UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION, Plaintiff, v. JESSE WILLMS, et al., Defendants.	CASE NO. C11-828 MJP ORDER GRANTING PRELIMINARY INJUNCTION

This matter comes before the Court on Plaintiff's motion for a preliminary injunction. (Dkt. No. 40.) Having reviewed the motion, the oppositions (Dkt. Nos. 43, 45), the replies (Dkt. Nos. 63, 65, 68), Defendants' surreply (Dkt. No. 73), and all related papers, and having held oral argument on August 4, 2011, the Court GRANTS the motion and enters a preliminary injunction.

Background

The FTC accuses Jesse Willms of selling products and services over the internet in violation of the Federal Trade Commission Act ("FTCA"). The FTC's lawsuit names several corporations as defendants, where Willms is either the sole owner or president. The FTC names several individuals as defendants, where they allegedly created certain corporations to assist

Willms in securing merchant processing services. (Dkt. No. 40 at 7-8.) Through these various corporate entities, Willms is alleged to have violated the FTCA by engaging in misleading or deceptive conduct targeted at consumers. The FTC also claims Willms has moved assets to offshore accounts to avoid scrutiny and liability. The FTC addresses three types of internet-based activities that Willms spearheaded. The first two are alleged as past conduct, while the latter remains actively on offer: (1) the sale of health and beauty supplements; (2) operation of penny auctions; and (3) research services ranging from reverse telephone research to genealogical research.

A. Past Conduct

Starting in 2007, Willms and the other Defendants allegedly used deceptive marketing tactics to sell various products, programs, and services through the internet. These included Acai-based weight loss supplements ("AcaiBurn"), colon cleansing supplements ("PureCleanse"), teeth whiteners, and credit report programs. Defendants marketed these products and services as either free or risk-free trials in which the purchaser had to pay only a nominal fee. According to the FTC, the purchasers were not adequately informed that the purchase was not free or that they were being enrolled in a recurring fee program wherein they would be charged for products or services unless they opted out shortly after placing their order. Although details of the charges were visible on De

In late 2009, Defendants began operating penny auction websites in a manner the FTC alleges violated the FTCA. (See Stefaniuk Decl. ¶ 8.) The FTC asserts the penny auctions use misleading terms to lure customers in with the promise of winning expensive items for mere pennies. Users of the website are offered bonus bids, but the website requires an enrollment fee of $150 and a recurring monthly charge of $11.95. (Pl. Ex. 6 at 283.) The membership fee and recurring charges are not allegedly disclosed up front and are only set forth in small font. The FTC also contends that refunds of the service are extremely difficult to obtain, because the customer is required to use up all of her bids without winning an item. This has led to hundreds of customer complaints with the Better Business Bureau and the FTC.

Throughout 2009 and 2010, the FTC alleges that Defendants unfairly and improperly charged clients for services in violation of the FTCA. As evidence, the FTC points to Defendants' high charge-back rates from various credit card companies and the use of various corporations as shells. A charge-back occurs when the cardholder contacts his or her issuer to dispute a charge and the charge is cancelled or refunded. The ratio of charge-backs to a merchant is monitored by Visa and MasterCard to ensure the merchant is not engaging in overly-risky or predatory conduct. Generally any rate of 1% or more will invite scrutiny from Visa or MasterCard's risk management divisions. (See Pl. Ex. 56 at 2907-08, 2918-19; Pl. Ex. 57 at 2986-87.) The FTC alleges that Defendants had charge-back rates over 1% and as high as 22.7%. Defendants allegedly could not get their charge-back rates down, and created new shell companies that contracted with new and different merchant processors to avoid any investigation from Visa and MasterCard. These companies were used, the FTC alleges, to hide Defendants Willms' association with them and artificially lower the charge-back rates. Defendants also

allegedly changed the billing descriptions that appear on consumers' bills in order to deceive

1. Likelihood of Success on Merits: Section 5(a) Claims

The FTC argues that the following practices violate Section 5 of the FTCA: (1) failing to disclose negative option and continuity features for services offered for low initial costs or that were advertised as free or risk-free; (2) misleading consumers that cancellation and refunds were easy to obtain. The FTC has shown a likelihood of success that Defendants' practices violate the Act.

a. Standard

Section 5(a) of the FTCA declares unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). "[A] practice falls within [Section 5(a)'s] prohibition (1) if it is likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material." F.T.C. v. Cyberspace.com LLC

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1,100 consumer complaints, most of which were about the charges made for the membership fees and monthly bid fees. (Brozek Decl. ¶¶ 5-6.) Defendants' argument that these sampling sizes are too small to be significant misses the mark. Consumer complaints are highly probative of whether a practice is deceptive, and the mere fact that some persons did not know they were deceived is not proof the acts are not deceptive. See Cyberspace.com, 453 F.3d at 1199, 1201.

The FTC has provided an expert declaration from Susan Kleimann, who concludes the AcaiBurn and SwipeBids websites are misleadin

websites selling phone number search services, as well as evidence submitted by Defendants of eighty-eight websites they currently operate selling similar services. These websites continue to contain negative option and continuity plans (e.g."trial" packages) whose enrollment fees and recurring costs are poorly disclosed. Notably, the fact that the services for sale contain any continuity plan or negative option is not disclosed until the user lands on the sixth page on which he or she is required to enter credit card information. The landing page and the four following pages nowhere suggest there are any other charges but a one-dollar fee. (See, e.g., Dkt. No. 79-1 at 2-6.) The ordering page itself discloses the terms of the continuity plan in text that is smaller than the other text. The placement is not central, and there is no means of purchasing the service without accepting enrollment into the continuity plan. The website design and layout are similar to those the FTC's expert reviewed and found to have a net impression that was misleading. (See Kleimann Decl. ¶¶ 42-53.) The Court finds the FTC likely to succeed in demonstrating these websites violate the FTCA.

Defendants argue that their current websites are indistinguishable from a website run by Intellius that the district court found not to be deceptive. (Dkt. No. 73 at 7.) The Intellius websites merely highlight the reasons why Defendants' websites likely violate the FTCA. (Engel Decl. (Dkt. No. 74) Ex. 2.) First, the Intellius website contains a stand-alone page explaining the terms of the offer, including the continuity plan and negative option, without any requirement to input information. Second, there is a separate box on the same page labeled "Remove Identity Protect Trial" that the user may select to avoid being enrolled in the continuity plan before making the purchase. (Id.) This is a key difference, as Defendants' websites do not permit the purchase of the services without the continuity plan. Third, the font size, placement of text, and overall display of the page is entirely different. The font size on the Intellius page

Section 12 of the FTCA is specifically directed to false advertising. F.T.C. v. Pantron I Corp., 33 F.3d 1088, 1095 (9th Cir. 1994). "That section prohibits the dissemination of 'any false advertisement'' in order to induce the purchase of 'food, drugs, devices, or cosmetics.'" Id. (quoting 15 U.S.C. § 52(a)(2)). The dissemination of any such false advertisement is an "unfair or deceptive act or practice in or affecting commerce" within the meaning of Section 5 of the FTCA. 15 U.S.C. § 52(b). The Act defines "false advertisement" as "an advertisement, other

The FTC also argues that the PureCleanse products "made strongly implied representations . . . [they] help prevent colon cancer." (Dkt. No. 40 at 28.) The FTC argues an embedded video of Katie Couric on the PureCleanse website discussing colon cancer misled consumers to think the cleansing of the colon would prevent cancer. (Id.) Defendants respond by arguing that nowhere did the website actually state that the PureCleanse would prevent colon cancer. Ingrid Martin, a marketing expert, avers that no one would conclude that PureCleanse prevents colon cancer. (Dkt. No. 51.) Martin argues that the video of Couric only goes on to show that the colonoscopies are important thing to obtain in order to prevent and catch colon cancer at an early stage. (Dkt. No. 51 at 9-10.) The inclusion of the video, however, suggests that the pills may have a strong correlation to prevention of colon cancer, a fact that has not been shown to be true. While this is a close question, the Court is persuaded that the FTC has a likelihood of success on the merits.

The FTC also argues that the use of celebrity endorsements to advertise the products violates § 12 of the FTCA. Defendants offer no response. This is unsurprising, as both Rachel Ray and Oprah have denounced the use of their personalities to advertise these products.

The Court finds the FTC has a likelihood of success on its § 12 claims tied to Defendants' statements about the efficacy of their products, and the use of false celebrity endorsements. Although there is no evidence that Defendants continued claims and endorsements, the Court finds it proper to issue an injunction barring such activity. See FTC v. Colgate-Palmolive Co., 380 U.S. 374, 395 (1965). Defendants do not seem to disagree. Defendants' proposed injunction forbids any misrepresentation of "[a]ny ma

service" and misrepresenting any celebrity endorsements. (Dkt. No. 73-1 at 8, 13.) The Court finds an injunction appropriate to forbid such activity.

3. Likelihood of Success on Merits: Unauthorized Billing Practices

The FTC argues Defendants have violated Section 5 of the FTCA by charging consumers' accounts without express informed consent and ignoring proper attempts to cancel charges. (Dkt. No. 40 at 41.) The evidence is sufficient to support a finding a likelihood of success for the FTC.

As explained above, Section 5(a) of the FTCA declares unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). An act is unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). Courts have found a violation of Section 5(a) where the defendant has withdrawn money from a consumer's bank account without informed consent. See F.T.C. v. Global Marketing Group, Inc., 594 F. Supp. 2d. 1281, 1288-89 (M.D. Fla. 2008); F.T.C. v. J.K. Publications, Inc., 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000) (noting that debiting a consumer's account without authorization is an unfair practice under the FTCA). The FTC also argues these practices violated the Electronic Funds Transfer Act and its regulations because Defendants failed to obtain written authorization from consumers for the merchant to place recurring charges on consumers' debit accounts, and provide a copy of the written authorization to the consumers. See 15 U.S.C § 1693(a); 12 C.F.R. §205.10(b). Failure to comply with these requirements is a violation of the FTCA, 15 U.S.C. § 1693o(c).

The FTC argues that the high charge-back rates from Visa and MasterCard to Defendants is evidence that Defendants were making unauthorized charges to consumers. (Dkt. No. 40 at

satisfy the bona fide customer demand for his product and not for any other reason." (Willms Decl. at 20.) Defendants argue there was no motive for using multiple processors as part of a deceptive practice. Lastly, Defendants argue that they were "repeatedly victimized by affiliate fraud." (Dkt. No. 43 at 28.) This, they argue, is the reason for the high chargebacks.

The FTC mounts a substantial attack to these defenses that the Court finds sufficient to find a likelihood of success on this claim. The FTC presents substantial testimony that Willms' beneficial ownership interests in the corporations were not adequately disclosed and that the structure of the affiliate defendant corporations was a means to avoid further scrutiny. The FTC also presents unrebutted evidence that the charges were coded in a confusing manner on consumers' charge accounts. Whether the corporations related to Willms are shells is a close question. The Court need not resolve that issue to find sufficient evidence here that the FTC is likely to succeed on its claim that Defendants violated the EFTA and the FTCA.

4. Public Interest

In weighing the equities, the Court is to favor the public interest against the private interest where the FTC establishes a likelihood of success on the merits. Affordable Media, 179 F.3d at 1236. The Court finds the equities weigh in favor of the FTC, as the evidence of consumer harm is substantial. Defendants' main argument is that they have ceased to engage in any conduct that violates the FTCA. As explained above, the Court disagrees.

5. Scope of Injunction

The Court finds that an injunction should issue

evidence the FTC has offered of such movement of funds. The Court is not persuaded by Defendant Willms' argument on this issue.

Defendants rely on F.T.C. v. John Beck Amazing Profits, LLC, 2009 WL 7844076, at

activities in concert with Defendant Willms that violates the injunction, it may seek leave of Court to expand the asset freeze.

D. Motion to Strike

Defendants move to strike several of Plaintiffs' exhibits submitted in support of the motion for a preliminary injunction. Defendants' attack to Exhibits 2, 3, 8-13, 47-49, 50, 51, 54, and 57 is without merit.

In the preliminary injunction context, the Court "may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial." Flynt Distrib. Co., Inc. v. Harvey