

DISTRICT COURT DENVER COUNTY, COLORADO 1437 Bannock St, #256 Denver, CO 80202	DATE FILED: August 22, 2014 CASE NUMBER: 2013CV32572
<hr/> Plaintiff(s): STATE OF COLORADO, ex rel. JOHN W. SUTHERS, ATTORNEY GENERAL v. Defendant(s): SEA TO SKI VACATIONS, LLC, TRADITIONS TRAVEL GROUP, LLC; and STEPHEN WUNDER, ANDREW WUNDER, BETHANY WUNDER, and CHRISTIAN WUNDER, individually	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> Case Number: 2013CV32572 Courtroom 409
ORDER RE: PLAINTIFF'S MOTION FOR PERMANENT INJUNCTIVE RELIEF AND OTHER DAMAGES	

THIS MATTER comes before me on Plaintiff's Motion for Permanent Injunctive Relief and Other Damages, filed on April 17, 2014. I have reviewed the Motion and Response, the entire case file and applicable case and statutory law. Being fully apprised in the premises, I hereby find and order as follows:

I. Background

Sea to Ski Vacations, LLC ("Sea to Ski") is a vacation club that advertises significant savings on travel through exclusive industry affiliations. Sea to Ski contracts with sales Distributors, one of which is Traditions Travel Group, LLC ("Traditions"), to recruit potential members. Individual Defendants owned and operated Sea to Ski and Traditions during the time of the alleged CCPA violations. Stephen Wunder is the Managing Director of Distributor Relations for Sea to Ski. Andrew Wunder is the manager of Sea to Ski's fulfillment operations. Bethany Wunder is the manager of Sea to Ski's travel concierges, and sets the price of condo vacations. Christian Wunder is an owner of sea to Ski and its Director of Concierge Services.

After receiving numerous consumer complaints about Sea to Ski and its affiliated entities, Plaintiff opened an investigation into Defendants' business practices in September 2012. This led to a June 6, 2013 civil law enforcement action to be filed with this Court alleging that Defendants' engaged in deceptive trade practices in violation of the Colorado Consumer Protection Act ("CCPA"). Plaintiffs alleged that Defendants' business practices violated C.R.S. §§ 6-1-105(l)(e), (l), (r), and (u).

On February 5, 2014 Plaintiffs filed a Motion for Summary Judgment on all four of its claims.

On March 11, I granted Plaintiff's motion with respect to all four claims, vacated the pre-trial conference and trial, and denied Plaintiff's motion for Default Judgment as moot.

Plaintiff now seeks permanent injunctive relief, civil penalties, disgorgement and restitution, and fees and costs, which I found Plaintiff to be entitled to in my March 11, 2014 Motion for Summary Judgment order. Defendant Stephen Wunder filed a Response to the Motion for Permanent Injunctive Relief, which I have also considered. However, I find much of the Response to be primarily an attempt to relitigate the issues upon which I already ruled. Defendants have had an opportunity to defend and therefore I do not find the arguments in the Response to be persuasive.

II. Findings of Fact and Conclusions of Law

A. Permanent Injunctive Relief

Plaintiff requests that Defendants be permanently enjoined from the activities that are listed in ¶¶ 5, 6, and 8(a)-(s) of their April 17, 2014 Motion.

A party seeking a permanent injunction must show that: (1) the party has achieved actual success on the merits; (2) irreparable harm will occur unless that injunction is issued; (3) the harm that could be caused to the opposing party by the injunction is outweighed by the threatened injury; and (4) the injunction would not adversely affect the public interest. *Langlois v. Bd. Of Cnty. Comm'rs of El Paso*, 78 P.3d 1154, 1158 (Colo. App. 2003).

1. **Actual Success:** This prong is met, since I granted Plaintiff's Motion for Summary Judgment as to all four of its claims for relief.
2. **Irreparable Harm:** I find that significant harm will occur if Defendants are allowed to continue in these business practices. Specifically, I find that additional consumers will be misled and possibly defrauded.
3. **Threatened Injury:** While Defendant Stephen Wunder describes in his Response the injury he will suffer if this injunction is issued, primarily economic hardship. However, I find that such injury is outweighed by the harm to potential consumers.
4. **Public Interest:** Since I previously found that Defendants' deceptive business practices injured consumers throughout the nation, permanent injunction is in the public's interest.

Plaintiff's request for Permanent Injunction Relief is **GRANTED**.

B. Civil Penalties

Plaintiff requests that Defendants pay a civil penalty of up to \$2,000 per violation of the CCPA according to § 6-1-112(1)(a). Plaintiff asks for civil penalties for violation of §§ 6-1-105(l)(e), (l), (r), and (u). Plaintiff alleges that there were 1,750 customers who were subjected to each of the four deceptive business practices for a total of 7,000 violations of the CCPA. The maximum

civil penalty for any related series of violations is capped at \$500,000 for any related series of violations. C.R.S. § 6-1-112(1)(a).

In my March 11, 2014 Order regarding Summary Judgment, I found that Defendants committed four statutory violations. I hereby impose civil penalties for those violations as follows:

1. Violation of C.R.S. § 6-1-105(1)(e), Misrepresentation of Exclusive Relationship

I found that Defendants misrepresented that Sea to Ski and/or Traditions had an exclusive relationship with SFX in a willful attempt to mislead potential consumers and induce them into purchasing a membership with Defendants.

Plaintiff asserts that approximately 1,750 consumers paid an average of \$3,750.00 each for a membership, and urges me to assess the civil penalty maximum amount of \$2,000.00 for each consumer, and then reduce that amount to the \$500,000.00 statutory maximum. The Attorney General is not required to put on evidence of each and every consumer harmed by a defendant's CCPA violations. *People v. Shifrin*, 2014 WL 785220, *6-7 (Colo. App. 2014). However, Plaintiff has not presented sufficient evidence that all consumers were misled by Defendants' misrepresentations. Accordingly, I decline to base civil penalties on the total number of Defendants' consumers. Eight affected consumers testified at the preliminary injunction hearing, and Plaintiff provided the affidavits of two more. I find that a civil penalty of \$500.00 for each of those ten consumers to be appropriate, for a total of \$5,000.00 for violation of C.R.S. § 6-1-105(1)(e).

2. Violation of C.R.S. § 6-1-105(1)(l), Misrepresentation of the Price of Goods, Services, or Property

I found that Defendants misrepresented the price of goods, services, or property to potential consumers. Pursuant to evidence presented by Plaintiff, 63% of Defendants' customers were quoted condominium prices at more than they were promised they would have to pay. Accordingly, I will assess civil penalties of \$2,000.00 for 63% of Defendants' 1,750 consumers, for a total of \$2,205,000.00 in damages for violation of C.R.S. § 6-1-105(1)(l). Pursuant to C.R.S. § 6-1-112(1)(a), this amount is reduced to \$500,000.00.

3. Violations of C.R.S. § 6-1-105(1)(r) and 6-1-105(1)(u), Buyback Guarantee

I found that Defendants violated these provisions regarding the buyback guarantee. However, I do not have information about how many consumers, beyond those who testified, were actually induced to enter into membership by the promise of the buyback guarantee, or tried to redeem such and were deterred from doing so. I find a civil penalty of \$500.00 for each of the ten consumers who testified, in-person or via affidavit, to be appropriate, for a total of \$5,000.00 for violation of C.R.S. § 6-1-105(1)(r) and 6-1-105(1)(u).

4. Violation of C.R.S. 6-1-105(1)(u), Free Prize Solicitation

I found that Defendants violated the statute by attaching undisclosed material terms and conditions to the “free” prize offer, making them virtually unredeemable. However, I do not have information about how many consumers, beyond those who testified, were actually induced to enter into membership by “free prize” promise, or tried to redeem such and were deterred from doing so. I find a civil penalty of \$500.00 for each of the ten consumers who testified, in-person or via affidavit, to be appropriate, for a total of \$5,000.00 for violation of C.R.S. § 6-1-105(1)(r) and 6-1-105(1)(u).

C. Disgorgement/Restitution

Plaintiff requests complete disgorgement and restitution in the amount of \$6,562,500 from Defendants. This is equivalent to the total that the combined 1,750 members paid at an average price of \$3,750 each. In order to seek disgorgement to prevent unjust enrichment, Plaintiff must show that: (1) at plaintiff’s expense, (2) defendant received a benefit, and (3) under circumstances that would make it unjust for defendant to retain the benefit without paying. *Salzman v. Bachrach*, 996 P.2d 1263, 1265-66 (Colo. 2000).

1. Plaintiff’s expense: Whether or not the 1,750 members were satisfied or not, the “benefit” that Defendants claimed to give them was actually something that any person could find throughout the industry and on online travel websites. Therefore, each member’s average expense of \$3,750 certainly meets this prong.

2. Defendants’ benefit: Defendants directly benefited every time a consumer paid a new membership fee. This prong is met.

3. Unjust retention: I find that it would be unjust to let Defendants keep the members’ dues that were obtained by deceptive business practices. The third prong is met.

Therefore, I find disgorgement and restitution in the complete amount of \$6,562,500 to be appropriate.

D. Fees and Costs

Plaintiff is not seeking reimbursement of its fees or costs in this action. This issue is moot and no fees or costs will be assessed against the Defendants.

E. Defendants’ Individual Liability

Plaintiff seeks to hold the individually-named Defendants jointly and severally liable for the civil penalties and disgorgement and restitution. Corporate officers may be individually liable even when acting on behalf of the company if the officer “was directly involved in the conduct through conception or authorization.” *Hoang v. Arbess*, 80 P.3d 863, 870 (Colo. App. 2003). I

find such to be the case here. Each individual defendant actively participated, cooperated, directed, or sanctioned the conduct I have found to be in violation of the CCPA. Accordingly, joint and several liability is appropriate here.

III. Order

Accordingly, Plaintiff State of Colorado's Motion for Permanent Injunctive Relief and Other Damages is **GRANTED**. Defendants are permanently enjoined from the activities listed in Plaintiff's Motion, and ordered to pay, jointly and severally, \$515,000 in civil penalties, and \$6,562,500 in disgorgement and restitution.

SO ORDERED this August 22, 2014.

BY THE COURT:



Robert L. McGahey, Jr.
District Court Judge

Cc: Counsel via efile