

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

FEDERAL TRADE COMMISSION : CIVIL ACTION  
v. : No. 082215  
NHS SYSTEMS, INC., et al. :

MEMORANDUM

Juan R. Sánchez, J.

March 28, 2013

Plaintiff Federal Trade Commission (FTC) brings this action against corporations and individuals for violations of § 5(a) of the Federal Trade Commission Act (FTCA), 15 U.S.C. § 45(a), and the Telemarketing Sales Rule (TSR), 16 C.F.R. Part 310. The amended Complaint names the following corporate defendants: NHS Systems, Inc.; Physician Health Service, LLC; Plus Health Savings, Inc.; Physicians Health Systems, Inc.; Health Management, LLC; 6676529 Canada, Inc.; Physicians Health Systems, Inc.; First Step Management, Inc.; Gold Dot, Inc.; and Nevada Business Solutions, Inc. (collectively, the Defendants). The Complaint also names the following individual defendants: Nicole Bertrand; Barry Kirstein; David James Ger; Tasha Jn Paul; and Linke Jn Paul (collectively, the Individual Defendants). The FTC asks the Court to hold each of the Defendants liable for engaging in an international enterprise to obtain millions of dollars from United States consumers through deceptive marketing practices and unauthorized charges to financial accounts.



consumer complained about a charge, the NHS/PHS Defendants would typically claim the charges were authorized, even if there was no recorded authorization available or the recorded authorization was available, but contained D Q R W K H U S H U V R Q ¶ V Y R L F H

The NHS/PHS Defendants utilized two consumer lists, which apparently contained L Q G L Y banks and contact information and were updated with their financial information they enrolled in a healthcare program. The first list 3 ' D W D E D W S H created by obtaining customer information from multiple pre-December 2006 telemarketing campaigns which had been overseen by several of the individual defendants Nicole Bertrand and Barry Kirstein testified the NHS/PHS telemarketers sold the consumers in Database 1 various discount healthcare programs and their bank accounts were charged monthly residuals to maintain their membership. The second list 3 ' D W D E D V H ' L Q D E C E M B E R 2 0 0 6 D O C U M E N T S R V W were immediately charged \$29.95 to receive information, \$29.95 to enroll, and \$19.95 per month thereafter. Each NHS/PHS affiliated company used the databases. The financial information contained therein was used to obtain money I U R P F R Q V X P H U V ¶ and E D Q N D F distribute it throughout the NHS/PHS enterprise.

The FTC takes no position as to whether the underlying discount healthcare programs were legitimate. The FTC focuses on the manner in which F R Q V X banks and information was obtained and how consumers were charged. The FTC F R Q W H Q G V W K H ' H I H Q G D Q W V ¶ was to deceptively obtain c R Q V X financial information and debit their accounts.

During the course of the telemarketing campaign the NHS/PHS Defendants misrepresented the cost of the discount healthcare programs. ' H I H Q G D Q W V ¶ told the consumers they would not be charged, misstated the cost of the program, or indicated the consumer would receive a future credit to offset any debit. The NHS/PHS Defendants sold

healthcare program to several customers which was actually a free program. Jan Sesso, CEO of Universal RX, a prescription discount benefit provider, testified this company was alarmed when it received multiple calls from consumers indicating they had been charged hundreds of dollars to enroll in a program which was supposed to be offered to consumers free of charge. The NHS/PHS telemarketers also posed as government employees such as representatives of Medicare, the Internal Revenue Services, and Social Security Administration.

The NHS/PHS corporations were founded by several of the same individual defendants. In December 2006, PHS Enterprises formed to target consumers listed in Database 1. Bertrand and Kirstein were named as the primary contacts for the HQ W L W L H V W K D W S U R F H V V H C payments. In June 2007, Bertrand and Kirstein instructed Harry Bell to form the corporation Plus Health Savings. Plus Health Savings began charging consumers in Database 1 at the direction of Bertrand, Kirstein, and Tasha Jn Paul.

Also in December 2006, NHS Systems formed and began to create and target new consumers, creating the consumer list in Database 2. Bertrand, Kirstein, and Tasha Jn Paul managed NHS Systems. Harry Bell was the nominal president of NHS Systems and was responsible for maintaining the bank accounts and reviewing and forwarding complaint mail received from consumers. Almost immediately, NHS Systems received several consumer complaints about their telemarketers falsely offering grants. By mid-November 2007, Bell was inundated by consumer complaints and emailed Bertrand detailing his concerns. In November 2007, Donna Newman formed Health Management, which began debiting NHS 6 \ V W H P V consumers in Database 2.

In November 2007, Newman formed Physician Health Service and Bell formed Physicians Health Systems. Both companies were apart of a new telemarketing campaign.

referred to as American Health Benefits and, but again were similar to the other corporations  
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whose discount healthcare plan provider could no longer serve them. FMC agreed to accept the clients for its MedValues Plus discount program, believing Nevada Business Solutions had sold healthcare plans to all of its customers. Nevada Business Solutions and FMC executed a written agreement in which Greer asked FMC to bill the

Amended Complaint also contains the following Counts asserting violations of the TSR: (6) failure to disclose material conditions; (7) misrepresenting total cost; (8) misrepresenting rate of services; (9) misrepresenting affiliation with government; and (10) lack of express verifiable authorization.<sup>5</sup>

On October 1, 2010, the FTC filed a motion for summary judgment. Tasha Jn Paul and Linke Jn Paul, who are husband and wife, are the only defendants who responded and filed prose briefs in opposition to the motion. On May 12, 2011, the Court found Teledraft, a payment processing firm that handled funds for several of the Defendants, in contempt of this Court. On September 24, 2009, Order. Telegraph appealed the Order to the Third Circuit Court of Appeals on May 19, 2011.

On August 9, 2011, the Court R U G H U H G Q R W In File For summary judgment. It be sent to all Defendants as a majority of the remaining D

The FTC moves for summary judgment claiming there are no genuine issues of material fact and the evidence



make a showing sufficient to establish the existence of a claim. *SEC v. J.W. Barclay & Co., Inc.*, 442 F.3d 834, 840 (3d Cir. 2006) (quotation omitted) With moving party has the burden of proof on the relevant issues, this means that the district court must determine that the facts specified in or in connection with the motion entitle the moving party to summary judgment, if appropriate, shall be entered against the adverse party.

If the adverse party does not . . . respond, summary judgment, if appropriate, shall be entered against the adverse party. *SEC v. J.W. Barclay & Co., Inc.*, 442 F.3d 834, 840 (3d Cir. 2006) (quotation omitted) With moving party has the burden of proof on the relevant issues, this means that the district court must determine that the facts specified in or in connection with the motion entitle the moving party to summary judgment, if appropriate, shall be entered against the adverse party.

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There are no genuine disputes of the material facts in the present case, thus, the Court must determine whether the FTC is entitled to judgment as a matter of law. First, the FTC claims the NHS/PHS Defendants violated § 5(a) of the FTCA. The provision states that a person who uses a deceptive device or method to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers.

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avoided unauthorized debits and (c) there was no countervailing benefit to consumers or competition.

This Court agrees with the FTC as the undisputed facts show the NHS/PHS Defendants violated § 5(a) of the FTCA. Their conduct was unfair as it caused and was likely to cause substantial financial injury to the consumers. The consumers could not reasonably avoid the limitless financial consequences of providing their account information for a supposed health care program. Additionally, any countervailing benefit the consumers may have received from enrolling in the programs was far outweighed by the financial burden and misfortune of being placed on R Q H R I W K H 1 + 6 3 + 6 bases H Q G D Q W V ¶ G

The 1 + 6 3 + 6 ' H I H Q G D Q W V ¶ F R Q G Defendants V W D H O V R P B U I N H S W U Y several misrepresentations to the consumers. The FTC does not need to demonstrate Defendants intended to deceive the consumers, rather, it must only establish the representations were likely to mislead customers acting reasonably under the circumstances. The FTC has met its burden. The telemarketers misrepresented information about the program's cost and enrollment, including the total cost and their affiliation with government agencies. These representations were material. D V W K H \ Z R X O G K D Y H D I I H F W H G W K H F R Q V X P H U ¶ V S X would have justifiably relied on the information. The NHS/PHS Defendants violated the FTCA. Accordingly, s X P P D U \ M X G J P H Q W Z L O O E H J U D O N E F T C A U a n s W K H ) 7 & against the NHS/PHS Defendants

The FTC also claims the NHS/PHS Defendants violated the TSR. The TSR requires a seller or telemarketer to W U X W K I X O O \ G L V F O R V H 3 > D @ O O P D W H U L D O U W R S X U F K D V H U H F H L Y H R U X V H W K H J R R G V R U V H U Y L F H V consumer consents to pay. 16 C.F.R. § 310.3(a)(1)(ii). A seller or telemarketer engages in a

deceptive act or practice under the TSR when it PLVUHSUHVHQWV ³>W@KH WRWD  
UHFHLYH RU XVH DQG WKH TXDQWLW\ RI DQ\ JRRGV RU V  
§ 310.3(a)(1)(i); ³>D@Q\ PDWHU the performance, efficacy, nature, or central  
FKDUDFWHULVWLFV RI JRRGV RU VHUYLFHV WKDW DUH WKH

health insurance and were not informed of this material aspect of the program. Moreover, some of those individuals were not removed from the program despite their efforts to contact the Defendants to request cancellation of the program. The consumers were also misled about who was authorized to access their accounts and how frequently debits would occur. Additionally, one of the NHS/PHS corporations sent its consumers the wrong contact information and did not notify them of the error once it was corrected.

The NHS/PHS Defendants' X V authorization recordings also did not comply with the TSR. A company debiting an account is required to maintain a record which clearly demonstrates authorization of payment with specific information. Many consumers stated the purported authorization recordings played to them were not authentic or had been altered. This conduct violates the TSR and therefore, the Court will grant summary judgment in favor of the FTC with regard to the TSR claims against those Defendants.

The FTC contends the NHS/PHS Defendants operated their scheme as one common enterprise which makes each corporation jointly and severally liable for the acts and practices of the others. This Court agrees the Defendants operated a common scheme as one enterprise and will be held jointly and severally liable for injuries caused by violations of **FTCA**. *See Millennium Telecard, Inc.*, 2011 WL 2745963, at \*8. To determine whether a common enterprise exists, the Court looks to the degree of interrelation of the companies, whether office space and officers, whether business is transacted through a maze of interrelated companies, unified advertising, and evidence which reveals that a distinction existed between the companies. *E.H.W.Z.H.H.Q. W.K.H. & R.U.S.R. (Undisputed Facts), No. 04-119*, 1996 WL 812940, at \*7 (S.D.Fla. Jan. 31, 1996) (internal quotation marks omitted). Courts have found a common enterprise where the corporations have shared office space and officers, whether business is transacted through a maze of interrelated companies, unified advertising, and evidence which reveals that a distinction existed between the companies. *H.Q.W.H.U.S.U.L.V. Corp. v. R.I.D. (Undisputed Facts), No. 04-119*, 1996 WL 812940, at \*7 (S.D.Fla. Jan. 31, 1996) (internal quotation marks omitted). Courts have found a common enterprise where the corporations have shared office space and officers, whether business is transacted through a maze of interrelated companies, unified advertising, and evidence which reveals that a distinction existed between the companies.

liability would provide the other defendants with a clear mechanism for avoiding the terms of the R U G H U *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1216 (D. Nev. 2011) (citing *Urological Grp., Inc.*, 645 F.Supp.2d 1167, 1182 (N.D.Ga. 2008) (quotation marks omitted)).

Based upon the evidence pertaining to the relationship of the companies, NHS/PHS Defendants were engaged in a common enterprise and will be jointly and severally liable. There was a common and dependent relationship between the corporations with overlapping actors and a common scheme. The companies shared the same lists of consumers, employed the same telemarketing tactics, and provided their telemarketers the same or similar scripts. The corporations within the NHS/PHS enterprise charged customers on behalf of other corporations. Bertrand and Tasha Jn Paul also had overlapping duties between the NHS/PHS corporations. The profits were split between the siphoning entities. Given the common control, officers, and customers, there was no real distinction between any of NHS/PHS corporations. As such, they will be held jointly and severally liable as a common enterprise.

Under the FTCA, once the corporation is found liable, the individuals involved in those corporations may also be held personally liable<sup>3</sup> μ \$ Q L Q G L Y L G X D O Z L O O E H O L D violations of the FTC Act if (1) he participated directly in the deceptive acts or had the authority to control them and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along Z L W K D Q L Q W H Q W L R Q D O M i D e m R n C e l e c t d , I n c . R 2 0 1 W K L H 2 7 4 5 9 6 3 W 9 ¶ (quoting *FTC v. Stefanichik*, 559 F.3d 924, 931 (9th Cir. 2009)). Authority to control can be demonstrated E \ D G H I H Q G D Q W ¶ V i n D u s i n e s s A f f a i r s Q Y R O Y H P H Q W

WL 1959270, at \*6 (D.N.J. July 5, 2007) (quotation and citations omitted). \$ G H I H Q G D Q W ¶ V

knowledge may be demonstrated by evidence that he or she

knew or should have known about the deceptive practices due to the complaints of misrepresentations Greer also oversaw the daily operations of sales and customer service in First Management He also knew about the consumer complaints.

Tasha and Linke Jn Paul claim they should not be held personally liable for the violation by the NHS/PHS corporations because the FTC failed to show they intended to deceive consumers or they had direct knowledge of the deception. Tasha acknowledges that she worked for First Step Management and Gold Dot, and explains her duties were limited to locating call centers, acting as middleman between the call centers and NHS/PHS Defendants for the purpose of paying the call centers and generating leads. She contends the FTC failed to show her involvement in the creation of the false recordings or deceptions. Instead, she argues a nonparty company handled recordings and verification. Tasha also disclaims any control over the consumer lists or billing.

Linke Jn Paul asserts he had little to no direct involvement with the NHS/PHS Defendants and the FTC only argues he was the director of two of the siphoning entities without proof. He also argues his participation was limited to locating call centers, being a middleman between the centers and the NHS/PHS Defendants and generating leads. He disclaims any control over the consumer lists or billing. Linke claims First Step Management received money from the NHS/PHS corporations to pay for the call centers. He also asserts he received minimal consultation fees that in no way reflect a fraction of the gross amount the FTC seeks in damages.

This Court disagrees with Tasha and Linke Jn Paul that the FTC failed to show their involvement in the telemarketing scheme perpetrated by the rest of the NHS/PHS Defendants. Both of them assert, without any evidence or support of their contentions that they were not



aware of the deception and did not participate in the scheme. The record, however, shows otherwise. Tasha<sup>2</sup> or sometimes referred to as (ULND 5 RHAHAW) or role in the

As all of the Defendants, both corporate and individual, will be held liable in the instant case, the Court will now consider the relief requested. The FTC asks for a permanent injunction imposing the following restrictions (1) banning the Defendants from engaging in telemarketing and from debiting consumer bank accounts; (2) enjoining them from making misrepresentations and from violating the TSR; (3) ordering monetary relief in the amount of \$6,879,162.22; and (4) permitting the FTC to monitor their compliance. The FTC argues that the requested relief is appropriate under Section 13(b) of the FTCA.

Section 13(b) of the FTCA provides that the court may grant permanent injunctive relief necessary to accomplish complete justice because it [does] not [meet] the traditional equitable standards. *Grp, L.L.C.*, 21 F. Supp. 2d 429 n.3 (quoting *Amy Travel Serv. Inc.*, 875 F.2d at 571). A permanent injunction is appropriate where the defendant's conduct is ongoing and the relief is necessary to prevent further harm.

character of past violations. *Davison Assocs., Inc.*, 431 F. Supp. 2d 560 (citing *W.T. Grant Co.*, 345 U.S. 633).

Ancillary equitable relief may take the form of disgorgement of the full amount lost by customers. *United States v. W.R. Hambrecht & Co. d/b/a Hambrecht & Co. v. Res Trading n v. Am. Metals Exchange Corp.*, 991 F.2d 71, 77 (3d Cir. 1993); *FTC v. Febre*, 128 F.3d 530, 537 (7th Cir. 1997); *FTC v. Medicor LLC*, 217 F. Supp.2d 1048, 1057-58 (C.D. Cal. 2002). The Court finds that the corporation engaged in misrepresentations or omissions of a kind usually relied on by consumers. *United States v. In the Matter of the Estate of M. F. Roy, Jr. d/b/a M.F. Roy & Co., P.H.U. L.L.C.*, 21 F. Supp. 2d 462 (citation omitted).

Initially, the Court will enjoin the Defendants from making misrepresentation and violating the TSR, which simply requires the Defendants to abide by the law. The Court will enjoin the Defendants from making the V W I R U Defendants from telemarketing and from debiting consumer bank accounts. Tasha and Linke Jn Paul argue that a lifetime ban from telemarketing, their sole source of income and chosen profession, amounts to slavery in violation of the Thirteenth Amendment. An order banning their participation in telemarketing would force them out of one industry and into another. The FTC argues that strict industry bans are lawful and warranted in this case. The FTC cites district court opinions enjoining individuals from participating in particular lines of business. The Third Circuit has also enjoin individuals from participating in particular lines of business. *United States v. In the Matter of the Estate of M. F. Roy, Jr. d/b/a M.F. Roy & Co., P.H.U. L.L.C.* and *United States v. In the Matter of the Estate of M. F. Roy, Jr. d/b/a M.F. Roy & Co., P.H.U. L.L.C.* sanctions on the other hand. *Steirer by Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 999 (3d Cir. 1993). Because Tasha and Linke Jn Paul can obtain alternative employment and are not

being compelled to do anything, the FTC argues a permanent injunction does not violate the Thirteenth Amendment.

A permanent injunction in this case is warranted.

