UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FEDERAL TRADE COMMISSION,	)	
Plaintiff,	)	
v.	)	**Civ. No. 8:07-1279-JSM-TGW**
BRYON WOLF, ROY ELIASSON, and MEMBERSHIP SERVICES, LLC,	)	**Dispositive Motion**
	)	**FILED UNDER SEAL**
Contempt Defendants.	)	

PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION FOR AN ORDER TO SHOW CAUSE WHY BRYON WOLF, ROY ELIASSON, AND MEMBERSHIP SERVICES, LLC, SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING THIS COURT'S PERMANENT INJUNCTION

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Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), respectfully moves this Court to order defendants Bryon Wolf ("Wolf") and Roy Eliasson ("Eliasson"), and their firm, Membership Services, LLC ("MS LLC") (collectively, "contempt defendants" or "defendants"), to show cause why they should not be held in civil contempt for violating the Court's December 30, 2008 Order for Permanent Injunction ("Permanent Injunction" or "Order"). The defendants have repeatedly violated this Court's Order by deceptively soliciting consumers and taking money from their bank accounts without consent.

I. INTRODUCTION

The FTC originally filed this case to stop Wolf, Eliasson, and their cohorts from running an unlawful telemarketing scheme. The defendants settled the case by agreeing to pay over $11 million in consumer redress and promising not to misrepresent material facts, debit consumers without consent, or perform other unlawful acts. Within months of the Court's Order, however, the defendants hatched a new scheme to defraud consumers.

In this scheme, the defendants target recent loan applicants with misleading phone and Internet solicitations, conveying the false impression that they offer a cash advance, loan, or general line of credit. The defendants do not offer cash loans or a general line of credit. Instead, they debit consumers for membership in a continuity program. When consumers realize the defendants have debited them, the vast majority leave the program, often quickly cancelling the memberships and seeking refunds. Very few consumers ever use the program. Many complain that the defendants misled them and debited them without consent.

The defendants have repeatedly violated this Court's Order by (1) misrepresenting their continuity program as a cash advance, loan, or general line of credit; (2) failing to

clearly and promptly disclose in telemarketing calls that they are marketing a program; (3) failing to clearly and conspicuously disclose all material terms of their program before asking consumers to reveal banking information or consent to be debited; (4) failing to get consumers' express, informed consent before debiting them; and (5) misrepresenting that consumers consented to be debited. Through their contemptuous conduct, the defendants have netted over $9 million. The FTC respectfully asks this Court to order Wolf, Eliasson, and MS LLC to show cause why they should not be held in civil contempt.

II. FACTS

A. The Underlying Case

On July 23, 2007, the FTC sued Wolf, Eliasson, and others, charging them with violating Section 5 of the FTC Act, 15 U.S.C. § 45, and the Telemarketing Sales Rule ("TSR"), 16 C.F.R. pt. 310. Goldstein Decl., PX10 ¶ 5; PX10A. *Inter alia*, the FTC charged that the defendants tricked consumers into revealing their bank account numbers by misrepresenting that they were affiliated with consumers' banks. *Id*. The FTC further charged that the defendants failed to adequately disclose the material terms of their offers, debited consumers without their consent, failed to promptly disclose the services promoted in telemarketing calls in violation of the TSR, and committed other violations. *Id*. On July 23, 2007, the Court granted the FTC a Temporary Restraining Order ("TRO"). PX10 ¶ 6.

The Court referred the FTC's motion for a preliminary injunction to U.S. Magistrate Judge Wilson. PX10 ¶ 6. In his Report, Judge Wilson found "overwhelming evidence that . . . the telemarketing business engaged in illegal and deceptive practices." *Id.* ¶ 7; PX10B at 1. This Court later adopted Judge Wilson's Report "in all respects." PX10 ¶ 8; PX10C.

On December 30, 2008, the Court entered the stipulated Permanent Injunction. This Order included a judgment of $11,254,334.89. PX10 ¶ 9. The Court ordered defendants Wolf and Eliasson, and their firms: (1) not to misrepresent, expressly or by implication, any material fact in promoting any product or service; (2) to clearly and conspicuously disclose all fees and material terms, conditions, and restrictions applicable to their offers; (3) to obtain consumers' express, informed consent before debiting them; (4) to comply with the TSR; and (5) not to misrepresent that a consumer agreed to buy a product or service. Perm. Inj., PX1 at 7 ¶ I to 14 ¶ IV. On December 30, 2008, the defendants acknowledged receiving the Order. PX10 ¶ 10; PX10D. Shortly thereafter, they began violating it.

B. The Contempt Defendants' Scheme

Since 2009, defendants Wolf and Eliasson have perpetrated a scheme that deceives consumers seeking loans and debits them without their consent. Wolf and Eliasson have run this scheme through a Florida firm they control, MS LLC, which has offered a continuity program under the names "Monster Rewards" and "Mongo" or "Money on the Go" (the "program").[1] Acting in concert, the contempt defendants mislead recent loan applicants to believe their application has been approved and then debit them for the program instead.

1. Defendants Wolf and Eliasson Control MS LLC.

Wolf and Eliasson, MS LLC's sole officers, direct the promotion and sale of the program. Since 2009, Wolf has served as MS LLC's President/CEO, directing its marketing efforts and website design, while Eliasson has served as MS LLC's Vice-President,

[1] The defendants changed the name of their program from "Monster Rewards" to "Money on the Go" in 2010 after Monster Worldwide, Inc., the online job placement firm, reported receiving "numerous complaints from consumers who noted unauthorized MasterCard charges of $49.00" generated by MS LLC, and complained that it was "being blamed for [MS LLC's] unauthorized credit card charges." PX10 ¶ 114; PX10LL at 1.

overseeing its "customer service," merchant processing, and information technology. PX10 ¶ 11, PX10J at 2. Wolf and Eliasson hold 61% and 24% ownership interests, respectively, in MS LLC's owner, Member Rewards, LLC. PX10 ¶ 14. Both Wolf and Eliasson review MS LLC's promotions before they are released to the public. PX10J at 2.

2. The Defendants Deceptively Promote a Continuity Program to Loan Applicants.

The defendants target what they call the "low demographic" — consumers who have just applied online for a cash advance or loan. PX10 ¶ 54. The defendants buy applicants' information from third parties. *Id.* ¶¶ 54, 69. Then, in real time, while consumers wait for a response to their online loan applications, the defendants call the applicants and/or re-direct their web browsers to websites hosting the defendants' offer. *Id.* ¶¶ 68-70, 85. Thereafter, the defendants misrepresent to these consumers, expressly or by implication, that they offer a cash advance, loan, or general line of credit.

a. The Defendants Claim to "Approve" or "Accept" Consumers' Pre-Existing Loan Applications.

Over the phone and the Internet, the defendants tell consumers that their recent loan applications have been approved. *Id.* ¶¶ 68-97. For example, the defendants' telemarketers have told consumers, "[w]e received your accepted loan application and . . . you've been approved for a $2,500 line of credit," or "Mongo was able to accept your loan application, and they were able to approve you for a $2,500 line of credit." PX9L at 3:11-13; PX9K at 3:13-15; PX10GG at 1, 3. Their telemarketers have given consumers "approval codes," directed them to the defendants' websites, and told them to type those codes into the sites. *Id.* When consumers input their "approval codes," the websites display personal information

that consumers typed into their "recent cash advance application." PX10FF, PX10 ¶ 75. The defendants' telemarketers ask consumers to use the websites to "verify" and submit their personal information. PX9K at 4:25-5:9; PX9L at 3:10-15; PX10GG at 1-5.

Similarly, the defendants' websites have greeted consumers awaiting a response to their online loan applications with, "**Congratulations! You have been approved**," followed by the phrases **"$2,500**" and "**Dollar**" in large, bold print. These phrases often appear near images of gold coins, dollar bills, or a bag piled high with dollars. PX10 ¶¶ 68-84; PX10Z; PX10BB. Under headlines like "**ACCOUNT STATUS: APPROVED**," the defendants' sites have asked consumers to "verify" their personal information as noted above, "re-enter" or input other data, including their bank account numbers, and click a button titled, "**Access Account**." PX10 ¶¶ 75-76; PX10Z. The defendants' sites have included "GetMy2500.com," "Fast2500.com," and "MongoATM.com." PX10 ¶ 83. Consumers have widely interpreted the defendants' promotion as approving their cash loan applications. Better Business Bureau Decl., PX7 ¶¶ 7(b)-7(e); PX7A; PX9J at 3:8-25; PX10 ¶¶ 23(a)-(h); PX10K *passim*.

b. The Defendants Fail to Prominently Disclose that They Are Marketing a Program with Material Restrictions.

While the defendants deceptively claim to "approve" consumers' loan applications, in truth and fact, they do not provide a general line of credit or make cash loans. PX10 ¶¶ 17, 34. Rather, they sell a continuity program with material restrictions. As part of this program, they offer a $2,500 credit usable solely at their "rewards mall" website. PX10 ¶¶ 32, 34.[2]

[2] To use this restricted credit, members must make an immediate 25% down payment on every purchase, pay all shipping fees and taxes upfront, and then make minimum monthly payments of 15% or $50 of their outstanding balance, whichever is greater. PX10 ¶ 34. The credit line cannot be used to pay program membership fees, down payments, shipping fees, taxes, or monthly minimum payments. *Id.*

The defendants do not conspicuously disclose that they are marketing a program, or prominently disclose its material limitations. For example, their telemarketers have failed to disclose that they are hawking a program, and that the defendants do not offer cash loans or a general line of credit. PX10 ¶¶ 92-94; PX9K; PX9L. Similarly, the defendants' websites avoid clear disclosures. Instead, they often couch inconspicuous references to the program or its fees and material terms in fine or un-bolded print. PX10Z; PX10BB; PX10 ¶¶ 71-81. Their sites fail to conspicuously display the program's fees; the fees appear in fine print, or not at all. PX10Z; PX10BB. Material terms such as the down payment requirement for the defendants' restricted credit offer are relegated to fine print at the bottom of their sites. *Id.* Their websites also fail to clearly specify that the program does not provide cash loans or a general line of credit. *E.g.*, PX10Z, PX10 ¶ 78.[3] Instead, the defendants refer generally to a "shopping credit" and "rewards mall," in un-bolded print smaller than the bolded "**$2,500**." *Id.*[4] The defendants' sites require consumers to click a box to confirm that they are over 18 years of age and have read the sites' fine print, where the program's existence, fees, and terms are mentioned. *E.g.*, PX10Z.[5] However, their sites do not even display the program's full material terms unless consumers click on tiny, hyperlinked text. PX10Z; PX10 ¶ 76.

[3] Towards the bottom left-hand side of the cited website, a cryptic statement appears: "Shopping Credit is exclusive for 75% of purchase price at site." PX10Z. This brief statement obliquely refers to two separate restrictions on the shopping credit: a 25% down payment required for purchases at the defendants' mall, and the fact that the credit is usable solely at the defendants' mall.

[4] For example, near the large, bold phrase, "**$2,500**," the phrase "Shopping Credit" appears in smaller, non-bold print, and the words "at our online rewards mall" appear below in even smaller print. PX10Z.

[5] By clicking this box, the consumer supposedly confirms all of the following fine print stipulations, in order: that they are above 18 years of age; that they assent to a website "Privacy Policy"; that they assent to vaguely-referenced "Terms and Conditions" (a hyperlink that, if clicked, actually reveals the "Member Agreement" for the defendants' program); that they agree with a fine print summary of "offer details" providing for enrollment into the program with its fees; and that they agree to receive emails related to "fulfillment of these services."

Hence, many consumers have reported that they did not see or understand the terms and fees of the defendants' program. *E.g.*, PX7A; Burton Decl., PX9 ¶ 7; PX10K *passim*.

c. The Defendants Have Debited Consumers Who Declined or Did Not Accept their Offer.

Additionally, the defendants have debited consumers who declined or did not accept their offer. Jackson Decl., PX2 ¶¶ 2-3; Oliver Decl., PX4 ¶¶ 2-3; McCoy Decl., PX6 ¶¶ 2-5; PX7 ¶ 7(f); PX9 ¶ 6(a). For example, a consumer attests that he was looking for a loan online and typed his personal information into a form on a payday loan website, but did not agree to the terms of the defendants' program or agree to a debit. Still, MS LLC debited his account for $99.95. Campagna Decl., PX5 ¶¶ 3-5. This sharp practice is confirmed by the experience of an FTC Investigator, who saw an offer for the defendants' program after typing bank account numbers into a payday loan site. The offer stated: "**CONGRATULATIONS! You're Pre Approved!**" PX8 ¶¶ 3-20. However, the offer's terms appeared in a thin, grey window in which only three lines of small print were visible at once. Only by scrolling down 11 times could the Investigator read all of the stated terms, including the restriction that the advertised $2,500 credit was usable solely at a website belonging to the defendants. *Id.* The Investigator declined the offer by selecting "no" from a menu of options. Nonetheless, MS LLC debited $49.95 from the bank account that he used, without his consent and contrary to his express instruction not to debit the account. *Id*. ¶¶ 23-25; PX8H; PX8J.

d. After Enrolling Consumers, the Defendants Seek to Debit Them, Amassing Millions Even Though Most of Their Attempted Debits Fail for Insufficient Funds.

After deceptively enrolling consumers into their program, the defendants try to keep consumers on the hook by directing webpages, emails, and print materials to them, citing the

features of the program as well as its fee schedule. PX10 ¶¶ 98-100. Typically within 24 hours of enrollment, however, the defendants begin debiting consumers for fees — often, a $99.95 activation fee, and a monthly $29.95 fee thereafter until consumers either cancel the program or stop payment. PX10 ¶ 33. As described below, many consumers have not had enough money in their bank accounts to pay the defendants' fees; after all, they sought cash advances or loans, not a continuity program with a $99.95 activation fee.

From June 2009 to mid-June 2012, the time period for which data is available to the FTC, over 68% of MS LLC's attempted debits failed. Sandler Decl., PX12 ¶¶ 18-19. This high volume of failed debits (481,924 in total) was due to several factors. Most frequently, MS LLC debited consumers who did not have enough money to pay its program activation fee. Over 60% of MS LLC's failed debits (291,876 in total) failed because consumers did not have sufficient funds on deposit to pay the defendants' fees. *Id.* ¶ 19. Consumers have incurred overdraft fees due to such "NSF" debits. PX2 ¶ 5; PX7 ¶¶ 7(c)-(e). Nearly 50,000 other debits failed because MS LLC tried to debit consumer accounts that were closed, and over 24,000 debits were returned with the return code, "Customer advises not authorized." PX12 ¶ 20-21.[6] These statistics demonstrate that MS LLC has widely debited consumers without first obtaining their consent.

Nonetheless, the defendants have amassed millions from their scheme. As of mid-June 2012, MS LLC had attempted to debit a total of $42,183,326 from consumers' bank accounts, and had achieved net revenues of $9,693,910. PX12 ¶ 24.

[6] MS LLC's high unauthorized transaction rate, among other factors, led First Bank of Delaware to terminate the authority of "Monster Rewards" and "Mongocard" to process remotely-created checks through the bank in 2011. PX10 ¶¶ 115-20; PX10OO.

e. Many Consumers Have Complained of the Defendants' Deception, Rapidly Cancelling and Demanding Refunds.

Consumers have widely complained that the defendants misrepresented their program and debited them without their consent, complaining to the Better Business Bureau ("BBB"), the FTC, MS LLC, and others. *E.g.*, PX7 ¶¶ 7(a-g) (quotes); PX7A; PX9 ¶¶ 6(a-g) (quotes); PX9A-PX9J (transcripts of selected phone complaints); PX10 ¶¶ 23(a-l) (quotes); PX10K (selected email complaints). The BBB and the FTC have received voluminous complaints of unauthorized debits by MS LLC. PX7 ¶ 5; PX9 ¶ 13. The volume of serious complaints against the firm, and its failure to address the causes of the complaints, among other factors, led the BBB in 2011 to give the firm an "F" grade, its lowest possible rating. PX7 ¶¶ 13-14.

Consumer complaints starkly illustrate how the defendants have misrepresented their offer to the public. As noted earlier, many consumers seeking loans have interpreted the defendants' promotion as the approval of their recent loan application, only to be debited for a program they did not want. PX10K *passim*; PX10 ¶¶ 23(a-e); PX7 ¶ 7; *see* PX7 ¶ 7(c):

> For [C]hristmas I found this website to apply for a payday loan. They said my funds were available[,] all I needed to do was to fill out my banking information. As soon as I clicked submit it says my membership is now active and I will be charged 99 dollars for my membership. . . . I was not asked to loan them money! Now I have overdraft fees in my acc[ount] when all I wanted to do was have a [C]hristmas for my kids!

MS LLC also has debited consumers who declined or did not accept its offer. *See supra* p.7.

The defendants have received a large volume of complaints for years. A former MS LLC representative attests that when she worked for the firm in 2010, consumers constantly called to complain that MS LLC deceptively promoted the program or debited them without permission. Puckett Decl., PX11 ¶ 7. MS LLC has received many such calls and emailed

complaints. *Id*. ¶¶ 5-7; PX10 ¶ 23; PX10K. Despite these complaints, the defendants have persisted with their deceptive scheme, prompting further complaints by financial institutions such as Bank of America, Wells Fargo, and others. PX10 ¶¶ 115-27; PX10PP; PX10QQ.[7]

After being enrolled and/or debited, consumers leave the program in droves, with many cancelling the same day or week they were enrolled. PX12 ¶¶ 7(d), 25-33. Indeed, the defendants' records show many consumers have promptly cancelled their memberships after learning of them. As of mid-June 2012, approximately 46% of the consumers MS LLC tried to debit contacted the firm directly to cancel the program. PX12 ¶¶ 25-27. Over three years, the median interval between the firm's attempted debits and consumers' cancellations was only two days. *Id.* ¶¶ 30-31.[8]

Many consumers also seek refunds, PX12 ¶¶ 22-23, but the defendants try to keep their gains by giving consumers the "run-around." Consumers have reported calling MS LLC multiple times before reaching a representative, PX9A at 3:17-20, PX9B at 4:6-10, PX10 ¶¶ 23(k-l), and the firm's representatives use aggressive tactics to keep consumers enrolled. These tactics have included putting callers on lengthy holds, repeatedly insisting consumers agreed to join the program, and forcing consumers to repeat cancellation requests multiple times. PX10 ¶¶ 23(i-l), 105; PX9C at 6; PX10L. Despite claiming a "no questions asked" refund policy, PX10M at 7, the defendants require consumers to "show proof" of their

[7] Bank of America complained in July 2012 that "[s]ince June 1, 2012 over 250 Bank of America accounts have been debited in the amount of $99.95 and for $29.95 . . . . Our customers advise us that these transactions were not authorized. These transactions occur daily." PX10QQ (emphasis in original). In May 2012, Wells Fargo reported it had "received complaints/claims from a substantial number of clients. Claims during the last 60 days exceed 450." PX10PP; *see also* PX10RR (reporting August 2012 complaint by federal credit union).

[8] Of the 122,822 consumers whom MS LLC successfully debited, more than 92% contacted the firm to cancel their memberships or left the program by not making a subsequent membership payment. PX12 ¶ 28. Over 70% of the consumers enrolled in MS LLC's program made just one payment. *Id*.

debits (insisting on a bank letter, for consumers requesting refunds within 10 days of enrollment) and to call back 10 days after enrollment to renew refund requests not backed by a bank letter. PX10 ¶ 108. MS LLC representatives often fail to tell cancelling consumers that no refund will issue without an express request, and have misrepresented the refund policy to falsely deny some consumers' requests as untimely. PX10 ¶¶ 105-10.

A sizable percentage of debited consumers have persevered through the defendants' "run-around" to obtain refunds. As of mid-June 2012, the defendants' refund rate was over 22%. PX12 ¶ 22. This rate dwarfs the rate at which consumers used the credit offered in the defendants' program: More than 41 times as many consumers sought and obtained refunds than used the defendants' credit to buy items from their online mall. *See id.* ¶¶ 22, 35. These refunds, combined with the defendants' vast volume of failed debits, yield an extraordinarily high total return rate of 77%.[9] *Id.* ¶ 24. The defendants' high volumes of complaints, rapid cancellations, refund demands, failed debits, unauthorized debits, and total returns all confirm that they have pervasively debited consumers without authorization.

f. Very Few Consumers Have Used the Defendants' Program.

Finally, one of the strongest indicia that the defendants have misrepresented their program, and that consumers do not knowingly agree to buy it, is that only a tiny percentage of eligible consumers have used the features of the program they supposedly agreed to buy.

The defendants' program offered three principal features for at least three years: (1) a restricted $2,500 credit, usable solely at the defendants' online "rewards mall"; (2) a prepaid

[9] MS LLC's total return rate is computed by adding over $30 million in failed debits to $2.2 million in refunds, and comparing that total, approximately $32.5 million, to its net program sales of approximately $9.7 million. PX12 ¶ 24.

debit card with "rewards points"; and (3) access to coupons for discounts with third-party merchants. PX10 ¶ 32. Very few consumers have used these features.

First, very few consumers have purchased merchandise from MS LLC's online mall using the offered credit. This credit is a core feature of the defendants' program. As noted earlier, the defendants have touted this credit while downplaying, omitting, or burying the limitation that the credit is valid solely at their mall. *See supra* pp. 4-6. From June 2009 to mid-June 2012, the defendants enrolled 417,457 consumers, successfully debiting 122,822 of them. PX12 ¶¶ 34-35. These 122,822 successfully debited consumers could buy items from the defendants' mall. Yet only 686 of these consumers — less than 0.56% of those eligible — ever made the down payment needed to buy an item at that mall. *Id.*

Second, few consumers have used the defendants' debit card. MS LLC has asserted that its program "attracts credit challenged applicants that are on the verge of becoming un-bankable and . . . have a *desperate need* for the company's shopping credit and pre-paid card services." PX10 ¶ 55; PX10R at 2 (emphasis added). Yet few consumers have satisfied their supposedly "desperate need" for the defendants' card. Between October 2010 and July 2012, the period for which data is available to the FTC, 83,206 debited consumers were eligible to get debit cards, but fewer than 12% did. Only 936 cardholders — less than 1.4% of those eligible — loaded money on the cards. PX12 ¶ 38. Further, the total amount loaded on all cards in August 2012 was less than a dollar per card issued. *Id*.

Finally, consumers rarely print, much less use, the online coupons offered as part of the defendants' program. PX 12 ¶ 40. A contractor, Access VG, LLC ("Access"), has sent emails to program members, advertising coupons on hotels, cruises, and other items offered

by merchants that consumers may print and use. PX10 ¶ 39. According to Access, from October 2010 to July 2012, only 169 consumers — 0.05% of those eligible — ever printed a coupon. PX12 ¶ 40. If consumers had intentionally enrolled in the defendants' program, far more would have used its features.

The defendants have seen many complaints, rapid cancellation requests, low program usage, and high rates of failed debits, refund demands, and total returns for a basic reason: They have deceptively marketed their program and debited consumers without consent. As set forth below, the defendants' conduct violates the Permanent Injunction.

III. DISCUSSION

This Court has the inherent power to enforce its orders through civil contempt. *Shillitani v. U.S.*, 384 U.S. 364, 370 (1966). The FTC, as a party to the case, may invoke the court's powers by filing a civil contempt motion. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 445-46 (1911). A civil contempt finding is warranted where, as here, there is clear and convincing evidence that the contemnors violated a court order. *See CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir. 1992). The contempt defendants should be held in contempt and ordered to make full redress to consumers because they are bound by this Court's Permanent Injunction and repeatedly violated its provisions.

A. The Permanent Injunction Binds the Contempt Defendants.

The Court's Permanent Injunction binds the contempt defendants. Wolf and Eliasson are parties to the case, signed the Order after negotiation and representation by counsel, and acknowledged receipt of the Order. The Order thus binds them. FED. R. CIV. P. 65(d)(2)(A). MS LLC has actual notice of the Order by operation of law through its officers, Wolf and

Eliasson. *See FTC v. Neiswonger*, 494 F. Supp. 2d 1067, 1080 n.18 (E.D. Mo. 2007), *aff'd*, 580 F.3d 769 (8th Cir. 2009); *see also Am. Standard Credit, Inc. v. Nat'l Cement Co.*, 643 F.2d 248, 270-71 & n.16 (5th Cir. 1981); *Shultz v. Applica, Inc*., 488 F. Supp. 2d 1219, 1227 (S.D. Fla. 2007) ("[T]he knowledge of individuals who exercise substantial control over a corporation's affairs is properly imputable to the corporation."). Further, the Order binds MS LLC because it has acted in concert with its officers to promote its program. FED. R. CIV. P. 65(d)(2)(C). Accordingly, all of the contempt defendants are bound by the Court's Order.

B. The Contempt Defendants Have Violated the Permanent Injunction.

The contempt defendants have violated the Order by: (1) misrepresenting their offer as a cash advance, loan, or general line of credit; (2) failing to clearly and promptly disclose that they are promoting a program and offering credit usable solely at their mall; (3) failing to clearly and conspicuously disclose all material program terms before asking consumers for consent to be debited; (4) failing to get consumers' consent before debiting them; and (5) falsely advising consumers that they agreed to buy the program.

1. The Contempt Defendants Have Misrepresented to Consumers that They Offer a Cash Advance, Loan, or General Line of Credit, in Violation of Permanent Injunction ¶ I.A.

Paragraph I.A of the Order prohibits the defendants from "[m]isrepresenting, either orally or in writing, expressly or by implication, any [m]aterial fact." PX1 ¶ I.A. As detailed herein, the defendants have misled consumers into submitting their bank account information for what they thought was a cash advance, loan, or general line of credit,[10] when in fact, the

[10] The defendants' representations are material because they lead consumers to submit their bank information. A representation is "material" if it is "likely to affect a person's choice of, or conduct regarding, goods or services." PX1 at 5 ¶ 9; *see FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006).

defendants sell a continuity program. Low program usage, rapid cancellations, and a large volume of refund demands and consumer complaints provide clear, convincing evidence that the defendants have misrepresented what they sell in violation of Paragraph I.A of the Order.

"Advertising deception is evaluated from the perspective of the . . . reasonable consumer in the audience targeted by the advertisement." *FTC v. Wash. Data Resources*, 856 F. Supp. 2d 1247, 1272 (M.D. Fla. 2012) ("Advertisements must be considered in their entirety, and as they would be read by those to whom they appeal."). Here, the defendants have targeted consumers who just applied online for a cash advance or loan, telling them, "[w]e have received your accepted loan application and you've been approved," "Mongo was able to accept your loan application," or "**Congratulations! You have been approved**." Their sites, such as "GetMy2500.com," have emphasized terms like **"$2,500**" and "**Dollar**" in large, bold print, often near images of money. In contrast, the defendants use fine print, un-bolded print, and oblique references to obscure material terms of their real offer — a fee-based continuity program with credit usable solely at the defendants' mall and other material restrictions. Financially distressed consumers applying for loans have reasonably interpreted the defendants' calls and websites as offering a cash advance, loan, or general line of credit. Indeed, "consumer interpretation informs whether a communication was deceptive," *id.* at 1273, and consumers have widely complained they were misled by the defendants, and then debited by them, when they really needed a loan. *See supra* pp. 4-10; PX7 ¶¶ 7(b)-(e); PX10 ¶ 23; PX10K *passim*.[11] Paragraph I of the Court's Order forbids such deception.

[11] Similarly, in 2009, Florida's Office of Financial Regulation found MS LLC employed the "misleading" statement that it is a "registered lender" operating its business from Florida, PX10SS at 9, and denied its application for a license as a consumer finance company for that and other reasons. *Id.* at 1-2, 9.

The startlingly low rates at which consumers have used the defendants' program further show that the defendants have misrepresented their program. MS LLC claims that consumers have a "desperate need" for its credit and debit card, but data tells the real story: Only 686 (less than 0.56%) of over 122,000 eligible consumers used the defendants' credit. Likewise, only 936 (less than 1.4%) of 83,206 eligible consumers loaded money onto debit cards, and only 169 consumers (0.05% of those eligible) ever printed a coupon. So many tens of thousands of consumers seeking loans would not pay for the defendants' program and then never use its core features unless they were deceived. *See FTC v. USA Fin., LLC*, 415 Fed. App'x 970, 973 (11th Cir. 2011) ("The fact that consumers did not purchase the defendant's products after obtaining their credit cards, which they could use to buy only defendant's products, suggests that they were actually deceived."); *FTC v. Capital Choice Consumer Credit, Inc.*, 2004 WL 5149998, at *35 (S.D. Fla. Feb. 20, 2004) ("it is illogical to believe that nearly 94% of [program] purchasers would not have bought a single item from the catalog had they known they were paying . . . for a catalog card"), *aff'd*, 157 Fed. App'x 248 (11th Cir. 2005).

Rapid cancellation requests and refund demands corroborate that the defendants have misrepresented their program. Over three years, almost half of all consumers contacted MS LLC to cancel the program, in a median interval of <u>two days</u>. So many consumers would not willingly join a "continuity" membership program only to cancel so quickly. Furthermore, over 22% of debited consumers have demanded refunds; this high rate is redolent of fraud. *See FTC v. Grant Connect, LLC*, 2009 WL 3074346, at *9 (D. Nev. Sept. 22, 2009) (citing "high" refund rate of 20% and other statistics as "probative evidence" of likely deception in

promotion of program); *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 936 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008).

Many consumer complaints provide direct, compelling proof of the defendants' misrepresentation. *E.g.*, PX9J at 3:8-25 ("I thought I was confirming my information for the loan."); PX10K at 2 ("Cancel this membership! This was misleading for a cash advance."); *id.* at 6 ("I thought I was applying for a cash advance loan . . . . I don't want this!!!!"); *id.* at 23 ("I was online applying for a payday loan and you tricked me into thinking that is what I am doing."); *id.* at 72 ("I do not want this account. I had no [in]tention of setting this up. I can barely feed my kids and [I] am about to be evicted."); *see supra* pp. 4-9, 15. Consumers' complaints confirm that the defendants misrepresented their offer. *See, e.g.*, *FTC v. Peoples Credit First, LLC*, 244 Fed. App'x 942, 943-44 (11th Cir. 2007); *Cyberspace.com, LLC*, 453 F.3d at 1202. The defendants' misrepresentation plainly violates the Order.

2. The Contempt Defendants Have Deceptively Telemarketed the Program in Violation of Permanent Injunction ¶ IV.D.

Paragraph IV of the Order prohibits the defendants from violating Section 310.4(d) of the TSR by "failing to disclose truthfully, promptly, and in a [c]lear and [c]onspicuous manner . . . the nature of the goods or services" promoted in a telemarketing call, PX1 ¶ IV.D (citing 16 C.F.R. § 310.4(d)), or "Assisting Others" in violating that provision. PX1 ¶ IV.[12] The defendants have flouted Paragraph IV. At their direction, reading phone scripts, their telemarketers have called loan applicants, telling them that they have "been approved for a

[12] Section 310.4(d) of the Telemarketing Sales Rule applies to "telemarketers," defined in the TSR as "any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor." 16 C.F.R. § 310.2(cc). The defendants' firm, MS LLC, admits using "*telemarketing campaigns* that direct consumers to the membership applications" on its websites. PX10G at 2 (emphasis added). Accordingly, the defendants are "telemarketers" required to comply with TSR Section 310.4(d), or have "assisted" telemarketers within the meaning of Order Paragraph IV.

$2,500 line of credit." PX10 ¶¶ 89-97. However, the defendants' telemarketers have failed to disclose that they are promoting a program and the offered credit is usable solely at the defendants' mall. *Id.* ¶¶ 91-93, PX10FF at 1-5 (script); PX9L (transcript); PX9K (same). Thus, the defendants have failed to promptly disclose the true nature of the services they offer, or have assisted others in failing to do so, in violation of the Court's Order.

3. The Contempt Defendants Have Not Clearly and Conspicuously Disclosed All Material Terms of the Program Before Asking Consumers for Their Consent to be Debited, in Violation of Permanent Injunction ¶ II.

Paragraph II of the Order prohibits the defendants from failing to "Clearly and Conspicuously disclose . . . all fees and costs [and] all [m]aterial conditions, limitations, or restrictions applicable to the . . . receipt of the product or service that is the subject of the offer" before asking consumers to reveal billing information or consent to any purchase. PX1 ¶ II. The defendants have repeatedly violated this provision.

The defendants do not clearly and conspicuously disclose the terms and restrictions of their program before asking consumers to reveal billing information. Under headlines like "**Congratulations! You have been approved**" and "**ACCOUNT STATUS: APPROVED**," their websites solicit recent loan applicants to confirm personal information they typed into their applications and input other data, including their banking information. *See supra* p.5; PX10Z; PX10BB. Yet at the same time, the defendants take pains to avoid conspicuously disclosing the program's fees and terms. Their websites use fine print, un-bolded text, and oblique references to obscure material terms. *See supra* pp. 6-7, 15. Material terms such as down payment requirements are relegated to fine print at the bottom of their sites, and the defendants disclose the program's fees in fine print, or not at all. PX10 ¶¶ 71-81; PX10Z;

PX10BB. Consumers can submit their bank account information without ever seeing the defendants' "Member Agreement"; the defendants do not even display this document unless consumers click on tiny, hyperlinked text at the bottom of their sites.[13] The defendants ask consumers to click a large button titled, "**Access Account**," whose title further obscures the fact that clicking it will result in a debit, not a cash advance or loan. The defendants' fine and un-bolded print, misleading terms, and omissions are the antithesis of the clear and conspicuous disclosures required by the Court's Order. PX1 at 7 ¶ 13(c)-(d) ("Any visual message shall be of a size and shade . . . and in a location sufficiently noticeable for an ordinary consumer to read and comprehend it."); *see Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989) ("Disclaimers or qualifications . . . are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression."); *Capital Choice Consumer Credit, Inc.*, 2003 WL 25429612 at *5.

Many consumers have complained that they did not see or understand the terms and fees of the program before the defendants debited them. *See supra* pp. 7, 15, 17. As a result, consumers have rapidly left the program, and few have used its features. *See supra* pp. 10-13. Complaints, rapid cancellations, and low usage further prove that the defendants have failed to clearly and conspicuously disclose the material terms and fees of their program

[13] As noted earlier, the defendants require consumers to check a box to assent to a set of fine print statements, including a vague reference to "Terms and Conditions." Closer inspection reveals that this reference is actually a hyperlink to the "Member Agreement" for the defendants' program. However, the reference to "Terms and Conditions" appears in the middle of the list of fine print statements, where it can be easily overlooked. Moreover, the "Member Agreement" is not shown unless the hyperlink is clicked. As such, it is avoidable — consumers can submit their bank account information without ever seeing it. Avoidable disclosures are not clear and conspicuous. The Court's Order defines "clear and conspicuous," in part, to require that "[i]n any communication disseminated by means of . . . Internet, or online services, a disclosure must be *unavoidable*." PX1 at 7 ¶ 13(c) (emphasis added).

before asking consumers for their bank account numbers and then debiting them. *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1228-29 (D. Nev. 2011).

4. The Contempt Defendants Have Failed to Obtain Consumers' Express, Informed Consent Before Debiting Their Accounts, in Violation of Permanent Injunction ¶ III.

Paragraph III of the Order prohibits the defendants from causing consumers' billing information to be submitted without their express, informed consent. To obtain such consent, the defendants must clearly and conspicuously disclose all material terms of the program "prior to the [c]onsumer's express informed consent." PX1 ¶ III. The defendants have debited consumers without consent in violation of the Order.

The defendants' misrepresentation of their offer as a loan, cash advance, or general line of credit, detailed *supra* pp. 4-5, 14-17, and their failure to clearly and conspicuously disclose all material program terms prior to purchase, detailed *supra* pp. 5-7, 18-19, violate Paragraph III. Misrepresentations and material omissions cannot yield informed consent. PX1 ¶ III; *Grant Connect, LLC*, 827 F. Supp. 2d at 1230.

Additionally, overwhelming evidence demonstrates that the defendants have debited consumers without consent: The defendants debited the account used by an FTC Investigator without his permission and against his explicit instruction. PX8 ¶¶ 23-26. Complaints to the BBB, the FTC, MS LLC, and banks provide ample evidence that the defendants also widely debited consumers without their consent. *E.g.*, PX2 ¶ 3; PX5 ¶¶ 5-6; PX7A; PX9D at 4:6-15; PX10 ¶¶ 23, 115-27. In addition, very low program usage rates and large volumes of rapid cancellations and refund demands all corroborate that consumers did not knowingly consent to be debited. *See supra* pp. 10-13. Further, MS LLC's high rates of failed debits, debits

reported as unauthorized, and total returns also evidence the defendants' unlawful debiting practices. Indeed, the defendants' NSF rate of 40% *exceeds* the rate that a Florida federal court has found probative of unauthorized debiting practices. *Capital Choice Consumer Credit, Inc.*, 2004 WL 5149998, at *19 ("the undersigned is particularly persuaded that the 30% rate of transactions returned for insufficient funds reflects that individuals were not knowingly authorizing the debiting of their bank accounts"). Moreover, MS LLC's own business records show that over 24,000 of its debits were reported as unauthorized, and each unauthorized debit violates the Order. PX1 ¶ III. Lastly, MS LLC's total return rate of 77% *exceeds* the rate that the Middle District of Florida has found to be "extraordinarily high" and supportive of summary judgment under the FTC Act and TSR.[14] The evidence conclusively establishes that the defendants caused consumers to be debited without their express, informed consent.

5. The Contempt Defendants Have Misrepresented that Consumers Consented to be Debited, in Violation of Permanent Injunction ¶ I.

Paragraph I.A of the Order expressly bars the defendants from falsely asserting "that a [c]onsumer purchased or agreed to purchase a product or service, or that a transaction has been authorized by a [c]onsumer." PX1 ¶ I.A.9. The defendants have violated this provision by repeatedly telling consumers they agreed to enroll in the program, when they did not.

The defendants' *modus operandi* is to debit consumers without authorization, and then, when consumers complain, lie and tell them that they agreed to be debited. Indeed, an

[14] *FTC v. Global Mkt'g Group, Inc.*, 594 F. Supp. 2d 1281, 1285, 1288-89 (M.D. Fla. 2008) (holding that defendant's role in telemarketing scheme and receipt of reports showing "extraordinarily high" return rates as high as 71.5% showed knowledge of deception or awareness of probability of fraud and conscious avoidance of truth, justifying summary judgment); *FTC v. Windward Mkt'g, Ltd.*, 1997 WL 33642380, at *6, 12 (N.D. Ga. Sept. 30, 1997) (concluding from 40% return rate that defendant knew debits were unauthorized or had notice of high probability of fraud).

MS LLC operator falsely told an FTC Investigator — after FTC staff had refused the offer to enroll in the defendants' program — that he had agreed to be debited for the program. PX10L at 4:11-6:21. Similarly, the defendants' operators have told consumers who denied authorizing debits that they agreed to enroll in the program, stating, "this was an application you submitted online," PX9I at 3:25-4:5, and other words to the same effect. *See* PX9C at 4:25-5:5; PX9D at 4:1-5; PX9E at 3:19-25; PX9F at 4:5-11; PX9J at 7:4-8:3. A former MS LLC representative affirms it was the firm's common practice to claim that consumers had agreed to join the program, even when consumers denied having ever heard of it. PX11 ¶ 7-8. For the many reasons detailed above, the claim that consumers consented to buy the defendants' program is false. This misrepresentation violates the Order.

C. The Contempt Defendants Should Be Ordered to Redress Consumers.

The defendants should be held in civil contempt and ordered to redress consumers for the millions of dollars of harm they have inflicted through their scheme. A court may impose civil contempt sanctions "to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *U.S. v. United Mine Workers*, 330 U.S. 258, 303-04 (1947); *see McGregor v. Chierico*, 206 F.3d 1378, 1385 n.5 (11th Cir. 2000) (FTC action). Consumers injured by the defendants' conduct are entitled to full remedial relief. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949). In FTC contempt actions, the remedy for contumacious conduct is akin to the remedy for violation of the underlying statute, namely, consumer redress. *Chierico*, 206 F.3d at 1387-88. Civil contempt damages need be proven only by a preponderance of the evidence. *Id.*

When the FTC demonstrates that defendants have engaged in contemptuous conduct, the court may use defendants' gross receipts in assessing sanctions. *Chierico*, 206 F.3d at 1389 (affirming $7.2 million valuation of damages, observing that "the fraud in the selling . . . is what entitles consumers in this case to full refunds"). "Proof of individual reliance by each purchasing customer is not a prerequisite to the provision of equitable relief needed to redress fraud. A presumption of actual reliance arises once the FTC has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product." *Id.* at 1388 (citations omitted).

Consumers should receive full redress for all fees paid due to the defendants' contumacy. As detailed herein, the defendants engaged in widespread misrepresentation, failed to clearly disclose material facts, and debited consumers without their consent. Their receipts are the appropriate baseline for compensatory sanctions. *See FTC v. Leshin*, 618 F.3d 1221, 1237 (11th Cir. 2010) (affirming contempt sanction calculated by gross receipts); *Chierico*, 206 F.3d at 1388 (upholding contempt sanction that required disgorgement of gross receipts, even though consumer allegedly received some value); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (affirming award of damages calculated by consumers' losses under FTC Act). If the defendants claim to have done business in conformance with the Order, it is their burden to show why certain consumers should not be redressed. *Leshin*, 618 F.3d at 1237. The defendants should make full redress to consumers for all of the harm they have inflicted, and not keep the fruits of their contemptuous conduct.[15]

[15] As the stipulated Permanent Injunction has proven insufficient to deter or prevent consumer deception by the defendants, the FTC also intends to file a motion to modify the Permanent Injunction, pursuant to FED. R. CIV. P. 60(b), seeking enhanced permanent injunctive relief against Wolf and Eliasson to prevent future frauds.

According to the defendants' internal consumer database, through mid-June 2012, they had netted over $9 million ($9,693,910) from their scheme, on attempted debits of over $42 million.[16] MS LLC's financial statements reveal that defendants Wolf and Eliasson cumulatively realized personal gains in excess of $1 million during that time. PX10 ¶ 138-39. As the defendants continued to deceptively market their program after mid-June 2012, however, their total net revenue and personal gains are likely greater, and will be the subject of further proof.[17]

Compensatory relief should be ordered jointly and severally against the contempt defendants because each is responsible for the violations. *See Leshin*, 618 F.3d at 1236-37 ("Where . . . parties join together to evade a judgment, they become jointly and severally liable for the amount of damages resulting from the contumacious conduct.") (citations omitted). As MS LLC's sole officers, Wolf and Eliasson are responsible for its disobedience, willful or otherwise. *See Wilson v. United States*, 221 U.S. 361, 376 (1911); *McComb*, 336 U.S. at 193 ("[I]t matters not with what intent the defendant did the prohibited act.").

D. The Court May Hold the Contempt Defendants in Civil Contempt Based on the Written Record if They Fail to Raise a Genuine Issue for Hearing.

The FTC requests that the Court conduct contempt proceedings, including argument and a hearing if the Court deems them necessary. However, if the Court finds there are no material disputes of fact that require a hearing, it may dispense with holding a hearing before

[16] The net revenue figure accounts for the defendants' failed debits as well as refunds made to consumers who persisted through the defendants' "run-around" to secure refunds. PX12 ¶¶ 22-23; *see supra* pp. 10-11.

[17] Pursuant to the compliance-monitoring discovery provisions of this Court's Order, PX1 ¶ IX, FTC counsel shortly will send defendants' counsel a request for production of a current copy of MS LLC's database and other information to generate an updated computation of consumer losses. The Order provides that defendants must produce materials for inspection and copying upon 15 days' notice. *Id.* ¶ IX.A.

sanctioning the defendants. *Mercer v. Mitchell*, 908 F.2d 763, 769 n.11 (11th Cir. 1990).

IV. CONCLUSION

The FTC respectfully requests that the Court enter an order directing the contempt defendants to show cause why they should not be held in civil contempt, order them to make full redress to consumers following appropriate contempt proceedings, and issue all relief appropriate in light of their repeated violations of the Permanent Injunction.

Respectfully submitted,

s/ Joshua S. Millard

Date: May 21, 2013

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Hearing Counsel

[18] Messrs. Millard and Goodhue are attorneys employed full-time by an agency of the United States government and appear in this matter consistent with M.D. Fla. L.R. 2.02(b).

Certification of Conference with Opposing Counsel

On this date, undersigned FTC counsel conferred via phone with Robby Birnbaum, Esq. of Greenspoon Marder, PA, Ft. Lauderdale, Florida, who has served as counsel for contempt defendants Bryon Wolf, Roy Eliasson, and MS LLC in connection with the FTC's investigation of this matter. FTC counsel previously attempted to contact Mr. Birnbaum by phone and email on May 20th. Today, FTC counsel discussed with Mr. Birnbaum the FTC's anticipated civil contempt filing, the specific contempt charges levied, and the requested relief, including full consumer redress. Undersigned counsel also answered questions from Mr. Birnbaum. Mr. Birnbaum indicated that he was not authorized to agree to the relief sought by the Commission. FTC counsel will promptly supplement this certification if the defendants thereafter agree to the relief sought.

Date: May 21, 2013

s/ Joshua S. Millard

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Certificate of Service

I hereby certify that on this date, I caused the foregoing document and its exhibits to be mailed via overnight U.S. Mail service to:

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Counsel for Bryon Wolf, Roy Eliasson, and Membership Services, LLC

I further certify that, on this date, the foregoing document and its exhibits have been mailed via overnight courier for filing, with a courtesy copy enclosed for:

THE HONORABLE JAMES S. MOODY,
U.S. DISTRICT JUDGE
Sam M. Gibbons U.S. Courthouse
801 North Florida Ave.
Tampa, FL 33602

Date: May 21, 2013

s/ Joshua S. Millard

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