

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION,
Plaintiff,

v.

BLUEHIPPO FUNDING, LLC,

and

BLUEHIPPO CAPITAL, LLC,
Defendants.

Civil No. 08 CV 1819 (PAC)

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR ORDER TO
SHOW CAUSE WHY CONTEMPT DEFENDANTS BLUEHIPPO FUNDING, LLC,
BLUEHIPPO CAPITAL, LLC AND JOSEPH RENSIN SHOULD NOT BE HELD IN
CONTEMPT FOR VIOLATING THE FINAL JUDGMENT AND ORDER
OF PERMANENT INJUNCTION**

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I. INTRODUCTION

Declaring “BlueHippo to the Rescue,” defendants BlueHippo Funding, LLC, BlueHippo Capital, LLC (collectively, “BlueHippo”) and their owner Joseph K. Rensin (together with BlueHippo, “Contempt Defendants”) aggressively market BlueHippo as a company in the business of financing computers to credit-challenged consumers. In reality, BlueHippo is in no such business. In fact, in the year following entry of this Court’s Stipulated Final Judgment and Order for a Permanent Injunction (“Order”), BlueHippo financed – at most – a single computer to the over 35,000 consumers who had contracted with BlueHippo in time to receive computers by year’s end. Ironically, while BlueHippo failed to finance computers for these duped consumers – those same consumers financed BlueHippo with more than \$15 million in payments. Contempt Defendants’ not only lie about the nature of BlueHippo’s business, but also about when and whether consumers would receive merchandise once consumers meet all of their onerous conditions.

Moreover, adding insult to injury, consumers desperate to get out of Contempt Defendants’ money pit find that Blue Hippo’s “store credit” refund policy contains onerous conditions that were not disclosed when they placed their orders. Contempt Defendant’s failure to disclose these conditions to any of the company’s more than 61,000 post-Order customers, who in total paid BlueHippo more than \$21 million, also violates the Order. Finally, as in the underlying case, Contempt Defendants have again unlawfully conditioned the extension of credit on mandatory preauthorized transfers, which also violates the Order. *See* FTC 20 at Sections I and IV.¹

¹ The evidentiary documents referenced herein are attached as FTC Consolidated Exhibits in Support of Motion for Order to Show Cause and Motion to Modify and identified by

As a result of Contempt Defendants' contumacious actions, the Federal Trade Commission ("FTC") seeks civil contempt sanctions, including compensatory relief for consumers who have been harmed by their misrepresentations and failures to disclose. In addition, the Commission is concurrently filing a separate motion, pursuant to Federal Rule of Civil Procedure 60(b), to ban BlueHippo from offering financing in connection with the sale of goods or services, from selling consumer electronics products, and imposing stricter refund requirements, because the company has demonstrated that it simply cannot conduct such activities in a lawful manner.²

II. THE COMMISSION'S PRIOR ACTIONS AGAINST BLUEHIPPO

A. The Complaint Action

In its complaint that led to entry of the Order, the Commission alleged that BlueHippo violated Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, by falsely representing that it would ship computers and other products to consumers within promised times and by failing to disclose to consumers that their installment payments were non-refundable. The Commission also alleged that BlueHippo violated the Mail Order Rule, 16 C.F.R. Part 435; the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1666j; and the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. §§ 1693-1693r.

Exhibit Number FTC ____.

² *See generally* Plaintiff's Motion to Modify the Final Judgment and Order of Permanent Injunction. The FTC seeks modification of the Final Order pursuant to Rule 60(b) only as to BlueHippo, because Rensin was not named as a defendant in the underlying action. However, as discussed below, although not an original defendant, Rensin is subject to contempt sanctions because he had notice of the Final Order and acted in active concert and participation with BlueHippo. *See* Fed. R. Civ. P. 65(d).

The parties reached a settlement, and this Court entered the Stipulated Final Judgment and Order for a Permanent Injunction on April 9, 2008. The Order includes several conduct prohibitions designed to protect consumers, including four provisions, which, as discussed below, Contempt Defendants have violated. First, Section I.A of the Order prohibits BlueHippo from making representations of material fact that are “false or misleading in any manner” in connection with its marketing, sale or offer for sale of consumer electronic products (which include computers). *See* FTC 20. Second, in addition to this general prohibition against misrepresentations, Section I.A specifically prohibits BlueHippo from making express or implied statements “misrepresenting that purchasers of [computers] who make the required periodic payments would receive the [computers] purchased within the times stated by Defendants.” *Id.* Third, Section I.B of the Order requires BlueHippo to disclose “clearly and conspicuously, prior to receiving any payment from customers[,] all material terms and conditions of any refund, cancellation, exchange or repurchase policy.” *Id.* Fourth, Section IV of the Order prohibits BlueHippo from “conditioning the extension of credit on mandatory preauthorized transfers in violation of the EFTA and its implementing Regulation E.” *Id.* In addition to these conduct prohibitions, the Order also includes compliance monitoring provisions to enable the FTC to monitor BlueHippo’s compliance with the Order. *See id.* at Sections IX-XI.³

³ The Court also entered a monetary judgment of between \$3.5 and \$5 million, depending on the amount of consumer claims. *See* FTC 20 at Section V. Ultimately, BlueHippo paid \$3.5 million for consumer redress.

B. The Compliance Monitoring Contempt Actions

BlueHippo repeatedly violated the compliance monitoring provisions of the Order. First, BlueHippo failed to provide a compliance report “setting forth in detail the manner and form in which Defendants have complied and are complying with [the] Order” as required under Section X.⁴ Originally due in October 2008, by April 9, 2009, BlueHippo still had failed to provide this required report, despite the FTC’s repeated requests and BlueHippo’s repeated assurances that it would do so. Second, BlueHippo failed to produce information or produced inadequate responses to requests issued by the FTC on January 29, 2009 and failed to respond to written demands for reports and documents issued by the FTC on March 9, 2009. Accordingly, on April 9, 2009, the FTC filed a motion to show cause why BlueHippo should not be held in contempt for failing to provide the required information. *See* Motion to Show Cause (Docket No. 3).

On April 16, 2009, this Court found BlueHippo in contempt and ordered the company to produce a compliance report and to produce certain documents. *See* FTC 24. Specifically, the Court ordered BlueHippo to pay \$2,500 per day until it provided a compliance report. *Id.* at 2, ¶ B. BlueHippo provided the report five days later resulting in a total sanction of \$12,500. The Court imposed an additional daily sanction of \$5,000 per day commencing May 1, 2009 for BlueHippo’s continued failure to provide responsive information to the FTC’s requests. *Id.* at 2, ¶ C. The Court fined BlueHippo \$20,000 before it provided sufficient information to convince the court to lift the sanction.

By late June 2009, BlueHippo still had failed to provide certain information dating back to the FTC’s January and March requests, and also failed to provide any information in response

⁴ BlueHippo also had failed to verify the accuracy of the consumer database it was required to produce to the Commission so that redress could be effectuated.

to a request issued on May 29, 2009. As a result, on June 23, 2009, the FTC brought a second contempt action. The Court once again found that BlueHippo's failures were unjustified and ordered BlueHippo to produce additional information or face further coercive sanctions. FTC 25 at 2, ¶ D.

III. PARTIES TO THE CURRENT ACTION: CONTEMPT DEFENDANTS

A. BlueHippo Capital, LLC and BlueHippo Funding, LLC

Contempt Defendant BlueHippo Capital, LLC is a Virginia corporation wholly owned by Contempt Defendant BlueHippo Funding, LLC. *See* FTC 26. Contempt Defendant BlueHippo Funding, LLC is a Maryland corporation wholly owned by Contempt Defendant Joseph K. Rensin. *See id.* The BlueHippo companies are located in Baltimore, Maryland and market computers and other electronics to consumers with poor credit through national radio, television, print, direct mail, and internet advertisements. Indeed, BlueHippo identifies itself as as "one of the fastest growing consumer finance companies in the country[.]" FTC 27A.

B. Joseph K. Rensin

Joseph K. Rensin is the sole owner and shareholder of BlueHippo Funding, LLC. FTC 26. Mr. Rensin acted as Chief Executive Officer of BlueHippo from its inception in 2003 until July 20, 2009. *See* FTC 28 at 7-8; FTC 22G at 3. As CEO, BlueHippo's corporate officers, including the Chief Marketing Officer, reported directly to Mr. Rensin. FTC 28 at 20-22. In addition, Mr. Rensin was involved in BlueHippo's day-to-day operations, "manag[ing] the overall structure and direction of the business" and "overseeing the senior management team in formulating strategy." *Id.* at 22; FTC 22G at 3.

IV. CONTEMPT DEFENDANTS' VIOLATIVE BUSINESS PRACTICES

Contempt Defendants aggressively advertise BlueHippo as a company in the business of financing computers for credit-challenged consumers. However, this representation is patently false. Indeed, in the year following entry of the Order, Contempt Defendants financed – at most – only one computer⁵ for more than 35,000 customers.⁶ Contempt Defendants only began to provide financed computers to some of its customers after the FTC intensified its scrutiny of BlueHippo by bringing its first contempt action. Contempt Defendants compound the harm caused by BlueHippo's failure to finance computers by failing to disclose fully the onerous conditions of its store credit refund policy, thereby rigging their refund policy to avoid giving anything back to consumers lured into BlueHippo's money pit.

A. Contempt Defendants Aggressively Market BlueHippo as a Company That Is in the Business of Financing Computers.

Contempt Defendants repeatedly and aggressively tout BlueHippo as a company in the business of “financing” computers. To that end, they widely disseminate advertisements, including in major metropolitan newspapers, on television, on the internet, and through direct mail, emphasizing that what they do is finance computers for credit-challenged consumers:

- “BlueHippo finances thousands of computers to people with past credit

⁵ As noted below, BlueHippo appears to have erred when it shipped this single customer a computer. *See* fn.16, *infra*.

⁶ All figures cited in this Memorandum are derived from BlueHippo's responses to FTC Requests for Information 3, 6, and 18, as summarized in the Fed. R. Evid. 1006 summary prepared by Erez Yoeli, Ph.D. *See* FTC 21. The correspondence between the FTC and BlueHippo relating to these requests for information and associated responses are provided as FTC 22A - 22G.

problems.” *See, e.g.*, FTC 29-30, 37;⁷

- “Need a new computer, but have bad credit? BlueHippo to the rescue. Call now to get the computer you need regardless of your credit.” FTC 27D at 3;
- “Guaranteed Approval For A Brand New Computer No Matter What Your Credit Looks Like” FTC 29-30, 37;
- “So it doesn’t matter if you have bad credit, past bankruptcies or unpaid bills because BlueHippo doesn’t even check your credit.” *Id.*;
- “[W]elcome to BlueHippo where anyone can get a brand new, brand name computer regardless of their credit.” FTC 27E at 5;
- “[A]t BlueHippo, your credit is good with us . . . We don’t even look at you any differently if you have bad credit. In fact, we can send you a brand new laptop without even checking your credit.” FTC 27F at 4;
- “All credit is accepted, so you won’t be turned down. All you need is a checking account.” *Id.*

See also FTC 38.

Contempt Defendants’ website, www.bluehippo.com, repeats and expands on these representations, proclaiming BlueHippo to be “one of the fastest growing *consumer finance companies* in the country[.]” FTC 27A (emphasis added). Indeed, the BlueHippo website emphasizes the nature of its business as a financing company, stating: “We don’t make *the products we finance* – we just make them available to everyone – regardless of their credit.” *See* FTC 27B (emphasis added).⁸

⁷ The cited advertisements are intended as examples of the violative advertisements disseminated by Contempt Defendants during the period between April 10, 2008 and December 10, 2008 and are not intended to be a complete index of those advertisements. BlueHippo advertisements that ran during this time period and that make representations concerning BlueHippo’s financing program have been attached at FTC 29-37.

⁸ As stated, BlueHippo does not actually manufacture the computers its customers order, nor does it maintain an inventory of computers; instead, in those rare instances in which it actually provides consumers with computers, it orders the computers from third parties such as

BlueHippo’s advertising, including its website, provides toll-free telephone numbers for interested consumers to call. When they do, BlueHippo telemarketers read from scripts touting their business providing financed computers to consumers:

- “But, after only 13 consecutive layaway payments, we can finance your balance and ship your computer directly to your home.” FTC 40 at FTC041309/BH00009;
- “Now, because we don’t check your credit, all we ask is that you build a short credit history with us by making a small down payment ... and then pay just 9 short weeks worth of layaway payments. Then we finance, order and ship your computer directly to your home.” FTC 39 at FTC021209/BH00005;⁹
- “After you’ve paid your initial payment and a minimum of 13 consecutive layaway payments, we will send you an offer to finance your balance.” FTC 40 at FTC041309/BH00029; *see also* FTC 39 at FTC021209/BH00026 (offering financing after 9 consecutive payments).

In addition, during these calls, Contempt Defendants’ telemarketers explain to consumers the steps they must take to obtain a computer. Specifically, consumers must pay an activation fee (generally \$99) and then make weekly payments of approximately \$35 or bi-weekly payments of approximately \$70 for a year.¹⁰ *See, e.g.*, FTC 39 at FTC021209/BH00007; *id.* at FTC021209/BH00025; FTC 40 at FTC041309/BH00009; *id.* at FTC041309/BH00028.

However, telemarketers emphasize that if a consumer makes thirteen consecutive payments and completes and returns a financing agreement and other paperwork, Contempt Defendants will

Dell.

⁹ The minimum number of consecutive payments Contempt Defendants require to qualify for financing varies based on the promotion BlueHippo is running at the time, but generally ranges from 9 to 13 consecutive payments.

¹⁰ The amount of consumers’ payments and the number of payments required varies depending upon Contempt Defendants’ promotions and the particular products selected by consumers. Pursuant to these payment arrangements, the few consumers who manage to pay in full, on average, pay BlueHippo over \$1,950.00 per computer. *See* FTC 21 at ¶ 21.

finance the consumer's balance.¹¹ Both on the telephone and in the financing-related documents, BlueHippo tells consumers that, if consumers finance their computers in this manner, Contempt Defendants will then ship the computer "within 3-4 weeks." *See, e.g.*, FTC 39, 41-42.¹²

Thus, Contempt Defendants represent that they are in the business of financing computers for credit-challenged consumers and that consumers can receive financed computers from BlueHippo in a matter of weeks (*i.e.*, after making 9-13 consecutive payments and allowing 4 weeks for shipping and handling).

B. In the Year Following Entry of the Order, Contempt Defendants Failed to Finance Computers.

Although BlueHippo aggressively promotes itself as a company in the business of financing computers, its actual performance shows it is not. Specifically – and rather incredibly – Contempt Defendants financed (at most) a single computer in the year after entry of

¹¹ These financing agreements mandate that customers wishing to obtain credit "preauthorize" BlueHippo to "initiate debit entries to your financial institution indicated below for the amounts indicated in this Contract." FTC 42 at FTC042909-BH-00021.

¹² Specifically, Contempt Defendants repeatedly tell consumers that, after qualifying for financing, the consumers will receive their computers after allowing "3-4 weeks for shipping and handling." *See, e.g.*, FTC 39 at FTC 021209/BH00026; FTC 41 at FTC042909-BH-00017 ("I understand that shipping and handling may take another 3 to 4 weeks after my payment and paperwork requirements have been met"). Similarly, BlueHippo's cover letter to its financing agreement, the Retail Installment Contract states:

When will my merchandise ship?

Providing you continue to make all of your pre-shipment payments on time, we will process your order and have it shipped to you within 3-4 weeks of receipt of these forms.

FTC 42 at FTC042909-BH-00018.

the Order.

To determine how many computers Contempt Defendants actually financed in the year following entry of the Order,¹³ the FTC considered the 36,090 computer orders consumers placed during the eight-month period between April 10, 2008 (the day after entry of the Order) and December 10, 2008. The FTC considered the computer orders during this eight-month period, rather than throughout the entire year, to ensure that BlueHippo could have financed each order within a year (*i.e.*, by April 8, 2009), pursuant to its financing criteria, taking into account the maximum 17 weeks (a maximum of 13 weeks of consecutive payments plus 4 weeks for shipping and handling) that BlueHippo required to provide a financed computer.¹⁴

During the period, 35,698 consumers, having been told that BlueHippo is in the business of financing computers, ordered 36,090 computers from Contempt Defendants. *See* FTC 21 at 20.¹⁵ However, Contempt Defendants financed at most a single computer¹⁶ out of these 36,090

¹³ This one-year period was not chosen randomly. Rather it coincides almost exactly with the filing of the FTC's first contempt motion on April 9, 2009. As discussed further below, this contempt action, along with subsequent FTC enforcement inquiries, spurred BlueHippo to break with its normal post-Order business practices and finally finance some computers for consumers in June 2009.

¹⁴ In other words, in order to receive a financed computer within a year after entry of the Order, a consumer would have to order no later than December 10, 2008.

¹⁵ It appears that 392 of these customers placed more than one computer order with BlueHippo. FTC 21 at ¶ 20.

¹⁶ The shipment of this computer was most likely in error, rather than a computer that BlueHippo intended to finance. The consumer (whose scheduled bi-weekly payments were \$61.32) only paid \$185.32 towards a computer with a total sale price of \$2,515.00 and never entered into a financing agreement. *See* FTC 21 at ¶ 27.

orders.¹⁷ *Id.* at ¶ 27. Incredibly, Contempt Defendants received *at least* \$15,182,479.64 from consumers for these 36,090 orders. *See* FTC 21 at ¶ 24.¹⁸

C. After the FTC’s First Contempt Action, Contempt Defendants Begin to Ship More Computers.

After the FTC brought its first contempt action on April 9, 2009, Contempt Defendants, in an apparent effort to avoid further law enforcement action, considerably accelerated their shipment of computers to consumers. Between April 9, 2009 and July 24, 2009 (*i.e.*, the last date for which BlueHippo provided data), BlueHippo ordered 4,056 computers for the consumers who ordered during the eight-month period, with a staggering 3,756 orders placed in June and an additional 238 orders placed in July. *Id.* at ¶¶ 29, 31.¹⁹ Significantly, in their rush to get computers out the door quickly, Contempt Defendants disregarded their own qualification criteria. Indeed, out of those 4,056 consumers for whom BlueHippo ordered computers during this spike, 2,594 did not even meet BlueHippo’s financing qualification criteria – highlighting that their haphazard, litigation-driven efforts were not truly reflective of their business practices,

¹⁷ Out of these 36,090 consumer orders, 2,477 qualified for financing on or before March 11, 2009 (the last date for which a consumer could qualify and expect to receive a computer by April 9, 2009). *See* FTC 21 at ¶ 25. The number of orders that qualified was determined by identifying all orders for which consumers made a minimum number of 13 consecutive payments and returned financing contracts. *See* FTC 21 at ¶ 12. While BlueHippo did send computers to 13 out of these 2,477 consumers prior to April 9, 2009, it did so only after the consumers had paid for the computers in full. FTC 21 at ¶ 26. Thus, these 13 computers were not financed.

¹⁸ These consumers may have paid BlueHippo as much as \$3.5 million more, depending on whether the payment data provided by the company included for each of its customers the required “activation fee” of approximately \$100.

¹⁹ Astoundingly, Contempt Defendants ordered the vast majority of these computers from vendors during a 7-day period. Indeed, between June 16, 2009 and June 23, 2009, Contempt Defendants ordered 3,311 (over 81%) of the 4,056 computers it ordered during the entire spike. FTC 21 at ¶¶ 31-32.

but rather an effort to stave off further law enforcement action. *See* FTC 21 at ¶¶ 31, 34.²⁰

D. Even after BlueHippo’s Litigation-Driven Ordering Spike, Contempt Defendants Failed to Finance Computers to Qualified Consumers in a Timely Manner – If at All.

Even after their litigation-driven ordering spike, however, Contempt Defendants failed to provide a computer to all consumers who qualified for financing. Indeed, 2,477 consumers who ordered computers during the eight-month period qualified to receive financed computers by making consecutive payments and returning the required paperwork. FTC 21 at ¶ 25. However, by July 24, 2009, the last date for which BlueHippo provided data, Contempt Defendants still had failed to provide computers to 1,015 of those consumers. FTC 21 at ¶ 33. In other words, even after the ordering spike, Contempt Defendants still failed to provide computers to nearly 41% of those who qualified. *Id.* In total, these 1,015 consumers paid Contempt Defendants \$844,968.15. *Id.*

Moreover, even for those consumers who finally received computers, Contempt Defendants failed to honor their promise to provide financed computers within 3-4 weeks of the consumer’s qualifying. Indeed, of the 1,462 consumers who qualified for financing and received a computer from BlueHippo, no consumers received the computer within the promised time frame. *See* FTC 21 at ¶¶ 34-35. On average, BlueHippo did not even order – let alone ship – a computer for those consumers until 26.2 weeks (over *six months*) from when the consumer qualified for financing. *See id.* at ¶ 37. In the most extreme case, BlueHippo did not order the computer until almost a full year after the consumer qualified for financing. *Id.* at ¶ 36.

²⁰ Moreover, Contempt Defendants’ litigation-driven ordering spike demonstrates that their failure to provide financed computers in the year following entry of the Order was not due to a lack of ability, but rather a lack of volition.

E. Contempt Defendants Fail to Disclose the Onerous Conditions of Their Store Credit Refund Policy and Fail to Provide Merchandise Purchased Using Store Credit.

Between April 10, 2008 (the day after entry of the Order) and July 24, 2009 (the last date for which BlueHippo provided data), 61,878 consumers placed 62,673 orders with BlueHippo. FTC 21 at ¶ 13. While collecting hundreds if not thousands of dollars from each of these consumers, Contempt Defendants rig their refund policy by failing to disclose material, onerous conditions of the policy that make it exceedingly difficult for consumers who understandably wish to cancel their computer orders and get back something for the monies they paid to BlueHippo.²¹ In this regard, after seven days, Contempt Defendants only offer one form of refund to consumers: a store credit. However, Contempt Defendants fail to inform consumers of three onerous hurdles they must clear in order to redeem merchandise using store credit, and then fail to provide the merchandise to the vast majority of those who nonetheless successfully clear these hurdles.

Specifically, at the time consumers place their orders, Contempt Defendants tell consumers: “You can cancel your order any time prior to shipment – and while we don’t give cash refunds after 7 days – we will give you store credit that you can use on over a thousand desktops, laptops, monitors, TV’s [sic] and more at BlueHippo.com.” FTC 40 at FTC041309/BH00016; *id.* at FTC041309/BH00030. Contempt Defendants reconfirm these statements on their sales order form. FTC 41 at FTC042909-BH-00015.

It is not until consumers cancel their orders and attempt to use their store credit that they

²¹ In total these consumers paid BlueHippo at least \$21 million. FTC 21 at ¶ 16. However, as described above, *see supra* at 11, if the consumers’ activation fees are not included in BlueHippo’s payment data, the total monies paid to BlueHippo by these 61,000 consumers could exceed \$27 million.

discover three onerous conditions. First and foremost, Contempt Defendants do not permit consumers to use their store credit for shipping, handling, and taxes. FTC 22F at 6. Second, consumers – even those with hundreds of dollars in store credit – must pay these extra costs to Contempt Defendants, in advance, via a money order. *Id.* Third, no matter what their credit balance, consumers may only place one order at a time. *Id.* Thus, consumers may not order a second item, until the first item is delivered to them. *Id.*

For example, a consumer who cancels their order after making \$1,000 in payments to BlueHippo ostensibly would receive \$1,000 in store credit. If that consumer wishes to purchase a \$700 laptop from BlueHippo’s online “store,”²² he or she would need to provide a money order to cover shipping, handling, and taxes before BlueHippo would order the \$700 laptop advertised on its website.²³ Moreover, the consumer would have to wait to actually receive the laptop before using store credit to obtain some type of printer – again paying for shipping, handling, and taxes in advance.

Even when consumers manage to meet these previously undisclosed conditions, however, they often receive nothing from Contempt Defendants. Since entry of the Order, at least 8,088 consumers have tried to redeem store credit.²⁴ FTC 21 at ¶ 39. Of those consumers, 3,454

²² BlueHippo neither manufactures nor inventories the products it offers through the on-line store; rather, as with the computers it offers, it orders these products from third-parties. *See* FTC 22F at 6-7 and fn. 10, *supra*.

²³ It is ironic that consumers lured into paying BlueHippo on average more than \$1950 for a computer can ostensibly use store credit to get one from the same company for \$700.

²⁴ The 8,088 consumers are those who placed an order through the on-line store and applied store credit to all, or a portion of, the product’s purchase price. Of course, there is no way to know how many consumers sought to use their store credit but abandoned their efforts once they learned of the previously undisclosed, onerous conditions – including that they would have to pay even more money to BlueHippo.

actually paid the previously undisclosed, additional costs for shipping, handling, and taxes. However, BlueHippo ordered merchandise for only 750 of these consumers.²⁵ *Id.* at ¶ 43. Therefore, BlueHippo failed to provide merchandise to 2,704 (approximately 75%) of the consumers who met its burdensome, undisclosed store credit requirements. *Id.* at ¶ 44. Needless to say, it is rather difficult to order a second item when you have to first receive the first item and it never comes.

V. ARGUMENT

This Court has the authority to enforce its own orders. *See In re Lafayette Radio Elec. Corp.*, 761 F.2d 84, 93 (2d Cir. 1985) (A court’s jurisdiction to enforce its own orders “is recognized as part of [the] court’s inherent power to prevent its judgments and orders from being ignored or avoided with impunity.”). As a party to the original action, the Commission may invoke the Court’s order enforcement power by initiating a proceeding for civil contempt in the same action. *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444-45 (1911).

Persons bound by an order are liable for contempt if “the order the contemnor failed to comply with is clear and unambiguous, . . . the proof of noncompliance is clear and convincing, and . . . the contemnor has not diligently attempted to comply in a reasonable manner.”

Paramedics Electromedia Comercial, LTDA v. GE Medical Systems Information Technologies, Inc., 369 F.3d 645, 655 (2d Cir. 2004).²⁶

²⁵ BlueHippo has refused to provide us confirmation of shipment for these 750 orders, claiming they do not maintain such records. Thus, we cannot confirm that even these consumers actually received the merchandise they ordered using store credit.

²⁶ There is no question Contempt Defendants are bound by the Order. As a party to the underlying action, BlueHippo has notice of, and is, therefore, bound by the Order. *See SEC v. Current Fin. Servs., Inc.*, 798 F. Supp. 802, 806 n.11 (D.D.C. 1992). Further, as BlueHippo Funding’s owner and former Chief Executive Officer who was involved in the company’s day-

Here, clear and convincing evidence establishes that Contempt Defendants have failed to comply with clear and unambiguous provisions of the Order. *Id.* Moreover, Contempt Defendants have not diligently attempted to comply with the Order. *Id.* Accordingly, Contempt Defendants should be required to compensate consumers harmed by their contumacious conduct. *See* Section III.C, *infra*.

A. The Contempt Defendants Have Violated Three Clear and Unambiguous Provisions of the Final Order.

Contempt Defendants have violated three clear and unambiguous provisions of the Order. First, they violated Section I.A by misrepresenting that they are a financing company, as well as the conditions precedent to and timing for receiving computers and other merchandise. Second, they violated Section I.B by failing to disclose onerous conditions that consumers must meet to use “store credit.” Finally, they violated Section IV by conditioning the extension of credit on mandatory preauthorized transfers.

1. Contempt Defendants Violated Section I.A of the Order by Misrepresenting That They Were in the Business of Financing Computers, as Well as the Conditions Precedent to and Timing for Receiving Merchandise.

Section I of the Order expressly prohibits Contempt Defendants from “making any express or implied representation of material fact that is false or misleading, in any manner, orally or in writing, to any consumer” in connection with the sale of any consumer electronics product. The Order defines “material” as “likely to affect a person’s choice of, or conduct regarding, goods or services.” Contempt Defendants made four material misrepresentations:

to-day-operations, Rensin acts in concert and participation with BlueHippo. Moreover, BlueHippo has admitted that all of its officers (of whom Rensin was one) received actual notice of the Order shortly after its entry. *See* FTC 43 at 9.

(1) that they were in the business of financing computers, (2) that consumers would receive a computer if certain conditions were met, (3) that they would deliver computers within a specified time frame, and (4) that consumers would receive merchandise if certain conditions regarding store credit were met.

a. Contempt Defendants Misrepresent That They Are in the Business of Financing Computers.

Contempt Defendants represent to consumers through statements such as “BlueHippo is one of the fastest growing consumer finance companies in the country” and “BlueHippo finances thousands of computers to people with past credit problems,” that they are in the business of financing computers to consumers with poor credit. *See, e.g.,* FTC 27A, 29, 30, 37; *see also* FTC 27F at 4 (“[A]t BlueHippo, your credit is good with us . . . We don’t even look at you any differently if you have bad credit. In fact, we can send you a brand new laptop without even checking your credit.”).

In fact, Contempt Defendants’ business was not financing computers – it was luring consumers into a money pit (*i.e.*, a program in which consumers sign up to make payments with the false hope of receiving a financed computer). At best, Contempt Defendants provided a layaway plan in which, at most, a single computer was provided in advance of payment in full.

As noted above, in the eight months after entry of the Order (from April 10, 2008 through December 10, 2008), consumers placed 36,090 orders for computers with BlueHippo. FTC 21 at ¶ 20. However, as of April 8, 2009, the day before the FTC initiated contempt proceedings against BlueHippo, Contempt Defendants *at most had financed one computer*. *Id.* at ¶¶ 26-27, 29. Meanwhile, Contempt Defendants amassed at least \$15,182,479.64 in revenue for these orders. *Id.* at ¶ 24. Put simply, a company that finances products to at most only one of its

consumers – accounting for essentially zero percent of its substantial revenues – is not in the business of financing that product.

In other contexts, courts have found that where a company engages in an activity infrequently, accounting for an insubstantial portion of its total revenues, it is not “in the business of” that activity. *See, e.g., Bramblett v. Commissioner of Internal Revenue*, 960 F.2d 526 (5th Cir. 1992) (finding that entity was not “in the business of” selling land even though it made five sales of land in three years, netting over \$7 million, because these sales were infrequent and insubstantial); *Byram v. United States*, 705 F.2d 1418 (5th Cir. 1983) (affirming district court finding that even when entity made 22 sales over three years, resulting in profits of \$3.4 million, company was not in the business of selling land). Here, of course, because Contempt Defendants have financed computers for virtually none of their 35,698 customers, they have not financed computers on even an “infrequent” or “insubstantial” basis. Thus, contrary to their representations to consumers, for the year after entry of the Order, Contempt Defendants were not in the business of financing computers.²⁷

Moreover, this misrepresentation was “material,” or “likely to affect a person’s choice of, or conduct regarding, goods or services.” *See* FTC 20 at 3 (definition of “Material”). Put another way, if consumers knew that Contempt Defendants were lying when they said that they

²⁷ Contempt Defendants are not saved by their belated efforts to finance computers to avoid law enforcement action. Indeed, courts have found that defendants’ claims “of abandonment [are] rarely sustainable as a defense to a Commission complaint where, as here, the alleged discontinuance occurred ‘only after the Commission’s hand was on the respondent’s shoulder.’” *International Assoc. Of Conf. Interpreters*, 123 F.T.C. 465, 658 (1997), quoting *Zale Corp.*, 78 F.T.C. 1195, 1240 (1971) (emphasis added); *see also FTC v. Sage Seminars, Inc.*, 1995 WL 798938, *6 (N.D. Cal. Nov. 2, 1995) (where violative conduct ceases “after defendants learn that the FTC [has] commenced an investigation . . . cessation can hardly be considered ‘voluntary’”) (internal citations omitted) (attached).

finance computers, they would not have signed up with and started throwing money at BlueHippo with the hope of receiving a financed computer.

b. Contempt Defendants Misrepresented That Consumers Who Met BlueHippo’s Financing Conditions Would Receive Computers.

Contempt Defendants also violated Section I.A of the Order by misrepresenting that, if consumers met certain requirements, they would receive a computer. Specifically, Contempt Defendants represented that consumers would receive a financed computer if they: 1) made a specified number of minimum payments, and 2) returned the executed financing agreement and associated paperwork. However, *even after* the post-contempt action spike in orders, BlueHippo failed to order computers for 1,015 of the 2,477 consumers (41%) who qualified for financing by making 13 consecutive payments and completing the required paperwork prior to April 8, 2009. FTC 21 at ¶¶ 25, 33.

c. Contempt Defendants Misrepresented That They Would Ship Computers to Consumers Within 4 Weeks of Qualification for Financing.

In addition to the general prohibition on misrepresentations of material fact, Section I.A of the Order specifically bars Contempt Defendants from making express or implied statements “misrepresenting that purchasers of [computers] who make the required periodic payments would receive the [computers] purchased within the times stated by Defendants.” *See* FTC 20 at 4. Contempt Defendants promised that, after consumers qualified for financing, BlueHippo would ship computers to consumers “within 3-4 weeks” and that those consumers should “allow 3-4 weeks for shipping and handling.” *See* FTC 42 at FTC042909-BH-00018; FTC 41 at FTC042909-BH-00017; FTC 40 at FTC041309/BH00029.

Even for those consumers who eventually received a computer during the post-contempt

action shipping spike, however, BlueHippo failed to order – let alone ship – the computers within the promised three to four weeks. In total, more than 1,400 consumers placed orders for computers with BlueHippo between the date of entry of the Order and December 10, 2008; met BlueHippo’s financing conditions; and received a computer by July 24, 2009. FTC 21 at ¶ 34. *None* of those consumers, however, received their computer within the promised time frame. *Id.* at ¶ 35. Instead, they waited for their computers, on average, more than 26 weeks, or *six and a half months*, after qualifying. *Id.* at ¶ 37. Of course, BlueHippo also has violated this provision with respect to the additional 1,015 who met the conditions for financing during the period and still have not received a computer.

d. Contempt Defendants Misrepresent That Consumers Who Meet Certain Conditions to Use Store Credit Will Receive Merchandise.

Contempt Defendants also misrepresent that consumers that meet the onerous conditions precedent to using “store credit” to purchase merchandise at BlueHippo.com will actually receive that merchandise. Despite the burdensome nature of these conditions, since entry of the Order, 3,454 consumers qualified to buy merchandise using store credit. FTC 21 at ¶ 41. Yet, BlueHippo only ordered merchandise for 750 of these consumers, leaving 2,704 consumers without their merchandise. *Id.* at ¶ 43.

2. Contempt Defendants Fail to Disclose Three Material Conditions of Their Store Credit “Refund” Policy.

Section I.B of the Order expressly prohibits BlueHippo from making any representations about their “refund, cancellation, exchange or repurchase policy without disclosing clearly and conspicuously, prior to receiving any payment from customers[,], all material terms and conditions” of such policy. While Contempt Defendants’ telemarketing sales scripts disclose

that they offer “store credit” in lieu of cash refunds, they fail to disclose several material terms and conditions of their refund policy prior to receiving payment. Specifically, they fail to disclose that: 1) consumers may not apply their store credit to shipping, handling, and taxes; 2) consumers have to send in money orders to pay for these additional charges before BlueHippo will order their merchandise; and 3) consumers may only redeem their store credit for one item at a time and have to wait for the first item to be delivered before ordering a second.

As described above, the practical effect of Contempt Defendants’ lack of disclosure is that consumers who have already been victimized by Contempt Defendants’ misrepresentations concerning the nature of BlueHippo’s business are required to give BlueHippo even more money before they can recover anything. Requiring consumers to advance additional money to Blue Hippo in the hope of getting *something* for the hundreds of dollars already paid certainly calls for a leap of faith from already-victimized consumers, especially when these conditions are only disclosed at the time consumers seek to redeem their store credit. Contempt Defendants intentionally compound consumers’ Hobson’s choice by forcing them to repeat the process for each item ordered in an obvious effort to rig the refund process in their favor. These are exactly the type of “material terms and conditions” concerning BlueHippo’s refund policy that, as required by the Order, consumers should have been informed of *before* they started throwing their money down the drain.

3. Contempt Defendants Violate Section IV of the Order by Conditioning Credit on Mandatory Preauthorized Electronic Transfers.

Section IV of the Order prohibits “conditioning the extension of credit on mandatory preauthorized transfers, in violation of the EFTA and its implementing Regulation E.” Under EFTA, “credit” is defined as the right “to incur debt and defer its payment.” 12 C.F.R.

§ 205.2(f) (definitions applicable to Regulation E). Here, Contempt Defendants extend “credit” to consumers by offering to provide computers after only thirteen weeks of payments and “defer” payment of the balance. Further, EFTA defines “preauthorized electronic transfers” as “electronic fund transfer[s] authorized in advance to recur at substantially regular intervals.” *Id.* at § 205.2(k). Contempt Defendants offer of credit is conditioned on mandatory “preauthorized electronic transfers” because their financing contracts require consumers to agree to weekly or bi-weekly electronic debit entries from consumers’ checking accounts. Thus, Contempt Defendants’ financing contracts extend credit conditioned on mandatory preauthorized transfers in violation of Section IV.

B. Contempt Defendants Have Not Diligently Attempted to Comply with the Order.

Contempt Defendants’ misrepresentations and failures to disclose evidence affirmative misconduct and, thus, are wholly inconsistent with any attempt to comply diligently with the Order. *See Paramedics Electromedicina Comercial, Ltd.*, 369 F.3d at 655. Here, Contempt Defendants violate the core conduct provisions of the Order, by – first and foremost – misrepresenting what they do (*i.e.*, that they finance computers to consumers with poor credit), as well as misrepresenting whether and when consumers will receive merchandise. Moreover, Contempt Defendants’ failure to diligently comply with the Order is highlighted by their misrepresentation of the period of time within which consumers will receive their computers, their failure to disclose the material terms and conditions of the store credit refund policy, and their extension of credit conditioned on mandatory preauthorized transfers. *See New York Nat’l Org. of Women v. Terry*, 886 F.2d 1339, 1352 (2d Cir. 1989) (finding no diligent attempt at

compliance where defendants persisted in unlawful conduct despite availability of lawful alternatives).

C. Contempt Defendants Should Pay Contempt Sanctions.

Courts may impose sanctions for civil contempt “either to coerce the contemnor into future compliance with the court’s order or to compensate the complainant for losses resulting from the contemnor’s past noncompliance.” *Terry*, 886 F.2d at 1352-53 (citing *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1946)). In a civil contempt action, “[t]he measure of the court’s power . . . is determined by the requirements of full remedial relief.” *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193-94 (1949). Accordingly, the court may award compensatory damages in an amount sufficient “to make reparation to the injured party and restore the parties to the position they would have held had the injunction been obeyed.” *Vuitton et Fils, S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979).

To the extent that Contempt Defendants persist in making misrepresentations, fail to disclose all material conditions of their refund policy, and continue to condition the extension of credit on mandatory, preauthorized transfers, the FTC seeks the imposition of appropriate coercive sanctions, including a substantial daily fine.

Moreover, Contempt Defendants should be ordered to pay compensatory monetary relief to the victims of their contempt for harm caused by their contumacious conduct. First, more than 35,000 consumers who placed orders with BlueHippo in the year after the Order and failed to receive either a computer or merchandise purchased using store credit should receive a refund of all monies paid to BlueHippo. These consumers collectively paid BlueHippo more than \$15 million. Each of these consumers placed orders with BlueHippo after being told by Contempt Defendants that BlueHippo was in the business of financing computers. As discussed above, had

BlueHippo not misrepresented the nature of its business in widespread nationwide advertising, these consumers would not have paid hundreds, if not thousands of dollars to BlueHippo. *See McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000) (widespread misrepresentations in violation of a court order create presumption that all customers relied on the misrepresentations); *FTC v. Trudeau*, 579 F.2d 754, 773, fn.15 (7th Cir. 2009).²⁸

Second, all consumers who have placed orders with BlueHippo since entry of the Order have been harmed by Contempt Defendants' failure to disclose fully the onerous terms and conditions of the refund policy. Since entry of the Order at least 61,878 consumers placed orders with BlueHippo with the understanding that if they chose to cancel those orders they would be able to obtain merchandise using store credit, and paid over \$21 million in the process. In violation of the Order, these consumers were not told of material, onerous conditions associated with receiving any kind of refund. Again, if consumers were aware that BlueHippo's store credit refund policy was rigged against them, they would not have ordered anything from BlueHippo. *See McGregor*, 206 F.3d at 1388; *Trudeau*, 579 F.2d at 773, n.15. As a result, all consumers who did not receive computers or store credit merchandise from BlueHippo should receive full refunds.²⁹

²⁸ Of course, the 1,015 consumers who failed to receive computers even after qualifying for financing would be included within this category of consumers.

²⁹ These consumers would include the 2,704 consumers who met the conditions to receive merchandise purchased using store credit but failed to receive their ordered products. In addition, the 750 consumers who received merchandise purchased using store credit were injured by Contempt Defendants' undisclosed requirement that those customers could not use their store credit to cover taxes, shipping, and handling, and should receive refunds of the additional monies they paid to BlueHippo to cover those costs.

Third, even those consumers who received computers, but were forced to wait longer than the promised three to four weeks after qualifying, were injured by BlueHippo's misrepresentations regarding delivery, and, accordingly should be compensated for the injury suffered as a result of that delay.

Furthermore, BlueHippo and Rensin are jointly and severally liable since each defendant is responsible for the repeated Final Order violations. *See NLRB v. AFL-CIO*, 882 F.2d 949, 955 (5th Cir. 1989) ("Where . . . parties join together to evade a judgment, they become jointly and severally liable for the conduct."); *Colonial Williamsburg Found. v. The Kittinger Co.*, 792 F. Supp. 1397, 1406 (E.D. Va. 1992), *aff'd* 38 F.3d 133 (4th Cir. 1994) (holding contempt defendants jointly and severally liable because all defendants had actively violated consent judgment).

VI. CONCLUSION

For the foregoing reasons, the FTC requests that the Court enter the proposed Order to Show Cause.

Dated: November 12, 2009

Respectfully submitted,

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