UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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American Check Processing, State Check Processing, Inc., Check Processing, Inc., US Check Processing, Inc., and Flowing Streams, F.S., Inc. (*Id.*). The relief defendant is Empowered Racing LLC. (*Id.*).

The following facts are taken from the pleadings and motion papers in this action, including the FTC's Statement of Material Facts ("SOF") (Dkt. No. 127-2). The SOF attaches forty-three exhibits totaling approximately 1,500 pages. (Dkt. Nos. 129-32).[1] The exhibits consist of consumer declarations, correspondence, business records, telephone recording transcriptions, discovery responses, and other evidence concerning the defendants' unlawful debt collection practices. The corporate defendants and Empowered Racing have not responded to the FTC's SOF, nor have they submitted any opposition to the FTC's motion. Briandi's and Moses' respective responses to the FTC's SOF primarily argue that they did not participate in, and were unaware of, the corporate defendants' unlawful debt collection activities.[2] Therefore, nearly all of the FTC's proposed facts regarding the corporate defendants' unlawful practices are undisputed. Unless otherwise noted, when citing the FTC's SOF, I have confirmed that the proposed fact is properly supported by evidence and that it has not been controverted with evidence by the defendants. *See* W.D.N.Y. L.R. Civ. P. 56(a).

[1] When citing an exhibit attached to the SOF, I have provided the CM/ECF docket number, the exhibit number, and the page number(s) designated by the FTC.

[2] Briandi also argues that summary judgment should not be entered because "discovery has not been completed by the defense." (Dkt. No. 151 at 4). This argument is rejected because the defendants had over one year to pursue discovery. (*See* Dkt. Nos. 68, 107, 113, 114). Moreover, Briandi has not set forth the nature of the uncompleted discovery, how those facts are reasonably expected to create a 12.3(p)3.1(a)-12.2 Tc 0 Tw 10.253 022.675ket 202 Tw [(s)-8(et) r I Tt Mor93,9I T

"office manager," and oversaw the three managers. (*Id.* ¶¶80, 146). Another employee, Michael Fix, served as compliance manager. (Dkt. No. 132-11, Ex. 41 at 1447 ¶11).

B. *Collection Tactics*

The corporate defendants collected consumer debts, primarily payday loan debts. (Dkt. No. 127-2 ¶14).[5] lceD[eb)n14(,)e2(u4.4)]e7Ew.[(d13uJnael)

tactics employed by collectors during these calls.[6] Generally, collectors identified themselves as "processors," "officers," or "investigators" from the "fraud unit" or "fraud division" of the corporate defendants. (*Id.* ¶¶87, 88). To persuade consumers to pay debts, collectors accused them of "check fraud" or other crimes, and threatened them with criminal prosecution, legal action, or wage garnishment. (*Id.* ¶¶89, 90, 96, 97). These accusations and threats were false because not once did the corporate defendants pursue criminal charges or garnishment against a consumer. (*Id.* ¶¶95, 97). Collectors might also call friends, family members, employers, and coworkers of a consumer, informing them that the consumer owed a debt, had committed check fraud or another crime, and faced pending or imminent legal action. (*Id.* ¶¶107-15).

Transcripts of telephone calls between collectors and consumers confirm that the collectors used the above tactics. (Dkt. No. 132-7, Ex. 38 at 799-810 ¶¶5-36). The transcripts show, for example, that collectors:

- Informed a consumer that she was a "named respondent regarding allegations of pending tax fraud." (*Id.* at 816).
- Informed a consumer that the call was not a collections call. (*Id.* at 826).
- Informed a consumer that he was "being processed under a Class A check violation." (*Id.* at 846).
- Warned a consumer that "[a] $500 check violation is a serious offense in the State of Texas." (*Id.* at 851).
- Informed a consumer that she was "named as a primary respondent" in a "complaint." (*Id.* at 886).

[6] The defendants do not argue that the FTC's evidence (*e.g.*, telephone calls, scripts, consumer complaints) is inadmissible, and their failure to do so may be construed as a waiver of any such argument. *DeCintio v. Westchester Cnty. Med. Ctr.*, 821 F.2d 111, 114 (2d Cir. 1987). In any event, courts have found similar evidence to be admissible under the "Residual Exception" to the hearsay rule, Fed. R. Evid. 807. *FTC v. Instant Response Sys., LLC*, No. 13 Civ. 00976(ILG)(VMS), 2015 WL 1650914, at *4-5 (E.D.N.Y. Apr. 14, 2015).

Check Processing, Central Check Processing, and Central Processing Services. (Dkt. No. 127-2 ¶65). One of these entities, Nationwide Check Processing, was incorporated in Colorado in June 2013 by a third-party agent. (*Id.* ¶66). During the period in which the corporate defendants collected under the Nationwide name, they used telephone numbers with area codes for Denver, Colorado, even though they placed their calls in East Amherst. (*Id.* ¶70). Another "business" operated by the defendants after the AOD, National Processing Service, was an unincorporated business that used a UPS Mailbox in Erie, Pennsylvania as its address. (*Id.* ¶72). Collectors began using phone numbers with an Erie area code to make collection calls, even though they placed the calls in East Amherst. (*Id.* ¶¶72-73). Further, the corporate defendants used out-of-state addresses and phone numbers to respond to law enforcement inquiries concerning their debt collection practices. (*Id.* ¶71).

At their respective depositions, the FTC asked Briandi and Moses if they notified the Attorney General that they were doing business under new names, as required by

accounts. (*Id.* ¶44). Between 2010 and 2013, Moses' average annual compensation was approximately $280,000. (Dkt. No. 145 at 2).

Moses was heavily involved in the corporate defendants' operations. He hired and disciplined employees (Dkt. No. 127-2 ¶¶46-47), determined employee compensation (Dkt. No. 145 at 2), approved scripts used by collectors to make collection calls (Dkt. No. 127-2 ¶53), authored at least one script that failed to inform the consumer that the call was from a debt collector attempting to collect a debt (*id.* ¶54), handled collection calls, some of which led to consumer complaints to the FTC (*id.* ¶¶59-60), received and responded to complaints from state law enforcement and the Better Business Bureau (*Id.* ¶¶55-57; Dkt. No. 132-8), and, along with Briandi, operated Flowing Streams, the entity the corporate defendants used to purchase consumer debts (Dkt. No. 127-2 ¶13).

1 at 176). Other responsibilities included handling personnel matters (he had the authority to hire and discipline employees) (Dkt. No. 127-2 ¶¶26-27), serving as the contact person for the corporate defendants' phone and internet registry accounts (*id.* ¶29), obtaining a merchant account to receive consumer payments (*id.* ¶30), and, along with Moses, operating Flowing Streams, the entity the corporate defendants used to purchase consumer debts (*id.* ¶13).

In 2009, Briandi regularly handled collection calls, but in subsequent years, he did not handle as many calls. (Dkt. No. 150-1 at 71-73). Adrian Fronczak, the corporate defendants' IT Manager, testified that calls were typically "passed to" Briandi. (Dkt. No. at 132-10, Ex. 40 at 1279). Some of the calls Briandi handled resulted in consumer complaints to the FTC. (Dkt. No. 127-2 ¶40).

In the twelve to eighteen months before the TRO, Briandi contends that he spent less and less time operating the corporate defendants because he was studying to become a pastor. Briandi testified that he began his work days by praying in his personal office. (Dkt. No. 150-1 at 65). After he prayed, he reviewed the corporate bank accounts before leaving the office to pick up mail and supplies. (*Id.* at 65-66). He then returned to the office to take online Bible classes before leaving the office around 2:00 or 3:00 p.m. (*Id.*

defendants, Moses, and Briandi from engaging in debt collection activities, bar them from making certain misrepresentations with respect to related consumer financial products and service markets, enable the FTC to monitor their compliance with a final order, and impose a money judgment for $10,852,396, *i.e.*, the amount deposited by payment processors into the corporate defendants' bank accounts between May 11, 2010 and March 10, 2014. (*See* Dkt. No. 127-2 ¶165). As for Empowered Racing, the FTC seeks disgorgement of the $92,000 it received from the corporate defendants.

In opposition to the FTC's motion, Moses filed separate responses to the FTC's SOF and its

as a common enterprise, “each entity within a set of interrelated companies may be held jointly and severally liable for the actions of other entities that are part of the group.” *FTC v. Tax Club, Inc.*, 994 F. Supp. 2d 461, 469 (S.D.N.Y. 2014). “To determine whether a

were, at most, nominal. *See Vantage Point Servs., LLC*, 2015 WL 2354473, at *7 (finding, in context of preliminary injunction motion, that debt collection companies operated as common enterprise because any distinctions between the companies were, at most, nominal). The defendants have not submitted any evidence to raise a genuine issue of fact as to the common enterprise factors. Therefore, as a matter of law, the corporate defendants operated as a common enterprise, and they are jointly and severally liable for each other's actions. The Court will now address the FTC's FDCP>( )]TJ0.002 Tw

1. *§1692e(1)*

Section 1692e(1) prohibits a debt collector from falsely representing or implying that it is affiliated with the United States or any state. Here, the corporate defendants used names (*e.g.*, Federal Recoveries, Federal Processing) that closely resemble those of governmental entities. Moreover, when they called consumers, the corporate defendants' collectors falsely identified themselves as "officers" and "investigators" before threatening consumers with criminal charges and incarceration. Based on these facts, the least sophisticated consumer would certainly believe that the corporate defendants were affiliated with the government, in violation of §1692e(1). (*See* Dkt. No. 129-6, Ex. 7 at 44 ¶5) (consumer believed that the corporate defendants' collector was calling from a "branch of the federal government")); *Alonso v. Blackstone Fin. Grp., LLC*, No. 1:11-cv-01693-SAB, 2013 WL 6843597, at *13 (E.D. Cal. Dec. 20, 2013) (pretending to be an "officer" and providing a case number configured to appear as a legal case number found to violate §1692e(1)).

2. *§1692e(2)*

Section 1692e(2) prohibits falsely representing "the character, amount, or legal status of any debt." "A debt collector that inflates the amount of the debt, whether through unauthorized service fees or otherwise, violates this provision of the FDCPA." *Gathuru v. Credit Control Servs., Inc.*, 623 F. Supp. 2d 113, 122 (D. Mass. 2009). The corporate defendants inflated debts by using an unreliable "formula" that Moses created to calculate "interest." Moses did not receive any formal assurances that the formula accurately calculated interest — indeed, the company that sold debts to the corporate defendants, Debt Management Partners, complained that the corporate defendants

were "inflating the balance" of debts. (Dkt. No. 127-2 ¶137). The corporate defendants' practices resulted in consumers paying much more than they actually owed. For example, the corporate defendants informed one consumer that she owed nearly $10,979.07, which she agreed to pay, even though her outstanding balance was listed as $5,892.58. (*Id.* ¶128(a)). Another consumer was told that he owed over $400 when the debt portfolio listed his debt as $166.04. (*Id.* ¶128(d)). These activities violate §1692e(2).

3. *§1692e(4)*

Section 1692e(4) prohibits "[t]he representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action." A collection company that threatens a consumer with legal action despite having a "fixed practice" of not pursuing such action violates §1692e(4). *See Tsenes v. Trans-Cont'l Credit & Collection Corp.*, 892 F. Supp. 461, 465 (E.D.N.Y. 1995) (quoting *Sluys v. Hand*, 831 F. Supp. 321, 326-27 (S.D.N.Y. 1993)). Here, although the corporate defendants routinely threatened consumers with criminal charges and garnishment, not once did they pursue this relief against a consumer. (Dkt. No. 127-2 ¶¶95, 97). Thus, they have violated §1692e(4).

4. *§§1692e(5), (7)*

Section 1692e(5) prohibits a debt collector from threatening to take any action that it cannot legally take or that it does not intend to take, while §1692e(7) bars a collector from falsely representing or implying that the consumer "committed any crime

or other conduct in order to disgrace the consumer." As discussed under §1692e(4), the corporate defendants routinely

flat out told a consumer that he was not calling about "collections." (Dkt. No. 132-7, Ex. 38 at 826 ("I wanted you to understand, this isn't collections. I mean, typically, what I deal with here is bad check claims where — a totally different type of case where that would be something handwritten, bounced, and it would be, you know, pursued on that end.")). Thus, the FTC has shown that the corporate defendants violated §1692e(11).

In sum, the corporate defendants violated each FDCPA provision underlying Count Three. Therefore, I recommend that summary judgment be granted against the corporate defendants on this count.

C. *Count Four (§1692c(b))*

Section 1692c(b) bars debt collectors from communicating with certain third parties (*e.g.*, family members, employers, co-workers) other than for the purpose of obtaining a consumer's contact information, unless the consumer consents to the.31 0 Td [(c

including, among other things, the amount of the debt, the name of the creditor to whom the debt is owed, and a statement that the collector will assume the debt to be valid unless the consumer disputes the debt within thirty days. The evidence shows that the corporate defendants did not disclose this information in telephone calls or letters to consumers. In one instance, a collector even told a consumer that it was not company "policy" to send letters. (Dkt. No. 127-2 ¶120). Thus, I recommend that summary judgment be granted against the corporate defendants on Count Five.

E. *Counts One and Two (FTC Act)*

Section 5(a)(1) of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. §45. "To prove a deceptive act or practice under §5(a)(1), the FTC must establish three elements: '[1] a representation, omission, or practice, that [2] is likely to mislead consumers acting reasonably under the circumstances, and [3] the representation, omission, or practice is material.'" *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006) (alterations in original) (quoting *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984)). "A representation is material if it involves information that is important to consumers, and, hence, likely to affect their choice of, or conduct regarding, a product." *FTC v. Navestad*, No. 09-CV-6329T, 2012 WL 1014818, at *4 (W.D.N.Y. Mar. 23, 2012) (quoting *FTC v. Cantkier*, 767 F. Supp. 2d 147, 151 (D.D.C. 2011)). The defendant need not have acted with intent to deceive; rather, "it is enough that the representations or practices were likely to mislead consumers acting reasonably." *Verity Int'l, Ltd.*, 443 F.3d at 63.

Impersonating law enforcement and falsely accusing consumers of criminal conduct are material misrepresentations likely to mislead reasonable consumers.

Indeed, the FTC has identified consumers who relied on these misrepresentations in deciding to pay the corporate defendants. (Dkt. No. 129-5, Ex. 6 at 34, 36 ¶¶2, 3, 14; Dkt. No. 129-6, Ex. 7 at 44 ¶7; Dkt. No. 129-7, Ex. 8 at 48 ¶5). The FDCPA violations discussed above also constitute violations of the FTC Act. 15 U.S.C. §1692(*l*) (providing that an FDCPA violation "shall be deemed an unfair or deceptive act or practice in violation of [the FTC] Act"). Therefore, the corporate defendants violated the FTC Act as a matter of law, and I recommend that summary judgment be granted on Counts One and Two.

II. *Moses*

An individual may be held liable for corporate acts or practices if he "(1) participated in the acts or had authority to control the corporate defendant and (2) knew of the acts or practices." *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 320 (S.D.N.Y. 2008); *see also FTC v. 4 Star Resolution, LLC*, 15-CV-112S, 2015 WL 7431404, at *4 (W.D.N.Y. Nov. 21, 2015) (same).

A. *Participation in the Wrongful Acts or Authority to Control the Corporate Defendants*

Moses participated in the corporate defendants' wrongdoing by handling collection calls that led to consumers submitting complaints to the FTC, approving scripts used by collectors to call consumers, and authoring a script that failed to notify the consumer that the call was from a debt collector attempting to collect a debt. Moses also had the authority to control the corporate defendants, as he was an owner and a director of each entity and, along with Briandi, controlled their bank accounts. *See 4 Star Resolution, LLC*, 2015 WL 7431404, at *5 ("Defendants do not dispute that the individual defendants here have the authority to control one or more of the Corporate

Defendants, as evidenced by, among other things, bank signatory cards and incorporation or other filings . . . ."); *Instant Response Sys., LLC*, 2015 WL 1650914, at *9 ("Assuming the duties of a corporate officer establishes authority to control."). Therefore, the FTC has satisfied the first element for individual liability against Moses.

B. *Knowledge*

Knowledge may be shown through "actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth." *4 Star Resolutions*

Moses' knowledge also arises from his participation in the corporate defendants' operation, which was permeated with fraud. *See Med. Billers Network, Inc.*, 543 F. Supp. 2d at 320 ("An individual's degree of participation in business affairs is probative of knowledge."); *Instant Response Sys., LLC*, 2015 WL 1650914, at *9 ("Active involvement in the day-to-day operations of a company . . . is probative of knowledge.").

Finally, the FTC served Requests for Admission asking Moses to admit, among other things, that he knew the corporate defendants violated the FDCPA and other applicable laws. (Dkt. No. 130-8, Ex. 19 at 558-75). Moses did not respond to the Requests (*see* Dkt. No. 127-1 ¶10), and his failure to do so is an admission that he knew of the corporate defendants' wrongdoing. Rule 36(a)(3).

Therefore, for these reasons, no disputed issue of fact exists as to Moses' authority to control the corporate defendants, his participation in their unlawful activities, and his knowledge of their wrongdoing. Accordingly, Moses is individually liable for the corporate defendants' wrongdoing, and I recommend that summary judgment be granted against him on Counts One through Five. *See FTC v. Williams, Scott & Assocs. LLC*, No. 1:14-CV-1599-HLM, at 74-75 (N.D. Ga. Nov. 4, 2015) (granting FTC's summary judgment motion and holding individual defendant liable for debt collection company's violations of the FTC Act and the FDCPA).

III. *Briandi*

The FTC has also established Briandi's authority to control the corporate defendants and his knowledge of their misrepresentations.

A. *Participation in the Wrongful Acts or Authority to Control the Corporate Defendants*

The undisputed evidence shows that Briandi had the authority to control the corporate defendants, as he served as co-owner and co-director of all but one of the entities and had control over their bank accounts. *See 4 Star Resolution, LLC*, 2015 WL 7431404, at *5; *Instant Response Sys., LLC*, 2015 WL 1650914, at *9.

B. *Knowledge*

Briandi contends that he lacks actual knowledge of the corporate defendants' misrepresentations because he spent little time in the office, and when he was in the office, he was alone, praying. But actual knowledge is not the only basis for liability — an individual may also be held liable if he was aware of a high probability of fraud and intentionally avoided learning the truth. *4 Star Resolution, LLC*, 2015 WL 7431404, at *4. Such is the case here.

Briandi's awareness of a high probability of fraud and his intentional avoidance of the truth arise from his involvement in the AOD and his actions thereafter. Specifically, in 2013, Briandi agreed to the AOD, which found that the corporate defendants "repeatedly and persistently violated the FDCPA." (Dkt. No. 129-14, Ex. 11 at 308 ¶17). The AOD further provides that the Attorney General, the Better Business Bureau, and the FTC received dozens of complaints accusing the corporate defendants of violating the FDCPA. (*Id.* at 307 ¶14). In the complaints, consumers state that the corporate defendants accused them of breaking the law, threatened them with arrest and imprisonment, falsely informed them that a lawsuit has been or would be filed, disclosed their debts to third parties, threatened to seize their property and garnish their wages, and failed to send them validation letters. (*Id.* at 307-08 ¶15). Briandi conferred with

the Attorney General's office concerning the AOD, and in May 2013, he signed an affidavit representing that he had taken steps to ensure that the corporate defendants complied with the FDCPA. (Dkt. No. 132-11, Ex. 41 at 1446-49).

The AOD put Briandi on notice of a high probability of fraud within the corporate defendants' operations. In the months after the AOD, Briandi should have made sure the corporate defendants complied with the AOD and all applicable laws. Instead, he put his head in the sand by praying in his office and running errands, all the while receiving

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Press, 53 F. Supp. 2d 248, 260 (E.D.N.Y. 1998) (internal quotation marks and citations omitted). "[T]he commission of past illegal conduct is highly suggestive of the likelihood of future violations." *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975).

Injunctive relief is warranted here because the corporate defendants repeatedly violated the FDCPA and FTC Act and failed to comply with the AOD. *See id.*; *Instant Response Sys., LLC*, 2015 WL 1650914, at *10 (finding that defendant's disregard of

a money judgment for $10,852,396, which represents the corporate defendants' revenue between 2010 and 2014. (Dkt. No. 128-1 at 23-28). The defendants oppose the FTC's proposed monetary relief, only.

A. *Prohibition on Debt Collection Activities*

Due to the defendants' history of unlawful debt collection practices, they should be enjoined from engaging in debt collection activities. *See FTC v. Gill*, 265 F.3d 944, 957 (9th Cir. 2001) (affirming injunction prohibiting

presumption of consumer reliance in part because the FTC identified consumers who purchased the defendants' services).

Second, as described above, the corporate defendants' misrepresentations were widely disseminated and continued unabated until the TRO. Pursuant to the TRO, the FTC discovered scripts in fifteen of the twenty-six collector stations in the corporate defendants' office and numerous recordings in which the corporate defendants' collectors impersonated law enforcement and accused consumers of having committed crimes. *Id.* (evidence of misleading telephone calls and letters satisfies the "widely disseminated" requirement). Briandi's contention that there are "thousands of telephone calls where no evidence exists of any wrongdoing" is not supported by any evidence. (Dkt. No. 151 at 7-8).

Third, the FTC has identified consumers who relied upon the corporate defendants' misrepresentations in deciding to pay the defendants. (Dkt. No. 129-5, Ex. 6 at 34, 36 ¶¶2, 3, 14; Dkt. No. 129-6, Ex. 7 at 44 ¶7; Dkt. No. 129-7, Ex. 8 at 48 ¶5); *Instant Response Sys., LLC*, 2015 WL 1650914, at *11 ("The misrepresentations were widely disseminated to hundreds of consumers across the nation, and at least some of these consumers eventually purchased [the defendants'] services0.7v(().)]TJ 0 Tc 0.012 Tw 5486 (

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1997)). "After the burden shifts, the risk of uncertainty 'fall[s] with the wrongdoer whose

CONCLUSION

I recommend that the FTC's motion for summary judgment (Dkt. No. 127) be GRANTED in its entirety and that the Court enter a final order and judgment (1) prohibiting the corporate defendants, Moses, and Briandi from engaging in debt collection activities, (2) prohibiting the corporate defendants, Moses, and Briandi from making certain misrepresentations with respect to related consumer financial products and service markets, (3) allowing the FTC to monitor the corporate defendants', Moses', and Briandi's compliance with a final order and judgment, (4) granting judgment against the corporate defendants, Moses, and Briandi for $10,852,396, and (5) granting

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The District Court will ordinarily refuse to consider *de novo*