Clerk of the Superior Court
*** Electronically Filed ***
M. Saldana, Deputy
4/6/2020 6:31:00 PM
Filing ID 11548061

MARK BRNOVICH
Attorney General
(Firm State Bar No. 14000)
Evan G. Daniels (State Bar No. 030624)
Andrija Samardzich (State Bar No. 026160)
Mark James Ciafullo (State Bar No. 034703)
Office of the Attorney General
2005 North Central Avenue
Phoenix, AZ 85004
Telephone: (602) 542-3725
Facsimile: (602) 542-4377
Email: consumer@azag.gov
Mark.Ciafullo2@azag.gov
Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, *ex rel.* MARK BRNOVICH, Attorney General,

Plaintiff,

vs.

VALLEY DELIVERY LLC; MY HOME SERVICES LLC; NEXT DAY DELIVERY LLC; NEXT DAY HOLDINGS LLC; MATTHEW WILLES, individually, and MATTHEW AND KRISTINE WILLES, a marital community;

Defendants.

Case No. CV2020-002880

RESPONSE TO MOTION TO DISMISS

[Oral Argument Requested]

Assigned to the Hon. Connie Contes

The State of Arizona ("the State") hereby responds to the Ariz. R. Civ. P. 12(b)(6) Motion to Dismiss (the "Motion") filed jointly by Valley Delivery LLC, My Home Services LLC, Next Day Delivery LLC, Next Day Holdings LLC, Mathew Willes, and Kristine Willes (collectively "Defendants").

INTRODUCTION

The Arizona Consumer Fraud Act, A.R.S. §§ 44-1521 *et seq*. (the "CFA") empowers the State to investigate deceptive and unfair business practices and bring an action to seek remedies. The State has done so in this case, alleging in its Complaint that Defendants utilized their deceptive and unfair business model to acquire valuable personal information from Arizonans using misleading tactics and a web of interrelated companies for the purpose of selling services. Defendants now seek to dismiss the Complaint at the outset of the case based on a single argument that misstates both the law and facts. Defendants further ask this Court to eliminate the State's right to seek restitution at the conclusion of this case. But as Arizona courts long have recognized, "[t]he Consumer Fraud Act is a broadly drafted remedial provision designed to eliminate unlawful practices in merchant-consumer transactions." *Madsen v. W. Am. Mortg. Co.*, 143 Ariz. 614, 618 (App. 1985). As is set forward in detail below, Defendants' requests are contrary to the law and to the facts, and their Motion should be denied.

LEGAL STANDARD

Dismissal under Rule 12(b)(6) may be granted only if "as a matter of law [] plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof." *Coleman v. City of Mesa*, 230 Ariz. 352, 356 (2012) (internal citation omitted). Although "mere conclusory statements are insufficient," the Court "must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts." *Id.* at 356. Under Ariz. R. Civ. P. 8, "Arizona follows a notice pleading standard," and the complaint need only "give the opponent fair notice of the nature and basis of the claim and indicate generally the type of litigation involved." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008).

FACTUAL BACKGROUND

Defendants Valley Delivery and Next Day Delivery are telemarketing lead generator companies masquerading as delivery companies. Their business model is to leave advertising material in the form of fake "delivery slips" on new homeowners' doors that state "Sorry We Missed You." (Complaint at ¶ 25). When consumers call the number on the slip to "reschedule their delivery," the companies collect the homeowners' name, address, and phone number and offer gift certificates for My Home Services' subsidiaries' services. (Complaint at ¶¶ 28-29). Subsequently, Defendants Valley Delivery and Next Day Delivery distribute their valuable consumer leads to Defendant My Home Services and its subsidiaries. (Complaint at ¶ 31). Those subsidiaries then make telemarketing phone calls to the homeowners and offer to sell various home-related goods and services, such as alarm systems. (Complaint at ¶ 32). Notably, Defendant Matthew Willes owns all of the Defendant companies. (Complaint at ¶¶ 16-18). In addition to distributing information among the Willes-owned companies, My Home Services also sells its leads to two third-party companies, Rescue One Air, LLC, and Pristene Water Inc. (Complaint at ¶ 31). The third-party companies also engage in telemarketing and sell home-related services to its consumers. (Complaint at ¶ 32).

This is not the first time Defendant Willes has faced a State enforcement action under the CFA. Willes previously owned "Metro Delivery," which entered into a consumer fraud consent judgment with the State in 2013 regarding similar conduct. (Complaint at ¶¶ 60-62; Complaint Exh. D). Under the consent judgment, Metro Delivery could no longer put fake delivery slips on doors, but Willes evaded the order by closing Metro Delivery, creating the Defendant companies, and engaging in the same prohibited conduct. (Complaint at ¶¶ 62-63). When the State began investigating Defendants in 2019, they responded by providing falsified versions of the delivery slips and swore to those delivery slips' truthfulness. (Complaint at ¶¶ 64-66).

As a result of Valley Delivery and Next Day Delivery's misleading and deceptive practices, My Home Services generated at least $2,265,695 in revenue in 2017 alone. (Complaint at ¶ 58). On March 3, 2020, the State filed a Complaint against Valley Delivery, Next Day Delivery, Next Day Holdings, My Home Services, and Matthew Willes for violating

the CFA. In its Complaint, the State is requesting restitution, disgorgement of profits, and civil penalties. (Complaint at ¶¶ 71-73).

ARGUMENT

I. Defendants conducted deceptive business practices "in connection with the sale or advertisement of any merchandise," which violates the CFA.

The State's Complaint sets forth in detail how Defendants use door tags to mislead consumers into allowing Defendants to harvest their data, and then to market services to the consumers using that data. (Complaint at ¶¶ 25, 28, 30-32.) Defendants admitted as much in their Motion, stating "Defendants acknowledge that once information is gathered about the new homeowners, services are offered to them." (Motion at 3.)

There can be no dispute that Defendants engage in the sale of merchandise under the CFA. The CFA specifically includes services in the definition of "merchandise." *See* A.R.S. § 44-1521(5). As the State's Complaint alleged in detail, Defendants use the misleading door tags and websites as part of a scheme to sell their services to the homeowners they misled. (Complaint at ¶¶ 25, 28, 30-32; Motion at 3.) And as is required for a motion to dismiss, Defendants admit for the purposes of their Motion that the State's allegation of misleading door tags must be taken as true, as must the State's other factual allegations, including allegations regarding Defendants' false representations on their websites. (Motion at 3.) Together, these admissions appear to defeat Defendants' Motion.

Nevertheless, to support their Motion, Defendants push an overly narrow and misleading reading of A.R.S. § 44-1522(A), claiming that the door tags themselves must be "advertisements" in order for the CFA to apply. (Motion at 3.) Defendants assert that the door tags are not "advertisements" and further assert (without citation to any legal authority) that their deceptive conduct can only be actionable if it is a "misrepresentation through an advertisement of merchandise for purposes of making a sale of that merchandise." *Id.*

Although the door tags are, in fact, advertisements, Defendants' assertion is contrary to law because the CFA prohibits more than just misleading advertisements. Instead, it prohibits the use of any deceptive or unfair acts or practices "*in connection with* the sale or advertisement

of any merchandise." A.R.S. § 44-1522(A) (emphasis added). The CFA's plain language places no limitation on what form or medium the deceptive act or practice must appear, only that it is "in connection with" the sale or advertisement of merchandise. *Id*.; *see also Fanning v. F.T.C.*, 821 F.3d 164, 173 (1st Cir. 2016) ("There is no requirement that a misrepresentation be contained in an advertisement . . . . We see no reason why it would not be a deceptive act or practice to place misrepresentations on websites if those misrepresentations 'affect[ed] [consumers'] choice of, or conduct' regarding the website." (citation omitted)). Apart from the statute's plain language, Arizona courts previously have defined "in connection with" broadly in other legal contexts. *Cf. State v. Bews*, 177 Ariz. 334, 336-7 (App. 1993) (defining "in connection with" as "a relationship or association in thought" and reflecting a broader scope than the language "in an official proceeding" in the context of a criminal proceeding). A broad reading of "in connection with" also comports with the purpose of the CFA, which is meant to be "a broadly drafted remedial provision designed to eliminate unlawful practices in merchant-consumer transactions." *Madsen*, 143 Ariz. at 618. As such, the CFA's scope cannot be limited merely to misrepresentations in advertisements that specifically relate to the merchandise advertised. Any such limitation would be contrary to the statutory language, legislative intent, and binding Arizona case law construing the CFA.

In addition, Defendants' proposed limitation would create an absurd loophole for deceptive conduct. Suppose a car dealership sent a mailer telling consumers they have won $1,000 in cash and simply need to come to the dealership to collect the money – no purchase necessary. Once consumers arrive at the dealership, the employees deny all knowledge of the cash offer but encourage consumers to take a test drive while they are there, and some consumers do so and end up purchasing a vehicle. Under Defendants' proffered interpretation of the CFA and view of the facts, the original cash offer would not be an "advertisement" and the dealership's conduct would not violate the CFA despite being plainly deceptive.[1] The Court

[1] *Madsen* establishes that deceptive representations under the CFA are those "that have a 'tendency and capacity' to convey misleading impressions to the consumers even though interpretations that would not be misleading also are possible" and that "in evaluating []

should reject Defendants' interpretation to avoid interpreting the CFA in a way that would produce an absurd result. *See Saban Rent-A-Car LLC v. Ariz. Dep't of Revenue*, 244 Ariz. 293, 301 (App. 2018) (statutory analysis "is informed by the principle that 'statutes must be given a sensible construction that will avoid absurd results'" (citations omitted)).

A. Defendants' misleading door hangers and websites were "advertisements" under the CFA.

Contrary to Defendants' assertion, the misleading door tags are "advertisements" under the CFA. The CFA defines an advertisement as any "attempt by publication, dissemination, solicitation or circulation, oral or written, to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise." A.R.S. § 44-1521(1). The misleading door tags were designed to collect personal information for sales leads. As such, they are written attempts to induce indirectly new homeowners to acquire merchandise, and thus are "advertisements" under the CFA.

Further, Defendants attempted to directly induce homeowners to acquire their merchandise through the use of gift certificates. As stated in the Complaint, Defendants offer gift certificates to consumers for Matthew Willes' businesses' home services after the homeowner contacted them regarding their "missed delivery." (Complaint at ¶ 29). These gift certificates essentially are coupons designed to solicit new customers for My Home Services' subsidiaries. Thus, the offer of gift certificates also makes the misleading door tags "advertisements" under the CFA.

If the door tags had been truthful, they would have identified the business and the services offered, and asked the consumer to call to discuss the purchase of those services. In other words, the door tags would have been readily identifiable advertisements, indistinguishable from countless other advertisements received by consumers. But instead, Defendants obtained a competitive advantage by using fake delivery door tags to trick consumers into calling Defendants, which allowed Defendants to advertise their services over

---

representations, the test is whether the least sophisticated reader would be misled." 143 Ariz. at 618.

the phone and offer gift certificates. It is nonsensical to suggest that Defendants' door tags fall outside of the CFA because they were so misleading that consumers could not recognize the tags as advertisements. The previously-mentioned hypothetical $1,000 cash offer from a car dealership is instructive here as well. The $1,000 offer is an advertisement, even though it does not ask the consumer to purchase anything, but because it is an "attempt … to induce … indirectly" consumers into purchasing vehicles. *See* A.R.S. § 44-1521(1).

B. Defendants' misleading door hangers and websites were "in connection with" the sales of their home services.

Even if the door tags were not "advertisements" under the CFA, Defendants' act of hanging misleading door tags on consumers' homes was done "in connection with the sale or advertisement of" Matthew Willes' other businesses' home services, and those services constitute "merchandise" as defined in the CFA. *See* A.R.S. §§ 44-1521(5) and 1522(A). Defendants employ a misleading marketing scheme to generate home services leads worth millions of dollars a year to Defendants and other businesses. Nevertheless, Defendants now ask this Court to ignore the obvious causal relationship between Defendants' misleading door tags and Defendants' subsequent marketing to consumers who responded to the door tags, using information obtained solely through the door tags. Not only is there a sufficient causal chain to constitute "in connection with" for purposes of the CFA, but even if Defendants rectified the misleading information before securing the sale of a service, the State still would be entitled to pursue its CFA claims regarding the deceptive practice. *See, e.g.*, *Madsen,* 143 Ariz. at 618 (businesses can still be liable for deceptive acts and practices when "earlier misrepresentations are corrected before the consumer agrees to a contract"). As such, a sufficient nexus exists between the Defendants' misleading door tags and the ultimate sale of services for the acts and practices alleged in the Complaint to be "in connection with the sale or advertisement of any merchandise."

C. Defendants' misleading door hangers and websites were "in connection with" the sale of services provided by others.

Defendants' deceptive representations resulting in the collection of personal information also directly resulted in telemarketing activities and sales made by third-party companies. As detailed in the Complaint, Defendants sell their wrongfully-obtained customer data to two third-party companies that also engage in telemarketing, Rescue One Air, LLC, and Pristene Water, Inc. (Complaint at ¶ 31.) Those companies also sell services that would be considered merchandise under the CFA. (Complaint at ¶ 32.) As with the services offered by Defendants, there is a causal relationship between Defendants' deceptive door tags and the third-party companies' subsequent marketing to consumers based on responses to the door tags. Thus, Defendants' act of hanging misleading door tags on consumers' homes is "in connection with the sale or advertisement of" not only the services that Defendants themselves offered, but also the services offered by the companies to which Defendants sold their consumers' personal information.

D. Defendants' misleading door hangers and websites were "in connection with" the sale of consumer data.

Finally, Defendants' deceptive practices directly led to the sale of valuable consumer data. After compiling marketing leads using their misleading door tags, Defendants sell those leads to Rescue One Air, LLC and Pristene Water, Inc. (Complaint at ¶ 31.) The definition of merchandise under the CFA is not limited to tangible goods and services. The definition also explicitly includes "intangibles" as a form of merchandise. A.R.S. §§ 44-1521(5). Here, the consumer leads provided by Defendants to the third-party companies are being sold for the purposes of facilitating telemarketing. The leads, therefore, constitute merchandise under the CFA. *See also State ex rel. Woods v. Sgrillo*, 176 Ariz. 148, 149 (App. 1993) (finding that information about low-interest credit cards offered for sale is merchandise under the CFA). Further, a causal relationship exists between the collection of homeowners' information to create telemarketing leads and those leads' eventual sale to Defendants' client base, the third-party companies. As a result, Defendants' misleading door tags and collection of personal information from Arizonans are also "in connection with" the sale of the compiled information, and Defendants' Motion should be denied for that reason as well.

II. The CFA authorizes the State to pursue restitution and the Court cannot dismiss a restitution remedy on jurisdictional grounds.

Under the CFA, the Court may, after a finding of liability, order various types of relief, including restoring any money that "may have been acquired" through practices that violated the CFA. A.R.S. § 44-1528(A)(2). Nevertheless, Defendants' Motion asks the Court to rule as a matter of law that the State is not entitled to restitution because the State did not "allege that any consumer was damaged in any way." (Motion at 4.) As described below, this request must be denied because: (1) restitution is a potential remedy to be awarded at the end of the case, not a "claim" that is subject to dismissal pursuant to Rule 12(b)(6); and (2) unlike private CFA claims, the State's CFA claims are not subject to the requirements that a person suffer damages.

A. Restitution is a remedy, not a claim reviewable under Rule 12(b)(6).

Defendants' request to bar restitution in this case through a Rule 12(b)(6) motion is inappropriate. Under A.R.S. § 44-1522, a State CFA claim contains only two elements: (1) unfair or deceptive acts or practices; and (2) in connection with the sale or advertisement of merchandise. *See* RAJI Commercial Torts Instructions (2017) at 16, footnote 4. In contrast, *after* liability has been established, the Court may impose a wide variety of remedies, including restitution, under A.R.S. § 44-1528. Defendants cite no authority to suggest that a motion to dismiss can be used to eliminate the State's ability to seek an eventual remedy before any disclosure or discovery has even taken place, and undersigned counsel is unaware of any such authority.

The State's Complaint states a CFA claim, and a Rule 12(b)(6) motion cannot be used to foreclose a potential form of recovery at the outset of the case, as evidenced by a recent decision by the Honorable Judge Danielle J. Viola. On March 11, 2020, in CV 2019-013111, Judge Viola denied defendant Choice Home Warranty's 12(b)(6) motion to dismiss, which alleged, among other arguments, that the State was not entitled to certain forms of damages under the CFA. (*See* Under Advisement Ruling, Attached as Exhibit A.) Judge Viola rejected this argument entirely, stating that a request for damages is not a claim. (Exhibit A at 3.) Likewise here, Defendants' Motion is not actually contesting whether the Complaint stated a CFA claim, it is attempting

preemptively to limit the State's eventual recovery. Defendants' Motion to "dismiss" restitution from this case should be denied as a matter of law.

B. The State need not allege damages to be entitled to restitution in this case.

Even if the Court were to consider Defendants' argument on this point, it still fails because the State is not required to allege damages as part of its CFA claim. Under the statute's plain text, the State may bring a claim for deceptive and unfair practices "whether or not any person has in fact been misled, deceived or damaged thereby." A.R.S. § 44-1522(A).[2] The lack of any requirement for the State to prove damages or reliance squares with the statute's express remedies, which provides that, if the Court finds that Defendants engaged in unlawful practices, it may restore to any person "any monies … which *may have been* acquired" through those unlawful practices. A.R.S. § 44-1528(A)(2) (emphasis added). This may include payments to consumers for the loss of their valuable data, payments to consumers who used Defendants' services as a result of a deceptive practice, or payments to consumers who used services provided by third parties who bought Defendants' wrongfully-obtained sales leads.

Defendants' cited cases are inapposite here because they all concern private consumer fraud actions. (*See* Motion at 4 (citing *Cheatham v. ADT*, 161 F. Supp.3d 815, 825 (D. Ariz. 2016); *Nataros v. Fine Arts Gallery of Scottsdale,* 126 Ariz. 44, 48 (App. 1980)).) Although a *private* consumer fraud claim brought must include allegations of damages, the State's CFA claims are not subject to this requirement, and Defendants' cited cases do not hold otherwise. For a private consumer fraud claim brought under A.R.S. § 44-1533,[3] a plaintiff must "show a false promise or misrepresentation made in connection with the sale or advertisement of merchandise and consequent and proximate injury resulting from the promise." *Kuehn v. Stanley*, 208 Ariz. 124, 129 (App. 2004); *see Peery v. Hansen*, 120 Ariz. 266, 269 (App. 1978)

---

[2] *See, e.g.*, *State ex rel. Corbin v. Tolleson*, 160 Ariz. 385, 398 (App. 1989) ("Reliance is not an element of consumer fraud.")

[3] In 1974, after the CFA's enactment, the Arizona Supreme Court stated that "[a]lthough the [CFA] does not specifically provide for a right of action against persons violating the provisions of the article, we believe inferentially such right of action is granted by [A.R.S. § 44-1533]." *Sellinger v. Freeway Mobile Home Sales, Inc*., 110 Ariz. 573, 576 (1974).

("It is clear that before a private party may exert a claim under the statute, he must have been damaged by the prohibited practice"); *Cheatham*, 161 F.Supp.3d at 825.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied. In the event that all or part of Defendants' Motion is granted, the State requests leave to amend its Complaint to address any deficiencies.

RESPECTFULLY SUBMITTED April 6, 2020.

MARK BRNOVICH
Attorney General

By: /s/ Mark James Ciafullo
Evan G. Daniels
Andrija Samardzich
Mark James Ciafullo
Assistant Attorney General
Assistant Attorneys General

CERTIFICATE OF SERVICE

Document electronically transmitted to
The Clerk of the Court for filing using
AZTurboCourt this 6th day of April, 2020.

Copy of the foregoing served via AZTurbo Court
And courtesy copy emailed this 6th day of April, 2020 to:

Richard Mahrle
Camila Alarcon
GAMMAGE & BURNHAM P.L.C.
rmahrle@gblaw.com
calarcon@gblaw.com
Attorneys for Defendants

By:/s Caitlin Young