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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 SCHANG; 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

REPLY IN SUPPORT OF FTC'S MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF ISSUES

1. THE COURT MAY RESOLVE ALL TRIABLE ISSUES ON SUMMARY JUDGMENT

Defendants argue that it is "improper" for the Court to evaluate the FTC's monetary relief claim on summary judgment because of the "astronomical amount" requested by the FTC (doc. #131 at 25:8-10), and because the FTC's evidence on liability is not "credible," "admissible," and undisputed. The Court should reject Defendants' argument for two reasons. First, the Court has already ruled on Defendants' evidentiary objections (see doc. #123), so Defendants' objections regarding credibility and admissibility are misplaced. Second, the district court may properly resolve both the liability and monetary relief issues on a motion for summary judgment. *See, e.g., FTC v. Stefanchik*, 559 F.3d 924 (9th Cir. 2009). This is so even when the amount in controversy is "astronomical." *See id.* (district court's $17 million summary judgment award affirmed). Thus, if the Court finds Defendants liable for violations of the FTC Act, it may impose monetary judgment in the amount of $40,429,893.25, which is the undisputed amount collected by Defendants from consumers during the time period 2004-2008. *See* Defendants' response to FTC's UF163.

2. THE FTC'S SECTION 5 CLAIMS ARE NOT BARRED BY ANY STATUTE OF LIMITATIONS

Defendants argue that the FTC may only recover monetary damages for the three years prior to the filing of the district court complaint. The Court should reject Defendants' argument because it confuses claims brought by the FTC under Section 5 of the FTC Act, as compared with those brought under the FTC's Telemarketing Sales Rule ("TSR").

The FTC's TSR claims are properly before the Court under the authority of Section 19 of the FTC Act. 15 U.S.C. § 57b. Section 19(d) of the FTC Act provides that:

> No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) of this section relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) of this section relates ....

15 U.S.C. § 57b(d). Thus, the FTC's TSR claims are subject to a three-year statute of limitations.

In contrast, however, the FTC's Section 5 claims are properly before the Court under the authority of Section 13(b) of the FTC Act. 15 U.S.C. § 53(b). The second proviso of Section 13(b) provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction" against violations of "any provision of law enforced by the Federal

Trade Commission." Under Ninth Circuit law, a common fraud case such as this one qualifies as a "proper case" for injunctive relief under Section 13(b). *FTC v. H.N. Singer, Inc.,* 668 F.2d 1107, 1111 (9th Cir. 1992). No statute of limitations bars the FTC's claims for Section 5 claims brought pursuant to Section 13(b) of the FTC Act. *See FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 263 (E.D.N.Y. 1998). Moreover, the Ninth Circuit has made clear that Section 13(b) authorizes district courts to grant the ancillary equitable relief requested in this case. *H.N. Singer* at 1113. Thus, the FTC may recover the full extent of consumers' losses, including those losses which occurred more than three years prior to May 14, 2008 (the date the FTC's complaint was filed).

Defendants admit that they have collected $40,429,893.25 from consumers for the period 2004 through 2008. *See* Defendants' response to FTC's UF163. Thus, if the Court concludes that Defendants have violated the FTC Act, it may impose monetary relief in the full amount of $40,429,893.25 against Defendants.

3. DEFENDANTS' CUSTOMER SATISFACTION "SURVEY" IS UNRELIABLE AND INADMISSIBLE

Defendants seek to introduce consumers' responses to two questions printed on their "First Payment Coupons" as evidence that consumers were "satisfied" with their interactions with PBS. The purported survey does not comply with the generally-accepted survey principles set forth in Section II.D. of the Court's October 30, 2009 Order (doc. #123) (citing *Keith v. Volpe*, 858 F.2d 467, 480-81 (9th Cir. 1988); *Schering Com. v. Pfizer Inc.*, 189 F.3d 218, 225 (2nd Cir. 1999), and *Pittsburgh Press Club v. United States*, 579 F.2d 751, 758 (3d Cir. 1978)).

Beyond the methodological deficiencies in Defendants' purported survey, the two questions themselves are also vague, ambiguous, and biased. The purported survey reads as follows:

> *TO HELP US SERVE OUR CUSTOMERS BETTER, PLEASE CHECK:*
> *1. How do you rate the way our representative presented your order?*
> *Excellent* ☐ *Good* ☐ *Fair* ☐
> *2. Were your magazines lists correctly on your order? Yes* ☐ *No* ☐

The First Payment Coupon form also provides space for consumers to write in *"Comments*." *See* SJ Exhibit 70 (fifth Gale declaration ¶¶ 4-8, Attachment 1, italics added).

The First Payment Coupon form does not specify to which of Defendants' three representatives (e.g., Defendants' salesperson, the shift supervisor, or the verifier) the phrase "our

representative" refers. The First Payment Coupon form also does not specify to what the phrase "presented your order" refers (e.g., does it refer to the telemarketer's demeanor? diction? politeness?). The "survey" also impermissibly encourages the consumer to give a positive rating, and in fact does not give consumers the option to rate "the way our representative presented your order" as "POOR."

In short, the First Payment Coupon "survey" questions are deficient both because they do not meet the threshold requirements for admissibility and because the survey questions are vague, ambiguous, and biased. Thus, the Court should not allow Defendants to use their First Payment Coupons as proof that some of their customers are "satisfied."[1]

These First Payment Coupons are probative on a different point, however. A review of Defendants' First Payment Coupons shows that, in many instances, even when consumers rated the way PBS's "representative presented your order" as "excellent," "good," or "fair," they often wrote in negative comments which indicated that the consumers were dissatisfied with the sales pitch. *See* SJ Exhibit 70 (fifth Gale declaration ¶¶ 4-8, Attachment 1). These negative comments include: *"what I heard is not what was said. You should not bother people who are working"; "Unsatisfied! ... "It is very rude to call a place of business for this type of thing. I WANT THIS ACCOUNT CANCELED"*; *"very pushy ... do not call with any more offers"; "It was as though I was forced into buying the magazines"*; *"Talked way to[o] fast. I know you have target times that you can't cross but it was a little ridiculous"*; *"should not call[] people at work. No time to think about the sale";* and *"I feel that I was tricked into making more monthly payments that I cannot really afford for magazines." See* SJ Exhibit 70 (fifth Gale declaration ¶¶ 4-8, Attachment 1). These First Payment Coupon are uncontroverted evidence that the consumers that Defendants characterize as "satisfied" are often, in fact, extremely dissatisfied with their interactions with PBS.

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[1] Moreover, the FTC need not prove that every consumer was injured. *FTC v. Amy Travel Service, Inc.,* 875 F.2d 564, 572 (7th Cir. 1989). The existence of some satisfied customers does not constitute a defense under the FTC Act. *Id.*

4. THE COURT SHOULD REJECT DEFENDANTS' ARGUMENT THAT MOST OF THEIR CUSTOMERS ARE "SATISFIED"

Defendants ask the Court to accept their claim that any customer who has not filed a "Third Party Complaint" is "satisfied" customer. The Court should reject this claim as unsupported by the evidence.

First, the low complaint percentage that Defendants proffer is unreliable. Defendants define "Third Party Complaint" to consist only of *written complaints made to consumer organizations, private attorneys or government entities*, and to exclude complaints that consumers made directly to company. *See* doc. #99 at 10:18-21. It does not include the many complaints that consumers made directly to the company, either by telephone or in writing, documented by FTC's summary judgment exhibits.

Second, the evidence shows that even Defendants' "paying" customers, who did not complain or cancel their orders, are dissatisfied with Defendants' sales tactics and feel they were tricked into the magazine order. For example, consumer Everal Toomer, Jr. felt "trapped [by PBS's tactics]... and that [he] didn't have any alternative but to pay the bill." *SJ Ex. 40 (Toomer declaration* ¶8). He unequivocally states that he has "never been a satisfied customer of PBS." *Id at ¶14.* Similarly, consumer Dawn Campbell stated that PBS "tricked [her] into paying much more than [she] was originally told." *SJ Ex. 29 (Campbell declaration ¶ 11).* She described her experience in dealing with PBS as "very unsatisfactory." *Id.* Consumer Danielle Shepard likewise describes herself as "thoroughly dissatisfied" with PBS and feeling "forced into paying [for] something that [she] never agreed to and did not want." *SJ Ex. 62 (Shepard declaration ¶ 5).* Ms. Shepard states that she "knew [she] hadn't agreed to buy anything from [PBS]," but felt like she had "no choice but to pay" in part because PBS' phone calls to her work were a "major distraction and [she] needed them to stop calling." *Id.* ¶ 2. *See* **SJ Exhibit 70** (fifth Gale declaration ¶ 9).

5. THE COURT SHOULD REJECT AS IRRELEVANT DEFENDANTS' ATTACK ON THE EMPLOYMENT TENURE OF THE FORMER EMPLOYEE DECLARANTS

Defendants attempt to discredit the declarations of their former employees (FTC's SJ Exhibits 15-19) on the ground that none of the employees worked for Defendants for longer than ten months. Defendants' own business records show, however, that the vast majority of their employees are "short-timers." *See* SJ Exhibit 70 (fifth Gale declaration ¶¶ 2, 3). Moreover,

Defendants set forth no logical reason how the length of an employee's tenure would affect the employee's recitation of his or her first-hand experience. The Court should thus reject Defendants' argument as a red herring.

6. THE COURT SHOULD REJECT DEFENDANTS' ATTACKS ON THE FTC'S CONSUMER DECLARATIONS AS BASELESS

Defendants attack some of the FTC's consumer declarations on the ground that they were "merely the parents of PBS customers." (Doc. #131 at 17:5-6.) Those declarations set forth in detail the parent's (and in some cases, the spouse's or the boss's) first-hand interactions with Defendants' customer service and collection department employees, including specific misrepresentations and harassing conduct that the parents, spouses, and bosses witnessed first-hand. These declarations include admissible testimony directly relevant to the FTC's claims and defenses. The Court should thus reject Defendants' attack on the declarations.

Defendants attack other consumer declarations on the ground that the consumers admit that they were not paying full attention to what Defendants' salespeople said during Defendants' telemarketing calls. The fact that some consumers did not listen with heightened attention to everything Defendants' salespeople is relevant to the FTC's uncontroverted claim that Defendants engaged in a deliberate practice of making their sales pitch to the person at each business who answers the business' telephone lines. Moreover, the verification recordings show that in many instances the consumers' inattention is obvious, and that Defendants' verifiers capitalize on this inattention to get "yes" or "okay" answers when it is clear that the consumer has not really absorbed the purported disclosures. *See, e.g.,* SJ Exhibit 43 (verification recordings) and SJ Exhibit 42 (third Gale declaration at Attachment 8) (verification recording transcripts). The Court should thus reject this attack on the consumer declarations as well.

Finally, Defendants attack some of the consumer declarations on the ground that were executed "months, if not years," after Defendants' salespeople made the telemarketing calls to those consumers, and that therefore they are "rendered suspect by the natural tendency of human memory to fade over time." (Doc. #131 at 17:12-14, 19:22-23.) The declarations are clear, however, about what the consumers do and do not remember. *See, e.g.*, SJ Exhibit 33 (Paula Keith declaration) (declarant states specifically what she does not remember (*see, e.g.,* SJ Exhibit 33 at

¶ 2), but she is also clear about what she did remember at the time she signed her declaration (e.g., *id.* at ¶¶ 2-6)). Moreover, these declarations are corroborated by SJ Exhibit 48-62 (consumer declarations re Defendants' recent telemarketing calls), which show that Defendants are engaging in the same or worse telemarketing practices. The Court should thus reject Defendants' "staleness" argument as lacking in merit.

7. DEFENDANTS HAVE NO BASIS FOR THEIR NARROW CHARACTERIZATION OF THE REACH OF SECTION 5 OF THE FTC ACT

Defendants argue that where the sale of goods is concerned, a violation of Section 5 of the FTC Act may occur only where the *nature* or the *cost* of the goods is misrepresented. The Court should reject this argument as contrary to the well-established case law which has interpreted and applied the FTC Act to a wise range of deceptive acts and practices, including the deceptive door opening sales tactics and false surveys that Defendants have used in selling their magazine subscription packages. *See, e.g., FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994) (adopting the *FTC Policy Statement on Deception,* appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 176 (1984); *Grolier v. FTC*, 699 F.2d 983, 987 (9th Cir. 1983).

Defendants also argue that the Court must find that Defendants engaged in "bold-faced lies" in order to conclude that they have violated Section 5 of the FTC Act. *See* doc. #131 at 8-12. As discussed previously, however, the case law is clear that a sales pitch may violate Section 5 even if the claims in the sales pitch are literally true, if the net impression it leaves with consumers is deceptive.

8. DEFENDANTS' TELEMARKETING PRACTICES CONTINUE TO GET WORSE

The Court entered a stipulated Preliminary Injunction in this case (doc. #25) in June 2008. Since then, Defendants have not corrected their telemarketing practices and in fact have become more aggressive in their attempts to trick consumers into paying hundreds of dollars for magazine subscriptions. Declarations from consumers who were solicited by Defendants after the Court entered the stipulated preliminary injunction show that Defendants are now demanding $897, rather than $720 or $717.60, from consumers. *See, e.g.,* SJ Exhibit 49 (Cox declaration), SJ Exhibit 52 (Hall declaration), SJ Exhibit 55 (Moerler declaration), SJ Exhibit 56 (B.O'Brien declaration), SJ Exhibit 57 (H.O'Brien declaration), SJ Exhibit 58 (Parris declaration), SJ Exhibit 59 (J.Pate declaration), SJ Exhibit 60 (S.Pate declaration), SJ Exhibit 61 (Raymond declaration).

Two of the declarations also show that Defendants' verifiers tell consumers that the total cost of the magazine subscription package is $8.97 ("eight ninety seven"), rather than $897 ("eight hundred ninety seven dollars"). *See, e.g.,* SJ Exhibit 56 (B.O'Brien declaration), SJ Exhibit 57 (H.O'Brien declaration).

9. DEFENDANTS' ASSERTION THAT THEY CLEARLY DISCLOSE ALL MATERIAL TERMS OF THE OFFER IS CONTRADICTED BY THEIR OWN EVIDENCE

Defendants' claim that all material terms of Defendants' offer (including the length of the subscription term, the amount of each monthly payment, and the number of payments) are "thrice-repeated" (doc. #131 at 7:5) is illusory. As discussed below, the first disclosure is incomplete and presented in a way that imply that the terms are voluntary; the second disclosure is often incomplete and misleading, and as discussed in the FTC's motion (*see* doc. #88), made after the consumer is told the disclosures are nothing more than a confirmation of previously-discussed information); and the third disclosure is made after the point where Defendants claim consumers committed to Defendants' material terms.

Specifically, the first time that Defendants purportedly disclose the material terms is through their "shift supervisors" (the second PBS employee that talks to the consumer). *See*, *e.g.,* FTC's UF115. As the scripts show, the shift supervisor does not disclose all of the material terms. *See, e.g.,* FTC's UF124. Moreover, the disclosure that the shift supervisor does make is done in a way that it sounds like a suggestion, rather than a mandatory, material term. *See, e.g.*, FTC's UF116.

The second time that Defendants purportedly disclose the material terms is through their verifiers. However, according to Defendants' own scripts, the verification recording is really the first time that all of the material disclosures are supposed to be made. *See, e.g.,* FTC's UF124. Moreover, Defendants' verification recordings show that in practice, Defendants' verifiers are inconsistent about making these disclosures. *See, e.g.*, SJ Exhibit 43 (verification recordings); SJ Exhibit 42 (third Gale declaration Attachment 8) (verification recording transcripts); doc. #133 (Defendants' CD containing verification recordings); SJ Exhibit 70 (fifth Gale declaration at Attachment 2) (verification recording transcripts).

The third time that Defendants purportedly make these disclosures is in the written invoice (which Defendants also refer to as the "guarantee"). A visual inspection of any of Defendants' written invoices shows that it is difficult to spot the material terms. The total price is buried in the bottom third of the invoice. The payment terms are difficult to pick out, as is the non-cancellation clause. *See, e.g.,* SJ Exhibit 42 (third Gale declaration at Attachment 2) (invoices sent to consumers by Defendants). This "third disclosure" comes too late. As discussed in the FTC's memorandum (doc. #88), consumers who read Defendants' written invoice and discover the material terms for the first time, typically call Defendants to complain or cancel. Defendants' response to these requests is to claim that consumers previously agreed, during the recorded verification call, to these terms. Given that Defendants attempt to hold consumers to the terms disclosed in the "second disclosure," the third disclosure (the written invoice) serves no practical purpose whatsoever in terms of forewarning consumers of the terms of Defendants' offer.

10. DEFENDANTS' MAGAZINE SUBSCRIPTION PACKAGES ARE NOT A "GOOD DEAL"

In their summary judgment motion papers, Defendants' counsel tries to district the Court from the blatant deceptiveness of Defendants' business practices by (irrelevantly) characterizing Defendants' magazine subscription packages as a "good deal." In their Opposition, they argue that "[t]he law does not prohibit PBS from trying to retain its accounts by reminding customers that PBS offers a good deal." (*See* doc. #131 at 8:9-10.) In fact, Defendants' deal is not a "good deal." As discussed in Section III.C. of the FTC's Opposition to Defendants' summary judgment motion, the FTC's evidence shows that Defendants' magazine subscription packages are not discounted or otherwise "low cost," and in fact are typically *substantially more expensive* than magazine subscriptions available on the open market. *See* doc. #136-1 (SJ Exhibit 67, fourth Gale declaration ¶¶ 2-8, pp.6320-6328, and Gale Attachments 1-14). Moreover, Defendants concede that they are not able to negotiate discounts with magazine publishers, and that prices are set unilaterally by the publishers. *See* SJ Exhibit 63 (Brenda Dantuma Schang deposition transcript (vol.1) at 36:12-25 and 37:1-7). Moreover, the law does in fact "prohibit PBS from trying to retain its accounts" when those attempts are made using the deceptive, harassing, and abusive tactics that Defendants use. *See generally* doc. #88 and doc. #134 and supporting evidence.

11. DEFENDANTS' OWN NUMBERS CORROBORATE THE FTC'S CONCLUSION THAT DEFENDANTS REMIT LESS THAN 10% OF THEIR REVENUES TO MAGAZINE PUBLISHERS

In their Controverting Statement of Facts (doc. #132 and #132-2), Defendants dispute the FTC's UF182 ("The 'remit rates' for the magazines that PBS offers in its telemarketing calls range from zero to ten percent."). However, Defendants' own numbers, set forth in their response to the FTC's UF163 and #184 shows that this is in fact undisputed.

Specifically, in response to FTC's UF163, Defendants claim that from 2004 through 2008, they have collected a total of $40,429,893.25 from consumers through their PBS and SOS sales (instead of the $40,456,893.25 that the FTC set forth in UF163). *See* docket #132-2 at p.69. In response to the FTC's UF184, Defendants claim that the amount of money remitted to the magazine publishers from 2004 through 2008 is as follows: 2004: $812,372.25; 2005: $831,897.66; 2006: $879, 850.54; 2007: $887,314.37; 2008: $595,527.67. *See* docket #132-2 p.81. This is a total of $4,006,962.30 remitted to the magazine publishers for the 2004-2008 time period. Thus, according to Defendants' own numbers, between 2004 through 2008, Defendants have remitted to the magazine publishers approximately 9.9% of the revenue they have collected from consumers through their PBS and SOS sales. In short, Defendants' numbers show that they sell magazine packages which result in an aggregate remit rate of less than 10% of the money collected from consumers. *See* SJ Exhibit 70 (fifth Gale declaration at ¶ 13).

12. EACH OF THE MATERIAL FACTS NECESSARY TO SUPPORT SUMMARY JUDGMENT IN THE FTC'S FAVOR ARE UNDISPUTED

A review of "Defendants' Controverting Statement of Facts" (doc. #132) shows that Defendants concede enough of the FTC's material facts for the Court to grant summary judgment on all counts of the amended complaints.[2]

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[2] Facts which are undisputed without qualification include: FTC's UF1-7, 10-25, 28-34, 37-41, 43-44, 50-56, 62, 64-65, 67, 69-70, 72-74, 77-80, 83, 85-87, 89, 91, 98, 111, 115, 119, 124, 131, 153-158, 162, 164-166, 168-169, 178, 180-181, 185-187, 189, 206, 210, 214, 230-234. Facts which Defendants do not dispute (but for which Defendants characterize as "incomplete" and for which they provide additional information) include: FTC's UF26, 47-48, 82, 84, 90, 92-94, 97, 146, 148-150, 152, 159. Defendants "dispute" the following facts, but a review of their response shows that the dispute does not affect the import of the FTC's evidence: FTC's UF8-9, 27, 57-61, 66, 71, 75-76, 42-43, 49, 68, 81, 121-123. In Defendants' responses relating to the following of Defendants' "disputed" facts, Defendants argue that the FTC's evidence does not support the fact

a. The undisputed facts show that Defendants' telemarketing scheme is subject to the TSR

Defendants concede that their telemarketing scheme involves calls to consumers on their home and cell telephone numbers. *See, e.g.,* Defendants' response to FTC's UF130. Thus, even under Defendants' own contorted interpretation of the TSR's business-to-business exemption, the TSR applies to their telemarketing calls. Further, as discussed in the FTC's Opposition to Defendants' summary judgment motion (doc. #134), both the plain language and the FTC's published intent make clear that the business-to-business exemption applies only to transactions between businesses, and does not shield telemarketers from liability for deceptive and abusive telemarketing calls to consumers at their place of business.

b. The undisputed facts show that Defendants' sales pitch is deceptive

Defendants do not dispute any of the material facts necessary for the Court to grant summary judgment on Count One and Count Five of the FTC's amended complaint (misrepresentations in the initial call and to induce payment). Defendants do not dispute that:

– their sales pitch consists of the lead scripts (Attachment 5 to FTC's SJ Exhibit 42), the shift supervisor scripts (Attachment 6 to FTC's SJ Exhibit 42), and the verification scripts (Attachment 7 to FTC's SJ Exhibit 42) (*see, e.g.,* Defendants' response to FTC's UF90, 92, 93);

– **Attachments 5, 6, 7, and 23 to SJ Exhibit 42** are the actual scripts that Defendants' PBS salespeople, PBS shift supervisors, PBS verifiers, and SOS salespeople use (*see, e.g.,* Defendants' response to FTC's UF90, 92, 93); or

– **SJ Exhibit 43** (verification recordings filed under seal), **Attachment 8 to SJ Exhibit 42** (transcripts of SJ Exhibit 43 verification recordings) accurately reflect the portions of Defendants' verification calls that the recordings and transcripts purport to reflect.

The parties differ as to the "net impression" conveyed by Defendants' sales pitch to the reasonable consumer, but this is a mixed issue of law and fact to be resolved by the Court. As the FTC notes in its Opposition to Defendants' summary judgment motion (doc. #134 at Section II.E.), the Ninth Circuit holds it is the net impression conveyed by a solicitation, "not its literal truth or

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but do not provide any evidence of their own to show that the fact is untrue: FTC's UF35, 45-46, 63, 151.

falsity," that determines whether it is deceptive. *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200, 1201 (9th Cir. 2000); *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009). Furthermore, it is undisputed that Defendants' target customer is the person who answers the company's telephone lines, and thus the net impression should be determined from the viewpoint of the reasonable consumer answering his or company's telephone lines.

Furthermore, the FTC's evidence is also undisputed that Defendants' salespeople and verifiers go "off-script," even though Defendants' company policy is for them to read the scripts "word-for-word." For example, Defendants' verification recordings for Everal Toomer and Leslie Narramore show that Defendants' verifiers sometimes present the cost in terms of weekly, monthly, and then doubled-up monthly cost, even though Defendants' verification scripts do not disclose cost in that manner. *See, e.g.,* doc. #133 (Defendants' CD containing Toomer and Narramore recordings); and SJ Exhibit 70 (fifth Gale declaration at Attachment 2) (transcripts of Toomer and Narramore recordings). *See also* FTC's UF179 and Defendants' response to FTC's UF179 (Defendants' narrative response shows that what they dispute is whether they authorize their employees to go off script; the fact that some of their employees have gone off script is *not* in dispute).

c. The undisputed facts show that Defendants make misrepresentations in their subsequent communications

There are also sufficient undisputed facts for the Court to grant summary judgment on Count Two of the FTC's amended complaint (misrepresentations in subsequent communications). Defendants do not dispute that they send out collection letters and that the collection letters contain some statements which are not true (including their status as member of a credit reporting agency, and the fact that they have a "legal department," among other things. *See e.g.,* Defendants' response to FTC's UF146, 148, 149, 150. Defendants also do not dispute that their collection department makes telephone calls to consumers to get the consumers to pay on their "accounts." Defendants' disputes with the FTC's facts on this issue go to the "net impression" conveyed by Defendants' collection efforts (including both the collection letters and the telephone calls). The only material dispute between the parties on this issue is the net impression conveyed by Defendants' representations in their subsequent communications with consumers. This is an issue

that should be resolved by the Court under the Ninth Circuit's unequivocal "net impression" case law.

d. The undisputed facts show that Defendants fail to disclose the purpose of their telemarketing call

Defendants do not dispute the script language their salespeople use at the beginning of their telemarketing calls. The parties disagree as to the net impression conveyed the script as to the purpose of the call. As discussed above, the Court may grant the FTC's summary judgment motion as to Count Four of the amended complaint even though the parties disagree on the net impression conveyed by Defendants' scripts.

In arguing that they promptly disclose the true purpose of their telemarketing calls, Defendants point to the questions that Defendants' salespeople ask at the beginning of the sales call (*"I just wanted to ask you a few questions on your personal buying habits and if you could help me we have a small surprise for you, nothing big but it's nice"*). Defendants point to this language as what makes "the purpose of the lead call [] evident." (*See* doc. #131 at 21:23.) Defendants characterize the questions that follow that introduction as "qualification" questions designed to verify the "creditworthiness" of the potential customer. (*See* doc. #131 at 21:24, 21:28.) The sales pitch should be viewed from the perspective of the consumer receiving the telemarketing call: if you were the consumer receiving the call, what would you think was the purpose of the call, having heard that part of the sales pitch? Would you think it was a survey? Would you have any reason to think that you were being asked "qualification" questions designed to verify your "creditworthiness"? Even Defendants themselves refer to it as a "survey" in one of their verification scripts. *See* doc. #100-2 (SJ Exhibit 42, third Gale declaration, Attch. 7. at p.729 (PBSS000269) ("*I'm just calling you to thank you for doing the survey and the magazine order with us just a little while ago, and I just need to quickly tape verify the information with you, ok?*") (emphasis added).

Moreover, even if the Court accepts Defendants' characterization of those questions as "pre-qualification" questions designed to test the potential customers "creditworthiness," Defendants have still failed to promptly disclose the purpose of their call, because Defendants give the consumer no reason to think that the questions are being asked as pre-qualification or an

assessment of creditworthiness as a prelude for a sales pitch. Either way, Defendants have failed to disclose the true purpose of the telemarketing sales call. They are liable under both the FTC Act and the TSR for their failure to do so.

e. The undisputed facts show that Defendants misrepresent the total costs of their magazine subscription packages

The FTC's consumer declarations, verification recordings, and transcripts of the verification recordings show that Defendants' verifiers misrepresent the total cost of Defendants' magazine subscription package in terms of nominal shipping and handling (e.g., $7.20 or $8.97), rather than the much higher true cost (e.g., $720 or $897). *See* FTC's Opposition to Defendants' summary judgment motion at Section II.F.1. The scripts themselves may be read to allow these misrepresentations, and Defendants have not put forth any evidence which would dispute the fact that these misrepresentations occur. On this ground alone, the Court should grant the FTC's summary judgment motion as to Count Four of the amended complaint.

Moreover, the scripted sales pitch (consisting of the scripts used by the salespeople, shift supervisors, and verifiers) viewed together show that even when Defendants' employees follow the scripts word-for-word, the sales pitch leaves consumers with the net impressions that the total cost of Defendants' magazine subscription package is substantially different from the actual total cost. *See* FTC's Opposition to Defendants' summary judgment motion at Section IV.C.

f. The undisputed facts show that Defendants engage in a pattern of abusive telephone calls

The FTC's evidence documents the fact that Defendants' employees have engaged in a pattern of abusive telephone calls in connection with their telemarketing program. The FTC's evidence also shows that in Defendants' St. Paul, Minnesota office, employees were instructed to put the "lead cards" which did not generate a "lead" back into the call pile so that the same consumers were called repeatedly even after stating they were not interested in Defendants' offer,[3] and that the verifiers (in Defendants' Altamonte Springs, Florida office) engaged in similar practices.[4] Defendants argue that they do not authorize their employees to make abusive telephone calls, but they do not dispute that the abusive calls have occurred. Defendants also do not put forth

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[3] *See* SJ Exhibit 15 (Aljubilah declaration ¶ 9).
[4] *See* SJ Exhibit 16 (Cholewin declaration ¶¶ 18, 19).

any evidence showing that they supervised each of their sales offices (including their St. Paul, Minnesota office), or that whatever supervision might have existed over each office would be sufficient to prevent their employees from engaging in abusive telemarketing practices.[5]

g. The undisputed facts show that Defendants operated as a common enterprise

Defendants argue that the 1971 FTC Order against Keystone Readers Service and the settlements that Defendants have entered into with various State Attorneys General have no relevance to the Court's evaluation of Defendant PBS's business practices. (Doc. 131 at 13:15-28, 14:1-6). The FTC respectfully submits that these Orders are directly relevant to the issue of

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[5] Complaints that consumers submitted to the Better Business Bureau (FTC's SJ Exhibit 44) corroborate the FTC's consumer declarations in their descriptions of Defendants' abusive and harassing telephone calls. These complaints include:
– SJ Ex. 44 p.1170 (Kim Carlsen: *"I just want them to stop harassing me and make sure that they can't report anything on my credit history as well because they threatened they would report it."*);
– SJ Ex. 44 p.1189 (Hellen Kinast: *"he said that I could not cancel they could not get a hold of the people who supply the magazines and that I was going to be turned in for fraud because they have me on record agreeing."*);
– SJ Ex. 44 p. 1311 (Ryan Larsen: *"I have told several people there (by phone and mail) that I did not agree to pay for anything and would like the account they created for me (also not authorized) to be terminated. I am getting nowhere as they refuse to do so and just keep telling me I owe them the money and there's nothing I can do about it. They have also recently threatened to ruin my credit if I don't pay."*);
– SJ Ex. 44 p.6176 (Sadie Porter: *"I also got a harassing phone call from their 'collection agency' that they use and said that she doesn't care if I get the magazines all she wants to know if I was going to pay the bill or not and threatened to sue me and my place of employment."*);
– SJ Ex. 44 p. 6228 (Sara Freeman: *"I told him that I was the owner of the store and that Robin [her daughter] did not have the authority to make this purchase as her name is not on any of my business accounts. He told me that the only way I could cancel this order was to file charges against Robin and fax him the police report. He then offered me a two-year option, but I would have to pay in full today ($362.05)."*);
– SJ Ex. 44 p. 3317 (Scott Pierce: *"I received another phone call yesterday from this company at my place of employment. I had told then previously not to call me there again, but this did no good. Yesterday I was told by the gentleman on the other end that he would be turning me over to a collection agency for the 'full price of the six year contract' I had made with them which would be over $700 and would ruin my credit."*);
– SJ Ex. 44 p.4550 (Jackie Baryk: *"On 01-04-08, I received a call from Shelly (settlement dept PBS) who states that if I did not pay it would be sent to collections for $720.00. She claims I would lose in court because of the verification tape.")*; and
– SJ Ex. 44 p.4544 (Argentina Maldonado: *"They kept telling me that if I didn't pay they would take me to court and report it[.]"*).

whether each Defendant, acting as a "common enterprise," knew the business practices employed by PBS are illegal, and if they did not, whether Defendants *should have known* these practices are illegal, *were "recklessly indifferent"* to the truth or falsity of the misrepresentations their employees made, or were *"aware of the high probability of fraud along with an intentional avoidance of the truth."*[6] Defendants have been put on notice repeatedly that their business practices are illegal. Defendants have represented in consent judgments and assurances of voluntary compliance that they would stop these specifically-described bad practices. Despite this notice and their promises to stop their bad conduct, they continue violating the law unabated. The Court may conclude from this that Defendants will not stop their bad practices until they are permanently banned from telemarketing and from selling magazine subscription packages, and until they are ordered to provide restitution to their victims.

Under the common enterprise legal doctrine, the Court may hold Ed Dantuma Enterprises, Inc. ("EDE") and Publishers Business Services, Inc. ("PBS") jointly liable for EDE's violations of the FTC Act and TSR under the common enterprise legal doctrine. Likewise, the Court may also hold both entities jointly liable for PBS's violations. The FTC's material facts on the common enterprise issue (FTC's UF230-234) are undisputed and support the conclusion that Defendants operated EDE and PBS as a common enterprise. Under the common enterprise doctrine, Defendants may not shield PBS from liability merely because it came into existence after the other Defendants entered into settlements and consent orders with the FTC and the State Attorneys General.

h. The undisputed facts show that Defendants collected $40,429,893.25

Defendants' response to FTC's UF163 shows that from 2004 through 2008, "PBS collected $39,280,100.98 from customers in connection with PBS sales ... [and] $1,149.792.27 from Subscription Order Services sales." Defendants have thus collected a total of $40,429,893.25 in

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[6] Followed to its logical conclusion, Defendants' argument would require the Court to give Defendants a "free pass" because they formed PBS after those orders and settlements were entered, and to give Defendants a free pass each time in the future when they start up a new corporate entity, even if the new entity engages in exactly the same deceptive acts and practices as Defendants' former business.

connection with PBS and SOS sales. Ninth Circuit law provides that if the Court concludes that Defendants' telemarketing sales pitch violated the FTC Act, the Court may award equitable monetary relief in the full amount of loss incurred by consumers. *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009).

i. The undisputed facts support the imposition of the requested injunctive relief against each of the individual Defendants

Defendant Edward Dantuma does not dispute the FTC's facts which show that he had the authority to control the deceptive acts and practices. Each of the other individual Defendants do not dispute the FTC's facts which show that they directly participated in the deceptive acts and practices. Furthermore, while Defendants argue that they have not made any misrepresentations, they do not dispute that they knew of the representations contained in the scripts that their employees used. They also do not dispute that they were aware of the consumer complaints and state Attorney General actions generated from their business practices. If the Court concludes that Defendants' sales pitch creates a "net impression" which is deceptive, or that it used deceptive "door opening" sales tactics, it should also conclude that Defendants knew of the misrepresentations, were "recklessly indifferent" to the truth or falsity of the misrepresentations, or at the very least, were "aware of the high probability of fraud along with an intentional avoidance of the truth" – the standard under which the Court may impose injunctive liability. Under the Ninth Circuit's *Stefanchik*, *Cyberspace*, and *Publishing Clearing House* line of cases, and based on these undisputed facts, the Court may impose the permanent injunctive relief that the FTC seeks in its proposed Order (doc. #108).

j. The undisputed facts support the imposition of the requested monetary relief against each of the individual Defendants

The Court may grant monetary relief against each of the individual Defendants if it concludes that: (1) the misrepresentations that Defendants made to consumers were the type upon which a reasonable and prudent person would rely; (2) consumer injury resulted; and (3) the individual Defendant "had knowledge that the corporation or one of its agents engaged in dishonest or fraudulent conduct." *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1234 (9th Cir. 1999) (citing *Publ'g Clearing House*, 104 F.3d at 1171). As discussed above, the Court should find that each of the individual Defendants either had actual knowledge of material misrepresentations, were

recklessly indifferent to the truth or falsity of a misrepresentation, or had awareness of a high probability of fraud along with an intentional avoidance of the truth. Under the Ninth Circuit's *Stefanchik*, *Cyberspace*, and *Publishing Clearing House* line of cases, and based on these undisputed facts, the Court may impose $40,429,893.25 in equitable monetary relief against each individual Defendant.

Dated: December 7, 2009

Respectfully submitted,

/s/ Faye Chen Barnouw
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