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7
8 **UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

9 FEDERAL TRADE COMMISSION,) Case No. 2:09-CV-01349-PMP-RJJ
10 Plaintiff,)
11 v.)
12 GRANT CONNECT, LLC, et al.,)
13 Defendants.)
14

15 **PLAINTIFF FEDERAL TRADE COMMISSION’S MEMORANDUM OF POINTS
16 AND AUTHORITIES IN OPPOSITION TO DEFENDANT KYLE R. KIMOTO’S
MOTION FOR SUMMARY JUDGMENT AND/OR TO DISMISS THE COMPLAINT**

17 Plaintiff Federal Trade Commission (“FTC”) respectfully submits this memorandum of
18 points and authorities in opposition to Defendant Kyle R. Kimoto’s Motion for Summary
19 Judgment and/or to Dismiss the Complaint [D.E. 155] (“Kimoto’s Motion”).

20 **I. INTRODUCTION**

21 Defendant Kyle R. Kimoto (“K. Kimoto”) is one of several Defendants who together
22 stand accused of deceptively marketing multiple products and services in violation of Sections
23 5(a) and 12 of the of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45(a) & 52
24 and both Section 907(a) of the Electronic Fund Transfer Act (the “EFTA”), 15 U.S.C. §
25 1693e(a), and Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b), including Grant

1 Connect (an Internet-based computer program that purportedly gets consumers easy access to
2 free government or other grant money), First Plus Platinum (an online shopping club
3 masquerading as a general purpose line of credit), One Hour Wealth Builder (a purported work-
4 from-home business opportunity), and Acai Total Burn (a dietary supplement).

5 On July 27, 2009, the FTC filed its Complaint For Permanent Injunction And Other
6 Equitable Relief [D.E. 1] (“Original Complaint”) against multiple defendants, including Vantex.
7 While K. Kimoto was not specifically named therein, the Original Complaint contemplated that
8 the named individual defendants were possibly acting “in concert with others.” *See e.g.*, Original
9 Comp. [D.E. 1] ¶¶ 13, 16 (alleging that defendants Rachael A. Cook (“Cook”), Vantex’s
10 Manager, and Juliette M. Kimoto (“J. Kimoto”), K. Kimoto’s wife¹ and ultimately Vantex’s
11 owner, acting alone or in concert with others formulated, directed, controlled, had authority to
12 control, or participated in the acts and practices of Vantex). On July 28, 2009, the Court entered
13 an *ex parte* temporary restraining order (“TRO”) against all of the then-named defendants,
14 including Vantex, Cook, and J. Kimoto.

15 On September 22, 2009, after full briefing and a hearing, the Court issued a preliminary
16 injunction [D.E. 83] (“Original P.I. Order”) against the Las Vegas Defendants,² including
17 Vantex, Cook, and J. Kimoto. In granting the Original P.I. Order, the Court found that there was
18 good cause to believe that all of the then-named defendants violated the FTC Act and the EFTA
19 by: (1) misrepresenting the likelihood that consumers will get grants and/or “free money” using
20 Grant Connect; (2) failing to disclose, or disclose adequately, that consumers who sign up for
21 Defendants’ products or services are enrolled in multiple membership programs and must cancel
22 the programs within a limited time period to avoid costly recurring monthly charges; (3)

23
24 ¹ The Kimotos divorced after the filing of this action.

25 ² The Reno Defendants stipulated to a preliminary injunction before the hearing. See Stipulated Preliminary Injunction As To Defendants Grant Connect, LLC; Horizon Holdings, LLC; O’Connell Gray, LLC; James J. Gray; and Randy D. O’Connell [D.E. 48].

1 deceptively marketing their “line of credit” offers, including First Plus Platinum, by making false
2 claims and failing to disclose material facts about the limitations of this credit line; and (4)
3 debiting consumers’ bank accounts on a recurring basis without obtaining a written authorization
4 as required by the EFTA. Original P.I. Order [D.E. 83] at pp. 13-15. The Original P.I. Order
5 enjoined these practices.

6 Among the numerous exhibits submitted by the FTC in support of its request for the
7 Original P.I. Order against the Las Vegas Defendants were the declarations of Defendants Randy
8 D. O’Connell (“O’Connell”) and James J. Gray (“Gray”) which showed that K. Kimoto was one
9 of the masterminds of the Grant Connect scheme and brought in O’Connell and Gray to assist
10 Defendant Global Gold with the logistics of accepting transactions over the internet. *See*
11 Declaration of Randy D. O’Connell, Px. 565 at ¶¶ 12-13; Declaration of James J. Gray, Px. 566
12 at ¶¶ 12-13.

13 On April 21, 2010, the FTC filed its Amended Complaint For Permanent Injunction And
14 Other Equitable Relief (“Amended Complaint”) specifically naming several additional
15 defendants, including K. Kimoto. On June 17, 2010, after full briefing and a hearing, the Court
16 issued a preliminary injunction [D.E. 165] (“Second P.I. Order”) against K. Kimoto and
17 defendants Michael L. Henriksen Jr., Tasha Jn Paul, and Johnnie Smith. In granting the Second
18 P.I. Order, the Court found that the FTC is likely to prevail in demonstrating Defendant K.
19 Kimoto participated directly in the acts and practices of Vertek and Vantex, and/or had the
20 authority to control the acts and practices of Vertek and Vantex employees. *See* Second P.I.
21 Order [D.E. 165] at pp. 10-11 (summarizing the evidence showing K. Kimoto’s direct
22 participation in the deception).

23 Despite detailed allegations that fully describe Defendants’ deceptive schemes and K.
24 Kimoto’s prominent role in the deception and ample evidence supporting the FTC’s allegations,
25 K. Kimoto seeks summary judgment under Federal Rule of Civil Procedure 56 and/or judgment

1 on the pleadings under Federal Rule of Civil Procedure 12(c). In doing so, K. Kimoto fails to
2 articulate any valid reason for why summary judgment or a judgment on the pleadings is
3 appropriate. Accordingly, the Court should deny Kimoto's Motion.

4 II. ARGUMENT

5 A. K. Kimoto's Request for Summary Judgment Should Be Denied Because It Is Not 6 Properly Made and Supported

7 K. Kimoto's request for summary judgment should be denied because it is not properly
8 made and supported. Summary judgment should only be granted when "the pleadings, the
9 discovery and disclosure materials on file, and any affidavits show that there is no genuine issue
10 as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R.
11 Civ. P. 56(c). The party seeking summary judgment bears the initial burden of demonstrating the
12 absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986);
13 *FTC v. Stefanchik*, 559 F.3d 924, 927 (9th Cir. 2009); *FTC v. Publr. Bus. Servs.*, 2010 U.S.
14 Dist. LEXIS 34336 (D. Nev. Apr. 7, 2010). In ruling on a motion for summary judgment, the
15 Court views all evidence in the light most favorable to the non-moving party. *FTC v. Publ'g*
16 *Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *FTC v. Figgie Int'l*, 994 F.2d 595,
17 602 (9th Cir. Cal. 1993).

18 Here, K. Kimoto has completely failed to meet his burden of demonstrating the absence
19 of a genuine issue of material fact. K. Kimoto has not submitted a shred of evidence in support
20 of his motion and has failed to articulate any reason for why summary judgment is appropriate.
21 By contrast, the FTC has submitted ample evidence showing that K. Kimoto directly participated
22 and had knowledge of the deception alleged in the Amended Complaint. *See* Second P.I. Order
23 [D.E. 165] at pp. 10-11 (summarizing the evidence showing K. Kimoto's direct participation in
24 the deception). Accordingly, K. Kimoto's request for summary judgment should be denied.

25

1 **B. Kimoto’s Request for Judgment On the Pleadings Pursuant to Rule 12(c) Should Be**
2 **Denied Because the Pleadings Are Not Closed**

3 Kimoto’s request for judgment on the pleadings pursuant to Rule 12(c) is equally flawed.
4 A party’s motion under Rule 12(c) “is directed at the legal sufficiency of a party's allegations.”
5 *Carmen v. San Francisco Unified School Dist.*, 982 F.Supp. 1396, 1401 (N.D.Cal.1997). When
6 a party seeks to dismiss a complaint the standard applied under Rule 12(c) is virtually identical to
7 that of a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *McGlinchy v. Shell Chem. Co.*, 845
8 F.2d 802, 810 (9th Cir.1988); *Carmen v. San Francisco Unified School Dist.*, 982 F.Supp. 1396,
9 1401 (N.D.Cal. 1997). On such a motion, the court must accept all material allegations in the
10 complaint as true and construe them in the light most favorable to the nonmoving party.
11 *McGlinchy*, 845 F.2d at 810; *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986). A
12 party may move for judgment on the pleadings under Rule 12(c) “after the pleadings are closed
13 — but early enough not to delay trial.” FED. R. CIV. P. 12(c). Pleadings are considered closed
14 after a complaint and answer have been filed; assuming no counterclaim or cross-claim is made.
15 *Doe v. U.S.*, 419 F.3d 1058, 1061 (9th Cir. 2005).

16 Here, K. Kimoto fails to articulate any reason for why a judgment on the pleadings is
17 appropriate. K. Kimoto makes no effort to demonstrate how the allegations contained in the
18 FTC’s Amended Complaint would not be sufficient to find him liable for violations of Section
19 5(a) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(a), the Electronic Funds
20 Transfer Act (“EFTA”), 15 U.S.C. § 1693e(a), and Section 205.10(b) of Regulation E, 12 C.F.R.
21 § 205.10(b). The FTC’s allegations clearly state a claim upon which the Court may grant relief,
22 and the Court has already found that the FTC is likely to prevail in showing that the Defendants,
23 including K. Kimoto, deceptively marketed Grant Connect and the line of credit products
24 described in the FTC’s Amended Complaint. *See* Original P.I. Order [D.E. 83] at pp. 13-15;
25 Second P.I. Order [D.E. 165] at pp. 10-11. Moreover, K. Kimoto’s request for dismissal under

1 **Certificate of Service**

2 I hereby certify that on June 21, 2010, I electronically filed the foregoing document with
3 the Clerk of the Court using CM/ECF, which will send a notice of electronic filing to all counsel
4 of record. Additionally, I served all of the counsel and parties listed on the attached Service List
5 by the methods indicated therein.

6
7 /s/ Roberto Anguizola
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SERVICE LIST

Federal Trade Commission v. Grant Connect, et al., Case No. 2:09-CV-01349-PMP-RJJ

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