

An injunction and asset freeze should issue because the State has shown a substantial likelihood of ultimate success on the merits of its claims and has demonstrated that the issuance of an injunction would be in the public interest.

FACTUAL BACKGROUND

Attachment A to this Memorandum contains the same facts presented in the State's Complaint with further citations to affidavits, the Defendants' advertisements, the Defendants' contractual and sales materials, and other materials.

ARGUMENT

Because the State has shown a substantial likelihood of success on the merits of its action alleging violations of the Prizes Offered as Inducements statute and the Tennessee Consumer Protection Act and has demonstrated that an injunction and asset freeze would be in the public interest, a statutory preliminary injunction, and asset freeze should issue.

I. Legal Standard for a Statutory Preliminary Injunction

Apart from the Attorney General's broad statutory and common law authority,⁴ the TCPA authorizes the Attorney General to seek temporary injunctions "whenever the [State] has reason to believe that any person has engaged in, *is engaging in* . . . any act or practice declared unlawful by this part and that proceedings would be in the public interest . . ." Tenn. Code Ann. § 47-18-108(a)(1) (emphasis added).

Notably, the triggering mechanism for the Attorney General's temporary injunction authority under the TCPA is explicitly tied to statutory violations. Consistent with this statutory provision, the wealth of case law states that where a law enforcement authority acts as a statutory guardian charged with safeguarding the public interest, the standard for a temporary injunction is

⁴ See, e.g., Tenn. Code Ann. § 8-6-109(b)(1); *State ex rel. Inman v. Brock*, 622 S.W.2d 36, 41 (Tenn. 1981); *State v. Heath*, 806 S.W.2d 535, 537 (Tenn. Ct. App. 1991).

different than the standard for a traditional equitable injunction and turns largely on violations of law.⁵

“The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits.” *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). The Sixth Circuit has slightly expanded the traditional two-part test based on equitable principles into a four-factor test, adding inquiries into whether substantial harm will be posed to others and whether the public interest will be served by the issuance of the injunction.⁶

The U. S. Supreme Court has emphasized that when a court is called upon to enforce a statutory injunction, its reliance upon the traditional practices of equity must be “conditioned by the necessities of the public interest which Congress has sought to protect.” *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944). “The standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief.”⁷ The Sixth Circuit has echoed this standard and expounded on it by stating, “Thus proof of irreparable harm and inadequacy of legal remedies need not be shown.”⁸

Because irreparable harm and injury need not be shown for a statutory injunction, the central inquiries are whether there is a substantial likelihood of ultimate success on the merits

⁵ *FTC v. Nat’l Testing Servs., LLC*, No. 3:05-0613, 2005 WL 2000634 (M.D. Tenn. Aug. 18, 2005); *Microsoft Corp. v. Action Software*, 136 F.Supp. 2d 735, 738-39 (N.D. Ohio 2001).

⁶ *Rock and Roll Hall of Fame and Museum, Inc. v. Gentile Prod.*, 134 F.3d 749, 753 (6th Cir. 1998).

⁷ *Bowles*, 321 U.S. at 331.

⁸ *SEC v. Youmans*, 729 F.2d 413, 415 (6th Cir. 1984) (concerning statutory injunction under the Securities Act of 1933); See also, *FTC v. Nat’l Testing Servs., LLC*, 2005 WL 2000634, at *3 (internal citations omitted). *Microsoft Corp.*, 136 F.Supp.2d 738-39 (“Because an injunction against infringing activity is authorized by statute, however, the Court need not consider these equitable factors [including irreparable harm]. Simply fulfilling the requirements of the statute or, in other words, fulfilling the first factor for an injunction to issue—showing a strong likelihood of success on the merits—is all that is needed for the Court to issue an injunction.”); *SKS Merch., LLC v. Barry*, 233 F.Supp.2d 841, 845 (E.D. Ky. 2002); *FTC v. Int’l Computer Concepts, Inc.*, No. 594CV1678, 1994 WL 730144 at *12 (N.D. Ohio Oct. 24, 1994); *United States v. City of Painsville*, 644 F.2d 1186, 1194 (6th Cir. 1981) (upholding issuance of permanent injunction for violation of Clean Air Act without evidentiary hearing assessing irreparable harm and inadequate remedy at law).

and whether an injunction would be in the public interest. In statutory injunction cases involving continuing violations, the question as to whether an injunction is in the public interest collapses into an inquiry as to the success on the merits because there can be no interest, private, public, or otherwise granting an individual the ability to violate the law. When the Court balances the hardships of public interest against a private interest, the public interest receives greater weight.⁹ In such cases, harm to the public interest is presumed.¹⁰

Moreover, asset freezes are appropriate to ensure availability of funds to satisfy any final order granting restitution to defrauded consumers upon a showing of pervasive consumer protection violations.¹¹ As with the FTC Act, courts under the TCPA are authorized to “make such orders or render such judgments as may be necessary” to restore an ascertainable loss.¹²

II. The Defendants Have Violated the “Prizes Offered as Inducements” Statute

The Defendants represent that consumers stand to receive select “free” merchandise, including digital cameras, color printers, LCD televisions, and other merchandise in conjunction with their offers for other “big ticket” merchandise, such as computers, electronics, and other products without clearly and conspicuously disclosing the information required by Tennessee’s “Prizes Offered as Inducements” statute. These violative advertisements continue to be published, broadcast, aired, or otherwise available to Tennesseans.¹³

The Legislature designed the statute to give consumers enough information to determine for themselves if the prize makes the overarching offer a good deal or not. This information is deemed so important that failure to make such disclosures makes the offer “not valid and binding

⁹ *National Testing Servs., Inc.*, 2005 WL 2000634, at *3.

¹⁰ *National Testing Servs., Inc.*, 2005 WL 2000634, at *3.

¹¹ *FTC v. Intn’l Computer Concepts*, No. 5:94CV1678, 1994 WL 730144, at *16 (N.D. Ohio Oct. 24, 1994) (citing *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431 (11th Cir. 1984)).

¹² Tenn. Code Ann. § 47-18-108(b)(1).

¹³ See, e.g., Ex. 67 to Prelim. Inj. Mot., Aff. of Donald Kinser (received violative advertisement on Oct. 31, 2008); See also, Ex. 15 to Prelim. Inj. Mot. (received violative advertisement on October 17, 2008).

on the consumer” pursuant to Tenn. Code Ann. § 47-18-120(d)(2). The Defendants’ advertisements, in particular, have violated and continue to violate the statute and the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101 *et seq.* on their face.

Application of Tennessee’s “Prizes Offered as Inducements” Statute

Based on the facts presented, it is clear that Tennessee’s “Prizes Offered as Inducements” statute applies. The “Prizes Offered as Inducements” statute is broadly written to apply to any person engaged in trade or commerce who, directly or indirectly, offers a consumer or other person or leads a consumer or person to believe that the consumer or person will or may receive any prize as an inducement to purchase a good, service, or other product or otherwise incur a monetary obligation. Tenn. Code Ann. § 47-18-120(b)(1). “Prize” is broadly defined as a “prize, gift, award, incentive promotion or anything of value.” Tenn. Code Ann. § 47-18-120(a)(3). The digital cameras, color printers, LCD televisions, and other merchandise the Defendants offer along with their computers and other electronics are certainly “things of value,” are incentive offers, and have also been described in the Defendants’ contractual documents as “promotional items.”¹⁴ Additionally, the exceptions found within the “Prizes Offered as Inducements” statute do not cover the Defendants’ conduct.¹⁵

Based on the above, it is clear that Tennessee’s “Prizes Offered as Inducements” statute applies and that the Defendants are obligated to disclose the information required by the statute in the manner required by the statute.

¹⁴ See, e.g., Attach. A, paras. 68-72.

¹⁵ The exceptions are limited to “advertising and promotional plans of persons covered by the provisions of the Tennessee Time-Share Act of 1981 . . .” and “[r]etail promotions which offer savings on consumer goods, including ‘one-cent sales,’ ‘two-for-the-price-of-one sales,’ or a manufacturer’s ‘cents-off’ coupons, when the consumer accepts the offer on-site.” Tenn. Code Ann. § 47-18-120(f)(1)–(2).

Under the statute, the Defendants are required in an initial offer¹⁶ to:

[C]learly and conspicuously state the name and street address of the person making the offer [Tenn. Code Ann. § 47-18-120(c)(1)(A)];

[C]learly and conspicuously disclose the approximate verifiable retail price¹⁷ of *each* prize . . . or the price of any product offered for sale through the promotional program in a position immediately adjacent to the item when the initial offer is in writing [Tenn. Code Ann. § 47-18-120(c)(1)(D) (emphasis added)];

[C]learly and conspicuously disclose the approximate verifiable retail price of *each* prize or product offered for sale through the promotional program when the initial offer is verbal [Tenn. Code Ann. § 47-18-120(c)(1)(E) (emphasis added)];

[G]ive the recipient a general description of the types and categories of restrictions, qualifications, or other conditions, that must be satisfied before the consumer or person is entitled to receive or use the prize . . . or product or service offered [Tenn. Code Ann. § 47-18-120(c)(1)(H)];

[G]ive the recipient an approximate total of all costs, fees or other monetary obligations that must be satisfied before the consumer or person is entitled to receive or use the prize . . . or product or service offered [Tenn. Code Ann. § 47-18-120(c)(1)(F)].

The Defendants' advertisements do not clearly and conspicuously state the name and street address of the person making the offer,¹⁸ the approximate verifiable retail price of each prize or product offered for sale in either written or verbal offers,¹⁹ or give the recipient an

16 Tenn. Code Ann. § 47-18-120(a)(2) defines "initial offer" as "the first contact with the consumer or person, whether verbally or in writing."

17 Tenn. Code Ann. § 47-18-120(c)(1)(D) defines "approximate verifiable retail price" as the "price at which the person offering the item can substantiate that a substantial number of these items have been sold at retail by another person or, in the event such substantiation is unavailable, an amount equal to no more than three (3) times the amount actually paid by the sponsor or promoter for the item."

18 See Attach. A, paras. 103-04; See generally, Collective Ex. 32 to Prelim. Inj. Mot. (Review of advertisements shows that besides postcard mailers, none of the Defendants' advertisements disclose street address except BH-TV3, BH-TV5, and BH-TV9. Street address in BH-TV3, BH-TV5, and BH-TV9 is shown in small print for less than five seconds.)

19 See Attach. A, paras. 91-102. See generally, Collective Ex. 32 to Prelim. Inj. Mot. (only advertisements that list a value for items referenced as "free" are BH-PR4, BH-PR6, BH-PR9, BH-PR13, BH-PR14, BH-PR15, BH-PR16, BH-PR20, BH-PR24, BH-PR25, BH-PR26, BH-PR27, BH-RA17, and BH-RA47, but these list a value for a group of items and not each item advertised as "free.")

approximate total of all costs, fees or other monetary obligations that must be satisfied before the person is entitled to receive the product.²⁰

Further, the Defendants' advertisements do not give consumers a general description of the types and categories of restrictions, qualifications, or other conditions, that must be satisfied before the consumer or person is entitled to receive or use the prize or product or service offered.²¹ If the Defendants qualify receipt of the "free" items in their advertisements, they state "with paid purchase."²² However, in their current layaway agreement, Defendants generically state that the consumer must "pay as agreed" to receive the items despite the fact that the current layaway sales order form qualifies "free" items only by the phrase "with paid order."²³

The statement "with paid purchase" also misrepresents the terms of the Defendants' promotional offer. Under the advertisement language, a consumer could tender full payment while making one untimely payment, and receive the "free" item. However, under the contractual provision this consumer would not receive the item, even assuming "paid as agreed" can be stretched to mean all payments being made on-time and in full. This violates Tenn. Code Ann. § 47-18-120(c)(3)(A) because it misrepresents the terms and conditions of the Defendants' promotional offer.

Aside from the adequacy and accuracy of these disclosures, conditioning the eligibility of consumers on making payments as agreed, is also *per se* unlawful under Tenn. Code Ann. § 47-18-120(d)(1).²⁴ Moreover, the Defendants state "with paid purchase" in their advertisements, but

20 See Attach. A, paras. 105-21. See generally, Collective Ex. 32 to Prelim. Inj. Mot. (The only advertisements that reference a price of the product offered are BH-TV3, BH-TV5 and BH-TV9. The reference to price is buried in the middle of a fine-print disclosure box that is flashed on the screen for less than five seconds).

21 See Attach. A, paras. 122-62. See generally, Collective Ex. 32 to Prelim. Inj. Mot.

22 See Attach. A, paras. 125-27.

23 Ex. 51 to Prelim. Inj. Mot., Ex. 10 to Prelim. Inj. Mot, Aff. of Angela Atkins, Attach. A Sales Order Form.

24 Tenn. Code Ann. § 47-18-120(d)(1) states, "It is unlawful to require the consumer or person to incur any monetary obligation . . . to continue to remain eligible to receive any prize. . ."

make receipt of the free items conditioned on the entire account not going into default in their current Retail Sales Installment Contract. Under the Retail Sales Installment Contract, the default term is sweeping and can be invoked for any technical violation of the agreement.²⁵ This violates Tenn. Code Ann. § 47-18-120(c)(4)(A) because it contradicts the Defendants' advertisements, which refer only to "with paid purchase."

Under the statute, the Defendants are also required in an initial offer or, at a minimum before the offer can be accepted, to clearly and conspicuously state verbally, or in writing, and upon request, in writing, the following:

A general description of the types and categories of restrictions, qualifications, or other conditions, that must be satisfied before the consumer or person is entitled to receive or use the prize . . . or product or service offered, including . . . any other conditions . . . such as financial qualifications; and all other material rules, terms or restrictions governing an offer that is an inducement to purchase a good, service or other product or to otherwise incur a monetary obligation [Tenn. Code Ann. § 47-18-120(c)(2)(A)(iv) and (v)]; and

The refund, exchange or return policies in regard to any offer that is an inducement to purchase a good, service, or other product or otherwise incur a monetary obligation. [Tenn. Code Ann. § 47-18-120(c)(2)(B)].

The Defendants do not clearly and conspicuously disclose the material rules, terms or restrictions associated with their offer, including the specific computer model²⁶ and whether the prize only applies with offers for certain product models.²⁷ The Defendants do not clearly and conspicuously disclose their no, limited, or store-credit refund policy in their advertisements or other materials.²⁸

²⁵ See Attach. A, at paras. 323-25; See also, Ex. 8 to Prelim. Inj. Mot, Aff. of Jessica King, Attach. A.

²⁶ See, e.g., Ex. 68 to Prelim. Inj. Mot. (Listing product generically as "Desktop 2005E with Intel Celeron Processor, 2.5GHz, 128 MB SDRAM Memory, 40 Gig Ultra Hard Drive, 17" Color Monitor, and Stereo Speakers).

²⁷ See Attach. A, paras. 79-91.

²⁸ See Attach. A, paras. 209-48.

The Defendants' failure to make even one of the above disclosures makes acceptance of the offer not valid and binding on a given consumer.²⁹

III. The Defendants Have Violated the TCPA

The TCPA is Tennessee's version of a "Little FTC Act."³⁰ The TCPA has two main operative provisions: § 104(a) prohibits "[u]nfair or deceptive acts or practices affecting the conduct of any trade or commerce,"³¹ and § 104(b) develops categories of forty-four prohibited acts and practices which constitute *per se* deception under the Act.³²

The TCPA was not intended to be a codification of the common law and its scope is much broader than that of common-law fraud.³³

To the contrary, one of the express purposes of the TCPA is to provide additional supplementary state law remedies to consumers victimized by unfair or deceptive business acts or practices that were committed in Tennessee in whole or in part.³⁴

Under the TCPA, recovery can be obtained without having to meet the burden of proof that is required in a common law fraud case, and the numerous defenses that are available to a defendant in a common law fraud case are simply not available to a defendant in a TCPA case.³⁵ An act or practice can be deceptive even if there is no intent to deceive,³⁶ knowledge of the deception,³⁷ or reliance.³⁸ Negligent misrepresentations can violate the statute³⁹ and the State

²⁹ Tenn. Code Ann. § 47-18-120(d)(2).

³⁰ "The little FTC Acts were so designated because of their similarity to the provision of the Federal Trade Commission Act that outlaws unfair or deceptive trade practices." *Tucker v. Sierra Builders, Inc.*, 180 S.W.3d 109, 114 (Tenn. Ct. App. 2005). See also, Tenn. Code Ann. § 47-18-115 requiring TCPA to be construed according to federal court and FTC interpretations of §5 of the Federal Trade Commission Act, which prohibits unfair and deceptive commercial acts or practices.

³¹ Tenn. Code Ann. § 47-18-104(a).

³² Tenn. Code Ann. § 47-18-104(b).

³³ *Tucker*, 180 S.W.3d 109 at 115.

³⁴ *Id.* (citing Tenn. Code Ann. §§ 47-18-102(2) and (4)).

³⁵ *Tucker*, 180 S.W.3d at 115 (internal citations omitted).

³⁶ *Smith v. Scott Lewis Chevrolet, Inc.*, 843 S.W.2d 9, 12-13 (Tenn. Ct. App. 1992). *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934); *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 925 (6th Cir. 1968).

³⁷ *Smith*, 843 S.W.2d at 12-13.

³⁸ *Harvey v. Ford Motor Credit Co.*, No. 03A01-9807-CV-00235, 1999 WL 486894, at *2 (Tenn. Ct. App. July 13,

does not need to prove that any consumer was actually misled or deceived in order to prove that a violation of law has occurred.⁴⁰

Aside from the categories which identify conduct as *per se* deceptive, the TCPA does not define “unfair” or “deceptive.”⁴¹ In order to give the broadest scope possible to the protections embodied in the statute and in order to prevent ease of evasion because of overly meticulous definitions, consumer protection laws like the TCPA typically make no attempt to define “unfair” or “deceptive,” but merely declare that such acts or practices are unlawful.⁴²

Section 115 states that the TCPA is to be interpreted “consistently with the interpretations given by the Federal Trade Commission and the federal courts pursuant to §5(A)(1) of the Federal Trade Commission Act.”⁴³ Based on interpretations of deception within the FTC Act, the Tennessee Court of Appeals in *Tucker v. Sierra Builders*⁴⁴ defined deception as conduct that “causes or tends to cause a consumer to believe what is false, or that misleads or tends to mislead a consumer as to a matter of fact.”⁴⁵ Thus, the State need not prove that any consumer was actually misled or deceived - only that defendants’ conduct has a “tendency” to mislead or deceive.⁴⁶ In addition, “The failure to disclose material information may cause an advertisement to be deceptive, even if it does not state false facts.” *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1154 (9th Cir. 1984). “A claim is considered material if it ‘involves information important to consumers and, hence, [is] likely to affect their choice of, or conduct regarding a product.’ *FTC*

1999).

³⁹ *Smith*, 843 S.W.2d at 13.

⁴⁰ See generally Tenn. Code Ann. § 47-18-104 and Tenn. Code Ann. § 47-18-108.

⁴¹ See Tenn. Code Ann. § 47-18-103. See also *Tucker*, 180 S.W.3d at 115.

⁴² *Tucker*, 180 S.W.3d at 116.

⁴³ Tenn. Code Ann. § 47-18-115. See also *Tucker*, 180 S.W.3d at 115; *Ganzevoort v. Russell*, 949 S.W.2d 293, 298 (Tenn. 1997).

⁴⁴ *Tucker v. Sierra Builders*, 180 S.W.3d 109 (Tenn. Ct. App. 2005).

⁴⁵ *Tucker*, 180 S.W.3d at 116; See also, *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 40 n. 2 (D.C. Cir. 1985).

⁴⁶ *Tucker*, 180 S.W.3d at 116.

v. Five-Star Auto Club, Inc., 97 F.Supp.2d 502, 529 (S.D.N.Y. 2000) (internal citations omitted).

The concept of unfairness is even broader than the concept of deceptiveness, and it applies to various abusive business practices that are not necessarily deceptive.⁴⁷ Tennessee courts have followed the FTC policy statement on unfairness⁴⁸ and defined unfairness as an act or practice that “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.”⁴⁹

Consumer injury will be deemed substantial “if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers.”⁵⁰ Substantial injury “must be more than trivial or speculative.”⁵¹ “Consumers cannot reasonably avoid injury when a merchant’s sales practices unreasonably create or take advantage of an obstacle to the free exercise of consumer decision-making.”⁵² “Practices that unreasonably interfere with consumer decision-making include (1) withholding important information from consumers, (2) overt coercion, or (3) exercising undue influence over a highly susceptible class of consumers.”⁵³

*Falsely Representing that Select “Free” Merchandise
Would Be Sent with All Orders Is Deceptive*

The Defendants have represented that select free merchandise including digital cameras, LCD televisions, and color printers will be provided with all orders when these prizes are only

⁴⁷ *Tucker*, 180 S.W.3d at 116.

⁴⁸ 15 U.S.C. § 45(n).

⁴⁹ *Tucker*, 180 S.W.3d at 116 (quoting 15 U.S.C. § 45(n)).

⁵⁰ *Tucker*, 180 S.W.3d at 117 (internal citations omitted).

⁵¹ *Tucker*, 180 S.W.3d at 117 (internal citations omitted).

⁵² *Tucker*, 180 S.W.3d at 117 (internal citations omitted).

⁵³ *Tucker*, 180 S.W.3d at 117 (internal citations omitted).

offered with more expensive computer or electronics packages.⁵⁴ This is deceptive because it likely misleads consumers as to a matter of fact, namely that the free items are included with all orders.

Representing Merchandise as “Free” But Charging Shipping and Handling

The Defendants represent that select merchandise is “free,” but, without prior disclosure, charge consumers for the shipping of this merchandise.⁵⁵ Without a disclosure this is deceptive because it likely misleads consumers as to a matter of fact, namely the amount the consumer will pay for the “free” item.

*Affirmatively Misrepresenting the Consistency of Contractual Terms
Between Verbal and Written Contracts Is Deceptive*

The Defendants represent that the same contractual terms are included in the Defendants’ verbal sales call and on the Defendants’ written documents with statements like “This form summarizes your purchase,” when this is not the case.⁵⁶ This is deceptive because it likely misleads consumers as to a matter of fact, namely that the written documents that are supposed to follow the sales call contain the same terms discussed on the sales call.

Falsely Representing that the Defendants’ Financing Agreement Was Required Is Deceptive

The Defendants have represented that their financing agreement was required, when, by the Defendants own documents, this was not true.⁵⁷ This is deceptive because it likely misleads consumers as to a matter of fact, namely that the financing agreement, which significantly increased the total amount the consumer was charged, was required to receive a computer. The Defendants also used generic terms and instructed consumers to return the “paperwork,”

⁵⁴ See Attach. A, paras. 79-91.

⁵⁵ See Attach. A, para. 78.

⁵⁶ See Attach. A, paras. 170-201.

⁵⁷ See Attach. A, paras. 166-169.

“welcome packages,” “welcome kits,” or terms or phrases of similar import that implied that all of the Defendants’ documents, including the financing agreement, had to be signed to receive a computer.⁵⁸ Such representations are deceptive because they likely mislead consumers as to a matter of fact, namely which documents are required as part of the offer.

Use of Sweeping Terms Such As “There’s No Catch and No Strings Attached” Is Deceptive

The Defendants have used sweeping terms, such as “There’s No Catch and No Strings Attached” to describe their offer, when the Defendants offers are subject to numerous restrictions and conditions including non-refundable payments, receipt of the product after a year,⁵⁹ and are subject to an acceleration of all payments and the highest interest rate allowed by law or 24% APR for any violation no matter how trivial.⁶⁰ The Defendants’ use of such terms is deceptive because they likely mislead consumers as to a matter of fact, namely that their offers are not subject to the numerous restrictions and conditions that they actually are.

The Defendants’ Failure to Clearly and Conspicuously Disclose the Defendants’ No or Restricted Refund Policy Is Deceptive

The Defendants represent that weekly payments are required to receive computers, but do not clearly and conspicuously disclose that these payments are non-refundable.⁶¹ The fact that a consumer may make payments amounting to hundreds if not thousands of dollars that he will not get back or that he has to apply towards items, most of which, cost as much as, if not more than, the original purchase, would likely affect the consumer’s decision to purchase a product from the Defendants, particularly for those consumers who are on a fixed or limited income.

58 See Attach. A, paras. 174-75; 187-89.

59 See Attach. A, paras. 202-08.

60 See Attach. A, paras. 313-25.

61 See Attach. A, paras. 209-48.

The Defendants have also failed to clearly and conspicuously disclose that an activation payment is non-refundable, and in other cases, have represented, albeit not clearly and conspicuously, that consumers stand to forfeit a particular fee, when that fee does not include the forfeiture of the consumer's activation payment.⁶² This is deceptive because it likely misleads consumers as to a matter of fact, namely, the consumer's ability to recover the activation payment or the total amount forfeited if the consumer cancels their order.

The Defendants have also represented, albeit not clearly and conspicuously, that consumers can apply their payments towards store credit on a large selection of merchandise at www.bluehippo.com.⁶³ Until recently, the Defendants only sold desktops, laptops, monitors, and phone cards in \$100 increments on their website www.bluehippo.com.⁶⁴ Aside from adequacy of the disclosure, the representation that consumers can apply their payments towards store credit on a large selection of merchandise is deceptive because it likely misleads consumers as to a matter of fact. For the consumers who do not already possess a computer,⁶⁵ the store credit is largely illusory as it could only be applied to another, most likely, more expensive computer, a computer monitor for the computer that they do not likely possess, a plasma screen television, which is also likely to be more expensive than their original purchase, or a phone card in \$100 increments. The fact that www.bluehippo.com only recently contains more items to purchase does not foreclose injunctive relief for this provision. Defendants' past misconduct "gives rise to the inference that there is a reasonable likelihood of future violations."⁶⁶

⁶² See Attach. A, paras. 116-18, 224-27.

⁶³ See Attach. A, paras. 244-47.

⁶⁴ See Attach. A, paras. 247-48.

⁶⁵ Collect. Ex. 32 to Prelim. Inj. Mot., BH-RA12 ("If your home doesn't have a computer . . . Again this is a special program for homes in need of a computer.")

⁶⁶ See, e.g., *SEC v. R. J. Allen & Assoc., Inc.*, 386 F.Supp. 866, 877 (S.D. Fla. 1974).

Misrepresenting Shipping Dates to Consumers Is Deceptive

The Defendants have misrepresented the date and time frame consumers will receive their computers and other products.⁶⁷ In some cases, the Defendants have used advertisements with explicit references to times and seasons, such as “Perfect for Back to School,” and “’Tis the Season for No Credit Checks,” which imply that the consumer will receive the product during that time or season.⁶⁸ The Defendants misrepresentations as to shipping dates are deceptive because they likely mislead consumers as to a matter of fact, namely the time frame that consumers will receive the products that they order.

Misrepresenting the Source of the Products the Defendants Offer

The Defendants’ advertisements and other promotional materials have misrepresented or caused confusion as to the source of the goods offered.⁶⁹ The Defendants’ misrepresentations are deceptive because they likely mislead consumers as to a matter of fact, namely that the products the Defendants offer originate with the Defendants and are possessed and processed by the Defendants. This information is important to consumers because the source of the products impacts the price paid, the date that the consumer stands to receive their product, and the potential applicability of warranties. The Defendants’ reference to their plan as a “layaway plan” is also deceptive, because they do not set aside the computers and other products they offer to consumers or cause others to set aside a specific computer or other product at the time the order is made.⁷⁰ This is deceptive because it likely misleads consumers as to a matter of fact, namely that their computer is set aside and reserved at the time the order is placed.

⁶⁷ See Attach. A, paras. 249-70.

⁶⁸ See Attach. A, paras. 252-55.

⁶⁹ See Attach. A, paras. 271-81.

⁷⁰ See Attach. A, paras. 272-73.

Falsely Representing “No Credit Checks”

The Defendants repeatedly state “no credit checks” in their advertisements, but require consumers to submit to credit checks in their contractual documents.⁷¹ This is deceptive because it likely misleads consumers as to a matter of fact, namely that “no credit checks” are performed or required.

Misrepresenting the Nature of the Defendants’ “Guaranteed Approval” Claim Is Deceptive

The Defendants have represented that every consumer is guaranteed to be approved, but have included language in many of their contractual documents to give the Defendants the discretion to reject applicants or to place previously undisclosed requirements on approval.⁷² The Defendants have also made statements indicating that “all the consumer needs” is, for example, an active checking account and a home phone, yet require that consumers produce additional information not disclosed, such as verification of employment, a driver’s license, and a social security number to be approved.⁷³ This is deceptive because it likely misleads consumers as to a matter of fact, namely that consumers will be approved or the conditions to be approved for the Defendants’ offer.

Using Unlawful Forum Selection and Choice of Law Clause Is Deceptive

Aside from the Defendants’ arbitration clause, which the State does not challenge through its action, but which the Defendants cannot raise as a third-party defense in this civil law enforcement action,⁷⁴ the Defendants purport to restrict the forum and applicable law to any dispute arising under the contract.⁷⁵ This violates Tenn. Code Ann. § 47-18-113(b). The Defendants’ forum selection and choice of law clauses are *per se* deceptive under Tenn. Code

⁷¹ See Attach. A., paras. 282-89.

⁷² See Attach. A, paras. 290-312.

⁷³ See Attach. A, paras. 299-309.

⁷⁴ *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297-98 (2002).

⁷⁵ See Attach. A, paras. 326-31.

Ann. § 47-18-104(b)(12) because they represent that a consumer transaction involves rights and remedies that are prohibited by law.

Misrepresenting the Nature of the Defendants' Rebate Program Is Deceptive

During the time that BlueHippo Funding used an “open-end” credit business model, BlueHippo Funding represented that rebates would be applied to a specific purchase, yet stated in its contractual documents that the rebate would be applied as a credit toward the consumer’s open-end account to be applied to future purchases.⁷⁶ Elsewhere, the Defendants have represented that the consumer stands to receive the monetary rebate before the time frame inconspicuously stated in the Defendants’ contractual documents.⁷⁷ This is deceptive because it likely misleads consumers as to a matter of fact, namely when the consumer stands to receive the rebate and, in the instance of the open-end credit model whether the rebate will be applied to a specific purchase or a future purchase. The Defendants also fail to clearly and conspicuously disclose material terms associated with their rebate program, chiefly that the rebate is conditioned on the account not going into default,⁷⁸ which can be triggered by any violation of the agreement no matter how trivial.⁷⁹ This is information that would likely affect a consumer’s choice to purchase the product because without the rebate, the consumer’s purchase price can be increased by 15%-40%.⁸⁰

Debiting Consumer Checking Accounts Counter to the Defendants' Purported Verbal and Written Agreements Is Unfair

The Defendants have debited consumer checking accounts on times and dates that were inconsistent with the verbal and written agreement the consumer signed with the Defendants. In

⁷⁶ See Attach. A, paras. 335-39.

⁷⁷ See Attach. A, paras. 340-46.

⁷⁸ See Attach. A, paras. 348-50. Ex. 55 to Mot. for Prelim. Inj.

⁷⁹ See Attach. A, paras. 313-25.

⁸⁰ See Attach. A, para. 334. See also, Ex. 68 to Mot. for Prelim. Inj.

some cases, this has caused consumers to have deficient funds and has subjected them to overdraft charges from their banks and the Defendants.⁸¹ This practice is unfair because it causes monetary injury to a large number of consumers, particularly for those who are on fixed or limited incomes, which the consumers cannot avoid because the Defendants have withheld important information, namely the date that they will deduct funds.

Failing to Deliver the Product or Free Item as Advertised Is Deceptive

The Defendants have failed to deliver the product or free item as advertised to consumers.⁸² In addition, consumers have made payments well-over the contract price and still not received the product or free merchandise.⁸³ This is deceptive because is likely misleads consumers as to a matter of fact, namely that the consumer will receive the item with the features represented or after the consumer has made the requisite number of payments.

Failing to Provide Consumers a Meaningful Time to Ask Questions Is Unfair

The Defendants' sales script directs consumers to ask any questions at meaningless times - either after the consumer has assented to the contract or prior to the recorded portion of the sales call in which new terms are disclosed, albeit inadequately, for the first time.⁸⁴ This practice is unfair because it causes monetary injury to a large number of consumers in that these consumers are systematically asked to assent to a purportedly legally binding agreement without being able to ask questions about all of the terms at a meaningful time. Consumers cannot avoid this injury because in practice the only time the consumer can ask questions about all of the terms of the Defendants' offer, he or she would have to have assented to the contract.

81 See Attach. A, paras. 351-59.

82 See, e.g., Ex. 7 to Prelim. Inj. Mot, Aff. of Billy Shane Bowling. (Consumer ordered a computer with three disc drives including a floppy disc drive, but received a computer with a CD-ROM drive only.)

83 See, e.g. Ex. 8 to Prelim. Inj. Mot., Aff. of Jessica King (Consumer made over \$3,000 worth of payments when product's contract price was for around \$1,800, but has not received computer or free merchandise).

84 See Attach. A, paras. 360-63.

Selectively Highlighting the More Attractive Term of One Offer Is Deceptive

The Defendants selectively highlight the more attractive term of their respective “layaway” and “financing” offers without adequately disclosing to which offer the term applies. For example, in the “Layaway” business model, the Defendants highlighted the shorter time frame the consumer stands to receive their computer under the financing offer and highlighted the lower total price under the “layaway” offer without adequately disclosing which term to which the offer applied.⁸⁵ This is deceptive because it likely misleads consumers as to a matter of fact, namely the terms of the offer being extended.

Failing to Disclose Material Terms of the Contract and Its Default Provision Is Deceptive

The Defendants have consistently included a sweeping default provision that purports to accelerate all outstanding amounts owed and raise the interest rate to 24% APR or the highest interest rate allowed by law, whichever is higher, for even technical violations of the contract.⁸⁶ The default provision is not disclosed in any prior advertisement or sales call.⁸⁷ Because it can be invoked to drastically increase the amount the consumer owes, it, in effect, makes every term of the agreement that the consumer could violate, a material term that would affect a consumer’s conduct towards the transaction.

85 Ex. 54 to Prelim. Inj. Mot., March 2006 to Late 2006 Layaway” Script, at 4 (“This is pretty easy, all you have to do is make a small activation payment and then pay just 6 short weeks of layaway payments. Then we finance your balance, order your computer, and have it shipped directly to your home.); Ex. 54 to Prelim. Inj. Mot., at 29 (“You have also given us the ok to then draft 52 consecutive weekly layaway payments of \$39.99 beginning on [date] drafting on [weekday] until you have paid in full – at which point your new computer system including software and accessories will be \$2,203 – BUT – Provided you make your payments as agreed, after your activation payment and \$300 mail-in rebate, it actually brings your entire computer system to just \$1,804 – and all of that is completely included in your weekly payment. Now [first name] you understand to get your purchase out of layaway before you pay in full, you will need to show our auditors you are credit worthy by paying as agreed and sending your layaway paperwork back.”); See also, Ex. 55, Current Sales Script, at 4.

86 See Attach. A, paras. 313-25.

87 See Ex. 44 to Prelim. Inj. Mot., Pre-March 2006 Sales Script, Ex. 54 to Prelim. Inj. Mot., March 2006 to Late 2006 Layaway Script, and Ex. 55 to Prelim. Inj. Mot., Current Sales Script.

Using Spanish Language Disclosures That Misrepresent the Defendants' Offer Is Deceptive

The Defendants have used Spanish language advertisements that contain disclosures, albeit not made in clear and conspicuous manner, that misrepresent the terms of the Defendants' offer.⁸⁸ This is deceptive because it likely misleads Spanish-speaking consumers as to a matter of fact, namely the terms of the Defendants' offer, including in this instance, the presence of a \$175 early termination charge for canceling the order.

Misrepresenting BlueHippo's Online Security Mechanism Is Deceptive

The Defendants have represented that their online website is secured by a mechanism known as secure sockets layer (SSL), when this was not the case.⁸⁹ The Defendants' representation is deceptive because it likely misleads consumers as to a matter of fact, namely that its online transactions are secure, and, in particular, secured by the SSL mechanism.

Misrepresenting BlueHippo's Status as a Registered Lender Is Deceptive

The Defendants have implicitly represented that they are a licensed lender to consumers. The Defendants allowed their lender's license to lapse on September 9, 2008 and are not believed to be licensed or registered in any other state.⁹⁰ The Defendants have extended financing and loans and extended payments after September 9, 2008. This is *per se* deceptive under Tenn. Code Ann. § 47-18-104(b)(44)(C) because the implicit act constitutes offering for sale any good or service that is unlawful to sell in the state.

CONCLUSION

For the reasons stated above, a preliminary injunction and asset freeze should issue.

⁸⁸ Ex. 57 to Prelim. Inj. Mot., Aff. of Jeremy Harwell (\$175 early termination charge is stated in Spanish language version as \$175 charge for early payments).

⁸⁹ See Attach. A, paras. 368-71.

⁹⁰ See Attach. A, paras. 370-71.

Respectfully submitted,

/S/ JEFF HILL

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*Application for admission in W.D. Tenn. Pending

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was filed electronically this 5th day of December, 2008. Notice of this filing will be sent by operation of the Court's electronic filing system to Gerald D. Neenan, Neal and Harwell, PLC, 150 Fourth Avenue North, Suite 2000, Nashville, Tennessee 37219.

/S/ JEFF HILL

JEFF HILL