on credit card or other bills.

The remaining defe

[1] The amended complaint named also as defendants Integretel, Inc. ("Integretel") and its subsidiary, eBillit, Inc. ("eBillit") (collectively, the "Integretel defendants"), which entered into a consent decree. *See FTC v. Verity Int'l, Ltd.*, No. 00 Civ. 7422 (LAK) (S.D.N.Y. Nov. 21, 2002). A third-party complaint against AT&T also has been resolved.

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[5] Pre-trial Order ("PTO") § III ¶ 2 (All subsequent references to the PTO, unless otherwise indicated, are to Section III, which contains stipulations of facts).

[6] PX 133 ¶¶ 2-3, 28 (Blanchard Decl.); PX 161 at 4-5 (Oriel, 2000 Annual Report); ACL Defs. SJ Mem. 26.

[7] PX 133 ¶ 27.

[8] PTO ¶¶ 5-6, 17-18, 21; PX 156 at 5 (Blanchard Decl.).

[9] PX 156 at 5.

[10] PTO ¶¶ 6, 8, 18.

[11] *Id*. ¶¶ 5, 15, 17, 20.

and Verity from the date the companies were incorporated up until September 18, 2000 and October 2, 2000, respectively.[12] Most of the companies' activities were based upon industry contacts that these two individuals developed over a ten-year period.[13]

ACL continued operations after the Oriel acquisition in September 2000 and became the key focus of Oriel's business operations.[14] Verity's operations, by contrast, were short-lived. It apparently began operations just prior to the Court's issuance of a temporary restraining order in October 2000 and ceased all operations soon afterward.[15]

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12 *Id.* ¶¶ 22-23.

13 *See* PX 154 ¶¶ 2, 19 (Green Decl.); PX 155 ¶¶ 2, 14 (Shein Decl.).

14 PX 161 at 4.

15 PX 156 ¶ 3.

16 PX 133 ¶ 28. Although defendants indicate that their billing system could have been used to provide any type of web content, not just pornography, they do not dispute that the websites in question exclusively carried adult content. *See* ACL Defs. SJ Mem. 26; *see also* Chacon Dep. 15 (Shein told eBillit representative that websites provided adult entertainment); Calgano Dep. 51 (Shein made same representation to Integretel representative).

[17] PX 133 ¶ 28. The website might offer also the alternative of paying by credit card.

[25] *See* PX 133 ¶ 28.

[26] *See* PX 151B ¶ 9; PX 133 ¶ 28; P.I

[29] PX 133 ¶ 15; PX 1 at 3 (Verity bill); PX 6 at 2 (same).

[30] *E.g.*, PTO Ex. A at 3-11.

[31] Despite defendants' representations that ACL played a minimal role in the billing system, representatives of ACL and Verity described the companies as providers of dialer billing systems. *E.g.*, PX 133 ¶ 28 (Blanchard Decl.) (describing how the "dialer service provided ACL"

[32] *See* PTO ¶ 24; PX 157A; PX 133 ¶ 5.

[33] PX 157A Ex. 1.

[34] PTO ¶¶ 31-32.

[35] PX 157A Ex. 2; PX 150 at 13. Although the agreement identifies the contracting parties as GIB and Western Connections (as opposed to ACL), defendants have represented that the agreement was between GIB and ACL. *E.g.*, ACL Defs. SJ Mem. 5 ("ACL

dialing and granted ACL some authority to approve disclaimers.[37] ACL did not itself create or provide web content.[38]

3. The Carrier Agreements

(a) The AT&T Agreement

The other components to ACL's billing system were its agreements with originating carriers – first AT&T and then Sprint – to carry, bill for, and collect on the calls.[39] In January 1999, ACL entered into an agreement with AT&T and AT&T U.K. (later known as Viatel) for the carriage and termination of traffic to the Madagascar telephone numbers assigned to ACL.[40]

42 calla

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37 PX 150 at 13.

38 PTO ¶¶ 29-30.

39 In order to bypass the line subscriber's designated carrier, the dialer placed the call using a dial-around sequence in the format 10-10-CIC, where CIC represented the unique identification code of the carrier chosen by ACL. Fox Dep. 32-33; McHale Dep. 41-42.

40 PTO ¶ 34; PX 151A.

41 PX 151A at 2.

42 PTO ¶ 45; PX 151A at 6-7.

[43] PX 151A at 6-7.

[44] *Id.* at 3.

[45] PTO ¶¶ 3

[50] *Id*. at 3.

[51] *Id*. at 8.

[52] *Id*.

[53] The first disclaimer stated:

"By

Although Sprint originally agreed to bill and collect for charges, it never did so. The parties entered a settlement agreement on August 16, 2000 that called for an end to the July 11 agreement on or before September 18, 2000.[54] The settlement agreement released Sprint from its billing and collection responsibilities, but permitted ACL to perform these activities so as long as ACL followed certain protocols.[55] For example, ACL agreed to charge users no more than $3.99 per minute and to use customer-friendly collection practices.[56] In addition, the agreement required ACL to pay Sprint a per minute transport fee.[57] Sprint agreed to provide ACL with the ANI information needed to identify the subscribers whose lines had been used to call the Madagascar phone numbers.[58]

The settlement agreement stated that Sprint was induced to sign only upon ACL's warranting that the calls were actually being terminated inside Madagascar.[59]

4. The eBillit Agreement

After Sprint declined to bill for the ACL traffic, ACL made other arrangements to bill

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54 PX 204 at 1, 7.

55 *Id.* at 2.

56 *Id.*

57 *Id.* at 8.

58 *Id.* at 2.

59 *Id.* at 1.

60 PX 184. Green and Sheen negotiated the agreement on behalf of ACL, but Green arranged for the agreement to be in Verity's name, not ACL's, on the day the agreement was signed. *See* PX 191 (email from Green to Calgano on August 21, 2000) ("Our accountants have advised us to put the billing into one of our subsidiary companies. Would this present any problems to you? If not would you produce the contract in the name of 'Verity International Ltd' (VIL) and we can sign it today."); Calgano Dep. 131-35. Tellingly, the agreement named ACL (not Verity) as the recipient of net proceeds collected under the agreement. *See* PX 184 at 5, 18. Integretel also replaced its name with that of its subsidiary, eBillit, in the final agreement, even though negotiations were conducted on the parent's behalf. Calgano Dep. 131-32.

61 *See* PTO ¶¶ 52-53.

62 ACL Ex. 31.

63 *See, e.g.*, PX 154

the industry, and in particular, our access to exchange numbers in certain parts of the world, including Madagascar."); PX 151A at 14 (Green signed AT&T agreement on behalf of ACL); Dooley Dep. 17-20 (Green helped negotiate agreement with Sprint); PX 203 at 7 (Green signed Sprint agreement on behalf of ACL); Fox Dep. 80-81 (Green met with GIB representative to discuss ways of stimulating traffic); PX 201 (Green initiated contact with Integretel); PX 230 (Green helped negotiate agreement with Integretel); PX 184 at 16 (Green signed eBillit agreement on behalf of Verity).

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See, e.g., PX 155 ¶14 (Shein Decl.) ("Most of ACL's activities for the period before and after [the first seven months of 2000] consisted of various telecommunications and billing transactions based on contacts that Robert [Green] and I have developed over the years in the industry, and in particular, our access to exchange numbers in certain parts of the world, including Madagascar."); Dooley Dep. 17-20 (Shein helped negotiate agreement with Sprint); Calgano Dep. 18, 23-29, 35-37 (Shein helped negotiate agreement with Integretel); *Id*. at 191 (Shein di 0.0800 -13.0800 TD0.1200 Tc-0.00 0.00 0.00 rgcus27 TD(ntegreof 68)Tj42.7200 0.

a surge in the volume of calls to Madagascar. AT&T billed $28,975,336 for the calls in 2000, compared to $1,643,111 in 1999.[75] AT&T's adjustments for contested bills also increased dramatically, from 8 percent (or $130,005) of total billings in 1999 to 38 percent (or $11,138,773) of total billings in 2000.[76] ACL received $2,088,031 in 1999 and $8,620,902 in 2000.[77]

The parties agree that at least some of the subscribers who received bills were users of ACL's dialer program, but none of the parties knows how many00 TD(f t)Tj9.9600 0.00.00 rg34.600 0.00.00 rg30.

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75 PX 128 Ex. A.

76 *Id.*

77 PX 157 at 7 (Sinclair Decl.).

78 PTO ¶¶ 59-60. The FTC offered eleven declarations from consumers who received bills during the AT&T Period, primarily to show that at least some line subscribers were charged for calls to Madagascar that they neither made nor authorized. *See* PX 82 through PX 92. Defendants objected to these declarations on hearsay grounds, and the FTC contends that the declarations are admissible under the residual exception to the hearsay rules, Fed. Rule of Evid. 807. But the issue ultimately is immaterial. Without consideration of the declarations, the Court finds for the FTC.

The FTC offered 81 additional consumer declarations relating to the Sprint Period. *See* PX 1 through PX 81. Defendants waived a hearsay objection to 22 of these declarations, *see FTC v. Verity Int'l Ltd.*, No. 00 Civ. 7422 (LAK) (S.D.N.Y. Aug. 5, 2002) (order signing stipulation for presentation of trial evidence), but objected to them on relevancy grounds. These declarations, however, are of obvious relevance to, *inter alia*, the FTC's claim that defendants billed line subscribers for calls that they neither made nor authorized. *See* PX 1; PX 3; PX 6; PX 7; PX 8; PX 9; PX 11; PX 12; PX 14; PX 15; PX 17; PX 18; PX 20; PX 30; PX 31; PX 39; PX 40; PX 41; PX 42; PX 46; PX 53; PX 71 (hereinafter, "Admitted Consumer Decls."). As the 59 consumer declarations to which defendants objected on hearsay grounds are redundant and cumulative, the Court does not consider them in reaching its decision.

79 *See* PX 157 at 5.

80 PX 161 at 5 (Oriel Annual Report for year ending June 2000); *see also id.* at 4 (attributing ACL's rapid business growth in 2000 "primarily to ACL's successful commercialisation of dialler billing systems for website

invoice number, the account number, the due date, and the total due.[85] Consumers were instructed to make checks payable to Verity.[86] Under the heading "INTERNET BILLING," the bill stated that "THIS BILL ACCOUNTS FOR INTERNATIONAL

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85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 Calgano Dep. 128-29.

90 PTO ¶ 54; PX 133 ¶ 17. Calls were billed at $3.99 per minute, the same rate that Sprint charged under its applicable tariff for genuine calls to Madagascar. PTO ¶ 47; PX 133 ¶ 28; Admitted Consumer Decls., *supra* note 78.

91 Calgano Dep. 88, 100.

that nonpayment would subject the subscriber to further collection activity.[103] The call center monitored CSRs to ensure their compliance with these rules. [104] Green and Shein worked with the call center to implement this approach.[105]

Not until after the FTC brought this action did the ICT call center soften its approach to handling consumer complaints. CSRs were permitted to grant one-time 100 percent courtesy adjustments, and were required to do so after a 2-minute sustain period.[106] In addition, CSRs were prohibited from telling consumers that nonpayment would result in further collection activity.[107] But even after ICT changed its policy for handling consumer complaints, some CSRs continued to grant only 50 percent adjustments, even for subscribers who denied making or authorizing the calls.[108] Nevertheless, the FTC's action did prompt an increase in adjustments. Prior to the FTC's action, only 3 percent of the 11,799 consumers who disputed the charges received adjustments, compared with 63 percent of the 13,187 consumers who did so after the FTC's action.[109]

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103 PX 275; PX 276; Chacon Dep. 32-36, 72-77.

104 Chacon Dep. 55-58.

105 PX 275 (email from Green approving instructions given to CSRs); Chacon Dep. 27-35 (Green approved instructions given to CSRs); *id*. at 72-77 (Shein reiterated to call center that it follow hard sustain approach); *id*. at 90-92 (Shein approved phone recording).

106 PX 286; Chacon Dep. 108-09.

107 PX 286; PX 287; Chacon Dep. 108-09.

108 Chacon Dep. 113.

109 PX 334.

Most of the consumer declarations in evidence contain the personal accounts of line subscribers who received bills for calls that they neither made nor authorized.[110] Many of these consumers tried to call Verity numerous times but received busy signals.[111] Those who eventually succeeded in connecting to a CSR first were put on hold for significant times, only to be told that the bills must be paid.[112] Some consumers tried to find an alternative phone number for Verity by calling directory assistance in San Jose, California.[113] These callers were put through to a different company, similarly named Verity, which (perhaps in response to a substantial number of calls) played a recorded message explaining that it was unaffiliated with Verity International and providing callers with contact information for the FTC.[114]

By the end of this billing disaster, 19,544 consumers who had received a Verity bill paid $1,616,678 in response to bills that were mailed on Verity's behalf.[115] As is true of the AT&T Period, neither the FTC nor any of the defendants knows the number of subscribers that made or

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110 *See, e.g.*, PX 6; PX 8; PX 9; PX 11; PX 14; PX 15; PX 17; PX 18; PX 30; PX 40; PX 41; PX 42; PX 53.

111 *E.g.*, PX 3 (called approximately 30 times a day for five days); PX 6 (called at least 20 times at various hours during one week); PX 11 (called approximately 30 times over several days).

112 PX 1 at 2 (put on hold for 40 minutes); PX 3 at 1 (put on hold for 35 minutes).

113 PX 1; PX 6; PX 7; PX 8; PX 9; PX 11; PX 14; PX 15; PX 20; PX 30.

114 PX 1; PX 6; PX 7; PX 8; PX 9; PX 11; PX 14; PX 15; PX 20; PX 30.

115 PTO ¶ 55.

authorized

[116] *Id.* ¶ 59.

[117] PX 334.

[118] *Id.*

[119] 15 U.S.C. § 45(a).

jurisdiction.[120] This Court previously addressed this contention and concluded that "the ACL activities at issue in this case are [not] common carrier activities within the meaning of the Communications Act."[121] As the facts considered by the Court in reaching that conclusion have not changed,[122] the prior holding is dispositive.

B. Deceptive Practices

Section 5(a) of the FTC Act declares unlawful any "unfair or deceptive acts or practices in or affecting commerce."[123] To establish that an act or practice is deceptive under Section 5(a), the FTC must demonstrate "a material representation, omission, or practice that is likely to mislead consumers acting reasonably in the circumstances."[124]

1. Legal Obligation to Pay (Count I)

To prevail on its first claim for relief, the FTC must establish that (1) the defendants represented, or caused others to represent, to line subscribers that they were legally obligated to pay

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120 PTO Ex. A. ¶ 1.

121 *Verity III*, 194 F. Supp. 2d at 277.

122 *See id.* at 274-77.

123 15 U.S.C. § 45(a).

124 *Verity I*, 124 F. Supp. 2d at 200 (citing *FTC v. Pantron 1 Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 526 (S.D.N.Y. 2000)).

irrespective of whether they used or authorized use of the

addressees were obliged to pay or face the consequences that normally ensue from failure to pay a telephone bill.

Moreover, the call center reiterated the message. The recording that was played to callers who were put on hold warned that failure to pay might result in blocking of their phone lines to (obscurely) "services of this nature" as well as further collection activity. Also, CSRs told consumers that the charges were valid and must be paid. Even though the call center may have instructed CSRs to modify their approach to handling calls after the FTC filed its lawsuit, there is no indication that any consumers were told that they were not legally obligated to pay if they had not used or authorized use of the services.

Defendants contend that, since eBillit performed billing and collection during the Sprint Period, they are not liable. The Court is not persuaded. Defendants contributed to, approved and supervised the methods that eBillit and its subcontractors used. The format of the bills, the audio voice recording, and the instructions given to CSRs all received defendants' approval.

In all the circumstances, the Court finds that defendants represented that line subscribers were legally obligated to pay these charges irrespective of whether they used or authorized use of the services of defendants' website clients.

whether they accessed or authorized access to the services of defendants' clients, under the filed rate

[125] *Verity I*, 124 F. Supp. 2d at 200-02 (collecting cases).

[126] *Id*. at 201-02 (citations omitted).

service.

Nor have defendants identified a filed tariff that covered the services they offered. Defendants contend that the filed rate doctrine applies because the calls were nothing more than telephone service and therefore were covered by the AT&T and Sprint tariffs for long-distance calls to Madagascar.[127] According to defendants, neither they nor anyone else changed the form or content of the calls, and consumers were billed only for the carriage of their calls to the Madagascar numbers. This contention falls short. Consumers were not charged merely for the carriage of calls to Madagascar, but for a package of Internet services that included a dialer billing program, the short-stopping of calls outside of Madagascar, and Internet web content. This package was not covered by either the Sprint or AT&T tariffs that defendants rely upon, as those tariffs are for basic international phone calls.[128]

Although the filed rate doctrine did not create a legal obligation to pay for the services, the question remains whether line subscribers were legally obligated to pay based upon the existence of contracts with the defendants. This issue is disposed of easily. As the Court explained previously: "[B]asic contract principles provide that an offer and acceptance create a contract only between the offeror and the offeree. . . . Accordingly, unless the line subscriber is the person who accepts the offe3rTD9r00 0(accept)Tj30.40.1l.00 0.002u000 Tw(accept)Tj30.no. .re(eate)Tj0.00 0D(to)Tj0.00

127 *See* PTO Ex. A ¶ 23.

128 *See* PX 331 (AT&T Tariff No. 27); PX 299 (Sprint Tariff No.1). Moreover, as discussed *infra* p. 31, these tariffs applied to calls that terminated *inside* the foreign country.

their clients, on the one hand, and the line subscriber, on the other."[129]

The Court finds that defendants represented to consumers that they were legally obligated to pay for the Internet services provided by defendants' clients. To the extent that the bills were sent to line subscribers who did not access or authorize access to the services, this representation was materially false and a violation of Section 5(a) of the FTC Act.

2. Re-routing calls (Count III)

Count III alleges that defendants violated Section 5(a) by billing consumers for calls to Madagascar, when the charges were for calls that terminated in other countries. Defendants concede that the calls were terminated outside Madagascar. Yet during both the AT&T and Sprint Periods, the bills indicated that the calls were to Madagascar. Reasonable consumers were likely to believe exactly what the misrepresentations stated--that the charges were for phone calls to Madagascar. In addition, these misrepresentations were material. The destination of a phone call in part determines its price and is essential to a consumer's understanding of the basis of the charges being billed. To the extent that defendants made this representation to subscribers who did not agree, or authorize others to agree, to the terms and conditions of the disclosure form, defendants made a materially false representation in violation of Section 5(a).

Defendants contend that no misrepresentation occurred because the calls were completed to the numbers dialed and therefore were covered by the filed tariffs. This argument fails. The bills misrepresented that the location called was Madagascar and, based upon this

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[129] *Verity I*, 124 F. Supp. 2d at 202.

misrepresentation, sought to extract high prices. Moreover, the tariffs that defendants rely upon cover calls that terminate *inside*

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130 PX 299 at 2 (emphasis added).

131 PX 331 at 1 (emphasis added).

132 *See* PX 112 at 3.

C. Unfair Practices (Count II)

The FTC's second count alleges that defendants' practice of billing line subscribers who did not use or authorize use of the Internet services offered by the defendants' clients constituted an unfair trade practice in violation of Section 5(a) of the FTC Act. An act or practice is unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[133]

The Court infers, and therefore finds, that during the AT&T Period, many line subscribers were charged for services they neither made nor authorized. AT&T and its LECs billed on the basis of ANI information, which identified the subscriber from whose line a call was placed without determining whether that same person made or authorized the call. In addition, AT&T charged back 35 percent of total billings in 2000, when videotext services began, compared to 11 percent of total billing during the prior year. This surge in adjustments indicates that many consumers called to dispute the charges and most likely did so for the same reason as during the Sprint Period–because they neither made nor authorized the calls. In all the circumstances, the Court finds that a significant proportion of the subscribers billed during the AT&T Period neither incurred, nor authorized others to incur, the charges billed to them.

During the Sprint Period, at least 8,651 of the 91,683 consumers who received bills (9 percent) were given adjustments because they denied using or authorizing use of the services. The

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[133] 15 U.S.C. § 45(n).

actual number of subscribers who received bills for calls they did not make or authorize was certainly much higher, as thousands of callers were unable to get through to the call center and many of those who did get through were denied an adjustment, irrespective of whether they had used or authorized use of the services.

The substantial injury to consumers who did not make or authorize the calls is not outweighed by the possible benefit to consumers of having an alternative to disclosing credit card information over the Internet. The thousands of consumer complaints and the large number of charge backs illustrate widespread dissatisfaction.

Defendants contend that there was no unfair trade practice because line subscribers reasonably might have protected themselves against injury by, for example, controlling access to their phone lines, placing an international-call block, locking their computers, or downloading software that would have prevented access to adult websites.[134] Even assuming that such practices would have been effective, the diffic

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[134] *See* PTO Ex. A. ¶¶ 29-36.

D. Individual Liability

To establish individual liability for corporate violations of the FTC Act, the FTC must prove that an individual defendant (1) participated directly in the wrongful practices or acts or had authority to control them, and (2) had some knowledge of the wrongful practices or acts.[135] Authority to control may be shown "by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer."[136] The FTC need not prove intent to defraud in order to establish a violation under the Act or to obtain injunctive or monetary relief a

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135 *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir.), *cert. denied*, 493 U.S. 954 (1989); *accord FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1996); *Five-Star Auto Club*, 97 F. Supp. 2d at 535.

136 *Amy Travel Serv.*, 875 F.2d at 573.

137 *Id.* at 574; *accord Five-Star Auto Club*, 97 F. Supp. 2d at 535.

138 PTO ¶¶ 22-23.

Madagascar, and that the bills would reflect charges for phone calls to Madagascar, instead of charges to access Internet services.

Green and Shein therefore are individually liable for ACL's and Verity's violations of the FTC Act.

III

The FTC seeks injunctive relief and a refund of monies paid by consumers and a disgorgement of funds reaped by defendants through their violations of the Act.

A. Injunctive Relief

The FTC asks the Court to enjoin defendants Verity, Green, and Shein from engaging in any capacity in the provision of any audiotext or videotext services to U.S. consumers. Although injunctive relief should be tailored to address specific harms and not impose unnecessary burdens on lawful activity,[139] courts may enjoin otherwise legitimate conduct in order to prevent future violations.[140]

A broad permanent injunction is warranted in the circumstances. First, defendants'

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139 *See, e.g., Soc'y for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1251 (2d Cir. 1984) (citing *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409-10 (1945)); *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 50 (2d Cir. 1996) (citing *Waldman Publ'g Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d Cir. 1994)).

140 *See, e.g., Five-Star Auto Club*, 97 F. Supp. 2d at 536 (defendants permanently enjoined from participating in any multi-level marketing); *FTC v. Micom*, No. 96-0472 (SS), 1997 WL 226232 (S.D.N.Y. Mar. 12, 1997) (defendants permanently prohibited from engaging in business of preparing or filing government licenses).

fraud was calculated and substantial. Green and Shein orchestrated an elaborate scheme to cause phone bills to reflect charges for long-distance phone calls to Madagascar, when in reality those charges were for videotext services and the calls were terminated elsewhere. They preyed upon consumers' well-founded understanding that all charges on a telephone bill must be paid, regardless of whether they were authorized. Verity and ACL were the corporate vehicles they used to perpetrate the fraud.

In addition, Green and Shein have failed to show remorse for the consumer harm they inflicted. Instead, they willfully have violated this Court's orders and showed an intention to put assets taken from U.S. consumers out of the reach of U.S. authorities. The preliminary injunction that this Court entered required, *inter alia*, that defendants produce to the FTC financial statements that were needed in order to ensure the availability of funds necessary to remedy the alleged harm.[141] Green and Shein deliberately and wilfully defied the Court's order, were held in contempt, and appear to remain at large.[142] As Green and Shein are foreign business people who directed monies to be paid to overseas accounts and later refused to comply with an order to make those monies available for consumer redress,[143] any repeat of their past conduct would again result in further consumer injury that is virtually irreparable.

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141 *See Verity II*, 140 F. Supp. 2d at 314-15.

142 *Id*. at 317 ("By withholding financial statements, Green and Shein quite deliberately and willfully are attempting to thwart efforts by the FTC to ensure that funds are available to remedy the harm they allegedly have done."). Defendant Verity belatedly complied with the FTC's requests and was not held in contempt. *Id*. at 315.

143 PX 154 ¶ 4; PX 155 ¶ 4.

These circumstances lead the Court to conclude that a broad permanent injunction is necessary to prevent future violations. The Court therefore will enter an order prohibiting defendants Verity, Green, and Shein from participating in any capacity in the offering of audiotext or videotext services to U.S. consumers.

The FTC seeks also restrictions upon ACL's billing practices similar to those contained in the preliminary injunction. Such restrictions are reasonable measures to prevent ACL from committing future violations similar to those in which it previously engaged. Accordingly, ACL will be enjoined from engaging in ANI-based billing of any line subscriber unless (1) the line subscriber provides express verifiable authorization agreeing to purchase and be billed for such services, or (2) the bill conspicuously contains an express statement that the line subscriber is not obliged to pay the bill unless he or she personally agreed or authorized another to agree to pay for the services for which the bill is rendered and provides a convenient method by which a line subscriber who claims not to have done so may have the bill canceled. Additionally, ACL shall be enjoined from (1) misrepresenting that line subscribers are legally obligated to pay for Internet services obtained using the ACL billing system irrespective of whether they used or authorized use of those services, and (2) misrepresenting on bills the true nature of the charges for which consumers are being billed.

B. Monetary Relief

The FTC seeks restitution, consumer redress, and disgorgement of funds gained by defendants' deceptive and unfair trade practices. Section 13(b) of the Act provides that,"in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent

144 15 U.S.C. § 53(b) (2004).

145 *Verity I*, 124 F. Supp. 2d at 205-06 (collecting cases).

146 *Id.* at 206 (quoting *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982)).

147 *E.g.*, *FTC v. Febre*, 128 F.3d 530, 535-36 (7th Cir. 1997); *FTC v. Medicor, LLC*, 217 F. Supp. 2d 1048, 1058 (C.D. Cal. 2002);

estimated payments in 1999, or $16.3 million.[148]

The next question is the amount, if any, that should be subtracted for subscribers who actually used or authorized use of the Internet services for which they paid. The FTC concedes that some consumers who received bills actually used or authorized use of the services. The difficulty, however, is that neither party knows how many. Yet, defendants' own conduct has made it impossible to exclude these subscribers. Defendants employed an ANI-based billing system that did not ascertain whether subscribers had made or authorized use of the services. Where defendants' own misconduct prevents an exact determination of the amount of consumer loss, "[t]he risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty."[149] Defendants ACL, Green and Shein therefore are liable for consumer redress in the amount of $16.3 million.[150]

2. The Sprint Period

Turning to the Sprint Period, the FTC asserts that the appropriate monetary relief is the entire $1,616,678 million paid during that period. During the Sprint Period, all of the calls were for Internet services. Once again, defendants' own conduct makes it impossible to determine the

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148 *See Five-Star Auto Club*, 97 F. Supp. 2d at 534 ("Plaintiff has the burden of showing that its calculations reasonably approximate the amount of consumers' net loss.").

149 *Febre*, 128 F.3d at 535 (quoting *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989)); *accord Five-Star Auto Club*, 97 F. Supp. 2d at 534.

150 The FTC's proposed order seeks monetary relief during the AT&T Period from all of the ACL defendants, including Verity. However, the FTC has not proven Verity's involvement during the AT&T Period. Therefore, any relief with respect to the AT&T Period is limited to defendants ACL, Green and Shein.

Plaintiff's motion to admit additional consumer declarations and defendants' motion to admit the declaration of Robert S. Laughlin are denied as moot.

SO ORDERED.

Dated: September 17, 2004

Lewis A. Kaplan
United States District Judge

Copies mailed 9/17/2004
Chambers of Judge Kaplan
MEA