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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. BUSINESS RECOVERY SERVICES, LLC a limited liability company, and, BRIAN HESSLER individually, and as owner, officer, or manager of Business Recovery Services, LLC, Defendants.	No. 2:11CV00390 JAT Reply in Support of Plaintiff's Motion for Preliminary Injunction

In response to Plaintiff's Motion for Preliminary Injunction, Defendants raise four arguments: (1) that the United States is unlikely to succeed on the merits because Defendants' customers did not lose money in telemarketing transactions, (2) that the United States is unlikely to succeed on the merits because Defendants do not make misrepresentations related to their recovery kits, (3) that the balance of the equities does not business opportunity and work-at-home schemes use a mix of online, mail, and telephone communications. For example, as detailed in the declaration submitted by Kristie Olmstead and attached as Exhibit A, even where the previous scheme may begin with an email or online communication, telephone calls are also used as part of the sales process.[3] As a result, this transaction becomes a "telemarketing transaction." Additionally, these companies sell their customer lists, and their customers find themselves receiving call after call from telemarketers offering them additional, related, goods and services.[4] If the individual makes a purchase from one of these companies, that transaction is a "telemarketing transaction."

Defendants sell recovery kits that they state are specific to individual companies. As a result, customers who lost money in multiple previous telemarketing transactions are encouraged to purchase a recovery kit for each transaction. As recently as March 14, 2011, Mrs. Olmstead paid Defendants $1,500 for six recovery kits, one for each of her prior telemarketing transactions.[5] Mrs. Olmstead and her husband found that their credit card had been "charged around 6:00 pm, about the time that I had given Ami my credit card information" and when they contacted Defendants later that evening to cancel their transaction, Defendants refused to issue a refund.[6]

The questionnaires that were submitted with the Motion for Preliminary Injunction do not contain many details related to the previous transaction. However, the companies from which these individuals purchased are well known telemarketing firms, and include several companies that have been sued by the Federal Trade Commission, and one that led to the

[3] See paragraphs 2 and 4 of Exhibit A.

[4] See paragraphs 5 through 11 of Exhibit A.

[5] See paragraphs 17 through 20 of Exhibit A.

[6] See paragraphs 20 through 23 of Exhibit A.

Act, any violation of the TSR, including Section 310.4(a)(3) of the TSR, constitutes an unfair or deceptive act or practice in or affecting commerce.

Additionally, although not critical to the United States' motion for a preliminary injunction which rests on Defendants' unlawful receipt of payments before the time permitted by the TSR, the evidence presented to the Court in support of the Motion for Preliminary Injunction demonstrates that when Defendants market their kits to potential customers, they make misrepresentations related to the effectiveness of their recovery kits. These misrepresentations are unfair or deceptive acts or practices. For example, Mr. Curalov wrote that they made "promises to recover losses from companies . . . ."[9] Ms. Hagan recalled that "Business Recovery Svcs said they could recover money . . . they were successful with others."[10] Mr. Gleske was told that "[a]t the minimum we would recover the money we spent on the purchase of the kits."[11] The salesperson who spoke with Ms. Aaker "said I will definitely get all my money back."[12] Additionally, when he spoke with Mr. Wilcox, "Mr. Hessler painted a rosy picture of the possibilities for recovery of my initial investment if I followed the 'easy' instructions in the package. He did not guarantee that I would succeed, but he did say that the chance of success was great."[13]

securing customer signatures confirming that there is no guarantee.

These misrepresentations certainly constitute unfair or deceptive acts or practices, though it is not necessary that the Court consider the specific statements and misrepresentations Defendants made to potential customers. As detailed above, any violation of the TSR constitutes an unfair or deceptive act or practice in or affecting commerce. Defendants' argument that the government has failed to show that Defendants' practices are deceptive should be dismissed, as the government has introduced indisputable evidence that Defendants violate Section 310.4(a)(3) of the TSR by their untimely billing and collection practices. Defendants do not deny that their sales practices violate this Section, and any violation of the TSR is an unfair or deceptive act affecting commerce.

The Balance of the Equities Supports Granting Injunctive Relief

Defendants raise several considerations that they assert change the balance of the equities such that injunctive relief should not be granted. These considerations are all either irrelevant or simply ignore the facts. For example, whether or not Defendants pay their taxes is irrelevant to the balance of the equities. Additionally, Defendants' argument that the government has filed to show "substantial harm" is also irrelevant. It is not necessary for the government to show substantial harm under 15 U.S.C. § 53(b), which "places a lighter burden on the Commission than that imposed on private litigants by the traditional equity standard; the Commission need not show irreparable harm to obtain a preliminary injunction." Federal Trade Commission v. Affordable Media, 179 F.3d 1228, 1233 (9th Cir. 1999) (quoting Federal Trade Commission v. Warner Communications, Inc.72 ref" 9 con R.4(i).1(, bearing on the balance of the equities, is inapplicable to the Motion pending before this Court, and is irrelevant to this proceeding.

Defendants assert that the balance of the equities weighs in their favor because they provide a cost-effective, successful way to recover money. Even assuming that Defendants have "300 known consumers"[15] who have been aided by their recovery kits, this number is a small percentage of the nearly 5,000 kits Defendants have sold. This demonstrates that Defendants' recovery kits are largely ineffective and unlikely to successfully aid consumers in recovering the money they lost. While Defendants found nine individuals willing to complete declarations stating that "[t]he kit was worth every penny[,]" many other customers would say otherwise. Customers have complained that the recovery kit was "simplistic"[16] and "overpriced for what I actually received."[17] Ms. Aaker stated that the "letters were a joke"[18] and Ms. Hagan noted that the form letters contained both typographical and grammatical errors.[19] Defendants' assertion that their recovery kits have helped some consumers does not change the balance of the equities, nor does it address the harm that flows from their violation of Section 310.4(a)(3) of the TSR.

Defendants also assert that "consumers do not have a financially reasonable alternative way to try and retrieve their losses." The falsity of this statement is underscored by the simplicity of the contents of Defendants' recovery kits. The usable portion of

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[15] Defendants attached thirteen declarations, signed by only nine consumers, as support for their claim that they have "obtained recovery for approximately 300 known consumers."

[16] See Coyle Questionnaire, previously submitted as Exhibit H to the Motion for Preliminary Injunction.

[17] See Hatch Questionnaire, previously submitted as Exhibit I to the Motion for Preliminary Injunction.

[18] See Aaker Questionnaire, previously submitted as Exhibit F to the Motion for Preliminary Injunction.

[19] See Hagan Questionnaire, previously submitted as Exhibit E to the Motion for Preliminary Injunction.

Defendants' recovery kits consists of five fill-in-the-blank letters. These letters are addressed to the Internal Revenue Service, a state attorney general's office, the Better Business Bureau, the customer's credit card company, and the United States Postal Inspection Service. Consumers could certainly write letters to these entities for much less than the $99 to $499 they pay for Defendants' recovery kit. Defendants provide consumers with letters that they could write themselves for considerably less expense. There is no basis for Defendants' assertion that consumers do not have a financially reasonable alternative.

The equities supporting the enforcement of federal regulations intended to protect consumers tips the balance of the equities greatly in support of issuing injunctive relief. No equities favor permitting defendants to continue their illegal practices, but searching for any equities that might favor Defendants, it is important to remember that, "[w]hen the Commission demonstrates a likelihood of ultimate success, a countershowing of private equities alone does not justify denial of a preliminary injunction." Warner Communications, Inc., 742 F.2d at 1165 (citing Federal Trade Commission v. Weyerhaeuser Co., 665 F.2d 1072, 1083 (D.C. Cir. 1981)). Because of the likelihood that the United States will prevail, any arguments defendants may raise are insufficient. Consumers have been harmed, and continue to be harmed by the practices defendants use. The equities weigh strongly in favor of protecting these vulnerable consumers from further violations of the law.

Section 310.4(a)(3) of the TSR is Not Arbitrary and Capricious[20]

The Administrative Procedure Act ("APA") regulates federal agency procedures, including the promulgation of rules and regulations. 5 U.S.C. § 553. The APA authorizes courts to set aside and hold unlawful agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A); Los Angeles

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[20] Defendants raised the argument that this provision of the TSR is arbitrary and capricious in their response to the Motion for Preliminary Injunction, however, they did not include this defense in their Answer filed on March 28, 2011.

Haven Hospice, Inc. v. Sebelius, 2011 WL 873303, at *4 (9th Cir. March 15, 2011).

The Court's review is narrow, and its task is only to determine whether the agency's decision is "within the bounds of reasoned decision making." Baltimore Gass & Elec. Co. v. Natural Resources Defense Counsel, 462 U.S. 87, 105 (1983). The standard used to evaluate agency rulemaking under the APA is "highly deferential, presuming the agency action to be valid." Nw. Ecosystem Alliance v. U.S. Fish and Wildlife Serv., 475 F.3d 1136, 1140 (9th Cir. 2007). An agency decision can only be reversed under this standard:

> if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Earth Island Institute v. Carlton, 626 F.3d 462, 469 (9th Cir. 2010) (quoting Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008).

Defendants do not assert that any of these bases for an agency decision to be found arbitrary and capricious exist. Indeed, Defendants do not provide any evidence related to the administrative record to support their allegation that the TSR is arbitrary and capricious. Defendants' unsubstantiated assertion that Section 310.4(a)(3) of the TSR is arbitrary and capricious should be dismissed outright.

The Telemarketing Act directed the Federal Trade Commission to prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or rulemaking process, the issues raised in the written comments and the public workshop, . . . and possible approaches to address the issues commenters raised." 60 Fed. Reg. 30406. The Federal Trade Commission then published a revised proposed rule along with a discussion of the various changes that were made to the proposed rule.

The Federal Trade Commission stated that the provision dealing with "[r]ecovery room services" was amended in response to the comments it received. 60 Fed. Reg. 30416. The Commission referenced comments received from law enforcement, which noted that "the recovery scheme is especially abusive, targeting particularly vulnerable victims, including the elderly." 60 Fed. Reg. 30416. The Commission stated that the proposed Rule prohibited requesting or receiving a "fee for recovery services until three days after the recovered money or other item is delivered to the consumer[,]" however, "AARP noted that the three-day period may be insufficient to protect consumers, and asked that the Rule allow the minimum time necessary for out-of-state checks to clear." 60 Fed. Reg. 30416. The Commission agreed with this proposal, and the revised proposed rule "lengthened the time period that must elapse before providers of such services can request payment from consumers to seven days after the delivery of the recovered money or other item of value." 60 Fed. Reg. 30416.

After publishing the revised proposed rule, the Federal Trade Commission again accepted comments from the public. 60 Fed. Reg. 30406 and 30424. The Commission received over 350 comments on the revised proposed rule. 60 Fed. Reg. 43842. The Commission published a Statement of Basis and Purpose with the final rule. 60 Fed. Reg. 43842. In the Statement of Basis and Purpose, the Commission discussed the regulation of the recovery industry, but did not reference receiving any comments related to Section 310.4(a)(3) of the Telemarketing Sales Rule. 60 Fed. Reg. 43854. The TSR, including Section 310.4(a)(3), became effective December 31, 1995. 60 Fed. Reg. 43842.

The Telemarketing Act required that the Commission evaluate the TSR's operation five years after it was enacted. 15 U.S.C. § 6108. After undertaking this evaluation, the FTC issued a Final Amended Rule, and issued a Statement of Basis and Purpose with the final amended Telemarketing Sales Rule. 68 Fed. Reg. 4580. The Federal Trade Commission noted that the provision of the TSR regulating recovery services was "included in the Rule under the Telemarketing Act's grant of authority for the Commission to prescribe rules prohibiting other unspecified abusive telemarketing acts or practices. The Act gives the Commission broad authority to identify and prohibit additional abusive telemarketing practices[.]" 68 Fed. Reg. 4614. The FTC stated that recovery services schemes meet the statutory criteria for unfairness as they:

had been the subject of large numbers of consumer complaints and enforcement

§ 1679(a)(2). To protect consumers in their dealings with credit repair organizations, then, Congress imposed a number of restrictions on those organizations. One of them is that a credit repair organization may not "charge or receive any money or other valuable consideration" for any service it has agreed to perform "before such service is fully performed." 15 U.S.C. § 1679b(b). Courts have not hesitated to enforce this commercial regulation. See, e.g., Federal Trade Commission v. Gill, 265 F.3d 944, 956 (9th Cir. 2001); United States v. Cornerstone Wealth Corp., Inc., 2006 WL 522124 at *7 (N.D.Tex. 2006); In re National Credit Management Group, L.L.C., 21 F. Supp. 2d 424, 459 (D. N.J. 1998). Allowing consumers to see what they are getting before being asked to pay for it is a rational consumer protection measure.

Defendants have not presented any evidence that the Federal Trade Commission relied on improper factors, failed to consider some important aspect, offered implausible explanations, or offered explanations that ran counter to the evidence before the agency. See Earth Island Institute raise changes that balance. Finally, Defendants' argument that Section 310.4(a)(3) of the TSR is arbitrary and capricious is unsubstantiated. Defendants' arguments have no merit, and the injunctive relief Plaintiff seeks should be ordered.

Respectfully submitted this 29th day of March, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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