

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

CASE NO. 8:08-CV-899-T-17MAP

USA FINANCIAL, LLC, a Florida
Limited Liability Company,
AMERICAN FINANCIAL CARD, INC.,
formerly known as CAPITAL
FINANCIAL, INC., a corporation,
JEFFREY R. DEERING, individual-
ly and as owner, officer, or
manager of the above-listed
corporations, RICHARD R.
GUARINO, individually and as
owner, officer, or manager of
the above-listed corporations,
and JOHN F. BUSHEL, Jr.,
individually and as owner,
officer, or manager of one or
both of the above-listed
corporations,

Defendants.

ORDER

This cause is before the Court on:

Dkt. 6 Notice
Dkt. 109 Motion for Summary Judgment
Dkt. 110 Motion for Summary Judgment
Dkt. 111 Notice
Dkt. 112 Response
Dkt. 115 Response

The Complaint in this case charges Defendants with falsely representing to consumers that, by paying an advance fee of \$200.00, the consumers would receive general purpose credit cards. The Federal Trade Commission has brought this complaint for violation of Section 5 of the Federal Trade Commission Act,

Case No. 8:08-CV-899-T-17MAP

15 U.S.C. Sec. 45(a) ("FTC Act") and 16 C.F.R. Part 310, the Telemarketing Sales Rule ("TSR").

Plaintiff Federal Trade Commission ("FTC") now moves for entry of summary judgment, based on voluminous and uncontroverted evidence that demonstrates there is no genuine issue of material fact in this case. Plaintiff FTC seeks to recover the damages to consumers from the operation of Defendants' telemarketing scheme. Plaintiff FTC further seeks injunctive, monetary and ancillary relief as to Defendants Deering Guarino and Buschel for their participation in the alleged unlawful conduct.

The Court notes that the FTC has compiled all of its evidence into a single statement of facts (Dkt. 110-2). The FTC has provided a proposed Final Judgment and Order for Permanent Injunction (Dkt. 110-3). The Court adopts and incorporates Plaintiffs' statement of facts.

Defendants also move for the entry of summary judgment. Defendants argue that their catalog and/or online membership program is not materially misleading, expressly or by implication, and Defendants are entitled to judgment as a matter of law.

In response, the FTC argues that the consumers' "net impression" was that they were buying a credit card. Many consumers made a written complaint; the FTC relies on consumer complaint letters to USA Financial. The FTC argues that hundreds of similar complaints were made to, and ignored by, Defendants, and establish Defendants' pervasive unlawful conduct in violation of Section 5 of the FTC Act and the Telemarketing Sales Rule.

Case No. 8:08-CV-899-T-17MAP

The Court notes that as of April 20, 2008, consumers lodged 766 complaints with the West Florida Better Business Bureau against American Financial, and 52 complaints against USA Financial as of May 2, 2008 (Dkt. 6).

The FTC argues that Millennium Communications & Fulfillment, Inc. v. Office of the Attorney General, 761 So.2d 1256 (Fla. 3d DCA 2000) did not involve a credit card program, only the postcard used to advertise the credit card program. The FTC argues that FTC v. Marketing Response Group, Inc., 1996 WL 420865 (M.D. Fla. 1996) is distinguishable because the Court ruled that, since Defendants' violative conduct had stopped, a preliminary injunction should not issue.

The FTC further argues that the Florida State Attorney General's opinion, based on its preliminary inquiry, does not control this case. The Florida State Attorney General did not investigate Defendants for violations of the FTC Act and the TSR, only for compliance with state law. The FTC argues that, after the conclusion of the Florida investigation in December, 2006, Defendants continued and expanded their program until the injunction entered in this case in May, 2008.

The FTC further argues that, regardless of how Defendants couch their illegal activity, when they requested or received payment of fees in advance of providing consumers with a promised credit card, they violated the TSR. The FTC relies on the Receiver's Affidavit, and his opinion that the "Membership" was of little value to consumers, and consumers likely did not understand what they were purchasing. The Receiver found that less than 3% of USA Financial's 2007 revenues were derived from

Case No. 8:08-CV-899-T-17MAP

merchandise sales; the rest derived from membership fees. The FTC argues that being licensed to telemarket under Florida law does render fraudulent business legal.

The FTC argues that it is not necessary for the FTC to establish that any consumer actually relied on or was injured by the unlawful conduct:

In an...enforcement action in which the government seeks restitution to compensate thousands of individual victims of unlawful practices, in contrast to a private action for fraud, such representative proof of injury suffered is sufficient to justify the requested relief...Requiring proof of subjective reliance by each individual consumer would thwart the effective prosecution of large consumer redress actions and frustrate the statutory goals of this section.

FTC v. Freedom Communications, 401 F.3d 1192, 1203 (10th Cir. 2005); McGregor v. Chierico, 206 F.3d 1378 (11th Cir. 2000).

A presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product.

The FTC requests that the Court deny Defendants' Motion for Summary Judgment, and grant the FTC's Motion for Summary Judgment.

I. Background

On May 12, 2008, Plaintiff FTC filed its complaint

Case No. 8:08-CV-899-T-17MAP

requesting preliminary relief. The Court granted a TRO on May 12, 2008. On June 2, 2008, Defendants USA Financial, LLC ("USA Financial"), American Financial Card, Inc., formerly known as Capital Financial, Inc. ("American Financial"), Jeffrey R. Deering ("Deering"), and Richard R. Guarino ("Guarino") filed Answers. On June 10, 2008, Defendant John F. Buschel ("Buschel") filed an Answer. On July 29, 2008, Defendants agreed to, and the Court entered, a Stipulated Preliminary Injunction with Asset Freeze and Appointment of Receiver. On February 18, 2009, the Court granted in part and denied in part Plaintiff's Motion to Strike as to Defendants' Affirmative Defenses.

A. Telemarketing Scheme

From November, 2004 through late 2007, Defendants marketed and sold advance fee credit cards, through the operations of Capital Financial, Inc., then American Financial, then USA Financial, Inc., by soliciting consumers through outbound telephone calls, in which Defendants misrepresented that, in exchange for a fee, consumers would receive a general purpose credit card. American Financial continued its alleged deceptive practices until late 2007, and USA Financial continued its alleged deceptive practices until enjoined by the TRO entered in this case.

In some telemarketing calls, Defendants expressly promised consumers that Defendants would provide a credit card that consumers could use anywhere. Defendants promised to provide consumers a credit card that had the characteristics of a general purpose credit card, such as an annual interest rate, a \$2,000 credit limit, and cash advance capabilities. Defendants used a

Case No. 8:08-CV-899-T-17MAP

scripted sales pitch which made representations as to the annual interest rate, the credit limit, and cash advance capabilities, and consumers consistently reported hearing these types of representations. These statements, and other statements made by Defendants, led consumers to believe they would receive a general purpose credit card by paying an advance fee of \$200.00.

B. Defendants Requested and Received Payment

During the sales call, after leading consumers to believe that Defendants were offering a general purpose credit card, Defendants requested and received consumers' banking information, and consent to debit consumers' bank accounts. After the sales call, Defendants debited consumers' accounts, typically in the amount of \$200.00.

C. What Consumers Received

Many consumers received nothing from Defendants. Some received a thin plastic card imprinted with the words "USA Platinum Merchandise Card," "American Financial Card," or "Capital Financial Card." Defendants also sent consumers four \$50.00 "vouchers" which Defendants claimed could be applied to future purchases. Consumers who paid \$200.00 and received these materials discovered that the card was a catalog card, the purchasing power of which was limited to a selection of items from the catalog or catalogs or from an online website. Until receipt of these materials, most consumers did not understand that the \$200.00 payment was non-refundable and would be applied to the cost of purchases from the catalog, only after they paid a cash down payment of 35% of the price of any merchandise they

Case No. 8:08-CV-899-T-17MAP

purchased.

Many consumers attempted to cancel their order after reviewing the materials sent by Defendants, and discovery that they had not received what they ordered. Many consumers had difficulty contacting Defendants to cancel, and were frustrated because they were unable to find a contact number. Other consumers who were able to contact Defendants found their refund requests summarily denied, or were told they were not entitled to a refund. The process of seeking refunds stretched on for many months, after which many consumers reached no satisfactory resolution. Consumers who were able to obtain refunds were only able to do so after the intervention of the Better Business Bureau of a government agency. At times, Defendants misrepresented to the Better Business Bureau that Defendants had refunded consumers' money, when in fact no refund was made. Defendant USA Financial typically made it a condition of any refund that the consumer agree to sign a document stating that the consumer had misunderstood the terms of the offer and further that the consumer agreed to withdraw his or her Better Business Bureau complaint.

II. Standard of Review

Summary judgment should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

Case No. 8:08-CV-899-T-17MAP

The plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

The appropriate substantive law will guide the determination of which facts are material and which facts are...irrelevant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the non-movant. See Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." See Anderson, 477 U.S. at 248. But, "[i]f the evidence is merely colorable...or is not significantly probative...summary judgment may be granted." Id. at 249-50.

III. Adverse Inferences

The FTC conducted extensive discovery in this case. In depositions, and in their responses to Plaintiff's written discovery, the individual Defendants invoked their Fifth Amendment privilege. The individual Defendants have refused to answer or respond to substantive questions posed to them in their deposition responses and in their responses to written discovery.

The Court may draw an adverse inference from a party's invocation of the right against self-incrimination. Baxter v.

Case No. 8:08-CV-899-T-17MAP

Palmigiano, 425 U.S. 308, 318 (1976). Adverse inferences may not be used as the sole basis to support a judgment against Defendants. FTC v. Transnet Wireless Corp., 506 F.Supp.2d 1247, 1252 (S.D. Fla. 2007) (citing United States v. Premises Located at Route 13, 946 F.2d 749, 756 (11th Cir. 1991)). Where adverse inferences are considered in conjunction with other incontrovertible evidence, the Court is permitted to rely on those inferences.

IV. Summary Judgment

Plaintiff FTC seeks entry of summary judgment as a matter of law. To establish that Defendants engaged in unfair practices, the FTC must establish: 1) there was a representation; 2) the representation was likely to mislead consumers acting reasonably under the circumstances; and 3) the representation was material. FTC v. Tashman, 318 F.3d 1273 (11th Cir. 2003). The FTC has relied on the numerous consumer complaints made to the Better Business Bureau to establish the violation of Section 5 (Dkt. 6).

Summary judgment as matter of law is appropriate where a reasonable fact finder evaluating the evidence could reach only one conclusion as to the material facts. The Court recognizes that Defendants assert that many material facts are disputed. After consideration of the supporting documents, the Court finds that a reasonable fact finder could reach only one conclusion as to the presence of material misrepresentations which were likely to mislead consumers acting reasonably under the circumstances. After consideration, the Court grants Plaintiff FTC's Motion for Summary Judgment and denies Defendants' Motion for Summary Judgment.

Case No. 8:08-CV-899-T-17MAP

A. Violation of Section 5 of the FTC Act

Defendants' practices violated Section 5(a) of the FTC Act, 15 U.S.C. Sec. 45(a), which provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." An act or practice is deceptive under Section 5(a) if it involves a material misrepresentation or omission that would likely mislead consumers, acting reasonably under the circumstances. (Count I).

Defendants misrepresented, directly or indirectly, expressly or by implication, that, after paying an advance fee, consumers would, or were highly likely to, receive a general purpose credit card. Many consumers reported that, only after paying money to Defendants, did they learn that they would not receive a general purpose credit card.

Defendants' misrepresentations were material to consumers, and consumers would not have made their decisions to pay \$200.00 for Defendants' card if not for Defendants' claims. A misrepresentation or omission is material if it is likely to affect the consumer's purchasing decision. Consumers state that, if they had known that they were purchasing a catalog card, rather than a general purpose credit card, they would not have paid their money to Defendants. Defendants misrepresentations were likely to mislead consumers acting reasonably under the circumstances. A representation is "likely to mislead" if it is false.

Case No. 8:08-CV-899-T-17MAP

B. Violation of the Telemarketing Sales Rule

Defendants' scheme also violated provisions of the TSR. The TSR, 16 C.F.R. Part 310, prohibits telemarketers and sellers from misrepresenting any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer.

Defendants were "sellers" or "telemarketers" engaged in "telemarketing" as defined in the TSR. A "seller" is defined as "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration." A "telemarketer" is defined as "any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer." "Telemarketing" is defined as a plan, program, or campaign "conducted to induce the purchase of goods and services by use of one or more telephones and which involves more than one interstate telephone call." In connection with telemarketing transactions, Defendants offered to provide, or arranged for others to provide, credit cards to consumers in exchange for advance fees. Defendants both initiated and received telephone calls to and from customers throughout the United States.

Defendants violated Sec. 310.3(a)(2)(iii) of the TSR, prohibiting telemarketers and sellers from misrepresenting any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer. Defendants violated this section by misrepresenting to thousands of consumers as part of Defendants' sales offer

Case No. 8:08-CV-899-T-17MAP

that, after paying Defendants a fee, consumers would receive an unsecured general purpose credit card consumers could use to purchase items anywhere. Consumers did not receive a general purpose credit card that could be used anywhere, but a card that could only be used to purchase from a limited selection of items in Defendants' catalogs. (Count II).

Defendants also violated Sec. 310.4(a)(4) of the TSE, which prohibits telemarketers and sellers from, inter alia, requesting or receiving payments of any fee or consideration in advance of obtaining or arranging an extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arrange an extension of credit. Defendants violated this section in their initial telephone call when they represented to thousands of consumers that they were approved for a general purpose credit card and then requested payment of \$200.00 before sending the card. Defendants received such payment before they sent anything to the consumer. (Count III).

C. Individual Liability

In order to find Defendants individually liable for violations of the FTC Act and the TSR, Plaintiff FTC must establish corporate liability, as shown above. Once the FTC establishes corporate liability, "the FTC must show that the individual defendants participated directly in the practices or acts or had the authority to control them...The FTC must then demonstrate the individual had some knowledge of the practices. The FTC may establish knowledge by showing "actual knowledge of material misrepresentations, reckless indifference to the truth

Case No. 8:08-CV-899-T-17MAP

or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.”

1. Individual Liability for Acts and Practices of American Financial

Individual Defendants Buschel, Deering and Buarino directly participated in the acts and practices of American Financial. Since late 2004, the individual Defendants began operating their advance fee credit card scheme through Capital Financial, a Florida corporation doing business in Clearwater, Florida. On February 7, 2007, Capital Financial filed a name change amendment with the Florida Department of State's Division of Corporations, changing its name to American Financial Card. As American Financial, Defendants continued to deceptively market an advance fee credit card. As owners, officers, or managers of American Financial, Buschel, Deering and Guarino had the authority to control the acts and practices of American Financial.

The FTC asks the Court to infer that Buschel's, Deering's and Guarino's answers in response to probative evidence against them would have been adverse to their interests. In response to discovery, Defendants exercised the privilege against self-incrimination.

In addition to the blanket assertion of their Fifth Amendment privilege and the adverse inferences of individual liability the Court should draw from such assertion, the individual Defendants are signatories on the corporate bank accounts and on various bank documents listing each of the individuals as "managers." Buschel is listed as president and

Case No. 8:08-CV-899-T-17MAP

Guarino is listed as vice president in the corporate resolution submitted to the bank. Guarino signed bank applications as secretary of American Financial and bank resolutions as American Financial's sales manager. As an officer of American Financial, Deering signed a U.S. Postal Service Application for Delivery of Mail through Agent. Deering also signed American Financial's Mailbox Services Agreement with the UPS Store.

In deposition, when questioned about their individual role in the scheme, the individual Defendants refused to answer, citing the Fifth Amendment. The Court may draw adverse inference against the individual Defendants from the exercise of their Fifth Amendment privilege against self-incrimination. The adverse inferences would establish that:

1. Individual Defendants, or others at their direction represented expressly or by implication that, after paying a fee, Customers would, or were highly likely to, receive a general purpose credit card;
2. Customers who paid them money did not receive a general purpose credit card;
3. Individual Defendants, or others at their direction, misrepresented directly or by implication, material aspects of the performance, efficacy, nature, or central characteristics of the credit cards Defendants sold, including that the card was a general purpose credit card rather than a card that could be used to purchase items from a catalog;
4. Individual Defendants, or others at their direction, requested or received payment of a fee or consideration in advance of customers obtaining a credit card that could be used to

Case No. 8:08-CV-899-T-17MAP

purchase items only from a catalog;

5. Individual Defendants, or others at their direction, did not refund money to customers, unless they filed complaints against the Defendants with the Better Business Bureau or a government entity; and

6. Individual co-Defendants directly participated in, had authority to control, and had knowledge of the violative acts and practices.

The adverse inferences, together with the overwhelming documentary evidence provided, establish liability against the individual Defendants for their wrongful activity in connection with American Financial.

2. Individual Liability for Acts and Practices of USA Financial

Based on the overwhelming evidence, and based on adverse inferences drawn from the extensive assertion of their Fifth Amendment privilege, Deering and Guarino directly participated in the acts and practices of USA Financial, or had the authority to control the acts and practices. Deering and Guarino also had knowledge of the violative acts and practices and therefore have individual liability for the acts and practices of USA Financial.

USA Financial's scheme is virtually identical to that of its predecessor, making the operations of American Financial and USA Financial a seamless progression which victimized consumers in the same way. In establishing USA Financial, Guarino and Deering took steps to continue the advance fee credit card scheme. Deering and Guarino incorporated USA Financial on August 22, 2006, with Guarino and Deering as its managing members, and the signatories on the company's bank accounts. Guarino and Deering

Case No. 8:08-CV-899-T-17MAP

were both owners, officers, or managers of USA Financial. Deering signed checks on behalf of USA Financial, including checks refunding money to consumers. Deering also signed the Application for Post Office Box or Caller Service on behalf of USA Financial. Guarino signed agreements on behalf of USA Financial as the company's owner and managing member and on behalf of American Financial as the company's representative to establish phone service.

Based on the above evidence, together with adverse inferences the Court draws from Deering's and Guarino's privilege against self-incrimination, the Court finds that Deering and Guarino directly participated in the violative acts and practices of USA Financial or had authority to control them, and they had knowledge of those acts and practices.

In this case, Buschel, Deering and Guarino have refused to admit or deny whether:

1. Individual Defendants, or others at their direction represented expressly or by implication that, after paying a fee, Customers would, or were highly likely to, receive a general purpose credit card;
2. Customers who paid them money did not receive a general purpose credit card;
3. Individual Defendants, or others at their direction, misrepresented directly or by implication, material aspect of the performance, efficacy, nature, or central characteristics of the credit cards Defendants sold, including that the card was a general purpose credit card rather than a card that could be used to purchase items

Case No. 8:08-CV-899-T-17MAP

only from a catalog;

4. Individual Defendants, or others at their direction, requested or received payment of a fee or consideration in advance of customers obtaining a credit card when they, or others at their direction, guaranteed or represented a high likelihood of success in obtaining or arranging for the acquisition of a credit card for such customers.

5. Individual Defendants, or others at their direction, did not refund money to customers unless they filed complaints against Defendants with the Better Business Bureau or a government entity; and

6. Individual co-Defendants directly participated in, had authority to control, and had knowledge of the violative acts and practices.

Based on the adverse inference the Court draws from Defendants' exercise of the privilege against self-incrimination, the Court finds that Buschel, Deering and Guarino participated directly in the violative practices or acts of American Financial or had authority to control American Financial, and had knowledge of American Financial's wrongful acts and practices.

Based on the adverse inference the Court draws from Defendants' exercise of the privilege against self-incrimination, the Court finds that Deering and Guarino directly participated or had authority to control the acts and practices of USA Financial, and had knowledge of its violative conduct.

V. Restitution

The FTC seeks restitution from Defendants based on the

Case No. 8:08-CV-899-T-17MAP

injury to consumers, \$17,300,509.00.

The Eleventh Circuit Court of Appeals has determined that the appropriate measure of consumer damages is the total loss suffered at the hands of Defendants. McGregor v. Chierico, 206 F.3d 1378, 1387 (11th Cir. 2000); FTC v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996).

The amounts sought are based on the testimony of Peter Makris, CPA, the accountant for the corporate Defendants. Peter Makris testified as to the net sales of American Financial (total amount of money earned minus refunds) for the year 2005, 2006 and 2007. Peter Makris further testified as to the net sales for USA Financial for 2007. The uncontroverted evidence shows that Defendant American Financial wrongfully took in at least \$16,226,793.00, and Defendant USA Financial wrongfully took \$1,073,716.00 from consumers, in violation of Section 5 of the FTC Act and the Telemarketing Sales Rule. The total consumer loss is \$17,300,509.00.

V. Remedies

All Defendants are jointly and severally liable for the total amount of the consumer injury, \$17,300,509.00.

The FTC argues that broad injunctive provisions are necessary to prevent future violations, given the transformation of Capital Financial into American Financial, and American Financial's transformation into USA Financial. The FTC requests that the Court ban individual Defendants from participating in any way in advertising, promotion, offering for sale, sale, or

Case No. 8:08-CV-899-T-17MAP

distribution of any telemarketing based on the acts and practices in this case.

After consideration, the Court concludes that a permanent injunction is appropriate. Accordingly, it is

ORDERED that Plaintiff's Motion for Summary Judgment (Dkt. 110) is **granted**, and Defendants' Motion for Summary Judgment (Dkt. 109) is **denied**. The Court will enter the final judgment and permanent injunction, subject to resolution of the pending cross-claim of the United States against Mark Bernet, Receiver, and USA Financial, LLC (Dkt. 127).

DONE and ORDERED in Chambers, in Tampa, Florida on this 31st day of March, 2010.



ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record