IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FEDERAL TRADE COMMISSION, et al., Plaintiffs, v. AMERICAN FUTURE SYSTEMS, INC., et al., Defendants.	CIVIL ACTION NO. 20-2266

OPINION

Slomsky, J. **June 11, 2024**

I. INTRODUCTION

On March 29, 2024, following a fifteen-day non-jury trial, this Court issued a 52-page Opinion (Doc. No. 463) with an accompanying Judgment (Doc. No. 464) in favor of Defendants American Future Systems, Inc., Progressive Business Publications of New Jersey, Inc. and Edward M. Satell ("AFS Defendants") and against Plaintiffs the Federal Trade Commission ("FTC") and the Commonwealth of Pennsylvania (collectively "Plaintiffs") on each claim alleged in Plaintiffs' Amended Complaint. (Doc. Nos. 463, 464.) Presently before the Court is Plaintiff FTC's Motion to Alter or Amend Judgment and for Other Relief (Doc. Nos. 466, 468) and Plaintiff Commonwealth of Pennsylvania's Motion to Amend or Make Additional Findings Pursuant to Federal Rule 52(b) and to Alter or Amend Judgment Pursuant to Federal Rule 59(e) (Doc. No. 467).

In Plaintiff FTC's Motion, it argues that judgment should be entered in their favor to "correct clear errors of law and fact in the Opinion as well as to prevent manifest injustice." (Doc. No. 466 at 1.) In support of this claim, the FTC argues that (1) "[t]he Opinion applies a perpetual

legal error,"United States v. Fiorelli, 337 F.3d 282, 288 (3d Cir. 2003), and may only be used to

Supp. 2d 565, 578 (E.D. Pa. 2001). Furthermore, "[b]ecause reconsideration of a judgment after its entry is an extraordinary remedy, requests pursuant to these rules are to be granted 'sparingly,' and only when dispositive factual matters or controlling decisions of law were brought to the court's attention but not considered." United States v. Meehan, No. 10-713, 2012 WL 12930581, at *1 n.1 (E.D. Pa. Aug. 7, 2012) (quoting Brunson Communications, Inc. v. Arbitron, Inc., 246 F. Supp. 2d 446, 447 (E.D. Pa. 2003)). It should not give a party a "second bite at the apple." Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1231 (3d Cir. 1995).

III. ANALYSIS

A. Plaintiff FTC's Motion to Alter or Amend Judgment Will Be Denied

As noted, in the FTC's Motion to Alter or Amendment Judgment, it argues that this Court should grant its Motion for four (4) reasons: (1) "The Opinion applies a perpetuating theory of consumer understanding, which lacks the persuasiveness and universality of the FTC's actual theory"; (2) "the Opinion overlooked the FTC's alternative statement of its claim, which contests the adequacy of the script's disclosures"; (3) "AFS's telemarketing script, when analyzed for adequacy of disclosure and through the prism of a sample trial, has a deceptive net impression"; and (4) "[t]he Opinion overlooks the FTC's argument about the unlawful process AFS used to market updates to its [Center for Education and Employment Law ("CEEL")] books." (Doc. No. 466-1 at 1-19.) Each argument will be addressed in turn.

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consumer was being confronted with a purchase decision." Id. at 9.) This argument is unpersuasive because, contrary to the FTC's contention, the Court considered the claim in its Opinion.

As previously noted, "[b]ecause reconsideration of a judgment after its entry is an extraordinary remedy, requests pursuant to these rules are to be granted 'sparingly,' and only when dispositive factual matters or controlling decisions of law were brought to the court's attention but not considered." Meehan, 2012 WL 12930581, at *1 (quoting Brunson, 246 F. Supp. 2d at 417). The motion should not give a party a "second bite at the apple." Bhatnagar, 52 F.3d at 1231.

Here, a "second bite at the apple" is what the FTC is seeking. Contrary to the FTC's contention, the Court did consider the FTC's "two free, trial sample" proposed net impression argument in its Opinion. On page 41 of the Opinion, after analyzing AFS's telemarketing script, the Court found that "[n]o reasonable employee with purchasing power of a business or organization would hear this information and believe, as Plaintiffs suggest, that they are receiving free newsletters into perpetuity." (Doc. No. 463 at 41.) The FTC, however, jumps on the language "into perpetuity" in that sentence as if it was the only consideration the Court gave to the deception analysis. It was not the only consideration. In any event, the Court concluded that there was no deception in the telemarketing script after analyzing the script as a whole and the FTC's "net impression" arguments.

In the Opinion, the Court considered the telemarketing script and evidence about it introduced by the FTC. After analyzing the telemarketing script, the Court found that the script "explicitly describes to the consumer how the subscription will work" and "explains what a consumer can do to cancel the subscription." Further, the Court found that no portion of the subscription was "free" when it held that "the script does not imply the alleged 'net impression'

argument fails because the FTC is attempting to reargue a matter the Court previously analyzed and rejected.

In Count II of the Amended Complaint, Plaintiff FTC alleged that Defendants violated the FTC act by "fail[ing] to disclose or disclose adequately to consumers" various material terms. (Doc. No. 43 at 15–16.) In the FTC's current Motion to Alter or Amend Judgment, it alleges that the Court addressed the alleged "fail[ure] to disclose" prong but failed to address the second prong—whether Defendants' telemarketers "adequately disclosed" the material terms of Defendants' offer. (Doc. No. 466-1 at 11.) This argument is meritless because, contrary to the FTC's contentions, the Court considered and rejected the "adequately disclosed" prong of Count II of the Amended Complaint.

In the Opinion, the Court found, through its discussion of the telemarketing script, that the telemarketers' disclosures were adequate. See, e.g., id. at 39 ("[T]he script explicitly describes to the consumer how the subscription will work."); id. at 39–40 ("Not only does the script explicitly state that they are only receiving the first two newsletters 'at no cost,' which is true, it also explains what a consumer can do to cancel the subscription.") Accordingly, the Court found the telemarketers' disclosures to be adequate, and although the FTC attempts to reargue its claim now, nothing argued by the FTC changes the finding that it did not prove its claim by a preponderance of the evidence.

3. The FTC's Argument that AFS's Telemarketing Script, When Analyzed for Adequacy of Disclosure and Through the Prism of a Two-Sample Trial, has a Deceptive Net Impression Fails

Third, the FTC once again asks this Court to reconsider its finding that Defendant's telemarketing script did not have a deceptive "net impression" by arguing that the "telemarketing script, when analyzed for adequacy of disclosure and through the prism of a two-sample trial, has

4. The FTC's Argument that the Court Overlooked the "FTC's Argument About the Unlawful Process AFS Used to Market Updates to its CEEL Books" Also Fails

The FTC's final argument is that "[t]he Opinion overlooks the FTC's argument about the unlawful process AFS used to market updates to its [Center for Education and Employment Law ("CEEL")] books" and therefore improperly held that Defendants did not violate the Unordered Merchandise Statute ("UMS"), 39 U.S.C. § 3009.[5] Plaintiff Commonwealth of Pennsylvania also makes this argument in its Motion, and accordingly, these claims will be addressed together.[6] (See Doc. No. 567-1 at 17.) The crux of Plaintiffs' argument is that the Court failed to discuss the CEEL books' renewal process, which Plaintiffs contend violated the UMS. Plaintiff Commonwealth of Pennsylvania makes this argument by alleging that a violation of the UMS is an "unfair or deceptive practice" under the UTPCPL. Plaintiffs' argument, however, fails for two reasons. First, the Court discussed the CEEL renewal process in its Opinion and found that the entire CEEL subscription process did not violate the UMS and the UTPCPL. (Doc. No. 463 at 51.) Thus, Plaintiffs are improperly asking the Court to rethink what it has already thought through. Second,

[5] 39 U.S.C. § 3009, states in pertinent part:

> (b) ... the mailing of unordered merchandise or of communications prohibited by subsection (c) of this section constitutes an unfair method of competition and an unfair trade practice in violation of section 45(a)(1) of title 15.
>
> ...
>
> (d) For the purposes of this section, "unordered merchandise" means merchandise mailed without the prior expressed request or consent of the recipient.

(Id.) Next, the Court analyzed the telemarketing script against the language of the UTPCPL and Plaintiff's allegations in the Amended Complaint and concluded that "Plaintiffs did not prove a violation of 73 P.S. § 201-2(4)(xvii)(A)-(C) by Defendants." (Id. at 54.) Thus, while the Commonwealth may disagree with the Court's conclusion reached in the Opinion, this argument is still an improper ground to raise in a motion to amend or alter judgment because the Court considered the language of subsection xvii in its Opinion. Specifically, the citation above includes the words "first," "affirmatively," "expressly," "identity of the seller," and "is to sell goods or services", all words that the Commonwealth claims the Opinion overlooked. But, the Court considered those terms when it held that the "initial sentence of the 'executive script'" "clearly identifies who the[] telemarketer works for and the purpose of the call" and covered subsection xvii in the ensuing analysis. (Doc. No. 463 at 52-53.) Accordingly, the Commonwealth's argument fails because the Court considered the plain language of subsection xvii of the UTPCPL in holding that the telemarketing script did not violate the UTPCPL.

2. The Commonwealth's Argument that the Court Failed to Consider TSR Case Law and Regulatory Guidance Fails

The Commonwealth next argues that the Court erred by failing to consider law interpreting provisions of the [f]ederal Telemarketing Sales Rule ("TSR")." (Doc. No. 467-1 at 8.) To support this argument, it cites to two federal cases for the proposition that Defendants actions violated the TSR and thus, in turn, violated section xvii of the UTPCPL. The Commonwealth's argument fails because the Court considered these cases and found them unpersuasive.

As an initial matter, the Commonwealth recognizes that "there is no Pennsylvania case law interpreting Section xvii [of the UTPCPL] to otherwise instruct the Court," but argues anyway that the Court should "look to FTC law for guidance and interpretation because the relevant

of the TSR are virtually identical to Section xvii. Id.) However, even though the cases relied on by the Commonwealth are not cited in the Opinion, the Court did review them in deciding whether the telemarketing script violated the UTPCPL. The Court found those decisions unpersuasive by its holding in the Opinion that "the telemarketers['] script clearly identifies the purpose of the call, the nature of the goods and services and the offer it is providing to the potential subscriber." (Doc. No. 463 at 54.)

The two cases interpreting the TSR that Plaintiff contends the Court overlooked are FTC v. Magazine Solutions, LLC, Civ. No. 7-692, 2008 WL 11383877, at *7 (W.D. Pa. 2008) and United States v. Corps. For Character, LLC, 116 F. Supp. 3d 1258, 1278 (D. Utah 2015). Both cases were cited and relied on in Plaintiffs joint Proposed Findings of Fact and Conclusions of Law (Doc. No. 459 at 107-08). The Court did not cite them in the Opinion because it found them unpersuasive, and the Court continues to do so.

Both Magazine Solutions and Corps. For Character do not support Plaintiff's position because

> threatened legal action against consumers who failed to comply with scheduled payments.

Id. The FTC then filed an action against defendants, alleging claims under the FTC Act and the TSR. Id. In analyzing the meaning of "prompt" in reference to telemarketing disclosures, the court held that "[a]t a minimum. . . prompt' disclosure should be made prior to the time any substantive information about a prize, product, or service is conveyed to the consumer." The court concluded that defendants violated this requirement when "[d]efendants use [] substantive information to the consumer about the prize, product or service before disclosing that the Defendants intended to sell magazines." Id. at 7. Specifically, it held that "[d]uring the first call, the Defendants reference the consumers' receipt of $1,000 in shopping coupons" and "[a]t no time before this substantive information about the coupons is given do the Defendants disclose that they are selling magazines." Id.

Here, the Commonwealth argues that this Court failed to consider the district court's holding in Magazine Solutions that telemarketing disclosures "should be made prior to the time any substantive information about a prize, product, or service is conveyed to the consumer." (Doc. No. 467-1 at 8.) However, unlike the defendants in Magazine Solutions, at MCID 1- (.)--n shopp-10 (c 26 (d)

The Commonwealth's citation to Corps. For Character is equally unpersuasive. 116 F. Supp. 3d at 1278. The Commonwealth argues that the Court failed to consider that Corps For Character "requires that the 'identify of the seller' be a legal name or registered fictitious entity." (Doc. No. 467-1 at 9.) In that case, telemarketers hired by "the Coalition for Quality Children's Media" failed to state that they are calling on behalf of "the Coalition for Quality Children's Media" and instead s

couple copies for you to look at. . .'). Shortly after, the telemarketer offers to guide the caller to the publication's website or send the subscriber an email with a link to the website. (

grounds to alter or amend the Court's judgment in this case. As a result, Plaintiffs' Motions (Doc. Nos. 466, 467, 468) will be denied. An appropriate Order follows.