UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV18-00729 JAK (MRWx)	Date	July 26, 2018
Title	Federal Trade Commission v. Digital Altitude, LLC, et al.		

Present: The Honorable	JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

Andrea Keifer	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) ORDER RE DEFENDANTS' MOTION FOR ATTORNEYS' FEES (DKT. 135); FTC'S MOTION FOR DEFAULT JUDGMENT AGAINST ASPIRE PROCESSING, LLC; DISC ENTERPRISES, INC.; RISE SYSTEMS AND ENTERPRISE, LLC; RISE SYSTEMS AND ENTERPRISE, LLC; AND SOAR INTERNATIONAL; DIGITAL ALTITUDE LIMITED; ASPIRE PROCESSING LIMITED; ASPIRE PROCESSING LIMITED; AND ASPIRE VENTURES LTD (DKT. 163); AND MOTION FOR ANDREW GORDON, BRADLEY GROSS, AND HANSEN TONG TO WITHDRAW AS COUNSEL (DKT. 194, 196)**

I. Introduction

On February 1, 2018, an *ex parte* temporary restraining order ("TRO") was entered that implemented an asset freeze as to all defendants in this action and established a receivership. Dkts. 32, 34. Michael Force ("Force"), Mary Dee ("Dee"), Digital Altitude LLC ("Digital Altitude") and Thermography for Life LLC ("Thermography") (collectively "Responding Defendants") opposed the entry of the TRO and a corresponding preliminary injunction. On March 6, 2018, after a two-day hearing was concluded, a preliminary injunction was entered as to all defendants. In general, it continued the terms of the TRO with respect to the asset freeze and receivership. Dkt. 111. However, under the terms of the preliminary injunction, Force and Dee could make requests to the Receiver for the release of funds from the frozen assets to cover their living expenses. *Id.* During these proceedings, Responding Defendants have been represented by Hansen Tong ("Tong"), Bradley Gross ("Gross") and Andrew Gordon ("Gordon") (collectively "Defense Counsel").

On April 3, 2018, the Responding Defendants filed a motion seeking the release of $100,000 from frozen assets for the payment of attorney's fees for services provided from February 5, 2018 to March 31, 2018, and for expected services thereafter ("Fee Motion" (Dkt. 135)). In support of the Fee Motion, Responding Defendants provided evidence to support approximately $65,000 in attorney's fees incurred as a result of the services provided by Gordon and his associates. No evidence was presented as to the services or fees of Tong or Gross. *Id.* The FTC opposed the Fee Motion. Dkt. 147. Responding Defendants filed an untimely reply, which included certain evidence as to the services of Tong and Gross and the corresponding fees. Dkt. 171. However, less than two weeks later, the reply was withdrawn. Dkt. 175. During a hearing on the Fee Motion, Gordon stated that they withdrew the filing because they realized it was untimely.

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On May 14, 2018, the FTC filed a motion for default judgment as to Aspire Processing, LLC; Disc Enterprises, Inc.; Rise Systems and Enterprise, LLC (Nevada); Rise Systems and Enterprise, LLC (Utah); Soar International; Digital Altitude Limited; Aspire Processing Limited; Aspire Processing Limited; and Aspire Ventures Ltd. ("Defaulting Defendants"). ("Default Judgment Motion" (Dkt. 163)). The proposed judgment included monetary and injunctive relief

On June 22, 2018, the Receiver filed an interim report. Dkt. 172. It states that approximately $2 million of cash had been frozen in connection with this action. He also reported that some funds are in bank accounts that are under his direct control, and the balance is in bank accounts of Force and Dee over which the Receiver has control. Thus, the banks would not release funds from either of these accounts unless the Receiver had approved the transaction. Dkt. 172. The interim report also states that the Receiver had approved the release of approximately $55,000 to Force and Dee for living expenses since February 12, 2018. Dkt. 172 at 4; Dkt. 172-2 at 2.

On July 2, 2018, a hearing was held on these matters. Dkt. 183. The request by the Receiver to release approximately $205,000 from the frozen funds to pay the fees billed by his counsel was granted. *Id.* With respect to the Default Judgment Motion, it was determined that the requested monetary relief was appropriate, but that there were certain open issues as to the requested injunctive relief. *Id.* Due to the latter, a final ruling on the Default Judgment Motion was deferred until the FTC submitted a supplemental brief addressing the open issues. *Id.*

Also at the hearing, the factors that apply to the consideration of the Fee Motion were discussed. *Id.* They included the following: (i) maintaining assets that can be used for the payment of restitution to injured consumers; (ii) the reasonableness of the amount of the fee request; (iii) the agreement by Defense Counsel to represent Responding Defendants notwithstanding the uncertainty whether funds would be released from frozen assets for the payment of legal fees and costs; and (iv) the availability of other assets of the Responding Defendants that could be used to pay the fees and costs. *Id.* Gordon stated that if there were no payment of his fees, he may have to withdraw as counsel. *Id.* Having balanced the relevant factors, the Court concluded that this analysis supported an interim payment of $10,000 to Gordon. *Id.* This determination was without prejudice to a later request by the FTC later to recover these funds from Dee and Force, and to a later request by either or both of them to release additional amounts. *Id.*

It was also determined that minimal evidence had been presented as to the current assets of Dee and Force, the efforts either or both have made to find employment or otherwise obtain funds to pay their respective living expenses and legal fees, and when Dee's new enterprise is expected to generate revenue and its amount. *Id.* If Responding Defendants renewed their request for the release of additional funds, it was to be supported by evidence as to these issues. *Id.*

On July 12, 2018, Responding Defendants filed a supplemental brief in support of the Fee Motion, which included declarations from Force and Dee and several additional documents. Dkt. 192. The FTC filed an opposition. Dkt. 197. On July 13, 2018, the FTC filed a supplemental brief as to the injunctive relief sought against the Defaulting Defendants, as well as an amended proposed judgment. Dkt. 193.

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On July 13, 2018, Defense Counsel filed a motion for leave to withdraw as counsel in this action ("Motion to Withdraw" (Dkt. 196)). Based on a review of the supplemental filings, it has been determined that all of the open matters can be decided without a further hearing. *See* L.R. 7-15.

On July 20, 2018, the Responding Defendants and the FTC submitted a joint report regarding settlement. Dkt. 198. It states that "settlement discussions came to a standstill some time before counsel . . . filed the [Motion to Withdraw]." *Id.* at 2. "The parties do not believe a settlement conference with Magistrate Judge Wilner would be productive." *Id.*

For the reasons stated in this Order, the Default Judgment Motion is **GRANTED IN PART** and the Motion to Withdraw is **GRANTED**. It is also determined that no additional release of frozen assets is warranted in connection with the Fee Motion.

II. Default Judgment Motion

A. Requested Injunctive Relief

The amended proposed judgment provides for the following injunctive relief:

Prohibitions Related to the Sale of Business Coaching Programs and Investment Opportunities

- Defaulting Defendants are prohibited from creating, advertising, marketing, promoting, offering for sale, or selling, or assisting others in creating, advertising, marketing, promoting, offering for sale, or selling any Business Coaching Program[1] or any Investment Opportunity.[2]
- Defaulting Defendants are prohibited from holding, directly or indirectly, any interest in any business entity engaged in such conduct.

Prohibitions Related to Merchant Accounts

- Defaulting Defendants are prohibited from credit card laundering or making, or assisting others in making, directly or by implication, any false or misleading statement in order to obtain Payment Processing services.
- Defaulting Defendants are prohibited from failing to disclose to an entity that enables the acceptance of payments material information related to a Merchant Account including, but not limited to, the identity of any owner, manager, director, or officer of the applicant for or holder of a Merchant Account, and any connection between an owner, manager, director, or officer of the applicant for or holder of a Merchant Account and any third person who has been or is placed in a Merchant Account monitoring program, had a Merchant Account terminated by a payment processor or a Financial Institution, or has been fined or otherwise disciplined in connection with a Merchant Account by a payment processor or a Financial Institution.

[1] A Business Coaching Program is any "program, plan, or product, including those related to work-at-home-opportunities, that is represented, expressly or by implication, to train or teach a participant or purchaser how to establish a business or earn money or other consideration through a business or other activity." Dkt. 193-2 at 5-6.
[2] An Investment Opportunity "means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation." Dkt. 193-2 at 7.

- Defaulting Defendants are prohibited from taking steps to avoid fraud and risk monitoring programs established by any operator of any payment system.

Prohibition Against Misrepresentations

- Defaulting Defendants and any affiliates acting in concert with them who receive notice of this order are prohibited from making misrepresentations in connection with the advertising, marketing, promoting, or offering for sale of any good or service as to the substantial income consumers will earn or likely earn, the business coaching consumers will receive that will enable them to build successful online businesses, and other material facts about such goods or services.

Customer Information

- Defaulting Defendants and any affiliates acting in concert with them who receive notice of this order are prohibited from failing to provide sufficient customer information to enable the FTC to efficiently administer consumer redress; disclosing, using, or benefitting from any customer information that enables access to a customer's account that any defendant obtained prior to entry of the judgment in connection with any activity that pertains to the sale of money-making opportunities and/or purported educational or coaching products or services provided online; and failing to destroy such customer information in their possession, custody, or control within 30 days after receipt of written direction to do so from a representative of the FTC. If a representative of the Commission requests in writing any information related to redress, Defaulting Defendants must provide it promptly.

Cooperation

- Defaulting Defendants must fully cooperate with the FTC in this action and any related investigation by providing truthful and complete information, evidence and testimony and causing all officers and other agents to appear for interviews, discovery, hearings, trials and other proceedings sought by the FTC.

Receivership Termination

- The Receiver shall complete all duties pertaining to Defaulting Defendants within 120 days of issuance of the judgment, at which time the receivership is dissolved as to these entities.

Order Acknowledgments

- Defaulting Defendants must confirm receipt of the judgment under penalty of perjury.

Compliance Reporting

- Defaulting Defendants must submit a compliance report one year after entry of judgment. The report must, *inter alia*, identify all contact information for each Defaulting Defendant and their businesses and describe the activities of those businesses.
- For 20 years after entry of judgment, Defaulting Defendants must submit a compliance notice to the FTC within 14 days of any change as to their designated point of contact or the structure of any entity they have ownership interest in that might affect compliance obligations under the judgment.
- Defaulting Defendants must submit to the FTC a notice of filing of any bankruptcy petition, insolvency proceeding or similar proceeding by or against them within 14 days of its filing.

Recordkeeping

- Defaulting Defendants must create certain records for 20 years after entry of the judgment, and retain each such record for 5 years. These records include: accounting records showing the revenues from all goods or services sold; personnel records; records of all consumer complaints and refund requests, and any response; all records necessary to demonstrate full compliance with each provision of the judgment; and a copy of each unique advertisement or other marketing material.

Compliance Monitoring

- Within 14 days of receipt of a written request from the FTC, each Defaulting Defendant must submit additional compliance reports or other requested information; appear for depositions; and produce documents for inspection and copying. The FTC is authorized to obtain discovery, without further leave of court, under Fed. R. Civ. P. 29, 30, 31, 33, 34, 36, 45, and 69.
- The FTC is permitted to communicate directly with Defaulting Defendants. Defaulting Defendants must permit the FTC to interview any employee or affiliated person who has agreed to be interviewed. Counsel may be present.

Dkt. 193-2.

B. Analysis

1. Legal Standards

A district court has the authority to impose affirmative injunctive relief. *See Ex parte Lennon*, 166 U.S. 548, 555-56 (1897) ("[T]he power of a court of equity . . . is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action, where the circumstances of the case demand it.") (citations omitted); *Hernandez v. Sessions*, 872 F.3d 976, 999 (9th Cir. 2017) (upholding preliminary injunction with mandatory injunctive provisions); 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2942 (3rd ed. 2018) ("[I]njunctions compelling the doing of some act, as opposed to forbidding the continuation of a course of conduct, are an ancient and familiar tool of equity courts and will be used whenever the circumstances warrant."). When an enabling statute expressly authorizes injunctive relief, "there is no doubt that the court may command affirmative action." Wright & Miller, *Federal Practice and Procedure* § 2942.

Section 53(b) of the FTC Act permits the FTC to "bring suit in a district court of the United States to enjoin any . . . act or practice" violating the FTC Act and states that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). This provision "gives the federal courts broad authority to fashion appropriate remedies for violations of the Act." *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *see FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) ("If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity."). A permanent injunction is appropriate where there is a "cognizable danger of recurrent

violation," or some reasonable likelihood of future violations. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). To determine the proper scope of an injunction, a court is to consider "(1) the seriousness and deliberateness of the violation; (2) [the] ease with which the violative claim may be transferred to other products; and (3) whether the respondent has a history of prior violations." *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1105 (9th Cir. 2014) (quoting *FTC v. John Beck Amazing Profits, LLC*, 888 F. Supp. 2d 1006, 1012 (C.D. Cal. 2012)).

2. Application

The terms of the proposed judgment regarding acknowledging receipt, compliance reporting, recordkeeping, and compliance monitoring are ones that have been included in injunctions in FTC enforcement actions. *See, e.g.*, *John Beck*, 888 F. Supp. 2d at 1016, *aff'd on other* grounds, 644 Fed. Appx. 709 (9th Cir. 2016) (20 year compliance reporting period in litigated case); *FTC v. ABC Hispana, Inc.*, No. 5:17-CV-00252, 2017 WL 3769195, at *4 (C.D. Cal. Aug. 28, 2017) (20 year compliance reporting period in default judgment); *FTC v. EMP Media, Inc.*, No. 2:18-CV-00035, 2018 WL 3025942, at *4 (D. Nev. June 15, 2018) (same). The FTC argues that these proposed reporting requirements are appropriate relief because they would permit the FTC to monitor compliance with the other terms of the judgment and provide a disincentive for Defaulting Defendants to commit future violations. Dkt. 193.

Injunctions in FTC enforcement actions also regularly include broad restrictions on conduct similar to those set forth in the proposed judgment. *See, e.g.*, *FTC v. Gill*, 265 F.3d 944, 957-58 (9th Cir. 2001) (affirming a ban on engaging in the credit repair business); *ABC Hispana, Inc.*, 2017 WL 3769195 at *2 (default judgment imposing permanent ban on telemarketing); *FTC v. Somenzi*, No. 16-cv-07101, 2017 WL 6049371, at *7-8 (C.D. Cal. July 24, 2017) (default judgment including a lifetime ban on participating in or assisting others in engaging in prize promotion schemes); *John Beck,* 888 F. Supp. 2d at 1013-15 (lifetime ban on telemarketing and production and dissemination of infomercials); *FTC v. Publ'g Clearing House, Inc.*, No. CV-S-94-623, 1995 WL 367901, at *14 (D. Nev. May 12, 1995) (ban on participating in telephone premium promotion); *FTC v. Dinamica Financiera LLC*, No. CV-09-03554, 2010 WL 9488821, at *12 (C.D. Cal. Aug. 19, 2010) (ban on mortgage loan modification and foreclosure relief services); *FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1009-10 (N.D. Cal. 2010) (ban on telephonic billing); *FTC v. Medicor, LLC*, No. CV 01-1896 CBM (EX), 2002 WL 1925896, at *1-2 (C.D. Cal. Jul. 18, 2002) (work-at-home medical billing opportunity ban). The FTC argues that the prohibitions in the proposed judgment are appropriate given "the seriousness of the FTC Act violations, the scope of consumer injury, and the transferability of the false claims at issue to other products and services." Dkt. 193 (citing *Grant Connect*, 763 F.3d at 1105 ("those caught violating the FTC Act must expect some fencing in"); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) (violations of FTC Act justify fencing-in relief); and *Litton Industries*, *Inc. v. FTC*, 676 F.2d 364, 370 (9th Cir. 1982) (approving broad fencing-in provisions regarding deceptive advertising)).

Substantial evidence has been presented that supports the contention that the Defaulting Defendants operated the Digital Altitude enterprise in a manner that led to consumer losses of approximately $54 million. In light of this evidence, it has been shown that there is a "cognizable danger of recurrent violation[s]," as well as "some reasonable likelihood of future violations," absent the imposition of injunctive relief. *W.T. Grant*, 345 U.S. at 633. The evidence presented also supports the claim that the violations at issue reflected a continuous and deliberate effort by sophisticated parties to take advantage of many consumers. Similarly, it meets this standard as to the amount of money paid by

consumers, and the limited ability to obtain restitution if it is deemed warranted. The evidence also supports the claim that the Responding Defendants could commence a similar operation because doing so would not require significant capital expenditures.

Accordingly, most of the requested injunctive relief is adequately tailored to address the risk of future violations through deterrence and monitoring. That relief would not be unduly burdensome as to the Defaulting Defendants. Such injunctive relief is justified by the evidence of present harm and the public interest in preventing future violations. For these reasons and those stated on the record during the July 2, 2018 hearing, the entry of almost all of the proposed injunctive relief is warranted. However, the requested relief regarding Cooperation and Compliance Monitoring has not presently been shown to be reasonably necessary to "accomplish complete justice." *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009). This conclusion is also supported by the absence of clear language in the Complaint sufficient to have provided clear notice to the Defaulting Defendants that the FTC was seeking to impose these onerous obligations on them. However, this determination is without prejudice to a renewed request associated with proceedings to enforce the judgment and based on further evidence as to why its adoption is reasonably necessary to fulfill the purposes of the FTC Act.

Therefore, the Default Judgment Motion is **GRANTED IN PART**.

III. Fee Motion

A. Legal Standards

A district court "may, within its discretion, forbid or limit payment of attorney fees" from frozen assets. *Commodity Futures Trading Comm'n v. Noble Metals Int'l, Inc.*, 67 F.3d 766, 775 (9th Cir. 1995); *see, e.g.*, *FTC. v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) ("Courts regularly have frozen assets and denied attorney fees or limited the amount for attorney fees."); *Commodity Futures Trading Comm'n v. Co Petro Mktg. Grp., Inc.*, 700 F.2d 1279 (9th Cir. 1983) (district court could require a law firm to return to a receiver $60,000 paid in attorney's fees). Limits on a defendant's use of frozen funds for attorney's fees neither "arbitrarily interfere[s] with a defendant's fair opportunity to retain counsel" nor offends the Fifth or Sixth Amendments. *Fed. Sav. & Loan Ins. Corp. v. Ferm*, 909 F.2d 372, 375 (9th Cir. 1990) (quoting *United States v. Monsanto*, 491 U.S. 600, 616 (1989)); *see also Nicholson v. Rushen*, 767 F.2d 1426, 1427 (9th Cir. 1985) ("[T]here is generally no right to counsel in a civil case.").

Although a district court may completely bar the use of any frozen assets to pay attorney's fees of a defendant, the more common approach is to allow access to some portion of those assets to be used for specific needs of the defendant. *See FTC v. Inc21.com Corp.*, 475 Fed. Appx. 106, 110 (9th Cir. 2012) (district court reasonably restricted access to frozen funds to pay attorney's fees when limiting access to "reasonable sums*"); FTC v. Osborne*, 1995 WL 635169 (Table), at *2 (9th Cir. Oct. 27, 1995) (district court properly placed $15,000 ceiling for attorney's fees). Other circuits have adopted a similar approach. *See*, *e.g.*, *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1032 (7th Cir. 1988) (upholding district court's "cap" on payment of counsel from frozen assets).

In determining whether to unfreeze assets for the payment of attorney's fees, a court is to consider both the likelihood of success on the merits of the claims brought by the FTC and balance the equities. *FTC v. Affordable Media*, 179 F.3d 1228, 1233 (9th Cir. 1999) (quoting *FTC v. Warner Comm'ns, Inc.*, 742 F.2d 1156, 1159 (9th Cir. 1984)). In this analysis, "public interests are generally entitled to stronger consideration than private interests." *FTC v. Merch. Servs. Direct, LLC*, No. 13-CV-0279-TOR, 2013 WL 4094394, at *2 (E.D. Wash. Aug. 13, 2013) (citing *World Wide Factors*, 882 F.2d at 347 ("[W]hen a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight.")). "Public equities include, but are not limited to, economic effects and pro-competitive advantages for consumers and effective relief for the [FTC]." *World Wide Factors*, 882 F.2d at 347. In balancing these equities, the availability of assets for consumer redress, the reasonableness of the fee request, whether defense counsel was aware of the possibility that fees might be denied or limited, and the defendant's access to alternative assets are all relevant factors. *See, e.g.*, *Noble Metals*, 67 F.3d at 775; *World Wide Factors*, 882 F.2d at 348; *FTC v. Johnson*, No. 2:10-CV-02203-MMD-GWF, 2015 WL 9243920, at *2 (D. Nev. Dec. 17, 2015).

B. Background

1. Prior Ruling

At the hearing, the Court stated that it had considered each of these factors. The Court added that it was mindful that, notwithstanding the entry of the preliminary injunction, there had been no determination of liability as to the Responding Defendants. Further, the Court acknowledged that if the Fee Motion were denied, it could affect their ability to defend the claims advanced by the FTC. Dkt. 183 at 3. It was also determined that no concrete evidence was submitted by the Responding Defendants as to their current income, their respective efforts to earn income through new employment or their assets, if any, that were not frozen pursuant to the TRO. *Id.* Defense Counsel Gordon stated that he might not be able to continue to represent the Responding Defendants if he does not receive any payment for the work that he has, and will continue to perform, or reimbursement for the costs that have been incurred. *Id.*

Based on "an assessment of the information presently available," the Fee Motion was granted in part. The Receiver was ordered to direct the appropriate financial institutions to release $5000 from the respective funds of Dee and Force, with that entire amount provided to Gordon as payment of a portion of the presently outstanding fees and costs. *Id.* As noted, the Responding Defendants were directed to submit a supplemental brief and supporting evidence in support of a request for any additional disbursement. *Id.*

2. New Evidence

Dee and Force each submitted a declaration in support of the supplemental brief. Other evidence was also proffered. *See* Dkt. 192 at 5-35. Neither the brief nor either declaration provides any context for, or authentication of, the additional documents.

a. Declarations

Dee declares that Digital Altitude and Thermography were "my primary source of income up until" this action commenced. Declaration of Mary Dee ("Dee Decl."), Dkt. 192 at 31-32 ¶ 3. She adds that "[s]ince that date, my income has ceased as the business operations of both entities have been shut-down." *Id.* Dee also declares that she was diagnosed with breast cancer last fall, and that in January 2018, had a double mastectomy. *Id.* ¶ 4. She declares that she was recovering from surgery from January 24, 2018 through March 21, 2018, and "was unable to work and earn any income." *Id.* ¶ 5.

Dee then declares that, from March 22, 2018 through April 22, 2018, she began "work on a new business venture," has "not earned any income yet as a result of my efforts but [is] continuing to work until [she does]." *Id.* ¶ 6. Dee declares that she had another surgery on June 15, 2018, that required a week of recovery. *Id.* ¶ 7. She declares that she will "require treatment and therapy for the foreseeable future" due to her medical conditions. *Id.* ¶ 8. Dee declares that undertaking her new business has been difficult in light of her medical issues. *Id.* ¶ 9. She declares that she cannot "afford my legal fees as I attempt to begin a new financial venture," and that her husband "is retired and has been since before the FTC filed its complaint." *Id.* ¶¶ 9-10.

Force declares that Digital Altitude was his "primary source of income" prior to the commencement of this action, and "[s]ince that date, my income has dropped and it has been a struggle to provide for myself and my family." Declaration of Michael Force ("Force Decl."), Dkt. 192 at 34-35 ¶ 3. Force declares that his "education is limited," because he did not attend college after graduating from high school, and instead enlisted in the Marines. *Id.* ¶ 4. Force contends he has been "a business owner and operator for two decades since completing [his] time in the military." *Id.* Force adds that "the stigma attached to the FTC's lawsuit has destroyed my reputation, which is preventing me from pursuing any business associated with my name or using my name to build a brand or business as the public nature of the lawsuit makes it easy for anyone to see review [sic] the lawsuit's pleadings on the internet." *Id.* ¶ 5. Force adds that he "cannot locate employment as [he does] not have the sufficient skills and education to procure such a job outside of the sales and marketing industry that [he has] been a part of for the previous two decades." *Id.* Force declares that he has been the "primary support" for his wife and two children, and that "even if I obtained employment, the likelihood of being able to support my family in the same manner I could before is highly suspect." *Id.* ¶ 6. Force declares that "attempting to pay my legal fees . . . would place an insurmountable burden on me." *Id.*

b. Additional Evidence

The Responding Defendants also submitted an "FTC Email Stipulating to Individual Defendants' Assets" from June 7, 2018. Dkt. 192, Ex. A. This document is a copy of an email from FTC's counsel to Defense Counsel that includes two charts. Dkt. 192 at 5-7. The first concerns the assets of Force, and includes the following items and corresponding dollar amounts, which total $82,500: (i) 2017 Zero DSR ($9100); (ii) 2017 Zero SR ($9900); (iii) 2016 Ducati Daivel ($12,000); (iv) 2017 Jeep Rubicon Recon ($35,000); (v) 2011 Toyota Sienna ($8000); and (vi) The Entrepreneur's Agency funds ($8500). *Id.* at 6. The second chart concerns the assets of Dee, and includes the following items and corresponding dollar figures, which total $222,800: (i) 2010 Hyundai Veracruz ($5800); (ii) Linn Operating royalty rights ($2000); (iii) artwork ($35,000); and (iv) Residence – equity ($180,000). *Id.* at 6-7. The email provides

no explanation of any of these entries or how any was calculated.

In its supplemental brief, the FTC contends that the aforementioned email is "not a stipulation by the FTC as to Defendants' assets, as Defendants represent." Dkt. 197 at 3. The FTC states that this "was a settlement communication in which FTC counsel summarized certain frozen assets that Defendants would turn over in a proposed settlement of this matter." *Id.* The FTC contends that it is "not a complete listing of Defendants' assets, and it does not include any assets that Defendants Force and Dee obtained since filing their financial disclosure statements with the FTC in February 2018." *Id.* at 3-4.

The other documents submitted with Defendants' supplemental brief are copies of the respective financial disclosures of Dee and Force that each apparently provided to the FTC in February 2018. Force executed his statement on February 16, 2018. Dkt. 192 at 18. It also includes a statement that Force had income in the following amounts from 2015 to early 2018: 2015 -- $107,672; 2016 -- $573,074; 2017 -- $1.785 million; and January 2018 -- $40,386.95. *Id.* at 10. The disclosure identifies the following assets: $90,685.59 in bank accounts; $674,046.90 in equity in Digital Altitude and another entity; and $88,000, which is the combined value of the vehicles he owns. *Id.* at 12-17. The disclosure states that he is a judgment creditor through a default judgment in an uncertain amount, and has a claim of $1.15 million against "My Online Business Empire" as the result of a "Settlement." *Id.* at 16. The disclosure concludes with a summary table stating that Force has total assets of $853,231.59, and $229,459.06 in liabilities. *Id.* at 17.[3] The disclosure states that Force has monthly expenses of approximately $10,000. *Id.*

Dee signed her financial disclosure on February 20, 2018. *Id.* at 29. It states that Digital Altitude provided Dee with $8500 in income in 2015, $309,496.73 in 2016, $589,674.75 in 2017, and $53,981.04 for the first month of 2018. *Id.* at 21. It states that she was unsure of the income she received from Thermography in 2017 and 2018. *Id.* The disclosure states that Dee's assets are $4123.86 in cash, $244,834 in bank accounts, $51,614.50 in publicly traded securities, $107,977 as the value of her equity in Thermography and two other entities, $22,867.16 in outstanding personal debts owed to her, $40,300 in several vehicles, $57,300 in jewelry, artwork and a jetski, and $358,207 in real property. *Id.* at 28.[4] It also identifies $293,078.48 in liabilities. *Id.*[5] The disclosure states that Dee has monthly expenses of $5245.14. *Id.* at 29.

C. Application

In considering a request to release seized asserts, it is appropriate to consider what other assets the movant has that could be used for the payment of attorney's fees. As to a defendant with substantial assets, there is less force to the need to grant the request, particularly where the disbursement of funds would reduce what is available for potential restitution to alleged victims. *See Inc21.com Corp.,* No. 3L10-cv-00022 WHA (N.D. Cal. 2010), Dkts. 111, 119, *aff'd* 475 Fed. Appx. 106, 110 (9th Cir. 2012) (limiting amount awarded for fee request when defendants failed to prove lack of alternative available

[3] The $1.15 million asset is not included in the total asset calculation in the summary table. Dkt. 192 at 17. The liabilities include $49,543.60 in automobile payments and a $179,915.46 balance due on 2016 income tax. *Id.*
[4] Dee's disclosure lists the entirety of the value of her home as an asset, though she has an outstanding balance on her mortgage of nearly $250,000. Dkt. 192 at 26, 28. The balance is listed as a liability. *Id.* at 28.
[5] The liabilities include $25,613.76 in automobile loans, $248,929 in mortgage debt, $18,502.97 in credit card debt and $32.75 in taxes. Dkt. 192 at 28.

funds); *see also Johnson*, 2015 WL 9243920, at *2 (denying fee request in lieu of inference that defendant might have access to additional assets based on "recent expenditures"). "When funds are linked directly to the fraud, it would frustrate the purpose of the regulation to allow the defendants to use those funds for attorney fees." *Wilson*, 2011 WL 6398933, at *3 (citing *Co Petro Marketing Group*, 680 F.2d at 584).

Based on the initial materials filed in support of the Fee Motion, there was evidence that Responding Defendants had funds, or indirect access to funds, that were distinct from their frozen assets, and that had been used by them to pay for certain legal expenses. Thus, as of February 20, 2018, $10,000 was held by the Gordon Law Group as a retainer "paid by an independent party" on behalf of the Responding Defendants "after the TRO was entered." Declaration of Laura Basford, Dkt. 147-1 at 2. On February 28, 2018, Digital Altitude disclosed that "$20,000 was being held by The Law Office of Bradley Gross as a retainer 'paid on behalf of Digital Altitude, LLC (and Mary Dee and Michael Force) by a third party on its behalf.'" *Id.* Responding Defendants were also able to obtain $2500 for a retainer paid to Hansen Tong. *Id.* The billing records provided by the Gordon Law Group show that, on March 14, 2018, an additional payment of $2500 was made on behalf of the Responding Defendants. Dkt. 147 at 15.

These submissions show that Responding Defendants had been able to obtain approximately $35,000 and used it to pay their legal fees. Responding Defendants argue that this does not show that they could continue to do so. However, they do not explain the source of the funds that were expended, and why it is no longer available.

In support of the Fee Motion, evidence was submitted that Dee was in the process of starting a new consulting business. No evidence was provided as to her progress or any projected revenues. Evidence was submitted that her health issues have impeded progress on the development of the business. Further, the financial disclosures were executed in February 2018, but have not been updated

Nor was evidence submitted as to any details about the efforts of Dee and Force to find other employment. Force declares that he "cannot locate employment" due to the limited nature of his education and skills and the publicly available information regarding this action. However, there is no evidence that Force has actually taken steps to seek employment. Moreover, without specific evidence, the general statements about the limitations on his ability to find new work are of limited probative value. Force has shown that he is a determined person, who served his country in the Marines. There should be some employment opportunities available to him. Nor does Force present evidence as to whether his spouse has been, or could become, employed.

Dee declared that she spent a month working on her new business venture but she has not yet earned any income from it. However, there is no evidence that Dee has taken steps to seek other employment opportunities, or why her retired spouse cannot provide financial support for her.

* * *

Viewed collectively, this evidence does not support directing the Receiver to release additional frozen funds to pay for Responding Defendants' legal fees.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV18-00729 JAK (MRWx)	Date	July 26, 2018
Title	Federal Trade Commission v. Digital Altitude, LLC, et al.		

IV. Motion to Withdraw

Defense Counsel seek leave to withdraw from representing Responding Defendants because: "(1) Defendants have failed to cooperate with Attorneys in the preparation and conduct of this matter; (2) Defendants have failed and refused to pay for the majority of invoices issued to them by the Attorneys; and, (3) there has been a significant and material breakdown in the relationship between the Defendants and Attorneys that has made it impossible for Attorneys to adequately and effectively represent the Defendants moving forward." Dkt. 196 at 2. Defense Counsel states that they have conferred with counsel for the FTC, and that they do not oppose the Motion to Withdraw. *Id.*

Under the Local Rules, "a motion for leave to withdraw must be made upon written notice given reasonably in advance to the client and to all other parties who have appeared in the action." L.R. 83-2.3.2. Such a motion must be supported by good cause, and "failure of the client to pay agreed compensation is not necessarily sufficient to establish good cause." *Id.* "An attorney requesting leave to withdraw from representation of an organization of any kind (including corporations, limited liability corporations, partnerships, limited liability partnerships, unincorporated associations, trusts) must give written notice to the organization of the consequences of its inability to appear pro se." L.R. 83-2.3.4.

Defense Counsel represent they "have given written notice to all interested parties and received permission from the Defendants to withdraw, . . . informed [Responding Defendants] reasonably in advance of the Attorneys decision to withdraw[,] . . . explained in writing to [Digital Altitude and Thermography] the consequences of their inability to appear pro se before the Court and the necessity to retain new counsel." Dkt. 196 at 3. Defense Counsel also state that Responding Defendants "understand the consequences of the Attorneys' withdrawal and the recommendations made by Attorneys." *Id.*

Defense Counsel contend they have good cause for withdrawal, given that Responding Defendants have failed to cooperate and respond timely to their requests, including those as to responses to discovery. *Id.* at 3-4. Defense Counsel represent that this "thwarts" their ability to comply with Court orders and provide proper representation. *Id.* at 4. Defense Counsel add that there are more than $90,000 in unpaid attorney's fees, which also justifies their withdrawal. *Id*. Defense Counsel argue that, collectively, these issues have created "a significant and material breakdown of the ability of Defendants and Attorneys to continue to work together in this matter." *Id.* They add that their relationship "appears to be irreparable." *Id.* Additionally, they contend that withdrawal will not prejudice any parties or cause unduly delay of these proceedings, given that the first discovery deadline is in November 2018. *Id.*; *see* Dkt. 166.[6]

Based on the evidence presented, and the absence of any opposition by the Responding Defendants, there is good cause for the Motion to Withdraw, and it is **GRANTED**. Digital Altitude and Thermography cannot self-represent because each is an entity. Therefore, they shall obtain new counsel and have such counsel enter an appearance in this action on or before August 13, 2018. A failure to do so may result in the striking of their answers (Dkts. 114, 116) and the entry of their defaults.

[6] The following deadlines were set on May 21, 2018: (i) Last day to amend or add parties (August 6, 2018); (ii) Non-Expert Discovery Cut-Off (November 19, 2018); (iii) Initial Expert Disclosures (November 19, 2018); (iv) Rebuttal Expert Disclosures (December 17, 2018); (v) Expert Discovery Cut-Off (January 14, 2019); and (vi) Last day to file All Motions *(including discovery motions)* (January 21, 2019). Dkt. 166.

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V. Conclusion

For the reasons stated in this Order, the Motion to Withdraw is **GRANTED**, the Default Judgment Motion is **GRANTED IN PART**, and no further award is warranted as requested by the Fee Motion.

IT IS SO ORDERED.

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Initials of Preparer ak