UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. LATRESE & KEVIN ENTERPRISES INC., a Florida Corporation, also doing business as HARGRAVE & ASSOCIATES FINANCIAL SOLUTIONS, LATRESE HARGRAVE, also known as, Latrese V. Williams, individually and as an officer of Latrese & Kevin Enterprises Inc., and KEVIN HARGRAVE, SR., individually and as an officer of Latrese & Kevin Enterprises Inc. Defendants.	**Case No. 3:08-cv-01001-J-34JRK**

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Table of Contents

Table of Authorities

Cases

Secondary Sources

Plaintiff, the Federal Trade Commission (the "Commission" or "FTC"), respectfully submits Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion for Summary Judgment ("Plaintiff's Reply"). Plaintiff filed its Motion for Summary Judgment and Memorandum of Law ("Summary Judgment Motion, "Dkt. No. 78 and "Plaintiff's Brief," Dkt No. 79) on June 30, 2009. Defendants' Opposition (Dkt. No. 84, "Defendants' Opposition" or "Opposition) is perfunctory at best, and presents unsupported and sometimes frivolous contentions that are completely devoid of merit and does not show that a genuine issue of material fact remains for trial. Plaintiff advocates that this Court reject Defendants' Opposition for the reasons set forth below, and urges this Court to render a swift and favorable decision on Plaintiff's Motion for Summary Judgment.

I. PLAINTIFF'S BRIEF IS SUFFICIENTLY SUPPORTED AND CLEARLY ESTABLISHES ENTITLEMENT TO SUMMARY JUDGMENT

The FTC is entitled to summary judgment because Plaintiff's Brief is sufficiently supported and substantiated, and more than meets the burden of demonstrating no genuine issue of fact remains for trial. Defendants' contention that Plaintiff's Summary Judgment Motion fails because of the absence of a supporting affidavit is patently wrong. Fed. R. Civ. P. Rule 56 does not require that an affidavit be filed.

A. An Affidavit is not Required

Contrary to Defendants' contention, the language of Rule 56 makes clear that a movant is not required to file an affidavit. Rule 56(a) specifically states "[a] party claiming relief may move, **with or with supporting affidavits**, for summary judgment on all or part

of the claim." [emphasis added].[1]

Further, established case law makes clear that a movant is not required to file an affidavit to succeed on summary judgment. The U.S. Supreme Court in *Celotex Corp. v. Catrett* held that "[t]here is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials."[2]

Moreover, *Pastore v. Bell Tel. Co.*, 24 F. 3d 508 (3rd. Cir. 1994), the legal authority Defendants cite to support their contention is irrelevant to the issue at hand. In *Pastore,* the plaintiff-appellants sought appeal against the entry of summary judgment by arguing they had not had adequate time for discovery. Rule 56(f) cited by the appellants in *Pastore* requires an affidavit be filed to set forth why additional time is needed.[3] However, Rule 56(f) is inapplicable and irrelevant here because the issue of whether additional time is warranted to complete discovery in this case is mooted by the order entered by this Court on June 3, 2009, denying Defendants' Motion to Enlarge Discovery. (Dkt. No. 77). As such, an affidavit is not required in this case to prevail on summary judgment.

B. Plaintiff's Summary Judgment Motion and the Equitable Judgment Sought Is Properly Supported and Substantiated

The supporting evidence consists of materials filed to support entry of the TRO

---

[1] Fed. R. Civ. P. Rule 56(a).

[2] *Celotex Corp. v. Carett*, 477 U.S. 317, 323-325 (1986). *See also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 885 (1990) (regardless of whether or not a party uses affidavits to support its summary judgment motion, the motion should be granted if it meets the standard for entry pursuant to Fed. R. Civ. P. 56(c)).

[3] *Pastore v. Bell Tel. Co.*, 24 F.3d 508, 510 (3d Cir. 1994).

(including signed declarations based on personal knowledge and sworn under the penalty of perjury from consumer victims, two credit reporting agencies, the president of the Northeast Florida Better Business Bureau, and an FTC investigator) and additional materials filed with Plaintiff's Brief (including Defendants' signed admissions witnessed by their counsel and defendants sworn deposition testimony). All of this evidence is credible and admissible. Moreover, Plaintiff's discovery requests were thorough and no evidence that exonerates the Defendants' deceptive sales tactics was discovered.

Additionally, Plaintiff has provided a clear explanation of the standard of proof for finding liability and proving injury under Section 5 of the FTC Act, and has substantiated the $7,443,732 equitable judgment sought.[4] For liability under Section 5, the FTC need only provide representative proof of injury, unlike in a private action for fraud.

> "In an FTC Act Section 13(b) enforcement action in which the government seeks restitution to compensate thousands of individual victims of unlawful practices, in contrast to a private action for fraud, such representative proof of injury suffered is sufficient to justify the requested relief . . . Requiring proof of subjective reliance by each individual consumer would thwart effective prosecution of large consumer redress actions and frustrate the statutory goals of the section."[5]

Defendants argue that a judgment for $7,443,732 is not substantiated because Plaintiff has not shown that all sales of credit repair and advance fee credit cards resulted

---

[4] Dkt. No. 79 at pages 11-13, 29-31.

[5] *FTC v. Holiday Enters. Inc.,* 2008 U.S. Dist. LEXIS 35858, at *16-17 (N.D. Ga. Feb. 5 2008) (quoting *FTC v. Windward Mktg.,* 1997 U.S. Dist. LEXIS 17114, at *27 (N.D. Ga. Sept. 30, 1997)). *See also McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000); *FTC v. Freecom Commc'ns., Inc.,* 401 F.3d 1192, 1203 (10th Cir. 2005); *FTC v. U.S. Oil & Gas Corp.*, 1987 U.S. Dist. LEXIS 16137, at *68 (S.D. Fla. July 10, 1987).

from Defendants's deceptive ads. Defendants's argument fails because requesting and receiving advance payment for credit repair services and credit cards is a separate and distinct violation from running deceptive ads. Plaintiff has proven that Defendants routinely required up front payment before fully performing the promised credit repair services which is a *per se* violation of CROA.[6] Also, Plaintiff has proven that Defendants routinely required advance payment for the extension of credit when a customer had been guaranteed or told there was a high likelihood that they would receive credit, which violates the TSR.[7] As a result, even in the unlikely event this Court determines that Defendants' ads are not deceptive, the fact that Defendants required and received advance payment violates the law and constitutes consumer injury, thereby justifying the $7,443,732 equitable judgment sought.

Furthermore, the $7,443,732 equitable judgment Plaintiff seeks is fully substantiated by the Defendants' own admissions that cannot be rebutted.[8] Each Defendant expressly

---

[6] Section 404(b) of CROA, 15 U.S.C. § 1679(b).

[7] Section § 310.4(a)(4) of the TSR, 16 C.F.R. § 310.4(a)(4).

[8] *See* Dkt. No. 79, Ex. 68[H&A Admissions] #101, 102; Ex. 69 [LH Admissions] #101, 102; Ex. 70[KH Admissions] #102, 103. Plaintiff used corporate Defendant's federal tax returns because filed tax returns carry an indicia of accuracy since falsifying them is a federal offense. Thus, Plaintiff reasoned the tax returns presented a conservative, but more accurate accounting of the corporate Defendant's earnings than would extrapolating total gross revenue from the incomplete credit repair customer records Defendants provided. Additionally, because Defendants admitted to the accuracy and genuineness of these records and to afford Defendants some privacy, Plaintiff concluded that submitting these records with Plaintiff's Brief was unnecessary. However, in light of the Defendants' contentions regarding substantiation, Plaintiff now submits these records as Exhibits 77A and 77B, appended to Exhibit 77 (Supplemental Declaration of Michael S. Liggins, FTC Investigator).

Plaintiff would also like to note that if we had used the incomplete credit repair customer records, the judgment sought would have been over $11 million for the five-year period that the corporate Defendant has sold credit repair services. Over a two-yr period, Defendants enticed 18,582 credit repair clients, multiplying

admitted to the accuracy of the corporate Defendants' earnings for 2004 through June 30, 2008, and to the genuineness of federal tax returns and other financial records prepared by Defendants' certified public account.[9] On Schedule B of Form 11205 asks the filer to state the type of business activity and product or service from which the reported income was derived. On Defendants' returns, they reported that "credit repair" was the product or service from which their income was generated.[10] Moreover, Defendants' contention that Plaintiff's possession of this information is somehow illegal, is patently false and is nothing more than an attempt to create an issue where none exists. Defendants' financial records were provided to Plaintiff because this Court ordered them to do so. (Dkt. No. 18, TRO ¶ XIII). Defendants' attempt to retract and/or dispute their admissions is improper under Fed. R. Civ. 36 that govern admissions. In accordance with Rule 36, matters admitted, whether explicitly or by default, are conclusively established, for purposes of the pending action,[11] unless the court, on motion, permits the withdrawal or amendment of the admission.[12]

---

the 18,582 by $250 per person accounts for gross revenue of $4,645,500. (Exhibit 78, Declaration of Jodie Breece, Principal and employee of Lewis B. Freeman & Partners, the forensic accounting and consulting firm that assisted the Temporary Receiver). Further, extrapolating this number to cover the entire five-year period would yield over $11.6 million. (18,582/2= 9,291 credit repair customers per year; 9,291 x 5= 46,455 credit repair customers over the 5-year period multiplied by $250 per customer equals $11,613,750.).

[9] Dkt. No. 79, Ex. 68 [H&A Adm.] #101, 102; Ex. 69 [LH Adm.] # 101, 102; Ex. 70 [KH Adm.] # 102, 103.

[10] Exhibit 77B at 34, 45, and 64.

[11] Fed. R. Civ. P. 36(b); *see also Am. Auto. Ass'n v. AAA Legal Clinic, 930 F.2d 1117, 1120 (5th Cir. 1991)* (conclusive effect of Fed. R. Civ. P. 36 applies equally to those admissions made affirmatively and those established by default, even if matters admitted relate to material facts that defeat party's claim).

[12] *See* 8 J. Moore, Moore's Federal Practice ¶¶ 36.03 (3d ed. 1997).

Because such a ruling has not been made, this Court is bound by Defendants' admissions,[13] no further proof of the matter admitted is required, and the party who made the admission is not permitted to rebut it.[14] Consequently, the Defendants are bound by their admissions, and Plaintiff's Summary Judgment Motion is properly supported and substantiated.

II. DEFENDANTS HAVE FAILED TO DEMONSTRATE THAT A GENUINE ISSUE REMAINS FOR TRIAL

The burden to be borne by the nonmoving party on a summary judgment motion is clear. Defendants have not met that burden as set out in Rule 56(e) and well-settled case law, and have not demonstrated that a genuine issue remains for trial. Furthermore, contrary to Defendants' implication, they are not entitled to a jury trial.

A. Burden of the Nonmoving Party

Rule 56(e) provides that once the movant has met its burden, the burden shifts to the nonmoving party to demonstrate why entry of judgment is not proper, and states the standard of proof as follows:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth **specific facts** showing

---

[13] *Tillamook Country Smoker, Inc. v. Tillamook County Creamery Ass'n,* 465 F.3d 1102, 1112 (9th Cir. 2006) (court cannot ignore admissions even when presented with more credible evidence by party against whom admission operates).

[14] *Am. Auto. Ass'n v. AAA Legal Clinic,* 930 F.2d 1117, 1120 (5th Cir. 1991) (admissions not withdrawn nor amended may not be rebutted nor ignored simply because new, more credible evidence comes to light).

that there is a **genuine issue** for trial.[15] [emphasis added].

In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, the U. S. Supreme Court held that the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts."[16] A factual dispute is not genuine unless it requires a trial to resolve competing reasonable factual contentions.[17] Further, facts that blatantly contradict the record are not genuine.[18]

B. Insufficiency of Defendants' Opposition

Defendants have unsuccessfully attempted to create a genuine issue regarding the equitable judgment Plaintiff seeks. As discussed above, the judgment sought is based on the most reliable and accurate evidence available. Defendants' contention that the corporate Defendant may have had some other revenue stream is a red herring. Plaintiff conducted extensive discovery and no evidence that the corporate Defendant ever generated any revenue from any business other than its illegal credit repair and advance fee credit card business was uncovered. The Defendants have cited no evidence that shows they actually

---

[15] *See also Chanel, Inc. v. Italian Activeware, Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991) ("Once a moving party has sufficiently supported its motion for summary judgment, the non-moving party must come forward with significant, probative evidence demonstrating the existence of a triable issue of fact."); *Irby v. Bittick*, 44 F.3d 949, 953 (11th Cir. 1995).

[16] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Irby*, 44 F.3d at 953.

[17] *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 249-250 (1996) (factual dispute is genuine only if non-movant's evidence is substantial enough to require a trial.).

[18] *Scott v. Harris*, 550 U.S. 372 (2007) (incontrovertible evidence, such as videotape with unchallenged accuracy should be accepted by the court on summary judgment motion, if it so utterly discredits opposing party's version that no reasonable juror could fail to believe version advanced by moving party).

conducted any other type of business from which they generated income. Instead, they have submitted two documents Plaintiff used during Mr. Hargrave's deposition. During that testimony, he testified the documents were created before the company even opened for the purpose of enticing investors.[19] Additionally, Mr. Hargrave testified that the information contained in one of these documents was "exaggerated" and "bullshit."[20]

Under Section 5, the FTC need only demonstrate that the best evidence available was used to substantiated injury. Since this is exactly what Plaintiff has done, the burden shifts to the Defendants to rebut the judgment Plaintiff seeks.[21] Moreover, fraudsters generally do not keep accurate records of the proceeds of their illegal activity. Thus, any risk of uncertainty about the exact amount received should fall on the wrongdoer whose illegal conduct created the uncertainty.[22] Consequently, the burden now rests with the Defendants to demonstrate that the $7,443,732.00 judgment is not justified, and they have failed to meet this burden.

C. Defendants Have No Right to A Jury Trial

The Defendants have no right to a jury trial under any of the claims stated in the Complaint. Under the U.S. Constitution the right to a trial by jury is preserved where (1) a

---

[19] Dkt. No. 79, Ex. 71 Ex. 71, page 143 line 1 to page 149, line 18, regarding DepoEx. # 59, 60.

[20] Dkt. No. 79, Ex. 71 page143 line 1 to page 145, line 15.

[21] *FTC v. Global Mktg. Group, Inc.*, 594 F. Supp. 2d 1281, 1290 (11th Cir. 2008, M.D. Fla.) (The Commission must show that its calculations reasonably approximate the amount of customers' net losses, and then the burden shifts to the defendant to show that those figures were inaccurate.)

[22] *SEC v. K W. Brown and Co.,* 555 F. Supp. 2d 1275, 1312 (llth Cir. 2007, S.D. Fla.); *see also FTC v. Gem Merch. Co.,* 87 F. 3d 466, 470 (11th Cir. 1996) .

statutory right to a trial by jury was specifically created or (2) in suits at common law. Neither of the statutory provisions under which the FTC has brought this action provides for a jury trial. The relief the Commission seeks is all equitable in nature, and Plaintiff's request embodies a classic equitable cause of action historically tried by a court. The right to a trial by jury applies only to cases that are fundamentally *legal* in nature, as distinguished from proceedings like this one where *equitable* rights alone are at issue and equitable remedies administered.[23] Moreover, the mere fact that the FTC's Complaint seeks monetary relief to redress the injury Defendants have caused does not alter the equitable nature of this action. Monetary awards do not automatically constitute "legal" as opposed to "equitable" relief for purposes of the Seventh Amendment.[24] Rescission and restitution have traditionally been recognized as equitable remedies and numerous courts have held that requests for restitutionary remedies under Sections 13(b) and 19 are equitable in nature.[25] Therefore, no right to a jury trial exists on that claim for relief. [26]

III. CONCLUSION

Plaintiff is entitled to summary judgment as a matter of law. Defendants' Opposition

---

[23] *See, e.g., Tull v. U.S.*, 481 U.S. 412, 417 (1987); *Granfinanciera v. Nordberg*, 492 U.S. 33, 41 (1989); *Nat'l Satellite Sports, Inc., v. Prashad*, 76 F. Supp. 2d 1359, 1361 (S.D. Fla., 1999). There is no right to a jury trial on equitable issues and claims. 8 J. Moore, Moore's Federal Practice ¶¶ 38.10 [3][a] (3d ed. 1997).

[24] *See, e.g., Curtis v. Loethe*, 415 U.S. 189, 196 (1974); *Mitchell v. DeMario Jewlry, Inc.*, 361 U.S. 288 (1960).

[25] *FTC v. U.S. Oil & Gas Corp.*, 748 F. 2d 1431, 1432-35 (11th Cir. 1984). *See also* 8 J. Moore, Moore's Federal Practice ¶ 38.31 [8], [9] (3d ed. 1997).

[26] *See, e.g.*, 8 J. Moore, Moore's Federal Practice ¶ 38.31[5][a] (3d ed. 1997).

does not demonstrate that a genuine issue of material fact remains. Accordingly, Plaintiff urges this Court to reject Defendant' Opposition and render a swift and favorable decision on Plaintiff's Motion for Summary Judgment and hold the Defendants jointly and severally liable for the equitable judgment of $7,443,732.

Dated: September 1, 2009

Respectfully submitted,

s/ Jessica D. Gray
JESSICA D. GRAY, Trial Counsel
Special Florida Bar Number A5500840
FEDERAL TRADE COMMISSION
Southeast Regional Office
225 Peachtree Street, N.E., Suite 1500
Atlanta, Georgia 30303
Office: 404-656-1350 (Gray)
Facsimile: 404-656-1379
Email: jgray@ftc.gov

CERTIFICATE OF SERVICE

I, Jessica D. Gray, hereby certify that on September 1, 2009, Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion for Summary Judgment and Exhibits 77 and 78 were electronically filed with the Clerk of Court using CM/ECF and were mailed first-class to the following:

Donald L. Dempsey, Esq.
4321 Roosevelt Boulevard
Jacksonville, FL 32210

Christopher A. Tomlinson, Esq.
GrayRobinson, P. A.
Suite 2200
201 North Franklin Street
P.O. Box 3324
Tampa, Florida 33601

Executed on this 1st day of September 2009, at Atlanta, Georgia.

s/Jessica D. Gray
Jessica D. Gray
Attorney for Plaintiff