

The plaintiffs contend that the "datapass" procedure, by which e-merchants share customers' credit card and billing information with Trilegiant without requiring that the customers re-enter that information on the Trilegiant enrollment page, constitutes an unlawful interception of an electronic communication under the ECPA. The defendants respond that no unlawful interceptions occurred because Trilegiant disclosed the terms of the program, including the transfer of the customer's information, and each plaintiff gave clear and unambiguous consent to those terms.

The defendants made a sufficient showing that the consent exception applies. The enrollment pages display text informing customers that by entering their name or date of birth and selecting "YES," **[\*122]** they authorize the release of information to Trilegiant, including their "name, email address, and credit card or debit card information to Great Fun for enrollment, billing, **[\*\*9]** and benefit processing." Supp. App. at 6-7, 25. Defendants submitted evidence demonstrating that only by providing the necessary information and clicking "yes" could an individual actually enroll in one of Trilegiant's programs. Such affirmative conduct evinces sufficient consent to an interception of an electronic communication. Other courts have reached the same conclusion on similar facts,<sup>3</sup> and we ourselves have reached the same conclusion in a summary order arising under a different statute with a parallel safe harbor provision. See *L.S. v. Webloyalty.com, Inc.*, 673 F. App'x 100, 106 (2d Cir. 2016) (summary order) (finding same activity to constitute authorization under the Electronic Funds Transfer Act, 15 U.S.C. § 1693e(a)).

<sup>3</sup> See, e.g., *In re VistaPrint Corp. Marketing and Sales Practices Litig.*, MDL No. 4:08-md-1994, 2009 U.S. Dist. LEXIS 77509, 2009 WL 2884727, at \*9 (S.D. Tex. Aug. 31, 2009) (dismissing ECPA claim where plaintiffs, "by clicking Yes in the designated spaces on the webpages, authorized VistaPrint to transfer that information" to the "VistaPrint Rewards" program); *Berry v. Webloyalty.com, Inc.*, No. 10-CV-1358-H CAB, 2011 U.S. Dist. LEXIS 39581, 2011 WL 1375665, at \*8 (S.D. Cal. Apr. 11, 2011) (in dismissing an ECPA claim over the "Shopper Discounts and Rewards" program, "[t]he Court conclude[d] that Plaintiff Berry's entry of his email address twice and clicking on 'YES' constitute[d] authorization given the several disclosures made on the enrollment page"), vacated and remanded for lack of standing, 507 F. App'x 581 (9th Cir. 2013).

The plaintiffs contend that they could not have consented because they have no recollection of giving such authorization or providing their name or date of birth as a passcode on the enrollment screen. But the plaintiffs do not offer evidence that would permit a reasonable jury to find that they did not take such steps to enroll: the defendants made a prima facie showing of consent by producing evidence that there would be no **[\*\*10]** other way for an individual to enroll in a Trilegiant program, and the plaintiffs' failures of recollection or bare denials offer no support for the alternative theory that Trilegiant somehow obtained the plaintiffs' credit card information and, out of the blue, created unauthorized membership accounts on their behalf. On this record, there is no material issue of fact on the question of the plaintiffs' consent to the exchange of electronic information among the defendants.

Alternatively, the plaintiffs contend that the inherently deceptive nature of the post-transaction enrollment pages vitiates consent as a matter of law because no reasonable consumer could believe she had consented to join Great Fun. We are urged to avoid myopic focus on "Trilegiant's miniscule fine print disclosures," and to consider instead "the content and manner of presentation, Plaintiffs' express testimony, and the unrebutted expert evidence submitted which established that Trilegiant designed the 'disclosures' so

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