

**FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

FEDERAL TRADE COMMISSION,

Plaintiff,

)
)
)

MAY 14 2008
MAY 14 2008
Judge Robert M. Dow, Jr.
United States District Court

08CV2783

[REDACTED]

current domain name (e.g., "smallbusiness.net" instead of "smallbusiness.com"). The mailings list a customer, reference, or account number, and payment instructions with a due date. They also request payments ranging anywhere from \$35 to \$300. The mailings include a self-addressed payment envelope, as well.

Buried on the back of the invoice is a disclosure which states that the mailing is a solicitation, not a bill. It seems plain that this "disclosure" is in no way intended to cure the gross deception present in this case, but instead is nothing more than an effort to forestall the inevitable attention of law enforcement. The evidence shows that many consumers do not notice this language and make payments to the defendants under the false impression that they owe the company money for maintaining their domain name registrations. Of course, in many cases

[REDACTED]

[REDACTED]

those who pay the bills are not the same people that handle the Internet needs of the businesses,

II. THE PARTIES

A. The Federal Trade Commission

The FTC is an independent agency created by the FTC Act, 15 U.S.C. §§ 41-58. The FTC is charged with, *inter alia*, enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC is authorized to initiate proceedings in any United States District Court, by its own attorneys, to enjoin violations of the FTC Act, and to secure such equitable relief as may be appropriate in each case, including consumer redress and disgorgement of ill-gotten gains. 15 U.S.C. §§ 53(b), 57b.

B. Defendants

Defendant Data Business Solutions Inc., also d/b/a Internet Listing Service Corp., ILS,

made payments to its domain name registrar on behalf of the company.⁷ Mulveney is also listed as the registrant contact for many of the variant domain names that Internet Listing Service

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

specific number, comprised of two letters followed by between seven and nine numbers, that is referred to as an "Account Number," "Customer Number," or "Reference Number." Use of this individualized account number, along with information particular to the consumer's Internet Web site, suggests that the consumer is an existing customer. *See FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006). Thus, these fake invoices directly imply a prior or ongoing business relationship, and consumer complaints and declarations establish that this is the impression with which most consumer victims are left.

~~In the middle of the back page of the fake invoice, there is a disclosure which states:~~

IS NOT A BILL. THIS IS A SOLICITATION. YOU ARE UNDER NO OBLIGATION TO PAY THE AMOUNT STATED ABOVE UNLESS YOU ACCEPT THIS OFFER." This disclosure is insufficient to cure the deception caused by the overall net impression that the document is an invoice.¹⁴ Furthermore,

the FTC has had experience with similar scams and the Ninth Circuit has found that a disclosure alone does not negate other factors that mislead consumers about the sender's intention.¹⁵ As

to addressing payment - leaving consumers with the impression that they owe the defendants the amount requested. The mailing is a one-page document, with text on both sides, that looks like a bill and even includes a perforated bottom, to be torn off and returned with the consumer's payment, and a self-addressed payment envelope.²⁰ The text on the front page includes bold

consumers contact the defendants via e-mail, does the company even offer to provide such services.²⁵

Curiously, defendants began registering some variant domain names in November 2006, over two years after they began operating. But those registrations are worthless to consumers.

new domain names exist. Consumers have only made payments to defendants because they mistook these domain names to be their own due to the confusing similarities in the domain names. In fact, many consumers do not realize that they have been mistakenly paying for these variant domain names for years.²⁶ Moreover, even in the unlikely event that consumers did know

company sometimes received messages back stating that the e-mail address is no longer active or

to communicate with the company's representative, they report that they usually had to make numerous requests before receiving a refund.³⁸ Some consumers only receive partial refunds.³⁹ When the BBB contacted the company about consumer complaints, the responses it received were "short, fragmented, and [did] not address the core issues of deception raised in consumers' complaints."⁴⁰ Some consumers became so frustrated with the whole process that they eventually gave up or put stop payments on their checks to defendants, thus incurring fees from their banks.⁴¹ The FTC has submitted the declarations of twenty-two representative consumers who were misled into sending money to defendants.⁴²

assets, and the appointment of a receiver. *See, e.g., Febre*, 128 F.3d at 534 (court has power to order redress as restitution or rescission); *World Travel*, 861 F.2d at 1026, 1031 (asset freeze appropriate); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102-03 (9th Cir. 1994) (restitution and disgorgement appropriate); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432 (11th Cir. 1984) (asset freeze and appointment of receiver appropriate under § 13(b)). Courts appropriately make

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As described in Section III above, the defendants have violated Section 5 of the FTC Act.

The FTC has submitted the declarations of twenty-two representative consumers who were

misled by defendants' false claims. It is clear that most consumers paid money to defendants because the mailings misled them to believe defendants were their existing domain name registrars and that they were required to pay them for the continued registration of their current

domain names. Defendants' misrepresentations also led to the consumers including

Defendants further misrepresent to consumers that they will provide “search optimization” services that will substantially increase and direct traffic to the consumers’ Web sites. As discussed in Section III.D, the FTC has submitted the declaration of a representative of Microsoft ~~that establishes that defendants’ claimed method of providing search engine optimization services~~

would be completely ineffective.⁴⁵

2. The Individual Defendants are Liable

Balabanian, Benlolo, and Mulveney are individually liable for the violations of the FTC Act. An individual may be held liable under the FTC Act if the Court finds that the individual: (1) actively participated in or had some measure of control over the corporation’s deceptive practices; and (2) knew or should have had knowledge or awareness about the misrepresentations. *FTC v. World Media Brokers*, 415 F.3d 758, 764 (7th Cir. 2005); *Amy Travel*, 875 F.2d at 573. Authority to control can be evidenced by “active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer.” *Amy Travel*, 875 F.2d at 573. The “knowledge requirement may be fulfilled by showing that the individual has ‘actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such

The positions of these individuals and their level of involvement in what appears to be a closely-held corporation, is more than sufficient to establish their ability to control corporate acts and practices. See *World Media Brokers*, 415 F.3d at 764-65; *Amy Travel*, 875 F.2d at 574; *FTC v. Publ'g Clearing House*, 1997 WL 22245 (9th Cir. Jan. 15, 1997) (president held liable for fraudulent practices); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (sole owner liable for corporate practices); *Standard Educators, Inc. v. FTC*, 475 F.2d 401, 403 (D.C. Cir. 1973) ("A heavy burden of exculpation rests on the chief executive and primary shareholder of a closely held corporation whose stock in trade is counseling and designing."); *FTC v. [redacted]*

[redacted]

Nevada, 612 F. Supp. 1282, 1292 (D. Minn. 1985) (authority to control evidenced by assumption of officer duties). The evidence demonstrates that the individual defendants participated in or controlled the deceptive practices at issue, and that they knew or should have known about the misrepresentations. Therefore, each should be held individually liable, jointly and severally.

C. Balance of Equities Favors the Requested Relief

In balancing the equities, the Court must assign greater weight to the public interest advanced by the FTC than to any of the defendants' private concerns. See *World Travel*, 861 F.2d at 1029. The public equities are compelling in this case. Here, the public has a strong interest in preventing further misrepresentations related to their domain names and in preserving assets necessary to effective final relief. In contrast, the defendants have no legitimate interest in continuing to unlawfully mislead consumers into paying for services that cannot be provided.

[redacted]

When, as here, business operations are permeated by fraud, the likelihood that assets will be dissipated during the pendency of the legal proceedings is high. *See, e.g., Int'l Controls Corp. v. Vesco*, 490 F.2d 1334, 1347 (2d Cir. 1974); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972). Mindful of this, courts have ordered asset freezes solely on the basis of pervasive fraudulent activities such as those found here. *See, e.g., U.S. Oil & Gas Corp.*, 748 F.2d at 1434; *H. N. Singer* 668 F.2d at 1113. In fact, the Seventh Circuit has stated that district

courts have a “duty” to ensure that assets are available for restitution when it is “probable that the FTC [will] prevail in a final determination of the merits.” *World Travel*, 861 F.2d at 1031; *see also FTC v. Phoenix Avatar, LLC*, 2004 U.S. Dist. LEXIS 14717, at *46 (N.D. Ill. July 29, 2004); *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) (upholding finding of “no oppressive hardship to the defendants in requiring them to comply with the FTC Act, refrain from fraudulent representations or preserve their assets from dissipation or concealment”).

The freeze should extend to the individual defendants’ assets to increase the likelihood that consumers will receive full refunds. The defendants’ knowledge of and participation in the practices and their failure to act within their authority to control those practices makes them individually liable for monetary damages. *See World Travel*, 861 F.2d at 1031.

E. Ex Parte Relief is Necessary

Ex parte relief is necessary here. Absent *ex parte* relief, there exists the serious risk that the defendants may dissipate or conceal assets. As discussed above, the defendants’ business operations are permeated by, and reliant upon, deceptive practices. Issuing the Temporary Restraining Order with asset freeze without notice will help preserve the possibility of full and

them or know where they are located.⁴⁷ The enclosed return envelopes are even addressed to a mail drop in Chicago, rather than to the Canadian address at which the defendants run their

... and the possession of documents through another person, such as David, that are located in