IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

NED NEWCOMER, individually and on behalf of all others similarly situated,

Plaintiff,

v. CASE NO. 4:10cv477-RH/WCS

1021018 ALBERTA, LTD., a Canadian company d/b/a JUST THINK MEDIA,

Defendant.

_________________________________/

ORDER DENYING CLASS CERTIFICATION

The plaintiff Ned Newcomer filed this purported class action against two defendants but voluntarily dismissed his claims against one, leaving as the sole defendant 1021018 Alberta, Ltd., doing business as Just Think Media ("JTM"). Mr. Newcomer has moved to certify a class under Fed. R. Civ. P. 23(b)(3). JTM has responded in opposition. This order denies class certification.

Mr. Newcomer's claims arise from an allegedly fraudulent website through which a user could buy JTM's work-from-home service. Mr. Newcomer asserts, among other things, that the website made it appear that a positive response would

obligate a user for just $2.95, when in fact JTM imposed a recurring monthly charge of $79.86 and another for $24.82—a "negative option" subscription not disclosed, or not adequately disclosed, on the website. JTM asserts that any buyer accepted an arbitration agreement—thus barring this lawsuit—and that in any event all the charges were clearly and prominently disclosed on a banner at the top of the relevant web page.

JTM is a defendant in another action arising from the same allegedly fraudulent website—an enforcement action brought by the Federal Trade Commission. The court in the FTC action has entered an order freezing JTM's assets.

Certification of a (b)(3) class is proper only if the case satisfies the four prerequisites set out in Rule 23(a) and the court makes the findings required by Rule 23(b)(3). I deny certification on the following grounds.

<u>Numerosity</u>. I assume that enough users visited the website and bought JTM's services to satisfy the numerosity requirement. But the record gives no indication of how many of those users agreed to arbitrate or how many saw the banner that disclosed the charges at issue. Mr. Newcomer has not established that the class—when properly defined to include only those who visited a website without the banner or only those who did not see and understand the banner—is

"so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

Typicality. To the extent that Mr. Newcomer seeks to include in the class users who visited a website that included the banner—and even more clearly to the extent he seeks to include in the class users who saw and understood the banner—Mr. Newcomer's claims are not "typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3).

Predominance of Common Questions. There are questions of law and fact common to the class. But there also are substantial individual questions: whether a user accessed a website with the banner or a website that adequately required an agreement to arbitrate; whether, if a user accessed a website with the banner, the user understood the banner; whether a user relied on any misrepresentation or failure to disclose; how many monthly payments the user made before cancelling or attempting to cancel; and whether, upon cancelling, the user sought or received a refund. A reliance issue often does not preclude certification, *see Klay v. Humana, Inc.*, 382 F.3d 1241, 1258 (11th Cir. 2004), but in the particular circumstances of this case, it cannot be said that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). To the contrary, this case is very much like *Clark v. Experian Information Solutions, Inc.*, 256 F. App'x 818 (7th Cir. 2007).

That case, like this one, arose from a negative-option website. The Seventh Circuit upheld a very experienced district judge's decision to deny class certification.

Superiority. Finally, it cannot be said here "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This is especially true in light of the FTC enforcement action and the freezing of JTM's assets. *See* Fed. R. Civ. P. 23(b)(3)(B) (identifying as a factor in the superiority analysis "the extent and nature of any litigation concerning the controversy already begun by . . . class members"); Fed. R. Civ. P. 23(b)(3)(C) (identifying as a factor "the desirability or undesirability of concentrating the litigation of the claims in the particular forum"). While the FTC action was not begun "by class members," the action seeks to vindicate the class members' interests, and the action has rendered JTM unable, as a practical matter, to fully defend itself here.

For these reasons,

IT IS ORDERED:

The class-certification motion, ECF No. 116, is DENIED.

SO ORDERED on January 25, 2012.

s/Robert L. Hinkle
United States District Judge