

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Anthony Zabit and Roberto Alvarez

Joint Complainants,

v.

NetFortris Acquisition Co., Inc., and its
Officers, Grant Evans, Bryan Koehler, and
Tom Swayze, and its board of directors

Defendants

File No. _____

**FORMAL COMPLAINT
OF ANTHONY ZABIT AND ROBERTO ALVAREZ**

iCommLaw
Anita Taff-Rice
Inna Vinogradov
1547 Palos Verdes #298
Walnut Creek, CA 94597
Telephone: (415) 699-7885
Facsimile: (925) 274-0988
anita@icommlaw.com

Attorneys for Joint Complainants

Dated: June 24, 2015

TABLE OF CONTENTS

I. SUMMARY.....3

II. PARTIES.....3

III. JURISDICTION.....4

IV. APPLICABLE LAW.....5

V. FACTS.....6

VI. CLAIMS.....10

COUNT I: USE OF CUSTOMER IDENTIFIABLE INFORMATION IN
VIOLATION OF 47 U.S.C. 222.....10

COUNT II: UNJUST AND UNREASONABLE PRACTICES IN VIOLATION OF
47 U.S.C. 201(b).....11

VII. REQUESTED RELIEF.....13

I. SUMMARY

Complainants Anthony Zabit and Roberto Alvarez (“Joint Complainants”) hereby complain to the Federal Communication Commission (“FCC”) of a violation by NetFortris Acquisition Co., Inc., (“NetFortris”) and its Officers, Grant Evans, Bryan Koehler, and Tom Swayze (“Defendants”) of 47 U.S.C. §§ 201(b), 206, 208, 209, and 222,. Mr. Zabit and Mr. Alvarez allege that Netfortris has violated federal law by surreptitiously recording conversations between himself and other individuals, and by compiling and disclosing call records associated with those recorded conversations that reveal the calling patterns and identity of telecommunications consumers without obtaining the required written consent from these consumers. In support of their Complaint, Mr. Zabit and Mr. Alvarez allege as follows:

II. PARTIES

1. Complainant Mr. Zabit is a resident of California and a user of intra-and interstate telecommunications services provided within and outside of California, including services previously provided by NetFortris.
2. Complainant Mr. Alvarez is a resident of California and a user of telecommunications services provided within and outside of California, including services previously provided by NetFortris.
3. The address and telephone number for Joint Complainants’ attorney is:

Anita Taff-Rice
iCommLaw
1547 Palos Verdes, #298
Walnut Creek, CA 95497
(415) 699-7885
anita@icommlaw.com

4. All pleadings, correspondence, and other communications concerning this Complaint

should be sent to Joint Complainants in care of their attorney at the address in the paragraph above.

5. Defendant NetFortris Acquisition Co., Inc. (“NetFortris”) is a corporation organized under the laws of the State of Delaware.
6. NetFortris is authorized by the California Public Utilities Commission to provide competitive local exchange and interexchange services in California.
7. NetFortris is authorized by the Federal Communications Commission to provide interstate telecommunications services under Registration Number 0022976716
8. Upon information and belief, the address and person to whom service of this complaint should be directed is: Bryan Koehler, 455 Market St Suite 620, San Francisco, CA 94105, bryan.koehler@NetFortris.com, (415) 287-1113.
9. Mr. Grant Evans is Chief Executive Officer of NetFortris.
10. Mr. Bryan Koehler is Chief Financial Officer of NetFortris.
11. Mr. Tom Swayze is Chief Technology Officer of NetFortris.
12. NetFortris has a board of directors.

III. JURISDICTION

13. The FCC has jurisdiction to hear this Complaint per 47 U.S.C. §§ 206, 208 and 209.

14. 47 U.S.C. §206 of the Telecommunications Act of 1996 mandates:

“In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney’s fee, to be fixed by the court in every case of recovery, which attorney’s fee shall be taxed and collected as part of the costs in the case.”

15. 47 U.S.C. §208(a) mandates:

Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of.

16. 47 U.S.C. §209 provides,

“If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.”

17. 47 U.S. Code §§206, 208 and 209 are in Chapter 5, Wire or Radio Communication, which also includes 47 U.S. Code § 222.

18. 47 U.S.C. § 502 provides for penalties for willful or knowing violations of any rule, regulation, restriction, or condition made or imposed by the Commission under authority of the Communications by a fine of not more than \$ 500 for each and every day during which such offense occurs.

19. The Joint Complainants are electing to make this Complaint to the FCC.

IV. APPLICABLE LAW

20. 47 U.S. Code § 222(a) and (c) impose a duty on all telecommunications carriers to protect customer proprietary network information (“CPNI”) and to not “use, disclose, or permit access to individually identifiable customer proprietary network information” unless authorized by the user or required by law.

21. Pursuant to 47 U.S.C. § 222(h)(1)(A), CPNI is defined as “information that relates to the

quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship. . . “

22. Section 201(b) mandates that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.”

V. FACTS

23. As set forth in the sworn affidavit of Anthony Zabit, he and Roberto Alvarez (“Joint Complainants”) are residents of California and users of telecommunications services regulated by the California Public Utilities Commission (“Commission”) and the Federal Communication Commission (“FCC”).¹

24. Joint Complainants previously used telecommunications services provided by NetFortris.²

25. Mr. Zabit founded IXC Holdings, Inc. (“IXC Holdings”), but in January 2014, IXC Holdings was acquired by NetFortris.³

26. Mr. Zabit remained as an employee at IXC Holdings until October 1, 2014.⁴

27. NetFortris operates as a provider of interstate telecommunications services under Federal Registration Number 0022976716.⁵

28. As part of IXC Holdings’ telecommunications offerings, it installed equipment capable

¹ Affidavit of Anthony Zabit, at ¶1 (“Zabit Affidavit”).

² Zabit Affidavit, at ¶2.

³ Zabit Affidavit, at ¶4.

⁴ Zabit Affidavit, at ¶5.

⁵ Zabit Affidavit, at ¶3.

- of allowing customers to record conversations.⁶
29. After it acquired IXC Holdings, NetFortris continued to make use of this equipment and to offer the call recording capabilities to customers.⁷
30. Mr. Zabit was aware that NetFortris had the capability to record conversations as part of its telecommunications offerings.⁸
31. The call recording capability was a feature sold to NetFortris customers and utilized internally for quality assurance and training purposes.⁹
32. It was Mr. Zabit's understanding that the call recording feature was enabled for a discreet number of employees who were aware of the recording.¹⁰
33. Mr. Zabit inquired of NetFortris whether his calls were being recorded.¹¹
34. Mr. Zabit was informed by NetFortris that call recording was not turned on for Mr. Zabit's extension.¹²
35. Mr. Zabit was further told that his extension had been included in a special group of extensions that did not allow his calls to be recorded even if he called someone who had call recording enabled.¹³
36. The equipment used by NetFortris to record conversations does not include an audible warning for calls made to or between direct dialed numbers not associated with the main call center number.¹⁴
37. After termination of his employment at NetFortris, Mr. Zabit discovered that NetFortris

⁶ Zabit Affidavit, at ¶6.

⁷ Zabit Affidavit, at ¶7.

⁸ Zabit Affidavit, at ¶9.

⁹ Zabit Affidavit, at ¶8.

¹⁰ Zabit Affidavit, at ¶10.

¹¹ Zabit Affidavit, at ¶11.

¹² Zabit Affidavit, at ¶12.

¹³ Zabit Affidavit, at ¶13.

¹⁴ Zabit Affidavit, at ¶14.

was recording his conversations made by him on his business land line, his company cell phone and his personal cell phone. ¹⁵

38. On information and belief, NetFortris recorded approximately 100 interstate calls between Mr. Zabit and others. ¹⁶

39. NetFortris continued to record Mr. Zabit's telephone conversations made on his personal cell phone after October 1st, 2014, after his employment with NetFortris was terminated. ¹⁷

40. After it was discovered that NetFortris was recording Mr. Zabit's telephone conversations, his wife who still worked at NetFortris, resigned. ¹⁸

41. NetFortris identified calls involving Mr. Zabit by searching within its call recording system all calls, within a certain date range, from or to known phone numbers that Mr. Zabit used, including his personal cell phone, his former work extension and his former work cell phone. ¹⁹

42. The call recordings were digital. NetFortris continued to record Mr. Zabit's telephone conversations made on his personal cell phone after October 1st, 2014, after his employment with NetFortris was terminated. ²⁰

43. NetFortris also compiled call records detailing the date and duration of calls and identified the calling and called number for some of the calls made or received by Mr. Zabit. ²¹

¹⁵ Zabit Affidavit, at ¶15.

¹⁶ Zabit Affidavit, at ¶16.

¹⁷ Zabit Affidavit, at ¶17.

¹⁸ Zabit Affidavit, at ¶18.

¹⁹ Zabit Affidavit, at ¶20.

²⁰ Zabit Affidavit, at ¶16.

²¹ Zabit Affidavit, at ¶21. An example of one such compilation, obtained in discovery in a case in California Superior Court, is attached as Confidential Exhibit 1.

44. In some instances the call records prepared by NetFortris included an email address of the call recipient.²²
45. NetFortris released these call records identifying callers, recipients, dates of the calls and call duration to its personnel.²³
46. On information and belief, certain officers and members of the NetFortris board of directors knew about and approved the surreptitious recordings and release of Mr. Zabit's proprietary customer calling information.²⁴
47. The recordings made by NetFortris were not for the purpose of rendering, billing or collecting for telecommunications services.²⁵
48. The recordings made by NetFortris were not for the purpose of compiling phone directories, responding to government orders or subpoenas, or for any other purpose allowed by federal law.²⁶
49. On information and belief, the conversations were recorded for purposes of gaining competitive advantage in an employment dispute between NetFortris and Mr. Zabit unrelated to the provision of telecommunications services.²⁷
50. Specifically, some of the calls involved discussions with Mr. Zabit's business partner in regards to ongoing negotiations between Mr. Zabit and NetFortris regarding his severance agreement and a settlement of post-closing issues arising from the 2014 sale of IXC Holdings to NetFortris.²⁸
51. On further information and belief, NetFortris recorded Mr. Zabit's conversations for the

²² Zabit Affidavit, at ¶22.

²³ Zabit Affidavit, at ¶23.

²⁴ Zabit Affidavit, at ¶24.

²⁵ Zabit Affidavit, at ¶25.

²⁶ Zabit Affidavit, at ¶26.

²⁷ Zabit Affidavit, at ¶27.

²⁸ Zabit Affidavit, at ¶28.

purpose of gaining an advantage over competitors because some of the calls involved his discussions with telecommunications users or vendors and NetFortris may have been attempting to learn information about product offerings and pricing or marketing strategies for other business opportunities Mr. Zabit was exploring with potential customers or vendors after he was no longer employed by NetFortris.²⁹

52. Mr. Zabit and Mr. Alvarez did not consent to having proprietary information about their calling patterns released for compilation, review or analysis.³⁰

VI. CLAIMS

COUNT I: USE OF CUSTOMER IDENTIFIABLE INFORMATION

IN VIOLATION OF 47 U.S.C. 222

53. Joint Complainants re-allege and incorporates by reference the allegations set forth above in paragraphs 1-52 as if fully set forth herein.

54. Federal law set forth in 47 U.S.C. § 222(c) prohibits telecommunications carriers from using or providing access to customer identifiable propriety information (“CPNI”), as defined in 47 U.S.C. § 222(h)(1), without consent for purposes other than providing or marketing telecommunications services, for emergency or public safety reasons, for compiling directories or for other narrow exceptions.

55. NetFortris obtained personal information as a result of the use of Mr. Zabit and Mr. Alvarez’ use of NetFortris’ telecommunications services.

56. NetFortris’ surreptitious recording of phone conversations and compilation of call records reveal quantity, type, destination, location, and amount of use of a telecommunications service by Mr. Zabit.

²⁹ Zabit Affidavit, at ¶29.

³⁰ Zabit Affidavit, at ¶30.

57. NetFortris' surreptitious recording of phone conversations and compilation of call records reveal quantity, type, destination, location, and amount of use of a telecommunications service by Mr. Zabit.
58. NetFortris has used and is using the call recordings and call records of Mr. Zabit for purposes other than providing telecommunications services or compiling directories.
59. NetFortris has used, and is using the call recordings and call records of Mr. Zabit for purposes other than providing telecommunications services or compiling directories.
60. Mr. Zabit did not consent to have NetFortris use or disclose his CPNI.
61. Mr. Alvarez did not consent to have NetFortris use or disclose his CPNI.
62. Mr. Zabit was damaged by Netfortris' disclosure of his CPNI.
63. Wherefore, Joint Complainants demand the relief set forth in Section VII.

COUNT II: UNJUST AND UNREASONABLE PRACTICES

IN VIOLATION OF 47 U.S.C. 201(b)

64. Joint Complainants re-allege and incorporates by reference the allegations set forth above in paragraphs 1-52 as if fully set forth herein.
65. Section 201(b) mandates that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.”
66. NetFortris intentionally and surreptitiously recorded phone conversations of Mr. Zabit and Mr. Alvarez, as the office phone, work cell phone, and private cell phone numbers of Mr. Zabit were targeted for recording.
67. NetFortris also compiled call records detailing the date and duration of calls and identified the calling and called number for some of the calls made or received by

Mr. Zabit.³¹

68. In some instances the call records prepared by NetFortris included an email address of the call recipient.³²

69. NetFortris released these call records identifying callers, recipients, dates of the calls and call duration to its personnel.³³

70. On information and belief, certain officers and members of the NetFortris board of directors knew about and approved the surreptitious recordings and release of my proprietary customer calling information.³⁴

71. The recordings made by NetFortris were not for the purpose of rendering, billing or collecting for telecommunications services.³⁵

72. The recordings made by NetFortris were not for the purpose of compiling phone directories, responding to government orders or subpoenas, or for any other purpose allowed by federal law.³⁶

73. On information and belief, the conversations were recorded for purposes of gaining competitive advantage in an employment dispute between NetFortris and Mr. Zabit unrelated to the provision of telecommunications services.³⁷

74. Specifically, some of the calls involved discussions with Mr. Zabit's business partner in regards to ongoing negotiations between him and NetFortris regarding his severance agreement and a settlement of post-closing issues arising from the 2014 sale of IXC

³¹ Zabit Affidavit, at ¶21.

³² Zabit Affidavit, at ¶22.

³³ Zabit Affidavit, at ¶23.

³⁴ Zabit Affidavit, at ¶24.

³⁵ Zabit Affidavit, at ¶25.

³⁶ Zabit Affidavit, at ¶26.

³⁷ Zabit Affidavit, at ¶27.

Holdings to NetFortris.³⁸

75. On further information and belief, NetFortris recorded Mr. Zabit's conversations for the purpose of gaining an advantage over competitors because some of the calls involved my discussions with telecommunications users or vendors and NetFortris may have been attempting to learn information about product offerings and pricing or marketing strategies for other business opportunities Mr. Zabit was exploring with potential customers or vendors after he was no longer employed by NetFortris.³⁹

76. NetFortris' deliberate collection, disclosure and use of CPNI without approval and in an effort to gain unfair advantage constitutes an unjust and unreasonable practice in violation of federal law.

77. Wherefore, Joint Complainants demand the relief set forth in Section VII.

VII. REQUESTED RELIEF

85. Joint Complainants seek monetary damages for Defendants' violations of 47 U.S.C. §§201 and 222.

86. Joint Complainants seek damages and attorney's fees pursuant to 47 U.S.C. § 206, 208 and 209.

87. Joint Plaintiffs request the FCC to find that the Defendants violated 47 U.S.C. § 222 by using or providing access to customer identifiable propriety information ("CPNI"), as defined in 47 U.S.C. § 222(h)(1), without consent for purposes other than providing or marketing telecommunications services, for emergency or public safety reasons, for compiling directories or for other narrow exceptions.

88. Joint Defendants request the FCC to find that the Defendants engaged in an unjust and

³⁸ Zabit Affidavit, at ¶28.

³⁹ Zabit Affidavit, at ¶29.

unreasonable practice in violation of 47 U.S.C. 201(b) by using and disclosing customer identifiable propriety information (“CPNI”), as defined in 47 U.S.C. § 222(h)(1), without consent to gain an advantage over Mr. Zabit.

89. Joint Defendants seeks monetary damages in the amount of at least \$500,000 for injuries to Mr. Zabit through their violation of 47 U.S.C. §§ 201 and 222. Specifically, NetFortris recorded calls, and compiled, used and disclosed associated call records for approximately 100 interstate calls. Pursuant to 47 U.S.C. § 502, damages in the amount of \$500 per offense may be imposed by the FCC.
90. Joint Defendants seek declaratory and injunctive relief to prevent Defendants from continuing to record, use or disclose calls or calling information of any telecommunications users without authorization.
91. Pursuant to 47 U.S.C. § 401(c), Joint Plaintiffs request that the FCC apply to a United States attorney to file a complaint in the proper court to prosecute Defendants for violation of 47 U.S.C. §222.
92. Joint Complainants seek all other relief that the FCC may deem equitable, just or appropriate that is available under applicable law.

Date: June 24, 2015

By: /s/Anita Taff-Rice

iCommLaw
Anita Taff-Rice
Inna Vinogradov
1547 Palos Verdes #298
Walnut Creek, CA 94597
Telephone: (415) 699-7885
Facsimile: (925) 274-0988
anita@icommlaw.com

On Behalf of Joint Complainants

DECLARATION

I, Inna Vinogradov, declare under penalty of perjury, that on June 23, 2015, in accordance with 47 CFR 1.11006, I submitted the formal complaint filing fee amount of \$225.00 through the FCC's electronic Fee Filer system.

iCommLaw
FRN: 0024-6869-66

Signed and Dated: June 24, 2015

/s/ Inna Vinogradov

iCommLaw
Inna Vinogradov
1547 Palos Verdes #298
Walnut Creek, CA 94597
Telephone: (415) 699-7885
Facsimile: (925) 274-0988
inna@icommlaw.com

CERTIFICATION

In compliance with 47 USC § 1.721, the Complainant certifies that he has, in good faith, discussed the possibility of settlement with the defendants prior to the filing of the formal complaint. The defendants have been put on notice of the allegations that form the basis of this Complaint because Complainant has filed a civil litigation suit against defendant in California Superior Court (*Zabit v. NetFortris Acquisition Co., Inc.*, CGC 15-543996, Superior Court for the City and County of San Francisco) and filed a formal complaint at the California Public Utilities Commission (C. 15-04-017). Both of these complaints arise from the same set of facts.

The Complainant has indicated to NetFortris a willingness to discuss settlement. Complainant, through his civil litigation counsel, asked the Defendants' attorney during a case management conference two weeks ago whether Defendants would be willing to have a mediation. Defendants' counsel stated he thought the client would consider it, but NetFortris has not responded. Complainant believes it is critical to the possible success of such mediation that it has identified all possible legal issues arising from Defendant's conduct, including those within the FCC's jurisdiction. Therefore, Complainant respectfully requests that the FCC proceed with his Complaint at this time, as there is no current effort underway that result in a settlement of this matter.

CERTIFICATE OF SERVICE

I certify under penalty of perjury that I have this day served a true and correct copy of the

FORMAL COMPLAINT

OF ANTHONY ZABIT AND ROBERTO ALVAREZ

on the defendants in this case by hand-delivery at the business address of NetFortris Acquisitions Co, Inc. at 455 Market St Suite 620, San Francisco, CA 94105.

Signed and Dated: June 24, 2015

/s/ Inna Vinogradov

iCommLaw
Inna Vinogradov
1547 Palos Verdes #298
Walnut Creek, CA 94597
Telephone: (415) 699-7885
Facsimile: (925) 274-0988
inna@icommlaw.com

INFORMATION DESIGNATION

DOCUMENTS

Confidential Exhibit 1

Date of preparation: Call logs from December 2014 – January 2015, emailed January 16, 2015

Author or source: NetFortris Acquisition Co., Inc., and officers of NetFortris Acquisition Co., Inc., including Grant Evans, Bryan Koehler, and Tom Swayze.

Recipients: Officers of NetFortris Acquisition Co., Inc., including Grant Evans, Bryan Koehler, and Tom Swayze.

Physical location: San Francisco, CA

Relevance to Complaint: Exhibit 1 contains emails between defendants which prove defendants recorded, distributed, received and reviewed and confidential customer communications, dialing patterns, and customer proprietary information of Complainants Anothony Zabit and Roberto Alvarez.

INDIVIDUALS WITH FIRSTHAND KNOWLEDGE OF THE FACTS

Other than the Complainants themselves, Complaints believe the following individuals to have firsthand knowledge of the facts alleged with particularity in the Complaint:

NetFortris Acquisition Co., Inc.'s Officers: Grant Evans, Bryan Koehler, and Tom Swayze, and its board of directors

Address: 455 Market St Suite 620, San Francisco, CA 94105
Email: bryan.koehler@NetFortris.com
Phone: (415) 287-1113

Complaints believe these individuals have firsthand knowledge of the facts alleged in this complaint, including Complainant's CPNI information, nature and substance of telephone calls, recording equipment used by NetFortris, number of calls recorded by NetFortris, dates during which calls were recorded, reviewed, and distributed.

Complainants identified the people of who they are aware who have information and have documents, data compilations, and tangible things relevant to the dispute based, and/or persons who personally participated in the activities complained of. Complainants did so based on their personal knowledge of the events in the Complaint. Further, Complainants identified some of this information during discovery conducted in the civil litigation suit arising out of the same set of facts against defendants in California Superior Court (*Zabit v. NetFortris Acquisition Co., Inc.*, CGC 15-543996, Superior Court for the City and County of San Francisco).