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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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FEDERAL TRADE COMMISSION, :

Plaintiff, :

-against- :

BLUEHIPPO FUNDING, LLC, et al., :

Defendants. :

08 Civ. 1819 (PAC)

ORDER

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HONORABLE PAUL A. CROTTY, United States District Judge:

The Federal Trade Commission (“FTC”) seeks an order of contempt against BlueHippo Funding, LLC and its wholly-owned subsidiary BlueHippo Capital, LLC (collectively, “BlueHippo”) for violating the terms of a consent order dated April 9, 2008 (the “Consent Order”),¹ as well as against Joseph K. Rensin, who is the whole owner of BlueHippo Funding, LLC (“Rensin,” and together with BlueHippo, “the Defendants”). Rensin served as CEO until July 2009 (FTC Ex. 22G, at 3.)²

BlueHippo markets computers and related electronic products to credit-challenged consumers. Advertising via national radio, TV, print, direct mail, and the Internet, BlueHippo promises to finance computer products for “everyone — regardless of their credit.” BlueHippo offers consumers two different ways to obtain computers: layaway (the “Layaway Plan”) and installment credit financing (the “Installment Credit Financing Plan”). The Layaway Plan consists of two steps: (i) an initial down payment, followed by (ii) a series of weekly or biweekly payments until satisfaction of the full purchase price. The Installment Credit Financing Plan grows

¹ On November 23, 2009, BlueHippo filed for Chapter 11 in the U.S. Bankruptcy Court for the District of Delaware. On December 23, 2009, BlueHippo’s bankruptcy action was converted to Chapter 7 liquidation. The trustee in bankruptcy has requested a 60-day continuance of these proceedings. The Court denies this request. The trustee in bankruptcy has declined to pay BlueHippo Funding, LLC’s counsel, prompting counsel to request withdrawal from these proceedings in December 2009. The Court granted counsel’s withdrawal motion on February 9, 2010. Counsel’s withdrawal does not constitute a default, however, and the Court will therefore consider BlueHippo’s objections on the record. Rensin has always been represented; since Rensin’s liability is derivative only, the Court must hold BlueHippo in contempt before holding Rensin in contempt.

²“FTC Ex.” refers to the exhibits that the Federal Trade Commission submitted in connection with the evidentiary hearing of February 9, 11, and 19, 2010.

out of the Layaway Plan. BlueHippo sends installment credit agreements (“Installment Credit Agreements”) to consumers who make an initial down payment followed by 13 additional consecutive payments. BlueHippo then sends computers to consumers who (i) properly complete and return the Installment Credit Agreements, and (ii) make a series of scheduled payments in partial satisfaction of the purchase price. BlueHippo considers the Installment Credit Financing Plan as a form of “financing” since consumers order computers while still owing part of the purchase price. BlueHippo tells consumers that it will fill their orders within three to four weeks via the Installment Credit Financing Plan.

In 2006, BlueHippo instituted a refund policy (the “Refund Policy”). Under the Refund Policy, BlueHippo grants refunds to consumers who make an initial payment and request a refund within seven days of the initial payment. After seven days, refunds are not granted. Instead, BlueHippo allows only a store credit (the “Store Credit Policy”). Under the Store Credit Policy, consumers are responsible for tax, shipping, and handling costs applicable to the merchandise obtained.

In 2006, the FTC notified the Defendants that it intended to file a complaint alleging violations of the Federal Trade Commission Act (the “Act”) (Def. Ex. A, at 4.)³ Specifically, the FTC claimed that BlueHippo violated the Act by falsely representing that BlueHippo would ship computers and televisions within promised times and failed to disclose that consumer payments were non-refundable.

Following this notification, BlueHippo made certain disclosures to the FTC, including a White Paper dated January 12, 2007 (the “White Paper”). In the White Paper, BlueHippo disclosed advertising materials, telemarketing scripts, and documents relating to both the Layaway Plan and the Installment Credit Financing Plan. The parties also exchanged draft complaints and consent orders. These initial drafts named Rensin as a defendant in the action.

³ “Def. Ex.” refers to the exhibits that the Defendants submitted in connection with the evidentiary hearing on February 9, 11, and 19, 2010.

On February 22, 2008, the FTC filed its Complaint but did not name Rensin as a defendant.⁴ The parties agreed to a Consent Order on April 9, 2008; but Rensin was not named in the Order. The Consent Order includes a monetary judgment of \$3.5 million that BlueHippo is obligated to use to fund a consumer redress program for consumers who made payments on or before February 28, 2006. In addition to the monetary judgment, the Consent Order includes injunctive relief, which prohibits BlueHippo from: (i) making any misrepresentations of material fact, express or implied; (ii) making representations regarding any refunds or cancellations without clearly and conspicuously disclosing all material terms and conditions; and (iii) conditioning the extension of credit on mandatory preauthorized transfers in violation of the EFTA.

Subsequently, the FTC initiated discovery to monitor BlueHippo's compliance with the Consent Order, but BlueHippo ignored the request, was uncooperative and non-compliant. From October 2008 through April 2009, BlueHippo either failed to produce information or provided wholly inadequate responses to the FTC's requests.

On April 16, 2009, the Court held BlueHippo in contempt for these failures (the "Civil Contempt Order"). Following the Civil Contempt Order, from May 2009 through July 2009, BlueHippo initiated a grudgingly compliant program of dribbling out responses to the FTC's queries.

On November 12, 2009, based on information BlueHippo produced during discovery, the FTC moved to hold both BlueHippo and Rensin in civil contempt for violation of the Consent Order (the "Contempt Motion"). The FTC sought both coercive sanctions and monetary relief for consumers harmed by BlueHippo's alleged misrepresentations and failures to disclose. Specifically, the FTC claimed that BlueHippo falsely advertised that it finances computers; BlueHippo failed to ship computers within specified time frames; BlueHippo failed to disclose material information about the terms of the Store Credit Policy; and BlueHippo conditioned its extension of credit on mandatory preauthorized transfers.

⁴ The FTC brought this action under §§ 5(a)(1), 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45(a)(1), 53(b), and 57(b); the Commission's Trade Regulation Rule Concerning the Sale of Mail or Telephone Order Merchandise ("the Mail Order Rule"), 16 C.F.R. Part 435; the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. §§ 1693-1693r, and its implementing Regulation E, 12 C.F.R. Part 205; and the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1666j, and its implementing Regulation Z, 12 C.F.R. Part 226.

The FTC's Contempt Motion is based on BlueHippo's data. Specifically, BlueHippo provided the FTC with the number of consumers who ordered computers from BlueHippo starting April 10, 2008, the date the Consent Order was entered, through July 24, 2009. BlueHippo verified the underlying data. The FTC and Rensin hired expert witnesses, however, who disagreed on how to analyze this data. On February 9, 11, and 19, 2010, the Court held an evidentiary hearing to hear testimony from both parties' expert witnesses.

FINDINGS OF FACT

After holding the evidentiary hearing and reviewing the parties' submissions, the Court makes the following findings of fact:

- (i) between April 10, 2008 and July 24, 2009, consumers placed 62,673 orders for computers;
- (ii) as of July 24, 2009, BlueHippo failed to provide either merchandise or store credit for 55,892 of those 62,673 orders;
- (iii) consumers paid BlueHippo \$14,062,627.51 for those 55,892 orders;
- (iv) after April 10, 2008, 24,108 orders could have qualified for financing on or before April 8, 2009, the day before the FTC brought its initial contempt action against BlueHippo;
- (v) by July 24, 2009, BlueHippo failed to provide either a computer or store credit merchandise for 20,760 of those 24,108 orders;
- (vi) BlueHippo earned a total of \$6,682,469.82 from those 20,760 orders;
- (vii) of those 24,108 orders, 2,025 qualified for financing by April 8, 2009;
- (viii) by July 24, 2009, BlueHippo failed to fill 677 of those 2,025 orders;
- (ix) BlueHippo earned \$609,856.38 from those 677 orders;
- (x) between April 10, 2008 and July 24, 2009, 3,454 store credit orders had a zero balance, indicating that consumers who placed these 3,454 orders were entitled to receive store credit merchandise; and
- (xi) by July 24, 2009, BlueHippo failed to fill 2,704 of those 3,454 store credit orders.

CONCLUSIONS OF LAW

A party “may be held in civil contempt for failure to comply with a court order if (1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner.” Paramedics Electromedicina Comercial Ltda. v. G.E. Med. Sys. Info. Tech., Inc., 369 F.3d 645, 655 (2d Cir. 2004). A party may be held in contempt even for unwillful violations. Id. As a party to the original action, the FTC may invoke this Court’s enforcement powers by initiating the civil contempt proceeding in the same action. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444-45 (1911). The moving party has the burden of proving each element of contempt. King v. Allied Vision, Ltd., 65 F.3d 1051, 1058 (2d Cir. 1995).

The parties do not dispute that the language of the Consent Order is clear and unambiguous. The FTC argues that several of BlueHippo’s actions, including its advertisement as a financing company, late shipments, store credit policy, and mandatory authorized transfers violate the Consent Order. The FTC further argues that proof of BlueHippo’s noncompliance is either clear and convincing, or shows that BlueHippo has not diligently attempted to comply in a reasonable manner. By contrast, BlueHippo maintains that it disclosed its current marketing and production practices in the White Paper and that it did not violate the Consent Order.

I. Financing Misrepresentations

An advertisement is deceptive under the FTC Act “if it is likely to mislead consumers, acting reasonably under the circumstances, in a material respect.” Kraft, Inc. v. FTC, 970 F.2d 311, 314 (7th Cir. 1992). Courts may look at the plain language of an advertisement to determine what it means. Kraft, 970 F.2d at 318-19; FTC v. Bronson Partners, 564 F. Supp. 2d 119, 126-28 (D. Conn. 2008). Such express claims and intentionally made implied claims are presumed material. Kraft, 970 F.2d at 322-23; FTC v. Five Star Auto Club, 97 F. Supp. 2d 502, 529 (S.D.N.Y. 2000).

The FTC argues that BlueHippo made misrepresentations to consumers by claiming to finance computers, when its own data show that it did not in fact finance computers. BlueHippo represented itself as

being in the business of financing in its national advertisements. BlueHippo's advertisements included statements such as "BlueHippo is one of the fastest growing consumer finance companies in the country" and "[A]t BlueHippo, your credit is good with us. We don't even look at you any differently if you have bad credit. In fact, we can send you a brand new laptop without even checking your credit" (FTC Ex. 27F, at 4.)

These representations are material under the Consent Order, which provides that BlueHippo may not make "any express or implied misrepresentation that is false or misleading in any matter" (Consent Order at 4.) The Consent Order defines materiality as "likely to affect a person's choice of, or conduct regarding, goods or services" (Consent Order at 3.) If consumers knew that BlueHippo's statements regarding financing and credit checks were false, they would likely have purchased computers from other vendors.

There are, however, two distinct consumer groups relevant to BlueHippo's financing misrepresentations, and the Court distinguishes between them: (i) consumers who entered the Installment Credit Financing Plan, but never qualified for financing; and (ii) consumers who met BlueHippo's financing criteria under the Installment Credit Financing Plan, but either did not receive a computer at all, or else received a computer only after the promised time frame.

i. Total Pool of Consumers That Placed Orders With BlueHippo

The FTC's expert witness testified that between April 10, 2008 and July 24, 2009, consumers placed 62,673 orders for computers, and that as of July 24, 2009, consumers received neither merchandise nor store credit for 55,892 of these 62,673 orders (Def. Ex. NN ¶ 3-4.) Consumers paid BlueHippo \$14,062,627.51 for those 55,892 orders and received nothing in return (Def. Ex. NN ¶ 5.) This consumer pool, however, includes consumers who did not qualify for financing and signed documentation stating they were aware of BlueHippo's no-refund policy.

The White Paper shows that BlueHippo represented to consumers that "the consumer would be approved for a 'shipment' or that the product would be 'ordered' following completion of the requisite number of payments by the consumer and the return by the consumer of the shipping documents" (White Paper at 2.)

BlueHippo included this information both in the telemarketing script that was read to consumers when they called to place their orders, and also in the Installment Credit Agreement which consumers signed and returned to receive their merchandise (White Paper at 1.) Accordingly, BlueHippo cannot be held liable for misrepresentation when it disclosed its terms and refund policies to each consumer at the outset of the transaction.

ii. Consumers Who Met BlueHippo's Financing Criteria But Did Not Receive a Computer

The Court looks instead at the pool of consumer orders that could have qualified for financing on or before March 11, 2009, the last date on which a consumer could qualify for a financed computer and, under BlueHippo's three to four week shipment policy, expect to receive a computer before April 8, 2009. This order pool consists of 24,108 orders, and of these 24,108 orders, 2,025 qualified for financing by April 8, 2009 (Tr. at 53, 55.)

In June 2009, following entry of the April 2009 Civil Contempt Order, BlueHippo bestirred itself to fill an unusually large number of computer orders (Def. Ex. NN ¶ 16.) By July 24, 2009, BlueHippo ordered 1340 computers to fill these 2,025 orders, leaving only 685 orders unfilled. BlueHippo also gave store credit merchandise toward 8 of these orders, resulting in a total of 677 unfilled orders (Def. Ex. OO ¶ 15.) Customers paid BlueHippo \$609,856.38 for these 677 orders (Def. Ex. OO ¶ 15.)

BlueHippo's belated efforts to fill computer orders do not preclude the Court from finding BlueHippo in civil contempt. Int'l Assoc. of Conference Interpreters, 123 F.T.C. 465, 658 (1997) (holding that claims "of abandonment are rarely sustainable as a defense to a Commission complaint where, as here, the alleged discontinuance occurred 'only after the Commission's hand was on the respondent's shoulder.'"). Moreover, BlueHippo represented that once consumers met certain pre-shipping requirements, BlueHippo would process and ship their orders within three to four weeks of receipt of the forms (FTC Ex. 42, at 1.) Yet BlueHippo took an average of 26.5 weeks to deliver computers to qualified consumers (Tr. at 56; Def. Ex. NN ¶ 24.)

Accordingly, BlueHippo misrepresented the time frame in which it delivered computers and its belated efforts of order fulfillment do not shield it from contempt. The Court finds BlueHippo in civil contempt for violating the Consent Order with regard to the 2,025 computer orders that qualified for financing by April 8, 2009.

II. Failure to Disclose the Details of its Store Credit Policy

Under the Store Credit Policy, BlueHippo grants store credit to consumers who make an initial payment, but do not request a refund for their orders within seven days. BlueHippo does not dispute that, in advance of fulfilling their store credit orders, consumers had to send BlueHippo additional money to cover shipping, handling, and taxes for online purchases. Further, consumers could order only one item at a time (FTC Ex. 22F, at 6), so that consumers might have to pay shipping, handling, and taxes on the second order. BlueHippo disclosed none of this. In fact, BlueHippo first informed consumers of these terms and conditions of the Store Credit Policy when consumers tried to use their credit. Between April 10, 2008 and July 24, 2009, 3,454 store credit orders had a zero balance, indicating that the consumers who placed these orders were entitled to receive store credit merchandise. By July 24, 2009, BlueHippo had not filled 2,704 of those 3,454 store credit orders (Tr. at 343; 360.)

BlueHippo's failure to make these disclosures violates the Consent Order, which enjoins BlueHippo from making representations about its "refund, cancellation, exchange, or repurchase policy without disclosing clearly and conspicuously, prior to receiving any payment from customers all material terms and conditions of any refund, cancellation, exchange, or repurchase policy" (Consent Order at 4.)

Defendants contend that its telemarketing scripts did not contain false or misleading statements and that any terms of the Store Credit Policy that it did not disclose were immaterial. Information concerning cost, however, is presumed material. FTC v. Crescent Publ'g Group, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001). Since the cost of shipping, handling, and taxes increases the overall cost of merchandise, these costs are material and BlueHippo should have clearly and conspicuously disclosed this information to consumers.

Defendants further argue that they should not be penalized for failing to make these disclosures since the FTC was aware of the Store Credit Policy and failed to object to its disclosure deficiencies. The FTC's failure to object, however, does not absolve the Defendants from complying with the Consent Order's terms. It was their burden to comply, not the FTC's. FTC v. Trudeau, 579 F.3d 754, 767 (7th Cir. 2009) (holding that the FTC's failure to warn defendant that commercial was problematic until it filed a contempt complaint was insufficient to reverse district court's finding that defendant was in contempt).

Accordingly, the Court finds BlueHippo in civil contempt for violating the Consent Order by failing to disclose material terms relating to its Store Credit Policy.

III. Mandatory Preauthorized Transfers

The Consent Order prohibits BlueHippo from conditioning the extension of credit on mandatory preauthorized transfers, in violation of the EFTA. The EFTA defines preauthorized electronic transfers as "electronic transfers authorized in advance to recur at substantially regular intervals." 15 U.S.C. § 1693a(9). The EFTA prohibits financial institutions and other persons to condition an extension of credit to a consumer on the consumer's repayment by preauthorized electronic fund transfers, except for credit extended under an overdraft credit plan or extended to maintain a specified minimum balance in the consumer's account. 12 C.F.R. § 205.10(e)(1). Defendants contend that the EFTA does not prohibit automatic preauthorized electronic transfers in credit-based transactions; rather, the EFTA only prohibits lenders from requiring such transfers as a precondition of credit. Defendants argue that they do not require electronic debiting services as a condition of credit and that the Installment Credit Agreements permit alternative types of payments.

The plain language of the Installment Credit Agreements undermines Defendants' arguments. The Installment Credit Agreements contain a provision entitled "Preauthorized Payments." This provision authorizes BlueHippo to "initiate debit entries to your financial institution indicated below for the amount(s) indicated in this Contract." It states that "You [the consumer] have authorized us to automatically debit your account on or after [date] for any amounts due on or after the payment date(s) and continuing thereafter until

this Contract is paid in full” (FTC Ex. 42, at 4.) This provision requires consumers to provide a bank name, routing number, account number, and account type and to acknowledge “receipt of a true and completely filled in copy of this contract at the time you sign it” (FTC Ex. 42, at 3.)

Accordingly, the Court finds that BlueHippo in civil contempt for violating the Consent Order by extending credit to consumers and conditioning that credit on mandatory preauthorized transfers.

IV. Damages

Courts may use civil contempt powers to compensate for losses or damages sustained by noncompliance. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949). The measure of the court’s power in civil contempt is determined by the requirements of full remedial relief. Id. at 193. Courts may impose sanctions for civil contempt either to coerce the contemnor into future compliance with the court’s order or to compensate the complainant for losses resulting from the contemnor’s past noncompliance. N.Y. State Nat’l Org. for Women v. Terry, 886 F.2d 1339, 1353 (2d Cir. 1989).

i. BlueHippo’s Damages

The Court has found that BlueHippo violated the Consent Order by: (i) failing to provide computers within the promised three to four week time frame to 1348 orders that qualified for financing and expected to receive a computer before April 8, 2009; (ii) failing to provide either a computer or store credit merchandise for 677 orders that qualified for financing and expected to receive a computer before April 8, 2009; (iii) failing to disclose the details of the Store Credit Policy; and (iv) conditioning the extension of credit on mandatory preauthorized transfers.

The FTC requests \$14,062,627.51 in damages (Tr. at 360; 363-64.) This amount, however, includes damages for consumers who did not qualify for financing and did not complete the full 13 payments under the Installment Credit Financing Plan. Accordingly, for BlueHippo’s failure to provide either a computer or store credit merchandise for 677 orders that qualified for financing and expected to receive a computer before April 8, 2009, the Court awards damages of \$609,856.38. For BlueHippo’s remaining violations, however, the FTC

has conceded that it has failed to provide record evidence approximating the damage to consumers (Tr. at 345; 356-57; 362-64.) It is the FTC's burden to do so. FTC v. Verity Int'l, Ltd., 443 F.3d 48, 67 (2d Cir. 2006).

Accordingly, the Court cannot award damages for these violations.

ii. Rensin's Derivative Liability

In addition to determining the appropriate amount of damages, the Court must also determine whether Rensin may be held jointly and severally liable. Rensin contends that since the Consent Order did not name him as a party, he was not bound by its decree. Under Fed. R. Civ. P. 65(d)(2), an order binds those who receive actual notice of it and are the parties, the parties' officers, agents, servants, employees, and attorneys, and other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B). Courts do not hold every corporate agent in contempt of court whenever they determine that a company violates its court-ordered obligations. Instead, courts focus on the agent's level of knowledge and involvement. FTC v. Garvey, 383 F.3d 891, 900 (9th Cir. 2004); see also Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832 (2d Cir. 1930).

To hold Rensin jointly and severally liable, the Court must determine that Rensin is legally identifiable with BlueHippo. Spectacular Venture v. World Star Int'l, 927 F. Supp. 683, 684-85 (2d Cir. 1979). As Chief Executive Officer and owner of BlueHippo Funding, LLC which wholly-owned BlueHippo Capital, LLC, Rensin testified that he led the management team and that department heads reported to him (FTC Ex. 63, at 29.) Rensin's testimony demonstrates that he was involved in both the day-to-day operations of BlueHippo, as well as in major corporate decisions, such as changing BlueHippo's business model (FTC Ex. 63, at 41-42.) Moreover, Rensin has stipulated that he may be held in contempt if BlueHippo is held in contempt (Tr. at 271.) Accordingly, Rensin is liable for BlueHippo's violations of the Consent Order.

iii. Joint and Several Liability of Rensin

Rensin argues that his liability should be limited to the amount that he directly benefited from BlueHippo, not the entire amount of damages. Specifically, Rensin argues that the Court should cap his liability

at \$316,923.17, the total sum of money he received relating to BlueHippo during the relevant period (Def. Ex. B.) Rensin relies principally on Verity, 443 F.3d at 66, for the proposition that monetary relief is limited to equitable restitution. Unlike legal restitution, which is punitive in nature, equitable restitution seeks to rectify unjust enrichment and thus would limit the FTC's recovery to "money or property in the defendant's possession that could clearly be traced to money or property identified as belonging in good conscience to the plaintiff." Id. at 66-67.

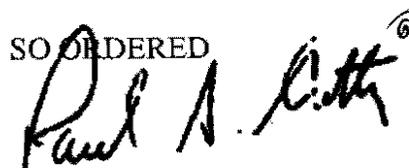
Verity is distinguishable. Verity involved a direct FTC action; this case involves a contempt proceeding. In Verity, the FTC brought suit to close the defendant for deceptive and unfair trade practices, within the meaning of the Act. Id. at 52. The Verity Court found that the Act allowed for restitution or other ancillary equitable relief and that the availability of restitution under the Act derived from the district court's equitable jurisdiction. Id. This line of reasoning is inapplicable here. The FTC is suing for contempt, not for the underlying violation of the Act. See Trudeau, 579 F.3d at 772 (holding Verity inapplicable in FTC civil contempt proceedings). Since Rensin is legally identifiable with BlueHippo, compensatory damages – not equitable restitution – are appropriate. Accordingly, the Court finds Rensin jointly and severally liable for BlueHippo's damages.

V. Conclusion

Accordingly, the Contempt Motion relating to the Defendants' violation of the Consent Order is GRANTED. The Defendants are jointly and severally liable for \$609,856.38. The Clerk of the Court is directed to enter judgment accordingly and to close out the pending motion in this case.

Dated: New York, New York
July 27, 2010

SO ORDERED



PAUL A. CROTTY
United States District Judge