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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

PUBLISHERS BUSINESS SERVICES, INC., a corporation; ED DANTUMA ENTERPRISES, INC., a corporation, also dba PUBLISHERS DIRECT SERVICES and PUBLISHERS BUSINESS SERVICES; PERSIS DANTUMA; EDWARD DANTUMA; BRENDA DANTUMA CHANG; DRIES DANTUMA; DIRK DANTUMA; AND JEFFREY DANTUMA, individually and as officers or managers of Publishers Business Services, Inc., or Ed Dantuma Enterprises, Inc.,

Defendants.

Case no. 2:08-cv-00620-PMP-PAL

PLAINTIFF FTC'S OPPOSITION TO "DEFENDANTS' MOTION TO STRIKE FTC'S MOTION FOR SUMMARY JUDGMENT"

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I. Introduction

Plaintiff FTC opposes Defendants' "Motion to Strike FTC's Motion for Summary Judgment." Defendants argue that the FTC's summary judgment motion should be stricken for four reasons: (1) the FTC's motion exceeds the page limit set by Local Rule 7-4, (2) certain declarations submitted in support of the FTC's motion contain hearsay and thus should be stricken in their entirety, (3) Defendants dispute some of the FTC's proposed undisputed material facts, and (4) if these declarations and proposed undisputed facts are excluded from consideration, there is insufficient evidentiary support for the FTC's summary judgment motion, and thus, the FTC's summary judgment motion must be stricken in its entirety. As discussed in this Opposition, Defendants' motion is based on a misunderstanding of this Court's practice, an incorrect application of the case law, and a misreading of the Federal Rules of Civil Procedure and Federal Rules of Evidence. The Court should thus deny Defendants' motion to strike.

II. The FTC's response to Defendants' page limit argument

A. The FTC's Concise Statement of Undisputed Material Facts was properly submitted as a separate document not subject to Local Rule 7-4's page limit

Defendants' claim – that a concise statement of undisputed facts must be filed as part of the same document as the memorandum of points and authorities and subject to the same page limit – is not only *unsupported* by the Federal Rules, Local Rules, and case law, but also *contrary* to District of Nevada practice.

1. Local Rule 56-1 does not prohibit the filing of a Concise Statement of Undisputed Material Facts as a separate document

Defendants' argument, that Local Rule 56-1 mandates that the concise statement of undisputed facts in support of a summary judgment motion must be included *in* the motion is without basis. Local Rule 56-1 requires that counsel set forth proposed undisputed material facts with specific citations to the evidence. *Goldstein v. Turnberry Pavilion Partners LP*, 2007 U.S. Dist. LEXIS 85996 at *1 (D. Nev. 2007). This statement of uncontested facts may be separate

from the motion. *Consejo de Desarrollo Economico de Mexicali, AC v. United States*, 438 F. Supp. 2d 1207, 1223 (D. Nev. 2006).[1]

2. Local Rule 7-4 does not require the pages of the concise statement of undisputed material facts to be counted with the summary judgment motion and memorandum

Contrary to Defendants' argument, the District of Nevada in fact *does* accept summary judgment motions in which the Concise Statement of Undisputed Material Facts is a separate document unrestricted by the thirty-page limit set forth in Local Rule 7-4. In *Consejo De Desarrollo Economico De Mexicali, AC v. United States* (case #05-CV-0870-PMP-LRL), for example, the plaintiffs filed a 28-page memorandum of points and authorities (doc. #152-10) and a separate 11-page statement of undisputed material facts (doc. #152-11), which this Court accepted. In *Shalomi v. Western Technologies, Inc.* (case #04-CV-0168-PMP-LRL), the Court likewise accepted the filing of a 30-page summary judgment motion and memorandum of points and authorities (doc. #140) and a separate 43-page statement of undisputed material facts (doc. #148). The FTC's filing of its Concise Statement of Undisputed Material Facts as a separate document not subject to the thirty-page limit set forth in Local Rule 7-4 is consistent with this practice. Thus, the FTC properly filed its Concise Statement of Undisputed Material Facts as a separate document, and that document should not be counted against the thirty-page limit set forth in Local Rule 7-4.

B. Defendants' requested remedy for violating the local rules – to strike the FTC's summary judgment motion – is not supported by the case law and is grossly disproportionate to the alleged local rule violation

Defendants cite *Moulton v. Eugene Burger Mgmt. Corp.*, 2009 WL 2004373 at *1 (D.Nev. 2009), for the proposition that the Court should "dismiss" the FTC's summary judgment motion because of the FTC's alleged violation of the Local Rules. The *Moulton* opinion, however, dealt with a motion to dismiss, *not* a summary judgment motion. That case cited *Ghazali v. Moran*, 46 F.3d 52 (9th Cir. 1995), which expressly distinguished the two types of motions, in holding that the

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[1] In contrast, the Court has previously opined the manner in which *Defendants* have presented the proposed "undisputed facts" in support of its cross-motion for summary judgment (*see* doc. #99) – weaving them into the narrative of the motion – is not a preferred practice. *Dunlop v. Richter*, 2008 U.S. Dist. LEXIS 2747 at *6 (D. Nev. 2008) ("While the Court might overlook the failure to formally identify such a statement of uncontested facts, were they woven into the narrative of the motion, Defendants failed to do even that.").

Court could grant a motion to dismiss pursuant to a District of Nevada local rule which provides that a case may be dismissed if the plaintiff fails to oppose the motion. Thus, *Moulton* has *no* applicability in Defendants' attempt to attack the FTC's summary judgment motion.

Likewise, Defendants impermissibly attempt to stretch the holdings of *Doe v. Washoe*, 2006 WL 3782951 (D. Nev. 2006), and *Clark v. Circus Circus Hotel & Casino,* 2009 WL 1409478 (D. Nev. 2009), in their attempt to attack the FTC's summary judgment motion. Both of those cases involved a party which had continued to violate the Local Rules, even after being given repeated warnings and given opportunities to cure past violations. The facts of those cases are in stark contrast to the ministerial, correctable page-limit violation alleged by Defendants.

Finally, Defendants cite to *Cinque v. Budge*, 2009 WL 1312065 at *1 (D. Nev. 2009), for the broad proposition that "where a party files a document that is not authorized by the Local Rules, this Court has stricken it"; that case involved the striking of an unauthorized "sur-reply" to the State of Nevada's reply brief. Unlike sur-reply briefs, summary judgment motions are in fact authorized, not only by the Local Rules, but by Rule 56 of the Federal Rules of Civil Procedure.

C. The FTC requests leave of Court to: (1) exceed the page limit for its motion and memorandum of points and authorities, or in the alternative, (2) file a combined motion and memorandum of points and authorities which complies with the thirty-page limit

If the Court concludes that the FTC's motion (doc. #86) and memorandum of points and authorities (doc. #88) should be counted together in applying the 30-page limit set forth in Local Rule 7-4, the FTC respectfully submits that the proper remedy is not to strike the FTC's summary judgment motion, but rather, to grant leave to either (1) exceed the page limit and thus allow the two filings to stand,[2] or (2) allow the FTC to file the same motion and memorandum of points and authorities in a combined format which complies with the thirty-page limit.[3]

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[2] This result would be consistent with the handling of this issue in *Brown v. Kinross Gold U.S.A., Inc.* (CV-S-02-0605-PMP-RJJ), a case in which the Court accepted the filing of a 2-page summary judgment motion (doc. #219) and a 30-page memorandum of points and authorities (doc. #220).

[3] The text of the FTC's Notice of Motion and Motion (doc. #86) and Memorandum of Points and Authorities (doc. #88), combined, fit on thirty pages. *See* **Exhibit A**, attached to this Motion. Neither the FTC's recitation of the facts nor legal argument would need to be abridged or deleted in order to fit on thirty pages.

If the Court further determines, contrary to past practice, that the concise statement of undisputed material facts also should be taken together with the summary judgment motion and memorandum of points and authorities in applying the thirty-page limit, the FTC requests that the Court grant the FTC leave to exceed the page limit and allow the two-page summary judgment motion (doc. #86), thirty-page memorandum of points and authorities (doc. #88), and fifty-page concise statement of undisputed material facts (doc. #90) to stand.

III. The FTC's response to Defendants' evidentiary objections

A. Pursuant to Local Rule 56-1, the proper avenue for Defendants to challenge the FTC's undisputed material facts is to dispute them by filing a *"concise statement"* of the disputed material facts, *not* by making *generalized* objections

In section II.A.2 of their Motion to Strike, Defendants argue that the FTC is distorting Defendants' deposition testimony in its Concise Statement of Undisputed Material Facts, that the distortions violates Local Rule 56-1, and that because of this alleged violation of Local Rule 56-1, the FTC's summary judgment motion should be stricken.

Local Rule 56-1 requires the FTC, as the moving party, to identify the material facts which it believes are beyond dispute and cite evidence that supports those assertions. This is precisely what the FTC has done in submitting its Motion for Summary Judgment and Concise Statement of Undisputed Material Facts to the Court. *Local Rule 56-1 also sets forth the proper avenue for Defendants to present their challenges to the FTC's evidence.* It expressly requires Defendants to file a "concise statement setting forth *each fact* material to the disposition of the motion" which they claim is "genuinely in issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies." (Emphasis added.)

Defendants violate Local Rule 56-1 by failing to make their evidentiary objections in a "concise statement setting forth each fact," instead making only a *general* attack on the FTC's evidence, arguing that they "should not be forced to sort through what is and is not properly referenced or represented" (Motion to Strike, doc. #114, at page 6, lines 3-4) and that, in essence, the requirements of Local Rule 56-1 should not apply to them.

Neither case law nor the Court's rules allow Defendants to base a motion to strike on generalized argument, or to strike an entire body of evidence based on an attack on a small portion

of that evidence. Defendants' motion to strike improperly seeks to strike the entirety of all of the declarations filed on July 31, 2009 in support of the FTC's summary judgment motion, without identifying with specificity the portions of the evidence being challenged. Without specific allegations, there is nothing for the FTC to refute or defend. This is an insufficient showing under both Local Rule 56-1 and under the rules for motions to strike in general. Defendants' motion should thus be denied.

B. Defendants' requested remedy for curing the FTC's alleged evidentiary deficiencies – to strike entire affidavits and categories of evidence – is not supported by the case law

Defendants cite two cases in support of their proposition that the Court should strike entire affidavits or categories of evidence on the basis of a few objectionable portions – *Midamerican Energy Co. v. Great Am. Ins. Co.*, 171 F.Supp.2d 835, 845-47 (N.D. Iowa 2001), *and Josleyn v. Hydro Aluminum North Am. Inc.*, 2009 WL 151160 *1-4 (N.D. Ind. 2009). Neither case supports Defendants' proposition. The *Midamerican Energy Co.* and *Josleyn* courts did not strike entire affidavits or categories of evidence. In contrast, those courts considered each challenged statement *paragraph by paragraph,* striking only those objectionable portions of the statement or paragraph, while allowing the balance of the affidavit to stand as evidence. *Midamerican Energy Co.*, 171 F.Supp. 2d at 846-47; *Josleyn*, 2009 WL 151160 *2-5. Notably, the moving parties in *Midamerican Energy Co.* and *Josleyn* carried their burden of raising *specific* objections to the evidence they found objectionable (in contrast to Defendants, who are asking the Court to strike *all* the FTC's evidence based on a *"sample"* of what they claim are evidentiary violations). *Id.*

Similarly, Defendants misleadingly cite to *American Family Mutual Ins. Co v. Teamcorp, Inc.*, 2009 WL 321679 *1 (D. Colo. 2009) for the proposition that striking the FTC's motion and exhibits is the appropriate remedy in this case. That case involved a motion to strike a summary judgment motion which was wholly based on a category of evidence (evidence extrinsic to the "four corners" of the insurance contract at issue) that, as a matter of law, the Court could not consider. That case did *not* concern the "quality" of the evidence (*e.g.,* on claims of hearsay, speculation or relevance). Moreover, the Court did not ultimately reach the issue which is the basis of Defendants' present motion – whether the challenged evidence violated FRCP 56. *Id*. at

*4. Furthermore, the remedy issued by the Court was to strike the parties' cross-motions for summary judgment *and allow the parties to file renewed motions at a later date*. *Id*. at *4, 6. Thus, *American Family Mutual Ins.* provides no support for Defendants' argument that the FTC's summary judgment should be stricken.

C. Defendants' evidentiary objections to the former employee declarations, consumer declarations, and the FTC's use of Defendants' deposition testimony should be overruled because the challenged evidence has not been "distorted," and is not hearsay, speculation, or "irrelevant personal feelings"

The Court should overrule Defendants' *specific* evidentiary objections to the former employee and consumer declarations because the challenged evidence is neither "distorted" nor hearsay, speculation, or "irrelevant personal feelings." The Court should also overrule Defendants' *generalized* evidentiary objections because they have been insufficiently pleaded.

1. Defendants' evidentiary objections affect only small portions of the witnesses' deposition and declaration testimony and do not affect the overwhelming majority of the FTC's proposed undisputed facts

Exhibit B to this Opposition is a table setting forth: (1) each of the 28 facts, (2) the evidence cited in support of each fact, (3) the portion of the evidence which is challenged by Defendants, (4) the Defendants' stated basis for attacking that portion of the evidence as inadmissible, and (5) the FTC's response as to why the evidence is proper. **Exhibit B** highlights three important points:

First, even if the Court reviews the FTC's summary judgment motion without considering the challenged evidence, the FTC's facts are still supported by substantial and overwhelming evidence. Thus, it would be ludicrous to strike the FTC's entire summary judgment motion based on Defendants' limited challenges to the evidence.

Second, Defendants attack only small portions of the declarations filed in support of the FTC's motion, and they do not attack all of the FTC's declarations.[4] It would be inappropriate to strike entire declarations, and whole categories of evidence (e.g, "all former employee

[4] Defendants do not challenge any portion of the declarations of consumers John Edwards, Paula Keith, James Krause, Katie Krause, and Kaitlyn Schultz.

declarations" and "all consumer declarations") based the limited statements that Defendants are challenging.

Furthermore, only two of the FTC's facts are supported solely by challenged evidence (UF 190 and UF 213). The evidence underlying both of those facts is non-hearsay because they are *admissions of a party-opponent*, admissible pursuant to FRE 801(d)(2). Moreover, even if the Court decides not to rely on these two challenged facts, the FTC's other facts provide a sufficient basis for the Court to grant summary judgment in the FTC's favor.

Finally, as discussed in Section III.C.2, *infra,* Defendants' hearsay, speculation, and "irrelevant personal feelings" objections are without merit; the declarants provide foundation for the challenged statements in elsewhere in those same declarations, establishing that the declarants have personal knowledge, and that their statements are supported by facts, are proper lay opinion based on personal observation, and are not "unsubstantiated speculation" or conclusory allegations. The Court should reject Defendants' attempt to have the challenged statements assessed out of context.

2. Defendants' evidentiary objections should be overruled

Defendants' specific evidentiary objections consist of three quotations from Defendant Dirk Dantuma's deposition transcript (Motion at Section II.A.2.), 14 statements contained in the declarations of Defendants' former employees, and 14 statements contained in consumer declarations (Motion at Section II.B.1.).[5] These challenged statements and deposition transcript

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[5] Four of the challenged former employee statements (Shadiyah Aljubailah ¶ 14, Kristen Cholewin ¶ 27, Jolie Mestre ¶ 9, Angelia Ollerman ¶ 31) and two of the challenged consumer statements (Dawn Campbell ¶ 11 and Everal Toomer ¶ 7) were not cited as support for any of the FTC's undisputed material facts. As they do not affect any undisputed fact, the FTC will not address the admissibility of these statements. These statements should not be stricken, however, because they provide helpful background for the other statements in the witnesses' declarations.

The 22 challenged paragraphs which the FTC *does* cite as support for its Concise Statement of Undisputed Facts are: Shadiyah Aljubailah ¶ 6, ¶ 7, ¶ 16; Kristen Cholewin ¶ 19, ¶ 30; Jolie Mestre ¶ 11, ¶ 14, ¶ 16, ¶ 17; Nichole Golden ¶ 14; Susan Krause Byers (first declaration) ¶ 5, ¶ 8; Susan Krause Byers (Supplemental declaration) ¶ 5, ¶ 6, ¶ 12; Kristy DeRuiter ¶ 8; Peter Harris ¶ 12, ¶ 15; Lindsey Roberts ¶ 8; Melissa Roberts ¶ 3, ¶ 4; and Leslie Narramore ¶ 4.

excerpts are cited as support for only 28 of the FTC's 234 material facts, and fall within five categories of admissible evidence:

a. Challenged statements which are admissible under FRE 801(d)(2) as admissions of a party-opponent

FRE 801(d)(2) provides that "[a] statement is not hearsay if ... [t]he statement is offered against a party and is ... the party's own statement, in either an individual or a representative capacity... ." Defendants challenge the FTC's use of three excerpts from the transcript of Dirk Dantuma's deposition on the ground that they are "distortions" of his testimony. Defendants' challenge to the FTC's use of Defendants' deposition testimony goes to the *weight*, not admissibility, of the evidence. Each of these statements (FTC's SJ Exhibit 8 (Dirk Dantuma deposition at 116:3-14, 199:5-8, and 195:20-24) are a defendant's own statements, made in either an individual or a representative capacity. Therefore, the statements are admissions of a party-opponent and should be admitted under FRE 801(d)(2).

b. Challenged statements which are admissible as evidence of motive

Out of court statements offered to show the listener's motive for taking a particular action are not hearsay. *United States v. Bailey*, 270 F.3d 83, 87 (1st Cir. 2001). Five of the statements that Defendants challenge are admissible because they are being offered to show the listener's motive for taking a particular action.

– FTC's SJ Exhibit 27 (first declaration of Susan Krause Byers) at ¶ 5: Ms. Byers' statement regarding the content of her son James Krause's call is not hearsay because it is not offered to prove the truth of the matter asserted; ¶ 2 and ¶ 3 of the declaration of James Krause is offered for that purpose. Instead, Ms. Byers' statement is offered to show that her motive for attempting to help her son solve his problems with PBS.

– FTC's SJ Exhibit 27 (first declaration of Susan Krause Byers) at ¶ 8: Ms. Byers' statement concerning her daughter Katie Krause's call with PBS is not offered to prove the contents of Katie's call (Katie Krause's declaration is offered to establish that point), but to show Ms. Byers' motive for calling PBS to cancel Katie's account.

– FTC's SJ Exhibit 32 (Peter Harris declaration) at ¶ 12: Mr. Harris' statement is offered to show Mr. Harris' motive for filing a complaint with his state's Department of Consumer Affairs.

– FTC's SJ Exhibit 30 (Kristy DeRuiter declaration) at ¶ 8: Ms. DeRuiter's statement is offered to show her motive for not accepting any more calls from PBS.

– FTC's SJ Exhibit 18 (Jolie Mestre declaration) at ¶ 11: Ms. Mestre's statement is not being offered to show the truth of the matter asserted (*i.e.,* that her co-worker was fired for not meeting the sales quota); it is being offered to show Ms. Mestre's motive for keeping her sales numbers "up."

c. Challenged statements which are admissible under FRE 701 as lay opinion

FRE 701 provides that "[i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions and inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

Five of the statements that Defendants challenge are proper lay opinion and thus should be admitted under FRE 701:

– FTC's SJ Exhibit 16 (Kristen Cholewin declaration) at ¶ 30: the challenged statement is a proper lay opinion based on Ms. Cholewin's direct observation of sales calls, described in Cholewin ¶ ¶ 25-30.

– FTC's SJ Exhibit 17 (Nichole Golden declaration) at ¶ 14: the challenged statement is a proper lay opinion based on Ms. Golden's observation in ¶ 14 that she heard the other salespeople "routinely deviate from the script."

– FTC's SJ Exhibit 18 (Jolie Mestre declaration) at ¶ 14: the challenged opinion is supported by ¶¶ 12, 13, 14, 16 of Ms. Mestre's declaration, in which she observes that deviations from the script by she and the other productive telemarketers were essentially ignored by the supervisors, and that meeting the sales quota appeared to be an important focus of the sales room supervisors.

– FTC's SJ Exhibit 15 (Shadiyah Aljubailah declaration) at ¶ 16: the challenged opinion is a proper lay opinion based on Ms. Aljubailah's observation, described in the unchallenged portion of ¶ 16, of Defendant's policy of disregarding "do-not-call" requests.

– FTC's SJ Exhibit 36 (Leslie Narramore declaration) at ¶ 4: the challenged opinion is a proper lay opinion based on Ms. Narramore's impressions of the sales call (described in ¶ 3), and upon receiving her first invoice (described in ¶ 4).

d. Challenged statements which are admissible under principal-agent law to show Defendants were "on notice" as to certain facts

It is well-established that "[n]otice to or the knowledge of an agent acting within the scope of his or her authority is chargeable to the principal regardless of whether that knowledge is actually communicated." 2A C.J.S. Agency § 446 (2009). Specifically, a customer complaint offered to show that a decision maker had notice of the complaint is not barred by the hearsay rule. *Kelly v. Airborne Freight Corp.*, 140 F.3d 335, 346 (1st Cir. 1998); *Curtis, Collins & Holbrook v. United States*, 262 U.S. 215, 222 (1923). The following statements are admissible because they are being offered to show that Defendants were put "on notice" as to certain events.

– FTC's SJ Exhibit 15 (Shadiyah Aljubailah declaration) at ¶ 6: the challenged statement is admissible to show that the customer complaints were made and that Defendants were on notice of these complaints.

– FTC's SJ Exhibit 16 (Kristen Cholewin declaration) at ¶ 19: the challenged statement is admissible to show that Defendants were on notice as to the complaints that consumers had made about Defendants' business practices.

e. Challenged statements which are admissible because the foundational requirement of "personal knowledge" has been established

Defendants challenge five statements as inadmissible on the ground that "personal knowledge" has not been established. In making these challenges, Defendants have misleadingly taken the statements of the FTC's witnesses out of context. When the challenged statements are viewed in the context of the rest of the witness' declaration, it is clear that the "personal knowledge" requirement has been met:

– FTC's SJ Exhibit 15 (Shadiyah Aljubailah declaration) at ¶ 7: the challenged statement is offered to show that Defendants' salesperson could not discern from the script that she was selling 5-year subscriptions. The foundation for Ms. Aljubailah's statement is based on her testimony, at ¶ 7, that everything she knew about the subscriptions she was offering was based on the script.

– FTC's SJ Exhibit 27 (first declaration of Susan Krause Byers) at ¶ 12: Personal knowledge foundation for the challenged statement is set forth in the unchallenged portion of ¶ 12.

– FTC's SJ Exhibit 16 (Kristen Cholewin declaration) at ¶ 30: Cholewin ¶ ¶ 25-30 provide the personal knowledge foundation for the challenged statement.

– FTC's SJ Exhibit 18 (Jolie Mestre declaration) at ¶¶ 16 and 17: Mestre ¶ 16 and the first part of Mestre ¶ 17 provide the personal knowledge foundation for the challenged statements.

D. The Court should deny Defendants' motion to strike the declaration of Juliana Blatz DuRivage and ¶ 66 of the third Declaration of Bruce Gale pursuant to *FTC v. Figgie Intl., Inc.*

Defendants argue that the declaration of Juliana Blatz DuRivage (FTC's SJ Exhibit 41) and ¶ 66 of the third Declaration of Bruce Gale (FTC's SJ Exhibit 42 at ¶ 66) should be stricken because they do not qualify as a scientific survey meeting *Daubert* standards. The FTC acknowledges that Ms. Blatz DuRivage's declaration and ¶ 66 of Mr. Gale's third declaration do not meet the standard for scientific surveys set forth in *Gibson v. County of Riverside*, 181 F.Supp.2d 1057, 1067-68 (C.D. Cal. 2002). They are nonetheless reliable because they carry sufficient circumstantial guarantees of trustworthiness to be considered by the Court under FRE 807.[6] *See FTC v. Figgie Intl., Inc.,* 994 F.2d 595, 608-09 (9th Cir. 1993).

In *Figgie*, the Ninth Circuit held that although consumer complaint letters did not fit "squarely under any of the enumerated exceptions to the hearsay rule as codified by Federal Rules of Evidence 803(1)-(23), ... [t]hey are, however, admissible under the 'catch-all' or 'residual'

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[6] The FTC primarily cites the Blatz DuRivage declaration as second-tier evidence which *corroborates* consumer declarations made under penalty of perjury. The Blatz DuRivage declaration provides secondary support for six of the FTC's 234 facts (UF 134, UF 143, UF 144, UF 151, UF 161, and UF 170) and primary support for two facts (UF 88 and UF 202). The FTC has not cited Gale ¶ 66 as support for any of its 234 facts, but the Court may consider it as corroborating evidence in support of the same eight facts supported by the Blatz DuRivage declaration (UF 88, UF 134, UF 143, UF 144, UF 151, UF 161, UF 170, and UF 202).

exception," FRE 807 (formerly numbered as FRE 803(24)). The *Figgie* Court first concluded that the consumer complaint letters "have the necessary 'circumstantial guarantees of trustworthiness.' The letters were sent independently to the FTC from unrelated members of the public. The fact that they all reported roughly similar experiences suggests their truthfulness." *Id.* (quoting 4 Weinstein & Berger, Evidence, Par. 803(24)[01] (1984), at 803-375). The Court also noted that the consumers "had no motive to lie to the FTC" and that there was "little risk" that the consumers' statements were could be the product of faulty perception, memory or meaning." Second, the Court concluded that the consumer complaint letters addressed a material fact. Third, the Court concluded that "'reasonable efforts' would not produce more probative evidence," noting that:

> Conceivably, FTC could bring letter-writers into court to swear, under oath and subject to cross-examination, that the contents of their letters were true. But such efforts would not be reasonable. "It should not be necessary to scale the highest mountains of Tibet to obtain a deposition for use in a $ 500 damage claim arising from an accident with a postal truck."

Figgie (quoting 4 Weinstein & Berger at 803-379). With respect to this third conclusion, the Court also noted that "testimony from the letter-writers is not likely to be any more reliable than the letters themselves." *Figgie* at 609 (citing *Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961)* (contemporary report of a fire in a newspaper article "is more reliable, more trustworthy, more competent evidence than the testimony of a witness called to the stand fifty-eight years later"). Fourth, the Court concluded that "admitting the letters 'furthers the federal rules' paramount goal of making relevant evidence admissible,'" *id.* at 609 (quoting 4 Weinstein & Berger at 803-381), and "also furthers the interests of justice." *Id. at 609.* Finally, the Court found that the party against whom these letters were being offered had "adequate notice" of the letters.

The facts set forth in Ms. Blatz DuRivage's declaration and ¶ 66 of Mr. Gale's third declaration show that they possess the same circumstantial guarantees of trustworthiness. – *Truthfulness:* First, the customers contacted were unrelated members of the public, and in fact were identified by Defendants as "satisfied customers." The consumers interviewed by Ms. Blatz DuRivage and Mr. Gale are not made up of a skewed selection of consumers, but were taken directly from Defendants' business records (First Payment Coupons and customer lists) both of which Defendants have unequivocally claimed are comprised of their "satisfied" customers. As in

Figgie, the fact that many of the consumers reported roughly similar negative experiences, despite their designation by Defendants as "satisfied" suggests their truthfulness. This evidence directly refutes Defendants' defense that any customer who did not file a written complaint with the BBB or a state Attorney General should be deemed a "satisfied customer." As in *Figgie,* the consumers have no apparent motive to lie to the FTC, and any weaknesses in the consumers' recollection, as related to Ms. Blatz DuRivage and Mr. Gale, is noted in their declarations.

– *Materiality:* Second, Ms. Blatz DuRivage's declaration and ¶ 66 of Mr. Gale's third declaration support eight material facts: UF 88 (sales pitch starts with a survey), UF 134 (consumers learn after the call following receipt of the invoice that they have been ensnared by Defendants' bait and switch scam), UF 143 (Defendants' collection calls are harassing), UF 144 (in the collection calls, Defendants verbally threaten consumers with lawsuits, garnishments, other collection actions, damage to their credit histories, and even arrest warrants), UF 151 (many consumers pay PBS not because they think they owe the debt but because they see it as the only way to stop PBS's threats and/or to preserve their credit), UF 161 (individual consumers have paid hundreds of dollars to Defendants in an attempt to stop Defendants' extortionate conduct), UF 170 (Defendants' frequent calls were annoying and negatively distracting to consumers), and UF 202 (consumers agree to accept magazines to get PBS to stop calling them).

– *Probative value of additional reasonable efforts:* The FTC contends that as with *Figgie*, testimony from the consumers that Ms. Blatz DuRivage and Mr. Gale interviewed would not likely be any more reliable than the affected portions of the declaration themselves.

– *Interests of justice*: Admission of these challenged portions of Ms. Blatz DuRivage's and Mr. Gale's declarations would further the Federal Rules' goal of making relevant evidence admissible and further the interests of justice.

– *Notice:* Finally, the FTC has previously provided Defendants notice of their intention to introduce unsworn evidence of consumers' experiences with PBS. *See* **Exhibit C** attached to this Opposition.

In addition, Defendants' assertion, that "[t]here is simply no way ... to either verify the accuracy of the survey responses or cross-examine the customers" with whom Ms. Blatz DuRivage

and Mr. Gale spoke, is disingenuous. Defendants possess their customers' contact information, and Ms. Blatz DuRivage's declaration and ¶ 66 of Mr. Gale's third declaration set forth in detail the full names of and specific information provided by the customers. This is all the information Defendants need to call each customer to "cross-examine" them as to whether the report was accurate. The Court should thus reject Defendants' excuse, that they cannot verify the information or "cross-examine" the customers, as a basis for striking Ms. Blatz DuRivage's declaration or ¶ 66 of Mr. Gale's third declaration.

Under these circumstances, any deficiencies with respect to Ms. Blatz DuRivage's and Mr. Gale's consumer call summaries should go to the weight of the evidence, not their admissibility.

E. The Court should deny Defendants' motion to strike the third declaration of Bruce Gale (FTC's SJ Exhibit 42)

Defendants argue that Mr. Gale's entire declaration should be stricken, including all attachments, on the basis of a few "examples" of purported evidentiary objections. In effect, Defendants ask the Court to strike the third declaration of Bruce Gale *in its entirety* based on challenges limited to statements in 17 of the 71 paragraphs in the declaration. Moreover, the specific evidentiary objections that Defendants raise lack merit.[7]

1. The statements that Defendants challenge as "legal conclusion" are admissible under FRE 701 as lay opinion drawn from admissible evidence

Defendants challenge four statements as impermissible "legal conclusions": ¶ 19 ("The subscription agency agreements are contracts between the Corporate Defendants and magazine publishers."); ¶ 24.a. ("The Orders apply to all Keystone Readers' Service franchises, including the franchise that Edward Dantuma operated from 1955 through around 1980."); ¶ 25 (in which Mr. Gale purportedly "explains" the legal requirements of the orders imposed on Defendants); and ¶ 54 ("The reports show that Defendants' verifiers engage in the same deceptive and abusive practices year after year.").

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[7] Defendants' generalized argument that Mr. Gale's "survey" and "summary" evidence do not meet standard for admitting such evidence fails to state which portion of the declaration are objectionable. The Court should thus disregard that argument to the extent that Defendants fail to specifically identify the "survey" or "summary" to which they are referring.

What Defendants attempt to characterize as impermissible "legal conclusion" is in fact "lay opinion" *permitted under FRE 701*. Lay opinion testimony is appropriate under FRE 701 if it is (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Each of the challenged statements refers to documentary evidence which is attached to the declaration and provides helpful lay opinion testimony pointing the Court to specific portions of that documentary evidence. In addition, Defendants' objection to Mr. Gale's characterization in ¶ 19 that Defendants' subscription agency agreements as "contracts" is frivolous given their own characterization of these documents as "Defendants' contractual agreements with magazine publishers." *See* doc. #45-2 at p.56 (Defendants' letter confirming they would produce "Defendants' contractual agreements with magazine publishers"). The Court should thus overrule Defendants' "legal conclusion" objections pursuant to FRE 701.

2. The statements that Defendants challenge as "opining on the evidence" are admissible under FRE 701 as lay opinion drawn from admissible evidence

Defendants challenge three of Mr. Gale's statements as improper "opinion." The Court should overrule Defendants' objection because these statements qualify as proper lay opinion under FRE 701:

First, Defendants challenge the underlined portion of Gale ¶ 12:

> I and other FTC staff have listened to these 'verification recordings.' In each of the verification recordings, Defendants' verifier speaks at a rapid pace. These recorded conversations average approximately 90 seconds in duration. I and other FTC staff have had to listen to these verification recordings numerous times in order to understand the content because Defendants' verifiers spoke so fast in the recordings. Many of the things that Defendants' verifiers said were difficult to understand or unintelligible. In fact, certified court reporters were not able to fully transcribe Defendants' verification recordings, when they were played at depositions Defendants' attorneys took of consumer witnesses in this case. A true and correct copy of 46 of these audio recordings is being filed as SJ Exhibit 43.

Looking at the statement in its context, it is clear that Mr. Gale formed the opinion that Defendants' verifiers spoke "fast" and that portions of the recordings "difficult to understand or unintelligible" from listening to these tapes over and over. His conclusion is further supported by the fact that the court reporters had difficulty transcribing these recordings at the consumer

depositions. In short, this is a proper lay opinion rationally based on Mr. Gale's perception while listening to the recording.

Second, Defendants' challenge the underlined portion of Gale ¶ 28:

> I and other FTC staff have reviewed 556 complaints that consumers submitted to the Better Business Bureau ("BBB") between October 12, 2004 and July 11, 2008. These complaints were produced to Defendants in discovery as FTC2548 - FTC6769, and are being filed under seal concurrently with the FTC's summary judgment motion as part of *SJ Exhibit 44*. These complaints corroborate the deceptive and abusive business practices described by consumers in the sworn declarations submitted in support of the FTC's summary judgment motion. *See, e.g., SJ Exhibits 27 through 40, Docket #5, and Docket #5-2.*

The language surrounding the challenged statement makes clear that Mr. Gale's conclusion regarding that consumer declarations, which describe Defendants' deceptive and abusive business practices, are corroborated by the BBB complaints. This is a proper lay opinion which is based on Mr. Gale's review of the relevant documents and is admissible under FRE 701.

Finally, Defendants challenge the underlined portion of Gale ¶ 70:

> Defendants produced customer account documents called "SOS Account Detail Reports" for fifteen consumers. Attachment 1 is a true and correct copy of the SOS Account Detail Reports. The SOS Account Detail Reports show that SOS places overlapping multi-year subscriptions to the same publications for its customers, year after year, and sometimes multiple times in the same year. For example, these SOS Account Detail Reports show that over the course of four years, SOS placed four two-year subscription orders to *Reader's Digest* magazine for consumer Jacklyn Magann (in August 2002, October 2003, January 2005, and March 2006). A year later, in April 2007, Defendants placed another one-year subscription order to the same magazine for this consumer. The following year, Defendants placed three, three-year subscription orders to the same magazine for this consumer (in April 2008, October 2008, and December 2008). This indicates that Ms. Magann has been receiving multiple copies of the same issues of *Reader's Digest* magazine over the past seven years (*e.g.,* multiple copies of the December 2008 issue of *Reader's Digest*), or has purchased nineteen years' worth of *Reader's Digest* magazine over the course of five years.

The unchallenged portion of Gale ¶ 70 provides the foundation for the opinion that Defendants challenge by attaching and describing the documents on which this opinion is drawn. Taken in context with the rest of ¶ 70, the challenged statement is a proper lay opinion admissible under FRE 701.

3. The statements that Defendants challenge as "hearsay" are either admissible or curable

Defendants challenge Gale ¶ 62 (a summary of magazine subscription prices) and Gale ¶ 66 (describing the experiences of PBS's "satisfied customers") as hearsay. Defendants object to ¶ 62 on the ground that Mr. Gale compared magazine prices based on information obtained from FTC

telephone calls to magazine publishers. However, a review of paragraph 63 and subparts a-e, shows that the price comparisons with Defendants subscription packages were ultimately based only on subscription prices obtained from www.magazines.com. In making his comparisons, Mr. Gale makes clear which consumer's customer accounts he relied upon and included those documents as part of Attachment 2. *See* ¶ 81. The only information that was not attached was the pricing information obtained from the www.magazines.com website.

Defendants' challenge to Gale ¶ 62 does not affect the merits of the *FTC's* summary judgment motion because the FTC has not cited this evidence as support for any of its proposed undisputed material facts. Gale ¶ 62 is relevant, however, to the FTC's opposition to *Defendants'* summary judgment motion, to refute the *Defendants'* proposed undisputed material fact that they sell "low-cost" magazine subscriptions. *See* Defendants' summary judgment motion (doc. #99 at 14:6 and 27:21). Thus, the FTC requests leave to file a supplemental declaration for Mr. Gale which attaches the pricing information printouts obtained from www.magazines.com and relied upon for his price comparisons. Granting such leave will not prejudice Defendants because, by right, the FTC will have the opportunity to oppose Defendants' cross-motion for summary judgment with affidavits (including additional declarations by the FTC's investigators, if necessary) and other evidence to address this and other proposed material facts that Defendants have set forth in support of their summary judgment motion.[8] If the Court does not grant such leave, the FTC requests that the Court strike only ¶ 62 of Mr. Gale's declaration.

Defendants' second hearsay challenge is to Gale ¶ 66; they object to the description of Mr. Gale's interviews of consumers that Defendants have labeled as "satisfied customers." As discussed above, the Court may admit this evidence pursuant to FRE 807 and *FTC v. Figgie Intl., Inc.,* 994 F.2d 595, 608-09 (9th Cir. 1993).

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[8] Oppositions to the parties' cross-motions for summary judgment, including the evidence the FTC will submit to show that Defendants' material facts are disputed, must be filed "no later than 10 days after this Court's ruling on Defendants' Motion to Strike the FTC's Motion for Summary Judgment (docket #114)." *See* doc. #118.

4. The statements that Defendants challenge as "pure argument" are admissible under FRE 701

Defendants challenge three of Mr. Gale's statements as "pure argument." The Court should overrule these objections because the challenged statements are lay opinions based upon Mr. Gale's review of Defendants' business records and are admissible under FRE 701.

First, Defendants challenge the underlined portion of Gale ¶ 39:

> Defendants' verifiers' deceptive practices, as evidenced by these recordings, are corroborated by the testimony of Defendant Jeffrey Dantuma, who stated at his deposition that his salespeople are instructed to keep reading the script despite intervening questions from consumers. *SJ Exhibit 11 (Jeffrey Dantuma deposition 106:21-25, 107:1-13).*

The challenged phrase is lay opinion drawn from Mr. Gale's lengthy analysis, set forth in the preceding ¶ 38, of a number of verification recordings. Defendants do not challenge Mr. Gale's analysis, nor have they challenged the accuracy of the verification recording transcripts. Thus, the challenged portion of ¶ 39 is a proper lay opinion admissible under FRE 701.

Second, Defendants challenge the underlined portion of Gale ¶ 59.b.:

> Presumably, the consumers in the bad tape report had their accounts cancelled due to Yolanda Woodbury's errors documented within that report; however, consumer Crystal Matthews' account was not cancelled even though Ms. Woodbury had been evasive with her on the question of cancellation. *See* Paragraph 9.d. above; Attachment 8 (transcript) p. 812 (Matthews' verification transcript). In fact, Ms. Matthews received numerous threatening collections calls and letters for several months after her order was verified. *SJ Exhibit 23 (Crystal Matthews deposition 45:23-25, 46:1-25, 47:1-19,90:21-25, 91:1-25, 92:1-25, 93:1-20, deposition exhibit 1 pp. 321, 322, 323, 324, 324-a, 325, 326, 327, 328-a*). After misleading Crystal Matthews, Ms. Woodbury misled another customer, only a month later, in substantially the same way. Attachment 21 p. 995 (*"I did play tape and the tape is BAD tape..The cust did ask cust could she cancel at anytime and she NVR said gave the cust a strait answer..but said they ask THAT YOU DON't.....I did let my mgr (angela) know this and she heard portions of the tape and she said Bad tape as well[.]*").

The balance of ¶ 59.b. shows that the challenged statement is proper lay opinion under FRE 701, drawn from admissible evidence. Specifically, it shows that the opinion is based upon Mr. Gale's review of Defendants' business recordings relating to Ms. Matthews and Ms. Woodbury (FTC's SJ Exhibit 43 (Ms. Matthews verification recording), Gale Attachment 21 at p.995 ("Bad Tape Report" for Ms. Woodbury)) and Ms. Matthews' deposition testimony (FTC's SJ Exhibit 23). Defendants do not object to the admissibility of the evidence from which Mr. Gale bases his lay opinion. Thus, the Court should overrule Defendants' objection to this statement.

Third, Defendants challenge the underlined portion of Gale ¶ 71:

> "Defendants' practice of tricking consumers into paying for duplicate subscriptions is corroborated by several sources, including former SOS salesperson Angelia Ollerman *(see SJ Exhibit 19),* the SOS scripts themselves, and consumer Paula Keith *(see SJ Exhibit 33)*, whom Defendants tricked into ordering a duplicate subscription of *Time* magazine."

The unchallenged portion of Gale ¶ 71 shows that challenged statement is not "pure argument," but a reasonable conclusion drawn from Mr. Gale's review of three separate sources of evidence: the declaration of former employee Angelia Ollerman, Defendants' SOS scripts, as well as the declaration of consumer Paula Keith.[9] Mr. Gale provides further foundation for the challenged statement in the preceding paragraphs (Gale ¶¶ 69,¶ 70). As ¶¶ 60, 70, and 71 make clear, the challenged statement is a lay opinion admissible under FRE 701. Thus, the Court should overrule Defendants' objection to this statement.

5. The statements that Defendants challenge as "speculation" are admissible under FRE 701 because they are lay opinions drawn from admissible evidence

Defendants selectively cite to statements in Mr. Gale's declaration out of context and divorced from any foundational statements to create the appearance of speculative testimony. When viewed in context, however, it is clear that Mr. Gale's statements are reasoned conclusions or inferences based on Defendants' own business records.

Defendants' first challenge is to the underlined portion of Gale ¶ 48:

> Defendants have produced no documentation to show that any of these consumers were previously informed about or agreed to the magazine changes prior to the mailing of the Guarantee. Thus, the change in the publications appears to be a unilateral change to the magazine subscription package made by Defendants after the tape-recorded verification.

Reading the preceding paragraphs (Gale ¶ 46 and ¶ 47) makes clear that Mr. Gale's conclusion that Defendants unilaterally changed some consumer's magazine subscriptions is based on Mr. Gale's review of Defendants' verification recordings and account documents, which memorialize statements that Defendants' verifiers made to consumers, and the fact that Defendants did not produce any other consumer account documentation which would show that the consumer agreed to the magazine changes. The challenged statement is based on the evidence, the admissibility of which Defendants have not challenged, and is a proper inference under FRE 701.

Defendants' second challenge is to the underlined portion of Gale ¶ 54:

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[9] Defendants do not object to the SOS scripts, and they only object to a single, unrelated, statement in ¶ 31 of Angelia Ollerman's declaration.

> However, Defendants' "Bad Tape report" shows the opposite: Defendants' verifier is allowed to stay on and make the same errors and misrepresentations to the consumers year after year. In fact, Dries Dantuma claimed that there was little turnover in the verification department. *(SJ Exhibit 9 (Dries Dantuma deposition 216:9-10)*. For example, the following verifiers have years, if not months' worth of tracked bad tapes: Bianca Gonzalez (BGG), Ashley Fulford (AFU), Janel B (who presumably is Janel Bittner), Yolanda Woodbury, and Renee Spagnol (who is now the verification supervisor *(SJ Exhibit 9 (Dries Dantuma deposition 216:11-217:2))*. Attached hereto are true and correct copies of the following verifiers' Bad Tape Reports, Attachment 2 (Bianca Gonzalez), Attachment 3 (Ashley Fulford), Attachment 4 (Janel Bittner), Attachment 5 (Yolanda Woodbury); and Attachment 6 (Renee Spagnol). The reports show that Defendants' verifiers engage in the same deceptive and abusive practices year after year.

Mr. Gale's "presumption" is not unsupported speculation, but is strong inference drawn from Defendants' business records. Defendants' former and current employee lists show that: (1) "Janel Bittner" is Defendants' only former verification employee who spelled her first name "Janel" and whose last name began with "B"; (2) Janel Bittner was an employee during the relevant time period (September 2004 through July 2007), and (3) there was no employee named "Janel" on Defendants' employee list current as of June 10, 2008. In addition, four consumers' account documents, which reference calls made during the period January 2005 through April 2007 by a verifier named "Janel," also noted that they all had same verifier who went by the initials "JB1" and who signed her name on Defendants' paperwork as "Janel B." *See* third Gale declaration Attachment 2 pp. 542, 543, 557, 558, 566, 567, 583, 584. Thus, Defendants' own business records show that "Janel B." refers to Defendants' former employee Janel Bittner.

To the extent that the Court determines that the declaration insufficiently sets forth the foundation statements to support Mr. Gale's inference that references in Defendants' business records to "Janel B," "Janel," and "JB1" refer to Defendants' former verifier Janel Bittner, the FTC requests leave to file a supplemental declaration of Mr. Gale which further lays foundation to support the challenged statement. Alternatively, if the Court nevertheless decides that the challenged statement is speculative and should be stricken, the balance of Mr. Gale's analysis regarding Janel Bittner's "Bad Tape Report" (Gale Attachment 20), and the verification recording of Denise Dominguez and Patricia Hall done by "JB1" or "Janel B." (Gale Attachments 2 and 8) should stand. In other words, the only real effect of striking Mr. Gale's statement is to support the

conclusion that Defendants employed two verifiers named Janel who engaged in deceptive practices, not one.

Defendants' third challenge is to the underlined portion of Gale ¶ 59b: "Presumably, the consumers in the bad tape report had their accounts cancelled . . ." Defendants take issue with this inference even though it is expressly based on their own business records. A review of Defendants' "Bad Tape Reports" (*see* Attachments 18, 19, 20, 21, 22) shows that these reports typically contain a note describing why a particular verification "tape" is "bad" and also states that the customer's account was being cancelled due to the bad tape. *See e.g.*, notations "*cxl'd acct bad tape*" or *"cxl'd acct due to bad tape*" (Attch 18 pp. 947-951, Attch. 19 pp. 968-973, Attch. 20 pp. 982-986, Attch. 21 pp. 987-995, and Attch. 22 pp. 998-1003). It is curious that Defendants take issue with this presumption since Mr. Gale essentially gave their paperwork the benefit of the doubt on this point.

6. The statements that Defendants challenge as lacking "foundation" are admissible because proper foundation has been laid

Defendants challenge three of Mr. Gale's statements on the ground that the foundation to admit this evidence is insufficient.

First, Defendants challenge Gale ¶ 2, on the ground that there was no foundation for the employee list department key (Attachment 1), which lists each PBS department by department name, department number, and location, and which the FTC cites to support UF 10, UF 12, and UF 16. The document bates-number (PBS001605) shows that Defendants produced it with their employee list to the FTC.[10]

Defendants' second challenge is to the admissibility of Defendants' Wachovia Bank account records, referenced in Gale ¶ 5. Defendants falsely claim that the FTC improperly withheld those documents from Defendants. In discovery, the FTC served Defendants with a

[10] To the extent that the Court finds that the FTC has not satisfied the foundation requirements, the FTC requests leave to cure this error, by introducing foundational evidence, including the representation of Defendants' attorneys that this document identifies the Defendants' "various departments."

written response which *identified* the Wachovia documents as responsive to several of Defendants' document requests. The FTC further responded that:

> As to the Wachovia Documents, the FTC objects to the production of these documents on the grounds that they are voluminous (exceeding 5,000 pages) and the information is equally available to Defendants because they pertain to Defendants' bank accounts. Subject to and without waiver of the foregoing objections, *the FTC can make arrangements to produce the Wachovia Documents to the extent that such production is determined to be necessary.*

Defendants did not challenge this objection and did not request the production of the Wachovia documents. Attached hereto as **Exhibit E** is a true and correct copy of the FTC's response regarding the Wachovia documents.[11]

Defendants' third challenge is to the admissibility of the FTC's transcripts of Defendants' verification recordings, referenced in Gale ¶ 13, on the ground that Mr. Gale does not lay the foundation for the admission of the verification recording transcripts. In the Ninth Circuit, a transcript may be used as an aid to reviewing audio-recorded evidence if:

(1) the court reviews the transcripts for accuracy;

(2) defense counsel is allowed to highlight alleged inaccuracies and to introduce alternative versions,

(3) the jury is instructed that the tape, rather than the transcript, is evidence, and

(4) the jury is allowed to compare the transcript to the tape and hear counsel's arguments as to the meanings of the conversations.

United States v. Delgado, 357 F.3d 1061, 1070 (9th Cir. 2004).[12] The verification recordings have been offered into evidence as FTC's SJ Exhibit 43, and the transcripts have been offered to aid the

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[11] *See* Exhibit E at p.14 (RPD #13), p.19 (RPD #19), p. 20 (RPD #20), and p. 22 (RPD #21).

[12] The FTC's case against Defendants seeks only equitable relief, *FTC v. H.N. Singer, Inc.,* 668 F.2d 1107, 1110-12 (9th Cir. 1982), and thus, this case ultimately will proceed to a bench, not jury, trial. *See, e.g., FTC v. North East Telecommunications, Ltd.,* 1997 U.S. Dist. LEXIS 10531 (S.D. Fla. 1997); *FTC v. Abbott Laboratories,* 1992 U.S. Dist. LEXIS 21474, 1992-2 Trade Cas. (CCH) ¶ 70,087 (D.D.C. 1992); *FTC v. Commonwealth Marketing Group,* 72 F. Supp. 2d 530, 543-544 (W.D. Pa. 1999); *FTC v. Kitco of Nevada,* 612 F. Supp. 1280, 1280 (D. Minn. 1985) (defendants' jury demands stricken in FTC injunctive actions). Although the *Delgado* court set forth the legal standard for evaluating the admissibility of transcripts in the context of a jury trial, the FTC has found no case which would suggest that the *Delgado* standard for admitting transcripts should not also apply to bench trials.

Court in reviewing the recordings. Defendants do not object to the admissibility of the recordings, nor do they contend that the transcripts inaccurately reflect the contents of the recordings. The Court should thus overrule Defendants' objection as to the transcripts.

IV. Conclusion

Defendants are attempting to avoid addressing the merits of the FTC's summary judgment motion by asking the Court to strike whole categories of evidence and entire declarations on the basis of a handful of objections. Defendants have no basis for seeking this relief under the case law or the governing rules. The Court should overrule Defendants' evidentiary objections and deny Defendants' motion to strike. Moreover, to the extent that the Court finds any deficiencies in the FTC's summary judgment filing, the FTC requests leave to cure the deficiencies.

Dated: August 25, 2009

Respectfully submitted,

/s/ Faye Chen Barnouw
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