IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FEDERAL TRADE COMMISSION,	)	CV 08-64-M-DWM
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
YOUR MAGAZINE PROVIDER, INC., a corporation, also D.B.A. PERIODICALS and U.S. MAGAZINE SERVICES; and JASON W. ELLSWORTH,	)	
	)	
Defendants.	)	

I. Introduction

Plaintiff, Federal Trade Commission ("FTC"), brought suit against Defendants, Your Magazine Provider, Inc., and Jason W. Ellsworth, alleging Defendants violated the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, and the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101–6108. A temporary restraining order was issued on May 14, 2006 after a preliminary examination based on evidence submitted by the FTC, that the FTC was likely to succeed on the merits of its claims. Subsequently, a hearing was held so that Defendants had an opportunity to show cause why a preliminary injunction should not be issued. Following the hearing, the parties entered a Stipulated Preliminary Injunction and asset freeze, based on their agreement to engage in negotiations to resolve this case. The parties have not resolved their differences. The Defendants now move to dissolve the stipulated preliminary injunction and asset freeze, claiming the FTC has not demonstrated it is likely to succeed on the merits.

After considering the evidence presented by the parties at the show cause hearing, as well as the additional evidence submitted by the FTC with its briefing on this motion, the FTC is unlikely to succeed on the merits of its claims. At the time of the show cause hearing, the FTC submitted affidavits from approximately twenty consumers who, ultimately, either agreed to accept Defendants' magazine subscription offer or were not charged in connection with the offer. The FTC also submitted evidence of about 200 general consumer complaints, most of which were handled to the consumers' satisfaction. In light of the fact that Defendants have contacted over 5,000,000 people in the last three years and sold magazine subscriptions to approximately 36,000 consumers, a small number of complaints is to be expected. The FTC submitted additional evidence in opposition to Defendants' motion to dissolve the injunction, including declarations of former employees and dissatisfied customers, recordings of calls from some complainants, and data regarding sampling of verification recordings. The current evidence is insufficient to show the FTC is likely to succeed on the merits of its claims. Consequently, the Defendants' motion to dissolve the stipulated preliminary injunction is granted.

II. Legal Standards

To obtain a preliminary injunction, the FTC must demonstrate a likelihood of success on the merits and that the equities weigh in favor of granting temporary relief. FTC v. Affordable Media, LLC, 179 F.3d 1228, 1233 (9th Cir. 1999). Irreparable harm is presumed in a statutory enforcement action such as this one. Id. An asset freeze is appropriate when the government demonstrates a likelihood of success on the merits and a possibility of dissipation of assets. Fed. Sav. & Loan Inc. Corp. v. Sahni, 868 F.2d 1096, 1097 (9th Cir. 1989).

III. Analysis

The FTC alleges Defendants violated section 5(a) of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). An act or practice is deceptive if "first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material." FTC v. Gill, 265 F.3d 944, 950 (9th Cir. 2001). Courts examine the "overall net impression" of all representations to determine whether they are misleading. FTC v. Gill, 71 F. Supp. 2d 1030, 1043 (C.D. Cal. 1999), aff'd, 265 F.3d 944 (9th Cir. 2001). The FTC also alleges Defendants violated various provisions of the Telemarketing Sales Rule.

The FTC first claims Defendants violated section 5(a) of the FTC Act and section 310.3(a)(1)(ii) of the Telemarketing Sales Rule[1] by telling consumers the magazine subscriptions Defendants offered would cost only $3.83 per week for 48 months, but then billing consumers $49.81 per month for 16 months. The FTC position is that consumers are not made aware of the accelerated monthly charge when they agree to purchase the magazine subscriptions. In support of this allegation, at the time of the show cause hearing, the FTC presented affidavits from approximately twenty consumers, some of whom stated they believed the magazine subscriptions they were purchasing cost only $3.83 per week. These consumers indicated they were surprised when they were billed $49.81 per month.

[1]Section 310.3(a)(1)(ii) of the Telemarketing Sales Rule requires telemarketers to disclose all material restrictions, limitations, or conditions to purchase, receive, or use goods. 16 C.F.R. § 310.3(a)(1)(ii).

Evidence presented by Defendants at the show cause hearing raises questions about the accuracy of these consumers' recollections. Specifically, Defendants presented tape recordings of telephone calls from Defendants to about one-half of the consumers who submitted affidavits during which the consumers agreed to pay $49.81 per month for the magazine subscriptions. Ex. 505–514.[2] The evidence shows, in an initial sales call, consumers are told they can purchase 48-month subscriptions for "just 3.83 per week." Ex. 502. That price is repeated a second time in the initial sales call. Ex. 502. Once the consumer expresses interest in the magazines, they are given an order number and told they will be contacted again. Ex. 502. During the second sales call, the consumers are told the following:

> It is just $3.83 per week guaranteed to you for the full 48 months of service; now we would never bother you for $3.83 every single week for 48 months cause that would drive you nuts! And we certainly wouldn't ask you to pay for it all at once, so what we do for you is set you up on our P.D.S. Service and take the total of the 48 months and break that into 16 consecutive monthly payments of just $49.81. We do that each month but only for the first 16 months and then you have 32 remaining months of service where you don't have to make anymore payment.

Ex. 502. In the third and final sales call, the consumers are again told the cost of the magazine subscriptions will be $49.81 per month for 16 months. Ex. 502, 505–514.

[2] Exhibits submitted at the time of the show cause hearing as designated as Ex. [number].

The FTC produced additional evidence in opposition to Defendants' motion to dissolve the injunction regarding the sales calls. The consumer declarations do not show the FTC is likely to succeed on the merits of this claims. For example, three of the consumers do not remember whether they were told about the pricing before the final verification call. Dec. of Dover, ¶ 3; Dec. of Foote, ¶ 2; Dec. of Salazar, ¶ 2. The fourth consumer stated that she was told during the initial call about the payment amount of $49.81. Dec. of Joseph, ¶ 3.

The employee declarations submitted by the FTC are also unconvincing. Neither of the employees ever worked as a "closer," during the second stage when Defendants state they review the billing information. Dec. of Buller, ¶ 2; Dec. of Gould, ¶ 2. Further, Buller states that the closer script described the monthly payments. Dec. of Buller, ¶ 12. While Gould states that the closers did not disclose the monthly cost of $49.81, this contradicts the other evidence submitted both by the Defendants and the FTC. Dec. of Gould, ¶ 9.

Considering the overall net impression of all representations made during the three sales calls, the FTC has not presented sufficient evidence to show it is likely to succeed on its claim that Defendants misrepresented the price of the magazine subscriptions. Consumers are told on several occasions that the magazine subscriptions will cost $49.81 per month for 16 months and are asked to agree to paying this amount. Although the FTC has presented documentation of complaints from about 200 consumers, as well as affidavits from four dissatisfied customers, Defendants have sold approximately 36,000 magazine subscriptions in the last three years. Second Aff. of Bryce Eggleston ¶ 10. The small percentage of consumers who were confused by Defendants' marketing practices is not sufficient to demonstrate FTC is likely to succeed on this claim.

The FTC next claims Defendants' failure to disclose its no-cancellation policy violates section 5(a) of the FTC Act and section 310.3(a)(1)(iii) of the Telemarketing Sales Rule.[3] The claim is that the no-cancellation policy is undisclosed until consumers try to cancel their order, at which point the consumer is told it is too late. Defendants maintain they do not have a no-cancellation policy. Rather, according to Defendants, they allow consumers to cancel within three days of placing an order. Defendants further note this policy is disclosed to consumers during the second sales call.

At the show cause hearing, the FTC presented a tape recording of Defendants' telephone call to Marcia Walsh. During the telephone call, when Walsh is told the magazine subscriptions will cost $49.81 per month for 16

[3]Section 310.3(a)(1)(iii) requires clear and conspicuous disclosure of any no-cancellation or no-refund policy. 16 C.F.R. § 310.3(a)(1)(ii).

months, she states she thought the magazines were only $3.83 per week and cannot afford the accelerated rate. Walsh asks to cancel her order and is told that Defendants have a no-cancellation policy. Although this telephone call is disturbing, the FTC has not presented evidence that Defendants routinely apply a no-cancellation policy. As an initial matter, the employee who told Walsh she could not cancel her order was terminated for failing to follow Defendants' script. Second Aff. of Bryce Eggleston ¶ 5.

In addition, approximately one-half of the consumers who submitted affidavits to the FTC concerning their displeasure with Defendants' marketing practices were never charged for magazine subscriptions. See, e.g., Ex. 2, 8, 9, 12. Of the 250,000 consumers who moved on to the second telephone call in Defendants' sales process, approximately 184,000 have canceled before confirming their order during the third sales call. Second Aff. of Bryce Eggleston ¶¶ 7–10. Of the 66,000 consumers who moved on to the third sales call, approximately 24,000 decided not to place an order. Second Aff. of Bryce Eggleston ¶¶ 7–10. Of the 42,000 consumers who confirmed their order during the third sales call, approximately 6,000 canceled their order thereafter. Second Aff. of Bryce Eggleston ¶¶ 7–10. This evidence suggests Defendants do not have a no-cancellation policy. Based on the evidence presented by the FTC at the show cause hearing, it is not likely the FTC will succeed on its claim that Defendants have, but do not disclose, a no-cancellation policy.

The additional evidence submitted by the FTC also does not show a likelihood of success on this claim. The sample verification recordings and consumer declarations provided by the FTC are drawn from 330 complaints received by the FTC. Of these 330, the FTC has provided transcripts from 30 of the verification calls which it claims show the Defendants have not properly disclosed their cancellation policies. Even so, these calls represent a very small percentage of complaints, given the number of calls completed by the Defendants. The inference drawn by the FTC is weak. The four consumer declarations are drawn from these 30 calls. Two of these consumers state they were not clear on the cancellation policy during the initial call and were then later told they could not cancel. Dec. of Dover, ¶ 3; Dec. of Joseph, ¶ 4. Two of the consumers do not remember any of the details from the calls prior to the final verification call and do not state whether or not they were informed of any cancellation policy. Dec. of Foote, ¶ 2; Dec. of Salazar ¶ 2. Defendants state that their review of the 30 recordings showed that several were not in compliance with company policies, including three of the four consumers who filed declarations, and these accounts have been cancelled. Second Aff. of L. Lavergne, ¶ 12.

The FTC also randomly selected 200 names from Defendants' customer list and found that in 20 of them (10%), the consumer asked about cancellation and received the scripted response regarding cancellation. Based on this sample, an economist estimated that 6%-15% of consumers asked about cancellation. However, this merely indicates the number of consumers who may have asked about cancellation, and not the number of time Defendants may have committed a violation of the FTC Act and Telemarketing Sales Rule. Again, while the inference may have some foundation in the proof, it is still weak.

In a few instances, Defendants'callers have not followed proper policy with consumers regarding cancellation policies. The existence of some problems does not demonstrate the FTC is likely to succeed on the merits of this claim. Nor, in this case, does it establish grounds to infer a pattern of conduct.

The FTC further alleges Defendants violated section 310.3(a)(1)(iv) of the Telemarketing Sales Rule. This section requires telemarketers to disclose that no purchase is necessary to win a prize or that any purchase will not increase a person's chances of winning a prize. 16 C.F.R. § 310.3(a)(1)(iv). The FTC claims Defendants failed to disclose this information when they told consumers about their sweepstakes. According to Defendants' script, they tell consumers their name has been entered in a sweepstakes and that the odds of winning are determined by the number of entries. Ex. 502. Several of the consumer affidavits submitted by the FTC confirm Defendants' use of this portion of the script. See, e.g., Ex. 2 ("[The caller] started out by saying that I had been automatically entered in a million dollar sweepstakes."), 5, 8, 13, 15, 18. But see Ex. 4, 11. This disclosure appears to comply with the requirements of section 310.3(a)(1)(iv), and thus, the FTC has not shown a likelihood of success on this claim.

The FTC finally alleges Defendants violated section 310.4(a)(6) of the Telemarketing Sales Rule, which prohibits a telemarketer from causing billing information to be submitted for payment without the express informed consent of the customer. 16 C.F.R. § 310.4(a)(6). The FTC asserts Defendants tell some consumers they need their credit card number to verify the consumer's eligibility and then charge the card without the consumer's express consent. Defendants acknowledge they ask consumers for their credit card number to verify that the consumer can afford the magazine subscriptions. Defendants note, however, the card is not charged unless the consumer gives oral consent. Several of the consumers who submitted affidavits to the FTC indicated Defendants requested their credit card number for verification. See, e.g., Ex. 1, 13, 15. Nevertheless, the evidence submitted by Defendants shows either the consumer's credit card was not charged or the consumer later orally agreed to purchase the magazine subscriptions. Ex. 1, 13, 15.

Additionally, the four declarations from consumers fail to show that the consumers did not give consent to be billed. The consumer declarations show that the consumers either did not remember whether they were told the price during the initial call, or remember being told about the price. All of them subsequently agreed during the verification call to purchase the subscription. Dec. of Dover, ¶ 5; Dec. of Foote, ¶ 3; Dec. of Salazar, ¶ 3; Dec. of Joseph, ¶ 4. Based on all this evidence, the FTC has not demonstrated a likelihood of success on this claim.

The stipulated preliminary injunction also included a freeze of certain assets owned by the Defendants. An asset freeze is appropriate if the FTC demonstrates both (1) a likelihood of success on the merits and (2) a possibility of dissipation of assets. Fed. Sav. & Loan Inc. Corp., 868 F.2d at 1097. Because the FTC has not met the first requirement by showing it is likely to succeed on the merits, the asset freeze must also be dissolved.

IV. Conclusion

IT IS HEREBY ORDERED that Defendants' Motion to Dissolve Stipulated Preliminary Injunction (dkt #74) is GRANTED. The Stipulated Preliminary Injunction and asset freeze are dissolved.

DATED this 4th day of February, 2009.

DONALD W. MOLLOY, DISTRICT JUDGE
UNITED STATES DISTRICT COURT