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

Federal Trade Commission,

Plaintiff,

v.

First Consumers, LLC, *et al*.

Defendants.

Civ. Action No. 2:14-cv-01608-GAM

FILED ELECTRONICALLY

**MEMORANDUM IN SUPPORT OF
PLAINTIFF FTC'S MOTION FOR DEFAULT JUDGMENT
AGAINST DEFAULTED DEFENDANTS**

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Plaintiff Federal Trade Commission ("FTC"), pursuant to Rule 55(b) of the Federal Rules of Civil Procedure, requests default judgment against First Consumers LLC; PowerPlay Industries LLC; Standard American Marketing, Inc.; 1166519075 Quebec Inc. d/b/a Landshark Holdings Inc.; and 1164047236 Quebec Inc. d/b/a Madicom Inc. (collectively, "Defaulted Defendants"). The FTC filed a request for entry of default, supported by affidavits of service, on November 21, 2014. DE 52. The Clerk of Court entered default against the Defaulted Defendants on December 4, 2014. The FTC's Complaint (DE 1) and evidence filed in support of its summary judgment motion against defendant Ari Tietolman (Des 61-66) demonstrate that default judgment is appropriate against the Defaulted Defendants. The FTC therefore seeks both permanent injunctive relief and equitable monetary relief against the Defaulted Defendants.

ARGUMENT

I. The Court Should Enter Default Judgment Against the Defaulted Defendants.

When a defendant fails to answer or otherwise defend an action, Federal Rule of Civil Procedure 55(a) directs the clerk to enter default against that defendant. Fed. R. Civ. P. 55(a). Once the clerk enters default, the Court must take as true the factual allegations in the complaint, except allegations about the amount of damages. *Teamsters Health & Welfare Fund v. Dubin Paper Co.*, Case No. 11-CV-7137, 2012 WL 3018062, at *2 (D.N.J. July 24, 2012) (citing *DIRECTV, Inc. v. Pepe*, 431 F.3d 162, 165 n. 6 (3d Cir. 2005)); *see also Comdyne I, Inc. v. Corbin*, 908 F. 2d 1142, 1149 (3d Cir. 1990). The clerk of court entered default against the Defaulted Defendants on December 4, 2014, so the factual allegations in the FTC's Complaint (DE 1) must be taken as true against the Defaulted Defendants.

After entry of default, the Court may enter default judgment. Fed. R. Civ. P. 55(b)(2). To determine whether to do so, the Court must first consider whether the Complaint and any additional evidence establish a cause of action. *Chanel, Inc. v. Gordashevsky*, 558 F. Supp. 2d

532, 536 (D.N.J. 2008); *Summit Trust Co. v. Paul Ellis Investment Assoc., LLC,* 2:12-CV-6672, 2013 WL 3967602, at *3 (E.D. Pa. Aug. 2, 2013); *Teamsters Health*, 2012 WL 3018062, at *3; *see also Comdyne I*, 908 F. 2d at 1149 (court need not take legal allegations in the Complaint as true). The Court should then consider the following factors: "(1) prejudice to the plaintiff if default is denied, (2) whether the defendant appears to have a litigable defense, and (3) whether defendant's delay is due to culpable conduct." *Chamberlain v. Giampapa*, 210 F.3d 154, 164 (3d Cir. 2000); *Gordashevsky*, 558 F. Supp. 2d at 537; *Summit Trust*, 2013 WL 3967602, at *4; *see also Hritz v. Woma Corp*., 732 F.2d 1178, 1181 (3d Cir. 1984) (articulating factors in context of motion to reopen default judgment). Because the FTC has established a cause of action against the Defaulted Defendants,[1] and because each of the three factors favors the FTC, the Court should enter default judgment against the Defaulted Defendants.

A. The FTC Has Established a Cause of Action Against the Defaulted Defendants.

The Defaulted Defendants operated as a common enterprise under the control of Defendant Ari Tietolman to commit three types of violations: deceptive practices in violation of Section 5 of the FTC Act, unfair practices in violation of Section 5 of the FTC Act, and deceptive and abusive telemarketing in violation of the Telemarketing Sales Rule.

1. The Defaulted Defendants Operated As a Common Enterprise.

As alleged in the FTC's Complaint, the Defaulted Defendants operated as a common enterprise under the control of defendant Ari Tietolman. DE 1 ¶¶ 38-39. A common enterprise exists where companies are under common control, share offices or officers, transact business through a maze of interrelated companies, and employ unified advertising and business practices.

[1] Indeed, the Court previously found that the FTC was "likely to prevail on the merits of this action," upon entering a Preliminary Injunction against the Defaulted Defendants. DE 13 at 2.

FTC v. NHS Sys. Inc., 936 F. Supp. 2d 520, 533 (E.D. Pa. 2013); *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000); *FTC v. Wolf*, Case No. 94-CV-8119, 1996 WL 812940, at *7-8 (S.D. Fla. Jan. 31, 1996). Each entity within a common enterprise is jointly and severally liable for violations committed by the enterprise as a whole. *NHS Sys.*, 936 F. Supp. 2d at 533. Because the Defaulted Defendants operated under the common control of Ari Tietolman, commingled their funds, transferred money through a maze of related companies, and shared business functions and unified branding, DE 1 ¶¶ 38-39, each defaulted defendant is liable for the enterprise's violations of the FTC Act and the Telemarketing Sales Rule.

2. The Defaulted Defendants Violated Section 5 of the FTC Act by Deceiving Consumers to Obtain Their Account Information.

An act or practice is "deceptive" under Section 5 of the FTC Act, 15 U.S.C. § 45, if it involves a material representation or omission that is likely to mislead consumers acting reasonably under the circumstances. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *NHS Sys.*, 936 F. at 531.

The Defaulted Defendants, operating under Tietolman's control, made telemarketing calls to obtain consumers' bank account information. DE 1 ¶ 18. The enterprise targeted elderly and vulnerable consumers. *Id*. The telemarketers misrepresented the "services" the enterprise provided, falsely claimed that they would not debit consumers' accounts, and falsely claimed affiliation with consumers' banks or the United States government to persuade consumers to divulge their account information. DE 1 ¶¶ 19-24.

These misrepresentations were material. "'Explicit claims or deliberately-made implicit claims . . . are presumed to be material.'" *NHS Sys.*, 936 F. Supp. 2d at 531 (citing *In re Nat'l Credit Mgmt.*, 21 F. Supp. 2d 42, 441 (D.N.J. 1998)). Furthermore, any claim – whether express or implied – is material if a reasonable consumer would consider the claim important in choosing

a course of action. *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992); *FTC v. Davison Assocs., Inc.,* 431 F. Supp. 2d 548, 559 (W.D. Pa. 2006). Many of the claims the enterprise made were express and therefore presumed material. DE 1 ¶¶ 19-20, 22-24. Furthermore, all of the enterprise's claims were important to reasonable consumers in choosing a course of action and were thus material. Claims about the central characteristics of the offered services "[struck] at the heart of a consumer's purchasing decision" and were therefore material. *FTC v. Freecom Commc'n, Inc*., 401 F.3d 1192, 1203 (10th Cir. 2005); *see also In re Thompson Medical Co., Inc.*, 104 F.T.C. 648 (1984). The telemarketers' misrepresentations that they were affiliated with trusted entities led reasonable consumers to divulge bank account information. Similarly, the telemarketers' express and implied representations that they would not debit consumers' accounts reasonably led victims to disclose their bank account information.

3. The Defaulted Defendants Violated Section 5 of the FTC Act by Debiting Consumers' Accounts Without Authorization.

Once consumers disclosed their account numbers, the enterprise used the information to generate remotely created checks payable to the Defaulted Defendants. DE 1 ¶ 30. The enterprise deposited the checks into the Defaulted Defendants' bank accounts, thus debiting consumers' accounts. *Id.* Consumers did not authorize these debits. DE 1 ¶¶ 28-29. The enterprise's unauthorized debits constituted an unfair practice in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(n). An act or practice is "unfair" under Section 5 if it: (1) causes or is likely to cause substantial injury to consumers; (2) that is not reasonably avoidable; and (3) that is not outweighed by countervailing benefits to consumers or competition. 15 U.S.C. § 45(n); *see also International Harvester Co.*, 104 F.T.C. 949, 1064 (1984); *NHS Sys.*, 936 F. Supp. 2d at 531.

Courts have repeatedly held that unauthorized charges or debits – like those at issue here

– violate Section 5. *See NHS Sys.*, 936 F. Supp. 2d at 531; *FTC v. Wells*, 385 F. App'x. 712, 713 (9th Cir. 2010); *FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1004 (N.D. Cal. 2010); *FTC v. Kennedy*, 574 F. Supp. 2d 714, 721 (S.D. Tex. 2008); *FTC v. Windward Marketing, Inc.*, Case No. 1:96-CV-615F, 1997 WL 33642380, at *13 (N.D. Ga. Sept. 30, 1997). Indeed, the unauthorized debiting scheme meets all three prongs of the unfairness standard.

First, the debits caused substantial injury. Defaulted Defendants debited hundreds of dollars from each consumer's accounts. DE 1 ¶ 30. Even considered on a consumer-by-consumer basis, such injury is "substantial." Furthermore, courts consider whether injury is "substantial" in the aggregate, so even a small individual injury would be substantial if inflicted on many consumers. *See FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985) (quoting FTC policy statement); *see also NHS Sys.*, 936 F. Supp. 2d at 531. The Defaulted Defendants' bank records show that, in the aggregate, the operation took more than $10 million from consumers' bank accounts, which constitutes more than "substantial" injury. DE 65, Summary Judgment PX75.

Second, this injury was not reasonably avoidable. As other courts have observed, when analyzing unauthorized billing under the unfairness standard, the burden does not fall "on defrauded customers to avoid charges that were never authorized to begin with." *Inc21.com*, 745 F. Supp. 2d at 1004; *see also FTC v. Crescent Publ'g Grp., Inc.*, 129 F. Supp. 2d 311, 322 (S.D.N.Y. 2001). The enterprise obtained consumers' account information through deception, often targeting elderly and vulnerable consumers who were least able to protect themselves. *Cf. FTC Policy Statement on Deception*, appended to *In re Cliffdale Assocs.*, 103 F.T.C. 110, 174 (1984) (FTC analyzes deception based on effect on targeted audience, such as the elderly). The victims often did not even know that the Defaulted Defendants would debit their accounts until

the debits appeared on their bank statements. DE 1 ¶¶ 29, 33. These consumers therefore could not reasonably avoid the unauthorized debits. *See NHS Sys.*, 936 F. Supp. 2d at 531 (finding unfairness and concluding "consumers could not reasonably avoid the limitless financial consequences of providing their account information for a supposed discount healthcare program"). Nor did consumers' ability to request reversal of the charges (DE 1 ¶¶ 34-35) make injury avoidable, as even consumers who successfully reversed charges had to expend "time, trouble, aggravation, and money" to do so. *FTC v. Neovi, Inc*., Case No. 06-CV-1952-JLS-JMA, 2009 WL 56139, at *4 (S.D. Cal. Jan. 7, 2009).

Finally, the massive harm caused to victimized consumers was not outweighed by countervailing benefits. The Defaulted Defendants provided no benefit to consumers or competition when they effectively stole consumers' money, whether under the guise of sales transactions, by pretending to "verify" existing services, or by masquerading as bank and government officials. *See Inc21.com*, 745 F. Supp. 2d. at 1004 ("it cannot be said that defendants' 'customers' benefitted at all from services that they never agreed to purchase, didn't know were being provided to them, and never wanted in the first place"); *see also Kennedy*, 574 F. Supp. 2d at 721; *Crescent Publ'g Grp.*, 129 F. Supp. 2d at 322.

4. The Defaulted Defendants Violated Several Provisions of the Telemarketing Sales Rule.

The Defaulted Defendants also violated the Telemarking Sales Rule (TSR), 16 C.F.R. § 310, by failing to disclose material facts, misrepresenting total cost, misrepresenting telemarketers' affiliation, and failing to obtain express verifiable authorization and informed consent before debiting consumers' accounts. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the TSR also constitutes a violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

The TSR prohibits sellers and telemarketers from making various types of misrepresentations or omissions, and from engaging in certain billing practices.

First, the TSR prohibits failing to disclose clearly and conspicuously all material restrictions, limitations, or conditions on the goods or services offered before a consumers pays. 16 C.F.R. § 310.3(a)(1)(ii). The Defaulted Defendants violated this provision by withdrawing money from consumers' bank accounts without clearly disclosing that they would do so, or that they would not provide the services as advertised. DE 1 ¶¶ 21-24. Second, the TSR prohibits telemarketers from misrepresenting the total costs to purchase goods or services, or their affiliation with any person or government entity. 16 C.F.R. § 310.3(a)(2)(i), (vii). The enterprise misrepresented, expressly and by implication, that consumers' accounts would not be debited and that the Defaulted Defendants were affiliated with the government or consumers' banks. DE ¶¶ 19, 23. Third, the TSR prohibits telemarketers from billing or debiting consumers' accounts without their express informed consent. 16 C.F.R. § 310.4(a)(7). The Defaulted Defendants debited consumers' accounts without their knowledge, let alone their express informed consent. DE 1 ¶¶ 28-29. Finally, the TSR requires telemarketers to obtain "express verifiable authorization" to debit consumers, and, if the authorization is oral, to make an audio recording of the authorization and telemarketers' communication of specified information. 16 C.F.R. § 310.3(a)(3)(ii). The Defaulted Defendants debited consumers' accounts without obtaining true "express verifiable authorization," as the telemarketers coached consumers through confusing verification recordings even though consumers had not actually authorized any debits. DE 1 ¶ 27.

B. The Default Judgment Factors Favor the Federal Trade Commission.

Once the Court finds that the FTC has established a cause of action, it may consider the following factors: "(1) prejudice to the plaintiff if default is denied, (2) whether the defendant

appears to have a litigable defense, and (3) whether defendant's delay is due to culpable conduct."[2] *Chamberlain*, 210 F.3d at 164; *Gordashevsky*, 558 F. Supp. 2d at 537; *Summit Trust*, 2013 WL 3967602, at *4. Each of the three factors favors the FTC.

First, because the Defaulted Defendants have not answered or otherwise defended this action, the FTC cannot obtain a final outcome against them unless default judgment is granted. The FTC would be prejudiced if it is denied the ability to obtain a ruling on its claims against the Defaulted Defendants. *See Teamsters Health*, 2012 WL 3018062, at *4.

Second, because the Defaulted Defendants have not responded in any way, they have presented no defense at all. Indeed, even the individual defendants who control the Defaulted Defendants have presented no litigable defense. Two of the individual defendants reached settlements with the FTC and provided testimony establishing their companies' roles in the FTC Act violations (DE 57; DE 64, Summary Judgment PX16 and PX17), and the FTC filed a summary judgment motion presenting uncontroverted and overwhelming evidence against the scheme's mastermind, Ari Tietolman. DEs 61-66.

Third, each Defaulted Defendant was properly served through the individual defendants, who were the Defaulted Defendants' officers and directors. DE 7-1 (affidavits of service). Each individual defendant participated to some degree in the litigation, but did not retain counsel to represent the Defaulted Defendants. DE 8, 9, 10 (stipulated Preliminary Injunctions against defendants Borie, Barczai, and Ferry); DE 20 (defendant Tietolman's answer); DE 22, 23, 32

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[2] In some cases, default is entered as a Rule 37 sanction against a defendant who filed an answer but then failed to participate fully in the litigation. In such cases, courts considering whether to enter default judgment employ a more extensive six-factor test articulated in *Poulis v. State Farm Fire and Casualty Co*., 747 F.2d 863, 868 (3d Cir.1984). However, where, as here, a defendant never answered or responded at all, courts consider the truncated three-factor test cited above. *Jimenez v. Rosenbaum-Cunningham, Inc.*, Case No. 07-CV-1066, 2010 WL 1303449, at * 3 (E.D. Pa. Mar. 31, 2010).

(motions by defendants Ferry and Tietolman); DE 33 (defendant Ferry's answer); DE 57 (stipulated final orders against defendants Barczai and Ferry). The Defaulted Defendants' officers and directors therefore knew of the lawsuit and its progress, but chose not to respond on behalf of the corporations. *See Gordashevsky*, 558 F. Supp. 2d at 537 (entering default judgment where defendant's "failure to defend is clearly his own").

Because the FTC has established its causes of action, and because the default judgment factors favor the FTC, the Court should enter default judgment against the Defaulted Defendants on all of the counts alleged in the FTC's Complaint.

II. The Injunctive Relief the FTC Seeks Is Reasonable and Appropriate.

Strong injunctive relief is necessary to protect consumers from future harm. Permanent injunctive relief is appropriate where there is a "cognizable danger of recurrent violation." *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953). To determine the danger of recurrence, courts may consider the deliberateness and seriousness of the violation, the violator's record with respect to unfair practices, and the adaptability or transferability of the unfair practice to other products. *Sears, Roebuck and Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982) (citing *FTC v. Colgate-Palmolive* Co., 380 U.S. 374, 395 (1965)); *see also Davison*, 431 F. Supp. 2d at 560 (citing *W.T. Grant*, 345 U.S. at 633). The likelihood of future violations may be inferred from the totality of the circumstances and "even presumed, from past unlawful conduct, and the absence of proof to the contrary." *CFTC v. Am. Metals Exch. Corp.*, 693 F. Supp. 168, 172 (D.N.J. 1988); *see also SEC v. Bonastia*, 614 F.2d 908, 912 (3d Cir. 1980). Courts presented with evidence of systematic wrongdoing, as opposed to an isolated occurrence, are "more willing" to enjoin future misconduct. *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979) (citing *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972)); *see also FTC v. Gill*,

71 F. Supp. 2d 1030, 1047 (C.D. Cal. 1999) *aff'd*, 265 F.3d 944 (9th Cir. 2001) (imposing ban where defendants engaged in systematic pattern of misrepresentations).

Where there is a reasonable basis to believe defendants will engage in future violations, injunctive relief should be "broa[d] enough to prevent [defendants] from engaging in similarly illegal practices." *Colgate-Palmolive*, 380 U.S. at 395; *see also NLRB v. Express Pub. Co.*, 312 U.S. 426, 435 (1941) (courts have "broad power" to restrict activity that "may fairly be anticipated from the defendant's conduct in the past"). Therefore, courts frequently impose bans enjoining defendants from engaging in the same or related activity that gave rise to their violative conduct. *See, e.g.*, *FTC v. John Beck Amazing Profits, LLC*, 888 F. Supp. 2d 1006, 1013 (C.D. Cal. 2012) (telemarketing ban); *FTC v. Grant Connect*, 827 F. Supp. 2d at 1233 (ban on marketing business opportunities); *FTC v. Neiswonger*, 494 F. Supp. 2d 1067, 1084 (E.D. Mo. 2007) (same); Order for Permanent Injunction, DE 116, *FTC v. Bay Area Bus. Council, Inc.*, Case No. 02-CV 5762 (N.D. Ill. Apr. 16, 2004) (telemarketing ban), *aff'd*, 423 F.3d 627 (7th Cir. 2005); *FTC v. Ivy Capital, Inc.*, No. 11-283 JCM GWF, 2013 WL 1224613, at *16 (D. Nev. Mar. 26, 2013) (extending ban to telemarketing because scam was highly adaptable to other areas).

The egregiousness and longstanding nature of the conduct in this case show that, absent strong injunctive relief against Defaulted Defendants, the enterprise is likely to harm consumers in the future. As set forth in the FTC's Complaint and summary judgment motion, the enterprise systematically targeted elderly consumers and tricked them into divulging their bank account information. Through the Defaulted Defendants, the enterprise then debited millions from consumers' accounts without authorization. The Defaulted Defendants used different fictitious

names over time, but employed the same abusive tactics. The same deceptive telemarketing tactics employed here could easily be used under the guise of selling new products and services.

The proposed injunctive relief reflects the egregiousness of the enterprise's actions and imposes safeguards to protect consumers from similar abusive practices. Specifically, the proposed order would prohibit the Defaulted Defendants from engaging in telemarketing. It would also prohibit them from processing payments using remotely created checks—the primary payment instrument the enterprise used—for accounts they do not control, and would require them to disclose material payment terms to consumers before charging a financial account. These restrictions are necessary because RCCs are often abused by fraudsters, just as the enterprise abused them in this case. *See* Notice of Proposed Rulemaking, Telemarketing Sales Rule, 16 C.F.R Part 310, 78 Fed. Reg. 41200, 41201-41215 (July 9, 2013).

In addition, the proposed relief would prohibit the Defaulted Defendants from misrepresenting any material facts for any product or service they sell. Such restrictions will ensure that the enterprise cannot employ deceptive practices in selling any products or services. Finally, the proposed injunction includes ancillary provisions to assist the FTC in monitoring and enforcing compliance with the order, including recordkeeping, monitoring, and reporting requirements. Such provisions are necessary to enforce compliance with the order and the FTC Act, and courts routinely grant them, including in default judgments. *E.g.*, *NHS Sys.*, 936 F. Supp. 2d at 537; *FTC v. U.S. Sales Corp.*, 785 F.Supp. 737, 753 (N.D. Ill. 1992); *FTC v. Hope for Car Owners, LLC*, 2:12-cv-778-GEB-EFB, 2013 WL 322895, at *5 (E.D. Cal. Jan. 24, 2013) (finding monitoring and recordkeeping provisions appropriate in default judgment).

III. The Monetary Relief the FTC Seeks Is Reasonable and Appropriate.

The FTC's proposed monetary relief is needed to redress the economic harm the enterprise's unfair practices caused consumers. Courts may issue "any ancillary relief necessary

to accomplish complete justice" under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). *Pantron I*, 33 F.3d at 1102; *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997). This includes equitable monetary relief, including restitution to consumers injured by defendants' conduct. *Pantron I*, 33 F.3d at 1102 (*citing FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir. 1989)); *FTC v. Magazine Solutions*, 432 F. App'x 155, 158 n.2 (3d Cir. 2011).

The proper amount of monetary relief is the full amount taken from consumers—less refunds—even if that amount may exceed the amount of defendants' unjust enrichment. *Febre*, 128 F.3d at 535-36; *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996); *Pantron I*, 33 F.3d at 1103. In determining the appropriate amount, "[t]he Commission must show that its calculations reasonably approximated the amount of customers' net losses, and then the burden shifts to the defendants to show that those figures were inaccurate." *NHS Sys.*, 936 F. Supp. 2d at 537 (quoting *Febre*, 128 F.3d at 535). Further, the FTC need not prove that each individual consumer relied upon defendants' false claims to obtain consumer redress. *Amy Travel*, 875 F.2d at 573; *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993) (citations omitted). Requiring individual reliance by each consumer as a prerequisite for compensation "would be virtually impossible" and "thwart and frustrate the public purposes of FTC action." *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000) (*citing FTC v. Security Rare Coin & Bullion Corp.,* 931 F.2d 1312, 1316 (8th Cir. 1991)). Instead, where the fraud was widespread, the FTC is entitled to a presumption that each consumer subject to the conduct was injured. *See, e.g., FTC v. Kuykendall*, 371 F.3d 745, 764-67 (10th Cir. 2004); *McGregor,* 206 F.3d at 1387-88; *see also Security Rare Coin,* 931 F.2d at 1316.

The FTC's proposed judgment of $10,734,255.81 is the correct amount of restitution because it reflects the amount of harm the enterprise caused consumers. Because fraud

permeated the scheme and was widespread, it is presumed all of consumers' money was obtained through deception. *See, e.g., Kuykendall*, 371 F.3d at 764-67; *McGregor,* 206 F.3d at 1387-88. Furthermore, because the Defaulted Defendants acted as a common enterprise under Tietolman's control, they are jointly and severally liable for the full amount of consumer harm. *See, e.g., NHS Sys. Inc.*, 936 F. Supp. 2d at 533.

Under Rule 55(b), the Court may hold a hearing to determine the appropriate amount of monetary relief. However, a hearing is not necessary if detailed affidavits or record evidence make it possible to compute the amount of relief. *Summit Trust*, 2013 WL 3967602, at *4; *accord Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir. 1981); 10 James Wm. Moore, Moore's Federal Practice, Civil § 55.32[2][a] (3d ed. 2012). Courts have granted the FTC equitable monetary relief by default without a hearing where the documentary evidence provides a calculation of the correct amount. *See, e.g*., *FTC v. 1263523 Ontario, Inc*., 205 F. Supp. 2d 218, 223 (S.D.N.Y. 2002) (calculating $10 million relief based on declaration from defendants' payment processor); *Hope for Car Owners*, 2013 WL 322895, at *6 (E.D. Cal. Jan. 24, 2013) (documents from financial institutions supported monetary relief proposed by FTC).

Here, the record contains sufficient evidence to support an order for equitable monetary relief against the Defaulted Defendants without further hearing. The FTC filed this evidence with its motion for summary judgment, concurrently with the filing of this motion. The FTC obtained the enterprise's account records from 23 banks, and computed total RCC deposits and total RCC returns in those accounts. DE 65, Summary Judgment PX52-74 (excerpts of bank records); PX75-77 (summaries of voluminous bank records). The enterprise used RCCs to debit a total of $18,856,360.56 from consumers' accounts. DE 65, Summary Judgment PX75.

Accounting for $8,122,104.75 in returns, the net loss consumers suffered, and thus appropriate monetary relief, is $10,734,255.81.

CONCLUSION

For the foregoing reasons, the Court should grant the FTC's motion for default judgment and issue the attached proposed order against the defaulted defendants.

Respectfully submitted,

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