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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMERICAN TAX RELIEF LLC, d/b/a American Tax Relief, *et al.*,

Defendants, and

YOUNG SOON PARK, a/k/a Young S. Son, *et al.*,

Relief Defendants.

Case No. CV 11-6397 DSF (Ex)

PLAINTIFF FTC'S REPLY IN SUPPORT OF THE FTC'S MOTION FOR SUMMARY JUDGEMENT ON ALL COUNTS AGAINST ALL DEFENDANTS AND RELIEF DEFENDANTS; OR IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF CLAIMS

Date: August 6, 2012
Time: 1:30 p.m.
Ctrm: 840 (Roybal Federal Bldg.)

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I. INTRODUCTION

The Federal Trade Commission ("FTC") has met its burden in proving that summary judgment should be granted against all Defendants and Relief Defendants ("Defendants") on all Counts of the FTC's Complaint. Even when the evidence is construed in the light most favorable to Defendants, there simply are no disputed issues of material fact for trial. Indeed, because all of Defendants' fact witnesses have invoked the Fifth Amendment in refusing to testify, there is not a single factual dispute on which the Court would be required to make a credibility determination at a trial. As a result, summary judgment is warranted.

The FTC is entitled to summary judgment on Count I because Defendants misrepresented that American Tax Relief ("ATR") already had helped thousands of people significantly reduce their tax debts. The undisputed facts show that within the first three months of ATR's existence, and continuing for the next decade, Defendants made that claim on postcards, in television and radio ads, and on ATR's website. The claim clearly was material – it induced consumers to contact ATR by conveying that the company had a proven track record of reducing tax debts. But the claim was false when Defendants began making it in January 2000, and it remains false today. Even after double- and triple-counting and exaggerating what can be gleaned from the often oblique entries in their unauthenticated and unreliable Call-In Database, Defendants still can claim to have reduced the tax debts of *at most* 1,187 of their approximately 20,000 customers – in other words, approximately 6% of their customers, leaving at least 94% with no tax relief whatsoever. The FTC's evidence on this point, which relies not on the database, but on actual letters from the IRS and state agencies granting tax relief, shows that the actual number of successes is far lower. Using either the FTC's or Defendants' numbers, however, it is clear that the "thousands" claim is false.

There also is no disputed issue of material fact on Count II. Defendants' ads directed consumers to call ATR for a "free consultation" to determine whether they

"qualified" for tax relief. Defendants' commission-based sales representatives told consumers who called in response to those ads that they did, in fact, "qualify" for tax relief that would significantly reduce their tax debts, typically an Offer in Compromise ("OIC") or Penalty Abatement ("PA"). Only upon being told they "qualified" did consumers agree to pay ATR thousands of dollars for its services. Yet, at the time Defendants' sales representatives told individual consumers that they "qualified," those representatives had no idea whether the consumer qualified or not. Indeed, even a tax practitioner with years of experience cannot possibly determine in a short telephone call whether a particular consumer "qualifies" for these forms of tax relief. And the undisputed evidence shows that the vast majority of Defendants' customers did not actually qualify for, or obtain, the significant reductions they were promised.

Finally, on Count III, it is undisputed that Defendants sometimes charged consumers without their consent. Although it is impossible to quantify the number of such instances in a case like this, the practice clearly was widespread. The FTC is therefore entitled to summary judgment on Count III and to injunctive relief prohibiting further unauthorized charges.

II. BACKGROUND AND MATERIAL FACTS

A. Defendants' Deceptive Advertising Claims

The uncontroverted facts demonstrate that ATR's ads were widely disseminated and included: 1) claims that ATR had already reduced the tax debts of thousands; 2) testimonials of supposed customers who described dramatic reductions in their tax debts; and 3) claims that ATR could help people significantly reduce their tax debt. (RF 151, 158-59, 161, 164, 174, 181, 191, 200-01, 215, 220-23, 233-35, 237, 244, 246, 252-55.) Many of Defendants' ads encouraged consumers to call ATR for a "free consultation" to see if they "qualified" for the advertised savings. (RF 158, 233-35.)

Having profited for many years from the false claim that ATR already had significantly reduced the tax debts of thousands, Defendants now attempt to downplay its significance and frequency. But the undisputed evidence establishes that the claim was featured in ATR's ads from at least January 2000 through September 2010. (RF 161, 166, 174, 178, 181, 188, 191, 199-201, 205, 215, 220-24, 252, 254-55.) In fact, between January 2000 and June 2004, Defendants' *only* form of advertising, other than their website, was through postcard mailings, which represented that ATR "has helped thousands settle their taxes for only Pennies-on-the-Dollar." (RF 161.) ATR's national radio and television ads similarly claimed that ATR has helped thousands "settle their tax debt for a fraction" or "eliminate"/"save" up to 85% of their back taxes, and ATR's website also touted its thousands of successes.[1] (RF 191, 215, 221, 252, 254-55.) Follow-up letters sent to consumers who did not initially hire ATR reiterated that it had "successfully helped thousands . . . settle their tax debts." (RF 362-63.) It also is undisputed that these widely disseminated ads left consumers with the overall net impression that ATR could significantly reduce their tax debts. (RF 264-65.)

B. Defendants' Sales Practices

Defendants admit that when consumers called ATR, its sales representatives reiterated the "thousands" claim during sales calls to convince consumers to hire ATR. (RF 303-05.) Defendants also concede that consumers were routinely told that they "qualified" for tax relief that would significantly reduce their tax debt.[2]

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[1] To attack the frequency of this claim, Defendants display a chart that supposedly includes all of ATR's ads. This chart is not only wrong (RF 464), but fails to include the postcards mailed out from 2000 through mid-2005 (RF 161), the website (RF 252, 254-55), or follow-up letters sent to consumers who did not initially agree to hire ATR (RF 362-63).

[2] Defendants further admit that sales representatives did not inform consumers of ATR's five-day 50% refund policy, and that by the time it was

(continued...)

(RF 300.) In defending the propriety of these statements, Defendants claim that their sales representatives "never intentionally lied to any caller." (Opp. at 6:3-4.) This does not matter, however, because the FTC need not show intent.

The evidence clearly demonstrates that consumers were deceived and that Defendants' business model was set up to do just that. There is no dispute that commission-based sales representatives, including some with criminal records, were charged with conducting "interviews" with prospective clients to determine whether they "qualified" for tax relief. (RF 277-81.) The sales representatives' training was limited to listening to other sales representatives' calls, reading from scripts, and then conducting their own calls. Regardless of what they "intended," these sales representatives simply were not qualified to make any determination about consumers' *potential* qualifications, let alone consumers' *actual* qualifications for tax relief. The undisputed evidence demonstrates that even an experienced tax practitioner cannot possibly make a determination about a consumers' qualifications for tax relief in a short telephone call. (RF 113.)

Defendants further claim that the determinations made by their untrained sales representatives were reached after entering information into a Call-In Database "based on IRS Guidelines." This argument is a red herring. First, there is no evidence that the database is "based on IRS Guidelines," and in fact, the evidence shows otherwise. (RF 113-14, 116-22, 128, 284-91, 529.) Second, Defendants can only make this argument for OICs – it is undisputed that the database had no ability to assess consumers' *possible* qualifications for any other form of tax relief. (RF 483, 529.) Third, there is no dispute that the information obtained from consumers during sales calls often was incomplete and inaccurate.

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[2](...continued)
revealed, the period was about to or already had expired. (RF 339-40, 373-75.)

(RF 292, 505.) Indeed, Defendants' sales representatives told consumers that estimates were sufficient. (RF 287.)

Defendants also cannot dispute that nearly every consumer who called ATR was told that they qualified for either an OIC or a PA. (RF 294.) Significantly, Defendants' own script proves that was the prevailing practice. (RF 321.) Yet even the limited number of consumers who were simply told that they qualified for tax relief, internally referred to as "Catch All," were told that their tax debts would be significantly reduced. (RF 295-96, 342, 356.)

III. ARGUMENT

To succeed on Counts I and II of its Complaint, the FTC need only prove "a pattern or practice of deceptive behavior." *FTC v. Nat'l Bus. Consultants, Inc.*, 781 F. Supp. 1136, 1141-42 (E.D. La. 1991) (citing multiple cases). The FTC is not required to show that all consumers were necessarily deceived. *FTC v. Stefanchik*, 559 F.3d 924, (9th Cir. 2009). Nor is the FTC required to show intent. *See, e.g., Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989). Based on these standards, the FTC clearly has met its burden, and Defendants have failed to establish that any triable issue exists. Indeed, Defendants have not identified a single issue on which the Court would be required to make a credibility determination at trial.[3]

A. The FTC is Entitled to Summary Judgment on Count I

As described above, Defendants regularly misrepresented in their ads and sales calls that the company already has significantly reduced the tax debts of thousands of consumers. In attempting to refute the FTC's evidence on this Count,

[3] The only defense witness who has not invoked the Fifth Amendment in refusing to testify is defense counsel's own paralegal. Defendants also rely on the declarations of two former employees who have since invoked their Fifth Amendment right in refusing to answer any questions. By separate motion, the FTC has moved to strike these declarations. (Dkt. No. 435.)

Defendants offer essentially two arguments. First, they suggest the claim is not false because ATR "obtained successful tax relief results" for thousands of clients. Second, they submit that even if the claim was false, it was neither material nor reasonably relied upon by the consumers. Both arguments are baseless.

As an initial matter, Defendants' only evidence of their "successful tax relief results" is in the form of summary spreadsheets "verified" by defense counsel's paralegal. (RF 471-77.) This "evidence" should be disregarded because the summaries are unreliable and inadmissible under Fed. R. Civ. P. 1006. (*See* FTC's Objections to Defendants' Evidence at General Objection 2.)

However, even if the Court were to consider this evidence, the "results" described in the spreadsheets still do not controvert the FTC's facts or put Count One (or Two) in dispute. As described in the FTC's Opening Memorandum, Defendants claim to have *significantly reduced* the tax debts of thousands of people. (Dkt. No. 325 at 15:13-16:13.) Of the 4,049 "successful tax relief results" identified by Defendants' paralegal, only 1,187 customers supposedly received tax reductions, and even that number is inflated and unreliable. (RF 471; Opp. at 6:15-17.) With respect to the remaining "results," Defendants have not shown any tax savings. Those include: 511 PAs, which Defendants admit were in amounts less than the fees customers paid to ATR, and were in some cases not the relief promised or were obtained by the customers themselves (RF 407-09, 473); 1,488 Installment Agreements, which do not reduce taxes and which ATR's own ads concede "get you nowhere" (RF 145-47, 231, 243, 473); 285 instances of "Tax Debt Eliminated" and 185 instances of "Statute of Limitations," neither of which Defendants have connected to any service provided by ATR[4] (RF 475-76); and 367 determinations of Uncollectable Status and 22 Lien Releases, neither of which

[4] Tax debts can be "eliminated" by paying the taxes or filing tax returns or amended returns showing no liability. (RF 476.) Taxes that expire pursuant to the statute of limitations do so on their own. (RF 109, 475.)

reduce tax debts. (RF 148-50, 474, 477). Thus, Defendants' own numbers fail to demonstrate that they significantly reduced the tax debts of thousands of ATR's customers, or that the limited reductions achieved were the result of ATR's services.

Defendants' second argument, that their "thousands" claim was not material, nor reasonable for consumers to have relied upon, likewise fails. Defendants do not dispute that the success claims were expressly made in ATR ads, during sales calls, and follow-up letters. (RF 161, 174, 181, 191, 200-01, 215, 221-24, 252, 254-55, 303-05, 362-63.) Express claims are presumed to be material. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095-96 (9th Cir. 1994). Similarly, it is presumptively reasonable for consumers to rely upon an express claim. *FTC v. Data Med. Capital, Inc.*, SA CV 99-1266 AHS (EEx), 2010 WL 1049977, at *27 (C.D. Cal. Jan. 15, 2010) (citing *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528 (S.D.N.Y 2000)). Defendants have offered nothing to rebut these presumptions. Furthermore, they do not dispute that consumers were induced to call ATR based on their advertising claims. (RF 267.) Indeed, the claim clearly was effective in soliciting clients, given that Defendants made the claim consistently for a decade. (RF 161, 166, 178, 188, 199, 205, 220, 252, 303.)

Because courts consider the overall "net impression" conveyed by a company's representations, Defendants also are wrong in suggesting that only representations made after the purported "qualification" interview could reasonably be relied upon by consumers. *See FTC v. Gill*, 265 F.3d 944, 956 (9th Cir. 2001); *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006).[5] Defendants' advertising and sales calls went hand-in-hand in creating a deceptive overall net

[5] Indeed, the court in one recent FTC case held that a defendants' representations in ads and sales calls combined to create the deceptive "net impression." *FTC v. Wash. Data Res.*, – F. Supp. 2d –, 09-cv-2309-T-23TBM, 2012 WL 1415323, at *22 (M.D. Fla. Apr. 23, 2012).

impression. The ads conveyed that ATR could significantly reduce consumers' tax debts because they already had done so for thousands of people. (RF 264-65.) In the sales calls, Defendants' sales representatives often repeated the "thousands" claim and then told individual consumers that they did, in fact, "qualify" for the represented tax relief. (RF 294-95, 297, 303-05.) Both of these express claims were deceptive and material to consumers' decisions to pay ATR thousands of dollars for its services.

B. The FTC is Entitled to Summary Judgment on Count II

An abundance of undisputed evidence establishes that Defendants falsely claimed that individual consumers "qualified" for tax relief that would significantly reduce their tax debts. Defendants, however, ignore this evidence and instead argue that, because consumers were only told they "qualified" for certain tax relief after going through an interview with the sales representative, Defendants are somehow protected from liability. Defendants also wrongly assert that their sales representatives were justified in making the representations to consumers because they only did so after purportedly entering the consumers' financial information into software that was "based on IRS guidelines." (Opp. at 16:1-7.)

First, there simply is no basis in the record for Defendants' claim that their software was adequate to determine whether a consumer qualified for tax relief per IRS guidelines. ATR's own tax resolution employees admit that the information collected during ATR's sales calls was insufficient to determine whether a consumer qualified for tax relief, and they did not rely on that information in assessing consumers' qualifications. (RF 387.) After reviewing the undercover calls, moreover, the FTC's expert similarly determined that, based on the limited information gathered, none of those callers qualified for the tax relief they had been promised by ATR. (RF 400.)

But beyond failing to collect sufficient information before representing that consumers "qualified," the undisputed facts show that ATR *simply did not achieve*

the promised results for the vast majority of its clients, as described above. Former ATR tax resolution employees admit that most of the ATR customers whose files they received did not qualify for the promised OICs or PAs, and could not have their tax debts reduced. (RF 392-95.) Consumer declarations and complaints also establish that ATR told consumers they "qualified" for significant reductions to their tax debts which, after hiring ATR, the consumers never received. (RF 341-42, 401.) And Defendants' own "successful tax relief results" reflect that the company only achieved at most 1,187 OICs and 511 PAs, the forms of tax relief for which consumers were routinely told they qualified.[6] (RF 471, 473.)

As they have throughout this litigation, Defendants again attempt to blame their own failings on their victims, claiming that consumers sometimes provided inaccurate or incomplete information during the sales call, or failed to follow up with necessary documentation. This argument essentially proves the FTC's point about the fallacy in ATR's business model – it simply is not possible, based on a short telephone interview in which consumers are told that estimates of their financial condition are sufficient and no documents are reviewed, to determine whether a consumer "qualifies" for an OIC, PA, or some other form of tax relief that would significantly reduce the consumer's tax debts. The FTC's expert has so stated in undisputed testimony. (RF 104-06, 113.) Yet that is precisely what Defendants purported to do. To convince financially strapped consumers to part with thousands of dollars apiece, Defendants' sales representatives told consumers that they "qualified" either for an OIC or PA, based only on the scant, estimated information provided to an untrained sales representative during a brief sales call.

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[6] All of the other forms of tax relief Defendants rely upon are not what the consumers had been promised, and Defendants have not demonstrated that these forms of relief reduced consumers' tax debts. *FTC v. Figgie Intern., Inc.*, 994 F.2d 595, 604 (9th Cir. 1993) (fraud is in the misrepresentation of the product sold, not in the value of what the consumer ultimately received).

Because ATR and its sales representatives had no idea at the time of making that representation whether the consumer qualified or not, Defendants clearly obtained consumers money through deceptive means. Having obtained consumers' money in this way, it cannot be a defense to assert, as Defendants do, that the consumers themselves are somehow at fault for providing inaccurate or incomplete information.

C. The FTC is Entitled to Summary Judgment on Count III

In response to the FTC's evidence that they charged consumers without authorization, Defendants do not attempt to dispute the testimony of individual consumers or the fact that ATR had a pattern of complaints about unauthorized charges. Instead, Defendants claim that consumers provided their consent in unrecorded calls and that ATR had a practice of obtaining written authorization for credit card charges. Neither of these responses addresses the FTC's undisputed evidence that: (1) ATR sales representatives sometimes pressured consumers who had not agreed to purchase ATR's services to provide account information and then assessed charges to their accounts (RF 410-12); and (2) ATR sometimes assessed additional charges to the accounts of consumers who had only authorized an initial charge. (RF 420-21.) That evidence stands unrebutted, and thus, the FTC is entitled to summary judgment on Count III. Because it is impossible to quantify the number of instances in which ATR charged consumers without their authorization, the FTC only seeks injunctive relief on this count.

D. Defendant Joo Park is Individually Liable

Defendants do not dispute Defendant Hahn's liability, but instead focus their efforts on challenging the individual liability of Joo Park. The undisputed evidence establishes, however, that Park had both the authority to control ATR and the requisite knowledge of, or reckless indifference to, ATR's deceptive practices to be held individually liable under Section 5 of the FTC Act, 15 U.S.C. § 45.

Defendants concede that Park was the owner of ATR (indeed, they claim ATR was simply a d/b/a of Park), visited ATR's offices, signed checks and contracts on behalf of ATR, and controlled ATR's bank accounts. (RF 54-59, 64.) Defendants further concede that Park was named in lawsuits challenging ATR's deceptive practices, and that she signed settlement agreements and checks satisfying judgments in connection with those lawsuits. (RF 60-62.) Defendants also do not dispute that: (1) Park was aware of Hahn's criminal record, but still permitted him to run ATR's operations; and (2) she knew since January 2009 that ATR was being criminally investigated and that the criminal authorities executed warrants on ATR in April 2010. (RF 63, 67-69.) In addition, Park invoked the Fifth Amendment in refusing to respond to discovery, thereby entitling the FTC to adverse inferences against her. The FTC's undisputed evidence and available adverse inferences are more than sufficient to demonstrate Park's liability.

E. The Scope of the Proposed Injunctive Relief is Appropriate

An order banning Hahn and Park from engaging or participating in telemarketing activities, and from marketing debt relief products and services, is warranted in this case. Defendants' deception has persisted for over a decade, despite a multitude of complaints and lawsuits, warnings from the Better Business Bureau, a lawsuit filed by New York City Department of Consumer Affairs, and even the execution of a criminal search warrant. (RF 422-25, 435-55.) Furthermore, after the Preliminary Injunction was entered here, Defendants attempted to covertly open another tax relief business. (RF 49, 76.) Hahn also has a long history of defrauding consumers, and Park knew this when she handed Hahn the keys to ATR. (RF 39-43, 63, 67.) To prevent future violations of the FTC Act, a strong injunction is necessary. Contrary to Defendants' claims, courts in this district have banned FTC defendants from an array of practices as final relief in FTC cases. *See* FTC's Opening Memorandum at 22:20-26. (Dkt. No. 325.)

F. The Requested Equitable Monetary Relief is Appropriate

The numbers used by the FTC to calculate consumers' losses stand largely unrebutted. Rather than contest those numbers, Defendants broadly argue that certain groups of consumers should not be included in the redress calculation. For instance, they first point to the "numerous forms of valuable relief" that ATR purportedly obtained for its clients and argue that these consumers are not entitled to restitution. But ATR gets no credit for such relief if it was not the type the consumer was promised and paid for. *Figgie*, 994 F.2d at 604. Similarly, the success rates of other tax practitioners is meaningless; unlike ATR, there is no indication that those practitioners assured clients before even reviewing their financial records that they "qualified" for particular forms of tax relief. Finally, the fact that there were outstanding client files at the time the FTC sued Defendants does not matter. The Receiver took over the business and attempted to obtain whatever tax relief was available to customers where possible.

IV. CONCLUSION

The undisputed facts show that Defendants have violated each Count of the Complaint, and that Defendants and Relief Defendants are liable for both injunctive and monetary relief pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). Accordingly, summary judgment should be entered on all Counts of the FTC's Complaint. To the extent the Court determines any issue remains to be tried, the FTC requests partial summary adjudication.

Dated: July 16, 2012

Respectfully Submitted,

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