IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff,

ORDER

v.

14-cv-513-wmc

THE MORTGAGE LAW GROUP, LLP,
CONSUMER FIRST LEGAL GROUP, LLC,
THOMAS G. MACEY, JEFFERY J. ALEMAN,
JASON E. SEARNS and HAROLD E. STAFFORD,

Defendants.

The court has reviewed the motion for reconsideration filed by defendants in this case. (Dkt. #216.) Defendants raise two challenges to the court's July 20, 2016, summary judgment opinion & order on liability (dkt. #191):

(1) plaintiff failed to offer sufficient evidence for a reasonable jury to find that defendants' intake specialists misrepresented the performance of nonprofit housing counselors and programs, a practice specifically prohibited by the regulation; and

(2) the court erred in finding that defendants' damages need not be reduced to account for consumers who received some form of benefit from their services.

In raising both challenges, defendants make new arguments, as well as cite new authority, not raised in their original response to plaintiff's motion for summary judgment. The defendants' failure to develop these arguments properly in response to plaintiff's motion for summary judgment, by itself, amounts to waiver. Moreover, even if their arguments are not deemed waived, the court finds no grounds for reconsideration for the reasons set forth below.

A. **Nonprofit counselors**

Regulation O specifically prohibits mortgage assistance relief providers from "misrepresenting expressly or by implication" the "availability, performance, cost, or characteristics of any alternative to for-profit mortgage assistance relief services." 12 C.F.R. § 1015.3(b)(9). During the summary judgment briefing, plaintiff proffered undisputed evidence that defendants' call scripts instructed their intake specialists to respond to consumers' questions about free mortgage loan modification services with the following statements:

> That makes a lot of sense to me, why pay for something if you don't have to right? How exactly are you planning on getting this service for free? (Let them answer) If things only worked that way in the REAL world! The service you are talking about are non-profits that will tell you what paper work you'll need to gather to submit to your bank to attempt a modification. Heck, I can do that in 30 seconds by sending you a document checklist and I'll even do it for free, but that isn't going to get the result you're really after, which is mortgage relief. You see, we employ a very definitive strategy in an attempt to achieve the BEST possible outcome for you and that involves lawyers tying up the foreclosure process, holding your lenders feet to the fire, A LOT of back and forth negotiating, and if need be filing a formal complaint to the authorities if we find any wrong doing on the part of your lender. Believe me _____ what you're talking about getting "for free" and what we're offering are miles apart and at the end of the day I think all you're REALLY after is getting the relief you so desperately need, not necessarily getting someone to work for free for you, am I right? Great! Here's what we need to get you started!!

Plaintiff also offered undisputed evidence that a former intake specialist who worked with both companies confirmed that intake specialists were both instructed to and did discourage consumers from using free mortgage loan modification services. Dkt. #79 at 130-34.

At summary judgment, defendants neither pointed to any evidence nor argued that plaintiff failed to show the script used by intake specialists contained false information. In fact, defendants' sole response to plaintiff's claim of misrepresentation was that their standard retainer agreement disclosed free services were available. As this court noted in its original opinion & order (dkt. #191 at 37), however, the retainer agreement addressed only the *availability*, not the performance of nonprofit agencies; plus, a client would have received that disclosure only *after* having an initial conversation with an intake specialist and likely being told falsely that those free services did not compare to the mortgage relief assistance services being offered by defendants. By failing to challenge the sufficiency of the evidence proffered by plaintiff on a timely basis in response to its summary judgment motion, much less to present counter-evidence, defendants forfeited their right to do so now in a motion to reconsider. *Nichols v. Michigan City Plant Planning Dep't*, 755 F.3d 594, 600 (7th Cir. 2014) ("The non-moving party waives any arguments that were not raised in its response to the moving party's motion for summary judgment.").

Even considering defendants' untimely argument, a reasonable jury would have to find the statements made by defendants' intake specialists here (as evidenced by their actual scripts and the undisputed testimony of the former intake specialist) misrepresented the characteristic and performance of free, nonprofit mortgage relief services relative to their own, at least to the extent that defendants were not providing mortgage relief services as part of the practice of law. In addition, while plaintiff did not provide its own, quantifiable evidence in the form of surveys or statistics showing that nonprofits actually

secure mortgage relief for consumers on par with defendants, the Federal Trade Commission (FTC) concluded as part of its rulemaking in this area that nonprofit agencies and for-profit entities perform comparable services in assisting consumers seeking mortgage debt relief:

> The recent economic downturn has also given rise to a new and broader range of third-party providers who offer to assist homeowners-for free or for a fee-in obtaining a loan modification or preventing foreclosure.
>
> * * *
>
> In addition to federal efforts, state and local agencies and non-profit organizations also offer similar foreclosure prevention assistance and other housing-related services. Nonprofit organizations and housing counseling agencies continue to provide a wide array of free services to homeowners who are in financial distress. HUD has certified numerous non-profit housing counseling agencies.
>
> These agencies provide homeowners with assistance, such as offering consumer education, assisting with debt management, negotiating directly with servicers to make mortgage payments more affordable-thereby providing foreclosure relief and helping consumers stay in their homes.
>
> The private sector also has developed and offered programs at no cost to help distressed homeowners.

Mortgage Assistance Relief Services, ANPRM, 74 Fed. Reg. 26134-35 (Jul. 1, 2009) (dkt. #102, exh. #1 at 7).

As plaintiff points out in its brief on reconsideration, the sweeping falsity and misleading nature of the comparison between free mortgage services and defendants' services is self-evident, or at the very least required defendants to have *some* basis to overcome the FTC's historically justified, contrary presumption. Accordingly, absent evidence that defendants were actually providing the added benefit of meaningful legal services to consumers, which went "miles" above and beyond the types of services provided

by no cost agencies, the statements in defendants' scripts were misleading in violation of Regulation O. On this record, defendants offer no such evidence.

**B. Damages**

The Consumer Protection Act authorizes courts to "grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law, including a violation of a rule or order prescribed under a Federal consumer financial law." 12 U.S.C. § 5565(a)(1). Among other things, relief may include restitution, disgorgement or compensation for unjust enrichment, civil money penalties and limits on the activities or functions of a person. § 5565(a)(2). In its motion for summary judgment, plaintiff argued that restitution or disgorgement of defendants' "unlawful advance fees" should be the companies' net revenues (i.e., the total amount of fees collected less any refunds made to clients), because the receipt of advance fees violated Regulation O, regardless of whether the consumer ultimately obtained a benefit in the form of a mortgage loan modification.[1]

In a one-paragraph response to plaintiff's summary judgment motion, defendants argued that many clients received benefits in the form of extended tenancy or a court defense, and at least those clients would be unjustly enriched by being compensated for benefits already received. Of course, defendants made no attempt to quantify the arguable value of the services that consumers actually received. Even if defendants had attempted such a showing, it would amount to no more than rank speculation about any

[1] This court already determined that the initial and monthly retainer fees charged by the corporate defendants qualify as advance fees under 12 C.F.R. § 1015.5(a). (Dkt. #191 at 2.)

marginal benefit actually conveyed as compared to the benefits that those clients would have obtained anyway at no charge from one of the unfairly maligned nonprofit agencies. Perhaps that is why the few cases that defendants were able to cite in support of their conclusory argument on summary judgment only discuss the general principal of double compensation, and even then mainly in the criminal context. For this reason, the court continues to agree with plaintiff that defendants' liability should not (and practically cannot) be reduced to account for the possibility that some consumers may have arguably received some, still undefined, speculative, marginal benefit over the services of a nonprofit agency.

Regardless, as the court explained in its original opinion & order (dkt. #191 at 47-50), whether a consumer was lucky enough to obtain a mortgage loan modification is ultimately irrelevant to the question whether defendants used misleading or deceptive representations to induce consumers to pay them fees, thus justifying disgorgement as an appropriate remedy. *See FTC v. John Beck Amazing Profits LLC*, 888 F. Supp. 2d 1006, 1018 (C.D. Cal. 2012), aff'd, 2016 WL 828339 (9th Cir. Mar. 3, 2016) (finding same). Many federal courts, including the Seventh Circuit, have recognized the disconnect between payments made in reliance on a defendant's misrepresentations and a benefit plaintiff arguably received that may have been obtained anyway, regularly concluding that the appropriate measure for restitution in consumer cases is the amount paid by consumers, less any amounts previously returned to them. *See, e.g.*, *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000) ("While it may be true that the defrauded businesses received

a useful product . . . the central issue here is whether the seller's misrepresentations tainted the customer's purchasing decisions."); *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997) ("[C]ourts have regularly awarded, as equitable ancillary relief, the full amount lost by consumers."); *FTC v. Figgie International, Inc.*, 994 F.2d 595, 606 (9th Cir. 1993) ("The fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds or to refunds for each detector that is not useful to them."); *John Beck*, 888 F. Supp. 2d at 1018 (liability of sellers of wealth-creation products should not be reduced to account for consumers who received some form of benefit); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1019 (N.D. Ind. 2000), *aff'd*, 312 F.3d 259 (7th Cir. 2002) (recognizing general rule that restitution is measured by amount paid by consumers less any refunds).

Now some four months *after* the court's summary judgment decision was issued, defendants attempt for the first time to distinguish this case law with trial just two months off, on the ground that, unlike some others, this case neither involves the sale of non-existent products or services, nor a sham enterprise because "thousands" of their clients received some form of mortgage modification. This attempt is both untimely and unpersuasive. Not only do defendants' still fail to present any concrete evidence of satisfied or even partially satisfied clients, they continue to completely ignore that the relevant question is whether any client received a marginal benefit over and above what that same client would have received using the free services.

Defendants' attempt to distinguish the cases relied on by the court also fall flat. Defendants primarily point to one, unpublished district court case, *FTC v. Zamani*, No. SACV 09-0977-DOC (MLGx), 2011 WL 2222065 (C.D. Cal. Sept. 28, 2011), for the proposition that the restitution amount must account for satisfied customers who received and consumed the services promised by a defendant. However, the holding in that case hinged on proof of detailed, quantifiable benefits that consumers received from the specific services promised by the defendant. In contrast, defendants here offer *no* such proof of any kind. Indeed, any claimed, marginal benefit is wholly speculative. Moreover, the holding in *Zamani* is at odds with the same court's later holding in *John Beck*, a decision that was later affirmed by the Court of Appeals for the Ninth Circuit, as noted above.

For all these reasons, defendants' motion for reconsideration will be denied.

ORDER

IT IS ORDERED that defendants' motion to reconsider (dkt. #216) is DENIED.

Entered this 13th day of February, 2017.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge