BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

FILED
OSAH
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BENE-FIT HEALTH PRODUCTS, INC.; DENNIS LOVETT AND RICHARD PERKINS, INDIVIDUALLY AND IN THEIR CAPACITIES AS PRINCIPALS OF BENE-FIT HEALTH PRODUCTS, INC.,	:	**Docket No.: OSAH-OCP-FBPA-1456186-20-Miller**
Petitioners,	:	**Agency Reference No.: 323497**
v.	:	
JOHN D. SOURS, ADMINISTRATOR, FAIR BUSINESS PRACTICES ACT, GOVERNOR'S OFFICE OF CONSUMER PROTECTION,	:	
Respondent.	:	

INITIAL DECISION

I. SUMMARY OF PROCEEDINGS

This matter is an appeal by the Petitioners, Bene-Fit Health Products, Inc. ("Bene-Fit"), and Dennis Lovett and Richard Perkins, individually and in their capacities as principals of Bene-Fit, of a decision by John D. Sours, Administrator of the Fair Business Practices Act, Governor's Office of Consumer Protection, to assess a civil penalty of $2,396,000.00 for violations of the Fair Business Practices Act ("FBPA"). The evidentiary hearing took place on June 20, 2014.[1] The Respondent was represented by Ellen Abt, Esq. Mr. Lovett and Mr. Perkins appeared *pro se* and as the representatives of Bene-Fit.[2]

[1] The record was held open until July 14, 2014, for the submission of Exhibit P-9 and the parties' written closing arguments. As part of their post-hearing filings, the Petitioners also submitted ten new exhibits. However, because the untimely filing of these exhibits was not authorized, they have not been admitted into evidence.

[2] Bene-Fit is a corporate entity that would ordinarily be required to retain an attorney in a legal proceeding. See Eckles d/b/a Atlanta Tech. Grp. v. Atlanta Tech. Grp., Inc., 267 Ga. 801, 805 (1997). However, the Administrative Rules of Procedure provide that "[i]n the Administrative Law Judge's discretion, an owner, majority shareholder, director, officer, registered agent, member, manager or partner of a corporation, limited liability company, or

After careful consideration of the evidence and the arguments of the parties, the Respondent's decision to assess a civil penalty against the Petitioners is **AFFIRMED**; provided, however, that the amount of the penalty is reduced from $2,396,000.00 to $1,386,000.00.

II. FINDINGS OF FACT

A. Overview

1.

Bene-Fit is a now-defunct corporation that maintained its principal place of business in Georgia and operated from April 2005 to January 2013. Mr. Lovett, Bene-Fit's president, and Mr. Perkins, its vice-president, were the owners and sole shareholders of the corporation. Bene-Fit sold a variety of consumer products containing magnets, such as mattress pads, pillows, seat cushions, and insoles. (Testimony of Dennis Lovett and Richard Perkins.)

2.

Bene-Fit utilized a business model whereby consumers across the United States were invited to attend an "entertaining health seminar" at a local restaurant and enjoy a free meal at Bene-Fit's expense. The company contacted consumers, most of whom were over age 60, using direct mail solicitations and/or prerecorded phone messages. During the "entertaining health seminar," company sales representatives[3] gave hour-long marketing presentations that culminated in the solicitation of orders for Bene-Fit's magnetic products. These marketing presentations were based on a script written by Mr. Lovett, which included multiple claims

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partnership may be allowed to represent the entity in a proceeding before an Administrative Law Judge." Ga. Comp. R. & Reg. 616-1-2-.34. Here, because Mr. Lovett and Mr. Perkins were the owners and sole shareholders of the now-defunct corporation, they were permitted to represent the corporation without counsel.

[3] These company representatives were hired as independent contractors. Mr. Lovett did most of the hiring. (Testimony of Mr. Lovett.)

regarding the products' effectiveness in treating various ailments. (Testimony of Mr. Lovett and Mr. Perkins; Exhibits P-3, R-4.)

3.

After the presentations, the sales representatives collected product orders and payments. Consumers who placed orders were promised delivery of their products within eight weeks.[4] (Testimony of Mr. Lovett and Mr. Perkins; Exhibit P-8.)

4.

Mr. Perkins and Mr. Lovett shared day-to-day operating duties at Bene-Fit. Both were involved in hiring employees and independent contractors. Mr. Lovett and Mr. Perkins mutually decided to use auto-dialed prerecorded messages to solicit business and to contract with Natural Bed Store, Inc., to manufacture their magnetic products. (Testimony of Mr. Lovett and Mr. Perkins.)

5.

Bene-Fit's gross revenue totaled between six and seven million dollars per year, with a profit margin of five to seven percent. Because the profit margin was relatively low, due in large part to the cost of providing meals to prospective customers, the company depended on high sales volume to produce profits. Mr. Lovett and Mr. Perkins took salaries based on the company's profits and did not keep formal records, but conceded that each took a salary of $2,000.00 per week during "most" of 2012, the last year of Bene-Fit's operations. (Testimony of Mr. Lovett and Mr. Perkins.)

[4] Bene-Fit's sales representatives provided customers with Notice of Cancellation forms and advised them that they were authorized to cancel their orders without penalty within three days. (Testimony of Mr. Lovett and Mr. Perkins; Exhibit P-7.)

6.

Bene-Fit initially appeared to succeed as a business. However, in the spring of 2011, its product manufacturing began to fall behind, and some orders were not fulfilled within the promised eight-week time frame. Order cancellations increased substantially, likely due to the delivery problems. By the summer of 2012, as late deliveries had become routine, Bene-Fit fell behind on its payments to the manufacturer, which caused even more late deliveries. Customers began to submit complaints regarding unfulfilled orders to the Governor's Office of Consumer Protection ("OCP") and the Better Business Bureau. In addition, cancellations had increased to approximately twenty-five percent of orders placed, and the company's profitability had eroded significantly. Both Mr. Lovett and Mr. Perkins were aware of these developments. (Testimony of Mr. Lovett and Mr. Perkins.)

7.

In December 2012, Bene-Fit applied for a loan of $360,000.00 from Merchant Direct, which was to be repaid with a percentage of consumer credit card purchases posted to the company's merchant services account.[5] Merchant Direct approved the loan, but the proceeds would not be disbursed until February 2013. Consequently, to stay afloat until the Merchant Direct loan came though, Bene-Fit applied for a $50,000.00 bridge loan—which Mr. Lovett and Mr. Perkins personally guaranteed—through Wall Street Funding on December 11, 2012. The

[5] Recognizing that Merchant Direct's financing terms were not optimal, Mr. Lovett and Mr. Perkins made arrangements to move Bene-Fit's merchant account from Bank of America to Citizens Bank in Kingsland, Georgia. Citizens Bank agreed to finance forty percent of a $500,000 loan, to be paid in April 2013. The remaining sixty percent would be provided through a Small Business Administration loan. Mr. Lovett and Mr. Perkins also sought funding from private investors. (Testimony of Mr. Lovett.)

loan was approved, and Bene-Fit received $50,000.00 a few days later.[6] (Testimony of Mr. Lovett; Exhibit P-5.)

8.

Shortly thereafter, Bank of America, which processed Bene-Fit's credit card orders through the merchant services account, elected to hold $10,000.00 in reserve to offset future chargebacks.[7] A few days later, Bank of America placed an additional $40,000.00 in reserve. By mid-January 2013, Bank of America had shut down Bene-Fit's merchant services account completely, which caused Merchant Direct to withdraw its loan offer. At that time, Mr. Lovett and Mr. Perkins realized that they did not have enough funding to continue the business. Bene-Fit stopped taking new orders in January 2013, but kept its doors open until March or April 2013 to communicate with consumers regarding their existing orders. (Testimony of Mr. Lovett and Mr. Perkins.)

9.

In March 2013, after receiving a number of consumer complaints, OCP opened an investigation of the company. OCP received 31 complaints directly from consumers and 60 complaints from the Better Business Bureau. Additionally, the Ohio Attorney General's office forwarded three complaints to OCP. (Testimony of Dominic DiCecco; Exhibit R-1.)

[6] The Petitioners were unable to repay this loan. In April 2014, a $49,709.35 judgment was entered against Bene-Fit and Mr. Lovett and Mr. Perkins individually. (Testimony of Mr. Lovett; Exhibit P-5.)

[7] As the company's order cancellations increased, so did its chargebacks, which occurred when consumers obtained refunds through their credit card companies. When Bene-Fit's chargeback rate exceeded three percent, Bank of America was authorized to hold a portion of its revenue in reserve to offset future chargebacks. (Testimony of Mr. Lovett.)

B. Unfulfilled Orders

10.

Forty consumers submitted affidavits to OCP, stating that they had attended one of Bene-Fit's sales presentations and placed an order for one or more magnetic products. None of these forty consumers had ever received either the product(s) they ordered or a refund of the purchase price. Of the forty consumers, thirty were over the age of sixty. Thirty-eight of these consumers placed their orders during or after the summer of 2012. (Testimony of Mr. DiCecco; Exhibits R-1, R-2.)

11.

Mr. Lovett and/or Mr. Perkins provided OCP with invoices for thirty-seven of the forty consumers who submitted affidavits. According to the invoices, nineteen consumers paid by check or cash and sixteen paid by credit card.[8] (Testimony of Mr. Perkins; Exhibit R-9.)

12.

Mr. Lovett and Mr. Perkins testified that Bene-Fit neither fulfilled nor refunded the credit card orders because they believed the consumers had already received chargebacks through their credit card companies. However, they produced no documentation to substantiate their belief, and their testimony lacked credibility. (Testimony of Mr. Lovett and Mr. Perkins.)

13.

Mr. Lovett and Mr. Perkins further testified that Bene-Fit neither fulfilled nor refunded the check and cash orders because they were unable to verify whether or not the consumers had

[8] One of the invoices did not contain enough information to ascertain how the individual made the purchase. (Exhibit R-9.)

received their products.[9] This testimony also lacked credibility. At the hearing, the Petitioners produced factory invoices in an attempt to show that products had been shipped to the consumers. However, the invoices demonstrate that only one consumer, Shirley Foley, received all of the products that she ordered.[10] Ms. Foley placed her order on November 13, 2012, and her products were shipped nearly six months later, on May 3, 2013. (Testimony of Mr. Lovett and Mr. Perkins; Exhibits P-9, R-3, R-9.)

C. Telemarketing Practices

14.

To increase sales of its products, Bene-Fit contacted potential customers via telephone and offered free dinners at restaurants around the country. Mr. Lovett and Mr. Perkins approved the use of an auto-dialer to contact thousands[11] of consumers and play the following prerecorded message:

> Hi this is _____ with Bene[-F]it Health Products[.] You are being invited to a complimentary dinner at _____ in _____ - on _____[.]
>
> There will be an entertaining health seminar, w[h]ere you will learn what some prominent physicians and major medical centers have know[n] for years about helping our bodies and health. After about 45 minutes of discussion topics . . . [t]o include aches and pains[,] lack of energy[,] sleepless nights[,] swelling of joints[,] stress or fatigue[,] neck and shoulder pain[,] back and hip pain[,] restless legs[,] and much[,] much more[,] [y]ou and your spouse[,] if married[,] and up to two adult friends that must be over 21[,] will join us for a relaxing, delightful[,] and most important . . . [] free dinner. There is absolutely no obligation, but space is limited[.]

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[9] OCP instructed the Petitioners that they should not make contact with any of the consumers who had submitted affidavits. (Testimony of Mr. Perkins.)

[10] The Petitioners contend that two other consumers, Rolando Gonzalez and Steven Zwald, also received their products. However, the invoices did not establish that those consumers received their products. Mr. Gonzalez's invoice shows that he received only one of the two products he ordered. Mr. Zwald's invoice shows that he cancelled his order on December 27, 2012, and that the order did not ship. (Exhibits R-2, P-9.)

[11] Neither Mr. Lovett nor Mr. Perkins was able to provide specific documentation of the number of consumers contacted in this way. However, both testified that it was "thousands." (Testimony of Mr. Lovett and Mr. Perkins.)

> [I]f you would like to not receive our free dinner seminar invitations for future event[s,] press the #2 on your phone to [be] permanently taken off our call list[.] [I]f you would like to attend this event[,] press the #1 on your phone to be connected to our reservation hotline[.] [I]f you are disconnected you may call direct[ ] 1-800-750-1712[.] [A]gain that number is 1-800-750-1712[.] [T]he dinner will be held on _____ at _____[.] We hope you can join us[.]

(Testimony of Mr. Lovett and Mr. Perkins; Exhibit P-3.)

15.

Bene-Fit scrubbed its call lists of consumer telephone numbers found on the National Do Not Call Registry. However, the company did not obtain written consent from any of the thousands of consumers it contacted via auto-dialer and prerecorded message. (Testimony of Mr. Lovett and Mr. Perkins; Exhibit R-5.)

D. Promised Health Benefits

16.

Bene-Fit and its sales representatives made unsubstantiated claims that the company's magnetic products would relieve consumers' pain and various ailments. The script for the sales representatives' marketing presentations, which was written by Mr. Lovett with Mr. Perkins' knowledge, contained specific claims regarding the alleged health benefits of magnetic field therapy, including the following:

> Magnetic field therapy has been around for over 2,000 years. There are currently 140 million people worldwide enjoying the benefits of magnetic therapy.
>
> [Magnetic field therapy] cannot hurt you in anyway [sic], shape[,] or form, unless you have a pacemaker . . . [b]ut for everybody else, [it is] 100% safe.
>
> [Magnetic field therapy] has an 80-95% success rate depending on your condition and according to many, many studies.

(Testimony of Mr. Lovett and Mr. Perkins; Exhibit R-4.)

17.

In support of the health benefit claims, the sales script refers to Dr. Linus Pauling, who is described as a two-time Nobel prize winner and "one of the very first to prove exactly how magnetic field therapy works." The script explains how magnetic therapy allegedly increases an individual's circulation, stating:

> In our blood we have hemoglobin, and in the hemoglobin is 4-5 grams of iron. This stimulates the iron, increases the oxygenation, and increases the circulation by up to 300%.

The script also references several purported clinical studies, as follows:

> The first one is Baylor College of Medicine. They say, "Magnetic field therapy results in prompt relief of pain of post-polio patients."
>
> Next, Vanderbilt University Medical Center says, "Eighty to ninety percent of patients with pain from sports injury find relief after magnetic therapy."
>
> And then Tufts University School of Medicine [says], "Magnetic therapy helped relieve fibromyalgia pain." Then it goes on to say, "Magnetic field therapy has been effective in the treatment of rheumatoid arthritis, infections, inflammation, headaches, and insomnia."

(Testimony of Mr. Lovett; Exhibit R-4.)

18.

In response to an OCP investigative demand for "the sources of the representations you make to consumers about the uses and benefits of the products you offer," the Petitioners provided photocopies of five book covers. The Petitioners did not provide the actual books or excerpts from the books, nor did they submit any tests or studies to support their claims that Bene-Fit's products would relieve pain.[12] At the hearing, Mr. Lovett testified that he relied on customer testimony, books, and copies of prescriptions from doctors who prescribed magnetic

[12] When Mr. Lovett was asked at the hearing whether he had brought with him any peer-reviewed studies or other scientific literature to substantiate the health benefit claims, he stated, "I don't know of any peer reviews; I don't even know what that is." (Testimony of Mr. Lovett.)

therapy, but added, "I can't talk about the effectiveness; I have no idea. Everybody is different . . . if [consumers] get [the product] and they believe it is going to work for them, even the placebo effect is real." Mr. Lovett further testified that consumers should investigate the claims for themselves by reading the books mentioned in the marketing presentations. (Testimony of Mr. Lovett; Exhibit R-5.)

E. OCP Action

19.

On July 1, 2013, the Respondent issued a Notice of Contemplated Legal Action, notifying the Petitioners that he had reason to believe that the Petitioners had engaged in unfair and deceptive business practices. The Notice of Contemplated Legal Action also invited the Petitioners to negotiate a written Assurance of Voluntary Compliance. (Exhibit R-6.)

20.

Shortly thereafter, on July 30, 2013, the Petitioners participated in a teleconference with counsel for the Respondent. Following the teleconference, counsel sent the Petitioners a proposed Assurance of Voluntary Compliance, which provided, in pertinent part, that the Petitioners would agree to issue refunds to consumers who had ordered and paid for Bene-Fit products that they had not received. The Petitioners rejected the proposal. (Testimony of Mr. Lovett and Mr. Perkins; Exhibit R-10.)

21.

On May 28, 2014, the Respondent issued a Civil Penalty Order, proposing to assess a civil penalty of $2,396,000.00 against the Petitioners for the following alleged violations of the FBPA:

A. You advertised products for sale, continued to take orders for merchandise when you knew you would be unable to fulfill those orders, accepted

funds sent to you by consumers who ordered said merchandise, then failed to fulfill those orders or to send refunds. This practice violates O.C.G.A. §§ 19-1-393(a), the FBPA's general proscription against unfair or deceptive practices, and 10-1-393(b)(9), which prohibits advertising goods with the intent not to provide them as advertised.

B. In contravention of 16 C.F.R. 310.4, you solicited business by using prerecorded messages ("robo-calls") to persons who had not previously consented to such messages. This violates O.C.G.A. § 10-1-393(a).

C. Your ads represented, expressly and by implication, that consumers who used your magnetic therapy merchandise would derive significant health benefits, but failed to provide any *bona fide* peer-reviewed medical and/or scientific substantiation for those claims. This practice violates O.C.G.A. §§ 10-1-393(a) and 10-1-393(b)(5), which prohibits representing that goods or services have characteristics, uses, or benefits that they do not have.

The Petitioners timely appealed. (OSAH Form 1 and attachments.)

III. LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The Petitioners are authorized, pursuant to O.C.G.A. §§ 10-1-397(b)(1) and 10-1-398, to request a hearing as a means of challenging the Respondent's issuance of a civil penalty order against them. When a contested case is referred to the Office of State Administrative Hearings, the administrative law judge assigned to the case "has all the powers of the referring agency . . . ." O.C.G.A. § 50-13-41(b); see also O.C.G.A. § 10-1-398(d). The evidentiary hearing is *de novo*, and the administrative law judge "shall make an independent determination on the basis of the competent evidence presented at the hearing." Ga. Comp. R. & Regs. 616-1-2-.21(a); see also Longleaf Energy Assocs., LLC v. Friends of the Chattahoochee, 298 Ga. App. 753, 768 (2009) (the administrative law judge is required "to consider the applicable facts and law anew, without according deference or presumption of correctness to the [agency]'s decision, and to render an independent decision"). Here, because this matter involves the imposition of a

civil penalty, the Respondent bears the burden of proof by a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.07(1), 616-1-2-.21(4).

The Fair Business Practices Act, O.C.G.A. §§ 10-1-390 to 10-1-407, was enacted to "protect consumers and legitimate business enterprises from unfair or deceptive practices in the conduct of any trade or commerce in part or wholly in the state." O.C.G.A. § 10-1-391. Under the FBPA, "Unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce are declared unlawful." O.C.G.A. § 10-1-393(a). After making this initial declaration prohibiting unfair or deceptive practices, the statute goes on to enumerate, "by way of illustration," seventeen examples of unfair or deceptive acts. O.C.G.A. § 10-1-393(b).

Neither the statute nor Georgia case law offers a precise definition, beyond the enumerated examples, of what constitutes an unfair or deceptive practice under O.C.G.A. § 10-1-393(a). However, when the FBPA was adopted, the General Assembly specifically expressed its intent that the Act should be afforded a liberal construction and "interpreted and construed consistently with interpretations given by the Federal Trade Commission in the federal courts pursuant to Section 5(a)(1) of the Federal Trade Commission Act," 15 U.S.C. § 45(a)(1).[13] Id. Thus, this Court looks to both state and federal law to resolve the issues presented in this case. Under 15 U.S.C. § 45(n), an act or practice is considered unfair or deceptive if "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."

[13] Section 5(a)(1) declares unlawful "unfair or deceptive acts or practice in or affecting commerce . . . ." 15 U.S.C. § 45(a)(1).

The Respondent's issuance of the Civil Penalty Order against the Petitioners is based on three alleged violations of the FBPA, as follows: (1) that the Petitioners advertised an eight-week delivery time frame with the knowledge that the products would be delivered late or not at all, then refused to issue refunds to consumers, in violation of O.C.G.A. §§ 10-1-393(a) and (b)(9); (2) that the Petitioners used prerecorded solicitations to contact consumers without their written consent, in violation of O.C.G.A. § 10-1-393(a) and 16 C.F.R. § 310.4; and (3) that the Petitioners made unsubstantiated claims regarding the health benefits of their products, in violation of O.C.G.A. §§ 10-1-393(a) and (b)(5). For the reasons stated below, the Court finds that the Respondent met his burden as to all three allegations.

A. Advertising Goods with Intent Not to Sell as Advertised

The Respondent proved, by a preponderance of the evidence, that the Petitioners failed to deliver their products as promised and refused to issue refunds to consumers, in violation of both O.C.G.A. § 10-1-393(b)(9), which prohibits "[a]dvertising goods or services with intent not to sell them as advertised," and O.C.G.A. § 10-1-393(a), the FBPA's general prohibition on unfair or deceptive practices.

First, the Petitioners violated O.C.G.A. §10-1-393(b)(9) by advertising an eight-week delivery time frame that they knew they could not meet, due to cash flow problems and pervasive delays. As detailed in the Findings of Fact, above, by the summer of 2012, Mr. Lovett and Mr. Perkins were fully aware that many customers' orders had not been delivered as promised. They were further aware that due to the company's cash flow problems, Bene-Fit was making late payments to its manufacturer, which resulted in further delivery delays. Despite this knowledge, the company continued to advertise its products, solicit orders, accept payments, and promise delivery within eight weeks. In fact, Mr. Lovett and Mr. Perkins ignored the company's

obvious problems until December 2013, when they were forced to apply for loans to keep Bene-Fit in business. Accordingly, the Court concludes that beginning in the summer of 2012 and continuing until the company ceased taking orders in January 2013,[14] the Petitioners advertised goods with the intent not to sell them as advertised, in violation of O.C.G.A. § 10-1-393(b)(9). See Regency Nissan, Inc. v. Taylor, 194 Ga. App. 645, 647-48 (1990) (finding a violation of the FBPA where a seller with "reasonable notice" of a defect in a car title failed to take "reasonable measures" to verify the title before consummating the sale).

Furthermore, by refusing to issue refunds to consumers whose products were never delivered, the Petitioners also violated the FBPA's general prohibition on "[u]nfair or deceptive acts or practices in the conduct of consumer transactions . . . ." O.C.G.A. § 10-1-393(a). As detailed in the Findings of Fact, above, the Petitioners accepted orders and payments from forty consumers who submitted affidavits to OCP. Of these, only one consumer received the products she ordered, and the Petitioners did not issue refunds to any of the remaining thirty-nine consumers. This conduct harmed consumers and was an unfair or deceptive practice that violated O.C.G.A. § 10-1-393(a).

B. Telemarketing with Prerecorded Messages

The Respondent proved, by a preponderance of the evidence, that the Petitioners violated 16 C.F.R. § 310.4 and O.C.G.A. § 10-1-393(a) by placing at least 1,000 telemarketing calls using an auto-dialer to play prerecorded messages, without obtaining prior written consent from consumers.

[14] As noted in the Findings of Fact, thirty-eight of the forty consumers at issue placed orders during this time frame.

Federal Trade Commission ("FTC") regulations provide, in pertinent part, that a seller or telemarketer[15] may not initiate "any outbound telephone call that delivers a prerecorded message . . . unless [ ] in any such call to induce the purchase of any good or service, the seller has obtained from the recipient of the call an express agreement, in writing . . . ." 16 C.F.R. § 310.4(b)(1)(v). A violation of this rule constitutes an unfair or deceptive act or practice, in violation of both the FTC Act and the FBPA. 15 U.S.C. §§ 57a(d)(3), 6102(c); O.C.G.A. §§ 10-1-391(b), 393(a).

As detailed in the Findings of Fact, above, Mr. Lovett and Mr. Perkins testified at the hearing that they used an auto-dialer to deliver prerecorded messages to thousands of consumers, and that they did not obtain written consent for such calls from any of the recipients. While the Petitioners argue that they should be excused from compliance with 16 C.F.R. § 310.4(b)(1)(v) because they were unaware of the regulation, their argument is not persuasive. Indeed, nothing in the governing statutes or regulations requires the Respondent to establish that the Petitioners acted with a specific intent to violate the law.[16] "[E]stablishment of unfair or deceptive acts or practices, within the meaning of the FBPA, does *not* require proof of an *intentional* conduct . . . ." Regency Nissan, 194 Ga. App. at 647 (emphasis in original). Here, the Petitioners' use of prerecorded messages to contact consumers without their consent was in clear violation of 16 C.F.R. § 310.4(b)(1)(v). This conduct also amounted to an unfair and deceptive act or practice, in violation of O.C.G.A. § 10-1-393(a).

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[15] The FTC defines "telemarketing" as a program "which is conducted to induce the purchase of goods or services . . . by use of one or more telephones and which involves more than one interstate telephone call." 16 C.F.R. § 310.2(dd). A "telemarketer" is defined as a "person who, in connection with telemarketing, initiates or receives telephone calls to or from a consumer or donor." 16 C.F.R. § 310.2(cc). Here, the Petitioners admittedly engaged in telemarketing by placing calls to thousands of consumers for the purpose of inducing sales of their products, under the guise of an offer for a free meal and an "entertaining health seminar."

[16] As one court has explained, the regulation includes a safe harbor provision to avoid imposing strict liability on a company that has made a good faith effort to comply with the its requirements. United States v. Dish Network, L.L.C., 667 F. Supp. 2d 952, 958 (C.D. Ill. 2009). The Petitioners here made no such effort.

C. Unsubstantiated Claims Regarding the Health Benefits of Products

The Respondent proved, by a preponderance of the evidence, that the Petitioners violated O.C.G.A. §§ 10-1-393(a) and (b)(5) by engaging in the unfair and deceptive practice of making unsubstantiated claims regarding the health benefits of their products.

The FBPA prohibits "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have . . . ." O.C.G.A. § 10-1-393(b)(5). In the absence of case law interpreting this statute, and in compliance with the General Assembly's directive to construe the FBPA consistently with Section 5(a) of the FTC Act, the Court looks to the FTC Act and its interpretive case law for guidance. See O.C.G.A. § 10-1-391. Under the false advertisement provisions of the FTC Act, an advertisement is considered deceptive if: (1) there was a representation; (2) the representation was likely to mislead customers acting reasonably under the circumstances; and (3) the representation was material. FTC v. Nat'l Urological Grp., Inc., 645 F. Supp. 2d 1167, 1188 (N.D. Ga. 2008) (citations omitted).

1. Was a Representation Made?

"When assessing the meaning and representations conveyed by an advertisement, the court must look to the advertisement's overall, net impression rather than the literal truth or falsity of the words in the advertisement." Nat'l Urological Grp., 645 F. Supp. 2d at 1189 (citing FTC v. Peoples Credit First, LLC, 2005 U.S. Dist. LEXIS 38545, at *20-25 (M.D. Fla. Dec. 18, 2005)). Representations may be either express or implied, and extrinisic evidence of consumer perceptions is not required unless the claim is "faintly implie[d]" or "barely discernible." Id. (citing FTC v. Febre, 1996 U.S. Dist. LEXIS 9487, at *14-15 (N.D. Ill. July 2, 1996)).

As detailed in the Findings of Fact, above, the Petitioners marketed their magnetic products to consumers by making specific representations promoting the safety, efficacy, and significant health benefits of the products. These representations, which were explicitly stated in the sales script written by Mr. Lovett, gave the overall, net impression that the Petitioners' magnetic therapy products would relieve pain and other ailments. Thus, the Respondent proved that the Petitioners made health-related representations during their marketing presentations to consumers.

2. Is the Representation Likely to Mislead?

Whether a representation is likely to mislead a reasonable consumer is determined by viewing it as a whole, with all of the phrases in context. Peoples Credit First, 2005 U.S. Dist. LEXIS 38545, at *23-24. To demonstrate that a claim is likely to mislead, the Respondent may proceed under either a falsity theory or a reasonable basis theory. Nat'l Urological Grp., 645 F. Supp. 2d at 1190 (citation omitted). Under the falsity theory, the Respondent is required to demonstrate that the representation at issue is false. Under the reasonable basis theory, the Respondent must prove only "that the advertiser lacked a reasonable basis—or adequate substantiation—for asserting that the message was true." Id. In this case, because the Respondent elected to proceed under the reasonable basis theory, the Petitioners were obligated to come forward with the substantiation upon which they relied. Only then would the Respondent bear the burden of establishing that the substantiation is inadequate. FTC v. QT, Inc., 448 F. Supp. 2d 908, 959 (N.D. Ill. 2006).

For claims regarding the efficacy or safety of a health product, the "reasonable basis must, at a minimum, consist of competent and reliable scientific evidence." Nat'l Urological Grp., 645 F. Supp. 2d at 1190 (citation omitted). Claims regarding immediate, significant, or

complete pain relief require a heightened level of substantiation. QT, Inc., 448 F. Supp. 2d at 961. More specifically, an express, health-related claim that a product provides pain relief should be supported by a well-conducted, placebo-controlled, randomized, double-blind study. Id. at 961-62 (scientifically-flawed studies provided insufficient substantiation of claims that a bracelet provided prompt pain relief).

Here, the Petitioners failed to proffer any scientific evidence whatsoever to support their representations; the photocopied book covers upon which they relied simply do not substantiate any of their health benefit claims. Moreover, contrary to the Petitioners' arguments, their customers were not required to research the effectiveness of the products independently. Rather, the relevant inquiry is the advertisement's net impression on the general populace, which does "not stop to analyze but too often [is] governed by appearances and general impressions." Peoples Credit First, 2005 U.S. Dist. LEXIS 38545, at *24. Finally, to the extent the Petitioners argued that their products provided pain relief through a placebo effect, this is plainly an insufficient basis for substantiation.[17] QT, Inc., 448 F. Supp. 2d at 964.

Accordingly, the Respondent established that the Petitioners lacked adequate substantiation for their representations regarding the health benefits of their products, and that these representations were likely to mislead consumers acting reasonably under the circumstances.

3. Is the Representation Material?

"A representation . . . is material if it is the kind usually relied on by a reasonably prudent person." Nat'l Urological Grp., 645 F. Supp. 2d at 1190 (citations omitted). Claims that "significantly involve health, safety, or other issues that would concern reasonable customers"

[17] In fact, a seller may not represent that its product is effective based solely on the placebo effect, and such representations are considered materially misleading. QT, Inc., 448 F. Supp. 2d at 964.

are presumptively material. Id. (citing QT, Inc., 448 F. Supp. 2d at 960, 965-66). Here, as detailed in the Findings of Fact, above, the Respondent proved that the Petitioners made material claims regarding the safety and health benefits of their magnetic products.

Based on the above, the Court concludes that that the Petitioners engaged in the unfair and deceptive practice of making unsubstantiated, materially misleading claims regarding the purported health benefits of their products, in violation of O.C.G.A. §§ 10-1-393(a) and (b)(5).

D. Individual Liability

The Respondent proved, by a preponderance of the evidence, that Mr. Lovett and Mr. Perkins should be held liable for the above-listed violations in their individual capacities. To establish individual liability, the Respondent was required to show that (1) the corporation violated the FBPA; (2) Mr. Lovett and Mr. Perkins either participated directly in the wrongful practice or had the authority to control the corporation; and (3) Mr. Lovett and Mr. Perkins had some knowledge of the wrongful acts or practices. See FTC v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996) (citation omitted).

Regarding the first requirement, the Respondent proved, as expressly determined above, that Bene-Fit committed violations of the FBPA.

Second, as detailed in the Findings of Fact, the Respondent proved that both Mr. Lovett and Mr. Perkins possessed the authority to control the corporation. When an individual is a "corporate officer of a small, closely-held corporation, that individual's status gives rise to a presumption of ability to control the corporation." Nat'l Urological Grp., 645 F. Supp. 2d at 1206-07 (citation omitted). This presumption was corroborated by Mr. Lovett's and Mr. Perkins' testimony that they shared responsibility for the day-to-day operations of the corporation.

As to the third requirement, the Respondent established that Mr. Lovett and Mr. Perkins participated in corporate affairs to such a degree that they met the knowledge criteria for individual liability. The knowledge requirement is fulfilled where the individuals had actual knowledge of the unfair or deceptive practices, exhibited reckless indifference to such practices, or knew of a high probability of the unfair practices, yet intentionally avoided the truth. Nat'l Urological Group, 645 F. Supp. 2d at 1207 (determining that corporate officers were individually liable for the corporation's misleading ads because, as the creators of the ads, the individuals knew of, or at least were recklessly indifferent to, the misrepresentations therein). Underlying the doctrine of individual liability is the principle that one who enjoys the benefits of the corporation's misdeeds should not be insulated from liability.[18] FTC v. Amy Travel Servs., Inc., 875 F.2d 564, 573 (7th Cir. 1989). Here, Mr. Lovett and Mr. Perkins were the sole owners and officers of Bene-Fit. Both individuals had knowledge that orders were not timely delivered and refunds were not issued; both had control over the content of the sales script;[19] and both participated in the decision to use prerecorded messages to solicit sales. Accordingly, Mr. Lovett and Mr. Perkins met the knowledge requirement for individual liability.

Because both Mr. Lovett and Mr. Perkins participated directly in Bene-Fit's unfair and deceptive practices and exhibited a reckless indifference to the legality of their business enterprise by failing to ensure that orders were delivered or refunds were provided, as well as by failing to familiarize themselves with the laws regarding mass telemarketing and advertising health claims, they are individually liable for Bene-Fit's violations of the FBPA.

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[18] Even good faith, which was not shown in this case, will not shield an individual from liability. See FTC v. Direct Benefits Group, 2013 U.S. Dist. LEXIS 100593, at *60-61 (M.D. Fla. July 18, 2013).

[19] Mr. Lovett, as the author of the sales script, was certainly aware that he did nothing to substantiate the claims he included in the script. Mr. Perkins, who was aware of the scripts, also did nothing to ensure that the health claims were true. See Findings of Fact, above.

E. Civil Penalty

The Respondent is authorized by statute to "issue an order against a person who willfully violates [the FBPA],[21] imposing a civil penalty of up to a maximum of $2,000.00 per violation . . . ." O.C.G.A. § 10-1-397(b)(1)(B). Additionally, a civil penalty up to $10,000.00 is authorized for each violation committed against individuals who are at least sixty years of age or disabled. O.C.G.A. §§ 10-1-850, 10-1-851. The Respondent may impose a civil penalty for each individual violation. See, e.g., Reader's Digest Ass'n, Inc., 662 F.2d 955, 965-66 (3d Cir. 1981) (allowing a $1,750,000.00 civil penalty consisting of $10,000 for each individual mailing in one bulk mailing); State ex rel. Corbin v. United Energy Corp. of America, 151 Ariz. 45, 48-49 (Ariz. 1986) (allowing a $55,000 civil penalty where the consumer protection statute allowed a maximum fine of $5,000 and 11 consumers were fraud victims); People v. Bestline Prods., Inc., 61 Cal. App. 3d 879, 923 (1976) (concluding that the number of violations depends on the number of persons to whom misrepresentations were made, not on the number of separately identifiable misrepresentations).

According to the Respondent's counsel, the Respondent calculated the proposed civil penalty of $2,396,000.00 as follows:

(1) $320,000.00 for the violations enumerated in the Conclusions of Law, Section A, above, related to the Petitioners' failure to deliver products as advertised ($10,000.00 per violation for each of thirty consumers age sixty or older, and $2,000.00 per violation for each of ten consumers under age sixty);

(2) $2,000,000.00 for the violations enumerated in the Conclusions of Law, Section B, above, related to telemarketing using prerecorded messages ($2,000.00 per violation for each of 1,000 calls placed); and

[21] A "willful violation" of the FBPA occurs when a person performs "a volitional act constituting an unfair or deceptive act or practice conjoined with culpable knowledge of the nature (but not necessarily the illegality) of the act." Colonial Lincoln-Mercury Sales, 152 Ga. App. at 383-384. The Petitioners here committed willful violations of the FBPA.

(3) $76,000.00 for the violations enumerated in the Conclusions of Law, Section C, above, related to unsubstantiated health benefit claims ($2,000.00 per violation for each of 38 marketing presentations given, as determined by the consumer affidavits).

In accessing the appropriate amount of civil penalties, courts have considered the following factors: (1) financial ability to pay; (2) the willfulness of the violation, or the degree of good faith or bad faith; (3) the degree of harm caused to the public; and (4) the benefits received by the violators. See, e.g., United States v. Mac's Muffler Shop, Inc., 1986 U.S. Dist. LEXIS 18108, at *22-24 (N.D. Ga. Nov. 4, 1986) (reducing a fine from $2,500.00 to $1,500.00 per violation of the Clean Air Act); United States v. Papercraft Corp., 426 F. Supp. 916, 918 (W.D. Pa. 1977) (reducing fine to $200.00 per day); FTC v. Consol. Foods Corp., 396 F. Supp. 1353, 1356-57 (S.D.N.Y. 1975) (reducing a fine to from $470,000.00 to $25,000.00 because the company deteriorated, rather than benefiting from its noncompliance); United States v. Beatrice Foods Co., 351 F. Supp. 969, 970-72 (D. Minn. 1972), aff'd, 493 F.2d 1259 (8th Cir. 1974).

In consideration of these factors, the Court observes that Bene-Fit's ability to pay a civil penalty of any kind is limited, inasmuch as it is no longer a viable business. Likewise, Mr. Lovett and Mr. Perkins testified that they are struggling financially in their personal affairs as well. However, they presented little evidence to support their claims of personal insolvency, thereby rendering their ability to pay unclear. The Court further notes that the Petitioners exhibited some degree of good faith by refraining from contact with consumers who were listed on the National Do Not Call Registry.

On the other hand, the FBPA is intended to protect the public from unfair and deceptive trade practices, especially when such practices target vulnerable populations. The Petitioners in this case used auto-dialed prerecorded messages to induce elderly consumers to buy magnetic products of dubious health value, making them precisely the type of business enterprise from

which the General Assembly sought to protect consumers. The Petitioners also displayed a callous disregard for the thirty-nine consumers who submitted affidavits to OCP and received neither refunds nor the products they ordered. Finally, the Court notes that Mr. Lovett and Mr. Perkins each continued to accept a salary of approximately $100,000.00 per year during the last year of the company's operations, at a time when Bene-Fit consistently failed to meet its obligations to its customers.

After consideration of the factors as outlined above, the Court finds that the civil penalty imposed by the Respondent should be modified as follows:

(1) $310,000.00 for the violations enumerated in the Conclusions of Law, Section A, above, related to the Petitioners' failure to deliver products as advertised or issue refunds ($10,000.00 per violation for each of twenty-nine consumers age sixty or older,[22] and $2,000.00 per violation for each of ten consumers under age sixty);

(2) $1,000,000.00 for the violations enumerated in the Conclusions of Law, Section B, above, related to telemarketing via prerecorded messages ($1,000.00 per violation for each of 1,000 calls placed); and

(3) $76,000.00 for the violations enumerated in the Conclusions of Law, Section C, above, related to making unsubstantiated health benefit claims ($2,000.00 per violation for each of 38 marketing presentations given, as determined by the consumer affidavits).

[22] Consumer Shirley Foley has been excluded from this calculation, as the Petitioners established that Ms. Foley received the Bene-Fit products she ordered.

IV. DECISION

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Respondent's decision to issue a civil penalty against the Petitioners is **AFFIRMED**; provided, however, that the amount of the penalty is reduced to $1,386,000.00.

SO ORDERED, this 24th day of August, 2014.

KRISTIN L. MILLER
Administrative Law Judge