

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

Case Number: 50-2016-CA-006963

OFFICE OF THE ATTORNEY GENERAL
STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS,
Plaintiff,

vs.

CLIENT EXPERTS CARE, LLC, *a Florida
Limited Liability Company, formerly known as*
FIRST CHOICE TECH SUPPORT, LLC, *a
Florida Limited Liability Company;*
CLIENT CARE EXPERTS, Inc., *a
Florida Corporation;* MICHAEL SEWARD,
an individual; KEVIN MCCORMICK, *an individual;*
Defendants.

**ORDER DENYING DEFENDANTS' MOTION TO DISSOLVE JUNE 27, 2016
TEMPORARY INJUNCTION ORDER WITHOUT PREJUDICE**

Defendants Client Experts Care, LLC, formerly known as First Choice Tech Support, LLC; Client Care Experts, Inc. (Corporate Defendants collectively referred to as "First Choice"); Michael Seward, an individual; and Kevin McCormick, an individual (collectively referred to as "Defendants") moved this Court to dissolve this Court's June 27, 2016 Order For Temporary Injunctive Relief and Asset Freeze Without Notice ("Defendants' Motion"), ordered upon Plaintiff's, Office of The Attorney General, State of Florida, Department Of Legal Affairs, Motion for Temporary Injunctive Relief and Asset Freeze Without Notice, pursuant to the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.201 et seq., and § 501.207(3) of the Florida Statutes and Florida Civil Procedure Rule 1.610. The Court having reviewed and considered the motions submitted by both parties, the testimonial and documentary evidence presented during hearings that took place on August 18, 2016, August 19, 2016, August

26, 2016, and August 29, 2016, and considering arguments from counsel for Defendants and Plaintiff, this Court denies Defendants' Motion, without prejudice, and further states:

FINDINGS OF FACT

1. This Court has jurisdiction over the subject matter of this case, as well as all parties hereto, and venue in this circuit is proper.

2. Plaintiff presented the testimony of seven (7) consumer witnesses, an investigator from the Office of the Florida Attorney General, an expert witness in computer security, a representative from the Department of Agriculture and Consumer Services, and a forensic accountant for the court-appointed receiver.

3. During the hearing, Plaintiff admitted evidence, including Florida Department of State filings, preservatons of Defendants' websites, sales scripts submitted by Defendants to the Department of Agriculture and Consumer Services, documents evidencing an undercover operation conducted by the investigator from the Florida Attorney General's Office and Plaintiff's expert witness, affidavits from ten (10) consumer witnesses, screenshots evidencing the pop-up advertisements used by Defendants to generate inbound consumer calls, sales scripts used by Defendants' sales agents, a current training manual used to train Defendants' sales agents, an affidavit from a representative from Microsoft, documents obtained from Defendants' business premises on June 29, 2016 regarding their marketing and sales practices, audio recordings between Defendants and consumers and transcripts of the same, Skype Chat excerpts of statements made by Michael Seward and Grant Wasik, a Consent Final Judgement and Permanent Injunction against Kevin McCormick in an un-related action by the Federal Trade Commission, and emails by Defendants regarding their marketing and sales practices.

4. At the hearing, the parties stipulated to certain factual findings: (1) the audio recordings of the sales calls between consumers and Defendants took place between March 31, 2016 and June 29, 2016; (2) the gross revenue of Client Experts Care, LLC for 2014, as reported by Defendants, was \$1,262,231.00; (3) the gross revenue of Client Experts Care, LLC for 2015, as reported by Defendants, was \$14,992,407.00; and (4) the assets identified and frozen as of August 18, 2016 amounted to \$243,696.78.

5. The Court finds that the evidence and testimony of Plaintiff's witnesses were credible and convincing. Plaintiff's evidence established that Defendants have engaged in acts or practices that violate FDUTPA. Specifically, the evidence was convincing that Defendants relied on methods that were misleading and deceiving in order to generate inbound consumer calls. In some instances, Defendants used advertisers who created pop-up advertisements on the internet that would appear on consumers' computers and urge consumers to contact a number listed for technical support ("Lead Generation"). The number on the pop-up ultimately led consumers to contact Defendants. As consumers were led to believe that the pop-up warning was legitimate, and not just an advertisement that did not actually indicate that malware existed on consumers' computers, consumers were deceptively lured to contact Defendants' inbound call center.

6. As evidenced by the testimony of consumer witnesses, consumer affidavits admitted into evidence, and audio recordings of inbound consumer calls, the Lead Generation had the effect of scaring reasonable consumers into believing that they must contact the number provided due to purported malware infecting their computers. As a result, consumers were misled to believe that their computers were severely infected.

7. Once consumers contacted Defendants' inbound call center, they were subjected to the carefully-crafted deceptive sales pitch of sales agents employed by Defendants. These sales agents feigned ignorance as to the cause of the Lead Generation, and offered to perform a diagnostic of the consumers' computer in order to determine the cause of the Lead Generation. The diagnostic offered by Defendants required that Defendants' sales agents gain remote access to the consumers' computers, where a consumer's computer screen is visible to and could be controlled by, Defendants' sales agent. Defendants' sales agents abetted these deceptive business acts and practices in violation of FDUTPA.

8. Defendants' sales agents used a sales script that was pre-deterministic, and always concluded with the recommendation that the consumer was in need of immediate services and products offered by Defendants, regardless of whether the computer actually was in need of service or a software product. Compelling evidence was admitted that, notwithstanding the efficacy of computer software used in the diagnostic, the sales scripts did not diagnose computers and were simply a way to drive sales. There were several misrepresentations that were made during the sales pitch, conducted by Defendants' employees. These misrepresentations range from false statements and exaggerations about the status of the consumers' computers to the impact of the number of processes running on a computer to the computer's performance.

9. Defendants' violations of FDUTPA occurred up and until Defendants' were served with this Court's Temporary Injunction Order on June 29, 2016.

10. Defendants' presented the testimony of Michael Seward, Grant Wasik, Igor Barash, and Rich Cohen.

11. This Court found Igor Barash to be evasive when confronted with questions about past, albeit recent, allegations of deceptive and unfair trade practices against a company he co-

founded. Rich Cohen's testimony regarding Defendants' future business plan did not make sense to the Court, and could not assure this Court that consumers would be protected from deceptive business practices by Defendants, if Defendants were permitted to conduct business during the pendency of the action. Considering that most of the consumer witnesses were senior citizens, this Court was concerned by Mr. Cohen's testimony regarding an attempt to send a cold-call letter to the chairman of the AARP. In addition, Grant Wasik's testimony was condescending and lacked any form of sensitivity or compassion for victimized consumers, or remorse for Defendants' conduct and practices. While Michael Seward had respect for the Court and he appeared to understand the gravity of what was transpiring during the hearings, his testimony and the evidence established that he was complicit in Defendants' conduct and practices.

CONCLUSIONS OF LAW

12. As the enforcing authority under FDUTPA, the Attorney General is specifically authorized to file a motion for interim relief. Pursuant to § 501.207(3), Fla. Stat., the Court may make appropriate orders, including, but not limited to, "appointment of a . . . receiver or ... freezing of assets, to reimburse consumers ... found to have been damaged; ... to order any defendant to divest herself or himself of any interest in any enterprise, including real estate; ... to order the dissolution or reorganization of any enterprise; or to grant legal, equitable, or other appropriate relief. The court may assess the expenses of a ... receiver against a person who has violated, is violating, or is otherwise likely to violate this part." Chapter 501, Part II, Fla. Stat.

13. The purpose of a temporary injunction is to preserve the *status quo* pending the final outcome of the case, and the trial court has broad discretion in granting temporary injunctions. *Brock v. Brock*, 667 So. 2d 310, 311 (Fla. 1st DCA 1995).

14. Generally, a temporary injunction requires a showing that (1) irreparable harm will result if the temporary injunction is not entered; (2) an adequate remedy at law is unavailable; (3) there is a substantial likelihood of success on the merits; and (4) entry of the temporary injunction will serve the public interest. *Sacred Family Investments, Inc. v. Doral Supermarket, Inc.*, 20 So. 3d 412, 415 (Fla. 3d DCA 2009).

15. However, because Florida Statutes Section 501.207(1)(b) expressly authorizes the enforcing authority to seek injunctive relief, Plaintiff "does not have to establish irreparable harm, lack of an adequate legal remedy or public interest." *Millennium Communications & Fulfillment, Inc. v. Office of the Attorney General*, 761 So. 2d 1256, 1260 (Fla. 3d DCA 2000). Therefore, Plaintiff only needed to show a substantial likelihood of success on the merits: "The Department's sole burden at a temporary injunction hearing under FDUTPA is to establish that it has a clear legal right to a temporary injunction." *Id.* Plaintiff's evidence established a clear legal right to the temporary injunction.

16. To prevail on an action under FDUTPA, Plaintiff must show that "the alleged practice was likely to deceive a consumer acting reasonably in the same circumstances." *Office of Attorney General, Department of Legal Affairs v. Wyndham Int'l, Inc.*, 869 So. 2d 592, 598 (Fla. 1st DCA 2004). The evidence before the Court established that Defendants' practices were likely to deceive a consumer acting reasonably, and did in fact deceive consumers acting reasonably.

17. To establish individual liability under FDUTPA, Plaintiff must show that the "individual defendant actively participated in or had some measure of control over the corporation's deceptive practices." *Wyndham Int'l, Inc.*, 869 So. 2d 592, 598 (Fla. 1st DCA 2004) ("individual defendant may also be held liable for consumer redress under the [FTC] Act if they participated directly in the deceptive practices or acts or they possessed the authority to control

them."). The evidence before the Court established that Defendants Michael Seward and Kevin McCormick directed and controlled, and/or had the ability to control, the acts and practices of the corporate entities.

18. "[O]ne purpose of the asset freeze is to ensure that funds are available to provide consumers redress and deprive wrongdoers of their ill-gotten gains." *F.T.C. v. JAB Marketing Assoc.*, LP, 972 F. Supp. 2d 1307, 1313 (S.D. Fla. 2013). In an equitable enforcement action, defendants are liable to the extent of their ill-gotten gains. *JAB Marketing Assoc.*, 972 F. Supp. 2d at 1312 citing *F.T.C. v. Bishop*, 425 Fed. Appx. 796, 798 (11th Cir. 2011). The proper measure of ill-gotten gains is revenue, not profit. *Id.* citing *F.T.C. v. Washington Data Resources*, 2011WL3566612, at *3 (M.D. Fla. July 15, 2011).

19. Here, as in *JAB Marketing Assoc.*, "[i]t is extremely unlikely that the frozen assets will be adequate to redress consumer injuries." *Id.* at 1314. Given these circumstances, the Court concludes that equity favors preserving frozen assets to protect consumers. The asset freeze requested by Plaintiff must be maintained to preserve the *status quo* until a final hearing on the merits. Thus, equity favors the injured consumers over Defendants "who did the injuring and are now suffering the consequences of their conduct." *Id.* at 1314-15 (internal citations omitted).

20. FDUTPA specifically provides that: "It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1) as of July 1, 2013." § 501.204(2), Fla. Stat.

21. As a matter of law, Defendants are responsible for deceptive advertisements made by their agents. Those who put into the hands of others the means by which they may mislead the public, are themselves guilty of a violation of Section 5 of the Federal Trade Commission Act.

Waltham Watch Co. v. FTC, 318 F.2d 28, 32 (7th Cir. 1963). The law is clear that under the FTC Act, a principal is liable for misrepresentations made by his/her agents (i.e., those with the actual or apparent authority to make such representations) regardless of the unsuccessful efforts of the principal to prevent such misrepresentations. *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502 (S.D.N.Y. 2000); *Standard Distribs. v. FTC*, 211 F.2d 7, 13 (2d Cir. 1954); *Goodman v. FTC*, 244 F.2d 584, 591-593 (9th Cir. 1957).

22. In addition, "liability for deceptive sales practices does not require that the underlying product be worthless." *F.T.C. v. JAB Marketing Assoc., LP*, 746 F.3d 1228 (affirming district court's injunction and rejecting the defendant's alternative defense that its products offered significant value to consumers). As stated by the 11th Circuit opinion in *JAB Marketing Assoc.*, "[r]ather, the salient issue in fraudulent-misrepresentation cases 'is whether the seller's misrepresentations tainted the customer's purchasing decisions,' not the value (if any) of the items sold." *Id.* at 1235 (emphasis added). The injury to a consumer occurs at the instant of a seller's misrepresentations, which taint the consumer's subsequent purchasing decisions. Further, the fraud entitles consumers to full refunds. *See FTC v. BlueHippo Funding, LLC*, 762 F.3d 238, 244 (2d Cir. 2014) ("Put alternatively, because the harm stems from the initial misrepresentations, the injury occurs at the moment the seller makes those misrepresentations").

23. As the evidence established that Defendants' violations of FDUTPA were ongoing up and until June 29, 2016, there is good cause to believe that immediate and irreparable harm would result unless Defendants are restrained and enjoined by this Court's June 27, 2016 Temporary Injunction Order. Further, there is good cause to believe that immediate and irreparable damage to this Court's ability to grant effective final relief for consumers, including monetary restitution, rescission, disgorgement or refunds, will occur from the sale, transfer,

destruction or other disposition or concealment by Defendants of their assets, documents, records or other evidence would result unless Defendants' are restrained and enjoined as provided in this Court's June 27, 2016 Temporary Injunction Order.

24. The interests of justice require that Defendants' Motion be denied without prejudice. Specifically, good cause exists to maintain: (a) the appointment of a Temporary Receiver over the Corporate Defendants; (b) the freezing of Defendants' Assets as provided in the June 27, 2016 Order of Temporary Injunction; and (c) the ancillary relief provided in the June 27, 2016 Order of Temporary Injunction.

25. Equity favors the injured consumers over Defendants who did the injuring. Weighing the equities and considering the evidence before the Court which established that there is a substantial likelihood of success on the merits and a clear legal right to a temporary injunction and asset freeze, the maintenance of this Court's June 27, 2016 Temporary Injunction Order, including an asset freeze, is in the public interest.

IT IS ORDERED AND ADJUDGED:

1. Defendants' Motion To Dissolve This Court's June 27, 2016 Temporary Injunction Order And Asset Freeze Is **DENIED** Without Prejudice, whereby, this Court will maintain the June 27, 2016 Temporary Injunction Order, Defendants' assets will remain frozen, and the Court-appointed Receiver will remain in place at the cost of Defendants.

2. This Order is without prejudice to allow the parties to continue to work toward a resolution that ensures the protection of consumers from violations of Florida's Deceptive and Unfair Trade Practices Act.

IT IS SO ORDERED:

Entered this 22 day of Aug., 2016



THE HONORABLE DONALD HAFELE

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