UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

	)	
FEDERAL TRADE COMMISSION,	)	
	)	
Plaintiff,	)	
v.	)	Civ. No. 8:07-1279-JSM-TGW
	)	
BRYON WOLF, ROY ELIASSON,	)	Dispositive Motion
and MEMBERSHIP SERVICES, LLC,	)	
	)	FILED UNDER SEAL
Contempt Defendants.	)	
	)	

PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION FOR AN ORDER TO SHOW CAUSE WHY BRYON WOLF, ROY ELIASSON, AND MEMBERSHIP SERVICES, LLC, SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING THIS COURT'S PERMANENT INJUNCTION

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Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), respectfully moves this Court to order defendants Bryon Wolf ("Wolf") and Roy Eliasson ("Eliasson"), and their firm, Membership Services, LLC ("MSLLC") (collectively, "contempt defendants" or "defendants"), to show cause why they should not be held in civil contempt for violating the Court's December 30, 2008 Order for Permanent Injunction ("Permanent Injunction" or "Order"). The defendants have repeatedly violated this Court's Order by deceptively soliciting consumers and taking money from their bank accounts without consent.

I. INTRODUCTION

The FTC originally filed this case to stop Wolf, Eliasson, and their cohorts from running an unlawful telemarketing scheme. The defendants settled the case by agreeing to pay over $11 million in consumer redress and promising not to misrepresent material facts, debit consumers without consent, or perform other unlawful acts. Within months of the Court's Order, however, the defendants hatched a new scheme to defraud consumers.

In this scheme, the defendants target recent loan applicants with misleading phone and Internet solicitations, conveying the false impression that they offer a cash advance, loan, or general line of credit. The defendants do not offer cash loans or a general line of credit. Instead, they debit consumers for membership in a continuity program. When consumers realize the defendants have debited them, the vast majority leave the program, often quickly cancelling the memberships and seeking refunds. Very few consumers ever use the program. Many complain that the defendants misled them and debited them without consent.

The defendants have repeatedly violated this Court's Order by: (1) misrepresenting their continuity program as a cash advance, loan, or general line of credit; (2) failing to

clearly and promptly disclose in telemarketing calls that they are marketing a program; (3) failing to clearly and conspicuously disclose all material terms of their program before asking consumers to reveal banking information or consent to be debited; (4) failing to get consumers' express, informed consent before debiting them; and (5) misrepresenting that consumers consented to be debited. Through their contemptuous conduct, the defendants have netted over $9 million. The FTC respectfully asks this Court to order Wolf, Eliasson, and MS LLC to show cause why they should not be held in civil contempt.

II. FACTS

A. The Underlying Case

On July 23, 2007, the FTC sued Wolf, Eliasson, and others, charging them with violating Section 5 of the FTC Act, 15 U.S.C. § 45, and the Telemarketing Sales Rule ("TSR"), 16 C.F.R. pt. 310. Goldstein Decl., PX10 ¶ 5; PX10A. *Inter alia*, the FTC charged that the defendants tricked consumers into revealing their bank account numbers by misrepresenting that they were affiliated with consumers' banks. *Id.* The FTC further charged that the defendants failed to adequately disclose the material terms of their offers, debited consumers without their consent, failed to promptly disclose the services promoted in telemarketing calls in violation of the TSR, and committed other violations. *Id.* On July 23, 2007, the Court granted the FTC a Temporary Restraining Order ("TRO"). PX10 ¶ 6.

The Court referred the FTC's motion for a preliminary injunction to U.S. Magistrate Judge Wilson. PX10 ¶ 6. In his Report, Judge Wilson found "overwhelming evidence that . . . the telemarketing business engaged in illegal and deceptive practices." *Id.* ¶ 7; PX10B at 1. This Court later adopted Judge Wilson's Report "in all respects." PX10 ¶ 8; PX10C.

On December 30, 2008, the Court entered the stipulated Permanent Injunction. This Order included a judgment of $11,254,334.89. PX10 ¶ 9. The Court ordered defendants Wolf and Eliasson, and their firms: (1) not to misrepresent, expressly or by implication, any material fact in promoting any product or service; (2) to clearly and conspicuously disclose all fees and material terms, conditions, and restrictions applicable to their offers; (3) to obtain consumers' express, informed consent before billing them; (4) to comply with the TSR; and (5) not to misrepresent that a consumer agreed to buy a product or service. Perm. Inj., PX1 at 7 ¶ I to 14 ¶ IV. On December 30, 2008, the defendants acknowledged receiving the Order. PX10 ¶ 10; PX10D. Shortly thereafter, they began violating it.

B. The Contempt Defendants' Scheme

Since 2009, defendants Wolf and Eliasson have perpetrated a scheme that deceives consumers seeking loans and debits them without their consent. Wolf and Eliasson have run this scheme through a Florida firm they control, MS LLC, which has offered a continuity program under the names "Monster Rewards" and "Mongo" or "Money on the Go" (the "program").[1] Acting in concert, the contempt defendants mislead recent loan applicants to believe their application has been approved and then debit them for the program instead.

1. Defendants Wolf and Eliasson Control MS LLC.

Wolf and Eliasson, MS LLC's sole officers, direct the promotion and sale of the program. Since 2009, Wolf has served as MS LLC's President/CEO, directing its marketing efforts and website design, while Eliasson has served as MS LLC's Vice-President,

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[1] The defendants changed the name of their program from "Monster Rewards" to "Money on the Go" in 2010 after Monster Worldwide, Inc., the online job placement firm, reported receiving "numerous complaints from consumers who noted unauthorized MasterCard charges of $49.00" generated by MS LLC, and complained that it was "being blamed for [MS LLC's] unauthorized credit card charges." PX10 ¶ 114; PX10LL at 1.

overseeing its “customer service,” merchant processing, and information technology. PX10 ¶ 11, PX10J at 2. Wolf and Eliasson hold 61% and 24% ownership interests, respectively, in MS LLC’s owner, Member Rewards, LLC. PX10

that consumers typed into their “recent cash advance application.” PX10FF, PX10 ¶ 75. The defendants’ telemarketers ask consumers to use these websites to “verify” and submit their personal information. PX9K at 4:25-5:19; PX9L at 3:10-15; PX10GG at 1-5.

Similarly, the defendants’ websites have greeted consumers awaiting a response to their online loan applications with, “Congratulations! You have been approved

The defendants do not conspicuously disclose that they are marketing a program, or prominently disclose its material limitations. For example, their telemarketers have failed to disclose that they are hawking a program, and that the defendants do not offer cash loans or a general line of credit. PX10 ¶¶ 92-94; PX9K, PX9L. Similarly, the defendants' websites avoid clear disclosures. Instead, they often couch inconspicuous references to the program or its fees and material terms in fine un-bolded print. PX10Z; PX10BB; PX10 ¶¶ 71-81. Their sites fail to conspicuously display the program's fees; these fees appear in fine print, or not at all. PX10Z; PX10BB. Material terms such as the down payment requirement for the defendants' restricted credit offer are relegated to fine print at the bottom of their sites. *Id.* Their websites also fail to clearly specify that the program does not provide cash loans or a general line of credit. *E.g.*, PX10Z, PX10 ¶ 78.[3] Instead, the defendants refer generally to a "shopping credit" and "rewards mall," in un-bolded print smaller than the bolded "$2,500." *Id.*[4] The defendants' sites require consumers to click a box to confirm that they are over 18 years of age and have read the sites' fine print, where the program's existence, fees, and terms are mentioned. *E.g.*, PX10Z.[5] However, their sites do not even display the program's full material terms unless consumers click on tiny, hyperlinked text. PX10Z; PX10 ¶ 76.

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[3] Towards the bottom left-hand side of the cited website, a cryptic statement appears: "Shopping Credit is exclusive for 75% of purchase price site." PX10Z. This brief statement obliquely refers to two separate restrictions on the shopping credit: a 25% down payment required for purchases at the defendants' mall, and the fact that the credit is usable solely at the defendants' mall.

[4] For example, near the large, bold phrase "**$2,500**," the phrase "Shopping Credit" appears in smaller, non-bold print, and the words "at our online rewards mall" appear below in even smaller print. PX10Z.

[5] By clicking this box, the consumer supposedly confirms all of the following fine print stipulations, in order: that they are above 18 years of age; that they assent to a website "Privacy Policy"; that they assent to vaguely-referenced "Terms and Conditions" (a hyperlink that, if clicked, actually reveals the "Member Agreement" for the defendants' program); that they agree with a fine print summary of "offer details" providing for enrollment into the program with its fees, and that they agree to receive emails related to "fulfillment of these services."

features of the program as well as its fee schedule. PX10 ¶¶ 98-100. Typically within 24 hours of enrollment, however, the defendants begin debiting consumers for fees — often, a $99.95 activation fee, and a monthly $29.95 fee thereafter until consumers either cancel the program or stop payment. PX10 ¶ 33. As described below, many consumers have not had enough money in their bank accounts to pay the defendants' fees; after all, they sought cash advances or loans, not a continuity program with a $99.95 activation fee.

From June 2009 to mid-June 2012, the time period for which data is available to the FTC, over 68% of MS LLC's attempted debits failed. Sandler Decl., PX12 ¶¶ 18-19. This high volume of failed debits (481,924 in total) was due to several factors. Most frequently, MS LLC debited consumers who did not have enough money to pay its program activation fee. Over 60% of MS LLC's failed debits (291,876 in total) failed because consumers did not have sufficient funds on deposit to pay the defendants' fees. *Id.* ¶ 19. Consumers have incurred overdraft fees due to such "NSF" debits. PX2 ¶ 5; PX7 ¶¶ 7(c)-(e). Nearly 50,000 other debits failed because MS LLC tried to debit consumer accounts that were closed, and over 24,000 debits were returned with the return code, "Customer advises not authorized." PX12 ¶ 20-21.[6] These statistics demonstrate that MS LLC has widely debited consumers without first obtaining their consent.

Nonetheless, the defendants have amassed millions from their scheme. As of mid-June 2012, MS LLC had attempted to debit a total of $42,183,326 from consumers' bank accounts, and had achieved net revenues of $9,693,910. PX12 ¶ 24.

[6] MS LLC's high unauthorized transaction rate, among other factors, led First Bank of Delaware to terminate the authority of "Monster Rewards" and "Mongocard" to process remotely created checks through the bank in 2011. PX10 ¶¶ 115-20; PX10OO.

complaints. *Id.* ¶¶ 5-7; PX10 ¶ 23; PX10K. Despite these complaints, the defendants have persisted with their deceptive scheme, prompting further complaints by financial institutions such as Bank of America, Wells Fargo, and others. PX10 ¶¶ 115-27; PX10PP; PX10QQ.[7]

After being enrolled and/or debited, consumers leave the program in droves, with many cancelling the same day or week they were enrolled. PX12 ¶¶ 7(d), 25-33. Indeed, the defendants' records show many consumers have

debits (insisting on a bank letter, for consumers requesting refunds within 10 days of enrollment) and to call back 10 days after enrollment to renew refund requests not backed by a bank letter. PX10 ¶ 108. MSLC representatives often fail to tell cancelling consumers that no refund will issue without an express request, and have misrepresented the refund policy to falsely deny some consumers' requests as untimely. PX10 ¶¶ 105-10.

A sizable percentage of debited consumers have persevered through the defendants' "run-around" to obtain refunds. As of mid-June 2012, the defendants' refund rate was over 22%. PX12 ¶ 22. This rate dwarfs the rate at which consumers used the credit offered in the defendants' program: More than 41 times as many consumers sought and obtained refunds than used the defendants' credit to buy items from their online mall. *See id.* ¶¶ 22, 35. These refunds, combined with the defendants' vast volume of failed debits, yield an extraordinarily high total return rate of 77%.[9] *Id.* ¶ 24. The(TdTf 1nts' v0 Td [nds. c denyplanded drapid in the)20 T

debit card with "rewards points"; and (3) access to coupons for discounts with third-party merchants. PX10 ¶ 32. Very few consumers have used these features.

First, very few consumers have purchased merchandise from MS LLC's online mall using the offered credit. This credit is a core feature of the defendants' program. As noted earlier, the defendants have touted this credit while downplaying, omitting, or burying the limitation that the credit is valid solely at their mall. *See supra* pp. 4-6. From June 2009 to mid-June 2012, the defendants enrolled 417,457 consumers, successfully debiting 122,822 of them. PX12 ¶¶ 34-35. These 122,822 successfully debited consumers could buy items from the defendants' mall. Yet only 686 of these consumers — less than 0.56% of those eligible — ever made the down payment needed to buy an item at that mall. *Id.*

Second, few consumers have used the defendants' debit card. MS LLC has asserted that its program "attracts credit challenged applicants that are on the verge of becoming un-bankable and . . . have a *desperate need* for the company's shopping credit and pre-paid card services." PX10 ¶ 55; PX10R at 2 (emphasis added). Yet few consumers have satisfied their supposedly "desperate need" for the defendants' card. Between October 2010 and July 2012, the period for which data is available to the FTC, 83,206 debited consumers were eligible to get debit cards, but fewer than 12% did. Only 936 cardholders — less than 1.4% of those eligible — loaded money on the cards. PX13 ¶ 28. Further, the *Id.* total amount loaded on all

by merchants that consumers may print and use. PX10 ¶ 39. According to Access, from October 2010 to July 2012, only 169 consumers – 0.05% of those eligible – ever printed a coupon. PX12 ¶ 40. If consumers had intentionally enrolled in the defendants' program, far more would have used its features.

The defendants have seen many complaints, rapid cancellation requests, low program usage, and high rates of failed debits, refund demands, and total returns for a basic reason: They have deceptively marketed their program and debited consumers without consent. As set forth below, the defendants' conduct violates the Permanent Injunction.

III. DISCUSSION

This Court has the inherent power to enforce its orders through civil contempt. *Shillitani v. U.S.*, 384 U.S. 364, 370 (1966). The FTC, as a party to the case, may invoke the court's powers by filing a civil contempt motion. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 445-46 (1911). A civil contempt finding is warranted where, as here, there is clear and convincing evidence that the contemnors violated a court order. *See CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir. 1992). The contempt defendants should be held in contempt and ordered to make full redress to consumers because they are bound by this Court's Permanent Injunction and repeatedly violated its provisions.

A. The Permanent Injunction Binds the Contempt Defendants.

The Court's Permanent Injunction binds the contempt defendants. Wolf and Eliasson are parties to the case, signed the Order after negotiation and representation by counsel, and acknowledged receipt of the Order. The Order thus binds them. FED. R. CIV. P. 65(d)(2)(A). MS LLC has actual notice of the Order by operation of law through its officers, Wolf and

Eliasson. *See FTC v. Neiswonger*, 494 F. Supp. 2d 1067, 1080 n.18 (E.D. Mo. 2007), *aff'd*, 580 F.3d 769 (8th Cir. 2009); *see also Am. Standard Credit, Inc. v. Nat'l Cement Co.*, 643 F.2d 248, 270-71 & n.16 (5th Cir. 1981); *Shultz v. Applica, Inc.*, 488 F. Supp. 2d 1219, 1227 (S.D. Fla. 2007) ("[T]he knowledge of individuals who exercise substantial control over a corporation's affairs is properly imputable to the corporation."). Furthe

defendants sell a continuity program. Low program usage, rapid cancellations, and a large volume of refund demands and consumer complaints provide clear, convincing evidence that the defendants have misrepresented what they sell in violation of Paragraph I.A of the Order.

"Advertising deception is evaluated from the perspective of the . . . reasonable consumer in the audience targeted by the advertisement." *FTC v. Wash. Data Resources*, 856 F. Supp. 2d 1247, 1272 (M.D. Fla. 2012) ("Advertisements must be considered in their entirety, and as they would be read by those to whom they appeal."). Here, the defendants have targeted consumers who just applied online for a cash advance or loan, telling them, "[w]e have received your accepted loan application and you've been approved," "Mongo was able to accept your loan application," or "Congratulations! You have been approved." Their sites, such as "GetMy2500.com," have emphasized terms like "$2,500" and "Dollar" in large, bold print, often near images of money. In contrast, the defendants use fine print, un-bolded print, and oblique references to obscure material terms of their real offer — a fee-based continuity program with credit usable solely at the defendants' mall and other material restrictions. Financially distressed consumers applying for loans have reasonably interpreted the defendants' calls and websites as offering a cash advance, loan, or general line of credit. Indeed, "consumer interpretation informs whether a communication was deceptive," *id.* at 1273, and consumers have widely complained they were misled by the defendants, and then debited by them, when they really needed a loan. *See supra* pp. 4-10; PX7 ¶¶ 7(b)-(e); PX10 ¶ 23; PX10K *passim*.[11] Paragraph I of the Court's Order forbids such deception.

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[11] Similarly, in 2009, Florida's Office of Financial Regulation found MS LLC employed the "misleading" statement that it is a "registered lender" operating its business from Florida, PX10SS at 9, and denied its application for a license as a consumer finance company for that and other reasons. *Id.* at 1-2, 9.

promotion of program); *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 936 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008).

Many consumer complaints provide direct, compelling proof of the defendants' misrepresentation. *E.g.*, PX9J at 3:8-25 ("I thought I was confirming my information for the loan."); PX10K at 2 ("Cancel this membership. This was misleading for a cash advance."); *id.* at 6 ("I thought I was applying for a cash advance loan . . . I don't want this!!!!"); *id.* at 23 ("I was online applying for a payday loan and you tricked me into thinking that is what I am doing."); *id.* at 72 ("I do not want this account. I had no [in]tention of setting this up. I can barely feed my kids and [I] am about to be evicted."); *see supra* pp. 4-9, 15. Consumers' complaints confirm that the defendants misrepresented their offer. *See, e.g.*, *FTC v. Peoples Credit First, LLC*, 244 Fed. App'x 942, 943-44 (11th Cir. 2007); *Cyberspace.com, LLC*, 453 F.3d at 1202. The defendants' misrepresentation plainly violates the Order.

2. The Contempt Defendants Have Deceptively Telemarketed the Program in Violation of Permanent Injunction ¶ IV.D.

Paragraph IV of the Order prohibits the defendants from violating Section 310.4(d) of the TSR by "failing to disclose truthfully, promptly, and in a [c]lear and [c]onspicuous manner . . . the nature of the goods or services" promoted in a telemarketing call, PX1 ¶ IV.D (citing 16 C.F.R. § 310.4(d)), or "Assisting Others" in violating that provision. PX1 ¶ IV.[12] The defendants have flouted Paragraph IV. At their direction, reading phone scripts, their telemarketers have called loan applicants, telling them that they have "been approved for a

[12] Section 310.4(d) of the Telemarketing Sales Rule applies to "telemarketers," defined in the TSR as "any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor." 16 C.F.R. § 310.2(cc). The defendants' firm, MS LLC, admits using "

$2,500 line of credit." PX10 ¶¶ 89-97. However, the defendants' telemarketers have failed to disclose that they are promoting a program and the offered credit is usable solely at the defendants' mall. *Id.* ¶¶ 91-93, PX10FF at 1-5 (script); PX9L (transcript); PX9K (same). Thus, the defendants have failed to promptly disclose the true nature of the services they offer, or have assisted others in failing to do so, in violation of the Court's Order.

3. The Contempt Defendants Have Not Clearly and Conspicuously Disclosed All Material Terms of the Program Before Asking Consumers for Their Consent to be Debited, in Violation of Permanent Injunction ¶ II.

Paragraph II of the Order prohibits the defendants from failing to "Clearly and Conspicuously disclose . . . all fees and cost

PX10BB. Consumers can submit their bank account information without ever seeing the defendants' "Member Agreement"; the defendants do not even display this document unless consumers click on tiny, hyperlinked text at the bottom of their sites.[13] The defendants ask consumers to click a large button titled, "Access Account," whose title further obscures the fact that clicking it will result in a debit, not a cash advance or loan. The defendants' fine and un-bolded print, misleading terms, and omissions are the antithesis of the clear and conspicuous disclosures required by the Court's Order. PX1 at 7 ¶ 13(c)-(d) ("Any visual message shall be of a size and shade and in a location sufficiently noticeable for an ordinary consumer to read and comprehend it."); *see Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989) ("Disclaimers or qualifications . . . are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression."); *Capital Choice Consumer Credit, Inc.*, 2003 WL 25429612 at *5.

Many consumers have complained that they did not see or understand the terms and fees of the program before the defendants debited them. *See supra* pp. 7, 15, 17. As a result, consumers have rapidly left the program, and few have used its features. *See supra* pp. 10-13. Complaints, rapid cancellations, and low usage further prove that the defendants have failed to clearly and conspicuously disclose the material terms and fees of their program

[13] As noted earlier, the defendants require consumers to check a box to assent to a set of fine print statements, including a vague reference to "Terms and Conditions." Cl

before asking consumers for their bank account numbers and then debiting them. *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1228-29 (D. Nev. 2011).

4. The Contempt Defendants Have Failed to Obtain Consumers' Express, Informed Consent Before Debiting Their Accounts, in Violation of Permanent Injunction ¶ III.

Paragraph III of the Order prohibits the defendants from causing consumers' billing information to be submitted without their express, informed consent. To obtain such consent, the defendants must clearly and conspicuously disclose all material terms of the program "prior to the [c]onsumer's express informed consent." PX1 ¶ III. The defendants have debited consumers without consent in violation of the Order.

The defendants' misrepresentation of the offer as a loan, cash advance, or general line of credit, detailed *supra* pp. 4-5, 14-17, and their failure to clearly and conspicuously disclose all material program terms prior to purchase, detailed *supra* pp. 5-7, 18-19, violate Paragraph III. Misrepresentations and material omissions cannot yield informed consent. PX1 ¶ III; *Grant Connect, LLC*, 827 F. Supp. 2d at 1230.

Additionally, overwhelming evidence demonstrates that the defendants have debited consumers without consent: The defendants debited the account used by an FTC Investigator without his permission and against his explicit instruction. PX8 ¶¶ 23-26. Complaints to the BBB, the FTC, MS LLC, and banks provide ample evidence that the defendants also widely debited consumers without their consent. *E.g.*, PX2 ¶ 3; PX5 ¶¶ 5-6; PX7A; PX9D at 4:6-15; PX10 ¶¶ 23, 115-27. In addition, very low program usage rates and large volumes of rapid cancellations and refund demands all corroborate that consumers do not knowingly consent to be debited. *See supra* pp. 10-13. Further, MS LLC's high rates of failed debits, debits

reported as unauthorized, and total returns also evidence the defendants' unlawful debiting practices. Indeed, the defendants' NSF rate of 40% *exceeds* the rate that a Florida federal court has found probative of unauthorized debiting practices. *Capital Choice Consumer Credit, Inc.*, 2004 WL 5149998, at *19 ("the undersigned is particularly persuaded that the 30% rate of transactions returned for insufficient funds refl

MS LLC operator falsely told an FTC Investigator — after FTC staff had refused the offer to enroll in the defendants' program — that he had agreed to be debited for the program. PX10L at 4:11-6:21. Similarly, the defendants' operators have told consumers who denied authorizing debits that they agreed to enroll in the program, stating, "this was an application you submitted online," PX9I at 3:25-4:5, and other words to the same effect. *See* PX9C at 4:25-5:5; PX9D at 4:1-5; PX9E at 3:19-25; PX9F at 4:5-11; PX9J at 7:4-8:3. A tk progr -32.iaJ 0.0002

When the FTC demonstrates that defendants have engaged in contemptuous conduct, the court may use defendants' gross receipts in assessing sanctions. *Chierico*, 206 F.3d at 1389 (affirming $7.2 million valuation of damages, observing that "the fraud in the selling . . . is what entitles consumers in this case to full refunds"). "Proof of individual reliance by each purchasing customer is not a prerequisite to the provision of equitable relief needed to redress fraud. A presumption e Tcdn o e1.s"Imeceiff eq2.3 .

According to the defendants' internal consumer database, through mid-June 2012, they had netted over $9 million ($9,693,910) from their scheme, on attempted debits of over $42 million.[16] MS LLC's financial statements reveal that defendants Wolf and Eliasson cumulatively realized personal gains in excess of $1 million during that time. PX10 ¶ 138-39. As the defendants continued to deceptively market their program after mid-June 2012, however, their total net revenue and personal gains are likely greater, and will be the subject of further proof.[17]

Compensatory relief should be ordered jointly and severally against the contempt defendants because each is responsible for the violations. *See Leshin*, 618 F.3d at 1236-37 ("Where . . . parties join together to evade a judgment, they become jointly and severally liable for the amount of damages resulting from the contumacious conduct.") (citations omitted). As MS LLC's sole officers, Wolf and Eliasson are responsible for its disobedience, willful or otherwise. *See Wilson v. United States*, 221 U.S. 361, 376 (1911); *McComb*, 336 U.S. at 193 ("[I]t matters not with what intent the defendant did the prohibited act.").

D. The Court May Hold the Contempt Defendants in Civil Contempt Based on the Written Record if They Fail to Raise a Genuine Issue for Hearing.

The FTC requests that the Court conduct contempt proceedings, including argument and a hearing if the Court deems them necessary. However, if the Court finds there are no material disputes of fact that require a hearing, it may dispense with holding a hearing before

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[16] The net revenue figure accounts for the defendants' failed debits as well as refunds made to consumers who persisted through the defendants' "run-around" to secure refunds. PX12 ¶¶ 22-23; *see supra* pp. 10-11.

[17] Pursuant to the compliance-monitoring discovery provisions of this Court's Order, PX1 ¶ IX, FTC counsel shortly will send defendants' counsel a request for production of a current copy of MS LLC's database and other information to generate an updated computation of consumer losses. The Order provides that defendants must produce materials for inspection and copying upon 15 days' notice. *Id.* ¶ IX.A.

sanctioning the defendants. *Mercer v. Mitchell*, 908 F.2d 763, 769 n.11 (11th Cir. 1990).

IV. CONCLUSION

The FTC respectfully requests that the Court enter an order directing the contempt defendants to show cause why they should not be held in civil contempt, order them to make full redress to consumers following appropriate contempt proceedings, and issue all relief appropriate in light of their repeated violations of the Permanent Injunction.

Respectfully submitted,

Date: May 21, 2013

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jmillard@ftc.gov
tgoodhue@ftc.gov

Hearing Counsel

[18] Messrs. Millard and Goodhue are attorneys employed full-time by an agency of the United States government and appear in this matter consistent with M.D. Fla. L.R. 2.02(b).

Certification of Conference with Opposing Counsel

On this date, undersigned FTC counsel conferred via phone with Robby Birnbaum, Esq. of Greenspoon Marder, PA, Ft. Lauderdale, Florida, who has served as counsel for contempt defendants Bryon Wolf, Roy Eliasson, and MS LLC in connection with the FTC's investigation of this matter. FTC counsel previously attempted to contact Mr. Birnbaum by phone and email on May 20th. Today, FTC counsel discussed with Mr. Birnbaum the FTC's anticipated civil contempt filing, the specific contempt charges levied, and the requested relief, including full consumer redress. Undersigned counsel also answered questions from Mr. Birnbaum. Mr. Birnbaum indicated that he was not authorized to agree to the relief sought by the Commission. FTC counsel will promptly supplement this certification if the defendants thereafter agree to the relief sought.

Date: May 21, 2013

s/ Joshua S. Millard

Joshua S. Millard
FEDERAL TRADE COMMISSION
Division of Enforcement
600 Pennsylvania Ave., N.W.
Mailstop M-8102-B
Washington, D.C. 20580
202.326.2454 (vox)
202.326.2558 (fax)
jmillard@ftc.gov

<u>Certificate of Service</u>

I hereby certify that on this date, I caused the foregoing document and its exhibits to be mailed via overnight U.S. Mail service to:

Robby Birnbaum, Esq.
GreenspoonMarder, PA
Trade Center South, Suite 700
100 West Cypress Creek Road
Fort Lauderdale, FL 33309-2140

Counsel for Bryon Wolf, Roy Eliasson, and Membership Services, LLC

I further certify that, on this date, the foregoing document and its exhibits have been mailed via overnight courier for filing, with a courtesy copy enclosed for:

THE HONORABLE JAMES S. MOODY,
U.S. DISTRICT JUDGE
Sam M. Gibbons U.S. Courthouse
801 North Florida Ave.
Tampa, FL 33602

Date: May 21, 2013

s/ Joshua S. Millard
Joshua S. Millard
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