UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV18-00729 JAK (MRWx)	Date	March 6, 2019
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 PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANT DIGITAL ALTITUDE (DKT. 222); PLAINTIFF FEDERAL TRADE COMMISSION'S APPLICATION FOR ENTRY OF A FINAL ORDER AGAINST ALL DEFAULTED DEFENDANTS (DKT. 260)**

I. Introduction

On January 29, 2018, the Federal Trade Commission ("FTC") brought this civil enforcement action under § 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b). The Complaint alleges that the defendants committed certain unfair and deceptive trade practices in violation of § 5(a) of the FTC Act, 15 U.S.C. § 45(a). Complaint, Dkt. 1. The FTC sought temporary, preliminary, and permanent injunctive relief, rescission or reformation of contracts, restitution, refund of monies paid, disgorgement and other equitable relief. The Complaint names the following defendants: Digital Altitude LLC ("Digital Altitude"), Digital Altitude Limited ("Digital Altitude UK"), Aspire Processing LLC ("Aspire Processing"), Aspire Processing Limited ("Aspire Processing UK"), Aspire Ventures Ltd ("Aspire Ventures"), Disc Enterprises Inc. ("Disc"), RISE Systems & Enterprise LLC ("RISE Utah"), Rise Systems & Enterprise LLC ("RISE Nevada"), Soar International Limited Liability Company ("Soar"), The Upside, LLC ("Upside"), Thermography for Life, LLC (dba Living Exceptionally, Inc.) ("Thermography") (collectively, the "Corporate Defendants"), Michael Force ("Force"), Mary Dee ("Dee"), Morgan Johnson ("Johnson"), Alan Moore ("Moore") and Sean Brown ("Brown") (collectively, the "Individual Defendants").

On February 1, 2018, an *ex parte* temporary restraining order ("TRO") was entered that froze the assets of all defendants in this action and established a receivership as to certain entities. 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. It continued many of the terms of the TRO with respect to the asset freeze and receivership. Dkt. 111. During these proceedings, Responding Defendants have been represented by Hansen Tong ("Tong"), Bradley Gross ("Gross") and Andrew Gordon ("Gordon") (collectively, "Defense Counsel").

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On March 26, 2018, the FTC filed a request for entry of default as to Aspire Processing; Disc; RISE Utah; RISE Nevada; Soar; Digital Altitude UK; Aspire Processing UK; and Aspire Ventures (collectively, "First Defaulting Defendants"). Dkt. 127; *see also* Dkts. 137, 170. Default was entered as to domestic defendants Aspire Processing; Disc; RISE Utah; RISE Nevada; and Soar on March 30, 2018. Dkt. 133. Default was entered as to international defendants Digital Altitude UK; Aspire Processing UK; and Aspire Ventures on July 5, 2018, following a hearing on the matter. Dkts. 183, 186. On May 14, 2018, the FTC filed a motion for default judgment as to the First Defaulting Defendants ("First Default Judgment Motion" (Dkt. 163)). The proposed judgment included terms for monetary and injunctive relief. Dkt. 163-5.

On July 2, 2018, a hearing was held on the First Default Judgment Motion. Dkt. 183. At the hearing, it was determined that the procedural requirements for entry of default judgment had been satisfied, and that the substantive factors under *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986), either supported the entry of default judgment or were neutral. Dkt. 183 at 3. With respect to the monetary relief sought through the default process, it was determined that the $54 million of restitution proposed by the FTC and the Receiver represented a reasonable estimate of the amount of the claimed injury to consumers, and was appropriate. *Id.* at 3-4. However, certain issues were identified with respect to the requested injunctive relief. *Id.* Consequently, a final ruling on the First Default Judgment Motion was deferred. *Id.*

On July 13, 2018, the FTC filed a supplemental brief as to the injunctive relief sought against the First Defaulting Defendants, as well as an amended proposed judgment. Dkt. 193. The amended proposed judgment provided for several forms of injunctive relief. They included: (i) prohibitions related to the sale of business coaching programs and investment opportunities; (ii) prohibitions related to merchant accounts; (iii) prohibitions against misrepresentations; (iv) customer information; (v) cooperation; (vi) receivership termination; (vii) order acknowledgements; (viii) compliance reporting; (ix) recordkeeping; and (x) compliance monitoring. Dkt. 193-2; *see also* Dkt. 201 at 4-5.

On July 26, 2018, an Order issued that granted in part the First Default Judgment Motion. Dkt. 201. The Order stated:

> 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.

Id. at 6-7.

On July 13, 2018, Defense Counsel filed a motion for leave to withdraw as counsel in this action ("Motion to Withdraw" (Dkt. 196)). On July 26, 2018, an Order issued that granted the Motion to Withdraw. Dkt. 201. It stated that "Digital Altitude and Thermography cannot self-represent because each is an entity," and instructed them to obtain new counsel and have such counsel enter an appearance in this action on or before August 13, 2018. *Id.* at 12. It advised that "[a] failure to do so may result in the striking of their answers (Dkts. 114, 116) and the entry of their defaults." *Id.* As of August 14, 2018, no new notice of appearance by counsel had been filed on behalf of Digital Altitude.

Also, on August 14, 2018, the FTC filed a Notice Regarding Representation of Corporate Defendants. It provided an update as to progress of Digital Altitude and Thermography in obtaining new counsel. Dkt. 209. FTC counsel "notified Defendants Michael Force and Mary Dee, the owners and principals of the Corporate Defendants [Digital Altitude and Thermography], that the deadline for the Corporate Defendants to obtain counsel had passed, and asked that they inform the FTC as soon as possible regarding the status." *Id.* at 2. FTC counsel reported that "Ms. Dee represented that she is in communication with an attorney and expects to have retained counsel for Thermography within the next 48 hours," whereas "Mr. Force represented that Digital Altitude will not be obtaining counsel in this matter." *Id.* Accordingly, default was entered as to Digital Altitude on August 14, 2018. Dkts. 210, 211.

On August 28, 2018, the FTC filed a motion for default judgment against Digital Altitude ("Second Default Judgment Motion" (Dkt. 222)). No opposition was filed. On November 8, 2018, the FTC filed an application for entry of a final order against all defaulting defendants ("Application" (Dkt. 260)). A revised proposed order was lodged in connection with the Application. Dkt. 260-1. On November 15, 2018, an Order issued that granted in part the Application. Dkt. 261. The Second Default Judgment Motion was taken under submission, and the Application was also taken under submission with respect to the request for the entry of a final order and permanent injunction against all defendants in this action who are in default. *Id.* All other defendants have reached settlement agreements in this matter. Dkts. 280-287.

For the reasons stated in this Order, the Second Default Judgment Motion and the Application are

GRANTED.

II. Factual Background

A. The Parties

1. FTC

The FTC is a regulatory entity whose jurisdiction includes the enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). That statute prohibits unfair or deceptive acts or practices in or affecting commerce. Compl. ¶ 8. "The FTC is authorized to initiate federal district court proceedings . . . to enjoin violations of the FTC Act and to secure such equitable relief as may be appropriate in each case, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies. 15 U.S.C. §§ 53(b), 56(a)(2)(A)." *Id*. ¶ 9.

2. Defendants

Digital Altitude is a Delaware limited liability company whose principal place of business is in Santa Monica, California. Compl. ¶ 10. Thermography is a Texas limited liability company. *Id.* ¶ 20. It is alleged that Thermography has been associated with Digital Altitude's operation since 2016. *Id*.

Force is a California resident, the CEO and founder of Digital Altitude, the sole shareholder of Digital Altitude UK, and a member and manager of Soar. *Id.* ¶ 21. Dee is a Texas resident, a member and manager of Aspire Processing, RISE Nevada, and Upside, a manager of Thermography, sole director of Digital Altitude UK, sole shareholder of Aspire Processing UK and an officer of Digital Altitude. *Id.* ¶ 22.

Aspire Processing is a Nevada limited liability company. It is alleged that it was used as a vehicle to open certain merchant and bank accounts on behalf of Digital Altitude. *Id.* ¶ 12. Disc is a Nevada corporation that allegedly has been used to open merchant accounts for processing consumers' credit card payments to Digital Altitude. *Id.* ¶ 15. RISE Utah is a Utah limited liability company that allegedly has been used to open merchant accounts for processing consumers' credit card payments on behalf of Digital Altitude. *Id.* ¶ 16. RISE Nevada is a Nevada limited liability company that allegedly has been used to open merchant accounts for processing consumers' credit card payments on behalf of Digital Altitude. *Id.* ¶ 17. Soar is a Utah limited liability company. Digital Altitude allegedly has used its registered address in at least one account with a payment processor. *Id.* ¶ 18.

Aspire Processing UK is a United Kingdom company. It is alleged that it has registered a website that directs consumers to Digital Altitude's website for payment. *Id.* ¶ 13. Aspire Ventures is a United Kingdom company that also allegedly operates a website that directs consumers to Digital Altitude's website for payment. *Id.* ¶ 14. Digital Altitude UK is a United Kingdom company that has allegedly been used to open merchant accounts to process consumers' credit card payments to Digital Altitude. *Id.* ¶ 11.

Johnson is a Texas resident, member and manager of RISE Nevada, and an officer of Digital Attitude. *Id.* ¶ 23. Moore is a Massachusetts resident, Chief Technology Officer of Digital Altitude, and Secretary

of Aspire Processing UK. *Id.* ¶ 24. Brown is a Utah resident, sole principal of RISE Utah, an officer of Aspire Processing and a member of the board of directors of Digital Altitude. *Id.* ¶ 25. Upside is a California limited liability company that allegedly has been used to open merchant accounts for processing consumers' credit card payments on behalf of Digital Altitude. *Id.* ¶ 19.

B. Allegations of Fraud

The Complaint alleges that Defendants operate a fraudulent scheme that takes advantage of consumers seeking to earn money through online businesses. The Complaint also alleges that Defendants falsely represent to such consumers that they can generate substantial revenues by applying the techniques and methods that are presented to them through the Digital Altitude marketing educational program. Compl. ¶ 4. Defendants allegedly represent through online advertisements and other marketing materials that this program will enable users to "start and grow a profitable online business" and "make six figures online in the next ninety days or less." *Id.*; *see id.* ¶¶ 35-37.

It is also alleged that Defendants represent to customers that they will receive "private and personal one-on-one business coaching" from digital marketing experts who are "making 6-Figures in their own online business." *Id.* ¶¶ 54, 56. Defendants' program has a series of tiered membership levels. They are called Aspire, Base, Rise, Ascend, Peak and Apex. A customer must pay a separate fee to obtain access to each level. The membership fee increases for each level. *Id.* ¶¶ 33-34. For example, the monthly fee for membership in the Aspire level is either $47 or $97, the one-time fee for Base is $597 and the one-time fee for Apex is $29,997. *Id.* It is alleged that Defendants charged many consumers more than $50,000 in membership fees and that total customer injury likely exceeds $14 million. *Id.* ¶ 6.

It is alleged that consumers are paid by Digital Altitude "when they recruit new consumers to join the program, in the form of commissions on the new consumers' membership fees," but they can only receive commissions for sales of membership levels they have already purchased themselves. *Id.* ¶ 41. Customers reselling Digital Altitude products are referred to as "affiliates." It is alleged that the vast majority of consumers who pay these fees to Digital Altitude never earn substantial income. Therefore, it is alleged that consumers do not earn the "six figure" income promoted throughout Digital Altitude's marketing materials. It is alleged that, of those customers who actively seek to attract new program participants, more than 60% make less than $100 per month in commissions. *Id.* ¶ 46. Thus, the FTC alleges that Defendants' representations are deceptive as to the earning potential and benefits to customers who pay for Digital Altitude membership fees.

It is further alleged that Defendants' representations as to "coaching" are deceptive. *Id.* ¶ 54. The coaches are allegedly salespeople paid on commission to sell Digital Altitude memberships to customers. To qualify as a coach, a person need not have any industry or related qualifications. *Id.* ¶ 55. It is also alleged that the role of the coaches is to upsell customers to each successive tier of Digital Altitude membership, not to provide substantive mentoring or other support to assist customers in developing skills to operate their own digital marketing business. It is also alleged that the materials that are provided by Defendants to consumers who purchase memberships from Defendants have little educational or business value.

The FTC alleges that financial institutions closed Defendants' merchant accounts in light of their suspect business practices and the complaints by consumers who paid fees with credit cards.

Thereafter, Defendants allegedly opened additional merchant accounts. It is alleged that they did so in the names of third parties to ensure that Defendants could continue to benefit from the processing of credit and debit card payments by these third-party entities. *Id.* ¶¶ 59-62. It is also alleged that certain misrepresentations were made to financial institutions to induce them to open such accounts. *Id.* ¶¶ 59-64.

C. Remedies Sought in the Complaint

The Complaint sought temporary, preliminary, and permanent injunctive relief, rescission or reformation of contracts, restitution, refund of monies paid, disgorgement and other equitable relief for acts and practices in violation of § 5(a) of the FTC Act, 15 U.S.C. § 45(a). Compl. ¶ 1.

III. Analysis

A. Legal Standards

1. Procedural Requirements for Entry of Default Judgment

Local Rule 55-1 requires that a party moving for default judgment submit a declaration or include information with respect to each of the following: (i) when and against which party default has been entered; (ii) the identification of the pleading to which default has been entered; (iii) 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; (iv) the Servicemembers Civil Relief Act, 50 App. U.S.C. § 3931 does not apply; and (v) notice has been provided to the defaulting party, if required by Fed. R. Civ. P. 55(b)(2).

2. Substantive Standards for Entry of Default Judgment

Fed. R. Civ. P. 55(b) grants discretion to the trial court with respect to whether a default judgment should be entered. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). The entry of default does not alone warrant or require the entry of a default judgment. *Id.* The Ninth Circuit has established seven factors that may be applied in determining whether a default judgment is appropriate. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). They are: (i) the possibility of prejudice to the plaintiff; (ii) the merits of plaintiff's substantive claim; (iii) the sufficiency of the complaint; (iv) the sum of money at stake in the action; (v) the possibility of a dispute concerning material facts; (vi) whether the default was due to excusable neglect; and (vii) the strong policy favoring decisions on the merits. *Id.* "The general rule of law is that upon default the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true." *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977).

B. Application

1. Procedural Requirements for Entry of Default Judgment

The FTC has satisfied the requirements of Local Rule 55-1. Andrew Hudson, who is counsel to the FTC, submitted a declaration stating that default was entered against Digital Altitude on August 14, 2018. Declaration of Andrew Hudson ("Hudson Decl."), Dkt. 222-2 ¶ 3. This is confirmed by the docket.

Dkt. 211. Hudson identifies the Complaint as the pleading as to which default was entered. Hudson Decl. ¶ 3. Hudson also declares that Digital Altitude is not an infant or incompetent person, and that the Servicemembers Civil Relief Act does not apply. *Id.* ¶¶ 4-5. Digital Altitude previously appeared in this action through counsel. Hudson declares that he caused the Second Default Judgment Motion to be served by mail and email on Michael Force, the owner and CEO of Digital Altitude. *Id.* ¶¶ 6-7; Ex. A to Hudson Decl.

2. *Eitel* Factors

a. The Possibility of Prejudice

A plaintiff is prejudiced if, absent the entry of a judgment, he will be left without a remedy. *See Philip Morris USA, Inc., v. Castworld Prods., Inc.*, 219 F.R.D. 494, 499 (C.D. Cal. 2003) ("Plaintiff would suffer prejudice if the default judgment is not entered because Plaintiff would be without other recourse for recovery."); *PepsiCo v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal. 2002) ("If Plaintiffs' motion for default judgment is not granted, Plaintiffs will likely be without other recourse for recovery."). Given the potential prejudice to the FTC, this factor weighs in favor of entry of default judgment.

b. The Merits of the FTC's Substantive Claim and the Sufficiency of the Complaint

The second and third *Eitel* factors overlap because a plaintiff must properly state a claim and the allegations contained in the complaint are deemed true. Thus, if the complaint is sufficient, a plaintiff's substantive claim has merit for purposes of a request for the entry of a default judgment. *PepsiCo, Inc.*, 238 F. Supp. 2d at 1175; *see also Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978) (allegations in the complaint must state a claim upon which the plaintiff may recover). The detailed, written Order setting forth the reasoning for the issuance of the preliminary injunction includes an in-depth discussion of the allegations in the Complaint and the evidence introduced by the FTC and the Responding Defendants. It concluded that the FTC was likely to prevail on the merits in this action against the Responding Defendants, including Digital Altitude. Dkt. 111 at 3-13. That analysis is incorporated by reference here.

As set forth in the preliminary injunction Order, the Complaint demonstrates that the FTC has alleged a meritorious claim under Section 5(a) of the FTC Act based on misrepresentations made to consumers about earning potential and business coaching related to Digital Altitude products and services. Thus, these factors weigh in favor of entry of default judgment.

c. The Sum of Money at Stake in the Action

Under the fourth *Eitel* factor, "the court must consider the amount of money at stake in relation to the seriousness of Defendant's conduct." *PepsiCo, Inc.*, 238 F. Supp. 2d at 1176. Default judgment is discouraged when the amount of money at stake in the litigation is "too large or unreasonable in light of defendant's actions." *Truong Giang Corp. v. Twinstar Tea Corp.*, No. C 06-03594 JSW, 2007 WL 1545173, at *12 (N.D. Cal. May 29, 2007); *see also Eitel*, 782 F.2d at 1472 (in light of parties' dispute as to material facts, entry of $3 million judgment would not be appropriate). However, where the sum of money at stake is tailored to the specific misconduct of the defendant, default judgment may be

appropriate. *See Bd. of Trs. of the Sheet Metal Workers Health Care Plan of N. Cal. v. Superhall Mech., Inc.*, No. C-10-2212 EMC, 2011 WL 2600898, at *2-3 (N.D. Cal. June, 30 2011) (the amount of unpaid contributions, liquidated damages, and attorney's fees were appropriate because each amount was supported by sufficient evidence).

The Complaint seeks, *inter alia*, restitution of all payments made by consumers for the products and services at issue. Compl. at 26. It is alleged that there has been "at least $14 million in consumer injury" that should be addressed through such a restitutionary award. *Id.* ¶ 28. In the Second Default Judgment Motion, the FTC argues that a "conservative calculation" of consumer loss is actually $54 million. It seeks an award of that amount against Digital Altitude.[1] Dkt. 222-1 at 7, 7 n.4, 10-11. This figure is based on the Receiver's First Report and Inventory. *See* Dkt. 93. In the report, Seaman concludes that approximately 185,000 "consumers have paid approximately $60 million" for these products and services. *Id.* at 14. He further concludes that commissions in the amount of $6,035,219 were paid to consumers. *Id.* at 16. He states that $8,838,985 in commissions were paid to 85 "coaches" and $12,127,763 in commissions were paid to 35 "joint venturers." *Id.* at 15-16. Thus, Seaman subtracts approximately $6 million in commissions paid back to consumers from the $60 million in purchases to conclude that consumer injury is approximately $54 million. *See* Declaration of Thomas A. Seaman, Dkt. 163-3 ¶¶ 3-5.

This figure is substantial. However, potential awards of millions of dollars do not weigh against entry of default judgment when the FTC can demonstrate that "relief was directly proportional to the seriousness of the Defendants' conduct because it represents [the] value of the consumer injury." *FTC v. Good Ebusiness, LLC*, No. 16-CV-01048-ODW-JPR, 2016 WL 3704489 at *5, (C.D. Cal. July 12, 2016) ($2,329,456 is not unreasonable in relation to alleged conduct); *see also FTC v. A to Z Mktg. Inc.*, No. S 13-CV-0919-DOC (RNBx), 2014 WL 12597436 at *4 ($12,471,944 is not unreasonable in relation to defendant's conduct). It has done so here. The allegedly deceptive scheme was sophisticated and long-running, and, as alleged, it resulted in significant harm to consumers. While $54 million is a significant sum of money, it is proportionate to the alleged conduct and resulting harm. Thus, this factor weighs in favor of entry of default judgment. However, this is not determinative of the amount of the judgment or fee award.

d. The Possibility of a Dispute Concerning Material Facts

Upon entry of default, all facts pleaded in the complaint are taken as true, except those relating to damages. *See TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987). The evidence introduced by the FTC in support of the entry of a preliminary injunction is sufficient to show that the allegations against Digital Altitude are meritorious. Although it is possible that Digital Altitude could dispute some or all of the material facts, its failure to do so supports a contrary finding. Accordingly, this factor weighs in favor of the entry of default judgment.

[1] The FTC also advanced this position in the First Default Judgment Motion. At the hearing on that motion, it was determined that the $54 million figure represented a reasonable estimate of the consumer injury. *See* Dkt 183 at 3-4. The written Order that followed found that "[s]ubstantial 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." Dkt. 201 at 6.

e. Whether Default was Due to Excusable Neglect

The sixth *Eitel* factor considers the possibility that default resulted from excusable neglect of the non-moving party. As the FTC argues, Digital Altitude "has had every opportunity to avoid entry of a default judgment." Dkt. 222-1 at 13. Until July 2018, Digital Altitude was represented in this action and actively participated in the litigation. Digital Altitude was advised repeatedly, both before and after the Motion to Withdraw was granted, that it could not represent itself in this action. Digital Altitude was also advised repeatedly that its default would be entered if it did not retain counsel. On August 14, 2018, FTC counsel reported that they had corresponded with Michael Force, owner and CEO of Digital Altitude, and "Mr. Force represented that Digital Altitude will not be obtaining counsel in this matter." Dkt. 209 at 2. There is no evidence that the default of Digital Altitude resulted from excusable neglect. For these reasons, this factor weighs in favor of entry of default judgment.

f. The Strong Policy Favoring Decisions on the Merits

The final *Eitel* factor considers the strong policy preference of deciding claims on the merits. This factor generally disfavors the entry of default judgment. "However, the mere existence of Fed. R. Civ. P. 55(b) indicates that this preference, standing alone, is not dispositive." *PepsiCo*, 238 F. Supp. 2d at 1177 (internal citation and quotation marks omitted). Further, a defendant's decision not to defend the action precludes a decision on the merits. Therefore, although this factor weighs against the entry of default judgment, it does not require that result. A contrary rule would mean that a default judgment could rarely, if ever, be entered.

* * *

Based on a review and balancing of the *Eitel* factors, entry of a default judgment as to Digital Altitude is warranted, subject to a separate assessment of the requested relief.

3. Requested Relief

a. Legal Standards

(1) Default Judgment

A "default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." Fed. R. Civ. P. 54(c). Further, the demand for relief must be specific. Fed. R. Civ. P. 8(a)(3). Therefore, "a default judgment must be supported by specific allegations as to the exact amount of damages asked for in the complaint." *Philip Morris*, 219 F.R.D. at 499. In addition, "Plaintiff must 'prove up' the amount of damages that it is claiming." *Id.* at 501. "In determining damages, a court can rely on the declarations submitted by the plaintiff or order a full evidentiary hearing." *Id.* at 498 (citing Fed. R. Civ. P. 55(b)(2)). "However, if the facts necessary to determine damages are not contained in the complaint, or are legally insufficient, they will not be established by default." *Id.* (citing *Cripps v. Life Ins. Co. of N. America,* 980 F.2d 1261, 1267 (9th Cir. 1992)).

(2) Affirmative Injunctions

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.

(3) FTC Act

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)).

Although § 13(b) only refers to injunctive relief, the Ninth Circuit has determined that § 13(b) also "empowers district courts to grant 'any ancillary relief necessary to accomplish complete justice,' including restitution." *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016) (quoting *FTC v. Pantron Corp*., 33 F.3d 1088, 1102 (9th Cir. 1994)). Restitution under the FTC Act is "typically the amount consumers paid for the product or service minus refunds and chargebacks." *Commerce Planet*, 815 F.3d at 603. "Courts have often awarded the full amount lost by consumers rather than limiting damages to defendant's profits," because the purpose of the FTC Act is to protect consumers. *FTC v. Stefanchik,* 559 F.3d 924, 931 (9th Cir. 2009). Once the FTC has established a reasonable approximation of restitution, typically the measured by the defendant's net revenue, "the burden then shifts to the defendant to show that the FTC's figures overstate the amount of the defendant's unjust gains." *Commerce Planet,* 815 F.3d at 603-04 (citing *Platforms Wireless*, 617 F.3d at 1096). "Any risk of uncertainty at this second step 'falls on the wrongdoer whose illegal conduct created the uncertainty.'" *Id.* at 604 (quoting *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 368 (2d Cir. 2011)).

Courts have awarded default judgments for millions of dollars when "detailed evidence" was presented by the FTC to support the awards. *See, e.g.*, *FTC v. Ideal Financial Solutions Inc.*, No. 13-CV-001430JAD-GWF, 2016 WL 756527 at *7-8 (D. Nev. Feb. 23, 2016) ($43 million default judgment);

FTC v. Tatto, Inc., No. 14-CV-8912-DSF-FFMx, 2014 WL 12571043, at *2 (C.D. Cal. Aug. 14, 2014) ($105,567,910 default judgment); *FTC v. J.K Publications, Inc.*, No. 99-CV-00044 ABC (AWx), 2000 WL 35594144, at *4 (C.D. Cal. Aug. 31, 2000) ($37,566,577 default judgement); *FTC v. Kutzner*, No. 16-CV-999-BRO (AFMx), No. 16-CV-00999-BRO (AFMx), 2017 WL 5230898, at *8 (C.D. Cal. Aug. 28, 2017) ($18,146,866.34 default judgment).

b. Application

(1) Injunctive Relief

The revised proposed judgment provides for the following injunctive relief:

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

- Digital Altitude is 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[2] or any Investment Opportunity.[3]
- Digital Altitude is prohibited from holding, directly or indirectly, any interest in any business entity engaged in such conduct.

Prohibitions Related to Merchant Accounts

- Digital Altitude is 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.
- Digital Altitude is prohibited from failing to disclose to an entity that enables the acceptance of payments, material information related to a Merchant Account. This includes, but is not limited to, the identity of any owner, manager, director, or officer of the applicant for or holder of a Merchant Account. It also includes any relationship 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.
- Digital Altitude is prohibited from taking steps to evade fraud and risk monitoring programs established by any operator of any payment system.

Prohibition Against Misrepresentations

- Digital Altitude and any affiliates acting in concert with it 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

[2] A Business Coaching Program "means 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. 260-1 at 6.
[3] 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. 260-1 at 6.

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

- Digital Altitude and any affiliates acting in concert with it who receive notice of this order are prohibited from failing to provide sufficient customer information to enable the FTC efficiently to 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, Digital Altitude must provide it promptly.

Cooperation

- Digital Altitude 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 Digital Altitude within 180 days of issuance of the judgment, or within 30 days of the termination of the Receivership over Thermography, whichever is later, at which time the receivership will be dissolved.

Order Acknowledgments

- Digital Altitude must confirm receipt of the judgment under penalty of perjury.

Compliance Reporting

- Digital Altitude must submit a compliance report one year after entry of judgment. The report must, *inter alia*, identify contact information for Digital Altitude and all of its businesses by all of their names, and describe the activities of those businesses.
- For 20 years after entry of judgment, Digital Altitude 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.
- Digital Altitude 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

- For 20 years after entry of the judgment, Digital Altitude must create certain records, and retain them for five 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, Digital Altitude 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 Digital Altitude. Digital Altitude must permit the FTC to interview any employee or affiliated person who has agreed to be interviewed. Counsel for such person may be present.

Dkt. 260-1.

The terms of the revised proposed judgment regarding acknowledging receipt, compliance reporting, recordkeeping, and compliance monitoring are ones that have been included in injunctions in other 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 because they would permit the FTC to monitor compliance with the other terms of the judgment and discourage Digital Altitude from committing future violations. Dkt. 222-1.

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 general claim that Digital Altitude was

operated 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. The evidence also meets this standard as to the amount of money paid by consumers, and the limited ability to obtain restitution if it were deemed warranted. The evidence also supports the claim that, absent appropriate relief, Digital Altitude could commence a similar operation because doing so would not require significant capital expenditures.

The Order as to the First Default Judgment Motion determined that parallel injunctive relief was warranted as to the First Defaulting Defendants, with the exception of the proposed provisions regarding Cooperation and Compliance Monitoring. Dkt. 201 at 7. The Order found that such relief: (i) was adequately tailored to address the risk of future violations through deterrence and monitoring; (ii) would not be unduly burdensome as to the First Defaulting Defendants; and (iii) was justified by the evidence of present harm and the public interest in preventing future violations. *Id.* Digital Altitude had a more central role in the challenged conduct than the First Defaulting Defendants. Consequently, the same injunctive relief provisions are warranted against Digital Altitude.

As to the Cooperation and Compliance Monitoring provisions, the FTC contends that Digital Altitude is "differently situated than the other defaulting Defendants." Dkt. 260 at 2 n.1. The FTC asserts that, "[u]nlike the other defaulting defendants, Digital Altitude *was* the scam." Dkt. 222-1 at 23 (emphasis in original). The FTC argues that "Digital Altitude has name and brand recognition," and that "[t]hese assets would make it all too easy for Digital Altitude to return to defrauding consumers once it is no longer under the control of the Receiver." *Id.* The FTC further argues that "[a] final order should therefore enable the FTC to monitor its activities to ensure it does not resume its fraud." *Id.* The FTC also argues that Digital Altitude had clear notice of the proposed Cooperation and Compliance Monitoring provisions. *Id.* The FTC asserts that Digital Altitude's owner, Michael Force, as well as its prior counsel "were made well aware of the compliance provisions the FTC seeks, through the course of the litigation, the multiple final orders that the Court has already entered, through draft settlement orders that the FTC has provided as to Defaulting Defendant, and through the FTC's inclusion of those provisions in the order it sought as to the other defaulting defendants." *Id.* at 23-24.

The arguments of the FTC are persuasive. The misconduct at issue in this action is linked directly to Digital Altitude. "Complete justice" would not be accomplished if Digital Altitude were able to evade the scrutiny of the FTC and resume the same or similar fraudulent activities. However, the condensed time periods for responsive action by Digital Altitude stated in the proposed Cooperation provision is more onerous than necessary to accomplish "complete justice."[4] The requested relief is warranted, provided, however, that the time periods in the Cooperation provision shall be extended to 14 days.

[4] The proposed Cooperation provision provides: "Digital Altitude LLC must cause its officers, employees, representatives, or agents to appear for interviews, discovery, hearings, trials, and any other proceedings that a Commission representative may reasonably request upon 5 days written notice, or other reasonable notice, at such places and times as a Commission representative may designate, without the service of a subpoena." Dkt. 260-1 at 13.

For the foregoing reasons, the Second Default Judgment Motion is **GRANTED** as to the requested injunctive relief**.**

(2) Restitution

The Complaint seeks, *inter alia*, restitution of all payments made by consumers for the products and services at issue. Compl. at 26. It is alleged that "at least $14 million in consumer injury" should be addressed through such a restitutionary award. *Id.* ¶ 28. In the Second Default Judgment Motion, the FTC argues that a "conservative calculation" of consumer loss is actually $54 million and it seeks an award of that amount against Digital Altitude.[5] Dkt. 222-1 at 7, 7 n.4, 10-11. This figure is based on the Receiver's First Report and Inventory. *See* Dkt. 93. The report concludes that approximately 185,000 "consumers have paid approximately $60 million" for these products and services. *Id.* at 14. He further concludes that commissions in the amount of $6,035,219 were paid to consumers. *Id.* at 16. It also concludes that $8,838,985 in commissions were paid to 85 "coaches" and $12,127,763 in commissions were paid to 35 "joint venturers." *Id.* at 15-16. Therefore, Seaman subtracted the approximately $6 million in commissions paid back to consumers from the $60 million in purchases in calculating the amount of consumer injury*, i.e.,* approximately $54 million. *See* Declaration of Thomas A. Seaman, Dkt. 163-3 ¶¶ 3-5.

At the hearing on the First Default Judgment Motion, it was determined that the requested monetary relief was appropriate as to the First Defaulting Defendants. *See* Dkt. 183 at 3-4; Dkt. 201 at 2. Thus, the $54 million in restitution requested by the FTC represented a reasonable estimate of the consumer injury. Dkt. 183 at 3-4. Substantial evidence supported the contentions of the FTC as to consumer losses. Dkt. 201 at 6.

Digital Altitude had a more central role in the challenged conduct than the First Defaulting Defendants. It is jointly and severally liable for the consumer losses incurred. For the reasons stated on the record during the July 2, 2018 hearing on the First Default Judgment Motion, the requested monetary relief is also appropriate as to Digital Altitude.

For the foregoing reasons, the Second Default Judgment Motion is **GRANTED** as to the requested monetary relief. Because this calculation assumes that the funds received by certain consumers who acted as coaches or joint-venturers should be treated as a credit against the amounts that they paid, this determination is without prejudice to a claim by any such person that all or part of such a credit should not be applied with respect to any claim made by that person for recovery from the funds that are overseen by the Receiver and whose distribution may be made through these proceedings.

V. Conclusion

For the reasons stated in this Order, the Second Default Judgment Motion is **GRANTED**.

[5] The FTC presented this argument in support of the First Default Judgment Motion. At the hearing on that motion, it was determined that $54 million represents a reasonable estimate of the consumer injury. *See* Dkt 183 at 3-4. The written Order that followed that hearing concluded that "[s]ubstantial 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." Dkt. 201 at 6.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	LA CV18-00729 JAK (MRWx)	Date	March 6, 2019
Title	Federal Trade Commission v. Digital Altitude, LLC, et al.		

Because all defendants have either entered settlement agreements with the FTC or defaulted in this action, and this Order and the Order as to the First Default Judgment Motion determined that default judgment was warranted as to all defaulting defendants, it is appropriate to enter a final order as to the defaulting defendants at this time. Accordingly, the Application is also **GRANTED.**

IT IS SO ORDERED.

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