ORDERED in the Southern District of Florida on December 13, 2018.

[redacted]

Erik P. Kimball, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

In re:

JOSEPH K. RENSIN,

Debtor.
v m / / l m 1

CASE NO. 17-11834-EPK
CHAPTER 7

The Court conducted trial in this matter on August 9, 2018. On October 4, 2018, the plaintiff and the defendant filed post-trial briefs in the form of proposed findings of fact and conclusions of law. ECF Nos. 106 and 107. The Court has considered the evidence admitted at trial to the extent relied on by the parties in their post-trial briefs. See ECF No. 91 (limiting the Court's review of the evidence to those matters addressed by the parties in their briefs). The Court also considered the original pleadings, the arguments presented at trial and in the post-trial briefs, and two orders entered in the district court case that gave rise to the debt at issue in this adversary proceeding, which orders the Court took judicial notice of pursuant to a post-trial order. ECF No. 108. This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

The time period relevant to this action is April 9, 2008 through July 24, 2009. This is the period during which the plaintiff alleges Mr. Rensin took the actions that cause his debt to the plaintiff to be excepted from discharge.

Mr. Rensin founded BlueHippo Funding LLC and its subsidiary BlueHippo Capital LLC (together, "BlueHippo") in the early 2000s. At all relevant times, Mr. Rensin was the CEO and sole owner of BlueHippo.

BlueHippo marketed computers and related products to consumers who might otherwise have been unable to purchase such items. BlueHippo advertised through radio, television, and print. A potential customer would call BlueHippo. BlueHippo employed in-house telemarketers who relied on prepared sales scripts when communicating with customers. BlueHippo specifically targeted customers with poor credit histories, telling potential customers that all they needed to buy a computer was a checking account. Most of BlueHippo's customers suffered from poor credit.

BlueHippo sold products in two different ways. Some of BlueHippo's customers attempted to purchase a computer on credit. They were required to make 13 consecutive payments and meet other conditions, after whic h they would receive the computer and would continue to make payments until the purchas-6.2Td ( ) f cu-make paid profullrent wayme ind would

and handling costs. For purposes of this Memo randum Opinion, these conditions on use of the store credit are called the "extra terms." There is no credible evidence to support Mr. Rensin's unsupported suggestion that some cu stomers were not in fact charged taxes, Wh-8341 Td ( )Tj 0.0003443 0.2730e5 22.851 -2.4uppo41 Td attempn( )-5d crtryargu ctore crstiosell (xes

to receiving payment, that payments would not be refundable under any circumstances. The 2008 district court action resulted in a consent order, entered April 10, 2008 (the "Consent Order"). Among other things, the Consent Order prohibited BlueHippo and its officers and agents from "[m]aking any representation regarding any refund, cancellation, exchange or repurchase policy without disclosing clearly and conspicuously, prior to receiving any payment from customers all material terms and conditions of any refund, cancellation, exchange or repurchase policy." BlueHippo was required to pay $3.5 to $5 million in the 18 months following entry of the Consent Order, depending on total claims. To provide the plaintiff with a method to monitor compliance with the Consent Order, BlueHippo was required to respond to written requests for information from the plaintiff within five days. Mr. Rensin was not explicitly covered by the Consent Order.

In 2009, the plaintiff investigated BlueHippo's compliance with the Consent Order by requesting information as permitted by the Consent Order. When BlueHippo did not timely provide the requested information, the plaintiff sought and obtained from the district court an order holding BlueHippo in contempt of the Consent Order and requiring BlueHippo to tender the requested information.

During this time, BlueHippo was involved in litigation with a number of parties, including the plaintiff, state attorneys general, individuals, and classes of plaintiffs. The litigation and settlement costs were a substantial drain on BlueHippo. Indeed, for a time in 2009 BlueHippo was unable to ship computers to customers because of its litigation related expenses. This is important as it places in context the deceit implemented by Mr. Rensin and his company to obtain funds from unknowing customers with the intent of never providing those customers anything in return.

In a response to a written request to BlueHippo consistent with the Consent Order, the plaintiff learned of the extra terms of the store credit refund policy and the fact that

BlueHippo was not advising customers of the extra terms prior to accepting funds. In November 2009, the plaintiff pursued an action in the district court against BlueHippo and Mr. Rensin, seeking damages for their alleged contempt of the Consent Order. On July 27, 2010, the district court entered an order holding both BlueHippo and Mr. Rensin in contempt

over time, and the greater weight of the evidence to the contrary, the Court does not find credible Mr. Rensin's testimony that he did not know during the relevant period of the implementation of the store credit refund policy and the failure to disclose the extra terms to customers, but only learned of these matters long after.

Mr. Rensin was the founder, CEO, and chairman of the board of BlueHippo from its inception until he left the company in July 2009. Mr. Rensin was also the sole owner of BlueHippo and the staffing entity that provided all of BlueHippo's employees. Mr. Rensin personally hired BlueHippo's department heads and they reported directly to him. Every employee of BlueHippo ultimately reported to Mr. Rensin. Mr. Rensin met regularly with the company's chief operating officer, who was responsible for advertising, marketing, and the telemarketing scripts. Mr. Rensin had weekly meetings with the chief operating officer, the telemarketers, and the marketing personnel. Mr. Rensin also had regular meetings with employees in charge of advertising, to oversee the effectiveness of BlueHippo's ads. Mr. Rensin reviewed BlueHippo's ads and telemarketing scripts and gave input on them. In addition to weekly meetings, Mr. Rensin had regular contact with BlueHippo's telemarketers, who worked on the other side of a wall from his office. Mr. Rensin regularly walked through the telemarketing area and overheard telemarketers reading from scripts as they interacted with customers. Given his overarching management control of BlueHippo, which was in effect Mr. Rensin's company, the Court did not find credible Mr. Rensin's testimony that when he walked through the telemarketing area he failed to interact in any way with his own employees or otherwise take note of what was happening as he passed through.

Mr. Rensin contends that he did not know of the extra terms of BlueHippo's store credit policy until after the relevant period. The Court did not find this testimony credible. Based on the greater weight of the evidence in this adversary proceeding, including Mr.

as well as when they were disclosed to customer s. But if Mr. Rensin did not know about the

to deceive customers. Customers were led to believe that their payments could simply be applied to buy products from BlueHippo's online store, but this was not true. BlueHippo intended for customers to make payments in connection with which BlueHippo knew it may never be required to deliver products. Many thousands of BlueHippo's customers relied on these misrepresentations and concealments as they made millions of dollars of payments and received no value in return. The Second Circuit Court of Appeals specifically recognized, in this very matter, that the extra terms were material to the transaction because if the extra terms had been revealed to BlueHippo's customers prior to purchase that disclosure would have influenced the purchase decision. FTC v. BlueHippo Funding, LLC, 762 F.3d 238, 246 (2d Cir. 2014). The plaintiff argues, and Mr. Rensin does not contest, that the Court may presume reliance on BlueHippo's misrepresentations and concealment, citing various decisions in the consumer protection context. The Court agrees. [3] But even without this presumption, from the customers making substantial payments to BlueHippo and their failure to obtain value in exchange for those payments, it is obvious that they actually relied on what BlueHippo told them, which was fatally misleading and amounted to fraudulent misrepresentation and concealment. The customers were justified in that reliance as they had no way of knowing that their ability to use promised store credits would be limited, a fact they could learn only when they attempted to purchase products from the online store using credits. And many thousands of customers sustained a loss as a result of the misrepresentations and concealments as they received nothing in exchange for their payments. The district court order holding BlueHippo and Mr. Rensin in contempt sets out the appropriate calculation of the damages, which the plaintiff is entitled to collect under federal law. Mr. Rensin attempts to re-argue the amount of the damages, but this matter

[3] The presumption applies equally in the context of this discharge exception proceeding. FTC v. Gugliuzza (In re Gugliuzza)

For the foregoing reasons, the Court will ente r judgment in favor of the plaintiff on Count I of the complaint, ruling that the entire sum represented by the contempt order shall be excepted from discharge in this bankruptcy case under § 523(a)(2)(A).

Count II of the complaint seeks a determinat ion that the debt is not dischargeable under 11 U.S.C. § 523(a)(6). A discharge under section 727 "does not discharge an individual debtor from any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). This Court has issued several decisions analyzing in detail the "willful and malicious" standard in § 523(a)(6). See Stewart Tilghman Fox & Bianchi, P.A. v. Kane (In re Kane), 470 B.R. 902 (Bankr. S.D. Fla. 2012), aff'd, 485 B.R. 460 (S.D. Fla. 2013), aff'd , 755 F.3d 1285 (11th Cir. 2014); Drewes v. Levin (In re Levin), 434 B.R. 910 (Bankr. S.D. Fla. 2010).

An injury alleged as the basis for a non-dischargeable claim under § 523(a)(6) must be both willful and malicious. In Kawaauhau v. Geiger, the United States Supreme Court addressed the meaning of the term "willful" in subsection (a)(6). 523 U.S. 57 (1998). The Kawaauhau court considered whether a claim for medical malpractice would be excepted from discharge. The Supreme Court determined that the reckless or negligent conduct alleged in the case before it was not sufficien t to meet the requirements of § 523(a)(6). The Supreme Court then addressed what conduct may in fact result in a non-dischargeable debt under that provision, stating:

> The word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, i.e.,"reckless" or "negligent," to modify "injury." Moreover, as the Eighth Ci rcuit observed, the (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intent ional torts generally require that the actor intend "the consequences of an act," not simply "the act itself."

(Bankr. N.D. Ill. 2000); Avco Fin. Servs. v. Kidd (In re Kidd), 219 B.R. 278, 285 (Bankr. D. Mont. 1998).

There is some disagreement among the courts as to whether the substantial certainty standard is a subjective standard, requiring th e plaintiff to prove that the defendant knew the act was substantially certain to cause in jury, or an objective standard, requiring the plaintiff to show that the defendant's act was substantially certain to cause injury without regard to the defendant's actual belief or knowledge in this regard. Via Christi Reg'l Med. Ctr. v. Englehart (In re Englehart), No. 99-3339, 2000 U.S. App. LEXIS 22754 (10th Cir. Sept. 8, 2000) (examining cases); see also Jendusa-Nicolai v. Larsen, 677 F.3d 320 (7th Cir. 2012). For example, the Fifth Circuit has held that substantial certainty requires an objective analysis by the court; the defendant's personal belief or knowledge on substantial certainty need not be proven. See Shcolnik v. Rapid Settlements Ltd. (In re Shcolnik), 670 F.3d 624, 629 (5th Cir. 2012); Guerra & Moore Ltd. v. Cantu (In re Cantu), 389 F. App'x 342 (5th Cir. 2010); Red v. Baum (In re Red), 96 F. App'x 229 (5th Cir. 2004); In re Miller, 156 F.3d at 603 ("either objective substantial certainty or subjective motive meets the Supreme Court's definition of `willful ... injury' in § 523(a)(6)"). On the other hand, the Tenth Circuit has held that the term "willful" in subsection (a)(6) requires the court to determine whether the defendant knew or believed the act was substantia lly certain to result in injury, a subjective standard.

F.3d 1140, 1146 n.6 (9th Cir. 2002). "The Debtor is charged with the knowledge of the natural consequences of his actions." Ormsby v. First Am. Title Co. of Nev. (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir. 2010) (citing Cablevision Sys. Corp. v. Cohen (In re Cohen), 121 B.R. 267, 271 (Bankr. E.D.N.Y. 1990)).

Most of the decisions addressing the nature of the substantial certainty analysis involve financial harm similar to that presented here. See, e.g., In re Englehart, 2000 U.S. App. LEXIS 22754; Conseco f/k/a Greentree Fin. Servs. v. Howard (In re Howard), 261 B.R. 513, 521 (Bankr. M.D. Fla. 2001). In these cases, the plaintiff typically alleges that the defendant misapplied or withheld funds or ot her property, interfered with contractual relations, or the like. In financial tort cases, because of the somewhat attenuated relationship between the defendant's act and the resulting har m, a purely objective substantial certainty analysis would bring the court dangerously close to the recklessness standard decried in Kawaauhau. In such cases, using a subjective standard for substantial certainty avoids

cause and thus was malicious within the meaning of § 523(a)(6). Mr. Rensin used BlueHippo to create a series of transactions aimed at defr auding consumers for the purpose of filling the coffers of BlueHippo. There was nothing defensible about his actions.

To meet its burden on the willfulness standard under the case law analyzed above, in light of the circumstances of this case, the plai ntiff must provide evidence causing the Court to infer that Mr. Rensin himself knew, at th e time he caused BlueHippo to implement and maintain the extra terms without appropriate disclosure to customers, that harm to BlueHippo's customers was certain or substantia lly certain to result. The evidence admitted in this case supports the Court's conclusion that, by implementing the store credit refund policy and failing to disclose the extra terms pr ior to receiving customer funds, Mr. Rensin intended for BlueHippo to obtain funds from customers under circumstances were Mr. Rensin expected that BlueHippo would not need to provide any value in exchange for those payments. Mr. Rensin knew that BlueHippo's customers had poor credit and regularly were unable to make all of the payments necessary to obtain a computer. Mr. Rensin caused BlueHippo to take their money, without telling them of road blocks BlueHippo would later use to inhibit, and often prevent, the custom ers from obtaining any benefit in exchange for their payments. There is no doubt that Mr. Rensin knew, and in fact intended, the financial impact of these actions, as BlueHippo took in millions of dollars under this scheme. The scheme depended on BlueHippo taking customers' money and giving them nothing. In effect, Mr. Rensin caused BlueHippo to steal from its own customers. As the Court has already ruled, the evidence supports a finding of fraud based on both misrepresentation and concealment. But the evidence goes further than that. "The Debtor is charged with the knowledge of the natural consequences of his actions." Ormsby v. First Am. Title Co. of Nev. (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir. 2010) (citing Cablevision Sys. Corp. v. Cohen (In re Cohen),121 B.R. 267, 271 (Bankr. E.D.N.Y. 1990)). Based on the greater weight of the

evidence admitted in this case, Mr. Rensin well knew that BlueHippo's customers would be harmed by the failure to disclose the extra terms. The plaintiff has also met its burden on the willfulness standard.

For the foregoing reasons, the Court will enter judgment in favor of the plaintiff on Count II of the complaint.

Consistent with the Court's order at summary judgment, the Court will enter judgment in favor of Mr. Rensin on Count III of the complaint. See ECF No. 37.

CONCLUSION

The Court will enter a separate judgment consistent with this Memorandum Opinion (a) in favor of the Federal Trade Commission under Count I and Count II of the complaint and (b) in favor of Joseph K. Rensin under Count III of the complaint. The entire claim held by the Federal Trade Commission, represented by that certain Final Judgment Imposing Compensatory Contempt Sanctions, entered by the United States District Court for the Southern District of New York on April 19, 2016, in case number 08 Civ. 1819 (PAC), in the amount of $13,400,627.60 plus post-judgment interest, shall be excepted from discharge in this bankruptcy case pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6).

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The Clerk is directed to serve all parties to this adversary proceeding with a copy of this Memorandum Opinion.