

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FEDERAL TRADE COMMISSION)
)
Plaintiff,)
vs.)
AMG SERVICES, INC. et al,)
)
Defendants.)

Case No.2:12-cv-00536GMN-VCF

ORDER

Pending before the Court for consideration is the Report and Recommendation (ECF No. 539) of the Honorable Cam Ferenbach, United States Magistrate Judge, entered on January 2, 2014. On February 14, 2014, the Muir Law Firm, LLC and Timothy J. Muir (collectively the "Muir Law Firm") filed their Objection. (ECF No. 542.) The Defendants AMG Capital Management, Level 5 Motorsports, LeadFlash Consulting, Black Creek Capital Corporation, Broadmoor Capital Partners, Scott A. Tucker, Blaine A. Tucker, Don E. Brady, Troy LittleAxe, and Robert D. Campbell. (ECF Nos. 545, 548, 549, 552.) The Federal Trade Commission filed its Response to the Objection (ECF No. 554) and Response to the Objection (ECF No. 554) and Response to the Objection (ECF No. 554) on February 2, 2014.

For the reasons discussed below, the Court will accept and adopt Magistrate Judge Ferenbach's Report and Recommendation (ECF No.539) to the extent that it is not inconsistent with this opinion

1 On the contrary, the webpage format discourages the reading of the terms and conditions
2 because it breaks the terms and conditions up into nine separate hyperlinks in eight or nine
3 point font See (Id. 8:4-9:22.) Furthermore, the most important link that takes the borrowers to
4 the document at issue for the presentations² the Loan Note and Disclosure² is the least
5 conspicuous⁶ of the nine links (Id.) The boxes and disclosure links appear on the websites as
6 follows:

7 I have read and accept the terms of Application, including the terms and provisions of LIMITED
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1 (Id.); see also FTC § Memo in Supp. of MS14:1-14, ECF No.456)(reproducing an internal

2 G R F X P H Q W I U R P ' H I H Q G D Q W V ¶ F R Q W D L Q L Q J W K L V S D \ P

3 While borrowers technically have the ability to decline enrollment in the automatic
4 renewal plan, the mechanism for declining enrollment is controlled by Defendants through
5 a convoluted email and hyperlink procedure. See ' H I H Q G D Q W V ¶ 2-54, 14:1516 by L R Q

6 16:16-18, ECF No.493.) For a borrower to decline enrollment in the automatic renewal plan
7 using the email and hyperlink procedure, the following steps must be completed: (1) three days
8 after the loan is funded, the lending Defendants send an email to the borrower containing
9 additional loan terms and a link to a webpage from where the borrower may elect to decline
10 enrollment in the renewal plan (2) the borrower opens the email, reads the new terms, accesses

1 percent of the borrowers she spoke with complained that Defendants had withdrawn more from
2 WKHLU DFFRXQWV WKDQ WKH ORDQ FR Ver words in) Kate with UP I
3 the Lending ' HIHQGDQWV ¶ HPSOR \HHV ZHUH LQ VWUXFWHG WI
4 worked in order to keep potential borrowers in the da For example, in response to an email
5 from one of the Lending ' HIHQGDQWV ¶ VDOHV UH See the Hear W Dn Judge H V
6 when explaining a loan to potential borrowers, Manager of Training and Development
7 stated:

8 , GRQ ¶ W WKLQN WKDW > WKLV ODQJXDJH @ HQFRXUD
9 we are trying to sell it I think we should leave outter like renew and pay down.
10 We don ¶ want to complicate things if we are trying to get them to get a loan. I
11 have heard many times customers ask to withdraw the loan after the explanation
and I believe that a lot of it has to do with the way it is explain

12 (Email, Ex. 72 of FTC § Dec. in Supp. of MS ECF No. 455-72.)

13 C. Procedural History of the Case

14 The FTC filed its Complaint on April 2, 2012, alleging claims for deceptive acts and
15 practices and deceptive collection practices in violation of the FTC (Counts I & II), for
16 failing to properly disclose certain loan information in violation of TILA and its implementing
17 Regulation Z (Count III), for conditioning the extension of credit on the preauthorization of
18 recurring loans in violation of EFTA (Count IV), and for disgorgement as provided under
19 section 13(b) of the FTC Act (Count V). (Complaint 1-20:8, ECF No. 1.)

20 2 Q ' HFHPEHU WKH & RXUW VLJQHGDQ 2 UGHU
21 for preliminary injunction and bifurcation. (ECF No. 296.) The Bifurcation Order divided the
22 litigation into two phases: a liability phase and a relief phase (1-10:23.) During Phase I
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1 F O D L O P O t e x Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

2 In determining summary judgment, a court applies a burden of proof. If the party moving for summary judgment would bear the burden of proof at trial, it must come
3 the party moving for summary judgment would bear the burden of proof at trial, it must come
4 forward with evidence which would entitle it to a directed verdict if the evidence went
5 uncontroverted at trial. In such a case, the moving party has the burden of establishing

6 W K H D E V H Q F H R I D J H Q X L Q H L V V X H R I C . D . R . W r a n s p . H D F K L

7 Brokerage Co. v. Darden Rests., Inc.

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1 competent evidence that shows a genuine issue for trial. See Celotex Corp, 477 U.S. at 324.

2 \$ W V X P P D U \ M X G J P H Q W D F R X U W \ V I X Q F W L R Q L V C

3 truth but to determine whether there is a genuine issue for trial. See Anderson, 477 U.S. at 249.

4 7 K H H Y L G H Q F H R I W K H Q R Q P R Y D Q W L V ³ W R E H E H O L H Y

5 in K L V I D O A R 255. But if the evidence of the nonmoving party is merely
6 not significantly probative, summary judgment may be granted. U.S. at 249.

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1 56; FTC v. Publishers Bus. Servs., 1821 F. Supp. 2d 1205, 1226 (D. Nev. 2010) v.
2 Grant Connect, LLC 827 F. Supp. 2d 1199, 1219 (D. Nev. 2011)

3 ' H I H Q G a d Q m e n f , however, is unpersuasive First, numerous Ninth Circuit cases,
4 including the ones cited by Defendants have found the net impression of a representation to be
5 suitable for summary judgment determination See e.g. Cyberspace.Com L 453 F.3d at 1201

6 ³ > 7 @ K H G L V W U L F W F R X U W

1 and that the terms contained in the fine print of the document are not hidden, vague, uncertain,
2 or contradictory (Id.)

3 This argument, however, misunderstands the law and- X G J H) H U H Q E D F K ¶ V D C
4 was directly addressed and refuted in the Report and Recommendation (Report &
5 Recommendation 2:11-26:18 ECF No. 539.) First, the terms of the Loan Note Disclosure are
6 not disputed by Defendant. See e.g. (' H I H Q G D Q W V ¶ 2-36 ROFIN 493) Second,
7 Judge Ferenbach noted that the terms of the TILA Box and th

1 of the net impression it creates even though the presentation also contains truthful
2 disclosures. (Report & Recommendation 10:1(4rt)-8(& Rec] TJ ET Q q 21.6F2 957.6, EC 10

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and payments schedule² are the very ones mandated by TILA. 12 C.F.R. § 1026.18(d)(e), (g) (h). Therefore, Judge Ferenbadt did not ignore binding Ninth Circuit precedent finding that the Loan Note Disclosure was ambiguous and in violation of TILA. Report &

Recommendation 30:4, ECF No. 539) (B H F D X V H ' H I H Q G D Q W V ¶ O R D Q Q R
matter of O D Z µ W R K I H W K H I U O P V J D O R E O L J D W L R Q E H W Z H H Q W K
F R Q V S L F X R X V O \ ¶ G L V F O) R V H I G Q D D J e t w / \$ \$ w i t h t o x m e i t H V ')

6. Ambiguity in TILA Mandated Terms

' H I H Q G D Q W V ¶ V L [W i d g e E e r e n b a d t f a i l e d t o u s e t h e w o r d c o n t r a c t u a l
contractual ambiguity in finding that the ambiguities in the Loan Note Disclosure violated
TILA. (Objection 2:12, ECF No. 542.) In support of this objection, Defendants assert that the
proper³ K R U Q e s r f r m a m b i g X L W \ L Q W K L V F D V H L V [D i s c o s u r e] m a y U W K
reasonably be read as creating an obligation to renew as opposed to the payment
R E O L J D W L R Q U H I O H F W H G (I d . 1 9 : 8 - 1 4 , 2 2 : 9 2 5 : 2 2)
this standard the TILA mandated terms in the Loan Note Disclosure were not ambiguous
because the single payment option Z D V ^ 3 F O H D U O \ b o r r o w e r s r e v e n d a l l y G
required to follow the renewal plan (id. 19:8-14, 22:925:22)

Defendants' argument here is unpersuasive. A contract is ambiguous if L W L V ^ 3 U H D V I
V X V F H S W L E O H ' W R P R U S k i l a t , D n Q v R O V S i C a r e n M a k C o p e 9 F 3 D W L R G
1005, 1015 (9th Cir. 2012); see also 11 WILLISTON ON CONTRACTS § 30:5 (stating the
same). In its analysis of FTC Act violations, this Court has already determined that the terms in
the Loan Note Disclosure regarding the automatic renewal plan were likely to mislead because
they implied in the prominent TILA Box that only one finance charge would be incurred while

¹³ ' H I H Q G D Q W V S U R Y L G H Q e s t , O n J u d g e F e r e n b a d t ' s R i s t o n O n C o n t r a c t s f o r t h e
S U R S R V L W L R Q W K D W ^ 3 D V D P D W W H U R I F R Q W U D F W c l o s e s n o t a H U I R U
O H J D O R E O L J D W L R Q C O N T R A C T S † W K H G 7 K H D F W X D O T X R W H
that leaves an essential element of a promise open for future negotiation and agreement, constitutes no promise
and creates no legal R E O L J D W L R Q X Q W L O W K H I X W X U H D J U H H P H Q W L V D F W

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1 recommended denying summary judgment on Counts II & IV and amending the Bifurcation
2 Order to permit those claims to proceed during Phase I. (ECF No. 35:1-36:5) (citing Fed. R. Civ. P.

3 G 3, I D Q R Q P R Y D Q W o r d e c l a r i n g t h a t, f o r s p e c i f i c r e a s o n s, i t c a n n o t
4 present facts essential to justify its opposition, the court may: (1) defer considering the motion

5 R U G H Q \ L W '

6 The Muir Defendants assert that granting summary judgment on Counts I & III
7 effectively 3 Q X O O L I L H G ' W K H S U R W H F W L R Q V D I I R U G H G X Q G H
8 necessitated denying summary judgment on Counts II & IV. (Limited Objection 43123

9 ECF No. 541.) The Muir Defendants further assert that the Bifurcation Order (ECF
10) H U H Q E D E K P Q V L V W H Q W U X O L Q J ' G H Q L H G W K H P R I W K H
11 discovery about the claims against them. (ECF No. 4:23-5:8.)

12 The Muir Defendants assertions, however, are unpersuasive. In contending that they
13 were denied the right to H Q J D J H L Q G L V F R Y H U \ D Q G W K D W - X G J H)
14 Recommendation is inconsistent in granting summary judgment on Counts I & III while
15 denying it on Counts II & IV, the Muir Defendants appear to ignore two important facts. First,
16 the Muir Defendants voluntarily chose to postpone discovery until after Phase I by stipulation
17 (ECF No. 278) and no doubt benefited from being relieved from the costs involved in
18 conducting that discovery. Second, the situation regarding Counts I & III is fundamentally
19 different from the situation regarding Counts II & IV. Unlike Counts II & IV which were not
20 fully litigated by the Lending Defendants, full discovery and litigation was conducted by the
21 Lending Defendants on Counts I & III, as was originally contemplated by all parties²
22 including the Muir Defendants in the Bifurcation Order See (Bifurcation Order, ECF No.

1 and Count IV to proceed against the Muir Defendants during Phasth litigation

2 DATED this 28th day of May, 2014.

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