UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

FEDERAL TRADE COMMISSION, *Plaintiff*, vs. E.M.A. NATIONWIDE, INC. et al. *Defendants*.	:	CASE NO. 1:12-CV-2394 AMENDED OPINION & ORDER [Resolving Doc. Nos. 153 & 157]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Plaintiff Federal Trade Commission (FTC) brings this action against various individuals and corporations (Defendants), alleging violations of the Federal Trade Commission Act (FTC Act), 15 U.S.C. §§ 41-58, the Telemarketing Sales Rule (TSR), 16 C.F.R. § 310, and the Mortgage Assistance Relief Services Rule (MARS Rule), 16 C.F.R. § 322.[1/] Generally, Plaintiff says that Defendants violated these laws through its marketing and sale of debt-related services, such as debt settlement, loan modification, and mortgage assistance relief.[2/] Plaintiff FTC now moves for summary judgment. The remaining defendants did not file a response. For the following reasons, Plaintiff FTC's motion to admit consumer complaints is DENIED, and Plaintiff FTC's motion for summary judgment is GRANTED.

[1/] Doc. 1.
[2/] *Id*.

I. Background

Defendants Dan Michaels and James Benhaim operated a series of related corporations in the United States and Canada. To make sales, these corporations would contact consumers, use scripted telemarketers to lure the consumers into signing debt consolidation contracts, and then do very little or nothing. Defendants' telemarketers would tell consumers that they were calling from a current lender's wholesale department (they weren't),[3/] that they had special relationships with the consumer's creditors (they didn't),[4/] or that they could save consumers hundreds of dollars a month (they couldn't).[5/] Consumers often paid thousands of dollars in up-front fees,[6/] with little to show for

Benhaim, and all seven corporate Defendants."[11] On the day before their brief in opposition was due, all three American corporations, three of the four Canadian corporations, and Defendant Michaels moved for an extension of time to respond.[12] This Court denied that motion.[13] Because all Defendants failed to respond, the FTC's motion for summary judgment is unopposed.

II. Analysis

As an initial matter, this Court may not grant Plaintiff's unopposed motion for summary judgment without conducting its own, searching review. The Sixth Circuit has said that "a district court abuses its discretion when it grants summary judgment solely because the non-moving party has failed to respond to the motion within the applicable time limit."[14] Rather, the moving party must independently demonstrate an "absence of a disputed question of material fact and a ground that would entitle the moving party to judgment as a matter of law."[15] This Court is therefore "required, at a minimum, to examine the movant's motion for summary judgment to ensure that he has discharged that burden."[16]

1. Motion to Admit Consumer Complaints

Before turning to the FTC's motion for summary judgment, the Court first decides whether it may consider certain evidence. The FTC asks this Court to admit certain consumer complaints under Rule 807 of the Federal Rules of Evidence.[17] The complaints were made by consumers of

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[11] Doc. 157. The FTC says that it is close to a stipulated permanent injunction with Mr. Ohayon.

[12] Doc. 161.

[13] Doc. 166.

[14] *Miller v. Shore Fin. Servs., Inc.*, 141 F. App'x 417, 419 (6th Cir. 2005) (citing *Stough v. Mayville Cmty. Sch.*, 138 F.3d 62, 614 (6th Cir. 1998)).

[15]

Defendants' services and were usually made to consumer protection units in various municipalities nationwide. Some contain detailed information about the consumer's contract and debt negotiations, while others are barely intelligible. The FTC says that the complaints contain circumstantial guarantees of trustworthiness.

Rule 807, the residual hearsay exception rule, admits certain hearsay evidence that is not specifically covered by one of the exceptions contained in Rules 803 and 804. Under the rule, a hearsay statement can be admitted if:

> (1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it 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 these rules and the interests of justice.[18/]

The Sixth Circuit has allowed the use of Rule 807, even if there is an exception in Rules 803 or 804 that is on point.[19/] This "close-enough theory" permits the admission of hearsay evidence "under the residual exception even when it just misses admissibility under an established exception."[20/] Regardless, the legislative history of Rule 807 demonstrates that the residual exception is to be "used very rarely, and only in exceptional circumstances."[21/]

The consumer complaints do not have sufficient indicia of trustworthiness. To be sure, they were submitted by consumers to government or non-profit organizations, and most consumers may have made their best efforts to convey accurate information. But, the consumers often made the

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[18/] Fed. R. Evid. 807.

[19/] *See* *United States v. Laster*, 258 F.3d 525, 530 (6th Cir. 2001) ("Rather, this court interprets Fed. R. Evid. 807, along with the majority of circuits, to mean that if a statement is admissible under one of the hearsay exceptions, that exception should be relied on instead of the residual exception.") (quotation omitted).

[20/] *Id.* at 534 (Moore, J., dissenting).

[21/] *Id.* at 533 (quoting S.Rep. No. 93-1277, at 20 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7066).

complaints with hopes of receiving some type of refund or other financial benefit.[22/]

also try to exact large fees from the consumer.[36/] This pattern went on,[37/] and on,[38/] and on.[39/]

The Court finds that Plaintiff FTC has satisfied its burden to show that there is no genuine issue of material fact as to whether Defendants made material representations likely to mislead

characteristics of goods or services that are the subject of a sales offer.[42/]

- Misrepresenting . . . any material aspect of any debt relief service, including, but not limited to, the amount of money or the percentage of the debt amount that a customer may save by using such service [or] the amount of time necessary to achieve the represented results.[43/]
- Requesting or receiving payment of any fee or consideration for any debt relief service until and unless: (A) The seller or telemarketer has renegotiated, settled, reduced, or otherwise alter

Defendants could reduce Vega's $25,000 in credit card debt by up to seventy percent.[48/] Other scripts used by Defendant EMA instructed employees to say they were calling "on behalf of" "the Obama Debt Relief Initiative" to inform the consumer that they could help cut their "debt by 50% OR MORE!!!"[49/] Defendant EMA also contacted Tiffanie Young, telling her that EMA would relieve between sixty and sixty-five percent of her debt, and that she would only be charged $215.65. Young ended up paying $1,078.25 in fees, and received no assistance.[50/] This evidence supports a finding of a violation of § 310.3(a)(2)(x) (misrepresenting amount of assistance) and § 310.4(a)(5) (receiving fees prior to any debt settlement or negotiation).

Finally, the FTC puts forth a number of examples of violations of the Do Not Call regulations. Tiffanie Young says that she received a call from EMA, even though her telephone number is registered on the Do Not Call registry, and she did not have a business relationship with EMA at the time of the initial call.[51/] Vivian Allen[52/] and Gregory Bauer say the same.[53/] The FTC also produced records showing close to a thousand complaints of Defendants' violations of the Do Not Call requirements. This evidence supports a finding of a violation of § 310.4(b)(1)(iii)(B).

C. Violations of the Mortgage Assistance Relief Services Rule (MARS Rule)

Plaintiff FTC says that Defendants violated the MARS Rule when Defendants: requested payment prior to an agreement being reached between the consumer and her loan holder (Count IX); told consumers not to contact her loan holder or servicer (Count X); misrepresenting the likelihood

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of obtaining mortgage relief assistance (Count XI); and by failing to make necessary disclosures (Count XII).

The MARS Rule prohibits entities offering mortgage relief from engaging in certain deceptive acts. Under the Rule, a "mortgage assistance relief service" is defined as "any service, plan, or program, offered or provided to the consumer in exchange for consideration, that is represented, expressly or by implication, to assist or attempt to assist the consumer" with her dwelling

Plaintiff FTC puts forth sufficient evidence to meet its burden that no genuine issue of material fact exists and that Defendants violated the MARS Rule. As already explained, Defendants told consumers not to contact their lenders and to let Defendants do all the talking;[58/] requested fees from consumers prior to any agreement between the consumer and her loan holder;[59/] and misrepresented the types of results that consumers might enjoy.[60/] Further, as evidenced by the transcript of the conversation with the FTC's investigator, Defendants failed to make the necessary disclosures.[61/] Defendants have therefore violated the MARS Rule as alleged in Counts 9 through 12 of Plaintiff FTC's complaint.

D. Joint & Several Liability

Plaintiff FTC says that all of the corporate Defendants acted as a common enterprise, and that Defendants Michael and Benhaim should be held personally liable for the acts of the corporate Defendants. Effectively, Plaintiff asks the Court to disregard the formal corporate structures separating the individual corporate Defendants from each other, and from the individual personal Defendants.

The FTC's theory that the corporate Defendants operated as a "common enterprise," does not find support in this Circuit. The most analogous theory in the Sixth Circuit is the "alter ego" theory, which asserts that Defendant A and Defendant B are the same entity.[62/] But, the alter ego theory has been applied primarily to attempts by a corporate defendant to shirk its labor obligations through

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[58/] Doc. 5-3, at 118 (declaration of Gloria Bernardo).
[59/] *Id.*

reincorporation.[63/] Regardless, this Court finds persuasive the positions held by courts in the First and Second Circuits. Under this position, "[i]f the structure, organization, and pattern of a business venture reveal a 'common' enterprise or a 'maze' of integrated business entities, the FTC Act disregards corporateness."[64/] Factors to consider include whether the businesses "(1) maintain officers and employees in common, (2) operate under common control, (3) share offices, (4) commingle funds, and (5) share advertising and marketing."[65/]

The evidence is overwhelming. Benhaim sent e-mails concerning the administration of New Life Financial, but signed them as "President, E.M.A."[66/] One of the Canadian corporations—7246293 Canada, Inc.—paid wages to employees of First United, New Life Financial, and EMA.[67/] That entity's accounts were funded from transfers from American accounts in the name of EMA, First United Consultants, and New Life Financial.[68/]

Additionally, bank records show that the numerically-named Canadian corporate Defendants transferred money frequently among themselves.[69/] Complaints from customers of New Life Financial were forwarded to EMA employees, and the websites for EMA, New Life Financial, and First United Consultants were all registered by Defendant Dan Michaels.[43] Ö`Ö`ÔTÔà

Life, and First United.[71]

This small snapshot of the overall record demonstrates that the corporate Defendants were a maze of interrelated entities. They shared common officers and ownership, commingled funds, and ignored any corporate formalities when dealing with third parties. The Court therefore finds that the seven corporate Defendants acted as a common enterprise.

To show that Defendants Benhaim and Michaels should be personally liable for injunctive relief for a corporation's violations, the FTC must prove two elements: "[f]irst, the FTC must show that corporate liability exists in that consumer injury resulted from consumers' reasonable reliance on the business practices involving misrepresentations or omissions;" second, "the FTC must show that the individual defendants actively participated in or had some measure of control over a corporation's deceptive practices."[72] The individual defendants can then be held personally liable for monetary restitution upon a showing "that the defendants had or should have had knowledge or awareness of the misrepresentations."[73] This knowledge requirement can be met by showing that the individual defendants knew or were aware of the misrepresentations.[74] Active participation in the business is probative of knowledge, and direct participation in the misrepresentation is not required.[75]

The first element, as discussed in the previous pages of this opinion, has been proven. Consumers were harmed by Defendants' deceptive behavior. Many paid thousands of dollars for nothing, and some lost, or came close to losing, their homes as a result.

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[71] Doc. 157-4, at 43 (e-mail from Benhaim to its payment processor: "We are encountering a major issue with one of our partners and immediately require a stop of all fund transfers to our bank of america [sic] accounts for EMA Nationwide, New Life and 1UC. We need to do a change of ownership of all the [vendor] accounts to a new owner.").

[72] *Int'l Computer Concepts*, 1994 WL 730144, at *15.

[73] *Id.* at *16 (quotation omitted).

[74] *Id.*

[75] *Id.*