IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Federal Trade Commission,

Plaintiff,

v.

First Consumers, LLC, *et al*.

Defendants.

Civ. Action No. 2:14-cv-01608-GAM

FILED ELECTRONICALLY

**MEMORANDUM IN SUPPORT OF
PLAINTIFF FTC'S MOTION FOR DEFAULT JUDGMENT
AGAINST DEFAULTED DEFENDANTS**

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Plaintiff Federal Trade Commission ("FTC"), pursuant to Rule 55(b) of the Federal Rules of Civil Procedure, requests default judgment against First Consumers LLC; PowerPlay Industries LLC; Standard American Marketing, Inc.; 1166519075 Quebec Inc. d/b/a Landshark Holdings Inc.; and 1164047236 Quebec Inc. d/b/a Madicom Inc. (collectively, "Defaulted Defendants"). The FTC filed a request for entry of default, supported by affidavits of service, on November 21, 2014. DE 52. The Clerk of Court entered default against the Defaulted Defendants on December 4, 2014. The FTC's Complaint (DE 1) and evidence filed in support of its summary judgment motion against defendant Ari Tietolman (Des 61-66) demonstrate that default judgment is appropriate against the Defaulted Defendants. The FTC therefore seeks both permanent injunctive relief and equitable monetary relief against the Defaulted Defendants.

ARGUMENT

I. The Court Should Enter Default Judgment Against the Defaulted Defendants.

When a defendant fails to answer or otherwise defend an action, Federal Rule of Civil Procedure 55(a) directs the clerk to enter default against that defendant.

532, 536 (D.N.J. 2008); *Summit Trust Co. v. Paul Ellis Investment Assoc.*, *LLC,* 2:12-CV-6672, 2013 WL 3967602, at *3 (E.D. Pa. Aug. 2, 2013); *Teamsters Health*, 2012 WL 3018062, at *3; *see also*

a course of action. *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992); *FTC v. Davison Assocs., Inc.,* 431 F. Supp. 2d 548, 559 (W.D. Pa. 2006). Many of the claims the enterprise made were express and therefore presumed material. DE 1 ¶¶ 19-20, 22-24. Furthermore, all of the enterprise's claims were important to reasonable consumers in choosing a course of action and were thus material. Claims about the central characteristics of the offered services "[struck] at the heart of a consumer's purchasing decision" and were therefore material. *FTC v. Freecom Commc'n, Inc*., 401 F.3d 1192, 1203 (10th Cir. 2005); *see also In re Thompson Medical Co., Inc.*, 104 F.T.C. 648 (1984). The telemarketers' misrepresentations that they were affiliated with trusted entities led reasonable consumers to divulge bank account information. Similarly, the telemarketers' express and implied representations that they would not debit consumers' accounts reasonably led victims to disclose their bank account information.

3. The Defaulted Defendants Violated Section 5 of the FTC Act by Debiting Consumers' Accounts Without Authorization.

Once consumers disclosed their account numbers, the enterprise used the information to generate remotely created checks payable to the Defaulted Defendants. DE 1 ¶ 30. The enterprise deposited the checks into the Defaulted Defendants' bank accounts, thus debiting consumers' accounts. *Id.* Consumers did not authorize these debits. DE 1 ¶¶ 28-29. The enterprise's unauthorized debits constituted an unfair practice in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(n). An act or practice is "unfair" under Section 5 if it: (1) causes or is likely to cause substantial injury to consumers; (2) that is not reasonably avoidable; and (3) that is not outweighed by countervailing benefits to consumers or competition. 15 U.S.C. § 45(n); *see also International Harvester Co.*, 104 F.T.C. 949, 1064 (1984); *NHS Sys.*, 936 F. Supp. 2d at 531.

Courts have repeatedly held that unauthorized charges or debits – like those at issue here

– violate Section 5. *See NHS Sys.*, 936 F. Supp. 2d at 531; *FTC v. Wells*, 385 F. App'x. 712, 713 (9th Cir. 2010); *FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1004 (N.D. Cal. 2010); *FTC v. Kennedy*, 574 F. Supp. 2d 714, 721 (S.D. Tex. 2008); *FTC v. Windward Marketing, Inc*., Case No. 1:96-CV-615F, 1997 WL 33642380, at *13 (N.D. Ga. Sept. 30, 1997). Indeed, the unauthorized debiting scheme meets all three prongs of the unfairness standard.

First, the debits caused substantial injury. Defaulted Defendants debited hundreds of dollars from each consumer's accounts. DE 1 ¶ 30. Even considered on a consumer-by-consumer basis, such injury is "substantial." Furthermore, courts consider whether injury is "substantial" in the aggregate, so even a small individual injury would be substantial if inflicted on many consumers. *See FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985) (quoting FTC policy statement); *see also NHS Sys.*, 936 F. Supp. 2d at 531. The Defaulted Defendants' bank records show that, in the aggregate, the operation took more than $10 million from consumers' bank accounts, which constitutes more than "substantial"

the debits appeared on their bank statements. DE 1 ¶¶ 29, 33. These consumers therefore could not reasonably avoid the unauthorized debits. *See NHS Sys.*, 936 F. Supp. 2d at 531 (finding unfairness and concluding "consumers could not reasonably avoid the limitless financial consequences of providing their account information for a supposed discount healthcare program"). Nor did consumers' ability to request reversal of the charges (DE 1 ¶¶ 34-35) make injury avoidable, as even consumers who successfully reversed charges had to expend "time, trouble, aggravation, and money" to do so. *FTC v. Neovi, Inc.*, Case No. 06-CV-1952-JLS-JMA, 2009 WL 56139, at *4 (S.D. Cal. Jan. 7, 2009).

Finally, the massive harm caused to victimized consumers was not outweighed by countervailing benefits. The Defaulted Defendants provided no benefit to consumers or competition when they effectively stole consumers' money, whether under the guise of sales transactions, by pretending to "verify" existing services, or by masquerading as bank and government officials. *See Inc21.com*, 745 F. Supp. 2d. at 1004 ("it cannot be said that defendants' 'customers' benefitted at all from services that they never agreed to purchase, didn't know were being provided to them, and never wanted in the first place"); *see also Kennedy*, 574 F. Supp. 2d at 721; *Crescent Publ'g Grp.*, 129 F. Supp. 2d at 322.

4. The Defaulted Defendants Violated Several Provisions of the Telemarketing Sales Rule.

The Defaulted Defendants also violated the Telemarking Sales Rule (TSR), 16 C.F.R. § 310, by failing to disclose material facts, misrepresenting total cost, misrepresenting telemarketers' affiliation, and failing to obtain express verifiable authorization and informed consent before debiting consumers' accounts. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the TSR also constitutes a violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

The TSR prohibits sellers and telemarketers from making various types of misrepresentations or omissions, and from engaging in certain billing practices.

First, the TSR prohibits failing to disclose clearly and conspicuously all material restrictions, limitations, or conditions on the goods or services offered before a consumers pays. 16 C.F.R. § 310.3(a)(1)(ii). The Defaulted Defendants violated this provision by withdrawing money from consumers' bank accounts without clearly disclosing that they would do so, or that they would not provide the services as advertised. DE 1 ¶¶ 21-24. Second, the TSR prohibits telemarketers from misrepresenting the total costs to purchase goods or services, or their affiliation with any person or government entity. 16 C.F.R. § 310.3(a)(2)(i), (vii). The enterprise misrepresented, expressly and by implication, that consumers' accounts would not be debited and that the Defaulted Defendants were affiliated with the government or consumers' banks. DE ¶¶ 19, 23. Third, the TSR prohibits telemarketers from billing or debiting consumers' accounts without their express inform

appears to have a litigable defense, and (3) whether defendant's delay is due to culpable conduct."[2] *Chamberlain*, 210 F.3d at 164; *Gordashevsky*, 558 F. Supp. 2d at 537; *Summit Trust*, 2013 WL 3967602, at *4. Each of the three factors favors the FTC.

First, because the Defaulted Defendants have not answered or otherwise defended this action, the FTC cannot obtain a final outcome against them unless default judgment is granted. The FTC would be prejudiced if it is denied the ability to obtain a ruling on its claims against the Defaulted Defendants. *See Teamsters Health*, 2012 WL 3018062, at *4.

Second, because the Defaulted Defendants have not responded in any way, they have presented no defense at all. Indeed, even th

(motions by defendants Ferry and Tietolman); DE 33 (defendant Ferry's answer); DE 57 (stipulated final orders against defendants Barczai and Ferry). The Defaulted Defendants' officers and directors therefore knew of the lawsuit and its progress, but chose not to respond on behalf of the corporations. *See Gordashevsky*, 558 F. Supp. 2d at 537 (entering default judgment where defendant's "failure to defend is clearly his own").

Because the FTC has established its causes of action, and because the default judgment factors favor the FTC, the Court should enter default judgment against the Defaulted Defendants on all of the counts alleged in the FTC's Complaint.

II. The Injunctive Relief the FTC Seeks Is Reasonable and Appropriate.

Strong injunctive relief is necessary to prot

71 F. Supp. 2d 1030, 1047 (C.D. Cal. 1999) *aff'd*, 265 F.3d 944 (9th Cir. 2001) (imposing ban where defendants engaged in systematic pattern of misrepresentations).

Where there is a reasonable basis to believe defendants will engage in future violations, injunctive relief should be "broa[d] enough to prevent [defendants] from engaging in similarly illegal practices."

names over time, but employed the same abusive tactics. The same deceptive telemarketing tactics employed here could easily be used under the guise of selling new products and services.

The proposed injunctive relief reflects the egregiousness of the enterprise's actions and imposes safeguards to protect consumers from similar abusive practices. Specifically, the proposed order would prohibit the Defaulted Defendants from engaging in telemarketing. It would also prohibit them from processing payments using remotely created checks—the primary payment instrument the enterprise used—for accounts they do not control, and would require them to disclose material payment terms to consumers before charging a financial account. These restrictions are necessary because RCCs are often abused by fraudsters, just as the enterprise abused them in this case. *See* Notice of Proposed Rulemaking, Telemarketing Sales Rule, 16 C.F.R Part 310, 78 Fed. Reg. 41200, 41201-41215 (July 9, 2013).

In addition, the proposed relief would prohibit the Defaulted Defendants from misrepresenting any material facts for any product or service they sell. Such restrictions will

permeated the scheme and was widespread, it is presumed all of consumers' money was obtained through deception. *See, e.g., Kuykendall*, 371 F.3d at 764-67; *McGregor,* 206 F.3d at 1387-88. Furthermore, because the Defaulted Defendants acted as a common enterprise under Tietolman's control, they are jointly and severally liable for the full amount of consumer harm. *See, e.g., NHS Sys. Inc.*, 936 F. Supp. 2d at 533.

Under Rule 55(b), the Court may hold a hearing to determine the appropriate amount of monetary relief. However, a hearing is not necessary if detailed affidavits or record evidence make it possible to compute the amount of relief. *Summit Trust*, 2013 WL 3967602, at *4; *accord Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir. 1981); 10 James Wm. Moore, Moore's Federal Practice, Civil § 55.32[2][a] (3d ed. 2012). Courts have granted the FTC equitable monetary relief by default without a hearing where the documentary evidence provides a calculation of the correct amount. *See, e.g*., *FTC v. 1263523 Ontario, Inc*., 205 F. Supp. 2d 218, 223 (S.D.N.Y. 2002) (calculating $10 million relief based on declaration from defendants' payment processor); *Hope for Car Owners*, 2013 WL 322895, at *6 (E.D. Cal. Jan. 24, 2013) (documents from financial institutions supported monetary relief proposed by FTC).

Here, the record contains sufficient evidence to support an order for equitable monetary relief against the Defaulted Defendants without further hearing. The FTC filed this evidence with its motion for summary judgment, concurrently with the filing of this motion. The FTC obtained the enterprise's account records from 23 banks, and computed total RCC deposits and total RCC returns in those accounts. DE 65, Summary Judgment PX52-74 (excerpts of bank records); PX75-77 (summaries of voluminous bank records). The enterprise used RCCs to debit a total of $18,856,360.56 from consumers' accounts. DE 65, Summary Judgment PX75.

Accounting for $8,122,104.75 in returns, the net loss consumers suffered, and thus appropriate monetary relief, is $10,734,255.81.

CONCLUSION

For the foregoing reasons, the Court should grant the FTC's motion for default judgment and issue the attached proposed order against the defaulted defendants.

Respectfully submitted,

Date: January 13, 2015

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