

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

Plaintiff, :

-against- :

08 Civ. 1819 (PAC)

ORDER

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, BlueHip

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 underlyi

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. Id.

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 choi

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

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

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.

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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

