

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

August 23, 2010

No. 09-20648

Lyle W. Cayce
Clerk

MICHAEL P. BOTT; DELORIS GORDON; LAUREL HUDSON;
JONATHAN MOOREFIELD; SUSAN OLMSTED; PHILLIP PACETTI;
RENEE WEST; KEVIN WOOLLEY; ASHLEY MITCHELL;
MILES-KEVIN BARON, Doing Business as Victory-Riders.com,

Plaintiffs-Appellants,

versus

VISTAPRINT USA INC.; ADAPTIVE MARKETING LLC;
VERTRUE INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:08-MD-1994

Before DAVIS, SMITH, and HAYNES, Circuit Judges.

PER CURIAM:*

Plaintiffs sued under the Electronic Funds Transfer Act, the Electronic Communications Privacy Act, the Massachusetts Unfair Trade Practices Act, and the common law, alleging that they were tricked into enrolling in certain membership programs when they used defendants' websites. The various actions were transferred to the district court *a quo* by the Judicial Panel on Multi-district Litigation. Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), asserting that their webpages were not deceptive as a matter of law, because they contained sufficient disclosures such that no reasonable person could be deceived.

The district court agreed with defendants and dismissed. In a well-reasoned, detailed Memorandum and Order entered on August 31, 2009, the court held that the subject webpages were not deceptive as a matter of law and that "plaintiffs' allegation regarding the deceptive nature of the webpages at issue is clearly and unequivocally refuted by the webpages themselves" *In re Vista-Print Corp. Mktg. & Sales Practices Litig.*, No. MDL 4:08-MD-1994, 2009 U.S. Dist. LEXIS 77509, at *14 (S.D. Tex. Aug. 31, 2009) (Atlas, J.). The court properly observed that

[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.

Id. at *20.

In addition, the district court examined the claims made under each as-

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

served cause of action and theory of recovery. The court's detailed analysis is compelling in explaining that each claim is entirely without merit.

We have reviewed the briefs and applicable law and have consulted applicable portions of the record. There is no error. The judgment is AFFIRMED, essentially for the reasons stated by the district court.¹

¹ We decline plaintiffs' request that we take judicial notice of certain documents not presented to the district court.

BILL OF COSTS

NOTE: The Bill of Costs is due in this office *within 14 days from the date of the opinion, See FED. R. APP. P. & 5TH CIR. R. 39.* Untimely bills of costs must be accompanied by a separate motion to file out of time, which the court may deny.

_____ v. _____ No. _____

The Clerk is requested to tax the following costs against: _____

COSTS TAXABLE UNDER Fed. R. App. P. & 5 th Cir. R. 39	REQUESTED				ALLOWED (If different from amount requested)			
	No. of Copies	Pages Per Copy	Cost per Page*	Total Cost	No. of Documents	Pages per Document	Cost per Page*	Total Cost
Docket Fee (\$450.00)								
Appendix or Record Excerpts								
Appellant's Brief								
Appellee's Brief								
Appellant's Reply Brief								
Other:								
Total \$ _____					Costs are taxed in the amount of \$ _____			

Costs are hereby taxed in the amount of \$ _____ this _____ day of _____, _____.

LYLE W. CAYCE, CLERK

State of _____
County of _____

By _____
Deputy Clerk

I _____, do hereby swear under penalty of perjury that the services for which fees have been charged were incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this Bill of Costs was this day mailed to opposing counsel, with postage fully prepaid thereon. This _____ day of _____, _____.

(Signature)

*SEE REVERSE SIDE FOR RULES
GOVERNING TAXATION OF COSTS

Attorney for _____

39.1 Taxable Rates. *The cost of reproducing necessary copies of the brief, appendices, or record excerpts shall be taxed at a rate not higher than \$0.15 per page, including cover, index, and internal pages, for any for of reproduction costs. The cost of the binding required by 5th CIR. R. 32.2.3 that mandates that briefs must lie reasonably flat when open shall be a taxable cost but not limited to the foregoing rate. This rate is intended to approximate the current cost of the most economical acceptable method of reproduction generally available; and the clerk shall, at reasonable intervals, examine and review it to reflect current rates. Taxable costs will be authorized for up to 15 copies for a brief and 10 copies of an appendix or record excerpts, unless the clerk gives advance approval for additional copies.*

39.2 Nonrecovery of Mailing and Commercial Delivery Service Costs. *Mailing and commercial delivery fees incurred in transmitting briefs are not recoverable as taxable costs.*

39.3 Time for Filing Bills of Costs. *The clerk must receive bills of costs and any objections within the times set forth in FED. R. APP. P. 39(D). See 5th CIR. R. 26.1.*

FED. R. APP. P. 39. COSTS

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise;

- (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
- (2) if a judgment is affirmed, costs are taxed against the appellant;
- (3) if a judgment is reversed, costs are taxed against the appellee;
- (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) Costs For and Against the United States. Costs for or against the United States, its agency or officer will be assessed under Rule 39(a) only if authorized by law.

(c) Costs of Copies Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) Bill of costs: Objections; Insertion in Mandate.

- (1) A party who wants costs taxed must – within 14 days after entry of judgment – file with the circuit clerk, with proof of service, an itemized and verified bill of costs.
- (2) Objections must be filed within 10 days after service of the bill of costs, unless the court extends the time.
- (3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must – upon the circuit clerk's request – add the statement of costs, or any amendment of it, to the mandate.

(e) Costs of Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

- (1) the preparation and transmission of the record;
- (2) the reporter's transcript, if needed to determine the appeal;
- (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and
- (4) the fee for filing the notice of appeal.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
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NEW ORLEANS, LA 70130

August 23, 2010

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or
Rehearing En Banc

No. 09-20648, Michael Bott, et al v. VistaPrint USA Inc., et
al

USDC No. 4:08-MD-1994

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. RULES 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. RULES 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals . 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases . If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

The judgment entered provides that appellants pay to appellees the costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk

By: Jamei R. Cheramie
Jamei R. Cheramie, Deputy Clerk

Enclosures

Mr. Kim Bernard Battaglini
Mr. Michael Adam Berg
Mr. Jeffrey I. Carton
Mr. Gregory Scott Coleman
Mr. Edward Caldwell Dawson
Mr. William B. Federman
Mr. A Danner Frazer Jr.
Mr. Peter N Freiberg
Mr. Robert Allen Horowitz
Richard A. Johnston
Ms. Kimberly Louise McMullan
Ms. Annette C. Rizzi
Ms. Toby Sue Soli
Richard Paul Yetter