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13
 14 **UNITED STATES DISTRICT COURT**
DISTRICT OF NEVADA

15
 16 FEDERAL TRADE COMMISSION,

17 Plaintiff,

18 v.

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

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

4 Likewise, Defendants impermissibly attempt to stretch the holdings of *Doe v. Washoe*,
5 2006 WL 3782951 (D. Nev. 2006), and *Clark v. Circus Circus Hotel & Casino*, 2009 WL 1409478
6 (D. Nev. 2009), in their attempt to attack the FTC's summary judgment motion. Both of those
7 cases involved a party which had continued to violate the Local Rules, even after being given
8 repeated warnings and given opportunities to cure past violations. The facts of those cases are in
9 stark contrast to the ministerial, correctable page-limit violation alleged by Defendants.

10 Finally, Defendants cite to *Cinque v. Budge*, 2009 WL 1312065 at *1 (D. Nev. 2009), for
11 the broad proposition that "where a party files a document that is not authorized by the Local
12 Rules, this Court has struck it"; that case involved the striking of an unauthorized "sur-reply" to
13 the State of Nevada's reply brief. Unlike sur-reply briefs, summary judgment motions are in fact
14 authorized, not only by the Local Rules, but by Rule 56 of the Federal Rules of Civil Procedure and Rule 67 of the Nevada Rules of Civil Procedure.

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

27 ³ The text of the FTC's Notice of Motion and Motion (doc. #86) and Memorandum of Points and
28 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.

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

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

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

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

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

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

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

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⁴ Defendants do not challenge any portion of the declarations of consumers John Edwards, Paula Keith, James Krause, Katie Kraus

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Four of the challenged former employee statements (S

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

3 **a. Challenged statements which are admissible under FRE**
4 **801(d)(2) as admissions of a party-opponent**

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

14 **b. Challenged statements which are admissible as evidence of**
15 **motive**

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

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

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

1 – FTC’s SJ Exhibit 15 (Shadiyah Aljubailah declaration) at ¶ 16: the challenged opinion is
2 a proper lay opinion based on Ms. Aljubailah’s observation, described in the unchallenged portion
3 of ¶ 16, of Defendant’s pol

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1 – FTC’s SJ Exhibit 15 (Shadiyah Aljubailah declaration) at ¶ 7: the challenged statement is
2 offered to show that Defendants’ salesperson could not discern from the script that she was selling
3 5-year subscriptions. The foundation for Ms. Aljubailah’s statement is based on her testimony, at
4 ¶ 7, that everything she knew about the subscriptions she was offering was based on the script.

5 – FTC’s SJ Exhibit 27 (first declaration of Susan Krause Byers) at ¶ 12: Personal
6 knowledge foundation for

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24 ⁶ The FTC primarily cites the Blatz DuRivage declaration as second-tier evidence which
25 *corroborates* consumer declarations made under penalty of perjury. The Blatz DuRivage
26 declaration provides secondary support for six of the FTC’s 234 facts (UF 134, UF 143, UF 144,
27 UF 151, UF 161, and UF 170) and primary support for two facts (UF 88 and UF 202). The FTC
28 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 0.00 0.00 0.00 rg

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

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

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

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

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

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

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

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

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

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

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

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

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 26 ⁷ Defendants' generalized argument that Mr. Gale's "survey" and "summary" evidence do not
 27 meet standard for admitting such evidence fails to state which portion of the declaration are
 28 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.

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1 **4. The statements that Defendants challenge as “pure argument” are**
2 **admissible under FRE 701**

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

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

7 Defendants’ verifiers’ deceptive practices, as evidenced by these recordings, are
8 corroborated by the testimony of Defendant Jeffrey Dantuma, who stated at his deposition
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1 “Defendants’ practice of tricking consumers into paying for duplicate subscriptions is
2 corroborated by several sources, including former SOS salesperson Angelia Ollerman (see
3 SJ Exhibit(see _____

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28 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.

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

3 Defendants' third challenge is to the underlined portion of Gale ¶ 59b: "Presumably, the
4 consumers in the bad tape report had their accounts cancelled . . ." Defendants take issue with this
5 inference even though it is expressly based on their own business records. A review of
6 Defendants' "Bad Tape Reports" (*see* Attachments 18, 19, 20, 21, 22) shows that these reports
7 typically contain a note describing why a particular verification "tape" is "bad" and also states that
8 the customer's account was being cancelled due to the bad tape. *See e.g.*, notations "*cxl'd acct bad*
9 *tape*" or "*cxl'd acct due to bad tape*" (Attch 18 pp. 947-951, Attch. 19 pp. 968-973, Attch. 20 pp.
10 982-986, Attch. 21 pp. 987-995, and Attch. 22 pp. 998-1003). It is curious that Defendants take
11 issue with this presumption since Mr. Gale essentially gave their paperwork the benefit of the
12 doubt on this point.

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

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

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

22 Defendants' second challenge is to the admissibility of Defendants' Wachovia Bank
23 account records, referenced in Gale ¶ 5. Defendants falsely claim that the FTC improperly
24 withheld those documents from Defendants. In discovery, the FTC served Defendants with a
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26 ¹⁰ To the extent that the Court finds that the FTC has not satisfied the foundation requirements,
27 the FTC requests leave to cure this error, by introducing foundational evidence, including the
28 representation of Defendants' attorneys that this document identifies the Defendants' "various
departments."

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

3 As to the Wachovia Documents, the FTC objects to the production of these documents on
4 the grounds that they are voluminous (exceeding 5,000 pages) and the information is
5 equally available to Defendants because they pertain to Defendants' bank accounts. Subject
6 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.*

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

10 Defendants' third challenge is to the admissibility of 800-416-0000 (Doc ID: 137200 0.0000 TD(cop)Tj20

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

23 ¹² The FTC's case against Defendants seeks only equitable relief, *FTC v. H.N. Singer, Inc.*, 668
24 F.2d 1107, 1110-12 (9th Cir. 1982), and thus, this case ultimately will proceed to a bench, not jury,
25 trial. See, e.g., *FTC v. North East Telecommunications, Ltd.*, 1997 U.S. Dist. LEXIS 10531 (S.D.
26 Fla. 1997); *FTC v. Abbott Laboratories*, 1992 U.S. Dist. LEXIS 21474, 1992-2 Trade Cas. (CCH)
27 ¶ 70,087 (D.D.C. 1992); *FTC v. Commonwealth Marketing Group*, 72 F. Supp. 2d 530, 543-544
28 (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.

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

4 **IV. Conclusion**

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

11
12 Dated: August 25, 2009

Respectfully submitted,

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