UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

FEDERAL TRADE COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
DIRECT BENEFITS GROUP, LLC,	)	
a Wyoming limited liability company,	)	
also dba Direct Benefits Online, and	)	**Case No. 6:11-CV-1186-JA-GJK**
Unified Savings;	)	
	)	
VOICE NET GLOBAL, LLC,	)	
a Wyoming limited liability company,	)	
also dba Thrifty Dial;	)	
	)	
SOLID CORE SOLUTIONS, INC.,	)	
a Utah corporation;	)	
	)	
WKMS, INC.,	)	
a Utah corporation;	)	
	)	
KYLE WOOD, individually and as owner,	)	
officer, or manager of Direct Benefits	)	
Group, LLC; and WKMS, Inc., and	)	
	)	
MARK BERRY, individually and as owner,	)	
officer, or manager of Voice Net Global,	)	
LLC; and Solid Core Solutions, Inc.,	)	
	)	
Defendants.	)	

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

In opposing Plaintiff's Motion for Summary Judgment, Defendants make a series of arguments that are not supported by the evidence, are irrelevant, and/or include misstatements or omissions of facts. Nothing raised by Defendants shows that there is a genuine issue of material fact. Therefore, summary judgment should be granted for Plaintiff in this case. Defendants' arguments break down into the following: (1) that the disclosures in the websites were clear and conspicuous, and that consumers' enrollment in Defendants' programs was voluntary and purposeful; (2) that the FTC must show an intent to deceive on the part of Defendants; (3) that return rates are not an indicator of substantial harm; and (4) that Defendants' efforts to meet FTC guidelines insulate them from liability. Each of these arguments is flawed. Defendants have presented no evidence in opposition to Plaintiff's Motion for Summary Judgment to establish a genuine issue of material fact that would undermine Plaintiff's Motion.

I. Defendants' Disclosures Were Not "Clear and Conspicuous."

Defendants argue that disclosures made on their websites met the standard of "clear and conspicuous" and that consumers' enrollment in Defendants' programs was voluntary.

First, Defendants misconstrue the law as to disclosures. To be deceptive, a material representation, omission, or practice must be likely to mislead consumers acting reasonably under the circumstances.[1] The test is whether the consumer's interpretation or reaction is

[1] *E.g., FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006), *aff'g,* 2002 U.S. Dist. LEXIS 25565 (W.D. Wash. July 10, 2002); *FTC. v. Tashman*, 318 F.3d 1273 (11th Cir. 2003); *In re Cliffdale Associates*, 103 F.T.C. 164-65 (1984).

reasonable. When representations or sales practices are targeted to a particular audience, the effect of the practice on a reasonable member of that group must be determined.[2] In evaluating a particular practice, the overall net impression of the complete advertisement is reviewed to determine how reasonable consumers are likely to respond.[3]

In this case, the Defendants failed to disclose adequately to consumers that Defendants used consumers' bank account information to charge for enrolling them in Defendants' programs. Defendants' websites appeared to be applications for payday loans. Defendants targeted a particular audience[4] — those who were searching for a payday loan. According to the thousands of consumers who complained about Defendants' practices, most, if not all, of these consumers were looking for a loan and were not interested in nor were they aware that they were being enrolled in Defendants' unrelated programs.[5]

Defendants attempt to argue that these consumers voluntarily purchased their programs, and thus must have read the disclosures in the websites. This assumption is not supported by any evidence. In fact, the overwhelming evidence, submitted by the FTC, shows that consumers were not aware of having purchased Defendants' programs and/or

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[2] *Cliffdale,* 103 F.T.C. at 165, n. 8.

[3] *E.g.,FTC v. Cyberspace.com LLC*, 453 F.3d at 1200; *FTC v. Peoples Credit First,* No. 8:03-cv-2353, 2005 U.S. Dist. LEXIS 38545, at *20-25 (M.D. Fla. Dec. 18, 2005), *aff'd*, 244 Fed. Appx. 942 (11th Cir. 2007)

[4] *Removatron int'l Corp. v. FTC,* 884 F.2d 1489, 1497 (1st Cir. 1989); *Floersheim v. FTC*, , 411 F.2d 874, 877 (9th Cir. 1969).

[5] SMF 31-32 ("SMF" refers to the Statements of Material Fact as part of Plaintiff's S.J. Motion.)

were tricked into doing so. Defendants received thousands of complaints about their unfair and deceptive practices, not just the 270 from the BBBs, as argued by Defendants. The FTC submitted 24 consumer declarations, 270 BBB complaints, the fifteen consumer complaints found on-site at the Defendants' business premises, numerous consumer complaints sent to State Attorneys General's offices, and evidence that 1800 consumer complaints were forwarded to Defendants by Direct Benefits, Inc., and that thousands of consumers called or e-mailed the Defendants to complain. Not one of these consumers reported that they voluntarily enrolled in Defendants' programs. In fact, they complained to the contrary.[6] Moreover, high return rates shows that consumers did not want Defendants' programs.[7]

In addition, any purported "disclosures" made by Defendants in their websites were ineffective and unclear. As the court stated in *U.S. v. Locascio*, 357 F. Supp. 2d 536, 549 (E.D. N.Y. 2004), the internet is somewhat more complex due to the interactive nature of web pages and the possibility of clicking on additional links or triggering pop-up screens. In the instant case, consumers filled out payday loan application forms. They were then

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[6] PX 7[Arseneau], ¶6; PX 8[Battaglia], ¶5; PX 9[Beaty], ¶¶5-6; PX 10[Bloch], ¶¶5-6; PX 11 [Bolyard], ¶5; PX 12[Bontatibus], ¶ 4; PX 13[Brown], ¶¶5, 7; PX 14[Calvo], ¶¶5-6; PX 15[Chagoya], ¶5; PX 16 [Conner], ¶¶7, 9; PX 17[Derenge],¶¶6, 9; PX 20[Feeley], ¶7; PX 21[Gallegos-Whitfield], ¶5; PX 22[George], ¶4; PX 23[Ginesta], ¶¶5-6; PX 24[Hanning], ¶¶6-7; PX 25[Lightaul], ¶¶4-5; PX 26[Palmer], ¶7; PX 27[Reynolds],¶¶5, 7; PX 28[Sambo], ¶5; PX 29[Tosado], ¶¶5-7; PX 30[Willis], ¶8; PX 31 [Liggins], ¶4; PX 36[Mayer], ¶¶ 5-8 and pp. 9-68 (SMF 39); and PX 45[Lynn Dep.], p.15, l.3 - p.16, l.1and p.38, l.22 - p.39, l.25 (SMF 35-36).

[7] Defendants argue that a large number of consumers did not select the OK button, but selected the Cancel button, arguing that the ones who did press the OK button must have meant to buy Defendants' programs. However, all that it means, in light of the high return rates and the numerous complaints that Defendants received, is that many consumers were deceived. Not all consumers need to be deceived for there to be a violation. *See Peoples Credit First*, 2005 U.S. Dist. LEXIS 38545, at *25 (*citing FTC v. US Sales Corp.*, 785 F. Supp. 737, 748 (N.D. Ill. 1992) ("the FTC need not show that every reasonable consumer would be misled.")) But more importantly, there is no evidence that any consumers who were looking for payday loans meant to buy Defendants' programs.

presented with an unrelated and unexpected advertisement for one of Defendants' programs. After answering several additional payday loan questions, the consumers were then instructed to click the "Submit" button to submit their payday loan form. The webpage then instructed the consumer to press "OK" and the "OK" button was pre-selected, but what the "OK" actually meant was that the consumer was purchasing Defendants' program, which was completely unrelated to the loan application. The "Cancel" button was actually how the consumer could avoid paying for the unrelated, unwanted program.[8]

Of course, selecting the "Cancel" button was counter-intuitive to a consumer's desire to "submit" a payday loan application. In addition, consumers had already rejected the purchase of Defendants' programs. Thus, when the pop-up box appeared, consumers were not expecting to re-visit the issue and were not expecting to purchase Defendants' programs.[9] These were not sophisticated consumers searching for a buyers club or calling service. Moreover, the victimized consumers were attempting to apply for a loan when visiting Defendants' website. They were unlikely consumers for Defendants' programs, which involved additional expense, except for Defendants' trickery. In fact, many of the consumers reported that they were in financial straits and could ill afford or would never have agreed to

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[8] *E.g.*, PX 20 [Feeley], ¶ 5; PX 30 [Willis], ¶11.

[9] The Receiver testified that there were only a small amount of rebates given by the Defendants, demonstrating that very few consumers actually used Defendants' programs. Even the Defendants now acknowledge the minuscule use of their programs by the admission in their response (pp. 9-10) that, over a three-year period, only $94,000 were given in rebates. Also, as to their unauthorized billing of consumers, Defendants' argument that there were countervailing benefits that outweighed consumer harm (Defs.' brief, pp. 9-10.) is incorrectly applied. The correct comparison is the $9.5 million in consumer injury compared to the $94,000 in redemption benefits; therefore, benefits do not outweigh the injury.

an additional monthly or yearly charge for a program they did not want or need.

In support of their argument, Defendants cite the *Vistaprint* case, which is clearly distinguishable.[10] In *Vistaprint*, there were no contradictory messages, and the consumer had to enter his or her e-mail address twice before clicking on "Yes." The other option was "No, thanks." In the instant case, in addition to being contradictory, the selection of "Cancel" in the pop-box was counter-intuitive since the consumer had just clicked the "Confirm" button. Moreover, there were no additional steps that could clarify the transaction, such as typing in the consumer's e-mail address twice before clicking on "Yes" for the new transaction, as in *Vistaprint*. Similarly, the other cases cited by Defendants are equally distinguishable when compared to the misleading nature of Defendants' webpages.

The uncontroverted evidence shows that consumers' overall net impression after visiting Defendants' websites was that they were filling out an application for a payday loan and not purchasing unrelated products or services.

II. Defendants' Argument that FTC Must Show Intent to Deceive is Wrong.

On page 14 of their brief, Defendants argue that a showing of intent to deceive is required under Section 5 for anything other than false advertisements. Defendants are wrong. It is well established that proof of an intent to deceive is not required, either to prove or

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[10] *In re Vistaprint*, 2009 U.S. LEXIS 77509 at *20 (S.D.Tex. Aug. 31, 2009). Moreover, the consumers in *Vistaprint* were purchasing business cards; they were not in desperate straits and seeking a payday loan. Moreover, the Direct Benefits consumers were not seeking to purchase anything, but looking for a loan to put money *into* their bank accounts, not take money out.

unfairness. In *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1368 (11th Cir. 1988), *cert. denied*, 488 U.S. 1041 (1989), the 11th Circuit opined that "Given that a practice may be deceptive without a showing of intent to deceive, it is apparent that a practice may be found unfair to consumers without a showing that the offending party intended to cause consumer injury."[11] Intent is not an element that need be proven by FTC.

III. Defendants' Return Rates Are Indicative of Substantial Harm.

Defendants argue that Plaintiff compared Defendants' return rates only to the national average and not to return rates within its industry. (pp.8-9) However, the Federal Reserve study that Defendants cited actually separated out the return rates for companies using Web transactions, which is the relevant industry for Defendants. According to the Fed study, the average for all Web returns was 2%, not 73.6% as argued by Defendants. (PX 37, pp.3-4; PX 39, ¶10; see also PX 39, ¶13.) Based on this study, it is evident that Defendants' return rates were on the very high end for companies that specialized in Web transactions. (SMF 41-43.) Moreover, at least one of Defendants' processors actually terminated Defendants because of high return rates. (PX 32 [Barton], ¶¶5-6.) Defendants' abnormally high return rates serve as notice to Defendants that their practices were highly indicative of fraud and deception.

IV. Defendants' Argument That They Relied On Legal Advice Is Irrelevant.

It is well settled that reliance on advice of counsel is not a defense to an FTC action.

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[11] *See also FTC v. National Urological Group,* 645 F. Supp. 2d 1167, 1185 (N.D. Ga. 2008), *aff'd*, 356 Fed. Appx. 358 (11th Cir. 2009); *FTC v. Bay Area Business Council,* Inc., 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1202 (10th Cir. 2005).

(FTC Motion, pp. 35-36.) In fact, the Eleventh Circuit has expressly opined that reliance on advice of counsel is not a defense to an action under Section 5 of the FTC Act.[12]

Moreover, even if this were not the law, Defendants do not have the facts to support their argument. First, Defendants do not present any independent evidence as to what three of the attorneys (Guerisoli, Adli, and Rothbard) advised Defendants; all we have are the unverified statements of Defendants. Second, the law requires that, among other things, the client must make adequate disclosure to counsel.[13] There is no evidence that adequate disclosure was made to any counsel. In fact, the other counsel, Thomas Cohn and Taylor Anderson, testified that Defendants did not disclose the thousands of complaints received by Defendants or that Defendants had high return rates at their banks.[14]

V. Conclusion

Defendants have not shown any genuine issue of material fact. Therefore, the Court should grant Plaintiff's Motion for Summary Judgment and enter the proposed order.

June 27, 2012

Respectfully submitted,

/s/ Harold E. Kirtz
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[12] *Orkin*, 849 F.2d at 1368 ("As the Commission noted, Orkin's reliance upon legal advice is simply not germane to the question whether Orkin's conduct was unfair within the meaning of Section 5.")

[13] *Takecare Corp. v. Takecare of Oklahoma, Inc.*, 889 F.2d 955, 957 (10th Cir. 1989).

[14] PX 46 [Cohn Dep.], p.15, l.20 - p.16, l.5; p.16, ll.18-24; p.18, l.25 - p.19, l.20; p.20, ll.4-7; p.23, l.23 - p.24, l.2; PX 47 [Anderson Dep.], p. 24, l.3 - p.27,l.7; p.28, l.2 - p.29, l.6.

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