

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

THE BROADCAST TEAM, INC.,

Plaintiff,

-vs-

Case No. 6:05-cv-1342-Orl-22JGG

FEDERAL TRADE COMMISSION,

Defendant.

_____ /

ORDER

I. INTRODUCTION

The Broadcast Team, Inc. (“TBT”) seeks a preliminary injunction prohibiting the Federal Trade Commission from enforcing the “abandoned calls” component of the agency’s Telemarketing Sales Rule (“TSR”)¹ in such a way as to prevent TBT from utilizing prerecorded calls to solicit funds on behalf of a charity. After carefully considering the parties’ oral arguments and written submissions, the Court determines that TBT has failed to demonstrate its entitlement to preliminary injunctive relief.

II. PRELIMINARY INJUNCTION STANDARD

“A district court may issue a preliminary injunction when the moving party demonstrates (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction is issued; (3) the threatened injury to the moving party outweighs whatever damage the proposed injunction might cause the non-moving party; and

¹16 C.F.R. Part 310.

(4) if issued, the injunction would not be adverse to the public interest.” *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 968 (11th Cir. 2005).

III. BACKGROUND

TBT is a for-profit company which has the technological capability to generate high volumes of automated telephone calls. TBT maintains that it does not perform live telemarketing for any of its clients. Rather, TBT states its “primary service is to allow entities access to [its] computerized systems by which they can send prerecorded telephone messages to designated telephone numbers.” Affidavit of Robert Tuttle, ¶ 3, at 1.² TBT alleges that it was approached on September 1, 2005 by another entity, New River Communications, Inc., to enter into an arrangement under which The Salvation Army would use TBT to send prerecorded messages to solicit funds for Hurricane Katrina relief efforts. The solicitation campaign was scheduled for the week of September 6, 2005. The planned “pitch” consisted of two prerecorded scripts, one for live recipients and one for answering machines.

TBT contends a staff attorney for the FTC informed TBT that the calls which were to be made under this arrangement violate the TSR because they constitute “abandoned” calls. TBT further states the FTC has threatened TBT with legal action concerning the planned campaign.³ TBT seeks declaratory and injunctive relief concerning the FTC’s interpretation of the TSR.

²Ex. “A” to Doc. 16.

³At the time TBT initiated this suit and moved for a preliminary injunction, the FTC had merely threatened enforcement action. That threat has now materialized. *See United States v. The Broadcast Team, Inc., et al.*, No. 6:05-cv-1920-Orl-19JGG.

IV. THE ABANDONED CALLS PROVISION

Under 16 C.F.R. § 310.4(b)(1)(iv), it is an “abusive telemarketing act or practice” for a telemarketer to “[a]bandon[] any outbound telephone call.” The regulation further states: “An outbound telephone call is ‘abandoned’ under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person’s completed greeting.” *Id.*

V. SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

TBT’s first argument is that the FTC’s interpretation of the abandoned calls rule is unreasonable. In the FTC’s view, the calls made by TBT which are actually received by a person (as distinguished from those connected to an answering machine) are abandoned because they are not connected to a live sales representative within two seconds of the completed greeting. In other words, the FTC’s interpretation of § 310.4(b)(1)(iv) is that “sales representative” means a “live” sales representative, i.e., an actual person, and not a recording. TBT counters that it is unreasonable to define “representative” as only including a live person.

TBT has not shown that it is likely to succeed on its argument that the term “sales representative” encompasses a recorded message, as distinguished from a living, breathing person. Or, stated another way, TBT has failed to demonstrate that the FTC’s interpretation of “sales representative” is incorrect or unreasonable. To the contrary, the FTC’s construction of the phrase seems to comport with common sense and ordinary usage.

TBT also argues that it is unreasonable for the FTC to consider the prerecorded calls “abandoned” because they do not cause any of the evils specified by the FTC - “hang-ups” and “dead air” calls - when it published the abandonment restriction. This position, too, is tenuous.

The FTC has a broad statutory authority to prevent abusive telemarketing practices. *See* 15 U.S.C. § 6102(a)(3)(A) (requiring the FTC to enact rules prohibiting telemarketers from “undertak[ing] a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy”). The FTC’s interpretation appears consistent with this broad statutory charge.

Next, TBT maintains that it is not a “telemarketer” because it simply allows charities to “use” its equipment. This argument is particularly weak. Under the TSR, “Telemarketer means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.” 16 C.F.R. § 310.2(bb). “Telemarketing means a plan, program, or campaign which is conducted to induce the purchase of goods or services *or a charitable contribution*, by use of one or more telephones and which involves more than one interstate telephone call.” § 310.2(cc) (emphasis added). Moreover, “[a] telemarketer initiates a telephone call by causing the called consumer’s telephone to ring.” 68 Fed. Reg. at 4643 n.736. Even though TBT may be “providing” its equipment to its customers in the very broad sense of the word, the equipment is physically located at TBT’s place of business, the equipment is operated by TBT’s personnel, and TBT is the entity which initiates the calls, i.e., causes the consumer’s telephone to ring. Consequently, TBT is a “telemarketer” within the meaning of the TSR.

TBT also argues that the FTC’s interpretation of the abandonment rule is erroneous because it is contrary to the expressed will of Congress. In the Court’s view, TBT has failed to demonstrate that it is likely to succeed on this point, as well. As previously noted, the Telemarketing Act initially directed the FTC to create rules prohibiting “unsolicited telephone

calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." 15 U.S.C. § 6102(a)(3)(A). The Act "instructed the FTC to regulate telemarketers *both* to prevent fraud *and* to protect the privacy of the home." *National Federation of the Blind v. F.T.C.*, 420 F.3d 331, 337 (4th Cir. 2005) ("*NFB*") (emphasis in original). However, under the original Telemarketing Act, non-profit entities were outside the FTC's jurisdiction. *See NFB*, 420 F.3d at 334 (stating that the Telemarketing Act did nothing to change the fact that non-profit organizations fell outside the FTC's jurisdiction). In 2001, Congress amended the Telemarketing Act by, *inter alia*, including charitable solicitations within the definition of telemarketing. 15 U.S.C. § 6106(4); *see also, NFB*, 420 F.3d at 335. However, Congress did not expand the FTC's jurisdiction to encompass non-profit organizations; as before, the FTC's jurisdiction covers only for-profit telemarketers. *NFB*, 420 F.3d at 335-36. The charitable solicitation amendments constituted "new congressional instructions" to the FTC. *Id.* at 335. Accordingly, the FTC promulgated a new TSR which required for-profit entities soliciting on behalf of charities to comply with the TSR. *Id.* at 335-36.

In *NFB*, the Fourth Circuit observed that "the FTC faced a quandary" in "[a]ttempting to formulate [the new TSR] in accordance with Congress' directions[.]" *Id.* at 335. "Congress had not altered the jurisdictional provisions in the Telemarketing Act, thus leaving the FTC without jurisdiction over non-profit organizations[;]" however, "at the same time, Congress did amend the definition of 'telemarketing' to cover charitable solicitations." *Id.* "To reconcile those two congressional mandates," the FTC concluded that "for-profit entities that solicit charitable donations now must comply with the TSR, although the Rule's applicability to

charitable organizations themselves is unaffected.” *Id.* at 335-36 (quoting 68 Fed. Reg. at 4585). The Fourth Circuit stated that the FTC’s reconciliation constituted “the only logical conclusion.” *NFB*, 420 F.3d at 347. The *NFB* court also determined:

Congress intended for *all conduct* now encompassed under the broadened definition of “telemarketing” to be subject to FTC regulations passed for the purpose of preventing fraud *and protecting the home*. The FTC enacted the TSR pursuant to these directions, and we find it was well within its statutory authority to do so.

Id. at 338 (emphasis added).

Thus, Congress has authorized the FTC to prevent for-profit telefundors acting on behalf of charitable organizations from engaging in abusive practices which invade the privacy of the home. Pursuant to this new charge, the FTC has determined that subjecting consumers to pre-recorded solicitation “pitches” by profit-making entities on behalf of charities is just such a practice. TBT’s argument, that this interpretation is contrary to Congressional will, is unpersuasive. To the contrary, it appears the FTC is doing just what Congress directed it to do. The Court thus concludes that TBT has failed to show that it is substantially likely to succeed on its argument that the FTC’s interpretation conflicts with the mandate of Congress.⁴

TBT also raises a host of constitutional arguments, including that the FTC’s interpretation constitutes prior restraint, that it is unconstitutionally vague and overbroad, and

⁴The fact that the FCC may have a more liberal rule, permitting pre-recorded solicitations by for-profit telefundors acting on behalf of charitable organizations, does not diminish Congress’s separate mandate to the FTC. *See NFB*, 420 F.3d at 348 n.6 (finding unsurprising that FTC and FCC have different rules regarding charitable solicitations).

that it violates equal protection principles. TBT has not succeeded in showing a substantial likelihood of success on these arguments, either.

As the Fourth Circuit stated in *NFB*, prior restraints are traditionally found in the context of injunctions or licensing schemes which confer unbridled discretion upon government officials. 420 F.3d at 350 n.8. Here, as in *NFB*, “it is only after the speech is uttered that a violation of the TSR can occur and sanctions can be imposed.” *Id.*

The vagueness and overbreadth arguments appear weak, as well. It is highly questionable whether the FTC’s interpretation of “sales representative” - as contemplating an actual person, as distinguished from a recording - renders the abandoned calls rule impermissibly vague. TBT’s overbreadth argument is equally unconvincing, particularly given the FTC’s broad charge to regulate abusive telemarketing practices invasive of a consumer’s right to privacy in the home. TBT’s equal protection challenge is dubious, as well. The Fourth Circuit rejected similar arguments in *NFB*. *See* 420 F.3d at 350 n.8 & 345-49. Moreover, in considering these constitutional arguments, this Court is compelled to recognize the very strong governmental interest the FTC has in protecting the privacy of the home. *Id.* at 339-40.


Based on the foregoing, the Court concludes that TBT has not succeeded in demonstrating that it has a substantial likelihood of success on the merits of any of its claims. For this reason, TBT’s request for preliminary injunctive relief must be denied.⁵

⁵The Court also determines that TBT has failed to establish that it faces irreparable injury, and that the balance of harms and the public interest favor issuance of a preliminary injunction.

VI. CONCLUSION

Based on the foregoing, it is ORDERED that The Broadcast Team, Inc.'s Motion for Preliminary Injunction (Doc. 15), filed October 28, 2005, is DENIED.

DONE and **ORDERED** in Chambers, in Orlando, Florida on January 6, 2006.



ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Party