UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE COMMISSION, *et al.*,	
Plaintiffs,	Case No. 15cv5781 Judge Feinerman Magistrate Judge Gilbert
v.	
LIFEWATCH INC., *et al.*,	
Defendants.	

PLAINTIFFS' MOTION IN LIMINE TO ADMIT
DECLARATIONS AND CONSUMER COMPLAINTS

Plaintiffs Federal Trade Commission ("FTC" or "Commission") and State of Florida, Office of the Attorney General, Department of Legal Affairs ("State of Florida"), respectfully request that this Court admit, for trial, (a) declarations by consumers who were victims of the scheme; and (b) complaints and statements made by consumers provided to the Better Business Bureau ("BBB"). All but two of these declarations were submitted by Plaintiffs along with their motion for preliminary injunction in July 2015 and most were relied on and admitted by the Court at the preliminary injunction hearing in December 2015.[1] All of the declarations were cited and included in Plaintiffs' motion for summary judgment. These consumer declarations and statements are admissible pursuant to the residual hearsay exception, Fed. R. Evid. 807, and it would be unnecessarily expensive to the consumers and Plaintiffs, and needlessly time-consuming to the Court and the parties, to bring these mostly elderly and disabled consumers into court to verify their previous statements.

In particular, Plaintiffs request that the Court admit the following exhibits:

[1] The two new declarations were sworn by a single consumer, Forest Horne, who received robocalls on his cellphone on behalf of Lifewatch just days before discovery closed. *See* Dkt. 249 and 250.

Exhibit No.	Docket No.	Description
PX 6	24-2	Declaration of Bill Smith, and attachments thereto
PX 7	24-3	Declaration of Susan Cuomo, and attachments thereto
PX 17	24-13	Declaration of Kathleen Bangasser
PX 18	24-14	Declaration of Ann Barker
PX 19	24-15	Declaration of Roger Beyer
PX 21	24-17	Declaration of Tamara Bliss
PX 22	24-18	Declaration of Shirley Bourne, and attachments thereto
PX 23	24-19	Declaration of Donald Bristow
PX 24	24-20	Declaration of Betty Carson
PX 25	24-21	Declaration of Joan Cattie, and attachments thereto
PX 26	24-22	Declaration of Vicki Cavic, and attachments thereto
PX 27	24-23	Declaration of Albert Clawson
PX 28	24-24	Declaration of Marilyn Cummings
PX 29	24-25	Declaration of Gayle D'Addario
PX 30	24-26	Declaration of Hilda Daniel
PX 31	24-27	Declaration of Paul DeLoca
PX 82	51-2	Declaration of Paul DeLoca, and attachments thereto
PX 1 Atts. W-Z	16-2 – 17-1	Transcripts of recordings received from Paul deLoca
PX 32	24-28	Declaration of David Eden
PX 33	25-1	Declaration of Lord Featherston, and attachments thereto
PX 34	25-2	Declaration of Patricia Felker, and attachments thereto
PX 35	25-3	Declaration of Barry Gates, and attachments thereto
PX 71	26-7	Declaration of Barry Gates in Support of Life Alert's Ex Parte Motion for Temporary Restraining Order and Order to Show Cause re Entry of Preliminary Injunction, and attachments thereto
PX 36	25-4	Declaration of Donna Girard
PX 37	25-5	Declaration of Angel Gordon
PX 38	25-6	Declaration of Sandra Green, and attachments thereto
PX 39	25-7	Declaration of Ann Grigorian
PX 40	25-8	Declaration of Michael Haselbauer
PX 41	25-9	Declaration of William James
PX 1 Atts. AA-FF	17-2 – 18-1 at 56	Transcripts of recordings received from William James
PX 42	25-10	Declaration of John W. Jensen, and attachments thereto
PX 43	25-11	Declaration of Doris Jones
PX 44	25-12	Declaration of Timothy Kirian
PX 45	25-13	Declaration of Edward Kulas
PX 46	25-14	Declaration of Isaac Lifshitz
PX 47	25-15	Declaration of Karen McCourt
PX 48	25-16	Declaration of Ann McGraw
PX 49	25-17	Declaration of Donn Meehl
PX 50	25-18	Declaration of Diana Mey, and attachments thereto

PX 83	51-3	Declaration of Diana Mey, and attachments thereto
PX 86	77-1	Declaration of Diana Mey, and attachments thereto
PX 1 Atts. GG-CCC	18-1 at 57 – 20-1 at 73	Transcripts of recordings received from Diana Mey
PX 51	25-19	Declaration of Joaquin Miller, and attachments thereto
PX 52	25-20	Declaration of Laurie Monaghan
PX 53	25-21	Declaration of Lamonte Nielson, and attachments thereto
PX 54	25-22	Declaration of Kenneth Pierce
PX 55	25-23	Declaration of Darlene Primm, and attachments thereto
PX 56	25-24	Declaration of Donna Rench
PX 57	25-25	Declaration of Susan Rivard
PX 58	25-26	Declaration of Ann Savagian
PX 59	25-27	Declaration of Gail Thill, and attachments thereto
PX 60	25-28	Declaration of Cynthia Veysey, and attachments thereto
PX 61	25-29	Declaration of Deborah Wagler
PX 62	25-30	Declaration of Claude Westbrook
PX 63	25-31	Declaration of Carolyne Whaley
PX 72	26-8	Declaration of Danielle Levine, and attachments thereto
PX 74	26-10	Declaration of Florence Holley
PX 81	51-1	Declaration of Robert Braver, and attachments thereto
PX 95	249	Declaration of Forest Horne
PX 96	250	Supplemental Declaration of Forest Horne

Most of these declarations Plaintiffs are seeking to admit are from consumers discussing their experience with Defendants and the robocalls they received on behalf of Defendants, and many contain transcripts of those calls. The remaining declarations either attach consumer complaints and transcripts or describe third-party communications with Defendants.

I. Plaintiffs' Consumer Declarations and Statements Should Be Admitted.

A. Standard for Admissibility.

All of the declarations Plaintiffs seek to admit fall within the residual exception to the hearsay rule, Fed. R. Evid. 807. Out of court statements are admissible under Fed. R. Evid. 807 when five elements are established: "'(1) circumstantial guarantees of trustworthiness; (2) materiality; (3) probative value; (4) the interests of justice; and (5) notice.'" *United States v. Moore*, 824 F.3d 620, 622 (7th Cir. 2016) (quoting *United States v. Ochoa*, 229 F.3d 631, 638

(7th Cir. 2000)). *See also Harris v. City of Chicago*, No. 16 C 10695, 2018 U.S. Dist. LEXIS 22918, at **2-3 (N.D. Ill. Feb. 13, 2018) (Feinerman, J.) (quoting *Moore*).

B. Plaintiffs' Exhibits are Admissible.

The declarations Plaintiffs seek to be admitted meet the criteria required for admissibility under Fed. R. Evid. 807. Indeed, courts have routinely admitted similar declarations in consumer protection cases brought by Plaintiffs. For example, in *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 576-77 (7th Cir. 1989), the court admitted a number of consumer affidavits in lieu of live testimony. In upholding the district court's admission of these affidavits pursuant to the residual hearsay exception, the Seventh Circuit explained:

> [I]t is clear that these affidavits will fall within the residual exception and the trial court did not abuse its discretion by admitting them. The affidavits possess sufficient guarantees of trustworthiness; each was made under oath subject to perjury penalties and the affiants describe facts about which they have personal knowledge – their contacts with defendants. The evidence is important to the issue of whether there was actual consumer injury from defendant's action and the affidavits would be probative of that fact. The interests of justice are served by allowing the affiants to submit affidavits instead of requiring their appearance in court. The defendants ran a nation-wide telemarketing operation and it would be cumbersome and unnecessarily expensive to bring all the consumers in for live testimony . . . Defendants were also given proper notice of the affidavits – they even had the chance to question the affiants themselves, but they chose not to avail themselves of the opportunities.

875 F.2d at 576. *See also FTC v. Figgie Int'l Inc.*, 994 F.2d 595, 608-09 (9th Cir. 1993) (consumer complaint letters are admissible); *CFPB v. The Mortgage Law Group, LLP, et al.*, No. 14-cv-513, 2017 WL 3581146, at **2-3 (W.D. Wis. April 19, 2017) (admitting consumer declarations and unsworn statements under Fed. R. Evid. 807); *FTC v. Instant Response Sys., LLC*, No. 13 Civ. 00976(ILG)(VMS), 2015 WL 1650914, at *4-5 (E.D.N.Y. April 14, 2015) (admitting BBB complaints pursuant to FRE 807); *FTC v. Ewing, et al.*, No. 2:07-cv-47, 2014 WL 5489210, at *2 (D. Nev. Oct. 29, 2104) (admitting 162 unsworn consumer complaints under Fed. R. Evid. 807); *FTC v. Magazine Solutions, LLC*, No. 7-692, 2009 WL 690613, at *1-2

(W.D. Penn. March 16, 2009) (finding that BBB complaints "have sufficient guarantees of trustworthiness to permit admission under Rule 807"); *FTC v. Cyberspace*, No. C00-1806L, 2002 WL 32060289, at *3 n.5 (W.D. Wash. July 10, 2002) (admitting unsworn emails and letters of complaint under FRE 807), *aff'd on other grounds*, 453 F.3d 1196 (9th Cir. 2006).

First, the consumer declarations possess sufficient guarantees of trustworthiness. As this Court noted in *Harris*, the Seventh Circuit has identified the following factors, which "are neither exhaustive nor absolute," as pertinent in assessing trustworthiness:

> …the character of the witness for truthfulness and honesty, and availability of evidence on the issue; whether the testimony was given voluntarily, under oath, subject to cross examination and a penalty for perjury; the witness's … motivation to testify …; the extent to which the witness's testimony reflects his personal knowledge; whether the witness ever recanted his testimony; the existence of corroborating evidence; and, the reasons for the witness's unavailability.

2018 U.S. Dist. LEXIS 22918, at **3-4 (quoting *Moore*, 824 F.3d at 622-23). All of the relevant factors support admission of this evidence.

Like the affidavits described in *Amy Travel*, 875 F.2d at 576, these declarations were made under oath and describe facts about which the declarants have personal knowledge and no motive to lie. *See also Harris*, 2018 U.S. Dist. LEXIS 22918, at **4-7 (statement given under oath, made with "no reason" to believe it would benefit witness, based on personal knowledge, and never recanted, sufficiently trustworthy even where witness was an admitted criminal and there was no corroborating evidence); *Ewing*, 2014 WL 5489210, at *4 (admitting sworn consumer declarations because given under penalty of perjury).

Similarly, the unsworn consumer complaints at issue here have ample guarantees of trustworthiness. Although not under oath, they were made voluntarily either to the Better Business Bureau or to telemarketers (Defendants' agents), and by individuals with personal knowledge of the subject of the complaints. The complaints were made at, or soon after, the

time that the consumers dealt with the issue about which they are complaining. Further, the statements were made independently by unrelated members of the public, all report similar experiences, and are consistent with other evidence introduced by Plaintiffs. *See Figgie*, 994 F.2d at 608 (volume and similarity of complaints indicates they are not "not the product of faulty perception, memory, or meaning, the dangers against which the hearsay rule seeks to guard); *Ewing*, 2014 WL 5489210, at *2 (same) (quoting *Figgie*). The consumers who made the statements have no motive to falsify information in their complaints. *See Moore*, 824 F.3d at 623 ("most important factor here is [witness's] motivation – or lack thereof – to lie…."); *U.S. v. Simmons*, 773 F.2d 1455, 1459 (4th Cir. 1985) (holding that lack of motive is indicator of trustworthiness). Moreover, all of the witnesses who provided declarations or statements about Defendants' conduct initiated the complaints themselves – none were contacted by the Plaintiffs or BBB until they had filed complaints.

Second, all of the declarations and statements are offered as evidence of material facts. The evidence provides details regarding the robocalls and telemarketing calls, as well as demonstrating consumer injuries. Indeed, all the declarations and statements can be tied directly to Defendants or their telemarketers. *See* Dkt. 53 at 5, Plaintiffs' Response in Opposition to Defendant Lifewatch Inc.'s Motion to Strike Certain Evidence, and Dkt. 53-1 (Attachment A). Moreover, to the extent that consumers are unable to specifically identify Defendants or their telemarketers, this inability is *wholly the fault of Defendants* because they demanded that their telemarketers not mention their names during telemarketing calls. *See* Dkt. 331 at 130, Defendants' Response to Statement of Material Facts (PSMF 47) (citing evidence that Defendants not provide Defendants' name to consumers). *See also* Dkt. 22-2 at 20, PX 4, Velez

Dec. Att. B (Lifewatch Call Center Welcome Package instructing telemarketers not to inform consumers they are calling for Defendants).

Third, the declarations and statements are more probative on the points for which they are offered than any other evidence which can be procured through reasonable efforts. Defendants' illegal activities were directed at thousands of consumers throughout the United States. It would be far too expensive and time consuming to call each of Defendants' victims – the consumer declarations and statements are the most probative evidence that is reasonably obtainable. *See, e.g.*, *Figgie*, 994 F.2d at 608-9 ("'reasonable efforts' would not produce more probative evidence … testimony from the letter-writers is not likely to be any more reliable than the letters themselves."); *Ewing*, 2014 WL 5489210, at *4 ("Due to the amount of time that has passed since the complaints were made, as well as the attendant practical difficulties of having the consumers testify, reasonable efforts would not produce evidence that is more probative than the contemporaneous complaints."); *FTC v. Kitco*, 612 F. Supp. 1282, 1295 (D. Minn. 1985) (consumer "affidavits are more probative on the issue of total liability than any other reasonably obtainable evidence."). This is particularly true given that most of Defendants' victims are elderly, disabled, or both.[2] Indeed, no other witnesses would be better able to describe the events that are the subject of the victim statements, even including Defendants' telemarketers . *See Harris*, 2018 U.S. Dist. LEXIS 22918, at **10-11 (potential testimony from adverse party's witness "does not, standing alone, bar the admission of statements that would otherwise satisfy the requirements of Rule 807) (citing *United States v. DeLeon*, 2009 U.S. Dist. LEXIS 85950, 2009 WL 3020145, at *4 (D. Md. Sept. 21, 2009)) (subsequent history omitted).

[2] Even nearly three years ago, as Plaintiffs explained to the Court in preparation for the preliminary injunction hearing, finding consumer witnesses healthy enough to testify, let alone to travel to Chicago, was extremely difficult.

Fourth, admitting these declarations and statements would further the general purpose of the rules of evidence, to make relevant evidence admissible. *See Amy Travel Service*, 875 F.2d at 576. *See also Figgie*, 994 F.2d at 609 (admitting letters "'furthers the federal rules' paramount goal of making relevant evidence admissible.'") (quoting 4 Weinstein & Berger, Evidence, Par. 803(24)[01] (1984) at 381.). Admission would also serve the interests of justice. Defendants engaged in a nationwide scheme and it would be unnecessarily expensive to bring consumers in from all over the country. *See United States v. Stern*, No. 11-CR-301, 2013 U.S. Dist. LEXIS 164455, at *17 (E.D. Wis. Nov. 18, 2013) (admitting unsworn statement to "'eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.'") (quoting Fed. R. Evid. 102).

Finally, notice is not an issue. Defendants were served with all but two of these declarations more than three years ago, when the case was first filed, and were served with the remaining two declarations more than a year before discovery closed. Moreover, all of the declarations were relied on and cited in Plaintiffs' summary judgment filing in December 2017.

WHEREFORE, Plaintiffs respectfully request that the Court grant Plaintiffs' motion in limine to admit the afore-mentioned consumer declarations and complaints.

Respectfully Submitted,

ALDEN F. ABBOTT
General Counsel

Dated: September 20, 2018

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CERTIFICATE OF SERVICE

I, David A. O'Toole, hereby certify that on September 20, 2018, I electronically filed **PLAINTIFFS' MOTION IN LIMINE TO ADMIT DECLARATIONS AND CONSUMER COMPLAINTS,** with the Court using the CM/ECF system, which will automatically send copies to any attorney of record in the case.

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