JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CASE NO.: CV 16-07101 SJO (GJSx) **DATE:** July 24, 2017

TITLE: Federal Trade Commission v. Terry A. Somenzi, et al.

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFF:	**COUNSEL PRESENT FOR DEFENDANTS:**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER GRANTING PLAINTIFF'S APPLICATION FOR DEFAULT JUDGMENT [Docket No. 79]

This matter is before the Court on Plaintiff Federal Trade Commission's (the "FTC") Application for Entry of Default Judgment against Defendants David Raff ("Raff") and Millenium Direct Incorporated ("MDI"), filed on May 25, 2017 ("Application"). Raff, proceeding *pro se*, opposed the Motion on July 3, 2017, to which the FTC replied on July 7, 2017. MDI did not oppose the Application. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for June 26, 2017. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court **GRANTS** the FTC's Application.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

The FTC alleges the following in the Complaint. MDI and Raff are two of several Defendants in this case involving alleged fraud.[1] Defendant Raff is the president of MDI and at all times material to the Complaint he has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of MDI; alone or in concert with others. (Compl. ¶¶ 7-8, ECF No. 1.) Since at least 2013, Raff, MDI, and several co-Defendants have caused hundreds of thousands of personalized cash prize notifications to be mailed to mostly elderly consumers in the United States and other countries announcing that the named recipient has won a substantial cash prize of nearly $1 million or more. (Compl. ¶ 11.) These mailed cash prize notifications are from

[1] MDI and Raff are the only remaining Defendants. The Court dismissed Defendant Terry Somenzi on November 4, 2016 pursuant to the FTC's request under Federal Rule of Civil Procedure 21. (ECF Nos. 40, 45.) As to Defendant Ian Gamberg, the Court granted a stipulated permanent injunction and monetary judgment pursuant on February 9, 2017. (ECF Nos. 58, 61.)

fictitious companies, including Paulson Independent Distributors, International Procurement Center, Keller, Sloan & Associates, and Phelps Ingram Distributors. (Compl. ¶ 13.)

To create the impression that consumers have been specially selected to receive a substantial prize, the personalized notifications contain statements such as "You have won a GUARANTEED CASH PRIZE payment per disclosed terms and conditions noted within. Your check will be paid by bank check cashable at any banking institution." (Compl. ¶ 14 (emphasis original).) To bolster the impression that the consumer has won a prize, the personalized notification congratulated the recipient on his or her winnings and included statements such as "Congratulations again on your guaranteed prize win!" (Compl. ¶ 15.) Further reinforcing this impression, the notification stated that the recipient has been specially selected to receive the notification, and includes language such as "CONFIRMED PRIZE WINNER NAME: [JANE DOE]." (Compl. ¶ 16 (emphasis original).) Again bolstering the impression of a prize win, the notifications stated that consumers had a limited amount of time to claim the cash prize, and used statements like "Your prize is awaiting disbursement to you in accordance with all rules and conditions stated herein provided you reply before the expiration date . . . . Your reply request within 14 days is strongly urged to avoid misplacement of this documentation." (Compl. ¶ 17.) Thus, the notifications assure consumers that the prize is official and legitimate by using specific statements. (Compl. ¶ 18.) The notifications often contained language in small print stating in vague terms that they are a reporting service that provides information on various sweepstakes; however, the language does not inform the consumer that they did not in fact win a prize. (Compl. ¶ 19.)

The cash prize notifications instruct the named recipients to pay a fee of approximately $25 to collect their prizes by sending enclosed and pre-addressed envelopes to the Netherlands. (Compl. ¶¶ 11, 13.) Many consumers believed that they had won a prize and mailed the fees to the addresses in the Netherlands. (Compl. ¶ 20.) After paying, consumers did not receive the promised cash prize money. (Compl. ¶¶ 12, 21.) Instead of receiving a prize, the customers who paid the fee were inundated with additional false cash prize notifications and other deceptive offers, because Defendants reused and sold responding consumers' personal information to others. (Compl. ¶¶ 12, 22.) As a result of their scheme, Raff and MDI have received substantial sums of money from consumers in response to these personalized notifications. (Compl. ¶ 23.)

The FTC alleges that, on numerous occasions, MDI and Raff provided electronic templates of the cash prize notifications, as well as the outer envelopes to be addressed to consumers and return envelopes. (Compl. ¶ 25.) Additionally, MDI and Raff provided the electronic lists of consumers, including their names and addresses, to whom the deceptive cash prize notifications were to be mailed. (Compl. ¶ 26.) These lists included a bar code and 11-digit number that was assigned to each consumer on the list and used to track the response rate and income from each list. (Compl. ¶ 27.) Lists of customers were refined, reused, and sold to other direct marketers. (Compl. ¶ 27.)

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B. Procedural Background

On September 21, 2016, the FTC filed the Complaint under the Federal Trade Commission Act ("FTC Act"), specifically section 13(b), 15 U.S.C. § 53(b) ("Section 13(b)"), to obtain preliminary and permanent injunctive relief, rescission or reformation of contracts, restitution, the refund of monies paid, disgorgement of ill-gotten monies, and other equitable relief for engaging in deceptive or unfair acts or practices in connection with their cash prize notification mailers in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) ("Section 5(a)"), which prohibits unfair or deceptive practices in or affecting commerce. (*See generally* Compl.) The Complaint was served on MDI and Raff on September 30, 2016; their responses were due October 21, 2016. (ECF Nos. 30-31.)

On October 20, 2016, the Court granted Raff's request for an extension to respond to the Complaint and granted Raff's application for Pro Se Electronic Filing on October 26, 2016. (ECF Nos. 39, 42.) Subsequently, Raff attempted to file several documents, all of which were rejected by the Court due to violations of the Federal Rules of Civil Procedure and Local Rules. Although Raff had sought e-filing privileges, he failed to register for an CM/ECF account and instead e-mailed documents to the Clerk and the Court, as summarized below.

First, on November 18, 2016, Raff, on behalf of Raff and MDI, attempted to file an Answer and Motion to Dismiss the Complaint. (ECF Nos. 48-49.) The Court struck the two documents, which it collectively construed as a Motion to Dismiss Complaint, on December 6, 2016 because the documents violated: (1) Local Rule 5-4.1 ("Sending a document by email does not constitute electronic filing"); (2) Local Rule 83-2.5 (barring ex parte communications with the judge such as by "sending e-mail messages to the judge" in absence of opposing counsel); and (3) Local Rules 7-3, 7-4, and 7-5 (requiring meet and confer with opposing counsel prior to filing a motion, hearing date and time on notice of motion, and a memorandum of points and authorities in support of a motion). Since Raff apparently did not intend to pursue his request for electronic filing, the Court ordered that Raff's filings must be made in paper format, and warned that the Court "will not consider documents submitted by other means, such as by e-mail." (ECF No. 51.)

Next, on January 3, 2017, the Court rejected Raff's Response to the FTC's Motion to Dismiss Defendant Somenzi, received on December 22, 2016, due to non-compliance with Local Rules 5-3.1.1, 7-3 through 7-5, 11-3, and 83-2.2.2 as well as Federal Rule of Civil Procedure 5, which bars Raff from filing documents on behalf of MDI because only individuals may represent themselves *pro se*. (ECF No. 57.) Third, on March 13, 2017, the Court rejected Raff's Motion to Dismiss Raff and Motion for an Indefinite Stay; and Response to FTC Motion to Dismiss (Answer), received March 10, 2017, due to violations of Local Rules 6-1, 11-3.8, 11-4.1, 83-2.5 and Federal

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Rule of Civil Procedure 5.[2] (ECF Nos. 64-65.) Moreover, Raff failed to appear at the scheduling conference held on March 20, 2017. (ECF No. 66.)

On April 13, 2017, upon FTC's request, the Clerk entered default against Raff and MDI for failure to respond to the Complaint. (ECF Nos. 67-68.) That same day, Raff e-mailed: (1) a request to appear telephonically, and (2) a request to stay the case, on behalf of Raff and MDI. (ECF Nos. 69-71.) The Court struck both requests on April 14, 2017 due to repeated violations of Local Rules 83-2.15-4.2(a)(1), 83-2.5, 11-1, and 6-1, and noted that, "[d]espite the Court's clear warnings, Mr. Raff continues to flout the Court's Orders and applicable rules." (ECF No. 72.) On April 18, 2017, Raff properly filed both requests, which the Court denied because there were no pending hearings in the action at which Raff could request to appear telephonically and because Raff failed to demonstrate that a stay was warranted.[3] (ECF Nos. 73-75.) On May 4, 2017, Raff appealed the Clerk's Entry of Default to the Ninth Circuit, which was dismissed for lack of jurisdiction on May 10, 2017. (ECF Nos. 77, 85.)

The FTC filed the instant Application on May 25, 2017. Upon notification of deficiencies from the Court, the FTC supplemented their application on June 7, 2017. (ECF Nos. 80-82.) On June 12, 2017, Raff requested an extension of 120 days to respond to the Application, which the FTC opposed on June 15, 2017. (ECF Nos. 83-84.) The Court granted Raff 30 additional days to respond. (ECF No. 86.)

Throughout these proceedings, MDI has not been represented by counsel. Raff's attempts to represent MDI were repeatedly rejected by this Court. (*E.g.,* ECF Nos. 57, 72.)

II. DISCUSSION

A. Procedural Requirements for Default Judgment

Under Federal Rule of Civil Procedure ("Rule") 15, obtaining a default judgment is a two-step process. First, the plaintiff must establish default by affidavit or otherwise, after which the court clerk enters default. Fed. R. Civ. P. 55(a). Second, the plaintiff must apply to the court for a

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[2] In brief, these Local Rules pertain to ex parte communications with the judge, the notice and service of documents and motions, the form and format of documents presented to the Court, and *pro se* litigants.

[3] In his request for a stay of the action, Raff asserted that a case involving Raff was in its final stages of litigation in Nevada federal court. The Court took judicial notice of the docket in the Nevada Action and denied the stay because Raff failed to explain how the factual or legal issues presented in the Nevada Action bear on this case. (ECF Nos. 73-74.)

default judgment if the plaintiff's claim is for a sum that is not certain or a sum that cannot be made certain by computation. Fed. R. Civ. P. 55(b).

Pursuant to the Local Rules of the Central District of California, applications for default judgment must be accompanied by a declaration that includes the following information:

> (a) When and against what party the default was entered;
> (b) The identification of the pleading to which default was entered;
> (c) Whether the defaulting party is an infant or incompetent person, and if so, whether that person is represented by a general guardian, committee, conservator or other representative;
> (d) That the Servicemembers Civil Relief Act (50 App. U.S.C. § 521) does not apply; and
> (e) That notice of the Application for Default has been served on the defaulting party, if the defaulting party has appeared in the action or it the damages sought are unliquidated.

L.R. 55-1; *see also* Fed. R. Civ. P. 55(b)(2).

The Court finds that each of these procedural requirements has been met. First, the clerk entered default and named MDI and Raff as the defaulting parties. (Second Decl. Nadine Samter In Supp. Pl.'s Appl. ("Second Samter Decl.") ¶ 2B, ECF No. 87; *see generally* Default by Clerk, ECF No. 68.) Second, the FTC has clearly identified that default was entered for failure to respond to the Complaint. (Second Samter Decl. ¶ 2A-B.) Third, the defaulting party is not an infant or an incompetent person. (Second Samter Decl. ¶ 2D.) Fourth, the Servicemembers Civil Relief Act does not apply. (Second Samter Decl. ¶ 2E.) Finally, the FTC served Raff and MDI with the Summons and Complaint. (ECF Nos. 30-31.)

B. Substantive Requirements for Default Judgment

A plaintiff is not entitled to a court-ordered default judgment merely because the defendant defaulted, and the applicable procedural requirements are met. Fed. R. Civ. P. 55. The district court, in its discretion, may grant or deny a motion for default judgment. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In conducting this evaluation, the Court considers the following factors:

> (1) the possibility of prejudice to the plaintiff;
> (2) the merits of plaintiff's substantive claim;
> (3) the sufficiency of the complaint;
> (4) the sum of money at stake in the action;
> (5) the possibility of a dispute concerning material facts;

(6) whether the default was due to excusable neglect; and
(7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Although Raff filed an Opposition, he only indirectly addresses the excusable neglect factor, which the Court turns to first. (*See generally*, Opp'n.)

1. Excusable Neglect

Pursuant to this *Eitel* factor, a court must consider whether the defendant's failure to respond to the plaintiff's allegations is the result of excusable neglect. *Eitel*, 782 F.2d at 1472. The possibility of excusable neglect is remote where the defendant is provided proper notice of the pending suit, but does not contact the court or the plaintiff in any manner. *See Phillip Morris USA, Inc. v. Castworld Prods., Inc.*, 219 F.R.D. 494, 501 (C.D. Cal. 2003). *Cf. Eitel*, 782 F.2d at 1472 (finding excusable neglect where "[t]he record shows that the parties engaged in earnest settlement negotiations after the complaint was served and in fact reached what appeared to be a final settlement agreement prior to the deadline for [the] answer").

Raff incorrectly argues that this Court cannot grant default judgment because he filed a responsive pleading when he responded to the Complaint. (Opp'n 1.) Relying on non-binding opinions from, *inter alia*, the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Eastern District of Wisconsin, Raff additionally argues that a party can avoid default by "pleading or otherwise defending," and he claims that he "defended himself on numerous occasions." (Opp'n 2.)

The Court finds that Raff's failure to respond to the Complaint was not due to excusable neglect.[4] After each attempted filing, the Court admonished Raff and specifically identified the rules that he violated, to no avail. (*See* ECF Nos. 51, 72, 75.) Although Raff is proceeding *pro se*, he must still adhere to the Court's rules. *See* L.R. 1-3 ("Persons appearing pro se are bound by these rules,

[4] The FTC argues that Raff's conduct is not excusable neglect, but rather, willful non-compliance. In 2008, Raff entered a plea agreement with the State of Florida to resolve a criminal action for grand theft for mailing fake sweepstakes checks to customers, requesting them to claim their prize by paying a $25 processing fee. (Appl. 12.) Additionally, in March 2016, the U.S. District Court of Nevada granted the FTC summary judgment against Raff for his participation in a scheme involving false representations made in direct mail for to customers who purchased weight a loss product. (Appl. 12.) Because the Court finds that there is no excusable neglect, the Court does not need to evaluate this assertion.

and any reference in these rules to 'attorney' or 'counsel' applies to parties pro se unless the context requires otherwise."); L.R. 83-2.2.3 ("Any person appearing pro se is required to comply with these Local Rules, and with the F.R.Civ.P., F.R.Crim.P., F.R.Evid. and F.R.App.P."); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987), overruled on other grounds by *Lacey v. Maricopa Cnty.*, 693 F.3d 896 (9th Cir. 2012) ("Pro se litigants must follow the same rules of procedure that govern other litigants.").

As to MDI, the possibility of excusable neglect is also remote. MDI was also properly served with the Complaint, failed to retain counsel, and has not responded or otherwise appeared in this action. Significant time has elapsed since MDI was served with the Complaint in September 2016.

Thus, this factor weighs in favor of granting default judgment against both Defendants.

2. Possibility of Prejudice to Plaintiff

Under this *Eitel* factor, the Court examines whether a plaintiff will be prejudiced if the request for entry of default judgment is denied. *Eitel*, 782 F.2d at 1471. The plaintiff has a basis for establishing prejudice if, absent default judgment, the plaintiff is left without other recourse for recovery. *See PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002); *Philip Morris USA v. Castworld Prods., Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003).

The FTC alleges that it will suffer prejudice if default judgment is not entered against both Raff and MDI because "it will be forced to commit time, resources, and personnel to prosecute a lawsuit" in which Raff and MDI will not meaningfully participate. (Appl. 5.) The FTC further alleges that it cannot litigate against Raff and MDI because they did not properly appear in Court. (Appl. 5.) Thus, the FTC alleges that it "cannot conduct discovery and move the case forward without Defendant's participation. Absent an entry of a default judgment against these Defendants, the FTC clearly would suffer prejudice." (Appl. 6.) The Court agrees.

As discussed above, despite notices from this Court, Raff continued to flout the Court's rules and failed to meaningfully participate in this action. As to MDI, it is "perfectly appropriate" to enter default judgment because it failed to retain counsel. *See United States v. High Country Broad. Co., Inc.*, 3 F.3d 1244, 1245 (9th Cir. 1993). The Court finds that the FTC'S only recourse for recovery is to pursue default judgment. Thus, this *Eitel* factor favors entry of default judgment.

3. Merits of Claim and Sufficiency of Verified Complaint

With regard to the second and third factors, the plaintiff is required to "state a claim on which the plaintiff may recover." *PepsiCo*, 238 F. Supp. 2d at 1175. Once a default has been entered by the clerk, the well-pleaded factual allegations of the complaint, except those concerning damages,

are deemed to have been admitted by the non-responding party. *TeleVideo Sys. Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

Section 5(a) prohibits unfair or deceptive practices in or affecting commerce, because their misrepresentations in the mailers caused consumer injury. 15 U.S.C. § 45(a). "An act or practice is deceptive if 'first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission or practice is material.'" *FTC v. Stefanchik*, 559 F.3d 924, 927 (9th Cir. 2009) (citing *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001)). "Deception may be found based on the 'net impression' created by a representation." *Stefanchik*, 559 F.3d at 927 (citing *FTC v. Cyberspace.Com*, 453 F.3d 1196 (9th Cir. 2006)).

Here, the FTC sufficiently alleged that Raff and MDI represented via personalized mail to mostly elderly consumers and that they had won a substantial prize and merely needed to mail the fee to claim it. (Compl. ¶ 11.) The FTC also alleged that Defendants played an important role in the scheme: MDI and Raff provided electronic templates of the cash prize notifications, outgoing and return envelopes, and electronic lists of consumers' contact information, which were used to track the response rate and income from each list and which were refined, reused, and sold to other direct marketers. (Compl. ¶¶ 25-27.)

The FTC also sufficiently alleged that the representation is likely to mislead consumers acting reasonably under the circumstances. Raff and MDI created the net-impression that the recipient won a substantial prize by using specific statements, personalizing the mailings, claiming that the customer is "specially selected," and asserting that the customer only has a limited amount of time within which to claim the cash prize. (Compl. ¶¶ 14-18; Ex. A-J.) This Court finds that the FTC sufficiently alleged that these representations and the "net impression" it creates, are likely to mislead consumers acting reasonably under the circumstances.

Finally, the FTC sufficiently alleged that the representation was material. As alleged, many customers believed that they won a prize and mailed the fees to the addresses in the Netherlands, and would not have paid the fee but for the representation that they had won a substantial prize and needed to pay the fee to claim it. (Compl. ¶ 20; Appl., Ex. 4 Decl. Joyce Grauman, ECF No. 79-8; Appl., Ex. 5 Decl. of Sarah Hasler, ECF No. 79-10; Appl., Ex. 6 Decl. of Beverly J. Johnson, ECF No. 79-11; Appl., Ex. 7 Decl. of Kevin Johnson, ECF No. 79-13.) Therefore, the second and third *Eitel* factors favor default judgment against both Defendants.

4. Amount of Damages

Next, "the court must consider the amount of money at stake in relation to the seriousness of Defendant's conduct." *PepsiCo*, 238 F. Supp. 2d at 1176. If the amount of money at stake is

proportional to the harm caused by the defendant's conduct, default judgment is warranted. *Landstar Ranger, Inc. v. Parth Enters., Inc.*, 725 F. Supp. 2d 916, 921 (C.D. Cal. 2010).

In the Complaint, the FTC requests both injunctive and equitable monetary relief. With regard to the monetary request, the FTC seeks a total of $501,895.00 against Raff and MDI, which it argues represents the estimated total amount consumers paid in response to the deceptive prize practices. (Appl. 11.) Based on records the FTC obtained from the companies that printed and mailed the deceptive mail pieces, the FTC argues that a conservative estimate shows that approximately 1,433,987 deceptive cash prize mail pieces were sent to consumers in 2013 and 2014, of which 1.4 percent resulted in a customer sending in the $25 "fee." (Appl. 20.) Thus, approximately 20,076 customers paid the fee, totaling approximately $501,895.00. (Appl. 20.)

Although Raff and MDI were not the only Defendants in this action, the FTC argues that the amount sought is "entirely commensurate" with the gravity of Raff and MDI's violations, because they directly participated in the scheme when they knew or should have known that the representations that the consumers had received a large prize were false. (Appl. 11.) "Equity may require a defendant to restore his victims to the status quo where the loss suffered is greater than the defendant's unjust enrichment. Moreover, because the FTC Act is designed to protect consumers from economic injuries, courts have often awarded the full amount lost by consumers rather than limiting damages to a defendant's profits." *Stefanchik*, 559 F.3d at 930. This Court finds that this factor does not disfavor granting default judgment.

5. Possibility of Dispute Concerning Material Facts

The next *Eitel* factor examines the likelihood of dispute between the parties regarding the material facts surrounding the case. *Eitel*, 782 F.2d at 1471-72. This factor is particularly relevant when the parties to a lawsuit dispute material facts in their pleadings and one party subsequently defaults. *Id.* at 1472. However, when the moving party supports its claims with ample evidence and the defaulting party makes "no attempt to challenge the accuracy of the allegations in the complaint, no factual disputes exist that preclude the entry of default judgment." *Landstar Ranger*, 725 F. Supp. 2d 916 at 922.

Defendants did not oppose the Complaint, and Raff's Opposition to the Application does not dispute any of the Complaint's allegations. Thus, there is no likelihood that genuine issues of material fact would preclude entry of default judgment.

6. Policy Favoring Decision on the Merits

"Cases should be decided upon their merits whenever reasonably possible." *Eitel*, 782 F.2d at 1472. However, where the defendant fails to respond to the plaintiff's complaint, a decision on the merits is impractical, if not impossible. Under Rule 55(a), "termination of a case before hearing

the merits is allowed whenever a defendant fails to defend an action." *Pepsico*, 238 F. Supp. 2d at 1177. Defendants' failure to respond to the Complaint, which was served on them approximately ten months ago, coupled with Raff's various failed attempts to file documents or otherwise meaningfully participate in this case, renders a decision on the merits highly impractical. This factor weighs in the FTC's favor.

On balance, the Court finds that the application of the *Eitel* factors to this case entitles the FTC to default judgment against MDI and Raff.

C. Appropriateness of Remedy

1. Injunctive Relief

The FTC seeks to permanently enjoin MDI and Raff from participating in or assisting others in engaging in prize promotion schemes and prohibit other related deceptive conduct, as detailed in the FTC's Proposed Default Judgment and Order.[5] (Appl. 13; Appl., Ex. 15 Proposed Default J. & Order.)

Section 13(b), as invoked by the FTC, "gives the Commission the authority to seek, and gives the district court the authority to grant, permanent injunctions in proper cases even though the Commission does not contemplate any administrative proceedings." *F.T.C. v. H.N. Singer, Inc.* 668 F.2d 1107, 1111 (9th Cir. 1982). This Circuit held that "a routine fraud case is a proper case [for the use of this authority]." *Id.* In addition, Section 13(b) "also by implication gives the Court authority to afford all necessary ancillary relief, including rescission of contracts and restitution." *Id.* at 1112. For an injunction to be imposed, "the necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). "The existence of past violations may give rise to an inference that there will be future violations." *United States v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980). "'The Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past.' Having been caught violating the Act, respondents 'must expect some fencing in.'" *F.T.C. v. Colgate-Palmolive*, 380 U.S. 374, 395 (1965) (quoting *F.T.C. v. National Lead Co.*, 352 U.S. 419, 431, 352 U.S. 419 (1957)).

[5] In the Application, the FTC argues for a permanent injunction against both MDI and Raff; in its Proposed Order, the FTC's injunctive relief request appears to be made against MDI only. It is clear that the FTC requests the proposed injunction against both MDI and Raff. (Appl. 15-17.) For the following reasons, the Court finds that the requested injunction and ban are warranted against both Defendants.

The Court agrees that there is a cognizable danger of a recurrent violation. In 2008, Raff entered into a plea agreement with the State of Florida to resolve a criminal action for grand theft for mailing thousands of fake sweepstake checks to consumers throughout the United States and Canada requesting customers to pay a $25 processing fee. (Appl. 12.) In the Nevada Action, the court entered summary judgment against Raff in March 2016 for his participation in a scheme involving false representations made in direct mail to consumers who purchased a weight-loss product called W8-B-Gone. (Appl. 12.) Raff's history of involvement in fraud schemes creates a cognizable danger of a recurrent violation that is more than a mere possibility. The FTC's requested injunctive relief against Defendants is warranted.

2. Equitable Monetary Relief

The FTC requests that the Court order Defendants Raff and MDI, jointly and severally, to pay Plaintiff the full amount of the injury that consumers suffered as a result of the misrepresentations. (Appl. 17.) Additionally, it asks the Court to hold Raff individually liable for MDI's wrongful conduct. (Appl. 19.)

Section 13(b) "by implication gives the Court authority to afford all necessary ancillary relief, including rescission of contracts and restitution." *H.N. Singer,* 668 F.2d at 1112. "Equity may require a defendant to restore his victims to the status quo where the loss suffered is greater than the defendant's unjust enrichment." *Stefanchik*, 559 F.3d at 930. "Moreover, because the FTC Act is designed to protect consumers from economic injuries, courts have often awarded the full amount lost by consumers rather than limiting damages to a defendant's profits." *Id.* One defendant is not discharged from liability under the FTC Act merely because multiple defendants contributed to the act of fraud, because "a single violation of the Act may have more than one perpetrator." *F.T.C. v. Neovi*, 604 F.3d 1150, 1155 (9th Cir. 2010). Additionally, in some cases, an individual defendant is held liable for corporate violations of the FTC Act if he "participated directly in the deceptive acts *or* had the authority to control them," and "had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *Stefanchik*, 559 F.3d at 931.

As discussed, the FTC sufficiently alleged that Raff and MDI participated in and contributed significantly to, the cash prize promotion scheme, knowing of the deceptive misrepresentations made to consumers. Raff and MDI knew, or were reckless in not knowing that the customers who paid the fees did not in fact win a prize. Raff and MDI are thus both liable for the full amount of damages of $501,895.00, as calculated in Section II.B.4., *supra*, even if this amount may be greater than MDI's and Raff's profits. Finally, Raff is also individually liable for MDI's corporate violations: as MDI's president, Raff had the authority to control its operations, had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentations,

or was aware of a high probability of fraud along with an intentional avoidance of the truth. The Court **GRANTS** the FTC's request for equitable monetary relief.

III. RULING

For the foregoing reasons, the Court **GRANTS** the FTC's Motion for Default Judgment against Defendants MDI and Raff. The Court hereby **ORDERS** MDI and Raff to pay, jointly and severally, the sum of $501,895.00 to Plaintiff, and **ORDERS** that MDI and Raff are banned from participating or assisting in prize promotions and prohibited against misrepresentations. A separate Default Judgment will issue. This case shall close.

IT IS SO ORDERED.