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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. **EDEBITPAY, LLC, et al.,** Defendants.	CV-07-4880 ODW (AJWx) ORDER HOLDING DEFENDANTS IN CONTEMPT OF JANUARY 22, 2008 FINAL ORDER AND ORDERING SANCTIONS

I. INTRODUCTION

Pursuant to the parties' stipulation, the Court issued a Final Order for Permanent Injunction and Monetary Relief ("Final Order") on January 22, 2008. (Dkt. # 35.) Plaintiff, Federal Trade Commission ("FTC") brings the instant contempt action, alleging that Defendants, EDebitPay, LLC ("EDP"), Dale Paul Cleveland ("Cleveland"), and William Richard Wilson ("Wilson") (collectively, "Defendants") violated the Final Order with respect to their marketing of two products on various websites. The Court has carefully considered the arguments and evidence proffered in connection with the contempt hearing conducted on November 19, 2010, December 2, 2010, and December 3, 2010, including exhibits, deposition testimony, hearing testimony, the parties' memoranda, and the proposed findings of fact and conclusions of law. For the following

reasons, the Court finds by clear and convincing evidence that Defendants are in contempt of the Final Order.

II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

A. THE PARTIES

Defendant EDebitPay, LLC, is a California-based limited liability company that Defendants Cleveland and Wilson founded in 2002. (Joint Ex. 171 ¶ 3, Att. A; Hr'g Tr. (Cleveland) 41:18-24.) EDP is "in the business of online marketing and advertising." (Joint Ex. 529 (Compliance Report) 4:13-14.)

Defendant Cleveland is EDP's Chief Executive Officer and one of its two managing members. (Hr'g Tr. (Cleveland) 41:11-19.) Cleveland is responsible for EDP's "day-to-day operations as well as its general management." (Joint Ex. 529 (Compliance Report)

knowing that there was a fee. (*Id.* ¶¶ 49-60.) Concurrently with the Complaint, the FTC filed an *Ex Parte* Application for a Temporary Restraining Order ("TRO") freezing Defendants' assets and appointing a receiver. (Dkt. ## 2, 12.) The Court issued the TRO on July 30, 2007. (*Id.*) Pursuant to the TRO, the FTC and the Receiver accessed EDP's business premises, served copies of the TRO on Defendants, and the Receiver took control of the business. (Dkt. # 28 at 3.) EDP temporarily discontinued operations; however, pursuant to the Court's entry of a stipulation signed by the Receiver and Defendants, Defendants resumed certain business operations during the pendency of the TRO. (Dkt. # 16.) During the receivership, th

determining whether there has been a contemptuous defense of its order.'"). As a party to the original action, the FTC may invoke the Court's power by initiating a proceeding for civil contempt. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444-45 (1911).

To establish Defendants' liability for civil contempt, the FTC must show by clear and convincing evidence that Defendants have violated a specific and definite order of the Court. *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999); *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 517 (9th Cir. 1992). Upon such a showing, the burden then shifts to Defendants to demonstrate why they were unable to comply. *Affordable Media, LLC*, 179 F.3d at 1239. While substantial compliance with a court order is a defense to civil contempt and is not vitiated by "a few technical violations," *In re Dual-Deck Video Cassette Recorder Antitrust Litigation*, 10 F.3d 693, 695 (9th Cir. 1993), both good faith and intent in attempting to comply with a court order are irrelevant to the finding of civil contempt. *Stone*, 968 F.2d at 856-57. Rather, "[the Ninth] Circuit's rule with regard to contempt has long been whether the defendants have performed 'all reasonable steps within their power to [e]nsure compliance'" with the court order. *Stone*, 968 F.2d at 856; *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d at 695.

Upon a finding that Defendants are in contempt, sanctions may be imposed to coerce Defendants into compliance with the Court's Order, or to

As a threshold matter, the Court addresses Defendants' argument that the subject provisions do not apply to their marketing of the Century Platinum shopping club, but rather only to the type of conduc

Defs.' Trial Brief at 11-12.) Such representations fall exceedingly short of the requirements of subsection I.B in that they misrepresent the product actually offered.

Notwithstanding the obvious inadequacy of these representations, Defendants argue that they provided adequate disclosures. (Defs.' Trial Brief at 11-12.) Specifically, they point to phrases such as "the credit line was

Order by clear and convincing evidence. The Court will now address the Super Elite Offer website.

b. Super Elite Offer Website

The Super Elite Offer website is formatted in the same two-page style as the Starter Credit Direct website and advertises a "$10,000" credit line in bold, large font and an "Instant $2500 Advance" also in bold, slightly smaller font. (Joint Ex. 137.) In even smaller text below the "10,000" appears the phrase "Century Platinum Membership Credit Line." (*Id.*)

respect to the Starter Credit Direct

appear below, or in the middle of, other small-font disclosures regarding matters such as the E-Sign Act and the Patriot Act. (*Id.*) In some cases, Defendants also bury the disclosures in hyperlinked terms and conditions. (*See* Joint Ex. 162.) Consumers are not required to click on the "Terms and Conditions" hyperlink to accept Defendants' offer. (Hr'g Tr. (Desa) 304:10-18.) These disclosures are not in a "location sufficiently noticeable for an ordinary consumer to read and comprehend" and thus, the Court finds by clear and convincing evidence that Defendants are in violation of subsection I.E.5 of the Final Order.

3. Defendants Have Not Violated Subsections I.A and I.F by Clear and Convincing Evidence

Subsection I.A prohibits Defendants from "[d]ebiting . . . or assessing any fee or charge against consumers or their bank or financial accounts, without first obtaining the consumers' express informed consent for the debit, charge, or fee." (Final Order at 5.) Subsection I.F prohibits Defendants from "[d]irectly or indirectly causing billing information to be submitted for payment, in connection with the marketing or sale of any good or service, unless Defendants first obtain the express informed consent of the customer . . . and Defendants adhere to the requirements of [s]ection I.E." (*Id.* at 7.)

The FTC does not challenging the adequacy of Defendants' disclosure of the $99 application fee for the Century Platinum shopping club. (*See* Pl.'s Trial Brief at 22.) Rather, the FTC argues that, "as a result of Defendants' misrepresentations and inadequate disclosures, consumers did not understand what they were being charged for. . . . [and that] [c]onsumers who do not know what they are buying cannot give their 'express informed consent.'" (*Id.*) Conversely, Defendants posit that "as long as a consumer was adequately informed that the consumer's account was going to be charged and the amount of the charge, there [is] no violation[.]" (Defs.' Trial Brief at 8.)

Subsection I.A requires "express informed consent **for the debit, charge, or fee.**" (Final Order at 5 (emphasis added).) Similarly, subsection I.F requires "express informed consent" before submitting "billing information . . . for payment[.]" The Court finds that

same webpage . . . proximate to the triggering representation . . . and . . . not . . . accessed or displayed through hyperlinks." (*Id.* at 4.)

On every version of Defendants' websites marketing the NetSpend card, the phrase, "Get a Prepaid Visa Debit Card at NO COST!" appears in red font. (Joint Exs. 137, 157.) However, there are fees to use the "NO COST" debit card. After contacting NetSpend, the card operator, to activate their card, consumers can potentially incur a $9.95 monthly service fee, a "PIN Purchase Convenience" fee, a "Signature Purchase Convenience" fee, an "ATM Withdrawal" fee, and an "Account-to-Account Transfer" fee. (Joint Exs. 131, 133; Hr'g Tr. (Cleveland) 219:3-10.) Defendants do not disclose the abovementioned fees on the same webpage as the "NO COST" offer. Rather, Defendants disclose those fees only in the middle of a separate 4,720-word "Terms & Conditions" page, available via hyperlink. Defendants do not require consumers to click on the Terms and Conditions hyperlink to apply for the card. (Hr'g Tr. (Cleveland) 95:5-11.) Such disclosures are not clear and conspicuous, nor are they in close proximity to the triggering representation of "No Cost." Consequently, Defendants' marketing of the NetSpend debit card is a clear violation of subsection I.D of the Final Order.

Indeed, Defendants admit that their marketing of the NetSpend card violates subsection I.D. (*See* Defs.' Trial Brief at 15; *see also* Hr'g Tr. (Defs.' Closing Arg.) 373:15-19 ("the Netspend marketing that failed to provide consumer notice of the [$]9.99 monthly fee . . . is a violation of the final order.").) In spite of this, however, Defendants present several arguments in an attempt to discharge or mitigate their liability.

First, Defendants claim that they "neither sold nor charged consumers for the Netspend debit card, [but rather,] . . . simply generated leads for Netspend[.]" (Defs.' Trial Brief at 15.) Subsection I.D requires clear and conspicuous **disclosure** of any fees in close proximity to statements such as "No Cost." Thus, whether Defendants directly sold the product to consumers or directly charged consumers is irrelevant. It is Defendants' disclosure, or lack thereof, that is at issue. Moreover, Defendants cannot

attempt to shift liability to NetSpend, for it is Defendants, not NetSpend, who are bound by the Final Order.[7]

Second, Defendants allege that only after a consumer received the NetSpend card, activated it, decided on a fee option plan, and funded the card, would that consumer be charged. (Defs.' Trial Brief at 15.) It is irrelevant, however, that certain fees may have been explained to consumers when they contacted NetSpend after receiving the NetSpend card, or that consumers were not charged immediately when on Defendants' website. Subsection I.D requires clear and conspicuous disclosure of any fees **in close proximity** to statements such as "No Cost." Explaining fees after-the-fact clearly does not equate to being "in close proximity."

Third, Defendants argue that because consumers were allegedly never charged by EDP for the NetSpend card and because EDP received only minimal revenue from NetSpend in connection with the card, their violation of the Final Order is merely technical. (Defs.' Trial Brief at 15.) The characterization of the violation, however, cannot be determined based on the amount of revenue generated, but rather on the nature of the violation itself. Rather than disclosing fees and costs on the same page as, or in close proximity to, the triggering representation of "NO COST," Defendants bury their fee disclosures in a hyperlinked document. This action is not technical, but flatly defiant of the Final Order, which requires clear and conspicuous disclosures in close proximity. Defendants' arguments in this respect are disingenuous. In light of the foregoing, the Court finds that Defendants have violated subsection I.D by clear and convincing evidence.

C. DEFENDANTS' AFFIRMATIVE DEFENSES

[7] To the extent that Defendants argue that they lacked knowledge of NetSpend's activity with regard to the NetSpend card, the Court finds that it is Defendants' responsibility to make necessary inquiries. Defendants, being bound by an injunctive order, must take every reasonable step to comply, including undertaking proper investigation to ensure that their representations comport with the actual characteristics of the product they are marketing. *See Stone*, 968 F.2d at 856; *In re Dual-Deck Video Cassette Recorder Antitrust Litigation*, 10 F.3d at 695.

In addition to their assertions that they complied with the provisions of the Final Order, Defendants set forth two affirmative defenses, estoppel and substantial compliance, which the Court will address in turn.

1. Estoppel Against the FTC and the Receiver[8]

Defendants allege that the FTC is estopped from pursuing contempt for both the Starter Credit marketing and the NetSpend card because the FTC and the Court-appointed Receiver knew of Defendants' marketing and did not raise any objections.[9] In essence, Defendants argue that the FTC and the Receiver impliedly approved their marketing. To prove equitable estoppel, Defendants must show that: (1) the FTC knew the facts; (2) the FTC intended that its conduct be acted on, or acted so that Defendants had a right to believe it is so intended; (3) Defendants were ignorant of the true facts; and (4) Defendants relied on the FTC's conduct to their injury.[10] *See Watkins v. U.S. Army*, 875 F.2d 699, 709 (9th Cir. 1989). Moreover, "the government may not be estopped on the same terms as any other litigant." *United States v. Bell*, 602 F.3d 1074, 1082 (9th. Cir. 2010) (citing *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984)). Hence, Defendants must satisfy two additional elements: (1) that the FTC

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[8] While asserting their estoppel defense, Defendants seemingly attempt to raise the separate defense of good faith, *i.e.*, that their "belief that the Starter Credit marketing was compliant with the Final Order was based on a reasonable and good faith interpretation of the Final Order, as seen through the eyes and actions of the FTC and Receiver." (Defs.' Trial Brief at 17.) However, Defendants have not offered any reasonable and good faith interpretation of the Final Order that would excuse their violations. As explained above, their interpretation that the Final Order does not apply to their marketing of the Century Platinum shopping club contradicts the plain language of the Order. Thus, this interpretation cannot be reasonable. Moreover, Defendants' assertion that the FTC failed to alert them of possible violations does not relieve them of their independent obligation to comply with the Order. The Court will reiterate that it is Defendants, not InSite, not NetSpend, not the FTC, nor the Receiver, who were charged with complying with the Final Order. According to Defendant Cleveland's testimony, Defendants were in control of their own marketing. (Hr'g Tr. (Cleveland) 201:21-23) (Defendants, not InSite, hosted the Starter Credit website); 201:24-25, 202:1 (Defendants, not InSite, input the content onto the Starter Credit website); 202:2-8 (Defendants, not InSite, made changes to the Starter Credit website); 202:12-20 (Defendants changed several things, such as footnotes and size of disclosures on the Super Elite Offer website). Thus, there is no reason that Defendants could not ensure

review their marketing of the Century Platinum shopping club); 255:10-16 (FTC counsel never approved the Century Platinum shopping club marketing).)

Instead of providing direct evidence of FTC approval, Defendants claim that the FTC reviewed and approved "creatives" for another website called Ultimate Platinum and that Defendants made changes to the Starter Credit marketing based on the FTC's comments with respect to the Ultimate Platinum website. (Defs.' Trial Brief at 19.) Therefore, Defendants conclude that the Starter Credit marketing is "modeled after a marketing template sanctioned by the FTC." (*Id.*) At the contempt hearing, the Court heard testimony and received exhibits regarding this issue. (*See* Hr'g Tr. (Cleveland) 89:12-92:8.) After reviewing the evidence presented, the Court finds that there are significant differences between the Ultimate Platinum website and the Starter Credit website, such that the FTC's alleged approval of Ultimate Platinum does not constitute such approval of Starter Credit. (*See* Hr'g Tr. (Cleveland) 89:19-92:8 (the Ultimate Platinum marketing prominently stated that it was for a "shopping credit line").) In light of the foregoing, Defendants have failed to prove the first element of equitable estoppel.

Defendants also fail to establish the remaining elements. As to the second element, Defendants argue that because the FTC knew of the violations and failed to raise objections, "the FTC led Defendants to reasonably believe that the Starter Credit marketing posed no issues or concerns." (Defs.' Trial Brief at 17.) It follows, however, that because Defendants have failed to show that the FTC had the requisite knowledge, they cannot establish that the FTC or the Receiver approved the Starter Credit marketing or led Defendants to believe that the Starter Credit marketing complied with the Final Order. As to the third element, Defendants cannot, in good faith, assert that they were ignorant of the true facts. Defendants developed their own marketing and were bound by the Final Order; therefore, Defendants were responsible to ensure that their marketing complied with the terms of the Final Order. As to the fourth element, without evidence of any statement or any conduct by the FTC or the Receiver, Defendants cannot establish that they relied to their detriment.

With regard to the additional elements necessary to pursue estoppel against the government, Defendants fail to prove, as described above, any affirmative government

misconduct, *i.e.*, "an affirmative misrepresentation or affirmative concealment of a material fact," by the FTC or the Receiver. *See Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993). Further, Defendants have not shown that the public interest would be served by estopping the FTC in this case. On the contrary, allowing the FTC to enforce the Final Order, and thereby compensate consumers for Defendants' conduct, serves the public interest. The Court will now address estoppel as to the second product at issue, the NetSpend prepaid debit card.

b. Estoppel as to the NetSpend Prepaid Debit Card

Defendants contend that during the receivership, they worked with the FTC and the Receiver to modify their debit card advertising. (Defs.' Trial Brief at 18.) Specifically, Defendants allege that the FTC approved revised debit card marketing material, which placed all other fees in a terms and conditions hyperlink. (*Id.*) Thus, Defendants

2. Substantial Compliance with the Final Order

Defendants allege that they have substantially complied with the Final Order. To succeed on a defense of substantial compliance, Defendants must show both that (1) they made "every reasonable effort" to comply with the Final Order; and (2) that their violations were merely technical. *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d at 695. Defendants fail to allege that they fulfilled either of these requirements, and instead, rely solely on an irrelevant factual position. Defendants argue that they have substantially complied with the Final Order because their violative marketing accounts for a nominal amount of their business – one percent of their gross revenues. (Defs.' Trial Brief at 19.) Without any legal basis, Defendants essentially ask the Court to leap to the conclusion that, because the instant contempt action only relates to a small percentage of their business, the rest of their operation must be in compliance. Defendants miss the mark. The defense of substantial compliance bears no relationship to Defendants' overall revenue production, but rather focuses on their conduct. Viewed in this light, the evidence overwhelmingly demonstrates that Defendants did not make "every reasonable effort" to comply with the Final Order. In fact, with very little effort, Defendants could have modified their marketing so that it complied with the Final Order. Defendants could have easily clarified what products they were actually offering and disclosed the costs and fees associated with those products. Moreover, as discussed above, Defendants' violations of the Final Order are not merely technical. On the contrary, Defendants' marketing violates the most fundamental purposes of the Final Order. Indeed, consumers, through no fault of their own, continue to be misinformed about what they are buying and how much it will cost.

D. THE COURT'S AWARD OF MONETARY SANCTIONS

The parties dispute whether monetary sanctions should be assessed based on the amount of Defendants' profits or the amount of consumer loss. In determining such sanctions in the context of civil contempt under the FTC Act, the district court has broad authority to "'grant ancillary relief as necessary to accomplish complete justice,' including the power to order restitution." *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009). Indeed, the Ninth Circuit has found that "because the FTC Act is designed to

protect consumers from economic injuries, courts have often awarded the full amount lost by consumers rather than limiting damages to a defendant's profits." *Id.* Moreover, "[e]quity may require a defendant to restore his victims to the status quo where the loss suffered is greater than the defendant's unjust enrichment." *Id.* (citing *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606-07 (9th Cir. 1993). Here, Defendants' actions are not isolated incidents. Rather, Defendants disregarded core provisions of the Final Order in their marketing of two products through various websites for several months. As a result of Defendants' actions, tens of thousands of consumers collectively lost over three million dollars. Accordingly, the Court finds consumer loss to be the appropriate measure of sanctions in this case.

Defendants advocate for a reduction of sanctions by asserting several arguments, none of which are persuasive. First, Defendants argue that, with respect to the Starter Credit Direct marketing, the fees should be calculated from October 2008 rather than January 2008. Defendants contend that, in an attempt to avoid estoppel, the FTC stated that the Starter Credit Direct marketing became "worse" in October 2008. (Defs.' Trial Brief at 29.) This is irrelevant. The relevant date is January 22, 2008, when the Final Order was entered. Any violative marketing in existence after the Final Order is properly considered in calculating fees. Second, Defendants argue that they should be charged only one-half of the recurring monthly fees because the other half went to InSite. However, as previously stated, "[e]quity may require a defendant to restore his victims to the status quo where the loss suffered is greater than the defendant's unjust enrichment." *Stefanchik*, 559 F.3d at 931. For the reasons stated above, the Court finds that Defendants should be held responsible for the entire amount of consumers injury. Third, Defendants argue that sanctions should be limited to amounts received from consumers who actually complained to Defendants. (Defs.' Trial Brief at 29.) In measuring consumer loss, however, the FTC is not required to prove that each individual consumer relied on and was injured by Defendants' marketing, or that each consumer was dissatisfied. *Stefanchik*, 559 F.3d at 929 n.12. Thus, consumer loss is not limited only to those consumers who complained about Defendants' marketing. Having found Defendants' arguments deficient, the Court now turns to calculating consumer injury.

Consumer injury relating to marketing of the Century Platinum shopping club can be calculated based upon the total amount of fees paid by consumers, minus refunds, which equals $3,778,315.06.[11] (*See* Pl.'s Proposed Findings of Fact ¶ 100.) The FTC, however, ultimately asks for consumer loss in the amount of $3,713,927.96. (*See* Pl.'s Proposed Conclusions of Law ¶ 118; Pl.'s Trial Brief at 32, 33.) While the Court has not been apprised of the FTC's reasoning for the reduction, it will use the FTC's adjusted figure of $3,713,927.96. Consumer injury from Defendants' marketing of the NetSpend card can be calculated from the total fees consumers paid to use the debit card, which equal $6,846.54. (Joint Exs. 131, 133.) The FTC has "show[n] that its calculations reasonably approximated the amount of customers' net losses . . ." and Defendants have not shown that these calculations are inaccurate. *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997); FTC v. Inc.21.com, Corp., — F. Supp. 2d —, No. C 10-00022 WHA, 2010 WL 3789103, at *30 (N.D. Cal. Sept., 21, 2010). Accordingly, the Court **ORDERS** judgment in favor of the FTC against Defendants in the amount of $3,720,774.50 ($3,713,927.96 plus $6,846.54).

V. CONCLUSION

For the foregoing reasons, the Court finds by clear and convincing evidence that Defendants are in contempt of the Court's January 22, 2008 Final Order. Defendants are jointly and seveI