

**United States District Court
Southern District of Florida**

Federal Trade Commission, Plaintiff, vs. DOTAuthority.com, Inc., et al., Defendants.	Case No. 0:16-cv-62186-WJZ Defendants' Motion for Summary Judgment Oral Argument Requested
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**Defendants' Motion for Summary Judgment
and Memorandum of Law in Support**

Defendants, DOTAuthority.com, Inc., James P. Lamb, and JPL Enterprises, Inc. (hereinafter collectively "Defendants"), by and through their undersigned counsel, and pursuant to Fed. R. Civ. P. 56 hereby move for summary judgment and as good cause therefore would state as follows:

According to the Federal Rule of Civil Procedure 56 (c), "summary judgment is appropriate if the evidence before the court shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir.1995). "In making this determination, the court must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000) (quoting *Haves*, 52 F.3d at 921). "Inferences in favor of the non-moving party are not unqualified, however. '[A]n inference is not reasonable if it is only a guess or a possibility, for such an inference is not based on the evidence, but is pure conjecture and speculation.'" *Deloney v. Fed. Express Corp.*, 2009 U.S. Dist. LEXIS 92966, at *2 (N.D. Ala. Sep. 30, 2009) (quoting *Daniels v. Twin Oaks Nursing Home*, 692 F.2d

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1321, 1324 (11th Cir. 1983)).

Moreover, “[t]he mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is *material* to an issue affecting the outcome of the case.” *Chapman*, 229 F.3d at 1023 (quoting *Haves*, 52 F.3d at 921)(emphasis added). “A genuine issue of material fact does not exist unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict in its favor.” *Id.*

Because 15 U.S.C. § 45(a)(2) expressly exempts common carriers from the FTC’s enforcement mandate and the corporate Defendants are themselves common carriers, they are entitled to judgment as a matter of law and summary judgment should be granted in favor of Defendants.

I. Statement of Undisputed Material Facts

1. Defendant, DOTAuthority.com, Inc. is a Florida corporation with a registered business in Fort Lauderdale, Florida. (SMF ¶ 1). DOTAuthority.com transacts or has transacted business in this district and throughout the United States. (*Id.*). DOTAuthority.com is a regulatory compliance organization that, among many services geared toward the motor carrier industry, registers its clients in compliance with the Unified Carrier Regulation (“UCR”) System. (SMF ¶ 1).

2. The Uniform Carrier Registration System plan and agreement (“UCR Agreement”) govern the collection and distribution of certain registration information and fees. (SMF ¶ 3); 49 U.S.C. § 14504a (2005). It requires most individuals and companies operating commercial motor vehicles in interstate or international commerce, as well as some brokers, freight forwarders, and leasing companies, to register their businesses with a participating state and pay an annual fee

based on the size of their fleet. (SMF ¶ 3). Forty-one states participate in the UCR System. (*Id.*).

3. Uniform Carrier Registrations may be filed online at the official UCR website operated by the State of Indiana on behalf of the participating states at www.ucr.in.gov. (SMF ¶ 4).

DOTAuthority.com provides services for registering with UCR. (SMF ¶ 5).

4. Using the client's assigned U.S. Department of Transportation number (USDOT number), DOTAuthority.com confirms that a client is active, (SMF ¶ 14), and then confirms that the client transports interstate and is not otherwise exempted from registration. (SMF ¶ 16).

5. DOTAuthority.com provides the client's information to the Federal Motor Carrier Safety Administration through the Indiana Department of Revenue portal. (SMF ¶ 20). Upon successful processing there, the clients receive proof of registration. (SMF ¶ 21).

II. Statement of the Case

On September 13, 2016, the Federal Trade Commission ("FTC") filed a three-count complaint for injunctive and equitable relief (DE 1) alleging that the individual and corporate Defendants violated section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and section 4 of the Restore Online Shoppers Confidence Act, 15 U.S.C. 8403 ("ROSCA"), in the marketing and sale of their online registration services to common carriers and small business truckers. The complaint alleges that Defendants intentionally and fraudulently pretended to be a government agency or falsely implied affiliation with the government, and failed to adequately disclose that they were enrolling common carriers [or consumers] in a negative option continuity program with recurring credit or debit card charges (DE 1 ¶¶68–72, 78–79).

Along with the complaint, the FTC filed a motion for a temporary restraining order, while James Lamb and Uliana Bogash were on vacation outside the United States, that included a

freeze on personal and business assets and appointment of a receiver, which the Court granted ex-parte without the Defendants having a meaningful opportunity to be heard. After a contested hearing on the motion for a preliminary injunction, on September 29, 2016 the Court entered a preliminary injunction, finding good cause to believe that Defendants had engaged in a violation of the FTC Act and ROSCA (DE 48 at p. 3 ¶2), stating that it was likely the Defendants violated the FTC Act “by making various misrepresentations regarding Defendants’ government affiliation and fees charged to consumers, and by failing to adequately disclose the material terms and conditions of their automatic renewal offers”, and “by engaging in illegal negative option marketing.” (DE 48 at p. 3 ¶2).

In addition, the Court found that there was no risk that Defendants would attempt to hide or dissipate assets, and therefore the Court terminated the receivership and returned management of the businesses and control over their bank accounts to Defendants. After directing the Defendants to issue a reminder notice to their existing Unified Carrier Registration (UCR) “SafeRenew” automatic renewal clients and prescribing enhanced disclaimer language to replace Defendants’ existing disclaimers to be used in their marketing and solicitations, the Court allowed Defendants to continue operating their websites and renew their clients’ registrations due during the annual renewal period of October 1, 2016 to December 31, 2016.

On October 12, 2017, the Small Business in Transportation Coalition (“SBTC”) filed a Motion to Intervene in this case. On that same day, SBTC also offered a proposed Motion to Dismiss for failure to state a claim, because Corporate Defendants are common carriers.

III. Argument

A. The Corporate Defendants Are Common Carriers.

The FTC Act, by its plain terms, exempts from the FTC's enforcement power "common carriers subject to the Acts to regulate commerce." 15 U.S.C. § 45(a)(2). "Common carrier" under the FTC Act is properly defined by reference to the common law of carriers. *See FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 57 (2d Cir. 2006).¹ That is, its meaning is "according to the ordinary sense of the word when Congress used it to create the exemption." *Id.*

Early common-carrier law applied to almost all workers and tradesmen, and required them to "serve the public generally and to do so on just and reasonable terms,' but over time, the common law of common carriers narrowed its focus to enterprises considered 'public' in some way, such as by the government grant of a legal monopoly or their use of public funds." *Id.* (quoting James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225, 255-57 (2002)). Eventually, two requirements have emerged: (1) the entity holds itself out as undertaking to carry for all people indifferently; and (2) the entity carries its cargo without modification. *Verity*, 443 F.3d at 58.

Thus, a common carrier is a corporation or individual operating a business that offers a service to all members of the public at a fixed rate or price, without differentiating between customers. Common carriers have a quasi-public character because a common carrier offers a service open to all members of the public indifferently. *Florida Power and Light Co.*, 660 F.2d 668, 674 (5th Cir. 1980). Simply put, a common carrier does not make individual decisions

¹*See also Nat'l Assoc. of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) ("NARUC II") (applying the ordinary contemporaneous common law meaning of "common carrier").

about whether and on what terms to provide the service to particular customers, but offers the same service at the same price to all customers in the public, without negotiating the price or other conditions of the service with customers. *United States v. State of California*, 297 US 175, 182–183 (1936); *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 US 194, 208 (1912); *Florida Power & Light Co. v. Federal Energy Regulatory Commission*, 660 F.2d 668, 674 (5th Cir. 1981).

It is not necessarily the “public at large” to which the services of a common carrier must appeal: “no carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts,” *Terminal Taxi Cab Co. v. Kutz*, 241 U.S. 252, 254 (1916). “The key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use.” *Payton v. Kale Realty, LLC*, 164 F. Supp. 3d 1050, 1057 (N.D. Ill. 2016) (citations omitted); *see also Iowa Telcoms. Servs. v. Iowa Utils. Bd.*, 563 F.3d 743, 746 (8th Cir. 2009) (same); *Iowa v. FCC*, 218 F.3d 756, 759 (D.C. Cir. 2000) (recognizing “the general rule that a carrier offering its services only to a legally defined class of users may still be a common carrier if it holds itself out indiscriminately to serve all within that class.”). In the common law rendering of common carrier status “[t]he dominant factor . . . is the presence of a “holding out” to transport the property or person of any member of the public who might choose to employ the proffered service.” *Valdivieso v. Atlas Air, Inc.*, 305 F.3d 1283, 1286 (11th Cir. 2002) (quoting *Las Vegas Hacienda, Inc. v. Civil Aeronautics Board*, 298 F.2d 430, 434 (9th Cir. 1962)). *See also Railroad Co. v. Lockwood*, 84 US 357, 376 (1873); *Florida Power and Light Co.*, 660 F.2d at 674.

Where transmission of non-physical “goods” is the service offered, the “without

modification” factor has also been framed as “allow[ing] customers to transmit intelligence of their own design and choosing.” *United States Telecom Association v. Federal Communications Commission*, 295 F.3d 1326 (D.C. Cir. 2002). That is, “[t]he choice of the specific intelligence to be transmitted is . . . the sole responsibility or prerogative of the subscriber and not the carrier.” *Payton*, 164 F. Supp. 3d at 1057 (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) and *Frontier Broad. Co., et al.* 24 F.C.C. 251, 254 (1958), respectively).

Here, the Defendants are in the business of offering the service of obtaining UCR registrations and renewals and filing biennial reports for customers in the trucking industry. (SMF ¶ 1). Defendants’ services are composed of the transmission of their clients’ information over the internet, (SMF ¶¶ 5, 6, 20), and closely track those of traditional common carriers in actual practice. Much like a common motor carrier, Defendants take a product that they had no involvement in creating, package it so that it might be effectively delivered to the intended recipient (INDOR), (SMF ¶ 20), and deliver that product to that recipient in compliance with the rules governing UCR registration, (SMF ¶¶ 20-21). While others provide the pathway for the transport, in much the same manner as the common carriers they serve, Defendants provide the vehicle for delivery of the information, using an established roadway.

As such, Defendants meet the common law definition of a common carrier. Their services are offered to all members of “whatever public its service may legally practically be of use,” and is offered at a fixed rate or price for each service, a price that is standardized and published on the Defendants’ websites. (SMF ¶ 7). The websites offer these services to all members of the public with an active USDOT number, and without negotiating individual prices or other conditions with each individual client. (SMF ¶¶ 6, 7). Clients may choose to engage the

Defendants' services for a single, one-time filing for UCR, or may choose to enroll in Defendants' SafeRenew Program for automatic yearly renewal of registration and for the filing of the required biennial report.

The Defendants' services transmit the clients' information for UCR registration or renewal over the internet to the website of the State of Indiana, which operates the website for the Federal Motor Carrier Safety Administration (FMCSA) under an interstate compact, and FMCSA issues the registration or renewal to the common carrier or other trucker. These services, by design and function, pass on information as the client chooses—that is, they “carry cargo” without modification. *See, e.g.* Pl.'s Opp. Defs.' Mot. for Protective Order (DE 78) at 2 (Defendants' business “files federal and state motor carrier registrations on behalf of owners of [affected] vehicles.” Each potential or current client that seeks Defendants' registration services must provide the necessary information, including an active USDOT number issued to that client. (SMF ¶ 12). It is the sole responsibility of that client to request a USDOT number, and all information necessary to receive a USDOT number is provided by that client to the Department of Transportation prior to engaging Defendants' UCR registration services. *Id.* The “account” associated with a USDOT number thereafter supplies much of the necessary information required for UCR registration. (SMF ¶ 13). Defendants have no authority or ability to alter or modify any information provided by reference to a client's USDOT number, and Defendants do not offer their registration services for any client that does not have a valid and active USDOT number, SMF 15. All other information needed to effect a valid registration, i.e., the size of the client's fleet, and how many of their motor carriers travel in interstate commerce, is solely

provided by the client.² (SMF ¶ 16-17).

When it is complete, Defendants then transmit the required information exactly as was provided by the client for UCR to INDOR in the proper format required by the UCR regulations. (SMF ¶ 20). Information provided solely by the client is the effective “payload” of the service Defendants provide, and Defendants carry that “cargo” without modification. *Vertity*, 443 F.3d at 58. Once Defendants have completed UCR registration, they process the client’s payment, and the client receives proof of registration. (SMF ¶ 21).

The transmission service provided by the Defendants’ websites for truckers to obtain UCR registrations and renewals over the internet meets all of the traditional and applicable criteria for being classified as a common carrier.

B. Congress Has Made Common Carriers Exempt from FTC Jurisdiction Pursuant to the “Common Carrier Exemption.”

15 U.S.C. § 45(a)(2) provides an exemption from jurisdiction of the FTC for “common carriers subject to the acts to regulate commerce.” Section 5 of the FTC Act, 15 U.S.C.

§ 45(a)(2) states:

“The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, *except* banks, savings and loan institutions described in section 57a(f)(3) of this title, federal credit unions described in section 57a(f)(4) of this title, *common carriers subject to the acts to regulate commerce*, air carriers and foreign air carriers subject to part a of subtitle VII of title 49, and persons, partnerships or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. §18 *et seq.*], except as provided in section 406(B) of said act [7 U.S.C.A. §227 (b)], from using unfair methods of competition in affecting commerce and unfair or deceptive acts or

² The client may, in some instances, provide information needed for UCR registration over the phone or by mail, as well as via an online form. Defendants also obtain billing information for processing the client’s payment, and an email address to send the client confirmation of registration and a receipt.

practices in or affecting commerce.”

15 U.S.C. § 45(a)(2) (emphasis added). The exception to jurisdiction over common carriers in § 45(a)(2) is known as “the common carrier exemption,” and courts have consistently found that the statute grants the exemption based on status as a common carrier and not on carrier activity—it is status-based rather than activity-based. *See Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 923 (2d Cir. 1980) (holding that because the carrier exemption is status-based, a non-carrier is not exempt from FTC regulation for activity affecting carriers); *National Fed’n of the Blind v. FTC*, 303 F.Supp. 2d 707, 714 (D. Md. 2004) (“FTC’s jurisdiction is based on an entity’s status, not its activity”); *FTC v Saja*, No. 97-cv-0666, 1997 U.S. LEXIS 17225, at *4 (D. Ariz. Oct. 6, 1997) (same). Conversely, an entity that is a common carrier is exempt from FTC action, even for non-carrier activities. *See, e.g., FTC v. Miller*, 549 F.2d 452, 455 (7th Cir. 1977) (construing the carrier exemption as status-based and rejecting the FTC argument that the common carrier exemption was not intended to apply to non-carrier activities). Indeed, the exemption extends broadly in another way as well. As the court in *Miller* noted, the exemption’s separate appearance in 15 U.S.C. § 46(a)’s grant of investigatory power effects the same limits on the FTC’s power to even *investigate* a common carrier’s activities to determine whether it was engaging in violations of 15 U.S.C. § 45. *Id.* at 460.

Because the Lamb Defendants are common carriers, all of their activities, including those at issue here, are beyond the jurisdiction of the FTC. Put plainly, “[t]he common carrier exemption in section 5 of the FTC Act carves out a group of entities based on their status as common carriers. Those entities are not covered by section 5 even as to non-common carrier activities.” *FTC v. AT&T Mobility LLC*, 835 F.3d 993, 1003 (9th Cir. 2016) (*reh’g en banc*

granted, 864 F.3d 995). As entities with the status of a common carrier, Defendants here are statutorily exempt from all FTC regulation and enforcement of their activities, including but not limited to FTC investigations into and lawsuits alleging unfair or deceptive acts or practices.

C. Because the FTC Lacks Jurisdiction over the Defendants, Summary Judgment Should be Granted.

Because Plaintiff lacks authority for its actions, summary judgment should be granted in favor of Defendants on all claims and the action dismissed. Since Congress has carried out under 15 U.S.C. § 45(a)(2) an exemption for common carriers and since the corporate Defendants in the FTC litigation are common carriers, the statute deprives the federal agency of the authority to bring an action against the Defendants here, Defendants are accordingly entitled to a judgment as a matter of law.³

Wherefore, it is respectfully requested that this Court enter an Order granting summary judgment dismissing the FTC's complaint with prejudice.

Request for Hearing

Pursuant to LR 7.1(b)(2), Defendants respectfully move for a hearing and request oral argument to be held concerning their Motion for Summary Judgment. Defendants request the benefit that hearing and argument would provide in resolving the disputes presented by the parties' arguments and estimates thirty (30) minutes per side as the time necessary for argument.

³Any liability of defendants, JPL Enterprises, Inc. and James P. Lamb in this action is only derivative of that of DOTAuthority. As the action against DOTAuthority must be dismissed as a matter of law, so must judgment be granted as to any claims against the JPL Enterprises, Inc. and James P. Lamb.

Date: October 24, 2017

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss was served electronically on October 24, 2017 on all counsel or parties of record on the service list.

/s/Peter Feaman

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