

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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FEDERAL TRADE COMMISSION,

Plaintiff,

-against-

THE CUBAN EXCHANGE, INC., also d/b/a
CreditSure America and also d/b/a MyiPad.us, a
corporation, and SUHAYLEE RIVERA,
individually and as an officer or director of
The Cuban Exchange, Inc.,

Defendants.

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REPORT AND
RECOMMENDATION

12 CV 5890 (NGG)(RML)

LEVY, United States Magistrate Judge:

By order dated November 30, 2012, the Honorable Roslynn R. Mauskopf, United States District Judge, granted the Federal Trade Commission's motion for a Temporary Restraining Order and ordered defendants The Cuban Exchange, Inc. and Suhaylee Rivera ("defendants") to appear before me on December 12, 2012 to show cause why a Report and Recommendation should not issue recommending the entry of a preliminary injunction against them. (See Order, dated Nov. 30, 2012 (the "TRO").)¹ Counsel for the Federal Trade Commission (the "FTC")² appeared in court on December 12, 2012, but defendants failed to

¹ By order dated December 14, 2012, Judge Mauskopf extended the TRO until January 25, 2013.

² The FTC is, of course, an independent agency of the United States government whose purpose is to end unfair or deceptive practices affecting commerce.

appear or otherwise contact the court or the FTC regarding this matter.³ (See Transcript of Civil Cause for Preliminary Injunction Hearing, dated Dec. 12, 2012 (“Tr.”).) For the reasons stated below, I respectfully recommend that the FTC’s request for a preliminary injunction be granted.

BACKGROUND

According to the complaint, defendants have violated sections 13(b) and 19 of the Federal Trade Commission Act (the “FTC Act”), 15 U.S.C. §§ 53(b) and 57b, and the Telemarketing and Consumer Fraud and Abuse Prevention Act (the “Telemarketing Act”), 15 U.S.C. §§ 6101–6108,⁴ by engaging in a telemarketing and internet scam in which they falsely claim an affiliation with the FTC in order to deceive consumers into giving defendants their bank account information. (See generally Complaint, dated Nov. 28, 2012 (“Compl.”).) Specifically, the FTC alleges that defendants have used illegal pre-recorded robocalls with fake caller I.D. information to make it appear as if the calls are coming from the FTC. Defendants’ pre-recorded messages allegedly direct consumers to the website www.ftcrefund.com,⁵ where defendants then solicit consumers’ personal and bank account information purportedly to expedite refunds

³ In her order granting the TRO, Judge Mauskopf found that the FTC had properly served the Complaint, the Order to Show Cause, the application for a TRO, and all accompanying papers on defendant Suhaylee Rivera and had provided reasonable notice to both defendants. (See TRO at 3.)

⁴ Under 15 U.S.C. § 6102(c), any violation of any rule prescribed under the Telemarketing Act is to be treated as a violation of a rule under the FTC Act. See also 15 U.S.C. § 6105(b) (stating that any person who violates a rule under the Telemarketing Act “shall be subject to the penalties . . . provided in the [FTC Act] in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of the [FTC Act] were incorporated into and made a part of” the Telemarketing Act.)

⁵ This website, as well as other identical websites established by defendant Rivera, including www.creditsure.net and www.creditsure.org, have been disabled pursuant to the TRO.

(known as “consumer redress” payments) defendants claim they are entitled to receive. (Id. ¶¶ 2–3.) In fact, defendants have no connection with the FTC and cannot receive or process refunds on behalf of consumers; rather, the calls are intended to dupe consumers into providing sensitive personal and banking information. (Id. ¶ 3.)

DISCUSSION

The FTC Act authorizes the FTC to obtain a preliminary injunction “[u]pon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.” 15 U.S.C. § 53(b). The standard differs from that applicable to private applicants for such relief. See F.T.C. v. Crescent Publ’g Grp., Inc., 129 F. Supp. 2d 311, 319 (S.D.N.Y. 2001) (“‘The intent is to maintain the statutory or ‘public interest’ standard which is now applicable, and not to impose the traditional ‘equity’ standard of irreparable damage, probability of success on the merits, and that the balance of equities favors the petitioner.’”) (quoting H.R. Conf. Rep. No. 624, 93d Cong., 1st Sess. 18 (1973), reprinted in 1973 U.S.C.C.A.N. 2533). Thus, the FTC need not show irreparable harm; rather, the court must (1) determine that the FTC has a fair and tenable chance of ultimate success on the merits, and (2) consider the equities. Id. (citing United States v. Sun & Sand Imps., Ltd., 725 F.2d 184, 188 (2d Cir. 1984); F.T.C. v. Lancaster Colony Corp., 434 F. Supp. 1088, 1090–91 (S.D.N.Y. 1977)).

I find that the FTC has satisfied this standard. First, the FTC has submitted extensive documentation in support of its motion, including the declarations of an FTC investigator and three consumer witnesses. (See Declaration of Reeve Tyndall, dated Nov. 26, 2012 (“Tyndall Decl.”); Declaration of Lyndsey Lee, dated Nov. 16, 2012; Declaration of Mark

Galagaza, dated Nov. 17, 2012; Declaration of Catherine Bond, dated Nov. 24, 2012.)

According to the investigator, the FTC first learned about the website www.ftcrefund.com in mid-November 2012, when consumers who had received unsolicited pre-recorded robocalls about the website,⁶ which appeared to come from the FTC's main toll-free number (877) 382-4357, began to register complaints with the FTC. (Tyndall Decl. ¶ 3, Ex. A.) The investigator then visited the website and captured copies of various pages using Adobe Acrobat 9 Pro software. (Id. ¶¶ 16–18; Exs. B, C.) The website – which purports to inform consumers that they will receive a refund from the FTC in five to seven business days and requests personal and bank account information – stated that it was operated by “CrediSure America” and contained a hyperlink to www.creditsure.us, which is an exact copy of www.FTCRefund.com and is registered to defendant Rivera (Id. ¶¶ 27–31, 36; Exs. B, C). The website is also hosted on the same IP address as six other domains, including creditsure.net, EzCo.biz, and MyIpad.us, all of which are registered to defendant Rivera or are connected with The Cuban Exchange, Inc. (Id. ¶¶ 34–46). As confirmed by Charles Lawson, Program Manager of the FTC's Redress Administration Office, the FTC has never hired or retained Rivera, The Cuban Exchange, CreditSure America, or MyIpad.us to manage or administer refund payments to consumers or to participate or have involvement in any FTC consumer redress program. (Declaration of Charles Lawson, dated Nov. 28, 2012, ¶¶ 5–7.)

To prevail on its FTC Act claims, the FTC need not prove individual consumer

⁶ The pre-recorded messages state: “Please visit www.ftcrefund.com, www.ftcrefund.com. Your seizure ID number is 123223, again your seizure ID number is 123223. Visit right now www.ftcrefund.com. Your seizure number is 123223. Thank you and have a nice day.” (Compl. ¶ 14.) The messages use the same “seizure ID number” for all consumers. (Id.)

reliance or injury; rather, it need only establish that a material misrepresentation or omission was made that was likely to mislead consumers acting reasonably under the circumstances. F.T.C. v. Ameridebt, Inc., 373 F. Supp. 2d 558, 564 n.6 (D. Md. 2005) (citing F.T.C. v. Kuykendall, 371 F.3d 745, 764-66 (10th Cir. 2004) (en banc); F.T.C. v. Tashman, 318 F. 3d 1273, 1277 (11th Cir. 2003); F.T.C. v. Pantron I Corp., 33 F. 3d 1088, 1095 (9th Cir. 1994)). In light of the evidence presented, I find that the FTC has shown a likelihood of ultimate success on these claims.

Second, the public equities weigh in favor of granting the preliminary injunction. See Lancaster Colony Corp., 434 F. Supp. at 1096 (“The equities to be weighed . . . are not the usual equities of private litigation but public equities.”) (citing F.T.C. v. Food Town Stores, Inc., 539 F.2d 1339, 1344 (4th Cir. 1976)). Given the fundamentally deceptive nature of defendants’ scheme, I find that the public interest predominates and will be best served by the issuance of injunctive relief. A preliminary injunction would not work any undue hardship on the defendants, as they do not have the right to persist in conduct that violates federal law. See F.T.C. v. World Wide Factors, Ltd., 882 F.2d 344, 347 (9th Cir. 1989) (upholding finding of “no oppressive hardship to the defendants in requiring them to comply with the [FTC Act], refrain from fraudulent representation or preserve their assets from dissipation or concealment”). I therefore respectfully recommend that the FTC’s motion for a preliminary injunction be granted.

CONCLUSION

For the reasons stated above, I respectfully recommend that the FTC’s motion for a preliminary injunction be granted and that all of the elements of the TRO be included therein. Any objections to this Report and Recommendation must be filed with the Clerk of the Court,

with courtesy copies to the Honorable Nicholas G. Garaufis, United States District Judge,⁷ and to my chambers, within fourteen (14) days. Failure to file objections within the specified time waives the right to review. See 28 U.S.C. § 636(b)(1); Fed. R. Crim. P. 59.

Respectfully submitted,

/s/
ROBERT M. LEVY
United States Magistrate Judge

Dated: Brooklyn, New York
December 19, 2012

⁷ Although Judge Mauskopf issued the TRO, this case is assigned to Judge Garaufis.