



GRANTED

Movant shall serve copies of this ORDER on any pro se parties, pursuant to CRCP 5, and file a certificate of service with the Court within 10 days.

DISTRICT COURT, CITY AND COUNTY OF DENVER,
COLORADO

1437 Bannock Street
Denver, CO 80202

STATE OF COLORADO, ex rel. JOHN W. SUTHERS,
ATTORNEY GENERAL,

Plaintiff,

v.

NATIONAL REBATE FUND, INC., d/b/a NATIONAL
ENERGY REBATE FUND and TIM STUBBS,
individually,

Defendants.

John W. Madden, IV
District Court Judge

DATE OF ORDER INDICATED ON ATTACHMENT

▲ COURT USE ONLY ▲

Case No.: 09CV1606

Div. 18

**ORDER: DEFAULT JUDGMENT AGAINST DEFENDANTS NATIONAL REBATE
FUND, INC. AND TIM STUBBS**

The Court, having reviewed the entire record in this matter, the pleadings, motions, and Plaintiff's Revised Motion for Default Judgment Against Defendants National Rebate Fund, Inc., d/b/a National Energy Rebate Fund ("NRF") and Tim Stubbs, and the supporting Affidavits and documents attached to the Motion, and being fully advised in the premises,

FINDS and CONCLUDES that default judgment should be entered for Plaintiff the State of Colorado ex rel. John W. Suthers, Attorney General against Defendants NRF and Stubbs for the following reasons:

1. This Court has subject matter jurisdiction in the matter presented herein by virtue of § 6-1-110(1), C.R.S. (2008). The Court has personal jurisdiction over NRF and Stubbs, who were served process in this matter pursuant to C.R.C.P. Rule 4(f).
2. NRF conducted business in the City and County of Denver, and at all relevant times Stubbs was the Chief Executive Officer of NRF. Therefore, venue is proper in the City and County of Denver, pursuant to § 6-1-103, C.R.S., and Colo. R. Civ. P. 98 (2008).
3. Pursuant to Rule 121 § 1-14, Defendants NRF and Stubbs are not minors, incapacitated persons, officers or agencies of the state, or in the military.
4. Plaintiff served process, pursuant to C.R.C.P. Rule 4(f), on NRF and Stubbs on

June 12, 2009. NRF and Stubbs did not file an answer or other response to Plaintiff's action within the time allowed pursuant to C.R.C.P. 12(a).

5. Plaintiff certifies that it provided NRF and Stubbs written notice of its application for default judgment three days prior to filing its Motion for Default Judgment, pursuant to Rule 55. *See, Plaza del Lago Townhomes Ass'n, Inc. v. Highwood Builders, LLC*, 148 P.3d 367, 371 (Colo. App. 2006).

A. Permanent Injunction

6. This Court is expressly authorized to issue an injunction to enjoin ongoing violations of the CCPA by § 6-1-110(1), C.R.S (2008):

(1) Whenever the attorney general or a district attorney has cause to believe that a person has engaged in or is engaging in any deceptive trade practice listed in section 6-1-105 or part 7 of this article, the attorney general or district attorney may apply for and obtain, in an action in the appropriate district court of this state, a temporary restraining order or injunction, or both, pursuant to the Colorado rules of civil procedure, prohibiting such person from continuing such practices, or engaging therein, or doing any act in furtherance thereof. The court may make such orders or judgments as may be necessary to prevent the use or employment by such person of any such deceptive trade practice or which may be necessary to completely compensate or restore to the original position of any person injured by means of any such practice or to prevent any unjust enrichment by any person through the use or employment of any deceptive trade practice.

§ 6-1-110(1), C.R.S.

7. Plaintiff, by means of its Complaint, has shown to this Court probable cause that:

- a. Defendants have knowingly and intentionally violated the Colorado Consumer Protection Act, Colo. Rev. Stat. §§ 6-1-101 through 115 (2008) ("CCPA") in their operation of NRF. The National Energy Rebate Fund ("NERF") program was designed to convince consumers to purchase higher-priced products by offering them false hopes that they had a fair opportunity to obtain a substantial rebate on those products. The NERF program was a fixed contest rather than a legitimate rebate program.
- b. Defendants mislead consumers into believing that their rebate programs are administered by an independent third party. In its promotional

materials, Defendant NRF states that the administrator, Fund Administrators, is an “un-biased 3rd party” that evaluates rebate claims “fairly in strict accordance with the terms and conditions of the rebate voucher.” In fact, Fund Administrators is not at all independent – it is a company that was started by Defendant Stubbs, and was run by his former secretary, Susan Duran. Stubbs exerted a significant amount of direction and control over the claims evaluation process.

- c. Defendants also misrepresent the ease and likelihood of qualifying for a rebate. Defendants lead consumers to believe that that all they need to do to collect their rebate is to remember to submit their claim on time and follow a set of simple and straightforward terms and conditions. The terms and conditions, as interpreted and applied by Defendants are not as easy or straightforward as represented.
- d. The terms and conditions are designed to result in NRF paying out approximately 8% of the total face value of rebate vouchers that they have issued. Defendants do not disclose to consumers that they only set aside 8% of the face value of the rebate voucher to pay rebate claims. To the contrary, Defendants lead consumers to believe that their chances of receiving their rebate are much greater given that they need only remember two deadlines and follow simple instructions in order to obtain their rebate.
- e. Defendants further misrepresent the legitimacy and viability of their rebate scheme by claiming that it is similar to rebates programs for smaller purchases. Defendants state that, “As an example, many people fail to send in rebates on such things as televisions, appliances, power tools, computer equipment or even to claim ‘flight fund’ rewards.” Defendants’ comparison of their rebate program to these rebate programs is entirely misleading, as Defendants’ program offers the consumers the opportunity to obtain thousands of dollars in rebates, while typical mail-in rebates result in substantially smaller payments to the consumer.
- f. Defendants also mislead consumers into believing that the NERF rebate program is driven by an effort to get consumers to purchase energy-efficient products. Defendants do not market the NERF rebate scheme to merchants as a way to encourage energy efficiency and conservation. Rather, Defendants market the NERF rebate program as a way for merchants to sell higher-priced items or to eliminate discounting.

8. Plaintiff has shown and satisfied the necessary factors to obtain a permanent injunction: success on the merits; a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; lack of a plain, speedy, and adequate

remedy at law; no disservice to the public interest; and balance of equities in favor of the injunction. *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004), *citing*, *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo.1982); *See*, *Baseline Farms Two, LLP v. Hennings*, 26 P.3d 1209, 1212 (Colo. App. 2001), *citing*, *Lloyd A. Fry Roofing Co. v. State Department of Air Pollution*, 191 Colo. 463, 553 P.2d 200 (1976) (supporting the proposition that when the Colorado Attorney General seeks an injunction to enforce state laws affecting the public interest, the Attorney General is not required to plead or prove immediate or irreparable injury).

9. Plaintiff has no adequate remedy at law and the remedy of a permanent injunction is appropriate in the circumstances of this case.

10. This Court further finds that NRF and Stubbs will suffer no undue hardship by the entry of a permanent injunction since NRF and Stubbs have no right to continue to engage in unlawful and deceptive trade practices in the State of Colorado, or to collect money from consumers as a result of such unlawful and deceptive conduct in violation of the CCPA.

11. Thus, this Court orders that NRF and Stubbs, and any other persons under their control or in active concert or participation with Defendants who receive actual notice of this Court's Order, are permanently enjoined from engaging in the deceptive trade practices detailed in Plaintiff's Complaint.

B. Restitution and Civil Penalties

12. The CCPA's broad legislative purpose is to "provide prompt, economical, and readily available remedies against consumer fraud," *Western Food Plan, Inc. v. District Court in and for the City and County of Denver*, 598 P.2d 1038, 1041 (Colo. 1979). Accordingly, the CCPA provides that this Court may make such judgments as may be necessary to "completely compensate or restore to the original position of any person injured by means" of a deceptive trade practice or to "prevent any unjust enrichment by any person through the use or employment of any deceptive trade practice."§ 6-1-110(1), C.R.S.

13. Consumer restitution in this matter can be measured by Defendants' unjust enrichment in operating their fraudulent rebate program. *See EarthInfo, Inc. v. Hydrosphere Resource Consultants, Inc.*, 900 P.2d 113, 118 (Colo. 1995) (restitution is measured by defendant's gain and seeks to force disgorgement of that gain to prevent unjust enrichment)

14. This Court finds that the affidavit by Rebecca Wild, Criminal Investigator in the Consumer Fraud Unit of the Colorado Attorney General's Office, submitted with Plaintiff's Revised Verified Motion for Default adequately establishes the amount of restitution for which judgment should be entered. Ms. Wild established that

Defendants retained 7% of the total face value of the vouchers they issued through their fraudulent rebate program, amounting to \$4.2 million.

15. The CCPA further provides for an award of civil penalties:

6-1-112 Civil penalties. (1) Any person who violates or causes another to violate any provision of this article shall forfeit and pay to the general fund of this state a civil penalty of not more than two thousand dollars for each such violation. For purposes of this subsection (1), a violation of any provision shall constitute a separate violation with respect to each consumer or transaction involved; except that the maximum civil penalty shall not exceed one hundred thousand dollars for any related series of violations.

16. In determining the amount of a civil penalty award, this Court considers the following concepts: (a) The good or bad faith of the defendant; (b) the injury to the public; (c) the defendant's ability to pay; and (d) the desire to eliminate the benefits derived by violations of the Colorado Consumer Protection Act. *State v. May Dept. Stores Co.*, 849 P.2d 802 (Colo. App. 1992).

17. Based on the record, the Court finds that Defendants' violations of the CCSA and CCPA were deliberate, knowing and done in bad faith. Defendants defrauded consumers around the country, convincing them to purchase more expensive, "energy efficient" products by offering them thousands of dollars in rebates. Consumers diligently remembered to send in their claims and followed the terms and conditions of the program, only to be rejected. Defendants made millions of dollars from their deception, and must be deterred from engaging in future deceptive trade practices.

18. The Court finds that based upon the affidavit of Raye Goldsborough, Defendants defrauded approximately 14,153 consumers.

19. This Court orders \$100,000 in civil penalties against Defendants based on a penalty of \$2,000.00 per consumer that participated in their fraudulent rebate program. This Court further orders that Defendants pay \$4.2 million in disgorgement for a total monetary award of \$4.3 million.

20. Defendants shall be jointly and severally liable for the damages set forth in paragraph 19.

C. Distribution of Funds in Escrow Account

21. The Court finds that Defendants placed approximately \$4.6 million in an Escrow Account at Christiana Bank, of which approximately \$4,446,897.19 remains, that was to be used to pay out rebate claims, and that these funds belong to the consumers that participated in the NERF rebate program.

22. Pursuant to its authority to make any orders necessary to “completely compensate or restore to the original position of any person injured by means” under § 6-1-110(1), C.R.S., the Court hereby orders that the funds in the Escrow Account be distributed to the consumers that participated in the NERF rebate program who have not previously received payment from the Escrow Account. The funds in the Escrow Account shall be released to the Colorado Department of Law, who will distribute the funds to consumers on a pro-rata basis, excluding consumers that already have received payment for “successful” rebate claims. The costs of administration will be paid from the Escrow Account. Any returned funds shall be divided between Plaintiff and the State of Wisconsin to cover reasonable attorney fees and costs.

23. The payment of the funds in the Escrow Account is independent of the monetary judgment against Defendants as set forth in Section B of this Order, and cannot be used to satisfy that judgment.

24. This Court therefore GRANTS Plaintiff’s Revised Verified Motion for Default Judgment and ENTERS such final judgment against Defendants NRF and Tim Stubbs.

Dated this ____ day of _____, 2010.

BY THE COURT:

John W. Madden, IV
District Judge

This document constitutes a ruling of the court and should be treated as such.

Court: CO Denver County District Court 2nd JD

Judge: John William Madden

File & Serve

Transaction ID: 28975759

Current Date: Jan 14, 2010

Case Number: 2009CV1606

Case Name: ST OF COLO et al vs. STUBBS, TIM et al

Court Authorizer: John William Madden

/s/ Judge John William Madden