UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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FEDERAL TRADE COMMISSION,

Plaintiff,

- against -

INSTANT RESPONSE SYSTEMS, LLC, and
JASON ABRAHAM,

Defendants.
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MEMORANDUM AND ORDER

13 Civ. 00976 (ILG) (VMS)

GLASSER, Senior United States District Judge:

Plaintiff, the Federal Trade Commission ("FTC"), brings this action against Instant Response Systems, LLC ("IRS") and Jason Abraham ("Abraham," collectively, "Defendants"), alleging that Defendants violated Section 5(a) of the Federal Trade Commission Act ("FTC Act"), codified at 15 U.S.C. § 45(a); the Telemarketing Sales Rule ("TSR"), 16 C.F.R. §§ 310.1–310.9; and the Unordered Merchandise Statute ("UMS"), 39 U.S.C. § 3009. The FTC moves, pursuant to Federal Rule of Civil Procedure 56, for summary judgment. For the reasons that follow, the motion is GRANTED.

BACKGROUND

I. Factual Background

The following facts are undisputed.[1] Abraham is the founder, owner, and chief executive officer ("CEO") of IRS, a registered New York Limited Liability Company

[1] Abraham filed a "Rebuttal" to the FTC's Rule 56.1 Statement, which does not comply with Local Civil Rule 56.1—it does not include "correspondingly numbered paragraph[s] responding to each numbered paragraph in the [FTC's Rule 56.1 Statement]," or cite to admissible evidence to support each statement. See L. Civ. R. 56.1. Given that Abraham appears pro se, the Court declines to accept all facts in the FTC's Rule 56.1 Statement as admitted; instead, it will consider the "totality of the parties' submissions in identifying disputed material facts." See FTC v. Med. Billers Network, Inc., 543 F. Supp. 2d 283, 302-03 (S.D.N.Y. 2008). The Court, however, exercises its discretion to excuse Abraham's failure only to the extent he has provided admissible evidence controverting the facts in the FTC's Rule 56.1 Statement. See Mateo v. Bristow, No. 12 Civ 5052, 2014 WL 4631569, at *1 (S.D.N.Y. Sept. 17, 2014).

located in Brooklyn, New York. FTC's Local Rule 56.1 Statement of Facts ("FTC SOF") ¶¶ 1-2. At the time Abraham founded IRS in March 2008, he was subject to a permanent injunction issued by the United States District Court for the District of Columbia on December 1, 2003. Id. ¶ 5. The injunction—the product of a 2003 FTC lawsuit against him for selling fraudulent identification documents and academic degrees—permanently banned him from making material misrepresentations in the sale of any goods or services. Id.; Plaintiff's Exhibit ("PX") 7.

IRS sells a medical alert monitoring service and equipment to the elderly. FTC SOF ¶¶ 8, 16-17. The equipment includes a pendant with a button that connects consumers to emergency dispatchers. Id. ¶¶ 16-17. As CEO of IRS, Abraham leads virtually all aspects of the business, including hiring, training, overseeing, and firing employees, and managing corporate finances. Id. ¶¶ 55-71, 73-90. Shortly after forming IRS, Abraham recruited and hired telemarketers via online ads. Id. ¶ 74. He also hired two key employees: Leticia Dumitras, who handled payroll and data entry (id. ¶ 88), and Lori Kennegeisser,[2] who handled billing and collections. Id. ¶ 83.

A. IRS Telemarketing Calls

IRS telemarketers used lists of customer phone numbers, or "leads," which Abraham obtained from paid lead generators in the Philippines. Id. ¶¶ 69, 74. Abraham testified that he did not take any steps to confirm whether the lead generators were filtering out numbers listed on the National Do Not Call Registry. Id. ¶ 12; PX 11 at 82:4-7. IRS' telemarketing targeted primarily consumers over the age of 64, who lived alone, and had a limited or fixed income. FTC SOF ¶¶ 8-9, 106.

[2] The FTC has spelled Ms. Kennegeisser's name differentl

Using a scripted sales pitch, telemarketers falsely told consumers that they were calling in response to a request for information about medical alert services. Id. ¶ 14; PX 1 at 64:13-65:1. Some consumers were told that a family member or loved one asked IRS to contact them. FTC SOF ¶ 14. After describing the medical alert equipment and monitoring service (id. ¶ 15), telemarketers told consumers that they could order either a lifetime monitoring service, which cost $1,128, or a three-year service, which cost $128 plus $36 per month.[3] Id. ¶ 22. Consumers were required to pro01 o1 75 -2.0002 Tc.82 -2.36 Tm-.0equ

Many consumers who did not order the medical alert services nevertheless received sales invoices from IRS. Id. ¶¶ 31-32. These invoices often stated: "As you agreed in our conversation, please send a check for $1,196 in the enclosed stamped envelope. . . .We ask that you send your payment NOW so that we can ship your lifesaving system to you immediately." Id. ¶ 32 (emphasis in original). Other consumers received merchandise from IRS that they never ordered. Id. ¶ 33.

When these consumers refused to pay, IRS sent follow-up letters that flagrantly accused them of ordering their services and demanded immediate payment. Id. ¶¶ 36-39. These letters, written by Abraham under a variety of aliases, urged consumers to "consult an attorney" about "the criminal and civil consequences of bouncing checks," and advised that "if a lawsuit is filed against

I. Legal Standard

Summary judgment is appropriate where the admissible evidence and pleadings demonstrate "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); accord

of the non-moving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1224 (2d Cir. 1994).

II. Analysis

The FTC moves for summary judgment on all five counts in its Complaint. Count One asserts a violation of Section 5(a) of the FTC Act based on Defendants' alleged misrepresentations that consumers ordered medical alert services and owed money to Defendants. (Compl. ¶¶ 30-32). Counts Two, Three, and Four allege violations of the TSR, 16 C.F.R. §§ 310.1–310.9, based on Defendants' alleged misrepresentations to induce consumers to pay for the IRS services, (Compl. ¶¶ 43-44); Defendants' use of threats or intimidation to coerce consumers to pay them (id. ¶¶ 45-46); and Defendants' calls to consumers whose numbers appear on the National Do Not Call Registry (id. ¶ 47). Count Five alleges that Defendants mailed unordered merchandise to consumers in violation of Section 3009(a) and (c) of the Unordered Merchandise Statute, 39 U.S.C. § 3009, (Compl. ¶¶ 50-52).

A. Evidentiary arguments

As an initial matter, the Court addresses Abraham's objections to evidence the FTC submitted in support of its motion—namely, seven sworn declarations from the caretakers of elderly consumers who were contacted by IRS, and 131 Better Business Bureau ("BBB") complaints. His argument that the evidence is inadmissible as hearsay is without merit and irrelevant.[6] See Response at 4-5; 55-56. The FTC correctly argues

[6] His attacks on the credibility of the caretakers are equally meritless: "Mr. Budd allows his 91 year old mother to livyear oloo

that the evidence is admissible under Federal Rule of Evidence 807, the "residual exception" to the hearsay rule. Rule 807 allows parties to use statements that would otherwise constitute hearsay if "(1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) is offered as evidence of a material fact; (3) is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of [the Federal Rules of Evidence] and the interests of justice;" and (5) "the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it." Fed. R. Evid. 807.[7]

The caretakers' declarations—hearsay only to the extent they are offered to prove the truth of the statements made to the elderly consumers—recite similar and consistent factual accounts about the consumers' experiences with IRS and the misrepresentations at issue. In particular, they describe the letters and phone calls demanding payment for unordered services and the threatening calls from IRS telemarketers. The declarations are also corroborated by letters and invoices from IRS that other consumers have provided, which reinforces their trustworthiness. Finally, it would be unduly wasteful of time and burdensome for the FTC to call each aggrieved consumer to testify, and the interests of justice are therefore best served by using the caretakers' declarations. <u>See</u> Fed. R. Evid. 807.

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dangerous, life threatening behavior. I contend that a person of such low moral character cannot be relied upon as a witness in a court of law." <u>Id.</u> at 5.

[7] The parties do not dispute whether there was adequate notice. The FTC produced the BBB complaints
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The BBB complaints are also admissible under Rule 807 given their inherent "guarantees of trustworthiness" as corroborating reports of the Defendants' misrepresentations, which were sent spontaneously by unrelated individuals to a government agency. See FTC v. Magazine Solutions, LLC, Civil Action No. 7-692, 2009 WL 690613, at *1 (W.D. Pa. Mar. 16, 2009) (admitting consumer complaints to BBB in part because "[t]he consistency of the representations" described in consumers' letters reinforced the trustworthiness of the complaints). Furthermore, "reasonable effort would not produce evidence that is more pr

factual assertions made in that letter were properly disregarded by the court").[8] And even if it were admissible, it fails to satisfy Rule 56(c)(4)'s requirement that affidavits used to oppose summary judgment must be "made on personal knowledge" and "set out facts that would be admissible in evidence." As an independent contractor for IRS who handled payroll and data entry, Dumitras lacks personal knowledge of the consumer complaints or the calls at issue. See PX 1 at 13:5-25. Her job did not involve communicating with consumers; rather, she received consumer names from IRS telemarketers and then assigned them SIN numbers. See Dumitras Testimony at 7:8-14. And although she allegedly listened to "dozens" of calls with consumers, she does not state whether she listened to calls between IRS agents and the complaining consumers. See Response at 38. Notably, Abraham does not provide affidavits from the telemarketers who spoke with consumers—most importantly, Kennegeisser.[9] He states repeatedly that all calls with consumers were recorded, but provides not a single record

Gottlieb, 84 F.3d at 518. He has presented no affirmative evidence to support his assertions, and "the mere existence of some alleged factual dispute between the parties alone will not defeat a properly supported motion for summary judgment." See Garnett-Bishop v. New York Cmty. Bancorp, Inc., No. 12-cv-2285, 2014 WL 4700222, at *5 (E.D.N.Y. Sept. 22, 2014) (internal quotations and citations omitted). "In the face of [the FTC's] well-supported summary judgment motion, [Abraham's] conclusory denials are insufficient to create a disputed issue of material fact" as to whether Defendants made material misrepresentations to consumers. See Soares v. Univ. of New Haven, 154 F. Supp. 2d 365, 376 (D. Conn. 2001). Summary judgment is therefore granted to the FTC on Count One.

C. The TSR

Counts Two through Four allege violations of the TSR. Any violation of the TSR is deemed a "deceptive act or practice" in violation of Section 5(a) of the FTC Act. 15 U.S.C. § 6102(c); 16 C.F.R. § 310.1. There is no question, and Abraham does not dispute, that Defendants are "sellers" or "telemarketers" that engaged in "telemarketing" and are thus subject to the TSR.[10]

1. False or Misleading Statement to Induce Payment

The FTC claims that Abraham violated the TSR by making false or misleading statements to induce consumers to pay for goods or services. See FTC Memorandum in Support of its Motion for Summary Judgme

rely on Dumitras' unsworn, inadmissible testimony that "[a]llegations of threats made by IRS agents are total fabrications" because she "never heard an IRS agent make a threat." See Response at 12; Dumitras Testimony at 13. As for alleged threats made over the phone, Abraham argues that he "find[s] it difficult to believe that someone can behave in a threatening manner by phone." Abraham SOF at 33. And in response to the IRS letters demanding payment, he merely states that "the advice to them to consult an attorney . . . was not intended as a threat" and that "[t]he Court can decide if these are threats, or simply an honest merchant trying to collect a legitimate debt after months of being ignored." Abraham Supplement at 8; Abraham SOF at 35. The calls and letters were indeed threats, Abraham's frivolous assertions notwithstanding. Without admissible evidence to support his position, he cannot properly assert that a genuine issue of material fact exists as to this claim. See Rule 56(c); Rule v. Brine, Inc., 85 F.3d 1002, 1012 (2d Cir. 1996). The Court therefore grants summary judgment to the FTC on Count Three of its Complaint.

3. Violation of Do Not Call Registry

The TSR created the National Do Not Call Registry ("Registry"), which allows consumers to opt out of receiving marketing calls by placing on a registry their phone numbers that telemarketers are prohibited from calling. See 16 C.F.R. § 310.4 (b)(iii)(B); FTC v. Navestad, No. 09-CV-6329T, 2012 WL 1014818, at *4 (W.D.N.Y Mar. 23, 2012). The FTC claims that Defendants violated the TSR by initiating outbound telephone calls to numbers on the Registry without consumers' prior written authorization or an "established business relationship." See Memorandum at 21.[11]

[11] The TSR defines "established business relationship" as a relationship between a seller and a consumer based on: (A) the consumer's purchase, rental, or lease of the seller's goods or services in a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the

The FTC has established that it is entitled to summary judgment on this claim. It provided declarations from consumers whose numbers were on the Registry and who received calls without having given IRS prior written authorization to make them or having a prior established business relationship with IRS. FTC SOF ¶¶ 11, 13. In response, Abraham does not deny that he lacked written permission from consumers (see Response at 19), and admits that he never confirmed whether the numbers called were filtered out numbers from the Registry. PX 1 at 180:17-182:7. Instead, he argues that an established business relationship did exist and is "obvious" because "IRS' salespeople only called consumers who were recorded requesting information about IRS services." Response at 19. Abraham has provided no admissible evidence—such as the alleged recordings or the testimony of an IRS salesperson—to support his assertion. Thus, there is no a genuine issue of material fact to be tried regarding the absence of a prior established business relationship between consumers and IRS, and summary judgment on Count Four is granted to the FTC.

D. Unordered Merchandise Statute

In its fifth and final claim, the FTC alleges that Defendants violated the Unordered Merchandise Statute ("UMS"), which prohibits the mailing of unordered merchandise to consumers, as well as any attempt to collect payment for that merchandise. 39 U.S.C. § 3009(a), (c). Under the UMS, the mailing of unordered merchandise constitutes a per se violation of Section 5 of the FTC Act. Id.

The FTC is entitled to summary judgment on this claim. It submitted complaints and declarations from consumers or their caretakers, which state that Defendants

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date of a telemarketing call; or (B) the consumer's inquiry or application regarding a product or service offered by the seller within the three (3) months immediately preceding the date of the telemarketing call. 16 C.F.R. § 310.2(o).

mailed unordered merchandise to them and attempted to collect payment for that merchandise. See FTC SOF ¶ 33; PX 35 at FTC-IRS_00522-31. Abraham provides no admissible evidence in response. He asserts that "IRS never sent any consumer unordered merchandise" because it "would be financially insane to do so" and "everybody who was sent IRS equipment had subscribed and agreed to pay for that subscription." Response at 54. Such unsupported assertions cannot create a genuine issue with respect to the material facts set forth in the numerous declarations and complaints that the FTC submitted. See Hicks v. Baines, 593 F.3d 159, 166 (2d Cir. 2010). Summary judgment is therefore granted to the FTC on Count Five of its complaint.

E. Liability of Abraham for Acts of IRS

1. Liability for Injunctive Relief

To obtain injunctive relief against an individual for a corporate defendant's violations, the FTC must show that the individual (1) participated directly in the corporate defendant's deceptive acts or prac

¶¶ 3, 55-71, 73-74, 80-93. He wrote the letters to consumers that demanded payment for unordered services. Id. ¶¶ 92-93. He was also responsible for hiring, training, and overseeing telemarketers, including Kennegeisser, who threatened consumers. Id. ¶¶ 83, 86. Thus, there is no genuine dispute of material fact that Abraham had authority to control IRS and participated directly in many of the company's deceptive acts and practices. The FTC has established Abraham's liability for injunctive relief, and the Court grants summary judgment enjoining him on terms as are discussed infra, Section II.F.1 and set forth in the attached Order.

2. Liability for Monetary Relief

To hold an individual liable for monetary relief, the FTC must show that the individual "had or should have had knowledge or awareness of the misrepresentations." Amy Travel, 875 F.2d at 573. The knowledge requirement may be satisfied by showing that the individual had "actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth." Five-Star Auto, 97 F. Supp. 2d at 535 (quoting Amy Travel, 875 F.2d at 574). Active involvement in the day-to-day operations of a company as well as awareness of consumer complaints is probative of knowledge. Amy Travel, 875 F.2d at 573-75.

The FTC presented unrebutted evidence that Abraham was intimately involved in IRS' daily operations and was aware of at least 100 consumer complaints. See FTC SOF ¶¶ 55-71, 73, 93, 98-101, 104. Thus, there is no genuine dispute of material fact that Abraham had, at the very least, "an awareness of a high probability of fraud along with an intentional avoidance of the truth," see Five-Star Auto, 97 F. Supp. 2d at 535. Therefore, he is individually liable for restitution.

F. Remedy

1. Injunctive Relief

The FTC requests the entry of a permanent injunction and monetary relief pursuant to Section 13(b) of the FTC Act. See 15 U.S.C. § 53(b) (". . . in proper cases the [FTC] may seek, and after proper proof, the court may issue, a permanent injunction"). In its revised proposed order, the FTC seeks to permanently enjoin Abraham from (1) engaging in the marketing, promotion or sale of medical alert goods or services; (2) making any material misrepresentation in connection with promoting or selling any goods or services; (3) violating the Unordered Merchandise Statute; and (4) collecting payment for any medical alert good or service. See Dkt. No. 76.

The FTC has demonstrated that a permanent injunction against Abraham is warranted, if not compelled. Section 13(b) permits a court to issue a permanent injunction for the violation of any law enforced by the FTC. See, e.g., FTC v. Minuteman

such conduct. Abraham's disregard for the terms of that injunction portends a "recurring violation." See Medicor, 217 F. Supp. 2d at 1057. Furthermore, the Court finds that the FTC's proposed order for a permanent injunction is "narrowly tailored to fit [Abraham's] specific legal violations" and does not "impose unnecessary burden[s] on lawful activity," such as lawful and legitimate telemarketing. See Waldman Publ'g Co. v. Landoll, Inc., 43 F.3d 775, 785 (2d Cir. 1994). The Court will therefore enter a permanent injunction against Abraham, the terms of which are set forth in the attached Order.

2. Monetary Relief

The FTC seeks an order providing for a monetary judgment of $3,432,462 against Abraham, which it alleges is the amount of revenues he received through his company's unlawful scheme.[12] It also seeks to require third parties holding Abraham's frozen assets to surrender the assets to the FTC in partial satisfaction of the monetary judgment. See Five-Star Auto, 97 F. Supp. 2d at 533 ("[Section 13(b)'s] grant of permanent injunctive power gives the court broad equitable authority to grant any ancillary relief necessary to accomplish complete justice"). Before a court may order restitution under Section 13(b), the FTC must establish a "presumption" of consumer reliance by showing that "(1) the business entity made material misrepresentations likely to deceive consumers, (2) those misrepresentations were widely disseminated, and (3) consumers purchased the entity's products." Freecom, 401 F.3d at 1205-06.

As discussed supra, Section II.B., Abraham and his company made material misrepresentations through telephone calls and letters that were misleading to a

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[12] As noted above, the Court entered a default judgment and order against IRS on January 31, 2014, which found the company liable for $3,432,462. See Dkt. No. 65 at 4.

reasonable consumer. The misrepresentations were widely disseminated to hundreds of consumers across the nation, and at least some of these consumers eventually purchased IRS' services.

In the Second Circuit, "[t]he appropriate measure for restitution is the benefit unjustly received by the defendants." Verity, 443 F.3d at 67. Once the FTC shows that it has "reasonably approximated" Abraham's unjust gains, the "burden shifts to [Abraham] to show that those figures are inaccurate." Id. at 67 (internal citations omitted).

The FTC has shown that the $3,432,462 in IRS' total gross revenues is a "reasonable approximation" of Abraham's unjust gains. Cf. FTC v. Bronson Partners, LLC, 654 F.3d 359, 368-69 (holding that "unjust gains" must be directly connected to the defendant's wrongdoing). In its Reply to Abraham's Supplemental Response, it provided additional documentation to support its calculations: the corporate financial statement for IRS that Abraham produced to the FTC on March 15, 2013 and the accounting spreadsheets that he relied on to prepare the statement. See Abraham Financial Disclosure at 9 (Dkt. No. 78; Exs. A-K). The Court finds that the FTC has provided sufficient documentation to support its calculation of the $3,432,462 in monetary relief that it seeks.

At the November 12, 2014 conference, Abraham agreed to the amount of monetary relief that the FTC requests. In his Supplemental Response, however, he seeks to refer the matter to a magistrate judge to "conduct a hearing to adjust the amount to a fair assessment" because he now realizes that "if the Plaintiff prevails, [he] will have the moral and ethical obligation to pay as much of this award as [he] is able." See Abraham Supp. at 11. He still has not contested the accuracy of the amount of