

# 11-374

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

FEDERAL TRADE COMMISSION,  
Plaintiff-Appellant

v.

BLUEHIPPO FUNDING, LLC; BLUEHIPPO CAPITAL, LLC;  
and JOSEPH K. RENSIN  
Defendants-Appellees.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

**BRIEF FOR APPELLANT FEDERAL TRADE COMMISSION**

---

OF COUNSEL:

JAMES A. KOHM  
Associate Director

ROBERT S. KAYE  
Assistant Director

AMANDA C. BASTA  
Attorney  
Bureau of Consumer Protection  
Federal Trade Commission  
Washington, D.C.

WILLARD K. TOM  
General Counsel

JOHN F. DALY  
Deputy General Counsel for Litigation

LAWRENCE DeMILLE-WAGMAN  
Assistant General Counsel for Litigation

MICHAEL D. BERGMAN  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
(202) 326-3184

## TABLE OF CONTENTS

	<b>PAGE</b>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
JURISDICTIONAL STATEMENT .....	1
STATEMENT OF THE ISSUE PRESENTED FOR REVIEW .....	2
STATEMENT OF THE CASE .....	2
A. <u>Nature of the Case, the Course of Proceedings, and the Disposition Below</u> .....	2
B. <u>Statement of the Facts</u> .....	5
1. Background .....	5
2. Proceedings below .....	11
STANDARD OF REVIEW .....	16
SUMMARY OF ARGUMENT .....	16
ARGUMENT .....	19
I. THE DISTRICT COURT PROPERLY FOUND DEFENDANTS IN CONTEMPT FOR FAILING TO DISCLOSE THE MATERIAL TERMS OF THEIR STORE CREDIT POLICY .....	19

II.	THE DISTRICT COURT ERRED BY FAILING TO ORDER COMPENSATION TO INJURED CONSUMERS .....	21
A.	The District Court Ignored the Consent Order’s Express Language That Establishes the Point in Time Consumers Were Injured as a Result of Defendants’ Failure to Disclose .....	23
B.	The District Court Erred in Failing to Follow Proper Legal Principles Regarding Injury Caused by a Widespread Material Omission .....	25
C.	The Commission Presented Uncontroverted Evidence of the Amounts Paid by Injured Consumers .....	29
	CONCLUSION .....	33
	CERTIFICATE OF COMPLIANCE	
	ADDENDUM (PARTIES’ SPECIAL APPENDIX)	
	CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES\*

CASES	PAGE
<i>In re Cliffdale Assocs., Inc.</i> , 103 F.T.C. 110 (1984) .....	20, 26
* <i>FTC v. Crescent Publ'g Group</i> , 129 F. Supp. 2d 311 (S.D.N.Y. 2000) .....	21
<i>FTC v. Febre</i> , 128 F.3d 530 (7th Cir. 1997) .....	29, 32
<i>FTC v. Figgie Int'l, Inc.</i> , 994 F.2d 595 (9th Cir. 1993) .....	26, 27, 28, 29
<i>FTC v. Five-Star Auto. Club, Inc.</i> , 97 F. Supp. 2d 502 (S.D.N.Y. 2000) .....	26
* <i>FTC v. Kuykendall</i> , 371 F.3d 745 (10th Cir. 2004) .....	16, 18, 19, 26, 28, 31
<i>FTC v. Security Rare Coin &amp; Bullion Corp.</i> , 931 F.2d 1312 (8th Cir. 1991) .....	26, 27
* <i>FTC v. Trudeau</i> , 579 F.3d 754 (7th Cir. 2009) .....	16, 18, 21, 27, 28, 31, 32
<i>King v. Allied Vision, Ltd.</i> , 65 F.3d 1051 (2d Cir. 1995) .....	19
<i>Kraft, Inc. v. FTC</i> , 970 F.2d 311 (7th Cir. 1992) .....	20
* <i>McComb v. Jacksonville Paper Co.</i> , 336 U.S. 187 (1949) .....	22

---

\* Authorities upon which we chiefly rely are marked with asterisks.

*\*McGregor v. Chierico*,  
 206 F.3d 1378 (11th Cir. 2000) ..... 16, 18, 26, 27, 28, 29

*\*New York State Nat’l Org. for Women v. Terry*,  
 886 F.2d 1339 (2d Cir. 1989) ..... 19, 22, 31

*Paramedics Electromedicina Comercial Ltda. v. G.E. Med. Sys. Info. Tech., Inc.*,  
 369 F.3d 645 (2d Cir. 2004) ..... 19

*Southern New England Tel. Co. v. Global NAPs Inc.*,  
 624 F.3d 123 (2d Cir. 2010) ..... 16

*United States v. Chusid*,  
 372 F.3d 113 (2d Cir. 2004) ..... 16

*\*Vuitton et Fils S.A. v. Carousel Handbags*,  
 592 F.2d 126 (2d Cir. 1979) ..... 16, 17

*Weitzman v. Stein*,  
 98 F.3d 717 (2d Cir. 1996) ..... 21, 32

**FEDERAL STATUTES**

Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-1693r ..... 1

Federal Trade Commission Act

    15 U.S.C. § 45(a) ..... 1, 3

    15 U.S.C. § 53(b) ..... 1

    15 U.S.C. § 57b ..... 1

Truth in Lending Act, 15 U.S.C. §§ 1601-1666j ..... 1

28 U.S.C. § 1291 ..... 1

28 U.S.C. § 1331 ..... 1  
28 U.S.C. § 1337(a) ..... 1

**RULES AND REGULATIONS**

12 C.F.R. pt. 205 ..... 1  
12 C.F.R. pt. 226 ..... 1  
16 C.F.R. pt. 435 ..... 1  
Fed. R. App. P. 4(a)(1)(B) ..... 2  
Fed. R. Civ. P. 59(e) ..... 1, 16  
Fed. R. Civ. P. 65(d)(2) ..... 13, 15

## **JURISDICTIONAL STATEMENT**

The Federal Trade Commission (“Commission” or “FTC”), an agency of the United States government, initiated this action in the United States District Court for the Southern District of New York seeking relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), for deceptive acts or practices that violated Sections 5(a) and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 57b; the Commission’s Mail Order Rule, 16 C.F.R. pt. 435; the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-1693r, and its implementing Regulation E, 12 C.F.R. pt. 205; and the Truth in Lending Act, 15 U.S.C. §§ 1601-1666j, and its implementing Regulation Z, 12 C.F.R. pt. 226. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337(a), and 15 U.S.C. §§ 45(a), 53(b), and 57b.

On April 10, 2008, the district court entered a Stipulated Final Judgment and Order of Permanent Injunction (“Consent Order”). On July 27, 2010, the district court granted in part the Commission’s motion for an order of contempt for violating the April 2008 Consent Order, and the clerk entered a final judgment in the contempt proceeding on July 30, 2010. On December 1, 2010, the district court denied the FTC’s motion, pursuant to Fed. R. Civ. P. 59(e), to alter or amend the Court’s contempt order. The FTC filed its Notice of Appeal on January 28, 2011, and that notice was timely pursuant to Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

Whether, after holding defendants in contempt for violating a consent order by failing to disclose the material terms and conditions of their store credit refund policy, the district court erred by failing to award damages to compensate the victims of that contumacious conduct.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case, the Course of Proceedings, and the Disposition Below**

This is a contempt proceeding, in which the court below found defendants in contempt of a prior Consent Order because they had failed to make disclosures to consumers that were not only required by the Consent Order, but were material to consumers deciding whether to enter into extended-payment contracts to purchase computers. Pursuant to those contracts thousands of consumers paid millions of dollars to defendants, but received nothing in return. Yet the court below failed to grant meaningful compensatory relief. The Commission therefore brings this appeal.

The Commission brought the underlying action in 2008, alleging that defendants BlueHippo Funding, LLC, and BlueHippo Capital, LLC, (collectively “BlueHippo” or “the BlueHippo companies”) had violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by falsely representing they would ship computers and related electronics products to consumers within promised time frames and by failing to



disclose to consumers that their installment payments were non-refundable. D.1 (A.20-32).<sup>1</sup> As explained further below, BlueHippo's business was based on inducing consumers to enter into contracts that were essentially variants on layaway plans, in which the consumers made substantial payments toward the price of a computer (although not necessarily the full price) prior to receiving merchandise. Its sales efforts were directed principally to consumers who could not qualify for more conventional forms of credit.

The action was initially resolved, in April 2008, by entry of a Consent Order, which prohibited the BlueHippo companies, *inter alia*, from making any representations regarding refunds, exchanges, or cancellations, "prior to receiving any payment from customers," without clearly and conspicuously disclosing all material terms and conditions of their refund policy. D.2 at 1, 4 (A.33, A.36).

After entry of the Consent Order, BlueHippo, under the direction of its owner and Chief Executive Officer Joseph Rensin, continued to market computers through national radio, television, print, direct mail, and internet advertisements to consumers with poor credit. *See, e.g.*, FTC Ex. 30 (A.383), Ex. 37 (A.385), Ex. 38 (A.387-408). Those sales pitches, however, violated the Consent Order in a number of ways. Accordingly, in November 2009, the Commission moved for an order to show cause

---

<sup>1</sup> Items in the district court's docket are referred to as "D.xx." Items in the Appendix are referred to as "A.xx."

why both the BlueHippo companies and Rensin (collectively “defendants”) should not be held in civil contempt. D.42 (A.129-134). On July 27, 2010, the district court agreed in large part, concluding that BlueHippo had violated the Consent Order in four distinct ways, including failing to disclose all material terms and conditions relating to its store credit refund policy. D.76 at 5-10 (A.999-1004).

In the contempt proceedings, the Commission adduced evidence not only of defendants’ contumacious conduct, but of its impact on consumers. Thousands of consumers entered into contracts in response to defendants’ contumacious ads and paid more than \$14 million dollars in weekly or bi-weekly payments with the expectation of getting a computer. But, due to BlueHippo’s stringent financing requirements, the vast majority of those consumers failed to qualify to receive a computer because they had missed or were late on a payment, or chose to cancel their order. In such cases, BlueHippo provided no cash refunds (after seven days following their initial investment), but only allowed any balance to be used as a “store credit” to purchase other merchandise from BlueHippo’s online store. But consumers who attempted that method of salvaging their investment were met with onerous conditions on the use of such “credits” – conditions that defendants had failed to disclose at the outset, in plain violation of the Consent Order.

Despite that showing, the court below awarded only limited relief, and declined

to award any compensation at all on the basis that consumers had been harmed by entering into contracts — and losing money to defendants — in response to advertisements and solicitations that failed to disclose material terms about the store credit policy, in violation of the Consent Order. D.76 at 10-11 (A.1004-05).

## **B. Statement of the Facts**

### **1. Background**

BlueHippo marketed computers and related electronic products through national radio, television, print, direct mail, and internet advertisements, to consumers with poor credit. *See, e.g.*, FTC Ex. 30 (A.383), Ex. 37 (A.385), Ex. 38 (A.387-408). The company promised to finance computer products for “everyone — regardless of their credit,” that it would send the consumer “a brand new laptop without even checking [the consumer’s] credit,” and guaranteed that the consumer “will never be turned down because of [his] credit.” FTC Ex. 27A at 1 (A.380). Indeed, the company “GUARANTEED APPROVAL For A Brand New Computer No Matter What Your Credit Looks Like,” as long as the consumer had a checking account. *See, e.g.*, FTC Ex. 30 (A.383), Ex. 37 (A.385). Consumers who wished to order a computer would call a toll-free number provided in the ads, listen to a sales pitch, place their order, and provide the financial information that BlueHippo used to automatically debit their checking accounts. *See* FTC Ex. 40 (A.442-472) (telemarketing script).

BlueHippo gave consumers two ways to pay for computers. First, it offered a “Layaway Plan,” under which the consumer made an initial down payment (sometimes referred to as an “activation fee” and generally in the amount of \$99) followed by a series of weekly or biweekly payments until the full purchase price was paid. After all payments had been made, defendants promised consumers they would receive a computer. FTC Ex. 27A at 1 (A.380), Ex. 39 at 5 (A.414), Ex. 40 at 9 (A.447), Ex. 41 at 17 (A.477), Ex. 42 at 18 (A.479).

BlueHippo also offered its “Installment Credit Financing Plan” (“Financing Plan”). Under the Financing Plan, consumers had to make the initial down payment, followed by up to 13 weekly or biweekly payments in partial satisfaction of the purchase price. Once consumers made those payments, returned a signed installment credit agreement (the “Retail Installment Contract”) and supporting documents to BlueHippo, and continued to make payments for an additional three to four weeks while BlueHippo processed the order, they were promised a computer. The consumer, however, was obligated to pay the remainder of the balance through continued weekly or biweekly payments. FTC Ex. 27A at 1 (A.380), Ex. 39 at 5 (A.414), Ex. 40 at 29 (A.467), Ex. 41 at 17 (A.477), FTC Ex. 42 at 20-21 (A.481-82). BlueHippo promised that it would send computers within three to four weeks to those consumers who fulfilled the requirements of the Financing Plan or Layaway Plan. FTC Ex. 39 at 5

(A.414), Ex. 40 at 29 (A.467), Ex. 41 at 17 (A.477), Ex. 42 at 18 (A.479).

Consumer contracts under the Financing Plan were subject to stringent requirements: consumers who missed or were late with a single payment could be disqualified from receiving a computer under that Plan.<sup>2</sup> *See, e.g.*, FTC Ex. 22C at 3 (A.312), Ex. 41 at 17 (A.477). As a result, only a small fraction of consumers actually met the company's financing requirements.<sup>3</sup> The vast majority of BlueHippo's customers — most of whom were already facing financial difficulties — paid the company hundreds, if not thousands, of dollars, but never received a computer.<sup>4</sup>

This practice would not have had an adverse economic impact on these consumers if they were able to obtain refunds of the money they paid BlueHippo. But BlueHippo's policy permitted cash refunds for only seven days after the initial

---

<sup>2</sup> Such consumers could pay on layaway and were to receive a computer once they made all the requisite installment payments. FTC Ex. 40 at 29 (A.467), Ex. 41 at 17 (A.477).

<sup>3</sup> Out of the 24,108 consumer orders eligible for financing during the relevant period, only 2,025 qualified. D.76 at 4 (Findings of Fact, no. (iv), (vii)) (A.998). Even the few consumers who met the financing conditions often did not get a computer. *See id.* at 4 (Findings of Fact, no. (viii)) (A.998) (finding that out of 2,025 consumers who qualified to receive a computer 677 received nothing).

<sup>4</sup> The average full price of BlueHippo's computers was approximately \$2000. Def. Ex. MM at 3 ¶21 (A.694). Thousands of consumers continued to make payments toward the full purchase price even after failing to meet the financing conditions. But the vast majority of these consumers were unable to complete their payments in full under the layaway plan, and thus stored up a significant amount of payments as store credit.

payment. FTC Ex. 40 at 16 (A.454). Thereafter, if a consumer wanted to obtain anything for the money he had put towards buying a computer, he was relegated to having to use “store credit” to purchase merchandise from BlueHippo’s online store, such as printers, monitors, TVs and other electronics goods. FTC Ex. 40 at 16, 30 (A.454, 468), Ex. 41 at 15 (A.475).

But the use of such “store credits” was subject to onerous and previously-undisclosed conditions. When consumers actually tried to redeem store credits, they were informed that they were responsible for paying handling and shipping fees, and taxes, to receive merchandise purchased with their store credits, and that they had to pay these fees via money order — they could not apply the amounts already paid to BlueHippo to cover these expenses. FTC Ex. 22F at 5-6 (A.334-35); *see also* Ex. 40 at 16, 30 (A.454, 468) (no explanation of such additional expenses during initial telemarketing call).<sup>5</sup> Thus, to take advantage of store credit, consumers who had already paid BlueHippo hundreds of dollars had to make additional payments. Adding to the problem, BlueHippo failed to disclose that consumers could only order only one item at a time using store credit, with each ordered item requiring a separate advance payment for the required taxes and fees. *Id.*

---

<sup>5</sup> In fact, the only time that defendants mentioned taxes, shipping and handling during their telephone sales pitch was to point out that the purchase price of the computers “even includes all taxes, shipping, and handling.” FTC Ex. 40 at 9 (A.447); *see also* FTC Ex. 39 at 7 (A.416).

Defendants touted their cancellation and store credit refund policy to consumers during their telephone sales pitch stating, “you can cancel your order at anytime [sic] 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, TVs and more at BlueHippo.com.” FTC Ex. 40 at 16 (A.454). Defendants repeated their statement in the Layaway Agreement that they required consumers to sign to confirm their orders. *See* FTC Ex. 41 at 17 (A.477) (“I can cancel my order at any time prior to shipment — and while BlueHippo doesn’t give cash refunds — they will give me store credit that I can use if I like towards desktops, laptops, monitors, software, TVs and more at BlueHippo.com[.]”). These two statements constituted the only disclosure BlueHippo made to consumers relating to its store credit policy.

Not surprisingly, consumers who complained to the FTC about BlueHippo’s deceptive business practices specifically cited defendants’ failure to disclose these additional terms of the store credit refund policy. These consumers cited the additional cost terms as a factor that would have affected their decision to do business with BlueHippo had these terms been disclosed prior to the consumers’ decision to order a computer.<sup>6</sup>

---

<sup>6</sup> *See, e.g.*, FTC Ex. 48D-H (A.489-503) (“People who order through BlueHippo are getting ripped off! If you decide not to order from them & they have your money, they keep it unless you order something & then you have to send more money in to get your order shipped!”) (Ex. 48D) (A.490); (“[W]hat is even more

Between April 10, 2008 (when the Consent Order was entered) and July 24, 2009 (the last day for which BlueHippo provided relevant data) 61,878 consumers placed 62,673 orders for computers from BlueHippo. D.76 at 4 (Findings of Fact, no. (i) (A.998); Def. Ex. MM at 2 ¶ 13 (A.693), Def. Ex. NN at ¶ 2 (A.698), Feb. 11, 2010 District Court Hearing Transcript (“Tr.”) (D.74) at 172 (A.178). As of July 24, 2009, however, only 6,781 orders (or approximately 11%) were fulfilled by defendants, either through the provision of a computer or store credit merchandise. D.76 at 4 (Findings of Fact, no. (ii) (A.998), Def. Ex. NN at 1, ¶¶ 2-5 (A.698), Feb. 11, 2010 Tr. (D.74) at 172-74 (A.178). The remaining 89% of Blue Hippo’s customers got nothing for their money.

Moreover, the undisputed evidence demonstrates that the vast majority of those 6,781 orders were fulfilled only after the FTC had filed its first contempt action in April 2009, a year after entry of the Consent Order. Feb. 11, 2010 Tr. (D.74) at 203-04 (A.185-86). Ultimately, during the 15 months following entry of the Consent Order, nearly 90% of the orders (or 55,892 orders) placed with BlueHippo went unfulfilled, leaving these consumers empty-handed. Thus, in total, Defendants took in \$14,062,627.51 – the monies paid for the unfulfilled 55,892 orders – from

---

perplexing is the store credit policy. [BlueHippo] claim[s] that I have sufficient store credit to purchase a television, however [it] still want[s] extra money for tax and shipping when I have enough credit to cover these costs as well. This inhumane treatment is uncalled for.”) (Ex. 48F) (A.496); *see also infra* at 24-25.



consumers who got nothing. Def. Ex. NN at 1, ¶¶ 2-5 (A.698); Feb. 11, 2010 Tr. (D.74) at 172-73 (A.178), D.76 at 4 (Findings of Fact, nos. (ii), (iii)), 6 (A.998, 1000).

## **2. Proceedings below**

As noted above, on February 22, 2008, the Commission filed a complaint against defendants alleging that BlueHippo misrepresented that consumers who purchased the company's products and who made required periodic payments would receive the items purchased within promised times; that BlueHippo engaged in an unfair practice by failing to disclose to consumers only after defendants had debited payments from consumers' bank accounts that consumers' payments were not refundable; and that BlueHippo violated the Mail Order Rule, the Truth in Lending Act, and the Electronic Fund Transfer Act. D.1 (A.20-32).

The FTC and BlueHippo settled the case and entered into a Consent Order (filed on April 10, 2008) prohibiting BlueHippo, and those with actual knowledge of the order "in active concert or participation" with them, from: (a) making any express or implied misrepresentation of material fact that is false or misleading to any consumer, including that purchasers of their computers who made "the required periodic payments" would receive the products within the promised time period;<sup>7</sup> and (b) "[m]aking any representation regarding any refund, cancellation, exchange or

---

<sup>7</sup> The Consent Order defined "material" as "likely to affect a person's choice of, or conduct regarding, goods and services." D.2 at 3 (A.35).

repurchase policy without disclosing clearly and conspicuously, prior to receiving any payment from customers all material terms and conditions of” such policy. D.2 at 4 (A.36).<sup>8</sup>

In response to Commission staff’s efforts to assess its compliance with the Consent Order, BlueHippo failed to provide requested information, compliance reports, and documents. Based on this noncompliance, in April 2009 the district court held BlueHippo in contempt, imposing a monetary sanction and ordering the company to produce a compliance report and certain documents requested by the Commission. D.16. After BlueHippo’s further failures to comply with the Commission’s information requests, the court again ordered BlueHippo to produce additional information or face further sanctions. D. 34 at 2 ¶ D.

Based on compliance materials finally provided by BlueHippo, in November 2009 the Commission moved for an order to show cause why both BlueHippo, and its owner and Chief Executive Officer, Mr. Rensin, should not be held in civil contempt for violation of the Consent Order. D. 42 (A.129-34).<sup>9</sup> Specifically, the FTC alleged

---

<sup>8</sup> The Consent Order further prohibited BlueHippo from violating the consumer protection laws charged in the complaint, required BlueHippo to pay \$3.5 million to fund a consumer redress program for consumers who made payments to BlueHippo on or before February 28, 2006, and required BlueHippo to provide reports and information to the Commission to assess its compliance with the Consent Order.

<sup>9</sup> The Commission sought to hold Mr. Rensin jointly and severally liable for violations of the Consent Order pursuant to Fed. R. Civ. P. 65(d)(2)(B).

that BlueHippo committed six discrete violations of the Consent Order:

(1) misrepresenting that it was in the business of financing computers; (2) misrepresenting that consumers who qualified for financing would receive computers; (3) misrepresenting that they would ship computers to such consumers within four weeks of their qualifying for financing; (4) misrepresenting that consumers who met the conditions to receive merchandise using their store credit would receive such merchandise; (5) failing to disclose in their store credit refund policy that consumers needed to pay additional money for shipping and handling fees and taxes for each item ordered using their store credit; and (6) improperly conditioning the extension of credit on mandatory preauthorized electronic transfers. D.43. The Commission sought to hold both BlueHippo and Mr. Rensin jointly and severally liable for the Consent Order violations, and requested compensatory sanctions for consumers injured by BlueHippo's violations.<sup>10</sup>

After holding oral argument on the contempt motion on December 18, 2009, *see* D. 65, the court held a two-day evidentiary hearing with expert testimony followed by additional arguments by the parties in February 2010. *See* D. 73, 74, 75. On July 27, 2010, the district court granted the FTC's contempt motion, having found that

---

<sup>10</sup> For similar reasons, the Commission also moved to modify the Consent Order to prevent future harm to consumers by BlueHippo's violative practices. D.44. This motion was rendered moot by BlueHippo's subsequent filing for bankruptcy.

BlueHippo committed four discrete violations of the Consent Order. The court, however, denied compensation to most of the consumers injured by defendants' contemptuous behavior. Specifically, the district court awarded just \$609,856.38 in compensatory damages to 677 consumers harmed by defendants' failure to provide computers to those who qualified for financing. D.76 at 7, 10 (A.1001, 1004).

The court, however, provided no recompense for the 55,892 orders that were placed by consumers who were victimized by defendants' contumacious failure to disclose the additional payments required under the store credit policy – despite having expressly found that those payments constituted costs that were material to consumers' purchasing decisions. *Id.* at 8 (A.1002).<sup>11</sup> The court additionally found that this contempt affected *all* consumers who placed orders during the relevant time. *Id.* (A.1002). Nonetheless, the court concluded that the Commission had failed to provide record evidence reflecting the amount of consumer harm resulting from this contumacious conduct. *Id.* at 10-11 (A.1004-05).<sup>12</sup>

---

<sup>11</sup> In so doing, the court mischaracterized the amount of consumer injury resulting from defendants' failure to disclose these additional payments (\$14,062,627.51) as relating to an entirely different contempt claim and group of consumers that the Commission alleged had been deceived by defendants' misrepresentation that they were in the business of financing computers. *See* D.76 at 6, 10 (A.1000, 1004); *see also* D.83 at 2-3 (A.1016-17).

<sup>12</sup> For the same reason, the court denied recompense for two other violations of the Consent Order it found BlueHippo to have committed. More specifically, the court denied compensation to those consumers injured by defendants' provision of

Finally, the court concluded that, although Mr. Rensin was not named in the Consent Order, he had actual notice of the Consent Order, and thus was bound by its terms pursuant to Fed. R. Civ. P. 65(d)(2). Moreover, the court found that Mr. Rensin was liable for BlueHippo's contumacious conduct as a person acting "in active concert or participation" with BlueHippo because, as the CEO and owner of the BlueHippo companies, he led the management team, department heads reported to him, and he was involved in both the companies' day-to-day operations and major corporate decisions. *Id.* at 11-12 (A.1005-06). Mr. Rensin was thus held jointly and severally liable for BlueHippo's civil contempt violations. *Id.*

On August 27, 2010, the Commission filed a motion, pursuant to Fed. R. Civ. P. 59(e), to alter or amend the July 27, 2010 order. D.78 (A.1013-14). In that motion, the Commission argued that the court erred in failing to award compensatory sanctions for defendants' failure to disclose the material terms of their store credit refund policy. On December 1, 2010, the court denied that motion for essentially the same reasons provided in its July 2010 order, holding that the Commission had failed to meet its burden of showing an "approximation of damages" to consumers. D.83 (A.1015-17).

---

computers — but after the promised time frame — to consumers who had qualified for financing, and defendants' conditioning their extension of credit on mandatory preauthorized transfers. *Id.* at 10-11 (A.1004-05). The Commission does not challenge those aspects of the district court's order in this appeal.

## STANDARD OF REVIEW

A district court's decision to impose civil contempt, including the amount of any compensatory award, is reviewed under an abuse of discretion standard. *FTC v. Trudeau*, 579 F.3d 754, 768 (7th Cir. 2009); *FTC v. Kuykendall*, 371 F.3d 745, 763 (10th Cir. 2004); *United States v. Chusid*, 372 F.3d 113, 117 (2d Cir. 2004); *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000). Rulings on issues of law are reviewed *de novo*. See *Southern New England Tel. Co. v. Global NAPs Inc.*, 624 F.3d 123, 144-45 (2d Cir. 2010). This includes the methodology a district court uses in calculating the amount of compensation. See *Kuykendall*, 371 F.3d at 763; *Trudeau*, 579 F.3d at 768. Thus, a district court's failure to apply governing law requiring a compensatory award when a violation of an injunction and damages flowing from the violation are established is an error of law reviewable *de novo*. See *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979). A district court's failure to apply governing law imposing a presumption of consumer reliance and harm resulting from a defendant's widespread omissions of material fact in violation of a Consent Order is similarly reviewed *de novo*. *Trudeau*, 579 F.3d at 773 n.15; *Kuykendall*, 371 F.3d at 766-67.

## SUMMARY OF ARGUMENT

The district court correctly found the defendants in contempt for violating the

Consent Order. Specifically, the district court found: (1) that the Consent Order required defendants to disclose the material terms and conditions of their store credit refund policy, (2) that defendants' store credit conditions, including that consumers had to separately pay shipping and handling fees, as well as taxes, for each store credit item ordered — in addition to all prior payments they had made to defendants — were material cost terms, and (3) that defendants failed to disclose these material terms prior to receiving “any payment” from consumers as required by the Consent Order. (Part I, *infra*).

Despite finding this clear cut violation of the Consent Order, the district court committed an error of law when it failed to compensate over 50,000 consumers for the over \$14 million in injury caused by defendants' contempt. Significantly, this Court has long stressed that “[t]he district court is not free to exercise its discretion and withhold an order in civil contempt awarding damages, to the extent they are established[.]” because “the plaintiff should be made whole for the harm he has suffered.” *Vuitton et Fils*, 592 F.2d at 130. (Part II, *infra*).

In failing to award consumers the damages they had suffered, the court below made three mistakes. First, the court failed to take into account the express language of the Consent Order establishing the initial point of injury as the time consumers signed up to buy a computer but without receiving all the material cost terms of their

bargain. (Part II.A, *infra*).

Second, the court failed to apply the settled presumption of consumer reliance and harm in a contempt action based on an FTC law enforcement action where defendants' material omissions are widespread. *Trudeau*, 579 F.3d at 773 n.15; *Kuykendall*, 371 F.3d at 766-67. This presumption is a cornerstone of effective relief to injured consumers. Given the large number of consumers injured, the courts have recognized that it is not practicable to prove materiality, reliance, and harm consumer-by-consumer. Rather, "a presumption of consumer reliance arises when the FTC shows 'that the misrepresentations or omissions were of the kind usually relied upon by reasonable and prudent persons, that they were widely disseminated, and that the injured consumers actually purchased the defendants' products.'" *Kuykendall*, 371 F.3d at 765. The court below disregarded this strong presumption, and the consequent principle that defendants' gross receipts (less refunds and fulfillment) establish the amount of injury consumers suffered. *Kuykendall*, 371 F.3d at 764-66; *McGregor*, 206 F.3d at 1387-88. (Part II.B, *infra*).

Third, the court inexplicably ruled that the FTC "conceded" that it failed to prove the damages to consumers attributable to BlueHippo's failure to disclose its store credit policy. That ruling is refuted by the record. During the evidentiary hearing conducted by the trial court, the Commission presented substantial, unrebutted



evidence — drawn from BlueHippo’s own records — that consumers who were not informed of the terms of defendants’ store credit policy suffered \$14,062,627 in consumer injury. (Part II.C, *infra*).

## ARGUMENT

### I. THE DISTRICT COURT PROPERLY FOUND DEFENDANTS IN CONTEMPT FOR FAILING TO DISCLOSE THE MATERIAL TERMS OF THEIR STORE CREDIT POLICY

Section I.B. of the Consent Order imposes an express obligation on defendants 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 \* \* \* .” D.2 at 4 (A.36). The district court properly found that defendants violated this provision of the Consent Order – and were thus in civil contempt – by failing to disclose the material terms and conditions of their store credit refund policy.<sup>13</sup>

In particular, the district court held that defendants failed to disclose to consumers three onerous terms of their store credit refund policy before consumers

---

<sup>13</sup> A party “may be held in civil contempt for failure to comply with a court order if (1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner.” *Paramedics Electromedicina Comercial Ltda. v. G.E. Med. Sys. Info. Tech., Inc.*, 369 F.3d 645, 655 (2d Cir. 2004) (quoting *King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995)); *New York State Nat’l Org. for Women v. Terry*, 886 F.2d 1339, 1351 (2d Cir. 1989). The Commission, as the moving party, had the burden of proving each element of contempt. *King*, 65 F.3d at 1058. The district court properly found that the Commission had met its burden. D.76 at 5, 8-9 (A.999, 1002-03).

made their initial payment. First, defendants failed to disclose that consumers would have to pay shipping and handling fees, as well as taxes, before they could redeem their store credit. Second, defendants failed to disclose that the monies consumers already had paid BlueHippo, and for which they had received nothing in return, could not be used to cover these fees. Third, defendants failed to disclose that consumers could only redeem one order at a time using their store credit, had to wait for the first item to be ordered before ordering a second, and had to pay the additional undisclosed costs for each store credit item ordered from defendants' online store separately. *See* FTC 22F at 6 (A.335).<sup>14</sup>

The district court properly found that these terms were material to consumers. D.76 at 8 (A.1002). Indeed, a representation is material under the FTC Act if it “involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product.” *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992) (citing *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165, 175, 182 (1984)).<sup>15</sup> As the district court found, “[i]nformation concerning cost \* \* \* is presumed material. Since the cost of shipping, handling and taxes increases the overall cost of

---

<sup>14</sup> Indeed, defendants admitted that they failed to make these disclosures to consumers prior to consumers making their initial payment. Dec. 18, 2009 Tr. (D.65) at 61-63 (A.156-58).

<sup>15</sup> This same materiality standard is directly incorporated into the Consent Order. *See* D.2 at 3 (A.35).

merchandise, these costs are material.” D.76 at 8 (A.1002) (*citing FTC v. Crescent Publ’g Group*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001)).<sup>16</sup> The lower court, therefore, correctly held defendants in contempt for their failure to disclose these material fees.

## II. THE DISTRICT COURT ERRED BY FAILING TO ORDER COMPENSATION TO INJURED CONSUMERS

This Court has made clear that, upon a showing of contempt and damages flowing from such contempt, “[t]he district court is not free to exercise its discretion and withhold an order in civil contempt awarding damages to the extent they are established.” *Vuitton et Fils*, 592 F.2d at 130; *see also Weitzman v. Stein*, 98 F.3d 717, 719 (2d Cir. 1996) (“The compensatory goal [of a contempt remedy] \* \* \* can only be met by awarding to the plaintiff any proven damages”). Thus, once the FTC met its burden of establishing a reasonable approximation of the injuries consumers suffered,

---

<sup>16</sup> Thus, the district court properly rejected defendants’ argument that any such additional fees and costs were immaterial because they allegedly amounted only to a small fraction of the total purchase price, because they were not charged on all store credit purchases, or because most customers did not try to use their online store credit. The district court also rejected the defendants’ argument that any failure to disclose should be excused because the FTC did not object to it until it filed its contempt motion in November 2009. In fact, that policy was only first disclosed to the FTC in defendants’ belated July 2009 discovery responses, *see* FTC Ex. 22F at 6 (A.335), and was not disclosed in defendants’ January 2007 White Paper submitted to the Commission. *See* Def. Ex. N at 10 (A.639). The district court properly held that “[t]he FTC’s failure to object, however, does not absolve the Defendants from complying with the Consent Order’s terms. It was their burden to comply, not the FTC’s.” D.76 at 9 (A.1003) (*citing Trudeau*, 579 F.3d at 767).

the district court was bound to award that amount in compensatory relief.

The only proper remedy for civil contempt, moreover, is the full measure of harm suffered by the victim of the contumacious acts. “The measure of the court’s power in civil contempt proceedings is determined by the requirements of full remedial relief.” *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949). As this Court held in *Terry*, 886 F.2d at 1353, “[c]ompensatory sanctions should reimburse the injured party for actual damages.” The injury need not be demonstrated with absolute precision, rather, it is sufficient to show a reasonable approximation of the harm suffered as a result of the contempt. *See id.* at 1354 (holding that “a complainant’s evidentiary burden is not great in the contempt context,” and is supported by “some proof of loss.”)

Here, in denying compensation to consumers who were victimized as a result of defendants’ contumacious conduct, the district court erred in three ways. First, the court ignored the plain language of the Consent Order, which specifically establishes the point in time where consumer injury occurs as a result of a failure to disclose material terms of the refund policy. Second, the court failed to apply the well-established case law regarding consumer injury that flows from a widespread omission of material fact. Finally, the court ignored the substantial, unrebutted evidence demonstrating defendants’ contempt caused consumers \$14 million in injury.

**A. The District Court Ignored the Consent Order's Express Language That Establishes the Point in Time Consumers Were Injured as a Result of Defendants' Failure to Disclose**

In failing to award compensation for each consumer to whom defendants failed to disclose the material terms of their store credit refund policy – and who ultimately received nothing for their money – the district court ignored language in the Consent Order that addressed this very issue. Specifically, the terms of the Consent Order explicitly require defendants to disclose all material conditions of their store credit refund policy *prior to receiving any money* from consumers. *See* D.2 at 4 (A.36). The Order contains this requirement because without this information consumers cannot evaluate whether to enter the agreement in the first place.

Here, consumers were asked to enter into an ongoing obligation to make significant payments toward a computer that they would not receive, or could not keep, if they failed to make all their payments. BlueHippo lured consumers into this agreement without providing all the material terms of the deal. Indeed, those undisclosed store credit terms would be particularly important to the consumers whom BlueHippo targeted precisely because of their poor credit history. This is demonstrated by the fact that the vast majority of them were not able to make all the payments required to get a computer. At that point, these consumers could only receive anything in return for their money by using the store credit promised by BlueHippo.

The consumer complaints in the record illustrate that Blue Hippo's failure to disclose its store credit policy was important. *See* FTC Ex. 48D-H (A.489-503). As one consumer explained: "When I cancelled my order I was informed that I would not be able to receive a refund but would have to use my initial 100 dollar deposit as an internet store credit on BlueHippos [sic] website. When I ordered the product I wanted off the website the total for the product was 50.72 plus 18.47 for S + H charges. However, BlueHippo required me to send the shipping and handling fee in separately and by money order even though I had a 100 dollar credit which is more than enough to cover the total charges \* \* \* I am very upset with this process and feel that I am being dupped [sic] out of my money." FTC Ex. 48G (A.499); *see also* FTC Ex. 48D (A.490) ("People who order through BlueHippo are getting ripped off! If you decide not to order from them and they have your money, they keep it unless your order something & then you have to send more money in order to get your order shipped!").

These undisclosed fees made recovering any portion of the consumers' "forfeited" money very difficult and burdensome. Consumers were reasonably hard pressed to trust a company – that had just defrauded them by failing to disclose material fees in violation of a federal court order – enough to pay them additional fees to purchase merchandise. This is particularly true when the consumers could not apply money they had already paid BlueHippo (often hundreds of dollars) to cover those

fees. It is, therefore, little wonder few consumers actually used their store credit.

This is the very reason that the Consent Order mandates that defendants disclose all material terms – in particular all the costs for the product – before they accept any payment from customers. It is at that point – when consumers are deciding whether to order a computer from BlueHippo and pay them money – that their injury started.<sup>17</sup>

**B. The District Court Erred in Failing to Follow Proper Legal Principles Regarding Injury Caused by a Widespread Material Omission**

As shown above, the district court itself recognized that defendants' consistent failure to disclose the terms of their store credit policy was not only in express

---

<sup>17</sup> The district court failed to recognize that consumer injury began when BlueHippo lied to them about the terms of store credit because it appears to have confused the amount of damages sought by the Commission for consumers misled by defendants' failure to disclose material terms of its store credit refund policy with those consumers deceived by defendants' separate misrepresentation that they were in the business of financing computers. *See, e.g.*, D.76 at 6, 10 (A.1000, 1004); D.83 at 2-3 (A.1016-17). As the record makes clear, for the misrepresentation that defendants were in the business of financing computers, the Commission was seeking \$6,682,469.82 in sanctions for the 20,760 orders placed by consumers who could have qualified for financing during the relevant time period, paid money to defendants, but received nothing in return. *See* Feb. 19, 2010 Tr. (D.75) at 355-356 (A.202). In contrast, for defendants' separate Consent Order violation of failing to disclose the material terms of their store credit refund policy, the Commission was seeking \$14,062,627.51 in compensation for the 55,892 orders placed by consumers who paid money to defendants during the relevant period but received nothing. It may be true that the 20,760 orders relating to the business of financing misrepresentation also fell within the pool of 55,892 consumer orders relating to defendants' failure to disclose. However, these two separate groups of consumer orders relate to two different Consent Order violation claims, and the fact that some of the consumers who placed the 55,892 orders ultimately did not qualify for financing is entirely irrelevant to whether they were also deceived at the outset by BlueHippo's failure to disclose.

violation of the Consent Order, but was material to consumers contemplating entry into a contract committing them to make substantial payments to defendants. The court erred in failing to follow well-established law regarding the injury that consumers suffered by dint of those transgressions.

Under the FTC Act, an omission of a material fact, such as defendants' failure to disclose their store credit conditions, is a deceptive act. *See* FTC Policy Statement on Deception, appended to *Cliffdale Assocs., Inc.*, 103 FTC at 174; *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 531 (S.D.N.Y. 2000) (holding that "a material omission, like a material misrepresentation, that is likely to mislead consumers acting reasonably under the circumstances is a deceptive act under Section 5" of the FTC Act).

Importantly, consumer injury resulting from widespread, deceptive acts is calculated by applying the well-established legal presumption that each consumer subject to such acts relied on the deception and is injured. *See, e.g., Kuykendall*, 371 F.3d at 764-67 (applying presumption in contempt case); *McGregor*, 206 F.3d at 1387-88 (applying presumption in contempt case); *see also FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993) (applying standard in case under FTC Act Section 19); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991) (applying standard in case under FTC Act Section 13). Indeed, "[p]roof of individual



reliance by each purchasing customer is not a prerequisite” to compensating consumers, “as it would be virtually impossible for the FTC to offer such proof, and to require it would thwart and frustrate the public purposes of FTC action.” *McGregor*, 206 F.3d at 1388 (citing *Security Rare Coin*, 931 F.2d at 1316 and *Figgie*, 994 F.2d at 605); accord *Trudeau*, 579 F.3d at 773 n.15 (no need for the FTC to show individual customer reliance or customer dissatisfaction in a contempt action).

The presumption of reliance and harm applies here because defendants’ omission of the store credit terms were material and widespread. Indeed, BlueHippo failed to disclose the material terms and conditions of its store credit refund policy to every consumer who placed an order between April 10, 2008 and July 24, 2009. *See* D.76 at 8 (A.1002); FTC Ex. 22F at 6 (A.335). Because each and every customer is presumed to have been injured by BlueHippo’s material failure to disclose, each must be compensated for defendants’ contumacious conduct.

In these circumstances, the measure of compensation needed to make consumers whole can only be compensatory damages equal to payments made by consumers who entered into contracts with BlueHippo during the specified time period and received nothing in return. In the present case, the need for such relief is particularly clear, for it does no more than refund money that consumers paid to BlueHippo in response to a deceptive and contumacious sales pitch, in exchange for which they received

nothing.<sup>18</sup> Indeed, even in cases where consumers arguably received *some* value in response to a contumaciously deceptive sales pitch, courts have recognized that the proper measure of relief is the entire amount paid (less any refunds), because such actions taint consumers' decisions to enter into a transaction in the first place. *See, e.g., Trudeau*, 579 F.3d at 773 n.16 (where presumption of reliance applies, consumer loss is assessed by awarding the consumers their full purchase price “because if the customers had known the truth, they might not have bought any [goods] at all”); *McGregor*, 206 F.3d at 1387-88 (full compensation required in contempt action, even if product had some value, because “seller’s misrepresentations tainted the customer’s purchasing decisions”); *see also Figgie*, 994 F.2d at 606 (full compensation required in direct FTC Act case, even if product had some value, because “the fraud in the selling, not the value of the thing sold, is what entitles consumers \* \* \* to full refunds”).

Accordingly, in order to make consumers whole in these circumstances, it is well-established that defendants' gross receipts (minus any refunds and fulfilled orders) provides a reasonable approximation of consumer injury. *See, e.g., Kuykendall*,

---

<sup>18</sup> Notably, defendants failed to provide evidence of even a single consumer who would have agreed to pay BlueHippo any money for a computer in the first place had they known how expensive and difficult it would be to redeem merchandise using their store credit.

371 F.3d at 764-66 (“where a defendant has engaged in a pattern or practice of contemptuously misleading consumers in violation of an FTC Act-authorized injunction, using the defendant’s gross receipts is a proper baseline in calculating the amount of sanctions necessary to compensate injured consumers”); *McGregor*, 206 F.3d at 1387-88 (holding that court properly presumed consumer reliance and calculated sanctions based on gross receipts); *see also Figgie* 994 F.2d at 605-06 (in case under FTC Act Section 19, holding that gross receipts was the proper baseline for consumer redress where FTC proved that defendant made misrepresentations and “that they were widely disseminated.”); *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997) (in case under FTC Act Section 13, awarding “the full amount lost by consumers”).

**C. The Commission Presented Uncontroverted Evidence of the Amounts Paid by Injured Consumers**

The Commission also adduced uncontested evidence reflecting the amount of consumer injury resulting from defendants’ failure to disclose. The Commission’s economic expert, Dr. Yoeli, testified — based on uncontroverted data provided by the defendants — that between April 10, 2008 (the day after the Consent Order was signed) and July 24, 2009 (the last date for which BlueHippo produced data), 61,878 consumers placed 62,673 computer orders with BlueHippo. Feb. 11, 2010 Tr. (D.74) at 172, 198 (A.178, 184). Dr. Yoeli further testified that BlueHippo failed to provide either a computer or store credit merchandise for 55,892 of those orders and that

consumers paid defendants \$14,062,627.51 for those 55,892 unfilled orders. *See* Feb. 11, 2010 Tr. (D.74) at 172-73, 198-205 (A.178, 184-86); Def. Ex. NN at ¶ 4 (A.698); *see also* D.71 at ¶¶ 7-9 (summarizing damages testimony); Dec. 18, 2009 Tr. (D.65) at 28-31 (A.140-43); Feb. 19, 2010 Tr. (D.75) at 330 (A.197).

The district court explicitly accepted this testimony in its factual findings, concluding that defendants failed to make the required disclosures of their refund policy to all consumers who placed 62,673 computer orders between April 10, 2008 and July 24, 2009, that defendants failed to provide either a computer or store credit merchandise to 55,892 of those 62,673 orders, and that “[c]onsumers paid Contempt Defendants \$14,062,627.51 for these 55,892 orders and received nothing in return.” D.76 at 4 (Findings of Fact nos. (i), (ii), and (iii)), 6 (A.996, 1000). These undisputed figures show that consumers were injured in the amount of \$14,062,627.51 due to defendants’ failure to disclose.

The district court, however, erroneously concluded that the Commission had “conceded that it has failed to provide record evidence approximating the damage to consumers.” *See* D.76 at 10-11 (A.1004-05); D.83 at 2-3 (A.1016-17). Not only did the Commission introduce evidence specifically relating to the amount of consumer injury arising from defendants’ failure to disclose, but FTC counsel made clear during closing arguments both the relative magnitude and specific amount of compensatory

sanctions the Commission sought relating to defendants' failure to disclose. *See, e.g.*, Feb. 19, 2010 Tr. (D.75) at 349 (A.200) ("the store credit failure to disclose damages are the largest damages"); *id.* at 358 (A.203) (defendants' failure to disclose constituted "the largest damages pool here."); *id.* at 360 (A.203) ("[i]n terms of damages, there were 62,673 orders with BlueHippo, 55,892 of these customers' orders didn't receive either a computer or store credit merchandise, and these customers paid BlueHippo \$14,062,627.51 in installment payments"). Even defendants' counsel acknowledged at the hearing that the FTC was requesting \$14 million in compensatory sanctions for defendant's failure to disclose. *See id.* at 395 (A.209). The FTC thus met its burden of adducing evidence showing a "reasonable approximation" of consumers' losses due to defendants' contumacious conduct. *See Trudeau*, 579 F.3d at 772-73; *Kuykendall*, 371 F.3d at 764; *Terry*, 886 F.2d at 1353-54.<sup>19</sup>

Once the FTC comes forward with calculations that "reasonably approximate" the amount of consumers' net losses, the burden shifts to defendants to show those calculations are inaccurate. *See Kuykendall*, 371 F.3d at 766 ("A baseline [presented by the FTC approximating compensatory sanctions] is only the beginning, however. To accurately calculate actual loss, the defendants must be allowed to put forth

---

<sup>19</sup> "To the extent the large number of consumers affected by the defendants' deceptive trade practices creates a risk of uncertainty [as to the amount of consumer injury,] the defendants must bear that risk." *Kuykendall*, 371 F.3d at 765.

evidence showing that certain amounts should offset the sanctions assessed against them.”) (citing *Febre*, 128 F.3d at 535); *Trudeau*, 579 F.3d at 773.

Defendants, however, did not effectively rebut the accuracy of the FTC’s consumer injury calculations. Indeed, defendants conceded that customers who placed 55,892 orders during the relevant time period failed to receive either a computer or store credit merchandise from defendants. *See* Feb. 11, 2010 Tr. (D.74) at 255 (A.192) (defendants’ expert agreed that his results were “substantially the same” as those obtained by Dr. Yoeli); Dec. 18, 2009 Tr. (D.65) at 39 (A.147) (defense counsel admitted that approximately 55,000 consumers received nothing from BlueHippo).

Thus, the FTC presented uncontroverted evidence that consumers paid \$14,062,627 to defendants for which they received nothing, in response to widespread advertisements that omitted material aspects of the deal being offered, all in plain violation of an existing Consent Order. The “compensatory goal” of civil contempt proceedings “can only be met by awarding \* \* \* [such] proven damages.” *Weitzman*, 98 F.3d at 719. Thus, the district court erred when it ignored this precedent and held that the Commission had not established the amount of injury resulting from BlueHippo’s failure to disclose the material terms of its store credit refund policy.

## CONCLUSION

For the reasons set forth above, this Court should reverse that portion of the district court's order denying the Commission compensatory sanctions for defendants' failure to disclose the material terms of their store credit refund policy, and order compensatory sanctions in the amount of \$14,062,627.

Respectfully submitted,

OF COUNSEL:

JAMES A. KOHM  
Associate Director

ROBERT S. KAYE  
Assistant Director

AMANDA C. BASTA  
Attorney  
Bureau of Consumer Protection  
Federal Trade Commission  
Washington, D.C.

WILLARD K. TOM  
General Counsel

JOHN F. DALY  
Deputy General Counsel for Litigation

LAWRENCE DeMILLE-WAGMAN  
Assistant General Counsel for Litigation

/s/ Michael D. Bergman  
MICHAEL D. BERGMAN  
Attorney  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
(202) 326-3184

## CERTIFICATE OF COMPLIANCE

I certify that Plaintiff-Appellant Federal Trade Commission's ("FTC") Brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because it contains 8,414 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by the Corel WordPerfect word processing program used to prepare the Brief.

I further certify that the FTC's Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

/s/ Michael D. Bergman  
Michael D. Bergman  
Counsel for Appellant  
Federal Trade Commission



## **ADDENDUM**

# SPC APP

# 11-374

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

FEDERAL TRADE COMMISSION,  
Plaintiff-Appellant

v.

BLUEHIPPO FUNDING, LLC; BLUEHIPPO CAPITAL, LLC;  
and JOSEPH K. RENSIN  
Defendants-Appellees.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

**SPECIAL APPENDIX PURSUANT TO LOCAL RULE 32.1(c)**

---

MARTIN F. HIMELES, JR.  
Zuckerman Spaeder LLP  
100 East Pratt St., Suite 2440  
Baltimore, Maryland 21201

WILLARD K. TOM  
General Counsel

JOHN F. DALY  
Deputy General Counsel for  
Litigation

LAWRENCE DeMILLE-WAGMAN  
Assistant General Counsel for  
Litigation

MICHAEL D. BERGMAN  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
(202) 326-3184

**TABLE OF CONTENTS**

<u>Document</u>	<u>Page</u>
1. District Court Order Granting in Part Motion of Plaintiff Federal Trade Commission (“FTC”) for an Order to Show Cause why Contempt Defendants Should Not be Held in Contempt (Dkt. No. 76, filed 07/27/10) . . . . .	1
2. Clerk’s Judgment (Dkt. No. 77, filed 07/30/10) . . . . .	13
3. District Court Order Denying FTC’s Motion to Alter or Amend the Court’s July 27, 2010 Order (Dkt. No. 83, filed 12/01/10) . . . . .	14
4. FTC Act Section 5(a), 15 U.S.C. § 45(a) (2011). . . . .	17
5. FTC Act Section 13(b), 15 U.S.C. § 53(b) (2011) . . . . .	18
6. FTC Act Section 19, 15 U.S.C. § 57b (2011) . . . . .	19

# Tab 1

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #: \_\_\_\_\_  
DATE FILED: July 27, 2010

-----X

FEDERAL TRADE COMMISSION, :

Plaintiff, :

-against- :

BLUEHIPPO FUNDING, LLC, et al., :

Defendants. :

-----X

08 Civ. 1819 (PAC)

ORDER

HONORABLE PAUL A. CROTTY, United States District Judge:

The Federal Trade Commission (“FTC”) seeks an order of contempt against BlueHippo Funding, LLC and its wholly-owned subsidiary BlueHippo Capital, LLC (collectively, “BlueHippo”) for violating the terms of a consent order dated April 9, 2008 (the “Consent Order”),<sup>1</sup> as well as against Joseph K. Rensin, who is the whole owner of BlueHippo Funding, LLC (“Rensin,” and together with BlueHippo, “the Defendants”). Rensin served as CEO until July 2009 (FTC Ex. 22G, at 3.)<sup>2</sup>

BlueHippo markets computers and related electronic products to credit-challenged consumers. Advertising via national radio, TV, print, direct mail, and the Internet, BlueHippo promises to finance computer products for “everyone — regardless of their credit.” BlueHippo offers consumers two different ways to obtain computers: layaway (the “Layaway Plan”) and installment credit financing (the “Installment Credit Financing Plan”). The Layaway Plan consists of two steps: (i) an initial down payment, followed by (ii) a series of weekly or biweekly payments until satisfaction of the full purchase price. The Installment Credit Financing Plan grows

<sup>1</sup> On November 23, 2009, BlueHippo filed for Chapter 11 in the U.S. Bankruptcy Court for the District of Delaware. On December 23, 2009, BlueHippo’s bankruptcy action was converted to Chapter 7 liquidation. The trustee in bankruptcy has requested a 60-day continuance of these proceedings. The Court denies this request. The trustee in bankruptcy has declined to pay BlueHippo Funding, LLC’s counsel, prompting counsel to request withdrawal from these proceedings in December 2009. The Court granted counsel’s withdrawal motion on February 9, 2010. Counsel’s withdrawal does not constitute a default, however, and the Court will therefore consider BlueHippo’s objections on the record. Rensin has always been represented; since Rensin’s liability is derivative only, the Court must hold BlueHippo in contempt before holding Rensin in contempt.

<sup>2</sup>“FTC Ex.” refers to the exhibits that the Federal Trade Commission submitted in connection with the evidentiary hearing of February 9, 11, and 19, 2010.

out of the Layaway Plan. BlueHippo sends installment credit agreements (“Installment Credit Agreements”) to consumers who make an initial down payment followed by 13 additional consecutive payments. BlueHippo then sends computers to consumers who (i) properly complete and return the Installment Credit Agreements, and (ii) make a series of scheduled payments in partial satisfaction of the purchase price. BlueHippo considers the Installment Credit Financing Plan as a form of “financing” since consumers order computers while still owing part of the purchase price. BlueHippo tells consumers that it will fill their orders within three to four weeks via the Installment Credit Financing Plan.

In 2006, BlueHippo instituted a refund policy (the “Refund Policy”). Under the Refund Policy, BlueHippo grants refunds to consumers who make an initial payment and request a refund within seven days of the initial payment. After seven days, refunds are not granted. Instead, BlueHippo allows only a store credit (the “Store Credit Policy”). Under the Store Credit Policy, consumers are responsible for tax, shipping, and handling costs applicable to the merchandise obtained.

In 2006, the FTC notified the Defendants that it intended to file a complaint alleging violations of the Federal Trade Commission Act (the “Act”) (Def. Ex. A, at 4.)<sup>3</sup> Specifically, the FTC claimed that BlueHippo violated the Act by falsely representing that BlueHippo would ship computers and televisions within promised times and failed to disclose that consumer payments were non-refundable.

Following this notification, BlueHippo made certain disclosures to the FTC, including a White Paper dated January 12, 2007 (the “White Paper”). In the White Paper, BlueHippo disclosed advertising materials, telemarketing scripts, and documents relating to both the Layaway Plan and the Installment Credit Financing Plan. The parties also exchanged draft complaints and consent orders. These initial drafts named Rensin as a defendant in the action.

---

<sup>3</sup> “Def. Ex.” refers to the exhibits that the Defendants submitted in connection with the evidentiary hearing on February 9, 11, and 19, 2010.

On February 22, 2008, the FTC filed its Complaint but did not name Rensin as a defendant.<sup>4</sup> The parties agreed to a Consent Order on April 9, 2008; but Rensin was not named in the Order. The Consent Order includes a monetary judgment of \$3.5 million that BlueHippo is obligated to use to fund a consumer redress program for consumers who made payments on or before February 28, 2006. In addition to the monetary judgment, the Consent Order includes injunctive relief, which prohibits BlueHippo from: (i) making any misrepresentations of material fact, express or implied; (ii) making representations regarding any refunds or cancellations without clearly and conspicuously disclosing all material terms and conditions; and (iii) conditioning the extension of credit on mandatory preauthorized transfers in violation of the EFTA.

Subsequently, the FTC initiated discovery to monitor BlueHippo's compliance with the Consent Order, but BlueHippo ignored the request, was uncooperative and non-compliant. From October 2008 through April 2009, BlueHippo either failed to produce information or provided wholly inadequate responses to the FTC's requests.

On April 16, 2009, the Court held BlueHippo in contempt for these failures (the "Civil Contempt Order"). Following the Civil Contempt Order, from May 2009 through July 2009, BlueHippo initiated a grudgingly compliant program of dribbling out responses to the FTC's queries.

On November 12, 2009, based on information BlueHippo produced during discovery, the FTC moved to hold both BlueHippo and Rensin in civil contempt for violation of the Consent Order (the "Contempt Motion"). The FTC sought both coercive sanctions and monetary relief for consumers harmed by BlueHippo's alleged misrepresentations and failures to disclose. Specifically, the FTC claimed that BlueHippo falsely advertised that it finances computers; BlueHippo failed to ship computers within specified time frames; BlueHippo failed to disclose material information about the terms of the Store Credit Policy; and BlueHippo conditioned its extension of credit on mandatory preauthorized transfers.

---

<sup>4</sup> The FTC brought this action under §§ 5(a)(1), 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45(a)(1), 53(b), and 57(b); the Commission's Trade Regulation Rule Concerning the Sale of Mail or Telephone Order Merchandise ("the Mail Order Rule"), 16 C.F.R. Part 435; the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. §§ 1693-1693r, and its implementing Regulation E, 12 C.F.R. Part 205; and the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1666j, and its implementing Regulation Z, 12 C.F.R. Part 226.



The FTC's Contempt Motion is based on BlueHippo's data. Specifically, BlueHippo provided the FTC with the number of consumers who ordered computers from BlueHippo starting April 10, 2008, the date the Consent Order was entered, through July 24, 2009. BlueHippo verified the underlying data. The FTC and Rensin hired expert witnesses, however, who disagreed on how to analyze this data. On February 9, 11, and 19, 2010, the Court held an evidentiary hearing to hear testimony from both parties' expert witnesses.

### **FINDINGS OF FACT**

After holding the evidentiary hearing and reviewing the parties' submissions, the Court makes the following findings of fact:

- (i) between April 10, 2008 and July 24, 2009, consumers placed 62,673 orders for computers;
- (ii) as of July 24, 2009, BlueHippo failed to provide either merchandise or store credit for 55,892 of those 62,673 orders;
- (iii) consumers paid BlueHippo \$14,062,627.51 for those 55,892 orders;
- (iv) after April 10, 2008, 24,108 orders could have qualified for financing on or before April 8, 2009, the day before the FTC brought its initial contempt action against BlueHippo;
- (v) by July 24, 2009, BlueHippo failed to provide either a computer or store credit merchandise for 20,760 of those 24,108 orders;
- (vi) BlueHippo earned a total of \$6,682,469.82 from those 20,760 orders;
- (vii) of those 24,108 orders, 2,025 qualified for financing by April 8, 2009;
- (viii) by July 24, 2009, BlueHippo failed to fill 677 of those 2,025 orders;
- (ix) BlueHippo earned \$609,856.38 from those 677 orders;
- (x) between April 10, 2008 and July 24, 2009, 3,454 store credit orders had a zero balance, indicating that consumers who placed these 3,454 orders were entitled to receive store credit merchandise; and
- (xi) by July 24, 2009, BlueHippo failed to fill 2,704 of those 3,454 store credit orders.

### **CONCLUSIONS OF LAW**

A party “may be held in civil contempt for failure to comply with a court order if (1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner.” Paramedics Electromedicina Comercial Ltda. v. G.E. Med. Sys. Info. Tech., Inc., 369 F.3d 645, 655 (2d Cir. 2004). A party may be held in contempt even for unwillful violations. Id. As a party to the original action, the FTC may invoke this Court’s enforcement powers by initiating the civil contempt proceeding in the same action. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444-45 (1911). The moving party has the burden of proving each element of contempt. King v. Allied Vision, Ltd., 65 F.3d 1051, 1058 (2d Cir. 1995).

The parties do not dispute that the language of the Consent Order is clear and unambiguous. The FTC argues that several of BlueHippo’s actions, including its advertisement as a financing company, late shipments, store credit policy, and mandatory authorized transfers violate the Consent Order. The FTC further argues that proof of BlueHippo’s noncompliance is either clear and convincing, or shows that BlueHippo has not diligently attempted to comply in a reasonable manner. By contrast, BlueHippo maintains that it disclosed its current marketing and production practices in the White Paper and that it did not violate the Consent Order.

#### **I. Financing Misrepresentations**

An advertisement is deceptive under the FTC Act “if it is likely to mislead consumers, acting reasonably under the circumstances, in a material respect.” Kraft, Inc. v. FTC, 970 F.2d 311, 314 (7th Cir. 1992). Courts may look at the plain language of an advertisement to determine what it means. Kraft, 970 F.2d at 318-19; FTC v. Bronson Partners, 564 F. Supp. 2d 119, 126-28 (D. Conn. 2008). Such express claims and intentionally made implied claims are presumed material. Kraft, 970 F.2d at 322-23; FTC v. Five Star Auto Club, 97 F. Supp. 2d 502, 529 (S.D.N.Y. 2000).

The FTC argues that BlueHippo made misrepresentations to consumers by claiming to finance computers, when its own data show that it did not in fact finance computers. BlueHippo represented itself as

being in the business of financing in its national advertisements. BlueHippo's advertisements included statements such as "BlueHippo is one of the fastest growing consumer finance companies in the country" and "[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 Ex. 27F, at 4.)

These representations are material under the Consent Order, which provides that BlueHippo may not make "any express or implied misrepresentation that is false or misleading in any matter" (Consent Order at 4.) The Consent Order defines materiality as "likely to affect a person's choice of, or conduct regarding, goods or services" (Consent Order at 3.) If consumers knew that BlueHippo's statements regarding financing and credit checks were false, they would likely have purchased computers from other vendors.

There are, however, two distinct consumer groups relevant to BlueHippo's financing misrepresentations, and the Court distinguishes between them: (i) consumers who entered the Installment Credit Financing Plan, but never qualified for financing; and (ii) consumers who met BlueHippo's financing criteria under the Installment Credit Financing Plan, but either did not receive a computer at all, or else received a computer only after the promised time frame.

#### **i. Total Pool of Consumers That Placed Orders With BlueHippo**

The FTC's expert witness testified that between April 10, 2008 and July 24, 2009, consumers placed 62,673 orders for computers, and that as of July 24, 2009, consumers received neither merchandise nor store credit for 55,892 of these 62,673 orders (Def. Ex. NN ¶ 3-4.) Consumers paid BlueHippo \$14,062,627.51 for those 55,892 orders and received nothing in return (Def. Ex. NN ¶ 5.) This consumer pool, however, includes consumers who did not qualify for financing and signed documentation stating they were aware of BlueHippo's no-refund policy.

The White Paper shows that BlueHippo represented to consumers that "the consumer would be approved for a 'shipment' or that the product would be 'ordered' following completion of the requisite number of payments by the consumer and the return by the consumer of the shipping documents" (White Paper at 2.)

BlueHippo included this information both in the telemarketing script that was read to consumers when they called to place their orders, and also in the Installment Credit Agreement which consumers signed and returned to receive their merchandise (White Paper at 1.) Accordingly, BlueHippo cannot be held liable for misrepresentation when it disclosed its terms and refund policies to each consumer at the outset of the transaction.

**ii. Consumers Who Met BlueHippo's Financing Criteria But Did Not Receive a Computer**

The Court looks instead at the pool of consumer orders that could have qualified for financing on or before March 11, 2009, the last date on which a consumer could qualify for a financed computer and, under BlueHippo's three to four week shipment policy, expect to receive a computer before April 8, 2009. This order pool consists of 24,108 orders, and of these 24,108 orders, 2,025 qualified for financing by April 8, 2009 (Tr. at 53, 55.)

In June 2009, following entry of the April 2009 Civil Contempt Order, BlueHippo bestirred itself to fill an unusually large number of computer orders (Def. Ex. NN ¶ 16.) By July 24, 2009, BlueHippo ordered 1340 computers to fill these 2,025 orders, leaving only 685 orders unfilled. BlueHippo also gave store credit merchandise toward 8 of these orders, resulting in a total of 677 unfilled orders (Def. Ex. OO ¶ 15.) Customers paid BlueHippo \$609,856.38 for these 677 orders (Def. Ex. OO ¶ 15.)

BlueHippo's belated efforts to fill computer orders do not preclude the Court from finding BlueHippo in civil contempt. Int'l Assoc. of Conference Interpreters, 123 F.T.C. 465, 658 (1997) (holding that 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.'"). Moreover, BlueHippo represented that once consumers met certain pre-shipping requirements, BlueHippo would process and ship their orders within three to four weeks of receipt of the forms (FTC Ex. 42, at 1.) Yet BlueHippo took an average of 26.5 weeks to deliver computers to qualified consumers (Tr. at 56; Def. Ex. NN ¶ 24.)

Accordingly, BlueHippo misrepresented the time frame in which it delivered computers and its belated efforts of order fulfillment do not shield it from contempt. The Court finds BlueHippo in civil contempt for violating the Consent Order with regard to the 2,025 computer orders that qualified for financing by April 8, 2009.

## **II. Failure to Disclose the Details of its Store Credit Policy**

Under the Store Credit Policy, BlueHippo grants store credit to consumers who make an initial payment, but do not request a refund for their orders within seven days. BlueHippo does not dispute that, in advance of fulfilling their store credit orders, consumers had to send BlueHippo additional money to cover shipping, handling, and taxes for online purchases. Further, consumers could order only one item at a time (FTC Ex. 22F, at 6), so that consumers might have to pay shipping, handling, and taxes on the second order. BlueHippo disclosed none of this. In fact, BlueHippo first informed consumers of these terms and conditions of the Store Credit Policy when consumers tried to use their credit. Between April 10, 2008 and July 24, 2009, 3,454 store credit orders had a zero balance, indicating that the consumers who placed these orders were entitled to receive store credit merchandise. By July 24, 2009, BlueHippo had not filled 2,704 of those 3,454 store credit orders (Tr. at 343; 360.)

BlueHippo's failure to make these disclosures violates the Consent Order, which enjoins BlueHippo from making representations about its "refund, cancellation, exchange, or repurchase policy without disclosing clearly and conspicuously, prior to receiving any payment from customers all material terms and conditions of any refund, cancellation, exchange, or repurchase policy" (Consent Order at 4.)

Defendants contend that its telemarketing scripts did not contain false or misleading statements and that any terms of the Store Credit Policy that it did not disclose were immaterial. Information concerning cost, however, is presumed material. *FTC v. Crescent Publ'g Group*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001). Since the cost of shipping, handling, and taxes increases the overall cost of merchandise, these costs are material and BlueHippo should have clearly and conspicuously disclosed this information to consumers.

Defendants further argue that they should not be penalized for failing to make these disclosures since the FTC was aware of the Store Credit Policy and failed to object to its disclosure deficiencies. The FTC's failure to object, however, does not absolve the Defendants from complying with the Consent Order's terms. It was their burden to comply, not the FTC's. FTC v. Trudeau, 579 F.3d 754, 767 (7th Cir. 2009) (holding that the FTC's failure to warn defendant that commercial was problematic until it filed a contempt complaint was insufficient to reverse district court's finding that defendant was in contempt).

Accordingly, the Court finds BlueHippo in civil contempt for violating the Consent Order by failing to disclose material terms relating to its Store Credit Policy.

### **III. Mandatory Preauthorized Transfers**

The Consent Order prohibits BlueHippo from conditioning the extension of credit on mandatory preauthorized transfers, in violation of the EFTA. The EFTA defines preauthorized electronic transfers as "electronic transfers authorized in advance to recur at substantially regular intervals." 15 U.S.C. § 1693a(9). The EFTA prohibits financial institutions and other persons to condition an extension of credit to a consumer on the consumer's repayment by preauthorized electronic fund transfers, except for credit extended under an overdraft credit plan or extended to maintain a specified minimum balance in the consumer's account. 12 C.F.R. § 205.10(e)(1). Defendants contend that the EFTA does not prohibit automatic preauthorized electronic transfers in credit-based transactions; rather, the EFTA only prohibits lenders from requiring such transfers as a precondition of credit. Defendants argue that they do not require electronic debiting services as a condition of credit and that the Installment Credit Agreements permit alternative types of payments.

The plain language of the Installment Credit Agreements undermines Defendants' arguments. The Installment Credit Agreements contain a provision entitled "Preauthorized Payments." This provision authorizes BlueHippo to "initiate debit entries to your financial institution indicated below for the amount(s) indicated in this Contract." It states that "You [the consumer] have authorized us to automatically debit your account on or after [date] for any amounts due on or after the payment date(s) and continuing thereafter until

this Contract is paid in full” (FTC Ex. 42, at 4.) This provision requires consumers to provide a bank name, routing number, account number, and account type and to acknowledge “receipt of a true and completely filled in copy of this contract at the time you sign it” (FTC Ex. 42, at 3.)

Accordingly, the Court finds that BlueHippo in civil contempt for violating the Consent Order by extending credit to consumers and conditioning that credit on mandatory preauthorized transfers.

#### **IV. Damages**

Courts may use civil contempt powers to compensate for losses or damages sustained by noncompliance. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949). The measure of the court’s power in civil contempt is determined by the requirements of full remedial relief. Id. at 193. 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. N.Y. State Nat’l Org. for Women v. Terry, 886 F.2d 1339, 1353 (2d Cir. 1989).

##### **i. BlueHippo’s Damages**

The Court has found that BlueHippo violated the Consent Order by: (i) failing to provide computers within the promised three to four week time frame to 1348 orders that qualified for financing and expected to receive a computer before April 8, 2009; (ii) failing to provide either a computer or store credit merchandise for 677 orders that qualified for financing and expected to receive a computer before April 8, 2009; (iii) failing to disclose the details of the Store Credit Policy; and (iv) conditioning the extension of credit on mandatory preauthorized transfers.

The FTC requests \$14,062,627.51 in damages (Tr. at 360; 363-64.) This amount, however, includes damages for consumers who did not qualify for financing and did not complete the full 13 payments under the Installment Credit Financing Plan. Accordingly, for BlueHippo’s failure to provide either a computer or store credit merchandise for 677 orders that qualified for financing and expected to receive a computer before April 8, 2009, the Court awards damages of \$609,856.38. For BlueHippo’s remaining violations, however, the FTC

has conceded that it has failed to provide record evidence approximating the damage to consumers (Tr. at 345; 356-57; 362-64.) It is the FTC's burden to do so. FTC v. Verity Int'l, Ltd., 443 F.3d 48, 67 (2d Cir. 2006).

Accordingly, the Court cannot award damages for these violations.

### **ii. Rensin's Derivative Liability**

In addition to determining the appropriate amount of damages, the Court must also determine whether Rensin may be held jointly and severally liable. Rensin contends that since the Consent Order did not name him as a party, he was not bound by its decree. Under Fed. R. Civ. P. 65(d)(2), an order binds those who receive actual notice of it and are the parties, the parties' officers, agents, servants, employees, and attorneys, and other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B). Courts do not hold every corporate agent in contempt of court whenever they determine that a company violates its court-ordered obligations. Instead, courts focus on the agent's level of knowledge and involvement. FTC v. Garvey, 383 F.3d 891, 900 (9th Cir. 2004); see also Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832 (2d Cir. 1930).

To hold Rensin jointly and severally liable, the Court must determine that Rensin is legally identifiable with BlueHippo. Spectacular Venture v. World Star Int'l, 927 F. Supp. 683, 684-85 (2d Cir. 1979). As Chief Executive Officer and owner of BlueHippo Funding, LLC which wholly-owned BlueHippo Capital, LLC, Rensin testified that he led the management team and that department heads reported to him (FTC Ex. 63, at 29.) Rensin's testimony demonstrates that he was involved in both the day-to-day operations of BlueHippo, as well as in major corporate decisions, such as changing BlueHippo's business model (FTC Ex. 63, at 41-42.) Moreover, Rensin has stipulated that he may be held in contempt if BlueHippo is held in contempt (Tr. at 271.) Accordingly, Rensin is liable for BlueHippo's violations of the Consent Order.

### **iii. Joint and Several Liability of Rensin**

Rensin argues that his liability should be limited to the amount that he directly benefited from BlueHippo, not the entire amount of damages. Specifically, Rensin argues that the Court should cap his liability



at \$316,923.17, the total sum of money he received relating to BlueHippo during the relevant period (Def. Ex. B.) Rensin relies principally on Verity, 443 F.3d at 66, for the proposition that monetary relief is limited to equitable restitution. Unlike legal restitution, which is punitive in nature, equitable restitution seeks to rectify unjust enrichment and thus would limit the FTC's recovery to "money or property in the defendant's possession that could clearly be traced to money or property identified as belonging in good conscience to the plaintiff." Id. at 66-67.

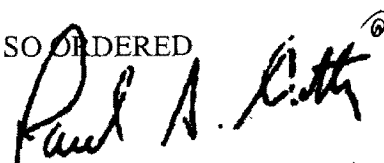
Verity is distinguishable. Verity involved a direct FTC action; this case involves a contempt proceeding. In Verity, the FTC brought suit to close the defendant for deceptive and unfair trade practices, within the meaning of the Act. Id. at 52. The Verity Court found that the Act allowed for restitution or other ancillary equitable relief and that the availability of restitution under the Act derived from the district court's equitable jurisdiction. Id. This line of reasoning is inapplicable here. The FTC is suing for contempt, not for the underlying violation of the Act. See Trudeau, 579 F.3d at 772 (holding Verity inapplicable in FTC civil contempt proceedings). Since Rensin is legally identifiable with BlueHippo, compensatory damages – not equitable restitution – are appropriate. Accordingly, the Court finds Rensin jointly and severally liable for BlueHippo's damages.

## V. Conclusion

Accordingly, the Contempt Motion relating to the Defendants' violation of the Consent Order is GRANTED. The Defendants are jointly and severally liable for \$609,856.38. The Clerk of the Court is directed to enter judgment accordingly and to close out the pending motion in this case.

Dated: New York, New York  
July 27, 2010

SO ORDERED



PAUL A. CROTTY  
United States District Judge

# Tab 2

Case 1:08-cv-01819-PAC Document 77 Filed 07/30/10 Page 1 of 1

U.S.D.C. S.D.N.Y.  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 7/30/10

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X  
FEDERAL TRADE COMMISSION,  
Plaintiff,

08 CIVIL 1819 (PAC)

-against-

**JUDGMENT**

BLUEHIPPO FUNDING, LLC, et al.,  
Defendants,  
-----X

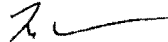
#10,1335

Whereas the above-captioned action having come before this Court, and the matter having come before the Honorable Paul A. Crotty, United States District Judge, and the Court, on July 27, 2010, having rendered its Order granting the Contempt Motion relating to the Defendants' violation of the Consent Order, finding Defendants jointly and severally liable for \$609,856.38, and directing the Clerk of the Court to enter judgment accordingly, it is,

**ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Order dated July 27, 2010, the Contempt Motion relating to the Defendants' violation of the Consent Order is granted; the Defendants are jointly and severally liable for \$609,856.38; accordingly, the case is closed.

**Dated:** New York, New York  
July 30, 2010

**RUBY J. KRAJICK**

BY: \_\_\_\_\_  
Clerk of Court  
  
\_\_\_\_\_  
Deputy Clerk

THIS DOCUMENT WAS ENTERED  
ON THE DOCKET ON \_\_\_\_\_

# Tab 3

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: December 1, 2010

-----X  
:  
FEDERAL TRADE COMMISSION,  
:  
Plaintiff,  
:  
-against-  
:  
BLUEHIPPO FUNDING, LLC, et. al.,  
:  
Defendants.  
:  
-----X

08 Civ. 1819 (PAC)  
ORDER

HONORABLE PAUL A. CROTTY, United States District Judge:

The Federal Trade Commission (“FTC”) requests that this Court alter or amend its July 27, 2010 Order (“Contempt Order”), in which the Court granted the FTC’s Contempt Motion against BlueHippo Funding, LLC, BlueHippo Capital, LLC (collectively, “BlueHippo”), and owner Joseph K. Rensin (collectively, the “Contempt Defendants”), and held the Contempt Defendants jointly and severally liable for \$609,856.38. The FTC accepts the Court’s findings with respect to liability, but requests additional damages “to compensate consumers who placed orders for computers from [Contempt Defendants], without being told material terms of Contempt Defendants’ refund policy, or, at a minimum, to compensate consumers who tried to use their store credit and met all of Contempt Defendants’ conditions to receive store credit merchandise, but still received nothing.” (FTC Mem. 1.) For the reasons that follow, the FTC’s motion is DENIED.

**LEGAL STANDARD**

“Reconsideration of a previous order by the court is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources.” Hinds County, Miss. v. Wachovia Bank N.A., 700 F. Supp. 2d 378, 407 (S.D.N.Y. 2010) (citation and quotation marks

omitted). “A motion to amend or alter a judgment under Rule 59(e) of the Federal Rules of Civil Procedure is held to [this] same strict standard.” Sampson v. Robinson, No. 07 Civ. 6890, 2008 WL 4779079, \*1 (S.D.N.Y. Oct. 31, 2008) (citation omitted). “[R]econsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked . . . .” Shrader v. CSX Transp., 70 F.3d 255, 257 (2d Cir. 1995). “The major grounds justifying reconsideration are ‘an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.’” Hinds County, 700 F.Supp.2d at 407 (quoting Virgin Atl. Airways, Ltd. v. National Mediation Bd., 956 F.2d 1245, 1255 (2d Cir.1992)).

### ANALYSIS

The background facts of this case are stated in full in the Contempt Order. See Federal Trade Comm’n v. BlueHippo Funding, LLC., No. 08 Civ. 1819 (S.D.N.Y. July 27, 2010). Familiarity with these facts is presumed.

The FTC does not allege any “intervening change in controlling law” or “availability of new evidence,” and does not suggest that the Court’s ruling will result in a “manifest injustice.” See Virgin 956 F.2d at 1255. Instead, the FTC asserts that the Court overlooked “controlling decisions or data” and therefore committed clear error. (FTC Mem. 1.) In particular, the FTC argues that “the record contains uncontroverted evidence of consumer harm caused by Contempt Defendants[’] failure to disclose material facts,” (Id. 4.), and that, therefore, “the FTC met its burden” to show that its calculations reasonably approximated the damage to the affected consumers. (Id. 5.)

The Court, however, did not “overlook” the FTC’s data or the law that the FTC believes controls the outcome of this case. The Court simply disagreed with the FTC’s conclusion that “its calculations reasonably approximated” the amount of damages to the affected consumers. See F.T.C. v. Verity Intern., Ltd., 443 F.3d 48, 67 (2d Cir. 2006) (citation omitted). Indeed, the Court (1) explicitly considered the full amount of damages requested by the FTC, pointing out that the amount “include[d]

damages for consumers who did not qualify for financing and did not complete the full 13 payments under the Installment Credit Financing Plan” (Opinion 10); and (2) cited Verity for the proposition that the FTC must show a reasonable approximation of damages and held that it had not done so. The fact that the Court did not cite to any of the FTC’s proffered cases regarding the presumption of reliance is immaterial. The Court recognized the FTC’s argument, but simply held that the FTC did not meet its burden with respect to approximation of damages. (Opinion 10-11.)

The above also holds true with respect to the consumers who attempted to use their store credits but received no merchandise. The Court did not “overlook” any data or controlling decisions — the FTC did not provide the calculation and evidence necessary for the Court to evaluate the amount of damages. And it is now too late to do so. As “[i]t is well-settled that Rule 59 is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a ‘second bite at the apple,’” Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144 (2d Cir. 1998), the FTC’s motion to amend or alter the Contempt Order must be denied.

**CONCLUSION**

For the foregoing reasons, the FTC’s motion to alter or amend the Court’s July 27, 2010 Contempt Order is DENIED. The Clerk of Court is directed to close the pending motion at docket number 78.

Dated: New York, New York  
December 1, 2010

SO ORDERED



---

PAUL A. CROTTY  
United States District Judge

# Tab 4



## **FTC Act Section 5(a), 15 U.S.C. § 45(a) (2011)**

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade.

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 18(f)(3), Federal credit unions described in section 18(f)(4), common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless--

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect--

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4) (A) For purposes of subsection (a), the term unfair or deceptive acts or practices' includes such acts or practices involving foreign commerce that--

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

# Tab 5

### **FTC Act Section 13(b), 15 U.S.C. § 53(b) (2011)**

(b) Temporary restraining orders; preliminary injunctions. Whenever the Commission has reason to believe

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28, United States Code. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

# Tab 6

## FTC Act Section 19, 15 U.S.C. § 57b (2011)

(a) Suits by Commission against persons, partnerships, or corporations; jurisdiction; relief for dishonest or fraudulent acts.

(1) If any person, partnership, or corporation violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 5(a)), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 5(a)(1)) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

(b) Nature of relief available. The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnership, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

(c) Conclusiveness of findings of Commission in cease and desist proceedings; notice of judicial proceedings to injured persons, etc.

(1) If (A) a cease and desist order issued under section 5(b) has become final under section 5(g) with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice, and (B) an action under this section is brought with respect to such person's, partnership's, or corporation's rule violation or act or practice, then the findings of the Commission as to the material facts in the proceeding under section 5(b) with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final by reason of section 5(g)(1), in which case such finding shall be conclusive if supported by evidence.

(2) The court shall cause notice of an action under this section to be given in a manner which is reasonably calculated, under all of the circumstances, to apprise the persons, partnerships, and corporations allegedly injured by the defendant's rule violation or act or

practice of the pendency of such action. Such notice may, in the discretion of the court, be given by publication.

(d) Time for bringing of actions. No action may be brought brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) relates; except that if a cease and desist order with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice has become final and such order was issued in a proceeding under section 5(b) which was commenced not later than 3 years after the rule violation or act or practice occurred, a civil action may be commenced under this section against such person, partnership, or corporation at any time before the expiration of one year after such order becomes final.

(e) Availability of additional Federal or State remedies; other authority of Commission unaffected. Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.

## CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Fed. R. App. P. 25(a) and Local Rule 25.1, on May 16, 2011, I electronically filed the Brief for Appellant Federal Trade Commission (with the Special Appendix as Addendum), and the parties' Appendix, with the Clerk of the Court of the United States Court of Appeals for the Second Circuit using the Court's Case Management/Electronic Case Filing (CM/ECF) system. I also certify that I will submit paper copies of the Brief and the Appendix consistent with Local Rules 30.1 and 31.1. I further certify that, pursuant to Local Rule 25.1(h), on this date I served the foregoing document by operation of the Court's CM/ECF system on all registered counsel of record in this case.

/s/ Michael D. Bergman  
Michael D. Bergman  
Attorney for Appellant  
Federal Trade Commission