

1
2
3
4 **UNITED STATES DISTRICT COURT**

5 **DISTRICT OF NEVADA**

6 FEDERAL TRADE COMMISSION,)

7 Plaintiff,)

8 vs.)

9 NATIONAL PRIZE INFORMATION GROUP)
10 CORP., and JOHN RINCON,)

11 Defendants.)
12

2:06-cv-01305-RCJ-PAL

ORDER

13 Before the Court is Plaintiff’s Motion for Summary Judgment (#62, #66).¹ The Court has
14 considered the motions and pleadings on file before the Court. Defendants have failed to oppose the
15 Motion; pursuant to Local Rule 7-2(d), Defendants’ failure to oppose constitutes a consent to the
16 granting of the motion. Nevertheless, an analysis on the merits is found below and for the following
17 reasons, the Motion for Summary Judgment (#62, #66) is *granted*.

18 **BACKGROUND**

19 John Rincon is the principal officer of National Prize Information Group (“NPIG”), serving
20 as its president, secretary, treasurer, and director. (#15-18, Ex. 2 at 1-3). NPIG is a Nevada
21 corporation that acts under various corporate names in sending mail solicitations to consumers
22 throughout the United States. These solicitations generally represent that the consumer has won a
23 substantial cash prize (several million dollars), and directs the individual to claim the prize by
24

25 ¹ #66 is a redacted version of the #62 Motion for Summary Judgment.

1 sending in a small \$20 fee. (*See, e.g.*, #15-3). Upon mailing the fee, consumers do not receive the
2 prize, but are usually flooded with further mailings regarding sweepstakes that they have either
3 already won or can enter. (*See, e.g.*, #15-5, Ex. 1).

4 Over the past several years, Defendants have sent millions of such mailers to consumers, with
5 suggestive seals, fonts, and language promising large sums of money in already approved cash
6 prizes. (#8-24, Ex. 1 at 3; #15-3; #15-17). Some of the mailers refer to the consumer as a “verified
7 recipient.” Many mailers claim that other recipients have already collected the “confirmed prize.”
8 The name of the consumer is listed, and the “confirmed prize” amount is generally over three million
9 dollars. All of the mailers contain detachable response forms that instruct recipients to remit \$20
10 to Defendants in an included, pre-paid envelope to collect the winnings. One such form, for
11 example, is titled “Acceptance of Disbursement,” and states that “disbursement made at once
12 following confirmation.” Defendants admit that approximately 294,000 consumers sent them money
13 in response to their mailers and that the scheme brought in approximately \$27 million dollars in
14 revenue between 2004 and 2005. (*See* #8-24, Ex. 2 at 1; #66-3, Ex. 2). Defendants admit that they
15 disburse no prizes, but vow or avow that their actual business is selling consumers a weekly
16 newsletter that reports on sweepstakes being offered around the nation. (#8-24, Ex. 1 at 1). While
17 some of the mailers do mention that they contain information about available sweepstakes, these
18 references are often inconspicuous and ambiguous. (#15-3, Ex. 8).

19 On October 18, 2006, the Federal Trade Commission (“Commission”) filed a Complaint
20 pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b),
21 alleging that Defendants were engaged in false and deceptive business practices. (#1). The Court
22 granted a Temporary Restraining Order against Defendants on October 18, 2006. (#16). The Court
23 also granted a preliminary injunction against Defendants on November 21, 2006, barring them from
24 continuing their unlawful practices. (#47).

1 ANALYSIS

2 **I. Summary Judgment Standard.**

3 The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as
4 to the material facts before the court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468,
5 1471 (9th Cir. 1994). Summary judgment is proper if the evidence shows that there is no genuine
6 issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.
7 R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where reasonable minds could
8 differ on the material facts at issue, summary judgment is not appropriate. *Warren v. City of*
9 *Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). As summary judgment allows a court to dispose of
10 factually unsupported claims, the court construes the evidence in the light most favorable to the
11 nonmoving party. *Bagdadi v. Nazari*, 84 F.3d 1194, 1197 (9th Cir. 1996).

12 The moving party bears the burden of informing the court of the basis for its motion, together
13 with evidence demonstrating the absence of any genuine issue of material fact. *Celotex*, 477 U.S. at
14 323. The movant bears "both the burden of production and the ultimate burden of persuasion" in
15 order to secure summary judgment. *Nissan Fire & Marine, Inc. v. Fritz Cos., Inc.*, 210 F.3d 1099,
16 1102-03 (9th Cir. 2000). To meet its burden of production, the movant must either produce evidence
17 negating an essential element of a claim or defense or show that there is not enough evidence of an
18 essential element of a claim or defense to carry its burden of persuasion at trial. *Id.* Likewise, to
19 carry its ultimate burden of persuasion on summary judgment, the movant must establish the absence
20 of a genuine issue of material fact. *Id.* Once the moving party has met its burden, the party opposing
21 the motion may not rest upon mere allegations or denials in his pleadings, but must set forth specific
22 facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
23 248 (1986).

1 **II. Deceptive Acts and Practices.**

2 Section 5(a) of the FTC Act prohibits deceptive acts and practices in or affecting commerce.
3 15 U.S.C. § 45(a). To prevail under the FTC Act, the Commission must show that “first, there is a
4 representation, commission or practice that, second, is likely to mislead consumers acting reasonably
5 under the circumstances, and third, the representation, omission, or practice is material.” *In re*
6 *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-65 (1984).

7 _____ First, Defendants’ mailers represented to the consumers who submitted a fee that they would
8 receive a substantial money prize. “A solicitation may be likely to mislead by virtue of the net
9 impression it creates even though the solicitation also contains truthful disclosures.” *FTC v.*
10 *Cyberspace.com*, 453 F.3d 1196, 1200 (9th Cir. 2006). While some of the mailers Defendants sent
11 out contained language claiming to disclose that they were selling a report about sweepstakes, many
12 mailers contained suggestive seals, fonts, and language promising large sums of money in already
13 approved cash prizes. Examples of misleading language include, “verified recipient,” “confirmed
14 prize,” and “Acceptance of Disbursement.” Defendants admitted they awarded no prizes.

15 Second, not only were Defendants’ mailers likely to deceive, the mailers actually misled
16 consumers. “Although proof of actual deception is unnecessary to establish a violation of Section
17 5, such proof is highly probative to show that a practice is likely to mislead consumers acting
18 reasonably under the circumstances.” *Cyberspace.com*, 453 F.3d at 1201 (citations and internal
19 quotation marks omitted). In this case, Defendants’ misrepresentation is evidenced by the hundreds
20 of thousands of consumers who sent money to the Defendants, totaling over \$26 million. There is
21 no question that the Defendants misled consumers.

22 Third, and finally, Defendants’ misrepresentation is material. “A misleading impression
23 created by a solicitation is material if it involves information that is important to consumers and,
24 hence, likely to affect their choice of, or conduct regarding a product.” *Cyberspace.com*, 453 F.3d
25 at 1201 (citations and internal quotation marks omitted). The Court already found in this case that

1 the misrepresentations in the mailers were material “[b]ecause it is unlikely the consumers would
2 have sent in the \$20 fee if they did not think that they had won the advertised prize money.” (#47
3 at 7).

4 Plaintiff has demonstrated that Defendants misrepresented consumers acting reasonably
5 under the circumstances and that the misrepresentation is material. Because of the deceptive acts
6 and practices of the Defendants, the Commission seeks a permanent injunction and liability for
7 consumer restitution from both NPIG and John Rincon.

8 **A. Injunctive Relief Against NPIG.**

9 The Commission seeks a permanent injunction against NPIG. Section 13(b) of the FTC Act
10 states that “in proper cases the Commission may seek, and after proper proof, the court may issue,
11 a permanent injunction.” 15 U.S.C. § 53(b). The Commission may seek a permanent injunction
12 against violations of “any provision of law enforced by the Federal Trade Commission.” *Id.* A
13 permanent injunction is justified when there is a “cognizable danger of recurrent violation.” *U.S.*
14 *v. W.T. Grant Co.*, 345 U.S. 629, 633 (1945). “[T]he commission of past illegal conduct is highly
15 suggestive of the likelihood of future violations.” *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 807
16 (2d Cir. 1975).

17 There is evidence to suggest that Defendants will revert to their illegal ways. After initially
18 hearing from the Commission, Defendants revised their mailers to eliminate any impression that
19 consumers had won a cash prize. This Court already ruled that Defendants’ modifications to comply
20 with the FTC Act was “overstated and disingenuous.” (#47 at 9). Defendants also mailed out
21 deceptive mailers after the Commission filed its Complaint. (#30-4, Exs. 20A & 20B). Therefore,
22 a permanent injunction is appropriate to prevent further defrauding of the public.

23 **B. NPIG’s Liability for Consumer Restitution.**

24 The Commission also seeks equitable relief in the form of consumer restitution. District
25 courts not only have the authority to grant permanent injunctions under Section 13(b), but also have

1 the authority “to grant any ancillary relief necessary to accomplish complete justice.” *FTC v. H.N.*
2 *Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982). To obtain consumer restitution, the Commission
3 must show “that the defendant made material misrepresentations, that they were widely
4 disseminated, and that consumers purchased the defendant's product.” *FTC v. Figgie Int'l*, 994 F.2d
5 595, 605-06 (9th Cir. 1993). “While ordinarily the proper measure of restitution is the amount of
6 enrichment received, if the loss suffered by the victim is greater than the unjust benefit received by
7 the defendant, the proper measure of restitution may be to restore the status quo.” *Id.*

8 As already discussed above, the defendants made material misrepresentations. NPIG sent
9 mailers throughout the United States to millions of consumers. From the millions of mailers sent
10 out, hundreds of thousands of people sent in the remittance fee to procure the prize. Consumers
11 relied on the defendants to their detriment. The Commission has met the requirements for an award
12 of restitution damages; NPIG is liable for consumer restitution.

13 **C. Injunctive Relief Against John Rincon.**

14 The Commission also seeks a permanent injunction against John Rincon. An individual can
15 be subjected to injunctive relief for corporate violations of the FTC Act when (1) the corporation
16 committed misrepresentations or omission of a kind usually relied on by a reasonable prudent
17 person, resulting in consumer injury, and (2) the individual participated directly in the acts or
18 practices or had authority to control them. *FTC v. Publ'g Clearing House*, 104 F.3d 1168, 1170 (9th
19 Cir. 1997). In this case as already discussed, the first element in the test has been established. The
20 second element, individual participation, is met because Rincon is the sole director of the company.
21 Rincon signed the application forms to open post office boxes used in the scheme. (#15-20 at ¶¶ 4
22 & 6). He controlled the financial affairs of the company and set up an account with a third-party to
23 process money NPIG collected from consumers. (*See* #66-1 at ¶¶ 4 & 10). A permanent injunction
24 is appropriate to prevent further defrauding of the public.

25

1 **D. John Rincon’s Individual Liability for Consumer Redress.**

2 The Commission moves the Court to make Rincon individually liable for consumer redress.
3 To establish a finding for individual liability, the Commission must show: (1) Rincon’s liability for
4 injunctive relief; and (2) Rincon’s knowledge of the deception. *Publ’g Clearing House*, 104 F.3d
5 at 1171. As already discussed above, Rincon is liable for injunctive relief. To show knowledge of
6 the deception, “[t]he extent of an individual's involvement in a fraudulent scheme alone is sufficient
7 to establish the requisite knowledge for personal restitutionary liability.” *FTC v. Affordable Media*,
8 179 F.3d 1228, 1235 (9th Cir. 1999).

9 Rincon knew of NPIG’s deceptive practices. His name appears on the mailers sent to
10 consumers. (*See* #66-4, Exs. 1-4). Rincon admitted to receiving numerous consumer complaints
11 and Rincon’s signature appears on responses to complaints. (*See* #66-5, Exs. 8 and 9). Rincon was
12 the company, and quite aware that his company did not give out cash prizes. There was never any
13 intent to award prizes to the consumers. (#8-24, Ex. 1 at 1). Therefore, Rincon is also liable for
14 consumer restitution.

15 **E. Monetary Damages Award.**

16 Plaintiff seeks \$26,885,182 in damages. Plaintiff requests consumer restitution equal to the
17 amount NPIG took in from its mailer scheme in 2004 and 2005, minus uncollected consumer
18 payments and refunds made. Considering, however, that the Court is ruling solely on the pleadings,
19 unopposed and without oral argument, the Court declines to rule on monetary damages at this time.
20 The Commission also seeks to hold both Rincon and NPIG joint and severally liable for the damages

21 ...

22 ...

23

24

25

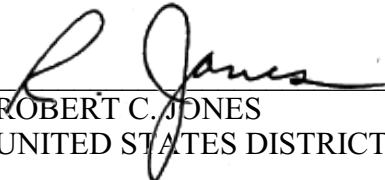
1 award because Rincon is individually liable for the corporation's actions. The Court will rule on
2 monetary damages at a further point in time, following briefing by both sides.

3 **CONCLUSION**

4 IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment is *granted*
5 (#62, #66).

6 IT IS FURTHER ORDERED that Plaintiff's Motion to Strike is moot and is, therefore,
7 *denied* (#56).

8 DATED: July 28, 2008

9
10 
11 ROBERT C. JONES
12 UNITED STATES DISTRICT COURT JUDGE
13
14
15
16
17
18
19
20
21
22
23
24

25 (mr)