SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT R. REED** **PART** **43**

Justice

----------X

CARL E. PERSON, individually and on behalf of all others similarly situated,

Plaintiff,

- v -

PSI SYSTEMS, INC., ENDICIA, HARRY WHITEHOUSE, and JOHN DOE 1-100 whose names and addresses and states of incorporation or principal place of business are unknown but use PSI Systems, Inc. to ship unordered wristwatches for them, and/or use one or more of the following telephone numbers and merchandise descriptions when making unauthorized charges on the credit cards of the persons being victimized:

POWERPERFECTSKINCREAM 833-226-5287 CA
ABSOLUTEGOLDESKINCREAM 833-207-5625 CA
BUYPLATINUMMAXSUPTESTO 888-828-6305 CA
BOOSTERTONE.COM 833-661-9930 CA,

Defendants.

----------X

INDEX NO. 651885/2020

MOTION DATE 07/06/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for JUDGMENT - DEFAULT.

This putative class action stems from the alleged unwanted and unauthorized mailings of packages containing wristwatches to plaintiffs by a licensee(s) of defendant PSI Systems, Inc. (PSI), which has resulted in unauthorized charges to their credit cards. Plaintiff Carl E. Person, an attorney representing himself and the purported class, moves, pursuant to CPLR 3215, for leave to enter of a default judgment on liability against PSI. Upon granting the motion, plaintiff seeks an award of actual damages, pre-judgment interest, a preliminary and permanent injunction and punitive damages on the first cause of action for fraud; an injunction and an award of reasonable attorneys' fees on the second cause of action under General Business Law § 396; an injunction

and an award of reasonable attorneys' fees on the third cause of action under General Business Law § 349 (h); and pre-action discovery on its fourth cause of action brought under CPLR 3102 (c), including an order directing PSI to disclose the residence and business addresses, telephone numbers for and the name of defendant Harry Whitehouse's (Whitehouse) employer. Plaintiff also moves, pursuant to CPLR 306-b, for an extension of time to serve Whitehouse and the John Doe defendants. PSI d/b/a Endicia opposes the motion and cross-moves, pursuant to CPLR 3013, 3016, and 3211 (a) (1) and (a) (7), to dismiss the complaint.

BACKGROUND

The following facts are drawn primarily from the complaint unless otherwise indicated and are assumed to be true for purposes of this motion (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 92 [1993]). Plaintiff is a resident of New York County. PSI is a California corporation registered to do business in New York where it had operated under the name "Endicia Insurance Services" (NY St Cts Elec Filing [NYSCEF] Doc No. 6, Person aff, exhibit A, ¶ 3; NYSCEF Doc No. 7, Person aff, exhibit B at 1-2). PSI and defendant Endicia (Endicia) (together, PSI) are owned or affiliated with "Stamps.com" (NYSCEF Doc No. 6, ¶ 3). Whitehouse is a founder and co-owner of PSI and is a member of Endicia's executive team (*id.*, ¶ 5). Whitehouse had invented a series of patents related to mailing systems and has transferred those patents to PSI (*id.*, ¶¶ 4-5 and 9).

Beginning in or about August 2019, PSI and other defendants have used the United States Postal Service (USPS) to mail to plaintiff and others "under Endicia imprint and USPS license number 071VD1328177 … unordered cheap, $5 wristwatches in black boxes in mailing package envelopes providing no shipper or seller name or physical address, with unauthorized credit card charges being made to the recipients' credit cards in the amounts ranging between $90.01 and $99.99 (*id.*, ¶ 2). The complaint lists four of the unauthorized credit card transactions:

"1/28 1/28 POWERPERFECTSKINCREAM 833-226-5287 CA $96.11
12/28 12/28 ABSOLUTEGOLDESKINCREAM 833-207-5625 CA $94.31
3/23 3/23 BUYPLATINUMMAXSUPTESTO 888-828-6305 CA $98.34
2/23 2/23 BOOSTERTONE.COM 833-661-9930 CA $97.59"

(*id.*, ¶ 16). In addition, "[t]he shipper of the unordered merchandise is a licensee of PSI by reason of its use of the Endicia mark on its mailings, by use of metered postage applied by the shipper, and by use of one or more of the patents owned by PSI. (*id.*, ¶ 12). Each package bore a return address of "Shipping Department, P.O. Box 40189, Houston TX 77240-0189" (*id.*, ¶ 14), which is alleged to be PSI's postal address (*id.*, ¶ 2). The failure to provide the name of the shipper or seller is an alleged violation of USPS, PSI and "Stamps.com" rules and regulations (*id.*, ¶ 14). The complaint alleges that "PSI had the duty of terminating its licenses to the shipper, or stop itself from the repeated unlawful activities, but has failed to do so" (*id.*, ¶ 13).

Plaintiff commenced this action on behalf of himself and the class on May 25, 2020 by filing a summons and complaint asserting four causes of action for: (1) common-law fraud; (2) a violation of General Business Law § 396; (3) a violation of General Business Law § 349 (h); and (4) pre-action discovery under CPLR 3102 (c). Plaintiff now moves for a default judgment on liability against PSI and for an extension of time to serve Whitehouse and the John Doe defendants. PSI opposes the motion and cross-moves to dismiss the complaint.

DISCUSSION

A. Plaintiff's Motion for a Default Judgment

Plaintiff submits that he served PSI with the summons and complaint in accordance with Business Corporation Law § 306, and that he "intends to mail a copy of the motion papers" to PSI at P.O. Box 40189, Houston, Texas 77240-0189[1] (NYSCEF Doc No. 12, plaintiff's mem of law

[1] An affidavit of service sworn to by plaintiff reveals that he personally mailed the motion papers to PSI at 323 N. Matilda Ave., Sunnyvale, CA 94085 on July 19, 2020 (NYSCEF Doc No. 16). Pursuant to CPLR 2103 (a), "[e]xcept where otherwise prescribed by law or order of court, papers may be served by any

at 8). As to the merits, plaintiff submits that the unauthorized credit card charges support the second cause of action under General Business Law § 396 and that he has adequately pled the requirements to sustain a cause of action under General Business Law § 349 (h).

PSI contends that the motion is premature since it was made one day before its time to answer expired and that it has both a reasonable excuse and a meritorious defense to the action.

Plaintiff, in response, submits that after PSI's counsel alerted him to this defect, he served an amended notice of motion by mail on August 6, 2020 (NYSCEF Doc No. 18). Plaintiff argues that PSI still waited until August 12, 2020 to appear in this action when it executed a stipulation to adjourn the motion (NYSCEF Doc No. 19).

It is well settled that an application for a default judgment must be supported with "proof of service of the summons and the complaint[,] ... proof of the facts constituting the claim, [and] the default" (CPLR 3215 [f]). "'[B]y defaulting, a defendant admits all traversable allegations contained in the complaint, and thus concedes liability, although not damages'" (*HF Mgt. Servs. LLC v Dependable Care, LLC*, — AD3d —, 2021 NY Slip Op 05459, *1 [1st Dept 2021] [citation omitted]; *Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 [1984]).

The affidavits of service sworn to on June 19, 2020 reveal that plaintiff served PSI and "PSI Systems, Inc. f/k/a Endicia Insurance Services s/h/a Endicia" pursuant to Business Corporation Law § 306 by delivering two copies of the summons and complaint to the Secretary of State on June 18, 2020, as is permissible under CPLR 311 (a) (NYSCEF Doc No. 8, Person aff, exhibit C at 1-2). "Service of process on such corporation shall be complete when the secretary of state is so served" (Business Corporation Law § 306 [b] [1]). Under CPLR 320 (a), PSI was

---

person not a party" to the action. Such service is improper (*see Bloomberg v Niebauer*, 286 AD2d 267, 267 [1st Dept 2001]; *Miller v Bank of New York*, 226 AD2d 507, 508 [2d Dept 1997]). The court, however, will overlook this defect as there is no prejudice to PSI (*see Neroni v Follender*, 137 AD3d 1336, 1337 [3d Dept 2016], *appeal dismissed* 27 NY3d 1147 [2016], *rearg denied* 28 NY3d 1024 [2016]).

required to answer or appear within 30 days (*see Jing Shan Chen v R & K 51 Realty, Inc.*, 148 AD3d 689, 690 [2d Dept 2017]). Because the thirtieth day fell on Saturday, July 18, 2020, PSI's time to answer expired on Monday, July 20, 2020 (*see* General Construction Law § 25-a). Plaintiff, though, filed the instant motion on Sunday, July 19, 2020 (NYSCEF Doc No. 4). Thus, the motion is premature as it was filed before PSI's time to serve an answer had expired.

Even assuming that plaintiff's actions cured this defect, PSI correctly points out that Executive Order (A. Cuomo) No. 202.8 (9 NYCRR 8.202.8) tolled its time to answer or appear in this action through November 3, 2020, when the toll expired (*see Grzesik v Sanchez*, 2021 NY Slip Op 31869[U], *4 [Sup Ct, NY County 2021]; *Whitsons Food Serv. (Bronx) Corp v Meglio 1 Corp.*, 2021 NY Misc LEXIS 3212, * 4 [Sup Ct, Suffolk County, April 1, 2021, Luft, J., index No. 607427/2020] [stating that "the tolling provisions were intended to equally apply to interposition of answers in civil proceedings"]; *see generally Brash v Richards*, 195 AD3d 582, 583-585 [2d Dept 2021] [discussing the executive orders issued as a result of the COVID-19 pandemic]). Accordingly, plaintiff's motion insofar as it seeks leave to enter a default judgment against PSI is denied.

In view of the foregoing, the court need not address whether PSI has presented a reasonable excuse for its default and a meritorious defense. Nevertheless, even were the default motion not premature, defendants have demonstrated that the motion should be denied. To avoid entry of a default judgment, a defendant must "'demonstrate a reasonable excuse for the default and a meritorious defense,' and … support their assertions through the submission of an affidavit" (*Xiaoyong Zhang v Jong*, 195 AD3d 435, 435 [1st Dept 2021] [citation omitted]). "'What constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court'" (*id.* [citation omitted]).

Here, defendants have demonstrated plaintiff has not suffered any prejudice from the short delay and that its delay was not willful. PSI has furnished the court with email correspondence dated July 15, 2020 from Sara Kani (Kani), a Senior Corporate Counsel at nonparty Stamps.com Inc. (Stamps.com), to plaintiff acknowledging receipt of the complaint and requesting an opportunity to speak with him (NYSCEF Doc No. 27, Kani aff, ¶ 1; NYSCEF Doc No. 29, Kani aff, exhibit B at 1). Counsel for PSI also submits copies of his email correspondence with plaintiff between July 20, 2020 and August 3, 2020 regarding his law firm's representation of PSI (NYSCEF Doc No. 25, Joseph Salvo affirmation, exhibit D).

As to the merits, Kani avers that PSI has been a wholly-owned subsidiary of Stamps.com since 2015 and that Endicia is a "trade name" used by PSI[2] (NYSCEF Doc No. 27, ¶¶ 1-2). Stamps.com is an approved, independent licensed vendor of USPS (*id.*, ¶ 5). Kani explains that PSI is engaged in the business of providing "software-as-a-service," an online platform that provides customers with internet mailing solutions (*id.*, ¶ 3). Customers using this service "weigh the needed postage, input data to the [online] Platform to print shipping labels, choose a shipping date and then pay for the needed postage from various public and private entities including … USPS … and United Postal Service ('UPS')" (*id.*, ¶ 4). The shipping information may be printed directly onto an envelope or onto a label to be affixed to the parcel (*id.*, ¶ 7). Kani avers that PSI does not inspect the envelopes or parcels shipped by its customers (*id.*, ¶ 8). Kani also states that PSI's terms and conditions governing the use of its services require all customers to comply with all USPS laws and regulations and prohibit harassing conduct (*id.*, ¶ 9; NYSCEF Doc No. 28, Kani aff, exhibit A). Moreover, PSI customers are not provided with a license, only the right to use PSI's services to purchase postage and related products in accordance with its terms and conditions

[2] Plaintiff accepts that PSI and Endicia are the same entity (NYSCEF Doc No. 33, plaintiff's reply mem of law at 7).

(NYSCEF Doc No. 27, ¶ 10). As the complaint does not allege that PSI is the "shipper" of the unwanted merchandise or the "seller' billing plaintiff for the unauthorized credit card purchases, PSI has demonstrated that it has a meritorious defense to the action.

B. Plaintiff's Request for Pre-Action Discovery

To the extent the moving papers can be read to request pre-action discovery from PSI (NYSCEF Doc No. 31, plaintiff reply aff, ¶ 6; NYSCEF Doc No. 33 at 25-26), the motion is denied. CPLR 3102 (c) provides that "[b]efore an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order." Plaintiff complains that PSI conceded this issue by failing to address it in its opposition. However, "[pre-action] [d]isclosure may only be obtained under CPLR 3102 (c) '[b]efore an action is commenced'" (*Matter of Johnson v Union Bank of Switzerland, AG*, 150 AD3d 436, 436 [1st Dept 2017]). Plaintiff has already commenced the action against PSI. Thus, plaintiff has not demonstrated that relief under CPLR 3102 (c) is available (*id.*).

C. Plaintiff's Request for an Extension of Time

Plaintiff moves to extend his time to serve Whitehouse. Plaintiff alleges that Whitehouse is the founder of Redbrick 247 Inc., a company located at 247 High Street, Palo Alto, California 94301 (NYSCEF Doc No. 6, ¶ 5). A process server in California has returned an affidavit of non-service stating that he had made five attempts to serve Whitehouse at that Palo Alto address between June 5, 2020 and July 6, 2020 but was unsuccessful[3] (NYSCEF Doc No. 6, ¶ 5; NYSCEF Doc No. 11, Person aff, exhibit F at 1).

CPLR 306-b allows the court to extend the time for service of the summons and complaint "upon good cause shown or in the interest of justice." Good cause requires the plaintiff to

[3] The court observes that the affidavit sworn to on July 13, 2020 indicates that the process server had attempted to serve "Howard Whitestone."

demonstrate "reasonable diligent efforts at service as a threshold matter" (*Leader v Maroney Ponzini & Spencer*, 97 NY2d 95, 105 [2001]). Plaintiff has not demonstrated that he was reasonably diligent in attempting to effectuate service. On the first attempt on June 5, 2020, the process server learned that "Red Juice Capital/Energy Tech Partners" occupied the building at the Palo Alto address. On the fifth and last attempt made on July 6, 2020, the process server confirmed that Redbrick 247., Inc. was not located in the building. Plaintiff does not state whether he made any other attempts to ascertain Whitehouse's home or business address after this last attempt at service (*see MTGLQ Invs., L.P. v Shay*, 190 AD3d 527, 529 [1st Dept 2021], *lv denied* 37 NY3d 908 [2021]). Instead, he blames his inability to serve Whitehouse upon PSI's default which has prevented him from obtaining the necessary information to serve Whitehouse and to identify the other defendants (NYSCEF Doc No. 12 at 5). As such, plaintiff has not established good cause for an extension.

Under the interest of justice standard, the court must engage in a "careful … analysis of the factual setting of the case and a balancing of the competing interests presented by the parties" and "may consider diligence, or lack thereof, along with any other relevant factor … including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" (*Leader*, 97 NY2d at 105-106) Plaintiff does not address of any of these factors in his moving papers. Even if plaintiff had done so, at least two factors militate against granting the extension. As noted above, plaintiff has not shown that he made any reasonably diligent efforts to ascertain Whitehouse's home address or any other address for 247 Redbrick, Inc. More importantly, though, plaintiff has not demonstrated the merits of the claims (*see Johnson v Concourse Village, Inc.*, 69 AD3d 410, 411 [1st Dept 2010]). The complaint alleges that

Whitehouse co-owns PSI and Endicia and that Whitehouse invented several patents now owned by PSI (NYSCEF Doc No. 6, ¶¶ 5 and 8-9). However, plaintiff has not alleged how Whitehouse's ownership interest in PSI or his inventions constitute a fraud or a violation of the General Business Law. Accordingly, the motion insofar as it seeks an extension of time to serve Whitehouse with the summons and complaint is denied.

D. PSI's Cross Motion to Dismiss

PSI cross-moves to dismiss the complaint under CPLR 3013, 3016 and 3211 (a) (1) and (a) (7). First, PSI posits that the complaint improperly groups all defendants together without pleading specific tortious conduct undertaken by each defendant. Second, the complaint fails to plead fraud with particularity. The allegations in support of the General Business Law § 349 claim are also conclusory. As for the cause of action under General Business Law § 396, PSI submits that the statute does not provide an express private right of action. In response, plaintiff argues that the complaint satisfies CPLR 3013 as he has pled the facts then known to him. He also submits that the complaint adequately pleads causes of action for fraud and for violations of General Business Law §§ 349 and 396.

"In assessing the adequacy of a complaint under CPLR 3211 (a) (7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff 'the benefit of every possible favorable inference'" (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [citation omitted]). "'[I]f from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail'" (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 [1st Dept 2013] [citation omitted]). That said, "bare legal conclusions" will not suffice (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [internal quotation

marks and citation omitted]). When the defendant submits documentary evidence, "'the standard morphs from whether the plaintiff stated a cause of action to whether it has one'" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] [citations omitted]). Whether a plaintiff can ultimately prevail on a claim is not part of the court's calculus on a motion to dismiss (*see J.P. Morgan Sec. Inc.*, 21 NY3d at 334]).

Dismissal under CPLR 3211 (a) (1) is warranted "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "A paper will qualify as 'documentary evidence' only if it satisfies the following criteria: (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and (3) its contents are 'essentially undeniable'" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86-87 [2d Dept 2010]).

CPLR 3211 (a) does not bar a defendant from moving for pre-answer dismissal of a class action (*see Maddicks v Big City Props., LLC*, 34 NY3d 116, 123 [2019]; *Ovitz v Bloomberg L.P.*, 18 NY3d 753, 758 [2012] [dismissing the class action under CPLR 3211]; *Moore v Liberty Power Corp., LLC*, 72 AD3d 660, 660 [2d Dept 2010], *lv denied* 14 NY3d 713 [2010] [granting dismissal of the complaint under CPLR 3211 (a) (1) and (7) and denying the plaintiff's cross motion for class certification]).

CPLR 3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

1. The First Cause of Action for Common-Law Fraud

To state a cause of action for common-law fraud, the plaintiff must plead "'a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury'" (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 578-579 [2018] [citation omitted]). The circumstances of the alleged fraud must be pled with particularity (*see* CPLR 3016 [b]). The complaint must describe "the misconduct ... in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud'" (*Lanzi v Brooks*, 43 NY2d 778, 780 [1977] [citation omitted]). The plaintiff need not furnish "unassailable proof of fraud ... [so long as] the facts are sufficient to permit a reasonable inference of the alleged conduct" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). That said, conclusory allegations lacking a factual basis will not suffice (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559-560 [2009]).

Applying these precepts, the complaint fails to plead a cause of action for fraud with the requisite particularity. As an initial matter, the complaint fails to distinguish between each defendant before attributing the allegedly fraudulent conduct to all of them, collectively. Such group pleading is improper (*see Principia Partners LLC v Swap Fin. Group, LLC*, 194 AD3d 584, 584 [1st Dept 2021]; *Jonas v National Life Ins. Co.*, 147 AD3d 610, 612 [1st Dept 2007]).

Significantly, the complaint merely recites the legal elements for a fraud cause of action without pleading specific facts or circumstances from which a reasonable inference of fraud may be made. First, the complaint does not identify a specific misrepresentation of fact on the part of PSI, when the alleged misrepresentation was made by or to whom (*see Raytheon Co. v AES Red*

Oak, LLC, 37 AD3d 364, 365 [1st Dept 2007] [dismissing a fraud counterclaim where "the allegation of an oral misrepresentation did not particularize when or by whom it had been made"]). Apart from "Endicia" having been imprinted on the shipping labels (NYSCEF Doc No. 6, ¶ 2), the complaint does not allege that PSI ever contacted or communicated with plaintiff. Plaintiff's billing statement listing the unauthorized credit card charges were prepared by a third-party, not PSI, for plaintiff (*id.*, ¶ 19[a]). Plaintiff also speculates that PSI has been shipping and charging him for the unwanted merchandise (NYSCEF Doc No. 31, ¶ 8), but this allegation is not supported. The four unauthorized charges listed in the complaint do not identify PSI as a seller or merchant. The assertion that PSI had shipped the unwanted merchandise (NYSCEF Doc No. 33 at 17) is also contradicted by plaintiff's earlier admission that the shipper is a licensee of PSI or uses PSI's patents (NYSCEF Doc No. 6, ¶ 12). This last allegation conforms with Kani's description of PSI as a company that merely facilitates shipping or mailing for its customers by allowing them to pay for postage and other fees online.

The complaint alleges in a wholly conclusory fashion that PSI had knowledge of the falsity of the alleged misrepresentation. While scienter is "most likely to be within the sole knowledge of the defendant and least amenable to direct proof,' plaintiff is still required to allege facts 'from which it is possible to infer defendant[s'] knowledge of the falsity of [their] statements' when they were made" (*MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286, 192 [1st Dept 2016] [citation omitted]). The complaint herein is devoid of any factual support sufficient to infer scienter (*see Briarpatch Ltd., L.P. v Frankfurt, Garbus, Klein & Selz, P.C.*, 13 AD3d 296, 298 [1st Dept 2004], *lv denied* 4 NY3d 707 [2005] [determining that the "assertions of scienter are conclusory, lacking sufficient facts to support such an inference"]). Crucially, the complaint fails to plead specific facts to plausibly infer that PSI, a business that provides postage and mailing services, participated

in a fraudulent scheme to charge for and ship unwanted merchandise to plaintiff (*see Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 61 [1st Dept 2017] [dismissing a cause of action for fraud, in part, where the plaintiff offered "nothing but speculation" that the defendant caused the fraudulent calls for which the plaintiff was charged]). Nor does the complaint adequately allege that plaintiff justifiably relied upon an alleged misrepresentation, namely the improper credit card charges, because plaintiff avers that he has disputed the unauthorized charges and canceled the credit card (NYSCEF Doc No. 5, plaintiff aff, ¶ 9; NYSCEF Doc No. 12 at 4). Accordingly, the first cause of action for common law fraud is dismissed.

2. The Second Cause of Action under General Business Law § 396

General Business Law § 396 governs unlawful selling practices. Although the complaint does not plead which subsection plaintiff is proceeding under, plaintiff submits that General Business Law § 396 (2) (a) applies. General Business Law § 396 (2) (a) reads:

> "No person, firm, partnership, association or corporation, or agent or employee thereof, shall, in any manner, or by any means, offer for sale goods, wares or merchandise, where the offer includes the voluntary and unsolicited sending of goods, wares or merchandise not actually ordered or requested by the recipient, either orally or in writing; any such goods, wares or merchandise so sent shall be prominently marked upon the container thereof in bold letters as follows …
>
> If after any such receipt deemed to be an unconditional gift under this paragraph a, the sender continues to send bill statements or requests for payment with respect thereto, an action may be brought by the recipient to enjoin such conduct, in which action there may also be awarded reasonable attorneys' fees and costs to the prevailing party."

Plaintiff contends that the statute allows him to bring an action to enjoin the violation. Plaintiff, however, ignores General Business Law § 396 (3), which provides:

> "Whenever there shall be a violation of this section, an application may be made by the attorney general in the name of the people of

> the state of New York to a court or justice having jurisdiction to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of such violation; and if it shall appear to the satisfaction of the court or justice that the defendant is, in fact, violating this section, an injunction may be issued by such court or justice, enjoining and restraining such action or violation, without requiring proof that any person has, in fact, been misled or deceived or otherwise damaged thereby."

General Business Law § 396 (3) empowers the New York State Attorney General to bring an action to address alleged violations (*see People v Glubo*, 5 NY2d 461, 473 [1959]), but makes no mention of whether a private right of action exists. To determine if a private cause of action under a statute exists, the court must consider: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme" (*Sheehy v Big Flats Community Day*, 73 NY2d 629, 633 [1989]). Key to any such determination is whether a private cause of action would be "incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme" (*id.* at 635). In this instance, plaintiff does not address any of the three factors, above. Moreover, the language in General Business Law § 396 (3) "suggests that recognition of an implied private right of action would be inconsistent with the legislative scheme" (*Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 217 [2d Dept 2008] [discussing General Business Law § 396-i (4)]). The second cause of action is dismissed.

3. The Third Cause of Action under General Business Law § 349

Under General Business Law § 349 (a), "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." A deceptive act or practice is "a representation or omission likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Gaidon v Guardian Life Ins.*

Co. of Am., 94 NY2d 330, 344 [1999] [internal quotation marks and citations omitted]). The deceptive act or practice must have "'a broader impact on consumers at large'" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 177 [2021], *rearg denied* 37 NY3d 1020 [2021], quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]). The query focuses "on the seller's deception and its subsequent impact on consumer decision-making, not on the consumer's ultimate use of a product" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP*, 37 NY3d at 177). Therefore, to plead a cause of action under the statute, "a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice" (*City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621 [2009]). The statute expressly carves out a private cause of action for "any person who has been injured by reason of any violation of this section" (General Business Law § 349 [h]).

Here, the complaint fails to plausibly allege a deceptive act or practice on the part of PSI. The complaint alleges that PSI and other defendants have used USPS to mail plaintiff unwanted merchandise, but the complaint also alleges that "[t]he shipper of the unordered merchandise is a licensee of PSI by reason of its use of the Endicia mark on its mailings, by use of metered postage applied by the shipper, and by use of one or more of the patents owned by PSI" (NYSCEF Doc No. 6, ¶¶ 2 and 12). The complaint further alleges that PSI should have terminated its licenses to the shippers of the unwanted merchandise (*id.*, ¶ 13). These allegations do not implicate a representation or omission made by PSI to plaintiff as it is incumbent upon the seller or shipper of each parcel to enter its information onto the shipping label. Furthermore, the complaint does not

allege that PSI exercised any control over this process or that PSI exercised any control over these third-party sellers and shippers.

The documentary evidence also refutes the allegation that PSI deliberately or purposefully withheld the name of the seller or the shipper on the shipping labels, as several sections in PSI's terms and conditions discuss how PSI's customers may print their own labels. In Section 8, titled "Account Funding," PSI's customers "are allowed to print or create labels up to the current balance of pre-funding in your account" (NYSCEF Doc No. 28 at 6). Any customer using "Bulk Inbound Shipping Services" is required to print and affix two labels to each parcel (*id.* at 7). PSI offers "qualified" customers to print service shipping labels as part of a "Pay-on-Use" program (*id.* at 10). The complaint does not allege that PSI exercised any control over its customers in how they entered data on the shipping labels.

Critically, the complaint also does not allege how the shipping labels purportedly generated on PSI's online platform have caused plaintiff's injuries (*see e.g. Donahue v Ferolito, Vultaggio & Sons*, 13 AD3d 77, 78 [1st Dept 2004], *lv denied* 4 NY3d 706 [2005] [dismissing claims brought under General Business Law §§ 349 and 350 where the plaintiffs failed to allege how the labels on defendants' beverages caused them injury]). The complaint cites the repeated, unauthorized credit card charges made by unauthorized sellers, not the labels bearing PSI's trade name, as the source of his damages (NYSCEF Doc No. 6, ¶¶ 16 and 19[d] and [h]). The third cause of action is dismissed.

Accordingly, it is

ORDERED that the motion of plaintiff Carl E. Person for leave to enter a default judgment against defendant PSI Systems, Inc., for pre-action discovery and for an extension of time to serve defendant Harry Whitehouse (motion sequence no. 001) is denied; and it is further

ORDERED that the cross motion of defendant PSI Systems, Inc. d/b/a Endicia to dismiss the complaint is granted, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

11/16/2021
DATE

ROBERT REED, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE