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** **Intervenor's Proposed Motion to Dismiss** **Oral Argument Requested**

Intervenor's Proposed Motion to Dismiss and Memorandum of Law in Support

The Small Business in Transportation Coalition, Inc. (hereafter "SBTC"), the proposed intervenor in the above entitled action, by and through their undersigned counsel, and pursuant to Fed. R. Civ. P. 12(b)(6), hereby moves to dismiss this action, and as good cause therefore would state as follows:

I. Background: The Underlying Action by the Federal Trade Commission

The Defendants James P. Lamb and Uliana Bogash (hereafter "the individual Defendants"), and the corporate Defendants DOTauthority.com, Inc., a Florida corporation, DOTFilings.com, Inc,. a Florida Corporation, Excelsior Enterprises International, Inc., a New Jersey corporation, also d/b/a DOTFilings.com, UCR Registration, and UCR Filings, and James P. Lamb & Associates; JPL Enterprises International, Inc., a New York corporation, also d/b/a DOTAuthority.com, On-line Registration, Registration Services, and James P. Lamb & Associates, (hereto referred to collectively as "corporate Defendants") operate businesses on the internet that have for over 15 years filed federal and state motor carrier registrations and renewals online on behalf of owners of tractor-trailer trucks and other commercial vehicles, including tens of thousands of common carriers of property and household goods.

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).

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 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.[1]

The Defendants' Answer denied the material allegations in FTC's complaint, and, upon information and belief, the case is now in discovery.

II. The Corporate Defendants Are Common Carriers.

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. The common carrier does not make individual decisions about whether and on what terms to provide the service to particular customers, but the common carrier 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). The controlling factor in determining whether a business has the status of common carrier is whether a business holds itself out and offers to potential customers the same service for a uniform price. *Railroad Co. v. Lockwood*, 84 US 357, 376 (1873); *Florida Power and*

[1] On or about October 27, 2016, Karen Hobbs, on behalf of the FTC, sent a letter to the SBTC asserting that the preliminary injunction applied to SBTC. Declaration of James Lamb (October 2, 2017) (filed as Exhibit A to SBTC's Motion to Intervene, ¶ 16). Specifically, the FTC asserted that the order's requirement that notices regarding automatic renewals be sent to defendants' customers applied to the SBTC and that the SBTC must send the same notices to its members. *Id.* ¶ 17. The FTC asked to be provided evidence that those actions had been taken by the SBTC. *Id.* By that time, the SBTC had already sent notices to its members and made changes to its website that the FTC acknowledges comply with the preliminary injunction. *Id.* ¶ 18.

Light Co., 660 F.2d at 674. 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 at 674.

Common carriers are engaged in a broad variety of businesses that provide different types of services to the public in general at a fixed rate. *Railroad Co. v. Lockwood*, 84 US at 376 (railroad carrying passengers and freight is a common carrier); *Terminal Taxicab Company v. Kutz*, 241 US 252 (1916) (taxicab company is a common carrier); *State of Washington ex rel. Stimson Lumber Co. v. Kuykendall*, 275 US 207 (1927) (tugboat company towing logs are common carriers); *Florida Power and Light Co. v. Federal Energy Regulatory Commission*, 660 F.2d at 674 (5th Cir. 1981) (utility company offering transmission of energy is common carrier); *Davis v. Southern Bell Telephone & Telegraph Co.*, 755 F. Supp. 1532, 1538 (S.D. Fla. 1991) (local telephone company is common carrier); *FTC v. AT&T Mobility LLC*, 835 F.3rd 993, 995, 997 (9th Cir. 2016), (*reh'g en banc granted*, 864 F.3d 995) (wireless data service provider on Internet is common carrier).

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 over the internet. In this context, "common carrier status turns on: (1) whether the carrier holds himself out to serve indifferently all potential users; and (2) whether the carrier allows 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).[2]

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[2] *See also Nat'l Assoc. of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) ("*NARUC II*"). There, the court explained that in the communications context, the "circularity and uncertainty" of the statutory and regulatory common carrier definitions advises "recourse to the common law of carriers," and "[a]n examination of the common law reveals that the primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking 'to carry for all people indifferently. . . .'" (citation omitted)). The court in *NARUC II* also recognized that the FCC had formulated a second factor, "that the system be such

"In assessing whether an entity possesses the first trait of a common carrier, '[t]he 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."). The service of obtaining registrations and renewals and filing biennial reports is 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 for each service that is standardized and published on the website. The websites offer these services to all members of the public without discrimination, and without negotiating individual prices or other conditions with each customer.

Second, those members of the public "'communicate or transmit intelligence of their own design and choosing,'" 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). The Defendant services transmit the customer's information for a 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. It is in "the very nature of the technology" of the services that

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that customers 'transmit intelligence of their own design and choosing.'" *Id.* at 609 (quoting *Nat'l Assoc. of Regulatory Util. Comm'rs v. FCC* 525 F.2d 630, 641, n.58 (1976) ("*NARUC I*")).

the information to be transmitted is of the user's design and choosing. *NARUC II*, 533 F.2d at 610. The services are in effect transmission services that, by design and function, pass on information that the client chooses. *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); *id.* at 6 n.5 (describing Defendants' services as "providing assistance with [certain] government registration requirements"). The transmission service provided by the Defendants' websites for truckers to obtain UCR registrations and renewals over the internet meets all of the traditional criteria for being classified as a common carrier.

III. 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 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. This cuts both ways: an entity that is not a common carrier is not exempt for carrying out "carrier-like" activities. *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" and for-profit telefunders are not exempt while telefunding for nonprofits); *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). 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.

IV. Because the FTC Lacks Jurisdiction over the Defendants, the Underlying Lawsuit Should be Dismissed.

This case should be dismissed under Fed. R. Civ. P. 12(b)(6), as the Plaintiff, lacking authority for its actions, cannot state a claim on which relief can be granted.[3]

The FTC Is Without Authority to Bring the Action and Therefore Fails to State a Claim upon Which Relief Can Be Granted.

Because Congress has incorporated into 15 U.S.C. § 45(a)(2) an exemption for common carriers, and because 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.

> Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This procedure, operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and factfinding. Nothing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," *Hishon, supra*, at 73, a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one.

Neitzke v. Williams, 490 U.S. 319, 326-27 (1989).[4]

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[3] *See FTC v. AT&T Mobility, LLC.*, 835 F.3d at 997 n.4 (the lack of FTC authority to bring a claim under 15 U.S.C. § 45 in light of the common carrier exemption presents a matter properly resolved under Rule 12(b)(6)).

[4] The Court in *Nietzke* went on to note that

> A patently insubstantial complaint may be dismissed, for example, for want of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *See, e. g., Hagans v. Lavine*, 415 U.S. 528, 536-537 (1974) (federal courts lack power to entertain claims that are "so attenuated and unsubstantial as to be absolutely devoid of merit") (citation omitted); *Bell v. Hood*, 327 U.S. 678, 682-683 (1946).

Neitzke v. Williams, 490 U.S. 319, 327 n.6 (1989).

Here, because the statutory basis of the FTC's complaint itself affirmatively withholds that basis for these Defendants, the court can, and should, dismiss the claims "on the basis of a dispositive issue of law." *Id.*

Wherefore, it is respectfully requested that this Court grant an order and judgment dismissing the FTC's complaint in all respects with prejudice.

Request for Hearing

Pursuant to LR 7.1(b)(2), Intervenor-Defendant SBTC respectfully requests that a hearing and oral argument be held concerning this, its Motion to Dismiss. This Motion presents a complex legal question that could prove dispositive to the case. Intervenor-Defendant requests the benefit that hearing and argument would provide in sharpening the issues presented and answering any questions that the Court may have. Intervenor-Defendant estimates thirty minutes per side as the time necessary for argument.

Date: October 12, 2017

Respectfully submitted,

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*Amended *pro hac vice* applications to be filed

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 Certificate of Service**

Certificate of Service

I HEREBY CERTIFY that on October 12, 2017, I electronically filed the foregoing Motion to Intervene with the Clerk of the Courts by using the CM/ECF system, which will send a notice of electronic filing to counsel of record appearing on the Certificate of Service generated by the ECF system.

/s/ Gregg J. Breitbart
Gregg J. Breitbart