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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

United States of America,	)	No. CV11-390-PHX-JAT
Plaintiff,	)	<b>ORDER</b>
vs.	)	
Business Recovery Services, LLC; Brian	)	
Hessler,	)	
Defendants.	)	

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Currently pending before the Court is Plaintiff United States of America’s (the “Government”) Motion for Order to Show Cause Why Defendants Should not be Held in Contempt (Doc. 53).

**BACKGROUND**

Defendant Business Recovery Services (“BRS”) is an Arizona limited liability company with its principal place of business in Maricopa County. Defendant Brian Scott Hessler is the owner of Business Recovery Services (collectively referred to herein as “Defendants”).

Defendants sell goods and services, including “recovery kits,” that they state allow customers to recover funds that consumers have lost in previous transactions. Some of the customers who purchase Defendants’ recovery kits lost money or other items of value in previous telemarketing transactions.

1 Defendants market and sell their recovery kits to customers located across the United  
2 States. Defendants initiate outbound telephone calls and receive inbound telephone calls.  
3 These calls are used to induce customers to purchase Defendants' recovery goods and  
4 services.

5 When a customer agrees to purchase one or more of Defendants' kits, Defendants  
6 immediately charge or bill the customer for the recovery kit(s). Defendants bill and  
7 customers pay for recovery kit(s) before the recovery kit(s) are sent to the customers.

8 Defendants' recovery kits contain a variety of materials, including a list of the  
9 business recovery kits Defendants sell, publications produced by the Federal Trade  
10 Commission on Business Opportunities, and instructions on how to use the recovery kit.  
11 Additionally, Defendants' recovery kits contain form letters, with blanks for customers to  
12 write down their personal information, addressed to the Internal Revenue Service, a state  
13 attorney general's office, the Better Business Bureau, the customer's credit card company,  
14 and the United States Postal Inspection Service.

15 Among other claims, the Government alleges that Defendants' sale of recovery kits  
16 for an up-front fee to customers who have lost money in previous telemarketing transactions  
17 violates the Telemarketing Sales Rule, 16 C.F.R. Part 310. The Telemarketing Sales Rule,  
18 in relevant part, prohibits those selling recovery goods or services from "requesting or  
19 receiving payment of any fee or consideration from a person for goods or services  
20 represented to recover or otherwise assist in the return of money or any other item of value  
21 paid for by, or promised to, that person in a previous telemarketing transaction, until seven  
22 (7) business days after such money or other item is delivered to that person." 16 C.F.R. §  
23 310.4(a)(3).

24 The Government filed a Motion for a Preliminary Injunction (Doc. 5) to enjoin  
25 Defendants from violating the Telemarketing Sales Rule. After holding a hearing on April  
26 5, 2011, the Court granted the Government- Inspection 7d4(s)..2.yaPs



1           The party alleging civil contempt has the burden of demonstrating that a violation of  
2 the court's order occurred. *In re Dual-Deck*, 10 F.3d at 695. The party asserting contempt  
3 must show it by clear and convincing evidence. *Id.*

4           If the Court finds a party in contempt, then it may impose sanctions against the party  
5 to ensure compliance with the Court's order or to compensate the party injured by the  
6 noncompliance.

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1 prior telemarketing transaction, Defendants claim that they substantially complied with the  
2 injunction by having their customers sign declarations saying the customers did not lose  
3 money as a result of a telephone call. But the declarations do not contain the actual language  
4 of the Telemarketing Sales Rule or this Court's injunction, nor do the declarations provide  
5 the injunction's definition of a telemarketing transaction.

6       Moreover, Mr. Gillett, Mr. Shelton, and Mr. Laurino all testified that they did not read  
7 the declarations before they signed them. Mr. Gillett testified that he found the electronic  
8 signature process confusing and that he just hit tab to move from electronic signature line to  
9 electronic signature line without reading the documents. And the evidence demonstrates that  
10 the BRS sales associate sold Mr. Gillett a recovery kit even though he had told her that he  
11 lost money in a prior telemarketing transaction. Mr. Laurino testified that he felt rushed and  
12 pressured to finish the electronic signature process quickly. He testified that the BRS sales  
13 associate kept telling him to just, "scroll down, scroll down." And the tape recording of the  
14 sales call with Mr. Shelton demonstrates that even after Mr. Shelton objected that Bank Card  
15 Empire used the telephone to sell him his failed at-home business opportunity, the BRS sales  
16 associate incorrectly assured Mr. Shelton that his prior transaction was not a telemarketing  
17 transaction.

18       The Court finds that Defendants' procedure of having customers electronically sign  
19 a declaration stating they did not lose money as a result of a telephone call, especially given  
20 the demonstrated sales tactics of some of Defendants' employees, does not adequately ensure  
21 that the customers did not pay money or other items of value in a prior telemarketing  
22 transaction. Defendants therefore did not substantially comply with the Court's Order by  
23 having their customers sign that declaration.

24       Defendants also seem to argue that they have substantially complied with the Court's  
25 Order because they sell their recovery kits only to business owners. First, while there is a  
26 business-to-business exemption to the Telemarketing Sales Rule found in 16 C.F.R.  
27 §310.6(b)(7), the Court's Order does not contain an exception for sales to businesses or  
28 business owners. Second, even if the Court deems Defendants' interpretation of the Court's

1 Order to include a business-to-business exemption as a good faith and reasonable  
2 interpretation of the Court's Order, the evidence clearly demonstrates that Defendants sell  
3 their recovery kits to individuals who have failed in their efforts to start at-home businesses,  
4 not to businesses.

5 Mr. Gillett, Mr. Shelton, and Mr. Laurino all testified that the at-home-business  
6 opportunities they purchased in their prior telemarketing transactions never got off the  
7 ground. They all testified that they had given up on the at-home businesses they purchased  
8 by the time Defendants contacted them regarding the recovery kits. Defendants' own  
9 employees testified at the hearing that they had never sold a recovery kit or contingency  
10 services to a customer who had successfully started an at-home business. Defendants'  
11 attempts to characterize their customers, victims of prior telemarketing schemes, as "business  
12 owners" seems overly optimistic, at best, and disingenuous, at worst. Defendants' customers  
13 may have fervently hoped to become owners of active and ongoing businesses as a result of  
14 their prior telemarketing purchases, but there is no evidence that any of them brought those  
15 dreams to fruition.

1 recovery kits and contingency services to individuals who have unsuccessfully attempted to  
2 start at-home businesses. The business exemption simply does not apply to the sales at issue  
3 here. The Court therefore finds that Defendants did not substantially comply with the  
4 Court's Order by having their customers sign declarations stating that they are business  
5 owners.

6 In addition to sales of recovery kits for an up-front fee, the evidence introduced at the  
7 hearing shows that Home-Based Business Consulting LLC, BRS's sister company, did not  
8 wait seven days from its customers' receipt of a refund to charge for contingency services.  
9 If the contingency customers lost money in a prior telemarketing transaction, then the failure  
10 to wait seven business days to charge for the contingency services also violated the  
11 injunction. But the Government has not introduced clear and convincing evidence that the  
12 purchasers of the contingency services paid money or other items of value in a prior  
13 telemarketing transaction, other than in the case of Mr. Gillett.

14 After purchasing recovery kits, Mr. Gillett entered into a contingency services  
15 agreement with Home-Based Business Consulting LLC (Exh. 5), an affiliate of Defendants.<sup>1</sup>  
16 After signing the contingency agreement, Mr. Gillett received a refund from 3XP, one of the  
17 telemarketers to whom he previously lost money. Mr. Gillett testified that he received the  
18 \$2500 refund from 3XP on June 23, 2011. His bank statement, which was introduced into  
19 evidence at the contempt hearing as Exhibit 8, reflects this amount was credited to his  
20 account on June 24, 2011. Mr. Gillett testified that he was charged for the contingency  
21 services six days after receiving the refund. His bank statement reflects a \$825 payment to  
22 Business Recovery Systems on June 29, 2011. The evidence clearly demonstrates that  
23 Defendants, through their affiliate, violated the injunction by charging Mr. Gillett for  
24 contingency recovery services sooner than seven business days after he received a refund  
25 from 3XP.

26 The government has proved by clear and convincing evidence that Defendants

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28 <sup>1</sup>The Court's Order enjoins Defendants' affiliates as well as Defendants.

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**IT IS ORDERED** GRANTING Plaintiff United States of America's Motion for Order to Show Cause Why Defendants Should not be Held in Contempt (Doc. 53).

**IT IS FURTHER ORDERED**

  
James A. Hilborn / James A. Hilborn  
United States District Judge / United States District Judge