

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. LA CV18-00729 JAK (MRWx)

Date July 2, 2018

Title Federal Trade Commission v. Digital Altitude, LLC, et al.

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

Andrea Keifer

Alex Joko

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Andrew S. Hudson

Andrew B. Gordon

Jody A. Goodman

Thomas Seaman (Receiver)

Benjamin Kin (Counsel for Receiver)

Laura C. Basford (via teleconference)

Proceedings: DEFENDANTS' MOTION FOR ATTORNEYS' FEES (DKT. 135)

**REQUEST FOR THE ENTRY OF DEFAULT AGAINST DEFENDANTS
ASPIRE PROCESSING LIMITED; ASPIRE VENTURES, LTD; DIGITAL
ALTITUDE LIMITED (DKT. 137, 170)**

**MOTION FOR DEFAULT JUDGMENT AGAINST: (1) ASPIRE
PROCESSING, LLC; DISC ENTERPRISES, INC.; RISE SYSTEMS AND
ENTERPRISE, LLC; RISE SYSTEMS AND ENTERPRISE, LLC; AND SOAR
INTERNATIONAL AND (2) DIGITAL ALTITUDE LIMITED; ASPIRE
PROCESSING LIMITED; ASPIRE PROCESSING LIMITED; AND ASPIRE
VENTURES LTD (DKT. 163)**

RECEIVER'S FIRST FEE APPLICATION (DKT. 143)

**RECEIVER'S MOTION FOR APPROVAL TO PAY INTERIM FEES AND
COSTS TO RECEIVER'S COUNSEL (DKT. 144)**

The motion hearing is held. Present are counsel for defendants Digital Altitude LLC, Thermography for Life LLC, Michael Force, and Mary Dee ("Responding Defendants"), counsel for the FTC, counsel for the Receiver, and the Receiver. The Court confers with counsel regarding the settlement process. Counsel report that additional agreements have been reached as to one party and discussions are ongoing as to others. On May 21, 2018, the Court ordered that, on or before July 23, 2018, the parties were to submit a joint report on the procedural status of the settlement processes. See Dkt. 166. That report shall be filed in accordance with the prior order, and shall include any updates on the procedural status of negotiations, as well as any estimate(s) as to what additional time will be required to conclude discussions, whether or not a settlement is reached as to some or all remaining defendants.

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The Court confers with the Receiver and counsel as to certain information set forth in the Receiver's Second Interim Report. This includes inquiries about payments by consumers that may have been transmitted to one or more defendants prior to the entry of the temporary restraining order ("TRO") (Dkt. 34), but that were not received by defendants until after it was entered. See Dkt. 172. The issue raised in the Second Interim Report is whether such funds should be immediately returned to the consumers who made such payments or consolidated with all other funds presently maintained and overseen by the Receiver, which include payments made by consumers and received by defendants prior to the entry of the TRO. The Court states its tentative view that the latter alternative appears more equitable, *i.e.*, that the later received funds should be maintained with those received earlier. Presently, there is no showing that there is a material difference between the alleged deception of consumers who made payments that were received before and after the entry of the TRO. Nor is there evidence that certain of the later received funds were not transmitted prior to the entry of the TRO. This consolidation of funds would be without prejudice to a claim by any consumer whose funds were received after the entry of the TRO, that the entire amount of those funds should be returned to that consumer. There is no objection by any party or the Receiver to this resolution. Therefore, it is adopted and the Receiver is ordered to implement it.

The Court states its tentative views that it is inclined to grant the FTC's Request for the Entry of Default (the "FTC's Request"), grant FTC's Motion for Default Judgment (the "FTC's Motion") subject to certain potential modifications based on the submission of additional information, grant the Receiver's First Fee Application (the "Receiver's Fee Application") and grant the Receiver's Motion for Approval to Pay the Interim Fees and Costs of the Receiver's Counsel (the "Receiver's Motion"). The Court provides detailed statements as to the basis for each of these determinations. Counsel address the Court. The Court concludes that, because the procedural requirements for service of a corporate entity in the United Kingdom have been satisfied, the FTC's Request is **GRANTED**. The Clerk is directed to enter default as to Aspire Processing Limited; Aspire Ventures, Ltd; and Digital Altitude Limited.

The Court concludes that the procedural requirements for entry of 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 have been satisfied, and that all substantive factors under *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986), either support the entry of default judgment or are neutral.¹ However, the terms of the judgment will be reviewed based on the supplemental briefing by the FTC. Thus, the Court directs counsel for the FTC to submit a supplemental brief addressing the issues raised as to the proposed permanent injunctive relief as to these defendants. These include the appropriateness of the proposed affirmative injunctive relief, the basis for the time periods in which certain restrictions apply, and the breadth of the proposed limitations on the conduct of the defendants who are in default. The FTC shall also file a red-line of the proposed injunctive relief that reflects any differences in its language from that used in the Order that entered the preliminary injunction. Although no deadline was set for this filing during the hearing, counsel for the FTC is directed to file its response on or before July 13, 2018. Upon receiving that submission, the Court will determine what changes, if any, will be made to the proposed order.

With respect to the monetary relief sought through the default process, the Court concludes that the

¹ The factors are: possibility of prejudice to moving party; merits of the claim; sufficiency of the complaint; sum of money at stake in the action; possibility of dispute concerning material facts; whether default was due to excusable neglect; and the strong policy favoring decisions on the merits.

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amount of restitution proposed by the FTC and the Receiver represents a reasonable estimate of the consumer injury. Because this calculation assumes that the funds received by certain consumers who acted as coaches or joint-venturers should be treated as a credit to 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.

For the reasons stated earlier as to the appropriate scope of injunctive relief, a ruling on the FTC's Motion is **DEFERRED**, and it is taken **UNDER SUBMISSION**.

The Court states that it has reviewed the materials submitted in support of the Receiver's Fee Application and Receiver's Motion, including detailed billing records, description of work performed, hourly rates charged, and information about individuals performing such work. Based on that review, and the absence of any objections by any party, the Court concludes that the requests are reasonable. This includes the request for expenses and costs, which were supported by sufficient evidence. Thus, the Receiver's Fee Application and Receiver's Motion are **GRANTED**, and the corresponding payments may be made by the Receiver from the available funds.

The Court states its tentative views that it is inclined to defer a final ruling on Responding Defendants' Motion for Attorneys' Fees (the "Responding Defendants' Motion"). The Court confers with counsel. The Court states that whether to permit the release of assets of one or more Responding Defendants that have been frozen pursuant to a prior Order to pay for the costs and fees of attorneys who are representing those defendants in this action requires the consideration of several factors. These include the desire to maintain assets that can be distributed as restitution to consumers, the reasonableness of the fee request, that counsel representing Responding Defendants agreed to do so when counsel knew there was a risk that frozen assets would not be made available to Responding Defendants for the payment of legal fees and costs, and whether the Responding Defendants have other assets that can be used to pay their counsel. The Court also states that it is mindful that, notwithstanding the entry of the preliminary injunction, there has been no determination of liability as to the Responding Defendants. Issues are presented with respect to whether the denial of the Responding Defendants' Motion would prevent them from defending the claims in this action. The Court also states that no specific evidence has been submitted by the Responding Defendants as to their current income, if any, their assets, if any, other than those that have been frozen, and their respective efforts to find employment. The FTC opposes any distribution because it will reduce the amount of funds potentially available to distribute as restitution to consumers. Counsel for the Responding Defendants states that he may not be able to continue to represent them if he is not paid any portion of his fees or out of pocket costs.

Based on an assessment of the information presently available, the Responding Defendants' Motion is **GRANTED IN PART**. The Court orders that the Receiver shall direct the financial institutions in possession of the respective funds of Mary Dee and Michael Force to release to each of them from his or her frozen funds \$5000, with that entire \$10,000 amount to be provided to their counsel, Andrew Gordon, as payment of a portion of the presently outstanding fees and costs. However, this determination is without prejudice to the FTC later seeking to recover these funds from Mary Dee and Michael Force in this action based on the application of all relevant factors.

With respect to the Responding Defendants' Motion, because the evidence that has been provided to

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date is limited, on or before July 16, 2018, if Responding Defendants continue to seek a distribution of more than \$10,000, they shall submit a supplemental brief, with supporting evidence, as to the following: (i) all assets of Mary Dee and Michael Force; (ii) what efforts Michael Force and Mary Dee have made to find gainful employment or otherwise obtain funds to cover their respective living expenses and legal fees; and (iii) when Mary Dee’s new enterprise is expected to generate revenue and how much income it is projected to provide to her. Any response by the FTC shall be filed within seven days after the filing of the Responding Defendants’ submission. Upon receipt of these materials, the Court will determine whether any additional amount should be advanced to counsel for the Responding Defendants under the same terms and conditions as set forth in this Order, and if so, in what amount.

IT IS SO ORDERED.

Initials of Preparer _____ : _____ 57
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