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

OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF LEGAL AFFAIRS, STATE OF FLORIDA,
Plaintiff,
vs. **Case No.: 2015CA002753XXXX**

E-RACER TECH, LLC d/b/a CLEAN IT PC and JAMES N VESER, an individual,
Defendants.
_____/

ORDER GRANTING PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTIVE RELIEF AND ASSET FREEZE

This matter came before the Court as a motion by Plaintiff, Office of the Attorney General, State of Florida, Department of Legal Affairs, and E-Racer Tech, LLC, d/b/a Clean It PC, and James N. Veser (collectively, "Defendants"), by and through their undersigned counsel. The Court being further duly advised in the premises, it is hereby

ORDERED AND ADJUDGED:

1. Plaintiff filed its Motion for Temporary Injunction and Asset Freeze ("Motion"), brought pursuant to the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), on April 16, 2015, with supporting evidentiary documents attached.

2. The Court held a 13-day hearing on Plaintiff's Motion from Wednesday, August 19, 2015 through Friday, August 28, 2015, and from Monday October 26, 2015 through Friday, October 30, 2015. Both Plaintiff and Defendants presented witnesses and documentary evidence at the hearing.

I. FINDINGS OF FACT

3. The Court finds that the evidence and testimony of Plaintiff's witnesses, including two consumers, one former employee, one expert witness, and Plaintiff's investigator, was

credible and convincing. Defendants' consumer witness testimony was consistent with that of Plaintiff's witnesses as well as the consumer affidavits and call recordings.

4. Defendants' witnesses were less than credible on the witness stand, as they appeared biased, gave evasive answers, made contradictory and implausible statements, and seemed unable to respond to allegations of misleading and deceptive business practices under FDUTPA. For example, while Defendants argued that E-Racer never controlled the pop-up advertisements, there are email messages that reflect Veser directing Matomy to use "pop-up virus" advertisements. Moreover, Thiago de Sousa testified that Matomy was bundling advertisements with adware; consumers would see the pop-up advertisement, believe it to be a warning or infection, call the number on their screen, and E-Racer would then convince the consumer to purchase a service that would purportedly remove the adware on their computer. This, of course, was the adware that was put on the consumer's computer by Matomy, in order the generate calls to E-Racer. Essentially, E-Racer contracted with Matomy to place adware on consumers' computer for the end goal of having that consumer pay E-Racer hundreds of dollars to purportedly remove the adware. Finally, although Mr. de Sousa stated numerous times in his testimony and deposition that consumers knew that the pop-ups were advertisements, it was clear from the audio recordings played during Mr. de Sousa's cross-examination that consumers were not aware that, in calling the number on their computer screen, they were responding to an advertisement.

5. In this case, equity favors the injured consumers over Defendants who did the injuring. The Court finds that the evidence was clearly in favor of Plaintiff, who did demonstrate a substantial likelihood of success on the merits and a clear legal right to the injunction and asset freeze.

6. Further, the appointment of a monitor is necessary to marshal Defendants' assets to preserve funds for consumer restitution and protect consumers from further damage as a result of misleading and deceptive sales tactics.

A. Deceptive Marketing

7. Specifically, the evidence was convincing that Defendants made representations to customers that were misleading and deceiving—that a pop-up advertisement was suddenly displayed on consumers' computers, urging consumers to call the number listed, and that number ultimately led consumers to be in contact with Defendants. The advertisement is disguised as a pop-up, which mimics a warning coming from the consumer's computer, warning of computer viruses, errors, and threats.

8. As evidenced by the consumer testimony and audio recordings of inbound consumer calls received pursuant to a third-party investigative subpoena, consumers are told through the pop-up window that they need to contact the toll-free number for immediate technical support. In other cases, the pop-up window generates an alarm sound that comes from the computer and continues until the consumer contacts the toll-free number for help. The pop-up windows and alarms have the effect of scaring reasonable consumers into believing that they must contact the number provided due to viruses, malware, or other infections on their computers. As a result, consumers are misled to believe that their computer is severely infected. This Court is unpersuaded by Defendants argument that the calls all took place on February 27, 2015 and therefore are not representative of the business. Not only are they representative of Defendants' most recent sales tactics, the calls are consistent with consumer affidavits and live testimony detailing transactions that took place on a range of dates.

B. Deceptive Sales Pitch

9. Once the consumer contacts E-Racer, they are subjected to the carefully-crafted deceptive sales pitch of E-Racer employees. When consumers ask who they are speaking with, the E-Racer employee often tells consumers that they are tech support, or a help desk, sometimes even that they are a help desk for Microsoft products. At this phase of the sales pitch, consumers are not told that they have reached E-Racer. Reasonable consumers are unaware that they have reached E-Racer, and that the alarm or pop-up window, or both, is a result of advertising for E-Racer meant to deceptively lure consumers to contact its call center.

10. Part of the deceptive sales pitch takes place once the E-Racer employee gains remote access to the consumer's computer in order to purportedly diagnose the problem that consumers are told is causing the pop-up window and alarms. E-Racer's remote access to consumer computers is integral to its scam because the employees open various windows and point out graphics on consumers' computers to scare consumers into believing there are problems with their computer. The consumer is then led through a "diagnostic" of their computer to point out computer issues that either do not exist or are grossly exaggerated.

11. This process is not a diagnostic test designed to identify the source of computer problems. Rather, E-Racer is responsible for the source of the pop-up advertisement, as it has contracted with a third party, Matomy USA, to display the pop-ups for the purpose of generating calls from unsuspecting consumers to E-Racer.

12. There are several misrepresentations that are made during the sales pitch, conducted by E-Racer employees. These misrepresentations range from false statements and exaggerations about what adware can do to a computer to the impact of the number of processes running on a computer to the computer's performance.

13. After the purported diagnostic, consumers are often told that they need immediate repairs to their computer. In many calls, the E-Racer employee tells the consumer that they need to bring their computer to a store that is several miles or hours away, which would inconvenience the consumer who is told that the repairs are absolutely necessary. Then, the E-Racer employee tells the consumer that it is possible to do the repairs remotely, which is meant to give the consumer relief that necessary repairs will not cause the consumer to be inconvenienced. After the consumer is convinced to purchase services and any other products recommended by the E-Racer employee, they are told to leave their computers running to allow E-Racer to complete the services remotely.

C. Individual Liability

14. James N. Veser ("Veser") was in fact was aware of E-Racer's acts and practices, and/or had the opportunity to be aware of and control them.

II. CONCLUSIONS OF LAW

15. 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.

16. 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).

17. 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).

18. 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." *Millenium Communications & Fulfillment, Inc. v. Office of the Attorney General*, 761 So. 2d 1256, 1260 (Fla. 3d DCA 2000). Therefore, **Plaintiff need only 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.*

19. 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.

20. 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." *KC Leisure v. Haber*, 972 So. 2d 1069, 1073 (Fla. 5th DCA 2008); *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 Defendant James N. Veser directed and controlled, and/or had the ability to control, the acts and practices of the corporate entities.

21. "[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. IAB Marketing Assoc.*, LP, 972 F. Supp. 2d 1307, 1313 (S.D. Fla. 2013).[1] In an equitable enforcement action, defendants are liable to the extent of their ill-gotten gains. *IAB 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*, 2011 WL 3566612, at *3 (M.D. Fla. July 15, 2011)).

22. Here, as in *IAB 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 is proper in scope and 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).

[1] 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.

III. DEFENDANTS' AFFIRMATIVE DEFENSES FAIL

23. Defendants raised numerous defenses that are not applicable to, and do not defeat, Plaintiff's entitlement to an injunction and asset freeze in this matter.

24. Specifically, Defendants maintain that they are not responsible for any deceptive advertisements because Defendants did not directly advertise to consumers, but instead paid a company, Matomy, for calls. However, 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).

25. Defendants also attempt to defeat Plaintiff's claims by asserting they provided (and continue to provide) valuable services to consumers. This is not a defense to claims under FDUTPA. In affirming the district court's injunction in *IAB Marketing Assoc.*, the Eleventh Circuit rejected the defendant's alternative defense that its products offered significant value to consumers by holding that "liability for deceptive sales practices does not require that the underlying product be worthless." *F.T.C. v. IAB Marketing Assoc.*, LP, 746 F.3d 1228. Rather, "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"). Deception can be made by innuendo in addition to outright false statements. It is the "net impression" of the representations that govern whether they are misleading. *See FTC v. Wilcox*, 926 F. Supp. 1091, 1099 (S.D. Fla. 1995); *FTC v. Peoples Credit First, LLC*, 2005 WL 3468588 (M.D. Fla. 2005).

26. Defendants finally seek to offer evidence of satisfied consumers. Such consumer testimony is not relevant to the conduct in violation of FDUTPA in this action, and thus does not negate Plaintiff's claims. *See FTC v. Amy Travel Service*, 875 F.2d 564, 572 (7th Cir. 1989) (affirming the District Court's exclusion of "satisfied" customers as irrelevant); *see also FTC v. Wilcox*, 926 F. Supp. 1091, 1099 (S.D. Fla. 1995). Because the issue before the Court on Plaintiff's Motion is whether there was deception in the representations made to secure a sale and thus taint the consumer's subsequent decisions, consumer testimony regarding their satisfaction of services is irrelevant. The Court disposed of this issue previously by granting Plaintiff's Motion in Limine to Exclude Irrelevant Testimony Regarding Consumer Satisfaction of Services on July 31, 2015.

IV. TEMPORARY INJUNCTION AND ASSET FREEZE

27. Based on application of the law, the testimony from Plaintiff's witnesses, including two consumers, one former employee, an expert witness with extensive experience in computer technical support, and Plaintiff's investigator, as well as documentary evidence before

the Court, Plaintiff has shown a substantial likelihood of success on the merits and a clear legal right to the temporary injunction and asset freeze.

28. Accordingly, Plaintiff's Motion for Temporary Injunctive Relief and Asset Freeze is **GRANTED**.

29. The Court hereby ENJOINS Defendants, their officers, employees, agents, representatives, or any other person or entity acting through or on their behalf, from the following until further notice of this Court:

a. Marketing, advertising, engaging in, rendering, or otherwise providing services to consumers relating to remote technical support, other than those services necessary to carry out contracts executed or services engaged prior to the date of the Order.

b. Marketing, advertising, promoting, distributing, offering for sale, or selling any goods or services in violation of Florida's Deceptive and Unfair Trade Practices Act, Chapter II, Section 501, Florida Statutes.

c. Charging, collecting or accepting any payments from consumers relating to remote tech support services.

d. Destroying, mutilating, concealing, altering or disposing of, in any manner, any information which has any connection to Defendants' operations, including books, records, papers, consumer files, call recordings, cash receipts, and personal or financial information contained therein, financial statements, computers, laptops, electronically stored or accessible information, documents correspondence, obligations or other property of Defendants herein until further Order of this Court.

30. Defendants shall refrain from disclosing, using, or benefitting from consumer information, including name, address, telephone number, email address, social security number,

other identifying information, or any data that enables access to a consumer's account (including a credit card, bank, or other financial account), of any person which any Defendant obtained through Defendant's business.

V. ASSET FREEZE

32. Within ten (10) days of the entry of this Order, Defendants shall deposit $500,000 into the Department of Legal Affairs Revolving Escrow Account to be held in escrow as part of the injunction to ensure the availability of funds for consumer restitution, subject to modification by this Court. Plaintiff is directed to designate that such funds deposited into such account be placed in an interest-bearing account. The amount allocated in this asset freeze is not determinative of the consumer restitution amount that may be awarded upon final dispensation of this matter and does not take into account penalties or attorney's fees and costs.

33. The Court determines that giving due regard for the public interest, no bond is required to be posted, pursuant to Florida Rule of Civil Procedure 1.610(b).

DONE and ORDERED in Palm Beach County, Florida this SIGNED & DATED day of JAN 13 2016, 2015.

CATHERINE M. BRUNSON
CIRCUIT JUDGE

Circuit Court Judge Catherine Brunson

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