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CENTRAL DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

UNIVERSAL PREMIUM SERVICES,
INC., *et al.*,

Defendants.

NO. CV 06-0849 SJO (OPx)

**ORDER GRANTING IN PART FTC'S MOTION
FOR SUMMARY JUDGMENT AGAINST
BRIAN MACGREGOR AND MEMBERSHIP
SERVICES DIRECT, INC. (A.K.A.
CONTINUITY PARTNERS, INC.)**

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The Federal Trade Commission ("FTC") has brought this suit against a number of corporations and individuals alleging telemarketing fraud. Several of the Defendants have reached settlements with the FTC. This Motion for Summary Judgment has been brought against one individual, Defendant Brian K. MacGregor ("MacGregor"), who has not settled. MacGregor is the owner, president, and CEO of Defendant Membership Services Direct, Inc., a.k.a. Continuity Partners, Inc. ("MSD"), the other Defendant against whom this Motion has been brought. (P&A at 6.)

For the reasons stated below, the Court GRANTS IN PART the FTC's Motion.

I. FACTUAL BACKGROUND

Capsulized, the FTC alleges that MacGregor operated a series of shell companies which engaged in telemarketing fraud. The companies would contract with call centers and "back office"

1 service providers, allegedly owned by front men but controlled by MacGregor, using mail drops
2 and fake addresses in at least three states. (P&A at 1.) These telemarketing operations would
3 allegedly cold-call consumers and offer gift certificates and other free items. *Id.* The consumers
4 would tell the telemarketers their bank account information, which was allegedly then used to
5 make unauthorized withdrawals, to the benefit of MacGregor and to the detriment of the
6 consumers. *Id.* About 40% of the money that MacGregor's companies took was returned through
7 chargebacks and refunds due to consumer complaints. *Id.*

8 II. LEGAL STANDARD

9 A. Motion for Summary Judgment

10 The standard for granting a motion for summary judgment is set out in Rule 56(c) of the
11 Federal Rules of Civil Procedure. It says that summary judgment will be granted if it is shown that
12 there is no genuine issue as to any material fact, after considering the pleadings and any
13 depositions, answers to interrogatories, admissions, or affidavits. This standard has been
14 explained by the Supreme Court in several cases. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242
15 (1986), *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*,
16 477 U.S. 317 (1986).

17 Whether a fact is "material" depends on the substantive law at issue in the case. If, under
18 the governing substantive law, a fact is irrelevant or unnecessary to determining the outcome of
19 the suit, summary judgment can be granted even if there is a genuine dispute about the fact.
20 *Anderson*, 477 U.S. at 248.

21 A "genuine issue" of material fact means that there is sufficient evidence in favor of the
22 non-moving party to allow a jury to return a verdict in its favor. *Id.* If the non-moving party fails
23 to muster enough evidence to allow a jury to return a verdict in its favor, summary judgment will
24 be granted against the non-moving party. *Id.* at 249. It is not enough for the non-moving party
25 to produce a mere "scintilla" of evidence. *Id.* at 252. It is also not enough for the non-moving
26 party to show that there is some "metaphysical doubt as to the material facts." *Matsushita*, 475
27 U.S. at 586. However, any inferences from the underlying facts must be viewed in light most
28 favorable to the non-moving party. *Id.* at 587.

1 The burden is on the *non-moving party* to designate specific facts showing a genuine issue
2 for trial. *Celotex*, 477 U.S. at 322. It is not the job of the district court to "scour the record in
3 search of a genuine issue of triable fact." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996).
4 Neither is it the job of the moving party to prove the absence of a genuine issue of fact, even with
5 respect to an issue on which the non-moving party bears the burden of proof. *Celotex*, 477 U.S.
6 at 325. The moving party can win summary judgment simply by pointing out to the district court
7 that there is an absence of evidence to support the non-moving party's case. *Id.* One of the
8 principal purposes of the summary judgment rule is "to isolate and dispose of factually
9 unsupported claims or defenses." *Id.* at 323-24.

10 B. Telemarketing Fraud

11 Congress in 1994 gave the FTC expanded power to pursue telemarketing fraud. 15 U.S.C.
12 § 6101 et seq. Pursuant to this power, the FTC enacted regulations of telemarketing, the
13 Telemarketing Sales Rule ("TSR"). 16 C.F.R. § 310 et seq. Violations of the TSR constitute unfair
14 or deceptive acts or practices in or affecting commerce, in violation of 15 U.S.C. § 45(a). See 15
15 U.S.C. §§ 57a(d)(3), 6102(c).

16 The provisions of the TSR allegedly apply to the Defendants because they are allegedly
17 "sellers" or "telemarketers" engaged in "telemarketing" as those terms are defined in the TSR.

18 The TSR defines "seller" as "any person who, in connection with a telemarketing
19 transaction, provides, offers to provide, or arranges for others to provide goods or services to the
20 customer in exchange for consideration." 16 C.F.R. § 310.2(z). "Telemarketer" is defined as "any
21 person who, in connection with telemarketing, initiates or receives telephone calls to or from a
22 customer." 16 C.F.R. § 310.2(t). The word "person" comprises both individuals and corporations.
23 16 C.F.R. § 310.2(v). "Telemarketing" is defined as "a plan, program, or campaign which is
24 conducted to induce the purchase of goods or services by use of one or more telephones and
25 which involves more than one interstate telephone call," but not including catalog sales. 16 C.F.R.
26 § 310.2(u). A "customer" is defined as "any person who is or may be required to pay for goods or
27 services offered through telemarketing." 16 C.F.R. § 310.2(i).

1 Counts one, two, and three of the FTC's First Amended Complaint ("FAC") are based on
2 15 U.S.C. § 45 or regulations thereunder, which prohibit unfair and deceptive acts and practices
3 in or affecting commerce. An act or practice is deceptive under section 45(a) if it involves a
4 material representation, omission, or practice that is likely to mislead consumers to their detriment
5 who are acting reasonably in the situation. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir.
6 1994). The FTC need not prove reliance by each purchaser allegedly misled. *FTC v. Figgie Int'l,*
7 *Inc.*, 994 F.2d 595, 606 (9th Cir. 1993). Misrepresentations are material under section 45(a) if they
8 involve facts that a reasonable person would consider important in choosing a course of action.
9 *Id.* If consumers would have chosen differently but for the deception, the misrepresentation was
10 material. *FTC v. Southwest Sunsites, Inc.*, 105 F.T.C. 7, 149 (1985), *aff'd*, 785 F.2d 1431 (5th Cir.
11 1986). Misrepresentations about essential characteristics of the transaction violate section 45(a).
12 *Goodman v. FTC*, 244 F.2d 584, 599-604 (9th Cir. 1957).

13 Significant aspects of the FTC's burden of proof are presumed under the law of several
14 court cases. Although these court cases are not binding precedent, the Defendants have not
15 argued that the law should not be adopted. Therefore, this Court adopts the law of presumed
16 materiality, reasonable reliance, and scienter. Express claims, or deliberately made implied
17 claims, used to induce a purchase are presumed to be material. *FTC v. SlimAmerica, Inc.*, 77 F.
18 Supp. 2d 1263, 1272 (S.D. Fla. 1999); *FTC v. Thompson Med. Co.*, 104 F.T.C. 648, 788-89
19 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986). Consumer reliance on express claims is presumed
20 reasonable. *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000). The FTC
21 need not prove that Defendants' misrepresentations were made with an intent to defraud or
22 deceive, or were made in bad faith. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020,
23 1029 (7th Cir. 1988).

24 When customers purchase goods due to dishonest practices in violation of 15 U.S.C. § 45,
25 the customers are entitled to a full refund. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606 (9th Cir.
26 1993). It is appropriate for a district court to order that damages be set at an amount no lower
27 than the dishonest merchant's profits and no higher than the dishonest merchant's revenue. *Id.*
28 at 608.

1 Counts four and five of the FAC are based on the TSR. Section 310.4(a) of the TSR
2 prohibits telemarketers and sellers from engaging in abusive telemarketing acts and practices,
3 which are defined to include: causing billing information to be submitted for payment without the
4 express informed consent of the consumer and using threats, intimidation, or the use of profane
5 or obscene language. 16 C.F.R. §§ 310.4(a)(6), (a)(1).

6 Count six of the FAC is based on the "Do Not Call List" parts of the TSR. Section 310.4(b)
7 of the TSR prohibits telemarketers from initiating, and sellers from causing a telemarketer to
8 initiate, an outbound telephone call to a person when that person previously has stated that he
9 or she does not wish to receive an outbound telephone call made by or on behalf of the seller
10 whose goods or services are being offered. 16 C.F.R. § 310.4(b)(1)(iii)(A).

11 Count seven of the FAC is based on the TSR. Section 310.3(b) of the TSR prohibits any
12 person from providing substantial assistance or support to any seller or telemarketer when that
13 person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act
14 or practice that violates 16 C.F.R. §§ 310.3(a), (c), or (d) or § 310.4. An individual can be held
15 liable for monetary or injunctive relief based on corporate defendants' violations of the FTC Act
16 or regulations issued thereunder if (1) the individual participated directly in the acts or practices
17 or the individual had authority to control them and (2) the individual had actual knowledge of the
18 material misrepresentations, was recklessly indifferent to the truth or falsity of a misrepresentation,
19 or had an awareness of a high probability of fraud along with an intentional avoidance of the truth.
20 *FTC v. Publishing Clearing House*, 104 F.3d 1168, 1170 (9th Cir. 1996).

21 III. UNDISPUTED FACTS

22 This Motion is unusual among summary judgment motions in that it is highly fact-intensive.
23 The factual conclusions necessary to support this Motion are based upon a profusion of pieces
24 of evidence, rather than asking a legal question based upon a simple factual predicate, such as,
25 "What is the meaning of this contract provision?" or "Was this specific injury actionable under this
26 tort law?" The FTC has catalogued and supplied much of this evidence, organizing the evidence
27 by relevant factual conclusion. The Court has reviewed the statement of undisputed facts
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1 submitted by the FTC and the supporting evidence. The evidence supports the FTC's factual
2 conclusions.

3 MacGregor and MSD have not offered alternative analyses of the supporting evidence to
4 reach different factual conclusions. With regard to the non-damages evidence, MacGregor and
5 MSD have objected to the undisputed facts, but only based on irrelevant facts or based on self-
6 serving, conclusory affidavits. "A conclusory, self-serving affidavit, lacking detailed facts and any
7 supporting evidence, is insufficient to create a genuine issue of material fact." *Id.* at 1171.

8 While MacGregor and MSD object that the FTC's case is built on compilations of individual
9 documents (Opp'n at 8-9), the Ninth Circuit has endorsed the use of these compilations in FTC
10 cases. The compilations can be treated as summaries permitted under Federal Rule of Evidence
11 1006 and an exception to hearsay under Federal Rule of Evidence 803(24). *FTC v. Figgie Int'l,*
12 *Inc.*, 994 F.2d 595, 608 (9th Cir. 1993). The alternative of bringing into court each of the hundreds
13 of private citizens who complained about MacGregor and MSD's alleged telemarketing fraud, so
14 that they may swear under oath and under cross examination that they were defrauded of a few
15 hundred dollars, is not reasonable. "It should not be necessary to scale the highest mountains of
16 Tibet to obtain a deposition for use in a \$500 damage claim." *Id.* at 609.

17 The FTC's evidence of damages is based entirely upon the "Report of Temporary Receiver
18 for the Period of February 22, 2006 through March 3, 2006," which was filed March 7, 2006 ("First
19 Report"). This report is quite thorough and details the sales for each of the products offered by
20 each of MacGregor's companies. In addition, the report details the chargebacks, customer-
21 initiated refunds, and company-generated refunds for each of the products and companies. One
22 caveat is that the First Report was written by the Receiver in about two weeks (the Receiver
23 entered the premises on February 22, 2006 and filed the First Report on March 7, 2006) and the
24 First Report prominently states, "This is the first Report to the Court on the progress of the
25 Temporary Receivership. It does not constitute an audit of financial condition and is intended only
26 to provide information for use by the Court in assessing the progress of the Receivership." (First
27 Report at 3.) Additionally, MacGregor and MSD have raised specific doubts about the accuracy
28 of the calculations, alleging that the damages figures do not take into account the 30-40% decline

1 rates from customers' banks, do not take into account late returns, and do not take into account
2 refund methods not reflected in normal refund or chargeback figures. (Opp'n at 15.) Thus, the
3 First Report may not be competent evidence to prove damages. In short, MacGregor and MSD
4 appear to be correct in that the First Report is, by its own terms, not competent evidence to prove
5 damages.

6 The Court has adopted the Statement of Undisputed Facts submitted by the FTC, with the
7 exception of the damages section. The Statement of Undisputed Facts was filed
8 February 9, 2007.

9 IV. ANALYSIS OF VIOLATIONS

10 The provisions of the TSR apply to the Defendants because they are "sellers" or
11 "telemarketers" engaged in "telemarketing" as those terms are defined in the TSR, and the people
12 who were called by the Defendants or on behalf of the Defendants are "customers" as the term
13 is defined in the TSR. (Order of Mar. 17, 2006 at 7.)

14 Count one of the FAC is based on 15 U.S.C. § 45, which prohibits unfair and deceptive
15 acts and practices in or affecting commerce. The Court finds: Continuity Partners made material
16 misrepresentations to customers; Premier Benefits made material misrepresentations to
17 customers; Consumer Reward Network made material misrepresentations to customers; Star
18 Communications made material misrepresentations to customers; All Star Access made material
19 misrepresentations to customers; and Prime Time Ventures made material misrepresentations
20 to customers. (Statement of Undisputed Facts ¶¶ 1-6.)

21 Count two of the FAC is based on 16 C.F.R. § 310.3(a)(2)(iv), which makes it unlawful to
22 misrepresent, in the sale of goods or services, any material aspect of the nature or terms of the
23 seller's refund, cancellation, exchange, or repurchase policies. The Court finds: Continuity
24 Partners misrepresented a material aspect of the nature or terms of its refund and cancellation
25 policies; and Premier Benefits, Consumer Reward Network, Star Communications, All Star
26 Access, or Prime Time Ventures misrepresented a material aspect of the nature or terms of its
27 refund and cancellation policies. (Statement of Undisputed Facts ¶¶ 7-8.)

1 Count three of the FAC is based on 16 C.F.R. § 310.3(a)(2)(vii), which makes it unlawful
2 to misrepresent a seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any
3 person or government entity. The Court finds: Continuity Partners misrepresented its affiliation
4 with or endorsement or sponsorship by a person or government entity; and Premier Benefits,
5 Consumer Reward Network, Star Communications, All Star Access, or Prime Time Ventures
6 misrepresented its affiliation with or endorsement or sponsorship by a person or government
7 entity. (Statement of Undisputed Facts ¶¶ 9-10.)

8 Count four of the FAC is based on 16 C.F.R. § 310.4(a)(1), which prohibits telemarketers
9 and sellers from engaging in abusive telemarketing acts and practices, including threats,
10 intimidation, or the use of profane or obscene language. The Court finds: Continuity Partners
11 engaged in threats, intimidation, or the use of profane or obscene language in connection with the
12 telemarketing of goods or services; Premier Benefits engaged in threats, intimidation, or the use
13 of profane or obscene language in connection with the telemarketing of goods or services; and
14 Star Communications engaged in threats, intimidation, or the use of profane or obscene language
15 in connection with the telemarketing of goods or services. (Statement of Undisputed Facts ¶¶ 13-
16 14.)

17 Count five of the FAC is based on 16 C.F.R. § 310.4(a)(6), which prohibits telemarketers
18 and sellers from engaging in abusive telemarketing acts and practices, including causing billing
19 information to be submitted for payment without the express informed consent of the customer
20 or donor. The Court finds: Continuity Partners caused billing information to be submitted, directly
21 or indirectly, without the express informed consent of the consumer; and Premier Benefits,
22 Consumer Reward Network, Star Communications, All Star Access, or Prime Time Ventures
23 caused billing information to be submitted, directly or indirectly, without the express informed
24 consent of the consumer. (Statement of Undisputed Facts ¶¶ 11-12.)

25 Count six of the FAC is based on 16 C.F.R. § 310.4(b), which prohibits telemarketers from
26 initiating any outbound telephone call to a person when that person has previously stated that he
27 or she does not wish to receive an outbound telephone call made by or on behalf of the seller
28 whose goods or services are being offered. Continuity Partners initiated or caused a telemarketer

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1 to initiate an outbound telemarketing call to a person when that person previously stated that he
2 or she does not wish to receive an outbound telephone call made by or on behalf of the seller
3 whose goods or services are being offered; and Premier Benefits, Consumer Reward Network,
4 or Star Communications initiated or caused a telemarketer to initiate an outbound telemarketing
5 call to a person when that person previously stated that he or she does not wish to receive an
6 outbound telephone call made by or on behalf of the seller whose goods or services are being
7 offered. (Statement of Undisputed Facts ¶¶ 16-17.)

8 Count seven of the FAC is based on 16 C.F.R. § 310.3(b), which prohibits any person from
9 providing substantial assistance or support to any telemarketer or seller when that person knows
10 or consciously avoids knowing that the telemarketer or seller is engaged in any act or practice
11 which violates the TSR. Brian MacGregor provided substantial assistance or support to a
12 telemarketer or seller when knowingly or consciously avoiding knowing that the telemarketer or
13 seller was engaged in an act or practice that violates section 310.3(a), (c), or (d) or section 310.4
14 of the TSR. (Statement of Undisputed Facts ¶ 18.)

15 V. ANALYSIS OF RELIEF

16 Monetary and injunctive relief are appropriate in this case, against MSD and MacGregor.

17 Injunctive relief is appropriate against MSD in light of its culpability, described above.

18 Injunctive relief is appropriate against Brian MacGregor in light of his involvement with the
19 culpable corporate defendants. Brian MacGregor had authority to control Continuity Partners and
20 its telemarketing campaign. Brian MacGregor also had authority to control Premier Benefits,
21 Consumer Reward Network, Star Communications, All Star Access, and Prime Time Ventures,
22 and their telemarketing campaigns. Brian MacGregor directly participated in the telemarketing
23 campaigns of Continuity Partners, Premier Benefits, Consumer Reward Network, Star
24 Communications, All Star Access, and Prime Time Ventures. (Statement of Undisputed Facts ¶¶
25 19-21.) Additionally, given the extent of Brian MacGregor's direct participation and control over
26 minutia of the telemarketing operations, and given the vast numbers of customer complaints
27 alleging fraud, Brian MacGregor was at least recklessly indifferent to the truth or falsity of a
28 misrepresentation.

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1 It is appropriate that Brian MacGregor be enjoined from violating the FTC Act and the TSR.

2 As detailed in the Stahl declaration, Brian MacGregor ignored voluminous customer
3 complaints and created numerous business entities to disguise his operations. Brian MacGregor
4 also used front men to hide his ownership and control over the companies. Brian MacGregor has
5 also demonstrated a willingness to continue flouting the law even after assuring state attorney
6 generals that he would stop. Therefore, it is appropriate that Brian MacGregor be permanently
7 banned from engaging in telemarketing and be permanently banned from engaging in the
8 marketing of program memberships. The FTC's proposed order is appropriate.

9 It is appropriate to impose monetary relief against MSD in light of the culpability described
10 above.

11 It is appropriate to impose monetary relief against Brian MacGregor in light of his
12 involvement with the culpable corporate defendants. Brian MacGregor had, or should have had,
13 knowledge or awareness of the deceptive or abusive business practices of Continuity Partners.
14 Brian MacGregor had, or should have had, knowledge or awareness of the deceptive or abusive
15 business practices of Premier Benefits, Consumer Reward Network, Star Communications, All
16 Star Access, and Prime Time Ventures. (Statement of Undisputed Facts ¶¶ 22-23.) Additionally,
17 given the extent of Brian MacGregor's direct participation and control over minutia of the
18 telemarketing operations, and given the vast numbers of customer complaints alleging fraud,
19 Brian MacGregor was recklessly indifferent to the truth or falsity of a misrepresentation.

20 Regarding the amount of the monetary relief, this Court has doubts about the competency
21 of the evidence offered by the FTC. At this time, monetary damages will not be awarded, and the
22 matter is reserved for trial.

23 VI. MONETARY RELIEF NOT TO BE DISCHARGED IN BANKRUPTCY

24 Because the proposed orders lodged by the FTC state that the monetary relief will be paid
25 to the FTC, the ordered relief will be a debt to the FTC if not paid. As the holder of the debt, the
26 FTC will have the sole power to discharge the debt. MacGregor and MSD will not be able to
27 discharge the debt in bankruptcy.

1 Although this Court is not comfortable fixing an amount of monetary liability at this time, the
2 Court makes a finding to preclude MacGregor or MSD from discharging the monetary liability in
3 bankruptcy. The bankruptcy code states that debts are not dischargeable in bankruptcy if they
4 were obtained "for willful and malicious injury by the debtor to another entity or to the property of
5 another entity." 11 U.S.C. § 523(a)(6). The Ninth Circuit has held that "the willful injury
6 requirement of § 523(a)(6) is met when it is shown . . . that the debtor had a subjective motive to
7 inflict the injury." *In re Jercich*, 238 F.3d 1202, 1208 (9th Cir. 2001). This Court finds that
8 MacGregor's role in orchestrating the telemarketing fraud and MSD's role as an instrument to
9 perform the fraud amount suffice to find a subjective intent to defraud customers, and thus injure
10 the property of customers.

11 Because this Court has made this finding, MacGregor and MSD will not be able to escape
12 the debt by re-litigating the dischargeability issue in bankruptcy court. When the issues implicated
13 by 11 U.S.C. § 523(6) have been previously litigated against the debtor, a bankruptcy court must
14 accord a previous court's judgment preclusive effect with regard to a 11 U.S.C. § 523(6) claim.
15 *In re Diamond*, 285 F.3d 822, 828 (9th Cir. 2002).

16 VII. CONCLUSION

17 The Court finds that MacGregor and MSD are liable on all counts.

18 The Court will enter the injunctions lodged by the FTC against MacGregor and MSD.

19 Damages are to be determined by a trial.

20 IT IS SO ORDERED.

21
22 Dated this 21st day of February, 2007.

23
24 

25 S. JAMES OTERO
26 UNITED STATES DISTRICT JUDGE
27
28