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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION, Plaintiff, v. DINAMICA FINANCIERA LLC, a California limited liability company; SOLUCIONES DINAMICAS, INC., a California corporation; OFICINAS LEGALES DE ERIC-DOUGLAS JOHNSON, INC., a California corporation; ERIC DOUGLAS JOHNSON, an individual; VALENTIN BENITEZ, an individual; JOSE MARIO ESQUER, an individual; and ROSA ESQUER, an individual Defendants.	Case No. 09-CV-03554 MMM (PJWx) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION OF THE ISSUES AGAINST DEFENDANTS DINAMICA FINANCIERA LLC, SOLUCIONES DINAMICAS, INC., OFICINAS LEGALES DE ERIC-DOUGLAS JOHNSON, INC., ERIC DOUGLAS JOHNSON, VALENTIN BENITEZ, JOSE MARIO ESQUER AND ROSA ESQUER Date: July 12, 2010 Time: 10:00 am Judge: Hon. Margaret M. Morrow Location: Courtroom No. 780, Roybal Federal Bldg., 255 E. Temple Street, Los Angeles

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I. INTRODUCTION [1]

Dinamica Financiera LLC (Dinamica), run by Valentin Benitez (Benitez) and Jose Mario Esquer (Esquer), preyed on Spanish-speaking home-owners facing foreclosure. Assuring success, they charged their clients an up-front fee equivalent to an entire monthly mortgage payment to stop foreclosure or obtain mortgage loan modifications. After learning of Plaintiff's investigation, Dinamica moved locations and continued to make the same promises as Soluciones Dinamicas, Inc. (Soluciones) before transforming the business, yet again, into Oficinas Legales de Eric-Douglas Johnson, Inc. (Oficinas), which was controlled by Eric Douglas Johnson (Johnson) and Benitez. Despite their silver-tongued assurances, Defendants more often than not failed their clients. Many of Defendants' clients did not receive the modifications they paid for. A significant number of their clients ultimately lost their homes or saved their homes only through their own efforts. Between January 2005 and October 2009, Defendants siphoned approximately $4,093,579 from consumers.

The uncontroverted facts show that Defendants' actions were deceptive in violation of Section 5(a) of the Federal Trade Commission Act (FTC Act). Plaintiff respectfully requests that this Court enter summary judgment against Defendants as to count one of Plaintiff's First Amended Complaint. To redress consumers who have been harmed by Defendants' deceptive conduct and to prevent it from happening again, Plaintiff requests that the Court exercise its full equitable powers by permanently enjoining Defendants from engaging in mortgage foreclosure rescue services and making misrepresentations in connection with the sale or marketing of goods and services, imposing a monetary judgment equal to the amount of money Defendants took from consumers, and imposing other

[1] In support of this motion, Plaintiff is concurrently filing 20 exhibits, including 10 consumer declarations, declarations of five FTC employees and four third parties, and one non-paper physical exhibit, and is lodging three deposition transcripts. Plaintiff is also relying on evidence submitted in support of its application for a temporary restraining order and preliminary injunction.

B. Defendants

Dinamica Financiera LLC is a California limited liability company that operated from 7857 East Florence Ave, Suite 201, Downey, CA 90240. UF 1-2.[3] Esquer and Benitez, colleagues from a previous foreclosure rescue business, created Dinamica in August 2000. UF 3, 20, 69. Dinamica operated until May 2008, when it was relocated and rebranded as Soluciones. UF 5-6.

Soluciones Dinamicas, Inc. is a California corporation that operated from 9550 Firestone Blvd, Suites 101, 201-203, Downey, CA 90241. UF 7-8.

[3] "UF" refers to Plaintiff's Statement of Uncontroverted Facts and Conclusions of Law filed herewith.

taking place." UF 174. He later assured her that "[i]f we start the process, of course, there is no reason to fear losing the house." UF 175.

While selling services for Oficinas, Benitez himself told consumer Ana Carrillo that Johnson was going to stop her foreclosure as soon as she paid Oficinas' fee and assured her that she was "in 'good hands' and that [she] would not lose her home." UF 176. Benitez then sent someone to her home within the hour to collect $2,347 in cash from Ms. Carrillo to stop her foreclosure. Id. Similarly, Soluciones' agent Manuel Pozo assured Brenda Pena that she would not lose her home (

mortgage arrears would be moved to the end of their mortgage terms. UF 186, 188-89. As one consumer explained, "the payments we had already missed . . . , as well as the ones we would not have to pay . . . , would simply be tacked onto the back end of our loan. The way Ms. Zambrano explained it, we would simply make up all of our missed payments at the end of our mortgage term." UF 190. Similarly, as another declarant explained, "[Benitez] told me not to worry about the late payments. He said that my bank would put the money that I owed at the back of my loan." UF 191.

3. <u>Defendants represented they would obtain loan modifications</u>

In recent years, Defendants represented to consumers, in many instances, that they would obtain loan modifications. UF 192. Defendants typically assured clients they would lower their payments (UF 193) and guaranteed specific modifications, including fixed interest rates, lower principal balances, and combined mortgage payments. UF 194, 198. For example, Dinamica told consumer Elsa Espinzoa that her lender would reduce her payment from $3,184 to $2,200 (UF 195), and Soluciones guaranteed substantially reduced mortgage payments to Wendy and Carlos Romo (UF 196). Similarly, Oficinas assured Cipriano Ayala that his lender would reduce his interest rate on two of his loans from seven to four percent, and that his lender would adjust the value of his property to reflect the current market. UF 197. As another consumer explained,

> Mr. Pozo assured me that Oficinas . . could help me. He made it sound like getting a reduced mortgage payment was a certainty, and not once did he say that there was a probability that it wouldn't happen. The only questions was how much our mortgage payment would be reduced. Mr. Pozo estimated between $900 and $800 [from $1,680]. UF 199.

The in-person representations by Defendants' sales agents were also consistent with Defendants' radio advertisements promising "new," "reduce[d]" and “smaller” payments, and encouraging consumers to contact Defendants if their modification requests had been ignored or denied. UF 143, 148 security, Defendants often failed to stop foreclosure or obtain loan modifications. *See* Section IV.C.1-3, *infra*. After learning that Defendants failed to deliver on their promises, some consumers saved their homes by negotiating directly with their lenders and without Defendants' assistance. UF 212-14. Others lost their homes. UF 213, 230.

1. Defendants failed to stop foreclosure in numerous instances

Tragically, a significant number and percentage of Defendants' clients lost their homes through foreclosure. At least 266 (approximately 43 percent) of Defendants' clients for whom Defendants' work had been concluded, including 196 (approximately 37 percent) of Defendants' clients who sought refunds and 70 (approximately 79 percent) of the clients whose files Dinamica destroyed lost their homes through foreclosure. Even consumers who had not missed a single mortgage payment before seeking Defendants' assistance or who could have continued or resumed making their mortgage payments lost their homes or nearly lost their homes after hiring Defendants. UF 215-78. While Defendants did not track their failure rate (UF 219), they tracked their clients' sale dates, waited for months before contacting their clients' lenders (frequently allowing their homes to go into foreclosure)[6] and often knew their clients homes had been sold. UF 220-22, 224-25.

Consumers often lost the money they paid Defendants (including money Defendants represented would be remitted to their lenders) as well as time and the opportunity to pursue other solutions. (UF 268-70). Many consumers ended up in a worse financial situation than when they hired Defendants. (UF 271). As Cirpiano Ayala, a man whose rental properties were his only source of income, explained,

> By using Soluciones (then Oficinas) I lost time and money; and now there is a strong possibility that my wife and I will lose our four

[6] Throughout this time, Defendants consistently assured their clients that everything was fine. UF 223.

> properties for which we had worked so hard to obtain. . . . My wife and I paid Soluciones and Oficinas more than $16,000 and we received nothing in exchange. Now we could even wind up homeless, without any source of income. UF 272.

Similarly, as consumer Nancy Lopez explained,

> In the end, I paid Soluciones and Oficinas more than $4,000, but they did not deliver on their promises. . . . Ultimately, Soluciones/Oficinas

[7] Worse, Defendants sometimes caused their clients' mortgage payments to increase. UF 234. As Johnson explained, a successful modification would be one "reducing [a client's] payments . . . [and] that's commensurate with what the[ir] income level is." UF 235.

[8] When Defendants finally contacted their clients' lenders, they simply transmitted paperwork (UF 240), never engaging in actual negotiations (UF 238-

(typically $2,500) in addition to the fee for its service, which Oficinas would use to pay its clients' modified mortgage payments. UF 243-44, 246. In some instances, Oficinas represented that it had already obtained the modifications before requesting these deposits. UF 245, 247. Despite collecting over $90,000 in deposits from approximately 36 consumers, Oficinas likely made no more than three payments totaling $3,212.76 to its clients' lenders, indicating that Oficinas never obtained the promised modifications or possibly caused their clients to lose the modifications by not making their mortgage payments.

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[9] Defendants' promise to pay the modified mortgage payments was likely just another ploy to siphon more money from consumers. In several instances, Defendants lied about having already obtained modifications. UF 245, 247. Defendants also never set aside the deposits for its clients' payments, opting instead to pay themselves. UF 248-49.

[10] The BBB and LACDCA complaints were sent to the Defendants. UF 265.

their results,[22] they implied nearly certain success, repeatedly assuring their clients "not to worry" and bragging of their past successes.

Contrary to Defendants' representations, many consumers did not receive the mortgage loan modifications or foreclosure protection they were promised. In fact, as discussed in Section IV.C. infra, approximately 538 of Defendants' clients sought to cancel their services and get refunds, approximately 43 percent of Defendants' clients lost their homes th

[22] Defendants do not have to use the word "guarantee" to do just that. *See Gill*, 71 F. Supp. 2d at 1044.

[23] *In re Thompson Medical Co.*, 104 F.T.C. 648, 788-89 n.6 (1984); *see also Pantron I*, 33 F.3d at 1095-96; *FTC v. Five-Star Auto Club, Inc.*, 97 F.Supp. 2d 502, 528 (S.D.N.Y. 2000) (internal citations omitted).

3. Defendants' representations were material

[24] Pantron, 33 F.3d at 1095-96.

[25] Cyberspace.com, 453 F.3d at 1201 (citing In Re Cliffdale Assocs., Inc., 103 F.T.C. 110, 165 (1984)).

[26] See FTC v. Stefanchik, 2007 U.S. Dist. LEXIS 25173 at *14-15 (W.D. Wa. 2007); see also Figgie, 994 F.2d at 604 (law does not protect people who merely imply their deceptive claims); Kraft, Inc. v. FTC, 970 F.2d 311, 322 (7th Cir. 1992); In the Matter of Southwest Sunsites, 105 F.T.C. 7, 149 (1985), 1980 FTC LEXIS 86, *375.

for injunctive relief under Section 13(b).[27]

1. The individual Defendants are subject to injunctive relief

An individual may be held liable for injunctive relief under the FTC Act if a corporate defendant violated the FTC Act and the individual participated directly in the deceptive acts or had authority to control them.[28] 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 office."[29]

Valentin Benitez. As explained in Section III.B., Benitez was intimately involved in every aspect of the businesses, including advertising and sales. As a member and supervisor of Dinamica and the manager and owner in fact of Soluciones, Benitez also had authority to control the representations being made. By creating the advertisements for and managing much of the day-to-day operations at Oficinas, Benitez also had authority to control the representations made by Oficinas.

Jose Mario Esquer. As a member, manager, and supervisor at Dinamica, and a supervisor at Soluciones, Esquer had authority to control the representations. Esquer's control is also evidenced by his active involvement in the entities as discussed in Section III.B. Also, despite his attempting to isolate himself from the business by not assuming a corporate officer position at Soluciones, Esquer continued to be the businesses' credit-worthy partner, knowingly enabling the continuation of the deceptive practices.

Eric Douglas Johnson. As an officer, Johnson had authority to control Oficinas' representations. Johnson also participated in the deceptive practices by sanctioning Oficinas' advertising and continuing to operate the business in the

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[27] FTC v. H.N. Singer, 668 F.2d 1107, 1110-11 (9th Cir. 1996).

[28] Stefanchik, 559 F.3d at 931; see also Cyberspace.com, 453 F.3d at 1202; FTC v. Publ'g Clearing House, 104 F.3d 1168, 1170-71 (9th Cir.1997).

[29] FTC v. Amy Travel, 875 F.2d 564, 573 (7th Cir. 1989).

Defendants' services.[40] The proper calculation for consumer redress is the full amount that consumers paid, less any refunds, even if it exceeds Defendants' unjust enrichment.[41]

As argued above, the Defendants made material misrepresentations of a kind usually relied upon by a reasonably prudent person. Defendants made these misrepresentations through radio advertisements and during in-person consultations conducted by various sales agents over the course of multiple years, clearly making the misrepresentations not just widely disseminated, but systematic. As discussed above, consumers were injured by having paid Defendants millions of dollars. Many consumers also lost their homes.

4. <u>The individual defendants are jointly and severally liable for the corporate defendants' consumer redress</u>

An individual who is liable for injunctive relief is also liable for restitution if he had knowledge of the deception.[42] Knowledge can be demonstrated by showing actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of the misrepresentations, or awareness of a high probability of fraud along with an intentional avoidance of the truth.[43] An individual's degree of participation in the corporation's business affairs is probative of knowledge and can be sufficient to establish the requisite knowledge for personal restitutionary liability.[44]

<u>Valentin Benitez</u> Benitez knew or should have known that Defendants did not stop foreclosure or obtain modifications in all or virtually all instances. Clients

[40] *Figgie*, 994 F.2d at 605; *see also FTC v. Kitco of Nevada*, 612 F. Supp 1282, 1293-94 (D. Minn. 1985).

[41] *Stefanchik*, 559 F. 3d at 931-32; *Figgie*, 994 F.2d at 606-07.

[42] *Publ'g Clearing House*, 104 F.3d at 1171. Individual defendants can be held jointly and severally liable for restitution. *See Sharp*, 782 F. Supp. at 1449.

[43] *FTC v. Affordable Media*, 179 F.3d 1228, 1234 (9th Cir. 1999); *see also Publ'g Clearing House*, 104 F.3d at 1171, citing *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080, 1089 (C.D. Cal. 1994).

[44] *Affordable Media*, 179 F.3d at 1235.

Under FDCPA § 3304(b)(1)(A), a “transfer” is fraudulent as to a “debt”[45] to the “United States,”[46] regardless of whether the debt arises before or after the transfer is made, if the debtor made the transfer with actual intent to hinder, delay or defraud a creditor. The courts recognize that “[w]hether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer.” *Filip v. Bucurenciu*, 129 Cal. App. 4th 825, 834 (2005).

In determining whether a debtor had “actual intent” to hinder, delay, or defraud a creditor, the Court may consider, among other facts, whether: (1) the transfer or obligation was made to an “insider;”[47] (2) the debtor retained possession or control of the property transferred after the transfer; (3) before the transfer was made, the debtor had been sued or threatened with suit; (4) the transfer was of substantially all of debtor’s assets; or (5) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred. 28 U.S.C. § 3304(b)(2).

Transfer to an Insider: As Esquer’s wife, Rosa Esquer is an insider.

Retaining possession or control over the transferred assets: Esquer continued to retain control over ID#1. He has admitted that he continued to reside at ID#1 with his family after transferring it to his wife. UF 301.

Existence of lawsuits and investigations, and timing of transfers: Esquer

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[45] The term “debt” is defined to include “an amount that is owing to the United States on account of a ... fine, ... penalty, restitution, damages, interest ... or other source of indebtedness to the United States.” 28 U.S.C. §3002 (3)(B). A money judgment obtained pursuant to Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), for consumer redress is a “debt,” as defined in the FDCPA. *FTC v. National Business Consultants, Inc.*, 376 F.3d 317, 319-20 (5th Cir. 2004).

[46] “United States” is defined to include “an agency, department, commission, board, or other entity of the United States.” 28 U.S.C. § 3002(15). The Federal Trade Commission is a commission of the United States. 15 U.S.C. § 41.

[47] The term “insider” includes “a relative of the debtor” and “a corporation of which the debtor is a director, officer, or person in control.” 28 U.S.C. § 3301(5). The term “relative” includes “spouse.” 28 U.S.C. § 3301(7).

knew of Plaintiff's investigation against him and its pending action to enforce the CID in this Court. When he learned of the investigation, he sought to escape liability by moving the business and changing its name. After realizing that Dinamica's "fresh start" failed and he might, indeed, face substantial liability, Esquer sought to preserve the most valuable asset he had, his home, by transferring it to his wife. In fact, as he admitted, he transferred the home because he was afraid of losing it.

Transfer of substantially all assets. When Esquer transferred ID#1 to his wife, he had no other substantial assets.

Lack of reasonably equivalent value in consideration. The transfer of ID#1 to Rosa Esquer was a gift, with Esquer having received nothing in return.

These factors all point to Esquer having had "actual intent" to hinder, delay