

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

Anthony Zabit and Roberto Alvarez

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**

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Attorneys for Joint Complainants

Dated: June 24, 2015

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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 605. Mr. Zabit and Mr. Alvarez allege that Netfortris has violated the Communications Act by surreptitiously recording conversations between Mr. Zabit and Mr. Alvarez, and other individuals. In support of their Complaint, Mr. Zabit and Mr. Alvarez allege as follows:

I. 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
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(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 Federal Communications Commission to provide interstate telecommunications services under Federal Registration Number 0022976716.
7. Mr. Grant Evans is Chief Executive Officer of NetFortris.
8. Mr. Bryan Koehler is Chief Financial Officer of NetFortris.
9. Mr. Tom Swayze is Chief Technology Officer of NetFortris.
10. NetFortris has a board of directors.

III. JURISDICTION

11. The FCC has jurisdiction to hear this Complaint per 47 U.S.C. §§ 206, 208 and 209.
12. 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.”

13. 47 U.S.C. §208(a) mandates that:

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.

14. 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.”

15. 47 U.S. Code §§206, 207, 208 and 209 are in Chapter 5, Wire or Radio Communication.

16. Further, the Commission has jurisdiction to hear this Complaint pursuant to Section 705

of the Communications Act (codified at 47 U.S.C. § 605) which states:

Except as authorized by chapter 119, title 18, United States Code [18 USCS §§ 2510 et seq.], no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

17. 18 U.S. Code § 2511, the federal Wiretap Act, sets forth very limited exceptions to the prohibition on persons intentionally intercepting, using or disclosing any communication made orally, by wire or by radio. Those exceptions are for operators of switchboards, mechanical or service quality control checks, and responses to a court order or other legal process.

18. None of the exceptions to 47 U.S.C. § 605 authorize NetFortris' conduct or deprive the FCC of jurisdiction.

19. 47 U.S.C. §401 authorizes the FCC to enforce 47 U.S.C. § 605. Section 401(a) and (c) state respectively:

401(a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this [Communications] Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

* * * * *

401(b) Upon the request of the Commission it shall be the duty of any district attorney [United States Attorney] of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

20. 47 U.S.C. § 605 is within Article VII “Miscellaneous Provisions” of the Communications Act.

IV. APPLICABLE LAW

21. 47 U.S.C. § 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.”

22. 47 U.S.C. §605 prohibits any person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio from divulging or publishing the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission.

23. 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.

V. FACTS

24. 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
25. Joint Complainants previously used telecommunications services provided by NetFortris.²
26. Mr. Zabit founded IXC Holdings, Inc. (“IXC Holdings”), but in January 2014, IXC Holdings was acquired by NetFortris.³
27. Mr. Zabit remained as an employee at IXC Holdings until October 1, 2014.⁴
28. NetFortris operates as a provider of interstate telecommunications services under Federal Registration Number 0022976716.⁵
29. As part of IXC Holdings’ telecommunications offerings, it installed equipment capable of allowing customers to record conversations.⁶
30. After it acquired IXC Holdings, NetFortris continued to make use of this equipment and to offer the call recording capabilities to customers.⁷
31. Mr. Zabit was aware that NetFortris had the capability to record conversations as part of

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.

⁶ Zabit Affidavit, at ¶6.

⁷ Zabit Affidavit, at ¶7.

its telecommunications offerings.⁸

32. The call recording capability was a feature sold to NetFortris customers and utilized internally for quality assurance and training purposes.⁹

33. 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

34. Mr. Zabit inquired of NetFortris whether his calls were being recorded.¹¹

35. Mr. Zabit was informed by NetFortris that call recording was not turned on for Mr. Zabit's extension.¹²

36. 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

37. 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

38. After termination of his employment at NetFortris, Mr. Zabit discovered that NetFortris was recording his conversations made by him on his business land line, his company cell phone and his personal cell phone.¹⁵

39. On information and belief, NetFortris recorded approximately 100 interstate calls

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.

¹⁵ Zabit Affidavit, at ¶15.

between Mr. Zabit and others.¹⁶

40. The call recordings made by NetFortris captured the content of Mr. Alvarez and of the person with whom Mr. Alvarez spoke.

41. 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

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

43. 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

44. 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

45. NetFortris downloaded a number of Mr. Zabit's calls. A list of some of the calls that NetFortris downloaded and emails demonstrating that NetFortris circulated, listened to, used and disclosed the recordings, is attached to this Complaint as Confidential Exhibit 1.²¹

46. NetFortris released to its personnel some or all of the downloaded call recordings

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 Confidential Exhibit 1 is filed separately under seal.

involving Mr. Zabit.

47. On information and belief, certain officers and members of the NetFortris board of directors knew about and approved the surreptitious recording of Mr. Zabit.
48. NetFortris personnel listened to some or all of the calls it made of Mr. Zabit and others.
49. The recordings made by NetFortris were not for the purpose of rendering, billing or collecting for telecommunications services.²²
50. 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.²³
51. 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.²⁴
52. 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.²⁵
53. 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 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

²² Zabit Affidavit, at ¶25.

²³ Zabit Affidavit, at ¶26.

²⁴ Zabit Affidavit, at ¶27.

²⁵ Zabit Affidavit, at ¶28.

customers or vendors after he was no longer employed by NetFortris.²⁶

54. Mr. Zabit and Mr. Alvarez did not consent to having their calls recorded, downloaded or reviewed by NetFortris.²⁷

VI. CLAIMS

COUNT I: RECORDING AND DISCLOSURE OF INTERSTATE

COMMUNICATIONS IN VIOLATION OF THE COMMUNICATIONS ACT

55. Joint Complainants re-allege and incorporates by reference the allegations set forth above in paragraphs 1-54 as if fully set forth herein.

56. 47 U.S.C. § 605 prohibits intentionally intercepting, using, or disclosing any wire, oral, or electronic communication.

57. 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.

58. NetFortris downloaded a number of Mr. Zabit's calls.

59. NetFortris released to its personnel some or all of the downloaded call recordings involving Mr. Zabit.

60. NetFortris personnel listened to some or all of the calls it made of Mr. Zabit and others.

61. The recordings made by NetFortris were not for the purpose of rendering, billing or collecting for telecommunications services.²⁸

62. 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

²⁶ Zabit Affidavit, at ¶29.

²⁷ Zabit Affidavit, at ¶30.

²⁸ Zabit Affidavit, at ¶25.

allowed by federal law.²⁹

63. 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.³⁰

64. 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.³¹

65. 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 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 he was exploring with potential customers or vendors after I was no longer employed by NetFortris.³²

66. NetFortris' targeting, recording, downloading and listening to Mr. Zabit's conversations without approval and in an effort to gain unfair advantage violates the Communications Act.

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

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²⁹ Zabit Affidavit, at ¶26.

³⁰ Zabit Affidavit, at ¶27.

³¹ Zabit Affidavit, at ¶28.

³² Zabit Affidavit, at ¶29.

COUNT II: UNJUST AND UNREASONABLE PRACTICES

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

68. Joint Complainants re-allege and incorporates by reference the allegations set forth above in paragraphs 1-54 as if fully set forth herein.
69. 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.”
70. 47 U.S.C. § 605 prohibits intentionally intercepting, using, or disclosing any wire, oral, or electronic communication.
71. 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.
72. NetFortris downloaded a number of Mr. Zabit’s calls.
73. NetFortris released to its personnel some or all of the downloaded call recordings involving Mr. Zabit.
74. NetFortris personnel listened to some or all of the calls it made of Mr. Zabit and others.
75. The recordings made by NetFortris were not for the purpose of rendering, billing or collecting for telecommunications services.³³
76. 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

³³ Zabit Affidavit, at ¶25.

allowed by federal law.³⁴

77. 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.³⁵

78. 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.³⁶

79. 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 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 he was exploring with potential customers or vendors after I was no longer employed by NetFortris.³⁷

80. NetFortris' targeting, recording, downloading and listening to Mr. Zabit's conversations without approval and in an effort to gain unfair advantage violates the Communications Act.

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

VII. REQUESTED RELIEF

82. Joint Complainants seek monetary damages for Defendants' violations of 47 U.S.C. § 47

³⁴ Zabit Affidavit, at ¶26.

³⁵ Zabit Affidavit, at ¶27.

³⁶ Zabit Affidavit, at ¶28.

³⁷ Zabit Affidavit, at ¶29.

U.S.C. §605.

83. Joint Complainants seek damages and attorney's fees pursuant to 47 U.S.C. § 206, 208 and 209.
84. Joint Defendants request the FCC to find that the Defendants violated 47 U.S.C. §605 by making surreptitious, unauthorized recordings of Mr. Zabit and others.
85. Joint Defendants request the FCC to find that the Defendants engaged in an unjust and unreasonable practice by making unauthorized, surreptitious recordings of Mr. Zabit and others to gain an advantage over Mr. Zabit.
86. 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 605.
87. 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.
88. 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. §§ 201 and 605.
89. Joint Complainants seek all other relief that the FCC may deem equitable, just or appropriate that is available under applicable law.

Dated: June 24, 2015

By: /s/ Anita Taff-Rice

ANITA TAFF-RICE
INNA VINOGRADOV

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anita@icommlaw.com

Attorneys for Joint Complainants

DECLARATION

I, Inna Vinogradov, declare under penalty of perjury, that on June 24, 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

By: /s/ Inna Vinogradov
 INNA VINOGRADOV

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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 at Walnut Creek, CA

By: /s/ Inna Vinogradov
 INNA VINOGRADOV

iCommLaw
Inna Vinogradov
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inna@icommlaw.com

INFORMATION DESIGNATION

DOCUMENTS

Confidential Exhibit 1

Date of preparation: 2015
Author or source: Anthony Zabit
Recipients: NetFortris, California Public Utilities Commission
Physical location: San Francisco, CA
Relevance to Complaint: Confidential Exhibit 1 contains a list of phone calls created by Mr. Zabit that he believes defendants surreptitiously recorded, distributed, and reviewed to gain advantage in employment litigation and competitive advantage in telecommunications offerings.

Confidential Exhibit 2

Date of preparation: January 16, 2015
Author or source: Officers of NetFortris Acquisition Co., Inc., including Tom Swayze.
Produced by defendants in discovery in *Zabit v. NetFortris Acquisition Co., Inc.*, CGC 15-543996.
Recipients: Officers of NetFortris Acquisition Co., Inc., including Bryan Koehler.
Physical location: San Francisco, CA
Relevance to Complaint: Exhibit 2 contains emails between defendants which prove defendants surreptitiously recorded, distributed, received and reviewed telephone communications of Anthony Zabit and Roberto Alvarez to gain advantage in employment litigation and competitive advantage in telecommunications offerings.

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).