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CLERK DISTRICT COURT
POLK COUNTY IOWA

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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| STATE OF IOWA ex rel. THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA,<br><br>Plaintiff,<br><br>v.<br><br>VERTRUE, INCORPORATED, (formerly known as MEMBERWORKS, INC.), a Delaware corporation; ADAPTIVE MARKETING, LLC, a Delaware limited liability company; IDAPTIVE MARKETING, LLC, a Delaware limited liability company,<br><br>Defendants. | ) | Equity No. EQ 53486<br><br>**RULING AS TO LIABILITY** |

On this 18th day of March, 2010, the Court enters this ruling as to liability in the above-captioned case. By way of background, this matter was commenced by the filing of the Attorney General's petition in equity on May 12, 2006, which named Vertrue, Incorporated (f/k/a MemberWorks, Inc.) as the sole defendant. An amended and substituted petition in equity was filed on October 23, 2007, adding as parties Adaptive Marketing, LLC; Idaptive Marketing, LLC; West Direct, Inc.; West Telemarketing, Inc.; and West Corporation. The latter three entities, the West Defendants, were subsequently dismissed from the litigation by Plaintiff on September 9, 2009, leaving the three Vertrue Defendants.[1] A bench trial commenced on October 26, 2009 and continued through November 5, 2009; however, the record remained open until January 8, 2010, when additional exhibits were submitted to complete the evidentiary record for the liability phase of this matter. The attorneys were then given until February 8, 2010 to submit

[1] Unless the context otherwise requires, the three Vertrue Defendants will be referred to herein as "Defendants," the "Vertrue Defendants," or "Vertrue."

any other desired post-trial briefs and filings. The parties and the Court have determined that these proceedings should be bifurcated, with the understanding that the Court would separately address issues relating to relief only after liability determinations have been made. Other aspects of the procedural history of this matter will be set forth below, as they relate to substantive findings and rulings.

## OVERVIEW OF THE EVIDENCE

At trial, the Attorney General presented the testimony of 25 Iowans affected by Vertrue's practices; 15 testified at trial, and Plaintiff offered the deposition testimony of 10 others. Plaintiff also presented the expert testimony of Dr. Robert Meyer, Professor of Marketing and Co-Director of the Risk Management and Decision Processes Center of The Wharton School. The Attorney General also offered the deposition testimony of: Better Business Bureau representative Carolyn Sheets; President of Adaptive Marketing Jay Sung; Vice President of Product for Adaptive Jeff Paradise; Vice President of West Direct, Inc. Robert Heeks; former Consumer Protection Division (CPD) Investigator Barbara Blake; and Iowa Department of Justice Information Technology Specialist John Hugg. The Attorney General also submitted numerous exhibits, including solicitation exemplars, emails and other documents produced by Vertrue in discovery; survey responses from Iowa consumers; complaints lodged by consumers with the Consumer Protection Division and the Better Business Bureau; and data showing the extent to which Iowans used the memberships in which they were enrolled. Such data was derived from a customer database produced by Vertrue in discovery, which included transaction data for some 863,970 Iowa memberships, beginning in 1989.

Defendants presented the testimony of seven consumers; three testified at trial, and Defendants offered the deposition testimony of four others. Defendants also presented the expert

testimony of Dr. Thomas Maronick and Barry Cutler, both former employees of the Federal Trade Commission. Defendants also called as witnesses Adaptive Vice Presidents Bruce Douglas and Jeff Paradise, and submitted the deposition testimony of CPD Investigator Marc Wallin. Defendants also submitted numerous exhibits, including solicitation exemplars, settlement agreements with other attorneys general, and statements of company policy.

Pursuant to Iowa Code § 714.16(7), this is a case in equity. In equity proceedings, evidence is ordinarily allowed to come in subject to objection without rulings by the court so that the entire record is before the reviewing court for de novo appeal. *In re Marriage of Erickson*, 228 N.W.2d 57, 59 (Iowa 1975). Accordingly, in the next section, the Court will address and resolve specific evidentiary disputes to the extent that the evidence in question was relied upon in the Court's final ruling. The subsequent section will review and evaluate the consumer testimony presented. The Court will then address each of the three counts of Plaintiff's amended petition.

## EVIDENTIARY RULINGS

Prior to trial, Vertrue filed six motions in limine, seeking to exclude several categories of evidence. The Attorney General responded by filing a resistance to each motion in limine. Thereafter, additional objections were made to evidence as it was offered at trial. All evidence was received, with the understanding that the Court would later rule on specific evidentiary objections as needed, consistent with the Iowa authority regarding equity proceedings (noted above). In this section, the Court will address several of the most prominent evidentiary disputes. However, to the extent the Court relies on particular evidence to which an objection was posed, without explicitly ruling on the objection, the objection is overruled.

***Depositions***

As noted above, Plaintiff and Defendants offered into evidence transcripts of several depositions, typically accompanied by corresponding deposition exhibits. Counsel for Plaintiff and Defendants participated in taking all the depositions that have been submitted. In all instances, the offering party has designated the portions of the deposition to be offered as evidence, and the other party has been given the opportunity to counter-designate portions. The parties were also accorded the opportunity, post-trial, to take supplemental depositions prior to the close of the record. Accordingly, pursuant to Iowa Code § 624.3, all deposition transcripts offered into evidence will be admitted.

***Evidence Involving West***

In their motions in limine[2] and at trial, Defendants objected on relevance grounds to evidence involving membership marketing of Vertrue programs by one or more of the West Defendants. Specifically, Defendants sought to exclude as irrelevant internal *Vertrue* documents reflecting communications to and from West Defendants regarding membership marketing; audio recordings of telemarketing by West Defendants; and deposition testimony of Robert Heeks, Vice President of West Direct, Inc. Defendants' main contention is that because the West Defendants are no longer parties to the current lawsuit, and because between the West Defendants and the Vertrue Defendants the former was legally responsible for the contents of the marketing, any evidence referencing or relating to the West Defendants is not relevant to determining Vertrue Defendants' liability. However, the evidence in question relates directly to the membership programs at the heart of this case, addressing the manner in which the

[2] *See* Vertrue's First Motion in Limine.

memberships were marketed to consumers and the policies that governed such programs. *See, e.g.*, Pl.'s Exs. 203, 204, 205, 544; Court Ex. 5a (Heeks Dep. at 21, 41). Whether or not the West Defendants may be legally responsible for improprieties in the marketing as between the parties does not reduce the Vertrue Defendants' responsibility as to Plaintiff. The relevancy objections to evidence involving membership marketing by one or more of the West Defendants are overruled. Such evidence is relevant to whether the Vertrue Defendants' actions violated the Consumer Fraud Act.

***Better Business Bureau***

In their motions in limine[3] and at trial, Defendants objected to evidence from the Better Business Bureau ("BBB"). Specifically, Defendants sought to exclude on relevance grounds the deposition testimony of Carolyn Sheets, a BBB representative, and BBB's ratings of Vertrue, Sam's Club, and Wal-Mart. Defendants also sought to exclude on relevance grounds and as hearsay[4] the consumer complaints received by the BBB regarding Vertrue. The relevancy and hearsay objections for evidence from the BBB are overruled.

Ms. Sheets is the BBB representative directly or indirectly responsible for handling the substantial volume of nationwide consumer complaints that were funneled to the BBB office in Omaha and then forwarded to Vertrue for a response. *See generally* Court's Ex. 4 (Sheets deposition). Counsel for Plaintiff and Defendants participated in taking her deposition in Omaha on September 29, 2009. She testified regarding the BBB complaint-handling process, the communications between the BBB and Vertrue in regard to complaints, the volume of

[3] *See* Vertrue's Second and Fourth Motions in Limine.

[4] Counsel for Vertrue clarified at trial that the hearsay objection is limited to the portion of the documents containing the consumers' complaints, not the portion of the documents containing Adaptive's response to the consumers' complaints. 11/5/2009 Trial Tr. at 94-95.

complaints, the subject matter of the complaints, and the pattern of consumers complaining that membership charges were unauthorized. She identified and authenticated Plaintiff's Exhibits 92 and 93, two CDs which together contain approximately 3,300 complaints received by the BBB over a recent three year period, as well as Vertrue's responses to those consumer complaints. Finally, she identified and authenticated portions of BBB's local and national websites, including the ratings that the BBB has posted for Vertrue (Pl.'s Ex. 98), and, for purposes of comparison, the postings for Wal-Mart (Pl.'s Ex. 96) and Sam's Club (Pl.'s Ex. 97). Ms. Sheets's testimony authenticated the consumer complaints and explained the overall context in which BBB complaints are received, processed, and resolved. Ms. Sheets's testimony, therefore, is relevant.

Vertrue also challenges the relevance of the web pages setting forth the BBB's business ratings for Vertrue, Wal-Mart, and Sam's Club. In isolation, a rating of a business by the BBB may have marginal probative value. Here, however, its probative value is buttressed by various factors. The rating is expressly grounded on a pattern of consumer complaints that membership charges were unauthorized, a theme which was noted by Vertrue's expert Barry Cutler, and which supports and is supported by several other sources of evidence, including complaints to the CPD, survey responses, and various company documents. *See* 11/5/2009 Trial Tr. at 37. Indeed, Vertrue's own documents reflect that complaints of unauthorized charges as well as chargebacks for unauthorized charges were common, and also reflect a greater willingness to grant refunds to consumers who threaten to lodge a complaint with the BBB. *See* Pl.'s Exs. 262a, 262b, 262c, 263a, 263b, 263c, 264, 439, 441, 443. Moreover, Mr. Cutler, in acknowledging the relevance of consumer complaints in general, expressed the qualification that Vertrue's high complaint volume must be considered as a function of transaction volume, asserting that such entities as Wal-Mart would be expected to generate a larger volume of

complaints simply on account of its high sales volume. *See* 11/5/2009 Trial Tr. at 27. It is therefore noteworthy – and relevant – that Wal-Mart and Sam's Club generated far fewer complaints than Vertrue. *See* 11/5/2009 Trial Tr. at 33-37; Pl.'s Exs. 96-98.

Vertrue also objects to the BBB consumer complaints as both irrelevant and hearsay, contending that such BBB complaints are particularly objectionable to the extent that they involve consumers from states other than Iowa. The Court regards consumer complaints as generally relevant to the consumer fraud determinations that must be made. Moreover, Vertrue's knowledge of the nature and number of consumer complaints, particularly the volume of consumers protesting that they were charged without their authorization, is relevant. Although complaints from Iowa consumers are particularly helpful, such as the complaints received by the CPD (discussed below), the nationwide assortment of complaints in the BBB database is also helpful. The marketing practices in question were nationwide. Nothing in the record suggests that the salient patterns that emerge from consideration of nationwide complaints do not apply to Iowa. *See* Pl.'s Exs. 454, 456, 459-462. On the contrary, the nationwide complaints are fully consistent with the various other sources of information regarding how Iowa consumers have been affected by Defendants' practices.

Regarding the hearsay objection, BBB consumer complaints are not hearsay to the extent that they are offered to establish knowledge on the part of Defendants of the volume or subject matter of complaints,[5] or to establish the necessary context for understanding Defendants'

[5] Defendants' counsel represented at the September 9, 2009 hearing that there would not be a dispute about admitting the consumer complaints to illustrate how many complaints there are or that such complaints occurred. 9/9/2009 Hr'g Tr. at 59-60.

responses to such complaints.[6] *See F.T.C. v. Magazine Solutions*, No. 7-692, 2009 WL 690613, at *1 n.1 (W.D. Pa. Mar. 16, 2009) (explaining that consumer complaints are admissible as proof of notice to defendants of the nature and volume of the complaints being generated); *see also Sandoval v. Am. Bldg. Maintenance Indus.*, 578 F.3d 787, 803 (8th Cir. 2009) (employee complaints admitted to show "severity and pervasiveness" of the workplace harassment at issue).

The further question is whether such complaints are otherwise admissible for the truth of the matters asserted. In this connection, Plaintiff has contended that the consumer complaints should be admitted under the residual exception to the hearsay rule, Iowa Rule of Evidence 5.807. Plaintiff informed Defendants of Plaintiff's intention to offer these consumer complaints under the residual exception by letter dated September 16, 2009,[7] sufficiently in advance of trial to provide Defendants a fair opportunity to respond. The Court hereby finds that the BBB consumer complaints offered by Plaintiff have circumstantial guarantees of trustworthiness equivalent to the exceptions in Rules 5.803 or 5.804. *See Magazine Solutions*, 2009 WL 690613, at *1-2 (holding that over 300 consumer complaints submitted to the Better Business Bureau, the state Attorney General, and to the defendant companies qualified for admission as residual exceptions to the hearsay prohibition because complaints corroborated one another and showed the widespread nature of the alleged misconduct); *see also Flow Control Indus. v. AMHI, Inc.*, 278 F. Supp. 2d 1193, 1197-98 (W.D. Wash. 2003) (consumer complaints in a Lanham Act met the standards for admission under Rule 807; trustworthiness shown *inter alia* by mutual

[6] Vertrue's responses to consumer complaints are admissions, and therefore do not constitute hearsay. *See* Iowa R. Evid. 5.801(d)(2); *see also* 11/5/2009 Trial Tr. at 94-95.

[7] This letter appears of record as an attachment to Plaintiff's resistance to Defendants' motions in limine.

corroboration of complaints' accounts); *State v. Weaver*, 554 N.W.2d 240, 247-49 (Iowa 1996); *State v. Rojas*, 524 N.W.2d 659, 662-64 (Iowa 1994).

The Court makes the following additional determinations with regard to the admissibility of the BBB complaints under Rule 5.807:

> (A) The statements set forth in the consumer complaints are offered as evidence of a material fact. The complaints address the core issue of whether or not the Defendants' conduct has a tendency or capacity to deceive, and whether or not such conduct is unfair within the meaning of the CFA. More specifically, the complaints reflect a pattern of consumers protesting that they have been subjected to membership charges that they regard as unauthorized.
>
> (B) The statements are more probative on the point(s) for which they are offered than any other evidence which Plaintiff can procure through reasonable efforts. Defendants are alleged to have committed consumer fraud against a very large volume of Iowans (approximately 430,000) over an extended period of time (about 20 years). Plaintiff has presented the testimony of 25 consumers, but they necessarily represent a modest portion of the customer base. Plaintiff has also surveyed a larger group of consumers, and seeks to admit the survey responses.[8] However, even that pool of consumers is relatively modest, and, without accepting the appropriateness of Defendants' criticism, Defendants have criticized the manner in which the survey responses were elicited. It therefore appears that the patterns that emerge from the larger pool of self-generated consumer complaints received by the BBB are highly probative of whether Defendants' practices have a tendency or capacity to deceive, or are unfair. Such patterns are more probative than any other reasonably available evidence.
>
> (C) The general purposes of the Iowa Rules of Evidence and the interests of justice will best be served by admission. It is impractical, at best, for the Court to receive the sworn testimony of every consumer who was motivated to file a complaint. Such complaints are nevertheless helpful to the Court in assessing whether Defendants' conduct amounts to consumer fraud. The Court therefore determines that the interests of justice are best served by admission of the consumer complaints, with the following proviso. The Court need not, and does not, credit each and every factual allegation put forward by each complaining consumer as necessarily true. Instead, the Court relies on the consumer complaints to the extent that a pattern emerges that corroborates other non-hearsay evidence the Court has received. *See Magazine Solutions*, 2009 WL 690613, at *1-2.

[8] The admissibility of the survey responses is discussed separately, below.

***Iowa Consumer Protection Division Consumer Complaints***

Plaintiff has offered into evidence consumer complaints received by Iowa's Consumer Protection Division (CPD).[9] Defendants have objected that such complaints are hearsay. Defendants' hearsay objection is overruled. As noted above, such complaints are not hearsay to the extent that they are offered to establish knowledge on the part of Defendants of the volume or subject matter of consumer complaints,[10] or to establish the necessary context for understanding Defendants' responses to such complaints.[11] *See Magazine Solutions*, 2009 WL 690613, at *1 n.1; *see also Sandoval*, 578 F.3d at 803. Like the BBB consumer complaints, discussed above, the Court hereby finds that the CPD consumer complaints offered by Plaintiff have circumstantial guarantees of trustworthiness equivalent to the exceptions in Rules 5.803 or 5.804, and that the requirements for admission under Rule 5.807 are met.[12] However, as discussed more fully below, the fact the Court has admitted into evidence these complaints does not mean that the Court finds all of the complaints made to be completely correct or accurate in substance.

[9] *See* Vertrue's Second Motion In Limine.

[10] Defendants' counsel represented at the September 9, 2009 hearing that there would not be a dispute about admitting the consumer complaints to illustrate how many complaints there are or that such complaints occurred. 9/9/2009 Hr'g Tr. at 59-60.

[11] Vertrue's responses to consumer complaints are admissions, and therefore do not constitute hearsay. Iowa R. Evid. 5.801(d)(2).

[12] Plaintiff informed Defendants of Plaintiff's intention to offer CPD complaints under the Residual Exception by letter of September 16, 2009. *See* Pl.'s Resistance to Vertrue Defendants' Motions in Limine Ex. 1.

***Consumer Surveys***[13]

On two occasions, the Attorney General sent written surveys to Iowans to elicit responses regarding their experiences as a past or current member or trial member of a Vertrue program. Plaintiff has offered the survey responses (Pl.'s Exs. 455, 457) and the summaries of the responses (Pl.'s Exs. 454, 456), over Defendants' hearsay objections. Defendants' hearsay objections are overruled. In the same September 16, 2009 letter that addressed consumer complaints (discussed above), Plaintiff informed Defendants of Plaintiff's intention to offer the survey responses under the residual exception. The Court believes that much of the rationale for receiving the consumer complaints under the residual exception also applies to the survey responses. In at least one respect the survey responses supply information that consumer complaints do not. Consumer complaints typically reflect the experiences of consumers who became aware of unwanted charges, and stepped forward to object. Such complaints shed less light on the experiences of persons who never registered an objection. The consumer surveys are helpful in shedding such light, and the Court receives such surveys under the residual exception.

In doing so, however, the Court acknowledges the criticisms that Defendants have presented regarding the Attorney General's surveys, and adjusts the weight to be given the survey responses accordingly. *See Schering Corp. v. Pfizer Inc.*, 189 F.3d 218 (2d Cir. 1999). The Court notes that the survey responses do not in themselves constitute pivotal evidence. Rather, they serve to corroborate evidence presented from several other sources, including *inter alia*, Vertrue's own marketing studies and other internal documents. *See, e.g.*, Pl.'s Exs. 262a, 262b, 262c, 263a, 263b, 263c, 266b, 266f, 266ff, 266d, 266d-1, 454, 456, 459-462.

[13] *See* Vertrue's Third Motion In Limine.

***Age Data***[14]

In connection with Count III of the Amended Petition relating to consumer frauds against persons aged 65 or older, Plaintiff offered Exhibits 227 and 228, comparing an age profile of certain long-term members with an age profile of Iowans in general. This evidence is described in greater detail as part of the discussion of Count III, below. Defendants have objected that Plaintiff's derivation of the ages of Vertrue members is irrelevant and relies on inadmissible hearsay, and that the age data Plaintiff used as the baseline for the ages of the Iowa population at large is also inadmissible as hearsay.

Plaintiff's Exhibit 228 describes the Attorney General's effort to obtain the ages of about 200 Iowa members of Vertrue programs, using an Iowa Motor Vehicles Division database, a Westlaw database, and the Social Security Death Index database. In order to qualify such evidence for admission under the hearsay exception of Iowa Rule of Evidence 5.807 (the residual exception), Plaintiff informed Vertrue by letters of September 30 and October 10, 2009 of Plaintiff's intention to proceed in this manner, and the October 10 letter specified the names of the Iowa members for whom age information would be sought and offered. *See* Pl.'s Resistance to Vertrue Defendants' Motions in Limine Ex. 8.

The Court finds that the residual exception should be applied to such age information, as all requirements of Rule 5.807 are met. The ages of such Iowa members are clearly relevant and material, particularly since Count III expressly focuses on older Iowans. There is no reason to regard the databases in question as anything less than fully reliable sources of age information, and there does not appear to be any more suitable means of establishing these consumers' ages. Obviously, deposing so many consumers for the sole purpose of asking their ages is

[14] *See* Vertrue's Sixth Motion In Limine.

unreasonable. The purposes of the rules of evidence and the interests of justice would best be served by allowing such age information to be admitted under the residual exception.[15] Additionally, the age information derived from the Iowa Motor Vehicles Division database is admissible under Rule 5.803(8) (public records); the age information derived from the Westlaw database is admissible under Rule 5.803(17) (commercial publications); and the information derived from the Social Security Death Index is admissible under Rule 5.803(9) (vital statistics).

Plaintiff's Exhibit 227 consisted of data on the State Data Center Website which provided the age profile of the Iowa population and thus served as the point of comparison for the ages of Vertrue members. This data falls within the hearsay exception relating to public records, Iowa Rule of Evidence 5.803, and is therefore admissible.

**TESTIMONY OF IOWA CONSUMERS**

Plaintiff presented the testimony of 24 Iowa consumers whose testimony exhibited most or all of the following traits: they had no idea how they became members; they had never intended to become members; they had never used any membership benefits (trackable or otherwise); and their accounts had been repeatedly charged for unwanted memberships.[16] This testimony is corroborated by evidence from other sources, including consumer complaints,

[15] It might also be noted that because Defendants were provided the identities of the consumers for whom Plaintiff presented age data, they had the opportunity to discover and correct inaccuracies, if any.

[16] Fourteen testified at trial, and Plaintiff submitted the deposition testimony of ten others. In addition, Plaintiff presented the trial testimony of Laura Mitchell regarding the membership in which her grandfather, Lee Mitchell, had become enrolled through a telemarketing solicitation in 2003. Ms. Mitchell testified regarding the diminished capacity of her elderly grandfather, who died in 2005, and regarding the difficulties encountered in trying to cancel the membership and avoid unwanted charges. 10/29/09 Trial Tr. at 184; Pl.'s Ex. 143.

internal company memos and reports, and membership usage data drawn from Vertrue's own transaction records.

In contrast, Vertrue presented the testimony of four Iowa consumers who were knowing and active members, at least for some period of time.[17] The testimony of the four Iowa consumers presented by Vertrue does little to counter the abundant evidence of consumer dissatisfaction; rather, Vertrue's consumer witnesses highlight just how atypical their circumstances were compared to the great majority of Iowa members.[18]

The three consumer witnesses Vertrue produced at trial had each made heavy use of the benefits of membership, at least at one time. The benefits used by these consumers were predominantly $10 or $25 gift cards, which they would order through the membership website. In placing such orders, the consumers would charge the full face value of each gift card to their credit cards. Vertrue would then credit back 20%, so that the consumer would ultimately pay $8 to obtain a $10 gift card, or $20 to obtain a $25 gift card.

Only two of these three consumers were program members at the time they testified at trial; one of the three (James Greazel) had decided prior to trial that the benefits were not worth continuing his membership, and had decided not to reactivate when his membership was cancelled by the company. *See* 11/4/2009 Trial Tr. at 132-33. Of the two who were still members, one consumer (Sharon Hicok) was considering cancelling at least one of her current

[17] Three testified at trial (Greazel, Hicok and Witt), and Vertrue submitted the deposition of the fourth (Rink).

[18] *See FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 572 (7th Cir. 1989) (stating that the existence of some satisfied customers does not constitute a defense under the Federal Trade Commission Act).

memberships, as she too had become uncertain that the costs justified the benefits.[19] *See* 11/5/2009 Trial Tr. at 150.

Vertrue also offered the deposition testimony of a fourth multiple user of benefits (gift cards), Merriam Rink. Ms. Rink had cancelled one or two other Vertrue programs, but was still a member of Simple Escapes at the time of her deposition. She maintained that she carefully weighed the cost of membership against the benefits; however, she estimated her annual savings to be in the vicinity of $160, and her annual cost had risen to almost $200. Court Ex. 20 (Rink Depo. at 15-17).

In any event, it appears that the benefit usage of these four consumers was not representative of that of most Iowans.[20] Vertrue's transaction database indicates that only a fraction of 1% of the 863,970 Iowa memberships reflected in the database involved the use of program benefits at the level of these four consumer witnesses.[21] Indeed, 731,575 Iowa memberships or 84.676% of Iowa memberships involved *no* benefit use. *See* Pl.'s Ex. 266b.

[19] Ms. Hicok also testified, in regard to one of the memberships in which she was enrolled by cashing a promotional check, that she would not have read the membership disclosures on the back of the check because the print was so small. 11/5/2009 Trial Tr. at 158. Ms. Hicok further testified that after purchasing gift cards from Vertrue's member-only website, Deal Pass, she is offered post-transaction consumer surveys, which she completes in order to receive a free gift card. *Id.* at 144-45. It appears that Ms. Hicok may not understand that completing such post-transaction surveys has the effect of enrolling her in additional memberships.

[20] These consumers were representative of the experiences of most Iowans in one regard, however. Three of the four (Witt, Hicok, and Rink) were either uncertain, or had no idea, how they had become enrolled as members.

[21] The number of orders for gift cards or other trackable benefits (each order typically involving multiple cards) placed by these four consumers ranged from a low of 73 orders (by Mr. Greazel) to a high of 378 orders (by Ms. Hicok, who testified that she had $4000 or $5000 worth of gift cards in a bag at home). The percentage of Iowa memberships that involved usage at or above Mr. Greazel's volume of orders was .001 %. Of the 99.999 % of memberships that involved less benefit usage than these four Vertrue witnesses, a strong majority involved no benefit usage whatsoever. *See* Pl.'s Exs. 266b, 545, 548, 552; Defs.' Ex. HH.

Although these four consumers do show that there were individuals – very rare individuals – who actually made robust use of Vertrue's program benefits, these exceptions tend to prove the rule, namely, that for most Iowa consumers membership in a Vertrue program had nothing to do with program benefits. Consistent with the testimony of Plaintiff's numerous consumer witnesses, the great majority of Iowa memberships involved no benefit usage whatsoever.[22]

Vertrue also presented the deposition testimony of three other Iowa consumers: Linda Ackermann, her husband Allen Ackermann, and Sharolyn Anderson. Linda and Allen Ackermann each accepted a trial membership in a Vertrue program as a result of separate "outbound" (that is, telemarketer initiated) telemarketing calls. Although each of them testified to difficulty in understanding their respective telemarketers, they each managed to cancel the two unused memberships without sustaining any losses. However, Mr. Ackermann was emphatic that he never received the $100 Wal-Mart gift card held out to him. Court Ex. 17 (Allen Ackerman Depo. at 21-23), and Mrs. Ackermann did not recall ever having received the Wal-Mart gift card held out to her, either. *See* Court Ex. 18 (Linda Ackermann Depo. at 34-35). These Vertrue witnesses do the Defendants little good. At best, they show that not everyone who was drawn into an unused trial membership by the lure of a gift card offer suffered out-of-pocket losses.

Sharolyn Anderson, Vertrue's other consumer witness, was also of little benefit to Defendants. She was not certain how she became enrolled in Simple Escapes. But she believed that if she had done so by signing the back of a check, she would have read the small print on the

[22] As noted above, the consumer witnesses produced by Vertrue also provide strong evidence against Defendants' suggestion that consumers who had little or no usage of trackable benefits may in fact have made ample use of non-trackable benefits. Ms. Witt made no use whatsoever of non-trackable benefits; Mr. Greazel used a non-trackable benefit only once; and there is no indication of record that Ms. Hicok or Ms. Rink used any non-trackable benefits.

check, using a magnifier if need be. She testified that her bank had warned her to read the print on the back of such checks, to avoid being "stuck in a membership." *See* Court Ex. 19 (Anderson Depo. at 31). In any event, she cancelled her unused Simple Escapes membership and incurred no losses. At best, her testimony shows that not everyone who cashed a Vertrue promotional check suffered financial losses, as she cancelled and avoided making any payments for her unused membership.

**COUNT I: BUYING CLUB MEMBERSHIPS LAW**

Count I of Plaintiff's Amended Petition alleged that Defendants' marketing of memberships to Iowans violated Iowa Code Ch. 552A, the Buying Club Memberships Law ("BCL"). The Court has previously entered summary judgment rulings resolving most aspects of this issue. The Court previously held that the BCL applied to direct mail, telemarketing, and Internet solicitations, and that Defendants' sale of membership programs violated the BCL. Specifically, the Court's March 11, 2009 Ruling on Plaintiff's Second Motion for Partial Summary Judgment determined that the BCL applies to direct mail solicitations and telemarketing solicitations, and that MemberWorks' direct mail solicitations that were the focus of the summary judgment motion violated the statute. This Court then held in its October 5, 2009 Ruling on Plaintiff's Third Motion for Partial Summary Judgment that Adaptive's telemarketing solicitations also fail to comply with the BCL. In addition, the latter ruling addressed the remaining marketing channel, the Internet, and determined that Adaptive's Internet sales of membership programs to Iowans are subject to, but fail to comply with, the requirements of the BCL.

These summary judgment rulings left three BCL issues yet to be resolved: (1) which Defendants are liable for the BCL violations; (2) whether all solicitations, and not just the

particular solicitations that were the focus of the summary judgment motions, violated the BCL; and (3) whether Defendants (or any of them) had made the showing necessary to avail themselves of the affirmative defenses they had asserted, namely a dormant Commerce Clause affirmative defense, a Due Process (vagueness) affirmative defense and an estoppels defense.

***Liability for the BCL violations***

The March 11, 2009 summary judgment ruling found liability under the BCL for MemberWorks' direct mail solicitations, and potential liability for the telemarketing solicitations,[23] but did not make a final determination as to which named Defendants were liable. The October 5, 2009 summary judgment ruling found Adaptive Marketing liable under the BCL for non-compliant telemarketing and Internet solicitations, but did not address whether other Defendants were also liable. For the reasons set forth below, the Court now finds that Vertrue, Incorporated and Idaptive Marketing, LLC are jointly and severally liable, with Adaptive Marketing, LLC, for all violations of the BCL.

The formal corporate relationships among the Defendants have been detailed in the various summary judgment filings of the parties, and the Court's earlier summary judgment findings are incorporated herein. In short, the membership sales at issue were conducted by: Cardmember Publishing Corporation from about 1989 to October of 1996, at which time Cardmember Publishing changed its name to MemberWorks Incorporated; MemberWorks from 1996 to October of 2004, at which time MemberWorks transferred its membership services business, including all assets and liabilities thereof, to Adaptive Marketing and then changed its name from MemberWorks to Vertrue Incorporated; and Adaptive Marketing, as a wholly-owned

[23] *Potential* liability, in that the ruling found that telemarketing solicitations were subject to the BCL, but did not make the further determination that such solicitations failed to comply. That latter determination was made in the October 5, 2009 ruling.

subsidiary of Idaptive and Vertrue, from October 2004 to the present.[24] *See* 3/20/07 affidavit of Vertrue Senior Vice President Douglas Weiss, ¶¶ 4-7.

There is no dispute that, to the extent the BCL has been violated in connection with the marketing of memberships at issue, Adaptive Marketing is liable for such violations. The membership programs were designed, operated, and serviced by Adaptive, and revenue generated by membership sales flowed to Adaptive. *See* 10/27/2009 Trial Tr. at 36-37. Adaptive marketed such programs to Iowans, either directly or by contracting with other entities.[25] Defendants have acknowledged the primacy of Adaptive's role in marketing the memberships. *See, e.g.*, 3/20/07 Weiss Aff. ¶¶ 8-10. Moreover, to the extent that MemberWorks was liable for BCL violations that occurred prior to the 2004 creation of Adaptive, Adaptive assumed that liability through an October 2004 assignment. *Id.* ¶ 5; Defs.' Ex. Q.

Having established that Adaptive is liable for the BCL violations, the question remains whether Vertrue and Idaptive jointly and severally share such liability. Vertrue has insisted from the outset of this litigation that it is a mere holding company, a separate and distinct business entity removed from the membership marketing conducted by its wholly-owned subsidiary's wholly-owned subsidiary, Adaptive Marketing. 3/20/07 Weiss affidavit ¶ 3; 10/18/06 Weiss affidavit ¶ 2 ("Vertrue is only a holding company that does not engage in any marketing...."). Vertrue sought to be dismissed from the litigation based on this position in its 2006 motion to dismiss, and again in its subsequent cross-motions for summary judgment, each time unsuccessfully.

[24] Adaptive Marketing is a wholly-owned subsidiary of Idaptive Marketing, which in turn is a wholly-owned subsidiary of Vertrue.

[25] Membership marketing through contracts with one or more of the West companies (formerly the West Defendants) represents a special case, according to Defendants, and is discussed below.

The evidence contradicts Vertrue's claims of separation. Vertrue has repeatedly characterized itself as a marketer of membership programs in its annual reports. *See* 2/14/07 Affidavit of Marc Wallin ¶¶ 5-13 and Attachments 16-18.[26] Various internal company documents reveal a high degree of participation in, if not overt control over, membership marketing operations by Vertrue.[27]

Even company officials responsible for membership marketing do not distinguish Vertrue from Adaptive in various important contexts. In fact, the President of Adaptive acknowledged that Vertrue is involved in Adaptive's membership business. *See* Court Ex. 3b (Sung Dep. at 17-18). The President of Adaptive also reports to, and is managed by, the CEO of Vertrue. *Id.* (Sung Dep. at 17). Vertrue and Adaptive share office space, employees, and accounting services. *See id.* (Sung Dep. at 14-15, 23-24). Indeed, the roles of employees and officials are so intermingled that Bruce Douglas, Vice President of Marketing at Adaptive, testified that his own immediate supervisor, Jay Sung, is an employee of Vertrue; in fact, Mr. Sung is an employee of – indeed, President of – Adaptive Marketing. 11/3/2009 Trial Tr. at 218-220. Mr. Douglas was also not able to specify whether Douglas Weiss, former Senior Vice President of Vertrue, was employed by Adaptive or Vertrue. *Id.* at 220. Moreover, Vertrue is responsible for Adaptive's core operations such as human resources and legal compliance. *See* Court Ex. 3b (Sung Dep. at 15-16). This blurring of functions and corporate identities belies the strict

[26] For example: "Vertrue ... is a leading consumer services marketing company.... Vertrue markets its services through inbound call marketing, Internet marketing, television and newspaper advertising, outbound telemarketing and direct mail." Aff. of Marc Wallin ¶¶ 5 - 13, Att. 17, p. 2.

[27] For example, an internal report addressing acquisition of the "Bargain" entity and the integration of marketing operations is labeled a "Vertrue" document, and often refers to Vertrue as the actual marketer. *See, e.g.*, Pl.'s Ex. 234 ("Vertrue's system" of product identification, p. 2; "Vertrue's double breakage model," p. 4; "Vertrue customers," p.8); Pl.'s Ex. 28.

separation claimed by the Vertrue Defendants, and reflects the underlying reality that Vertrue is intimately involved in and controls the marketing of memberships.

In contrast to Vertrue's open, active, and prominent role in the marketing of Adaptive's memberships, Idaptive's role has been less visible. However, the record is clear that Adaptive is a wholly-owned subsidiary of Idaptive, and, in turn, Idaptive is a wholly-owned subsidiary of Vertrue. 3/20/07 Weiss Aff. ¶ 7. The reasons for this particular Russian-doll arrangement of nested corporations remains obscure, but it is well known that such devices are sometimes used to frustrate efforts to assign responsibility and collect on judgments. *See generally Moyle v. Elliott Aviation, Inc.*, No. 05-0406, 2006 WL 468764, at *4 (Iowa Ct. App. Mar. 1, 2006); *Schmoll v. Acands, Inc.*, 703 F. Supp. 868, 872 (D. Or. 1988); *Permasteelisa CS Corp. v. Airolite Co.*, No. 2:06-cv-569, 2007 WL 4615779, at *11-12 (S.D. Ohio Dec. 31, 2007). As of October 2004 when Vertrue, Idaptive, and Adaptive succeeded MemberWorks, MemberWorks had been the target of a number of law enforcement efforts and class action lawsuits. *See, e.g.*, Defs.' Exs. AG, AH, AI, AJ, AK, AL, AM, AN; Pl.'s Ex. 155 (listing thirteen private consumer cases filed against MemberWorks). In any event, the record shows that Idaptive actively participated in the marketing by executing agreements with the West Defendants arranging for the telemarketing of memberships on behalf of Adaptive, which telemarketing violated the BCL. These agreements were dated as early as December 2004, and as late as July 2007, and dealt with a variety of marketing issues, including premiums, the Internet, and the division of revenues. *See* Pl.'s Exs. 554 and 555. Allowing Idaptive to escape liability for the unlawful conduct of the corporation it controls (Adaptive) could put the victims of such conduct at risk, if the ability to satisfy a judgment in the victims' favor were to be hampered by manipulations of corporate

assets. Accordingly, for the reasons discussed above, the Court finds that each Defendant is jointly and severally liable for the BCL violations.

***The West Companies***[28]

The Vertrue Defendants have also contended that they are not responsible for BCL violations associated with the telemarketing of memberships by the West companies.[29] In support of this contention, the Vertrue Defendants point to the contracts with West, which state that West owned the telemarketing scripts employed to market the memberships and assumed responsibility for ensuring that the scripts complied with the law.[30]

Although Vertrue can enter into contracts for indemnification, or can otherwise seek to allocate risk and liability between itself and another entity participating in the marketing of memberships, no such contract can limit the legal remedies available to authorities for violations of law. This is particularly so in light of the fact that Vertrue never separated itself from key aspects of the telemarketing of memberships by West. *See* Pl.'s Exs. 203-205; 544. In addition to choosing West to telemarket its memberships, Vertrue supplied West with the initial scripts that served as the templates for West's telemarketing, *see* Court Ex. 5a (Heeks Dep. at 41); actively participated in crafting, approving, and implementing specific language for script

[28] The three West companies will be referred to collectively herein as "West," unless the context requires a different interpretation.

[29] The Vertrue Defendants do not contend that any of the entities with which they contracted for the telemarketing of memberships, other than West, are liable for any BCL violations.

[30] Contracts provided for two marketing arrangements, wholesale and retail. West's responsibility for legal compliance was associated only with the wholesale arrangement, and the volume of marketing under the retail arrangement appears to have been negligible. Virtually all memberships sold by West under the wholesale arrangement were immediately transferred to Vertrue, at which point Vertrue would be responsible for all aspects of the membership program. *See* Pl.'s Ex. 375.

variations, *see id.* (Heeks Dep. at 45-48, 68), and Pl.'s Exs. 203-205; made the arrangements associated with the offer of premiums to prospective members; performed almost all functions associated with operating the membership programs (including the mailing of fulfillment materials to new members, the mailing of renewal packets to at least some renewal members, membership billing, and the provision of membership services); established and applied refund policies; and enjoyed a flow of revenue from the membership marketing conducted by West. *See* Court Ex. 5a (Heeks Dep. at 13-14, 33, 36, 58, 62). West played little or no role in designing the membership programs; in determining what benefits would be offered in connection with particular memberships; in developing new programs or retiring existing ones; in migrating members from one program to another; or in billing members. *See id.* (Heeks Dep. at 28). In general, Vertrue developed the business model for telemarketing its memberships, and West plugged into that existing model in a limited way. *See id.* (Heeks Dep. at 21).

Whether or not West's participation in such marketing made it liable to Plaintiff for BCL violations is now a moot point, as the Attorney General has settled with the West companies and dismissed them from the lawsuit.[31] But in any event, the record establishes that the role played by the Vertrue Defendants, directly or indirectly, in the telemarketing conducted pursuant to contracts with West renders Defendants jointly and severally liable for failure to comply with the BCL.

***Application of the BCL to All of Vertrue's Membership Marketing***

Each of the two summary judgment rulings that established BCL liability in connection with Vertrue's membership marketing focused on particular marketing exemplars, and the

[31] Whether Vertrue's contracts with West provide a basis for Vertrue to seek indemnification or contribution from West is a separate issue not before the Court.

rulings were formally limited to those exemplars. However, Vertrue has repeatedly argued that Plaintiff's discovery efforts should be confined to receiving representative exemplars, rather than each and every variation of a given marketing approach, and Vertrue has never indicated that the particular exemplars that were the focus of Plaintiff's summary judgment efforts were unrepresentative. *See* 2/6/09 Hr'g Tr. at 59-62 (stating that exemplars provided contain identical boilerplate). Even more conclusively, Vertrue has responded to Plaintiff's requests for admission by acknowledging that none of its solicitations, in any marketing channel, have ever complied with specific disclosure requirements of the BCL. *See* Pl.'s Ex. 152, ¶¶ 11-13. Therefore, the previous summary judgment rulings finding violations of the BCL apply to all of Vertrue Defendants' membership solicitations, and are not limited to the specific solicitations that were the subject of each ruling.

***Constitutional Affirmative Defenses***

In response to this Court's March 11, 2009 ruling that the BCL did not violate the dormant Commerce Clause as applied and that the BCL was not unconstitutionally vague as applied, Vertrue filed a motion to reconsider. In an April 27, 2009 ruling on the motion, the Court stated that there was no reason to disturb the March 11, 2009 ruling, but that "the Court will not prohibit defendant from doing further discovery or from filing future motions to reconsider based upon additional facts learned in the discovery process, subject to the deadlines contained in the trial scheduling order." 4/27/09 Ruling at p. 4. The record does not indicate that Vertrue did in fact pursue further discovery on these issues, and Vertrue has not filed any further motions to reconsider, in compliance with the scheduling order deadlines or otherwise. These facts provide ample reason to reaffirm the Court's earlier rulings that the constitutional provisions in question have not been violated.

Nevertheless, at trial Vertrue presented the expert testimony of Dr. Thomas J. Maronick, who had performed an Internet-based consumer survey that had potential implications for Vertrue's dormant Commerce Clause affirmative defense. Dr. Maronick's survey was very limited in its scope and import, however. Dr. Maronick focused narrowly on two particular ways in which an Internet transaction might be consummated through a face-to-face meeting in which a written membership contract is executed. One way involved a representative coming to the consumer's home, and the other way involved the consumer making a trip to a supermarket or store to sign up. Dr. Maronick concluded that, of the survey respondents who would be interested in the membership offer and would be willing to enter an email address to accept the offer, 73.4% would be "unlikely" to accept the offer if doing so required a home visit, and 70.6% would be "unlikely" to accept the offer if doing so required a trip to the supermarket or some other store. Moreover, because his survey indicated that only 5.5% of respondents would "definitely" accept the offer by making the store visit, Dr. Maronick concluded that "a requirement that an Iowa resident would need an in-person meeting to complete the Adaptive Marketing transaction could result in a loss of as much as 94% of possible sales." *See* Defs.' Ex. BI; 11/3/2009 Trial Tr. at 82-84.

Although various concerns may be raised regarding the design of Dr. Maronick's study and the conclusions reached,[32] for the Court's purposes it suffices to note that Dr. Maronick's conclusions, even if fully credited, are too limited to meet the heavy burden Vertrue bears when

[32] For example, Dr. Maronick did not know whether the landing page used for his survey was typical of Adaptive's landing pages (11/2/2009 Trial Tr. at 86), did not consider whether consumers would link the post-transaction solicitation with the initial volitional transaction (11/2/2009 Trial Tr. at 93-96), did not consider any other option besides "go to store" and "come to house" (11/2/2009 Trial Tr. at 108-09), and acknowledged that his survey responses reflected a yeah-saying bias (11/2/2009 Trial Tr. at 104-105). *See also* Pl.'s Ex. 467 at 16-18.

challenging the constitutionality of the BCL. *See Schroeder Oil Co. v. Iowa State Dep't of Revenue & Fin.*, 458 N.W.2d 602, 603 (Iowa 1990) ("A person challenging a statute must negate every reasonable basis upon which the statute could be upheld as constitutional."). Dr. Maronick addresses only Internet marketing, although the Court has ruled that the BCL also applies to membership sales through telemarketing and direct mail. 11/2/2009 Trial Tr. at 85. And even as to Internet marketing, the study focuses only on face-to-face options for consummating a membership transaction, ignoring such other options as coupling an on-line electronic signature with oral contact by telephone or through the computer,[33] or the exchange of contracts or other required documents by mail. Dr. Maronick's testimony provides no basis for the Court to alter its earlier ruling that applying the BCL to the membership in question does not violate the dormant Commerce Clause.

As to Vertrue's vagueness claim, Dr. Maronick's testimony does not address that issue, and Defendants have not otherwise added anything to the record as it existed when the Court previously ruled that the BCL is not unconstitutionally vague as applied. Therefore there is no basis for overturning that earlier ruling. Accordingly, Defendants have not made the showing necessary to avail themselves of the affirmative constitutional defenses, namely the dormant Commerce Clause and Due Process (vagueness).

***Judicial Estoppel***

Vertrue's arguments as to why the BCL should not apply to its marketing programs have almost constantly evolved and shifted during the course of this case. In its post trial filings,

[33] The Attorney General has adopted the position that an electronic signature could meet the execution requirement of the BCL. The Attorney General has also noted that there are technologies for engaging in real-time oral conversations as part of an on-line transaction; in fact, Vertrue's own documents indicate that a company acquired by Adaptive employed such "Live Chat" technology, which Vertrue evidently elected to disable. Pl.'s Ex. 234, p. 8.

Vertrue contends that the State is barred from seeking to apply the BCL to Vertrue by the doctrine of judicial estoppel. Vertrue bases its argument on consent judgments which the State entered into with two of Vertrue's competitors in the past. See Exhibits R and T. In summary, Vertrue asserts that because the State did not require defendant's competitors to comply with the BCL in the consent decrees, the State is now judicially stopped from requiring compliance with the BCL by Vertrue.

The elements of judicial estoppel are set forth and discussed in *Tyson Foods, Inc. v. Hedlund*, 740 N.W.2d 192 (Iowa 2007). The Court concludes that the doctrine is inapplicable to the facts of this case. Assuming for purposes of argument that the doctrine of judicial estoppel can be utilized against the government, the defendant has failed to make any showing that the State has taken a position in this case contrary to its position in prior cases. At best what defendant has established is that the State has not previously sought to enforce the BCL against defendant's competitors. In reality, defendant's argument amounts to nothing more than an assertion that it is unfair that the State has picked Vertrue to be the first party against whom it has sought enforcement of the BCL. Defendant's argument is legally untenable.

***Conclusion as to Count I***

Each of the three Vertrue Defendants is jointly and severally liable for each violation of the Buying Club Law.

## COUNT II: THE IOWA CONSUMER FRAUD ACT

***Interpretation and application of the Iowa Consumer Fraud Act***

The Attorney General alleged in Count II that Defendants' marketing of memberships to Iowans violated the Iowa Consumer Fraud Act, Iowa Code § 714.16 (hereinafter the "Consumer Fraud Act" or "CFA"). The CFA is to be liberally interpreted to advance the consumer

protection goals of the Act. "A law providing regulations conducive to public good or welfare, such as suppression of fraud, is ordinarily remedial, and as such is liberally interpreted." *State ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W.2d 624, 629 (Iowa 1971). The legislature intended the definitions in the CFA to be expansive, to ensure wide application. *State ex Rel. Miller v Cutty's Des Moines Camping Club, Inc.,* 694 N.W.2d 518, 526 (Iowa 2005), citing with approval *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 980 (D.C. Cir. 1985) ("It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field.").

The CFA expressly eliminates several of the elements of common law fraud, such as reliance, knowledge, and intent.[34] The State has the burden to prove violations of the Iowa Consumer Fraud Act by a preponderance of clear, convincing, and satisfactory evidence. *State ex rel. Miller v. Pace*, 677 N.W.2d 761, 767 (Iowa 2004). After trial and review of the record before the Court, the Court finds that the State has met its burden of proving by a preponderance of clear, convincing and satisfactory evidence that Defendants violated the Consumer Fraud Act in connection with their direct mail, Internet, and telephone marketing of memberships to Iowans to the extent set forth below.

***Key Provisions of the CFA***

The CFA provides:

> *The act, use or employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale, or advertisement of any merchandise or the solicitation of contributions for charitable purposes, whether or not a person has in fact been misled, deceived, or damaged, is an unlawful practice.*

[34] Note, however, that knowledge and intent, in particular, may be relevant to the imposition of civil penalties.

Iowa Code § 714.16(2)(a). This prohibition is disjunctive. For example, a practice that is deceptive or unfair violates the CFA; it need not be both deceptive and unfair. *See Cutty's,* 694 N.W.2d at 527.

***Deception under the CFA***

The CFA defines deception as "an act or practice which has the tendency or capacity to mislead a substantial number of consumers as to a material fact or facts." Iowa Code § 714.16(1)(f). A statement which is literally true may nevertheless be found to be deceptive. *State ex rel. Miller v. Rahmani*, 472 N.W.2d 254, 258 (Iowa 1991).

***Unfairness under the CFA***

Under the CFA, "[u]nfair practice means an act or practice which causes substantial, unavoidable injury to consumers that is not outweighed by any consumer or competitive benefits which the practice produces." I.C.A. §714.16(n). In *Cutty's*, the Iowa Supreme Court explored the meaning of this term:

> *What is an "unfair practice"? On its face the term is dizzying in its generality. Guidance can be found, however, in the decisions of other courts and in the definitional portion of the statute. Other courts have pointed out that an unfair practice is nothing more than conduct "a court of equity would consider unfair." [Citations omitted.] These courts have determined statutes that prohibit "unfair practices" are designed to infuse flexible equitable principles into consumer protection law so that it may respond to the myriad of unscrupulous business practices modern consumers face.... Determining what constitutes an unfair practice is a "highly fact-specific inquiry" that will depend upon the circumstances of each case.*

694 N.W.2d at 525. The *Cutty's* court went on to hold, *inter alia*, that a trier of fact could find unavoidable injury to consumers in several features of the seller's conduct, shedding light on how the "unavoidable injury" element of Iowa's unfairness prohibition is to be applied. In that case, the Court found that various potential injuries to campground

members could be deemed "unavoidable" for purposes of the unfair practice standard. The Court found that unavoidable injury would result if the Club had "used ambiguous documents to lure unwitting consumers into ownership of what are, in the Club's view, the equivalent of lifetime contracts." *Cutty's*, 694 N.W.2d at 530. The Court also found that a course of conduct on the part of the seller that the consumer "would not have anticipated" could give rise to an unavoidable injury. *Id.* The *Cutty's* Court clearly opted for a broad interpretation of "unavoidable injury," consistent with the liberal interpretation that is to be accorded the CFA. A consumer who suffers financial losses as a result of a scheme designed to lure the unwitting, or designed to run counter to what a consumer would naturally anticipate, can be seen to have sustained unavoidable injury.

***Iowa Code § 714.16(14)***

Subsection 14 of the Consumer Fraud Act provides that "nothing herein contained shall apply to any advertisement which complies with the rules and regulations of, and the statutes administered by the federal trade commission."

By its plain terms, this subsection excludes only certain "advertisements" from application of the CFA. According to Iowa Code § 714.16(1)(a), "[t]he term 'advertisement' includes the attempt by publication, dissemination, solicitation, or circulation to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in merchandise." Thus, conduct that does not constitute an advertisement is not excluded from application of the CFA by subsection 14. For example, the erection of breakage barriers (discussed below) or the imposition or continuation of unauthorized charges would fall outside the sphere of "advertisements," and would not be affected by subsection 14. Subsection 14 is also clear in excluding only

those advertisements that comply with FTC rules and regulations, *and* with the FTC Act, which prohibits the use of "unfair or deceptive acts or practices in commerce." 15 U.S.C.A. §45(a).

***The FTC Deception Standard***

An act or practice is deceptive within the meaning of the FTC Act if it is "likely to mislead consumers acting reasonably under the circumstances in a way that is material." *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1199-1200 (9th Cir. 2006). Vertrue has argued that, in the context of advertisements, subsection 14 of the CFA has the effect of replacing the definition of deception and unfairness expressly set forth in the CFA with the FTC's deception and unfairness standards.[35] This argument has potentially serious implications, because for deception, the CFA's "tendency or capacity to mislead" language establishes a lower threshold, as it does not require the offending practice to be *likely* to mislead consumers *acting reasonably under the circumstances*.

It is counterintuitive that the Iowa legislature would establish its own, highly protective definition of deception in one subsection of the Consumer Fraud Act, only to let it be superseded by the FTC's less protective standard whenever the matter under consideration falls within the important category of "advertisement." However, the Court need not resolve this statutory construction issue because the conduct that the Court finds to be deceptive under the CFA, which conduct is described below, is also deceptive under the FTC standard. Therefore subsection 14 of the CFA does not exempt Defendants' conduct in connection with such findings of deception.

[35] Unlike unfairness, the FTC Act does not provide a definition of deception.

***The FTC Unfairness Standard***

The FTC's prohibition of unfair practices is closely comparable to the CFA's definition of unfair practice cited above. An act or practice is unfair in violation of the FTC Act if it (1) causes or is likely to cause substantial injury to consumers, (2) the injury is not reasonably avoidable[36] by consumers themselves, and (3) the injury is not outweighed by countervailing benefits to consumers or to competition. 15 U.S.C. § 45(n). *See, e.g., F.T.C. v. IFC Credit Corp*, 543 F. Supp. 2d 925, 945 (N.D. Ill. 2008). Given the similarity between the Iowa and federal standards, instances in which an advertisement constitutes an unfair practice under the CFA, but is lawful under the FTC Act, would be rare. In any event, the Court has determined that, to the extent an advertisement is found herein to be unfair for purposes of the CFA, it would also be in violation of the FTC Act. Therefore subsection 14 of the CFA does not exempt Defendants' conduct in connection with such findings of unfairness.

***Marketing Channels***

Vertrue marketed memberships to Iowans through direct mail, telemarketing (inbound, where the consumer initiates the telephone call, and outbound, where the consumer receives the phone call), and the Internet. Vertrue refers to these different means of reaching consumers as "marketing channels." The findings below will be

[36] The "reasonably avoidable" element has been interpreted *inter alia* in terms of whether consumers have a free and informed choice that would have enabled them to avoid the unfair practice, or whether the consumer had reason to anticipate the impending harm, coupled with the means to avoid it. *See, e.g., F.T.C. v. IFC Credit Corp*, 543 F. Supp. 2d 925, 945 (N.D. Ill. 2008); *F.T.C. v. J.K. Publications, Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000); *Orkin Exterminating Co., Inc. v. F.T.C.*, 849 F.2d 1354, 1365 (11th Cir. 1988).

organized as follows: First, the analysis will address the "common architecture" (to use the phrase of Plaintiff's expert) of the deceptive and unfair membership marketing efforts in different channels. Second, the Court will address certain deceptive and unfair practices unique to particular marketing channels.

***Overview of Vertrue's Claimed Deceptive and Unfair Marketing Through All Marketing Channels***

Some features of Vertrue's overall sales operation create special hazards for consumers. Unlike Vertrue's memberships, most consumer goods are tangible. Thus, for example, if a membership arrangement involves the periodic review of books or CDs on a negative option basis, the receipt of the items themselves serves as unequivocal notice to the consumer of the fact of membership and its attendant obligations.

By contrast, a membership that provides "access" to benefits may be all but invisible and may have little concrete presence in a consumer's life, especially in instances where the consumer is not even aware of purchasing the "access" in the first instance. Here Vertrue fosters invisibility by utilizing a marketing structure that obscures effective notice to the consumer of the membership enrollment and places numerous burdens on the consumer: the burden to cancel in order to avoid the onset of charges; the burden to differentiate a membership notice from the junk mail or spam that it resembles; and the burden to detect an ambiguous charge on one's account statement and act on it..[37] Vertrue's own records show that 84% of the more than 860,000 Iowa memberships involved no discernible use whatsoever of any membership benefits by the consumers

[37] While each element of Vertrue's marketing program may only escape notice by a certain percentage of consumers, the cumulative effect of the elements leads to a practical non-transparency to the majority of Vertrue's customers.

who were subject to membership charges.[38] Thus, the Defendants' overall marketing scheme has netted more than $35 million[39] in membership charges from Iowans, and has provided remarkably little in return. *See* Pl.'s Ex. 266c. Indeed, Vertrue's own benefit usage data for memberships that began after 1989 and were active as of May of 2009 shows that 91.5% of memberships involved no benefit usage whatsoever. *See* Pl.'s Ex. 266d-1.

Most of Plaintiff's consumer witnesses generally recalled nothing about the transactions at issue. (See Appendix to Def. Post-Trial Reply Memo.) Their testimony was not probative of what they actually understood about enrollment at the time they accepted Adaptive's offers. (Id.) Nor was their testimony probative of what a reasonable consumer would have understood when presented with the Adaptive Program offer.

Plaintiff presented little evidence that consumers who read or listen to the offers would not understand, at the very least, that they were agreeing to try an Adaptive Program. Few of Plaintiff's consumer witnesses testified they read or listened to the disclosures at the time they accepted the offers but were unable to understand them. When presented with exemplars of the marketing materials at trial, the consumers acknowledged that if they had read the materials, they would have understood them. (10/26 Tr. 63:1-21; 10/29 Tr. 18:14-25, 21:19-22:1, 40:25-41:19, 43:13-15, 76:15-25, 83:3-10, 176:8-20.)

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[38] The Ninth Circuit Court of Appeals emphasized the high rate of non-use of benefits in finding that a check mailer scheme similar to Vertrue's was deceptive. *See Cyberspace*, 453 F.3d at 1201.

[39] Vertrue's internal data shows that the Iowa membership revenues were $56,251,860.67 for the 20 year period from 1989 to 2009, with net revenue after refunds at $35,663,678.90. *See* Pl.'s Ex. 266c.

The law charges consumers with knowledge they would glean from reading or listening to the offer, whether or not they actually read or listened to it, and regardless of whether they remember. The law does not provide relief for consumers who accept offers without reading or listening to the details of the offer. The requirement that parties "read before signing" is so engrained in the law that it is applied even to lengthy and detailed license agreements full of legalese that individuals routinely "accept" by clicking an icon on the landing page without even opening the document, much less reading it. *See, e.g., Barnett v. Network Systems,* 38 S.W.3d 200, 204 (Tex. Ct. App. 2001) (holding that parties to a contract in electronic format are obligated to read what they sign; and, absent actual or constructive fraud, they are not excused from the consequences attendant upon a failure to read the contract) (citing *Cadapult Graphic Systems, Inc. v. Tektronix, Inc.*, 98 F. Supp. 2d 560 (D.N.J. 2000); *iLan Systems v. Netscout Service Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) ("The only issue before the Court is whether clickwrap license agreements are an appropriate way to form contracts, and the Court holds they are. In short, i.LAN explicitly accepted the clickwrap license agreement when it clicked on the box stating 'I agree.'"). Here the offer details are in plain English, with no legalese, on a single web page (there is no need to click on a link to access the offer details), and are understandable. (See, e.g., Ex. HG at p. 18.)

The only court that has considered a claim that any of the Internet web pages involved in this case are deceptive is the United States District Court for the Southern District of Texas, in *In re VistaPrint Sales and Marketing Practices Litigation*, No. 4:08-md-1994, 2009 WL 2884727 (S.D. Tex. Aug. 31, 2009), on appeal Docket No. 09-20648.

It held, as a matter of law, the web page was not deceptive because the disclosures were clear and easily understandable if read by the consumer:

> A consumer cannot decline to read clear and easily understandable terms that are provided on the same webpage in close proximity to the location where the consumer indicates his agreement to those terms and then claim that the webpage, which the consumer has failed to read, is deceptive. *See, e.g., Pacholec v. Home Depot USA, Inc.*, 2007 WL 4893481, *5 (D.N.J. July 31,2007); *Tarallo-Brennan v. Smith Barney*, 1999 WL 294873, *3 (S.D.N.Y. May 10, 1999) (rejecting Plaintiffs' attempt to avoid terms of a contract as "deceptive" where the relevant information was provided in "a clear and legible manner" but Plaintiff did not read the full agreement). The *VistaPrint Rewards* webpage contains adequate disclosures which, if read by the consumer, prevent the webpage – as a matter of law – from being deceptive.

Id. at *6.

The State asserts that Vertrue's marketing practices, when taken as whole, constitute deceptive and unfair membership marketing, and apply to all marketing channels and are a violation of the CFA. Based upon the authorities cited above, the Court cannot reach such a blanket conclusion. As discussed herein, the lack of transparency in Vertrue's marketing practices does constitute an additional reason to conclude that the BCL does apply to all of Vertrue's efforts. In addition, the Court finds that some of Vertrue's marketing practices do violate the CFA directly, and those must be discussed in detail. Because marketing channels differ in some important respects, the Court will address the issue of CFA compliance separately for each channel, and the Court's further determinations should be read in light of the foregoing.

Before addressing each marketing channel separately, however, two other facets of Vertrue's marketing practices can be seen as cutting across all modes of solicitation, and therefore deserve separate treatment. These include the employment of practices that

maximize "breakage," and the representation that a consumer's acceptance of a trial membership is "risk free."

***Breakage***

Within Vertrue's marketing operation, "breakage" refers to the extent to which obstacles are created for consumers to claim the "free premiums" (e.g., $25 Wal-Mart gift card) that are used to lure consumers into trial memberships. In resolving a discovery dispute in which Plaintiff sought documents from Defendants relating to breakage, Judge Artis Reis ruled on November 20, 2008 that "[t]he use of 'breakage' ... could be shown to be ... in violation of section 714.16(2)(a)." Judge Reis continued: "When a 'free' premium is offered in connection with a solicitation, use of breakage could cause customers to purchase unused items and to continue as subscribers to the services in question for longer periods of time. Also, this 'breakage' could be shown to be an item of damages to consumers...."

The record shows that breakage has been at the heart of Vertrue's sales and profitability.[40] Indeed, Vertrue has characterized its business model as a "double breakage model," referring to the practice of requiring consumers to jump two sets of unnecessary hurdles in order to obtain the promised premiums. This "breakage model" is utilized intentionally by Defendants for the sole purposes of making it difficult for consumers to redeem the promised premium, and to ensure that Vertrue will receive more in revenue from members than the cost of the promised premium. For example, in an

[40] Because Defendants' sales efforts have relied heavily on gift cards and other premiums, breakage affects all marketing channels. *See* Pl.'s Ex. 553 as an instance of the use of a gift card premium in the direct mail channel.

internal e-mail exchange regarding premium fulfillment, a Pamela Cohen from Adaptive states:

> Questions:
>
> 1. **Ken**: What is bargain's current process for premium fulfillment? Do you require the user to print out the premium page and mail in or is it all through the link on your welcome email?
>
> 2. **Team**: If we were to make this a little bit more "difficult" for the user to redeem by requiring the user to physically print something out (really could be anything) and physically mail it back to us, how could we fit that in the process.
>
> My concern here is making it a little too easy to redeem the premium. While I don't have an issue with the single breakage, this process while simple for us may be too simple for the user!

Pl.'s Ex. 10. Even a single set of artificial hurdles, when employed solely as a breakage device to keep consumers from getting what they were explicitly led to expect, is deceptive and unfair; double breakage is even more egregious. In another e-mail exchange, a Linda Springer, Senior Manager of Market Research, Vertrue Inc., states:

> Duane indicated that a Continuous Marketing customer must mail back two forms to get a premium (for breakage). His second form typically includes survey questions – in order to provide a rationale for the customer to send in the second form – but this data is always discarded.

Pl.'s Ex. 28; *see* Pl.'s Ex. 183 (referring to "bogus survey"); *see also* Pl.'s Ex. 153 at p. 10 (stating in written discovery that the surveys were never tallied or put to any use whatsoever). The President of Adaptive, Jay Sung, when asked about the purpose of the second form in a double breakage model stated, "The second form – well, the second form oftentimes will be a survey. But, you know, it brings down the number of people who do redeem." Court's Ex. 3 (Sung Dep. at 109). Thus, consumers were asked to complete and return a fake, make-work survey form for the sole purpose of burdening the consumer to the point of abandoning the

redemption effort. This survey ruse is itself unfair and deceptive, in addition to being a component of the unfair and deceptive breakage scheme.

Vertrue contends that its breakage hurdles are disclosed to would-be members when consumers are told that they may "claim" (rather than obtain or receive) a premium, but that slender reed will not bear so much weight. Consumers are attracted by a premium (as Vertrue intends), and any limitations placed on the consumer's receipt of the premium would, at minimum, need to be unequivocally conveyed to the consumer from the outset. The failure to do so, as part of a business scheme involving systematic efforts to erect unnecessary barriers, is unfair and deceptive.

The abuse of consumers represented by these breakage efforts is amplified by the fact that Vertrue typically required a consumer to be an active member *at the time* he or she clears the last hurdle to receive the premium.[41] This means that the consumer might have to pay more to remain an active member than the premium is worth. Vertrue is well aware that "breakage extends the time it takes to redeem these kinds of premiums [gift cards or rebate]," s*ee* Ex. 8 at VTRU 69997, and notes that the "optimal" timing of processing each step of the 5 steps for double breakage is an average of 10 days: "1. Time to get mailer; 2. Customer to mail in BRC; 3. Customer to receive form; 4. Form to reach Vertrue; 5. Gift card to reach customer." Pl.'s Ex. 13. Here, it would take a consumer approximately 50 days to receive the premium, which is consistent with another Vertrue employee's estimate: "This means that members usually receive a single break premium in less than a month and a double break premium in less than 2 months." Pl.'s Ex. 190. Indeed, the President of Adaptive even acknowledged:

[41] Vertrue has four levels of premium redemption requirements: single breakage (one artificial hurdle), single active breakage (one artificial hurdle and must have active membership at time of premium redemption), double breakage (two artificial hurdles), and double active breakage (two artificial hurdles and must have active membership at time of premium redemption). *See* Court's Ex. 3 (Sung Dep. At 109-10; 113-14).

> Q: Breakage also increases, in addition to the steps, it increases the time to get the premium or to claim the premium; correct?
>
> A: By definition.

Court's Ex. 3 (Sung Dep. at 140). Like the breakage hurdles themselves, this "active member" requirement was not adequately disclosed.[42] What makes the Vertrue breakage program particularly egregious is the fact that Defendant designed the process with built-in delays to ensure that it would collect more monthly dues than the value of the premiums to its customers—let alone the cost of the premiums to Vertrue. Vertrue never disclosed to consumers the length of time it would take for the premiums to be earned, a time period guaranteed to exceed the free trial period by the delays built into the process by Defendant. The reality is that in most cases the so-called premiums were neither risk free nor of greater value to the consumers that successfully redeemed them than the inherent costs.

The Court finds that the above-described breakage practices have the tendency or capacity to deceive a substantial number of consumers as to material facts, and are therefore deceptive under the CFA. The Court also finds that such breakage practices involve the unlawful omission of material facts within the meaning of the CFA. Moreover, the breakage practices in question are likely to mislead consumers acting reasonably under the circumstances in a way that is material, and therefore constitute deception for purposes of the FTC Act.

The Court further finds that these breakage practices constitute an unfair practice, under both the Consumer Fraud Act and the FTC Act. Substantial consumer injury is

[42] Indeed, the "active member" requirement appears to have been deliberately obscured in some instances. When consumer Tracy Cahill asked the telemarketer: "Now is the Walmart card mine to keep regardless?" the telemarketer responded : "Uh-huh. Yeah …" *See* Defs. Ex. 448(t) at 35; Pl's Ex. 448.

clear, particularly since about 90% of members never get their premium; the injury is not reasonably avoidable by consumers, who have no reason to anticipate the unnecessary, artificial barriers they will encounter in obtaining the promised premiums; and there are no countervailing benefits that might justify the practices.

***"Risk Free"***

Vertrue has often assured consumers that accepting the proffered trial membership was "risk free." This assurance appeared in telemarketing scripts and recorded pitches, in online presentations, and in direct mail pieces. However, it is clear from the record that assenting to a trial membership was anything but risk free. In fact, Vertrue's scheme for selling its memberships imposes a number of serious risks on consumers, from the very outset of the transaction. The evidence shows that the vast majority of consumers were billed for memberships that they did not knowingly enroll in, and were charged for memberships that they never wanted or used. Numerous consumers have had to expend considerable time and effort to cancel memberships, dispute charges, and (sometimes) obtain refunds.

Each trial member was subjected to the overarching risk that he or she would end up paying substantial sums over the course of months or years for a membership program that the consumer did not want and did not realize he or she was being charged for. The record is replete with testimony and complaints from consumers who found themselves in this situation, and Vertrue has long been aware that trial members bore this considerable risk. *See* Pl.'s Exs. 459-462.

This overarching risk to consumers involves numerous separate elements of risk. Vertrue has been well aware (even though consumers were not) that accepting a trial membership subjects a consumer to the following risks, among others:

a) the risk that the terms and conditions were not adequately conveyed, and that foreseeable gaps in the consumer's understanding would result in financial loss;

b) the risk that subsequent communications regarding the membership would be ineffective, because they appeared to be junk mail or spam;[43]

c) the risk that periodic charges for memberships would escape notice, because they were obscure[44] or misinterpreted;[45]

d) the risk that membership charges would rise over time, well beyond whatever costs were cited in initial solicitations;

e) the risk that a program that appeared to be the subject of a sales presentation would be automatically accompanied by an additional membership, and that cancelling one would not halt charges for the other;[46]

f) the risk that efforts to cancel would be difficult, or that charges for a given program would continue even after cancellation;[47]

g) the risk that a consumer calling to cancel would succumb to "save" efforts, and would suffer additional financial loss even after attempting to cancel;[48] and

h) the risk that Vertrue would retain most of the consumer's money even if the consumer cancelled and requested a refund, because restrictive refund policies trigger a full refund only in certain narrow circumstances.[49]

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[43] Defendants' expert Barry Cutler was twice unable to recall the name of a membership program a short time after focusing on a solicitation for the program. Mr. Cutler acknowledged that consumers would have to perform the same feat after the lapse of days, not minutes. *See* 11/4/2009 Trial Tr. At 216-18.

[44] For example, JUane Hrabak's membership charge appeared with a toll-free number on her statement as "MVQ*CNNECTNS" (Pl.'s Ex. 543), and Christopher Scarpellino's charges appeared on his mortgage statement with "Optional Products" as the sole descriptor (Pl.'s Ex. 473).

[45] Various consumers testified that they noticed the charge, but thought it was something else, such as insurance (Hrabak; 10/30/2009 Trial Tr. At 6), credit card protection (Pope; 10/29/1009 Trial Tr. At 49), or Internet protection (Iossi; 10/29/2009 Trial Tr. At 100).

[46] *See* 11.4/2009 Trial Tr. At 81, 85, 87-88.

[47] *See* Pl.'s Ex. 143.

[48] Verture Vice President Jeff Paradise testified that Vertrue does not engage in efforts to "save" memberships by dissuading consumers who call to cancel, but on cross examination acknowledged that policy of trying to "save" memberships was in fact in place until August 2008. 11/2/2009 Trial Tr. At 96-97; Pl.'s Ex. 359.

Vertrue has responded to the State's claims that its "risk free" promotions are unfair and misleading in the same fashion as it has to all of the State's other claims, namely that its promotions meet the strict requirements of the law and that consumers must bear responsibility for failing to read the fine print and boilerplate language contained in their promotional materials. For the reasons set forth above, and due to the same authorities, the Court cannot conclude that all of Vertrue's promotions constitute violations of the CFA.

Consumers do bear responsibility to read and understand the terms of the offers they are accepting. By the same token, it is clear that Vertrue has set out upon a course to sail as close to the wind as possible. It regards unhappy customers and requests for refunds to be simply a cost of doing business, to be minimized if at all possible, but to be borne in any event. Responding to complaints by regulatory authorities is viewed in exactly the same manner. To the extent consumer losses cannot be blamed on the consumers themselves, Vertrue will alter its practices to the minimum extent possible and make restitution as required. Vertrue has continually stressed to the Court the competitiveness of its industry, and argues that any restrictions ordered by the Court will cause it to lose business to its competitors. In reality, defendant's argument is that the more information about its products and prices that it is required to disclose to consumers, the more likely it is that those consumers will not subscribe to its services and products.

[49] To obtain a full refund, a consumer must say that the charge was "unauthorized," using that exact word and not similar terms, or must raise the specter of a complaint to the authorities. *See* Pl.'s Exs. 27, 223 and 359.

While the Court does not conclude that all of Vertrue's materials using the term "risk free" are necessarily violations of the CFA, they do constitute violations in those circumstances where Vertrue has affirmatively taken actions to deceive consumers. Those circumstances include instances where consumers have been told they may claim premiums whether or not they are members when they receive their reward, and where Vertrue has created a breakage model designed to ensure that more members' dues will be received than the value of the premium. By definition, such a model is not "risk free." Other instances are discussed below.

***Separate Marketing Channels***

Having addressed various features of Vertrue's deceptive and unfair membership marketing that are shared across marketing channels, the Court will now focus on deceptive or unfair marketing that occurs within, or through, particular channels.

***Direct Mail***

Vertrue used a device called a "check mailer" to solicit and enroll Iowans in membership programs through the direct mail channel, and (evidently to a much more limited extent) "gift-card mailers" for consumers to enroll Iowans who accept an invitation ostensibly from their credit card issuers to "Claim Your $25 Gift Card!" (Pl.'s Ex. 553).[50] Charles Pope, a 63-year-old military veteran from Marshalltown, testified at trial regarding his experience with a check mailer. Mr. Pope's experience appears to be representative, and well illustrates the objectionable features of Vertrue's method of marketing in the direct mail channel.

[50] Vertrue has indicated that no check mailers were sent out after January 2007. However, it appears that Vertrue has never stopped billing consumers who were enrolled through check mailers before their use was discontinued. *See* Hr'g Tr. at 49; Pl.'s Ex. 266.

Mr. Pope received a mailing in the form of a "snap-pack," a check-sized envelope that is to be opened by tearing off a perforated stub at the end.[51] The outside of the snap-pack bore the name and the logo of the consumer's credit card issuer ("Union Plus" in Mr. Pope's case), and also bore the words "CHECK ENCLOSED" above Pope's name and address.[52] The envelope contained a $10 check made out to Mr. Pope. The envelope also contained a check-sized slip of paper, which explained in small print that by cashing or depositing the check the consumer would be enrolling in a trial membership, which would lead to charges on the consumer's bank (or credit) account unless the consumer affirmatively cancelled.[53] A similar explanation appeared above the signature line on the back of the check, below instructions to "Cash or Deposit This Check Before Void Date Shown On Other Side," formatted as follows:

Cash or Deposit This Check Before
Void Date Shown On Other Side

Please enroll and send me an *essentials* Membership Card and Kit as soon as possible. I understand that cashing this check activates a risk-free trial membership in *essentials.* After the 30-day trial, the membership fee of $12.95 a month will be automatically charged to my Union Plus Credit Card each month, unless I call to cancel. I may call at any time to cancel for any reason. The $10.00 is mine to keep regardless.

Signature_____

Vertrue's billing records showed that Mr. Pope's Union Plus credit card was charged $12.95 a month beginning in October of 2004, and the monthly charges continued through September of 2008, by which time the charge had risen to $14.95. Mr. Pope testified that he was not aware that he was a member of any Vertrue program until

[51] *See* Pl.'s Exs. 56-58. Mr. Pope's mailing appears in the record as a photocopy, but an original snap-pack appears in the record as Def.'s Exhibit FO.
[52] The form mailer used to entice consumers to "Claim Your $25 Gift Card!" also bore the name of the consumer's bank or credit card name. *See* Pl.'s Ex. 553.
[53] Plaintiff's second motion for summary judgment focused on the direct mail channel, and the record includes several examples of check mailers that were submitted as part of that effort. Additional examples were received at trial. *See, e.g.,* Def.'s Ex. D' Pl.'s Exs. 68 and 72.

he was contacted by the Attorney General's office in about September of 2008, at which time he cancelled the membership. He recalled receiving the check in the mail, but had assumed that he was being reimbursed for overpaying his credit card account. Mr. Pope testified that he never intentionally enrolled, and never made any use of whatever benefits the membership involved. Mr. Pope testified that he had seen the charges on his statement, but mistakenly believed that they related to insurance. By the time he cancelled after four years, Mr. Pope had unwittingly paid $695.60 in membership fees. Upon cancellation, he was refunded only one payment of $14.95.

The trial record contains the testimony of several other consumers who, like Mr. Pope, unknowingly paid membership charges to their credit cards, sometimes for several years, after negotiating the check they received in a check mailer.[54] Although details vary, clear themes emerge. Consumers receiving a low-dollar check ostensibly from their credit card issuer believed it to be a rebate or reimbursement. They deposited it without suspecting that doing so would enroll them in a program that would be charged to their credit cards. They were never asked to provide their credit card numbers or other means of payment, which would have alerted them to the fact that they were making a purchase and would be charged. They did not (in some instances could not) read the block of small print above the signature line, and were not made aware by the slip of paper that accompanied the check that they were agreeing to anything by endorsing the check. The membership charges on their credit card statements, typically in modest amounts unlikely to draw close scrutiny, either went unnoticed or were misinterpreted. Consumers testified

[54] *See* the trial testimony of Helen Adam, Pamela Oviatt, Rosalie Doyle, and Lloyd Jarrett, and the deposition testimony of Craig Mateer, Edwin Altekruse, Rick Lamparek, Betty Sudmeier and Jan Sudmeier.

that enrolling in a membership program by cashing a check was totally unfamiliar and unexpected; no other club, organization, or program they had ever joined involved such an enrollment procedure. Vertrue's check mailers created the net impression that the checks were rebates or refunds from a consumer's credit card issuer, and under the circumstances consumers were unlikely to read the fine print that might have disabused them of this false belief. *See Cyberspace*, 453 F.3d at 1200; *In re Stouffers*, 118 F.T.C. 746, 776-78 (1994) (analyzing the net impression of Stouffer's package).

The check mailers are misleading as to the fundamental nature of the transaction, namely, that depositing a check ostensibly from the consumer's credit or bank card issuer will be regarded as the purchase of a membership from Vertrue. The gift-card mailers, likewise, are misleading as to the fundamental nature of the transaction, namely, that sending in a form to "Claim Your $25 Gift Card!" from the consumer's credit or bank card issuer will be regarded as the purchase of a membership from Vertrue. The Court finds that the use of these check mailers and gift-card mailers by Vertrue to enroll consumers and charge their credit/bank cards has the tendency or capacity to mislead a substantial number of consumers as to a material fact or facts, and is therefore deceptive under the Consumer Fraud Act. *See* Iowa Code § 714.16(1)(f).

***Direct Mail Devices and the Current FTC Deception Standard***

In the above-cited *Cyberspace* case, the Ninth Circuit Court of Appeals applied the FTC deception standard to a check mailing scheme much like Vertrue's. The *Cyberspace* defendants mass-mailed checks in the amount of $3.50 each, which, if cashed or deposited, constituted the consumer's agreement to pay a monthly fee for Internet service, to be added to the consumer's phone bill. Small print on the back of the

check and elsewhere explained the nature of the obligation the consumer would incur by negotiating the check.

The *Cyberspace* defendants argued that the fine-print disclosures precluded liability. *Cyberspace*, 453 F.3d at 1200. However, the Court noted that "a solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures." *Id.* at 1200. The Court found that the mailing "created the deceptive impression that the $3.50 check was simply a refund or rebate rather than an offer for services." *Id.*

The Court drew additional support for its conclusion of *actual* deception from the fact that only about 1% of those who signed up for the Internet service actually used it. "[T]he remaining 99% did not realize they had contracted for internet service when they cashed or deposited the solicitation check." *Id.* at 1201. The Court observed that, although proof of actual deception is unnecessary to establish a violation of the FTC Act, "such proof is highly probative to show that a practice is likely to mislead consumers acting reasonably under the circumstances." *Id*. Here, consumers who were "enrolled" by Vertrue's check mailers also demonstrated a low level of usage. More than 90% of all Vertrue memberships created through direct mail involved no benefit usage whatsoever, according to the company's own customer database. Pl.'s Ex. 266.[55] The low level of usage is consistent with the testimony of consumers, consumer complaints, and survey

[55] Of course the company's database only tracked the usage of "trackable" benefits, and Vertrue contends that certain "non-trackable" benefits may have been used even where trackable benefits were not. However, Verture has adduced no surveys or other evidence of such usage, beyond the opinion of one corporate representative, Jeff Paradise. *See* 11/2/2009 Trial Tr. At 155-57. Moreover, the testimony of Vertrue's consumer witnesses undermines the company's position, as they testified to a high volume of trackable benefit usage, and little or no use of non-trackable benefits. *See* footnote 20, above; *see also* 11/4/2009 Trial Tr. At 124, 146.

responses, all to the effect that consumers were deceived by Vertrue's use of check mailers to enroll them in membership programs.

Ultimately, the *Cyberspace* court found that the offending check mailers were deceptive as a matter of law. "[N]o reasonable factfinder could conclude that the solicitation was not likely to mislead consumers acting reasonably under the circumstances in a way that is material." 453 F.3d at at 1201. The Court agrees with the *Cyberspace* analysis and findings. The Court finds that Vertrue's check mailers were likely to mislead consumers acting reasonably under the circumstances in a way that is material, and therefore violated the deception prohibition of the FTC Act, as well as the Iowa Consumer Fraud Act.

The Court further finds that the gift-card mailers, made to appear to be premium offers from a consumer's credit card issuer, inadequately disclose that they are in fact membership enrollment devices from a new entity (Vertrue).[56] Such mailers are also likely to mislead consumers acting reasonably under the circumstances in a way that is material, and therefore violate the deception prohibition of the FTC Act, as well as the Iowa Consumer Fraud Act.

***Direct Mail Devices and Unfairness under the CFA and the FTC Act***

The Court further finds that the use of the check mailers and gift-card mailers constitutes an unfair practice, under both the Consumer Fraud Act and the FTC Act. Substantial consumer injury is clear; the injury is not reasonably avoidable by consumers, given (*inter alia*) the rebate check ruse and the unexpected device of deeming the negotiation of a check (check mailers), or acceptance of an invitation from one's credit

[56] *See* Pl.'s Ex. 553, which also appears of record as Attachment 34 to the 11/14/2008 Affidavit of Marc Wallin submitted in connection with Plaintiff's Second Motion for Summary Judgment.

card issuer to claim *your* gift card (gift card mailers), as a membership enrollment; and there are no countervailing benefits that might justify such practices.

***Internet Marketing***

Another method Vertrue used to enroll Iowa consumers was post-transaction Internet marketing.[57] This involved Vertrue's forging a relationship with another online marketer, which allowed Vertrue to solicit the other marketer's customers as those customers were concluding their business on the other marketer's website. For example, Vertrue had such a relationship with Orbitz, a website consumers use to arrange flights and other travel accommodations. The deposition testimony of Stan Green, a 61-year-old Des Moines resident, described Mr. Green's experience in becoming enrolled in a membership after visiting the Orbitz site, and illustrates key features of Vertrue's post-transaction Internet marketing.

Mr. Green testified that he became aware that he was a member of the Connections program when he was contacted in May 2009 by the Iowa Attorney General's office. He checked his credit card records, and confirmed that he was being charged for the membership each month. According to Vertrue's billing records, the charges began in July of 2004, when Mr. Green was enrolled in Connections after visiting the Orbitz website. Mr. Green testified that he had not intended to enroll, was not aware of the membership, and over the course of the five years paid about $788.00 in membership fees. He further testified that at one point he had noticed the charge and

[57] This form of marketing, and Vertrue's conduct in pursuing such marketing, was the subject of a recent staff report issued by the Commerce Committee of the United States Senate in connection with the Committee's ongoing investigation. *See* Pl.'s Ex. 550.

discussed it with his wife, but they mistakenly concluded that it related to their newspaper service, and so they continued paying it.

Mr. Green recalled being offered $10 off a plane ticket, but thought he was still on the Orbitz website at the time.[58] Mr. Green also recalled making affirmative responses to get the $10 cash back, and testified that the web page he was shown at his deposition, which involved completing a "consumer survey," could have been what he saw. Mr. Green testified that he had understood that he was providing his responses in order to get $10 cash back from *Orbitz* – exactly what Vertrue intends. *See* Pl.'s Ex. 28.

The web page in question (Pl.'s Ex. 117) shows how a consumer navigating the Orbitz website might be enrolled in and charged for an unwanted membership. The most conspicuous portions of the web page express a "thank you" for doing business with Orbitz, and invite the consumer to "CLAIM $10 CASH BACK!" The cash-back arrow points to a brief "Consumer Survey," the first question of which deals with travel, strengthening the perceived connection to Orbitz. The consumer is asked to provide payment information upon completion of the survey, but the consumer who (like Mr. Green) believes he is still dealing with Orbitz would not be alerted to any dangers in completing the cash-back process by providing such information. The portions of the web page that might prevent any misunderstandings are inconspicuously presented; the "Offer Details" appear in an uninviting block of small print. Vertrue has acknowledged that the cash-back survey that appears as the most conspicuous feature of the solicitation is not a true survey; the responses are never compiled or used in any manner. *See* Pl.'s

[58] This misperception is common and probably intended, given that the landing page is designed to look like a continued transaction with the initial marketer. *See See* Defs.' Ex. E; 10/27/2009 Trial Tr. At 216-17, 237-38.

Ex. 153 at 10. Thus, the survey is a ruse, making the consumer think (as Mr. Green thought) that the cash-back offer is a quid pro quo from Orbitz for the survey responses. These features are a perfect example of the Court's findings and conclusions above that Vertrue is determined to operate as close to the legal limits as possible, and to rely upon consumers' duty to read and understand the fine print of the Vertrue offers when complaints are made by consumers or regulatory authorities. Mr. Green and a number of other consumer witnesses[59] testified to their lack of understanding of the services to which they subscribed.

In addition to post-transaction Internet solicitations, Vertrue also offers direct marketing to consumers in the Internet channel. For example, Vertrue maintains its own website FreeScore.com, where the consumers can purchase a service involving credit scores. *See* Defs.' Ex. HE. However, Vertrue bundles another distinct product, Privacy Plus, with the purchase of the initial service, for an additional monthly fee of $1.00. Thus, to purchase the initial service, a consumer must purchase Privacy Plus, although this fact is obscured as much as possible. *See* 11/4/2009 Trial Tr. at 80-82. In such instances, although the record is unclear as to whether a consumer receives one welcome e-mail for both services or two separate e-mails for the two distinct services, there is no ambiguity that to cancel both services, a member must call two separate 800 numbers, even though the consumer had no choice but to purchase both services together. *See* 11/4/2009 Trial Tr. at 81-85. Most consumers will likely be unaware of the purchase of the second service (much like the post-transaction solicitations discussed above), and that when the consumer calls an 800 number to cancel the primary service, he or she will

[59] *See* the trial testimony of Kenneth Burke, Mary Grefe, Jane Hrabak, Mark Iossi, and the deposition testimony of Allan Aasen, Everett Ihle, and Robert Hough.

continue to be billed for the (unknown) add-on service. *See* Pl.'s Exs. 314-316. Moreover, even for the wary consumer that understands that two services are being purchased with only one click of the mouse, such a consumer may not understand that calling one number to cancel does not cancel both services, despite the "one-click" nature of the initial purchase.

Despite the foregoing discussion, and for the same reasons as set forth above, the Court cannot conclude that all of Vertrue's Internet marketing violates the CFA or FTC Act. *See In re VistaPrint Sales and Marketing Practices Litigation*, No. 4:08-md-1994, 2009 WL 2884727 (S.D. Tex. Aug. 31, 2009), on appeal Docket No. 09-20648. However, as also discussed above the Internet marketing does violate both laws when it offers "risk free" premiums for programs where Vertrue deliberately delays the premiums, places obstacles to reduce or prevent premium redemption for no business purpose other than to maximize profits and creates a multi-step process to cancel multiple programs which the consumer is obligated to purchase in one transaction.

***Telemarketing***

Another method Vertrue used to enroll Iowans in membership programs was telemarketing, both inbound and outbound. Vertrue contracted with various telemarketing companies to make membership presentations to consumers by phone. Inbound presentations were made to consumers who called a toll-free number for some unrelated purpose, such as to place an order from a catalog or to buy something advertised on television. Outbound presentations (aka "cold calls") were initiated by the telemarketers.

***Outbound Telemarketing Solicitations***

The experience of consumer Patricia Ackelson illustrates several objectionable aspects of Vertrue's telemarketing of memberships. Ms. Ackelson, a 76-year-old widow from Des Moines, testified at trial regarding the outbound telemarketing call she received in 2003.[60] A recording of the sales presentation that enrolled Ms. Ackelson in the Simple Escapes program was played while she was on the stand at trial. *See* Pl.'s Ex. 87.

The recorded sales pitch was seriously flawed as a meaningful way to obtain a consumer's knowing assent to the fact of membership enrollment, much less to the exact terms of membership. Neither did it effectively convey the steps that must be taken to avoid credit card charges. The telemarketer had a heavy accent, and spoke at a very fast pace, rendering much of the pitch unintelligible.[61] The telemarketer packed a great deal of information into a very short space, and then accepted a general indication of assent as sufficient to bind and bill the consumer. For example, a portion of Ackelson's exchange with the telemarketer proceeded as follows, according to the transcription created by the court reporter at Ackelson's deposition:

> *OPERATOR: Okay. Thank you. I just want to make sure (inaudible). You can refuse your membership (inaudible) in 7 to 10 days and will have 30 days (inaudible) program for only one dollar. Keep in mind, Ms. Patricia, if you are not completely satisfied, you can cancel by calling 1-888-241-0073 during your 30-day trial and get your dollar back or you can cancel after the trial and receive*

[60] Ackelson's 2/15/2007 deposition is also of record, as it was submitted as attachment II to Plaintiff's 4/19/2009 Resistance to Vertrue Defendants' Motion to Compel. *See also* Pl.'s Ex. 86.

[61] As an indication of the challenges to understanding what the telemarketer was saying, the court reporter who transcribed the deposition, and who had a copy of the recording to listen to in producing a thorough transcription, ultimately identified 16 portions of the sales presentation as "inaudible." By contrast, Vertrue has also transcribed the recording with no portions deemed inaudible. Of course, Vertrue had access to the underlying script, which was not available to Ms. Ackelson or the court reporter at thte deposition. Moreover, given the significant inaccuracy noted above in Vertrue's transcription of Mr. Spencer's telemarketing recording, the audio recordings themselves, which also reflect the pace and manner of delivery, clearly provide the most reliable account of what transpired.

*a refund of your (inaudible) membership fee. (Inaudible) account information to be charged.*

*Ms. Patricia, may I have approval (inaudible) to automatically charge your Citi bank credit card the one dollar trial fee (inaudible) and then after the trial (inaudible) cancel, the monthly fee of $14.95 (inaudible) for as long as you wish to remain a member?*

*MS. ACKELSON: All right.*

*OPERATOR: Okay. Great. Now, Ms. Patricia, (inaudible) to begin using Simple Escapes (inaudible). You can start using the benefits within three business days by calling 1-888-241-0073. And remember, Ms. Patricia, your membership (inaudible) all the information you need to obtain your $25 Wal-Mart gift card as a member of Simple Escapes.*

*And just to verify that I have your (inaudible) today and (inaudible) membership to Simple Escapes and you know how it will be charged, I need your city of birth. What would that be, please?*

*MS. ACKELSON: You need what?*

*OPERATOR: Your city of birth, ma'am.*

*MS. ACKELSON: Des Moines, Iowa.*

A consumer may be excused for thinking that a request for one's city of birth was simply that, without fully appreciating that a response would lock in a membership transaction and subsequent charges.

That the telemarketer's pitch was ineffective in conveying key information was also apparent from Ms. Ackelson's testimony at trial. Immediately after listening to the recording at trial,[62] Ms. Ackelson testified that: she did not catch the name of the membership program the recording had enrolled her in; she did not understand how a $1 payment figured into the membership transaction; she was uncertain whether the sales

[62] In hearing the telemarketer's sales pitch at trial, Ms. Ackelson was actually hearing it for the fourth time.. She heard it once when she received the call that enrolled her as a member, and a second and third time when Vertrue played it twice at Ms. Ackelson's deposition.

pitch had included a phone number, and, if so, what it was for; she did not catch whether a gift card had figured into the transaction; and she did not understand why she was asked for her city of birth. *See* 10/30/2009 Trial Tr. at 73-74.

Telemarketing pitches like the one Ms. Ackelson received, whether outbound or inbound, explain how consumers have become enrolled as members through a telemarketing call, but then have been unaware that they are members over the course of the subsequent months that they are charged for the unused membership. Several consumers testified that that is precisely what happened to them.[63]

***Inbound Telemarketing Solicitations***

The inbound solicitations suffer from the same defects as the outbound, and some additional ones as well. As noted above, a consumer receiving an inbound sales presentation had placed a call for an unrelated purpose, and then found himself or herself receiving an unexpected offer relating to a membership. One MemberWorks script read as follows:

> *To thank you, we're sending you a voucher for a free $25 gift card to The Home Depot with a risk-free 30-day trial membership in Home Works Plus. Offered by Major Savings, this service offers you hundreds of dollars in savings at stores like The Home Depot, Kmart, Circuit City, Linens and Things, Macy's and more of your favorite stores through their gift card program. You can also save up to 40% on name brand furniture, appliances, electronics and more through the Home Works Plus discount shopping service. Now if you want to cancel, just call the toll free number in your welcome packet in the first 30 days and you won't be charged. And with your OK today, if you decide not to cancel, after the 30 day trial the service is automatically extended to a full year for just $139.95, charged as Home Works Plus to the credit card you provided today and the free $25 gift card to The Home Depot is yours to claim just for trying the program, OK?*

[63] *See* the trial testimony of Helen Adam, Pam Douglas, Rosalie Doyle, Lloyd Jarrett, Thavary Keo, Christopher Scarpellino and Julia Seeman, and the deposition of Laura Jensen.

Pl.'s Ex. 357 at 2.

When the telemarketer leads with the phrase, "To thank you, we're sending you...," the consumer is invited to expect something as a show of gratitude for his or her patronage, and justifiably lets down his or her guard.[64] References to an attractive premium follow, consistent with the "thank you" theme that has been established. The consumer is not so much asked to make a decision, as to passively acquiesce in a process that's already underway: "We're sending you...." Hesitation is further minimized by the assurances – misleading assurances, as discussed above – that the transaction is "risk free."

The structure of this pitch is itself objectionable. The 173-word pitch recites the terms, conditions, and putative benefits of membership without any interaction with the consumer, until a final "OK?" requests assent to everything that came before.[65] This approach is more likely to obscure than inform, and Vertrue improperly relies on such pitches as the basis for months or years of credit card charges for unused memberships. *See* Pl.'s Exs. 266b, 266c.

These features, coupled with the ample evidence that consumers were in fact deceived and suffered losses as a result, render Vertrue's telemarketing of memberships, both outbound and inbound, deceptive and unfair. As to deception, the telemarketing solicitations have a tendency or capacity to deceive a substantial number of consumers as to material facts, and are therefore deceptive under the CFA. Moreover, consumers are deceived by the net impression created by these solicitations. The Court also finds that Vertrue's telemarketing solicitations are likely to mislead consumers acting reasonably under the circumstances in a way that is material,

[64]The claim that any part of the transaction is intended as a "thank you" is false, and is therefore another deceptive feature of the transaction, in and of itself, or which Vertrue is well aware. *See generally* Pl.'s Ex. 370.

[65] Vertrue Vice President Bruce Douglas acknowledged the problem with this structure from the witness stand. After Douglas protested that a question put to him on cross examination was confusing, Plaintiff's counsel asked: "Like, if I said a whole bund of things together and then at the end said "okay," you wouldn't know what you were answering, would you?", to which Douglas responded: "That's correct." 11/4/2009 Trial Tr. At 58.

and therefore constitute deception for purposes of the FTC Act. The telemarketing solicitations are far different from the solicitations described in *Vista Print, supra* because the consumer has no meaningful opportunity to read or attempt to study the "fine print."

The Court further finds that these telemarketing solicitations also constitute an unfair practice, under both the Consumer Fraud Act and the FTC Act. Substantial consumer injury is clear; the injury is not reasonably avoidable by consumers, given (*inter alia*) the structure, context and content of the sales pitch, as well as the manner of presentation; and there are no countervailing benefits that might justify the practices.

***Conclusion as to Count II***

The Court finds that Plaintiff has met its burden of proving by a preponderance of clear, convincing and satisfactory evidence that Defendants violated the Consumer Fraud Act in connection with their direct mail, Internet, and telephone marketing of memberships to Iowans, to the extent detailed above. Each of the three Vertrue Defendants is jointly and severally liable for each such violation of the Consumer Fraud Act. Such joint and several liability is based on the same analysis set forth above in connection with the Court's determination that each Defendant is jointly and severally liable for violations of the BCL.

**COUNT III: CONSUMER FRAUDS AGAINST OLDER IOWANS**

Count III of the Amended Petition alleges that Defendants violated the Consumer Fraud Act and that some such violations were committed against older persons (age 65 or older), giving rise to an additional civil penalty of up to $5,000 per violation as set forth in Iowa Code § 714.16A. This provision will be referred to as the "Older Iowans Law."

The evidence adduced by the Attorney General in support of this claim takes three forms: testimony or complaints from (or about) affected consumers aged 65 or older; an analysis of the

ages of certain long-time members in Vertrue's database of Iowa transactions; and documents produced by Vertrue in discovery.

First, the Attorney General presented testimony and written complaints from older Iowans (or from someone acting on their behalf) who suffered losses or were otherwise negatively impacted by Vertrue's marketing scheme. For example, five of the fifteen consumer witnesses who testified in Plaintiff's case-in-chief were 65 or older, and one of the other ten witnesses testified about the membership experience of her elderly (now deceased) grandfather. Three of the ten consumers whose depositions were submitted into evidence by Plaintiff were also 65 years of age or older.

In addition to relating the experiences of individual older Iowans, this testimony sometimes identified aspects of membership transactions that suggested that other older persons would be similarly harmed. For example, various older Iowans testified regarding their difficulty reading print as small as that used by Vertrue for various important disclosures, and also testified to the commonly-known fact that reading small print is harder for consumers whose eyesight has been compromised by advanced age.

Second, the Attorney General presented age data for persons who were long-term members of Vertrue programs, but who had never used any of the membership benefits reflected in Vertrue's database of Iowa membership transactions. Specifically, the Attorney General identified the fifty longest-term members[66] among Iowans who were enrolled through (a) direct mail; (b) inbound telemarketing (aka "Memberlink"); (c) outbound telemarketing; and (d) online transactions. The Attorney General also identified the twenty longest-term members,[67]

[66] As determined by the highest number of billing entries for individual consumers in the Iowa consumer database maintained by Vertrue. *See* Pl.'s Ex. 266.
[67] Members with 90 or more billing entries.

without regard to which marketing channel enrolled them. For each of these five groups, the Attorney General then determined the ages of the listed individuals, using the database of the Iowa Motor Vehicles Division driver's license database, a specified Westlaw database, the Social Security Death Index, or a combination of these sources. The percentage of persons age 65 or older on each of these lists was determined, and was compared to the percentage of Iowa adults age 65 or older in the general population, as derived from the State Data Center Website.[68] Pl.'s Ex. 227 & 228. The State Data Center Website indicated that the percentage of adult Iowans age 65 or older was 19.9% in 2000, the same in 2004, and 19.4% in 2008. By contrast, the long-term Iowa members with no recorded benefit usage were disproportionately age 65 or older. Specifically, older Iowans constituted 46.6% of the direct mail members; 52% of the inbound telemarketing members; 30.95% of the outbound telemarketing members; 31% of the Internet members; and 50% of the members with the highest number of billings without regard to marketing channel.

To regard the Attorney General's age analysis as probative for purposes of the Older Iowans Law, the Court must find that the underlying age data may be admitted into evidence over Vertrue's hearsay and relevance objections, and that the over-representation of older Iowans in the specified membership categories suggests that older Iowans are over-represented in the group of persons who were victims of consumer fraud. As to the hearsay and relevance objections, the Court finds that such data should be admitted; the basis for this finding is set forth in a separate section related to evidentiary rulings, above.

As to the inference to be drawn from the over-representation of older Iowans in the specified membership categories, the record includes the testimony of numerous consumers who

[68] www.iowadatacenter.org

met the same profile as the consumers in the categories in question, that is, long-time members with no record of benefit usage. In all instances, the consumers testified that they did not intentionally enroll in the programs, were not aware that they were members, and were charged for memberships over an extended period without realizing that they were paying for memberships.

The third form of proof adduced by Plaintiff regarding violations of the Older Iowans Law consisted of documents produced by Vertrue to the Attorney General. Contradicting the trial testimony of Jeff Paradise, Adaptive's Vice President of Product, who stated that age was not discussed at Adaptive, internal company documents include demographic studies that examine age data extensively. For example, one such study indicated that almost half of all visitors to a membership privacy website were age 55 or older, and that, among persons who made no use whatsoever of any trackable membership benefits, 19.4% were age 65 or older. *See* 11/2/2009 Trial Tr. at 107-107, 113; Pl.'s Ex. 263b.

Iowa Code § 714.16A(2) lists factors that are to be considered in determining whether to impose the enhanced penalty for each violation, and the amount of any such penalty. Based on the evidence identified above, the Court concludes that the State has failed to carry its burden of proof that the Vertrue defendants have targeted older Iowans. While Verture has certainly made efforts to understand the results of its programs, the Court concludes that Vertrue has attempted to take advantage of all consumers equally, and not directed its efforts against any one age group.

**ORDER AND JUDGMENT**

**IT IS THEREFORE ORDERED AND ADJUDGED** that Defendants Vertrue Incorporated, Adaptive Marketing, LLC, and Idaptive Marketing, LLC are jointly and severally liable for all violations of law described herein, and that a hearing should be held for the purpose

of determining appropriate remedies. The Court will schedule such a hearing, and notify the parties.

**SO ORDERED** this 18th day of March, 2010.

**ROBERT A. HUTCHISON, JUDGE**
Fifth Judicial District of Iowa

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