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Federal Trade Commission

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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FEDERAL TRADE COMMISSION,

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Plaintiff,

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v.

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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.,

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Defendants.

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Case no. 2:08ev-00620PMP-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
 2 Defendants argue that it is "improper" for the Court to evaluate the FTC's monetary relief
 3 claim on summary judgment because of the "astronomical amount" requested by the FTC (doc.
 4 #131 at 25:8-10) and because the FTC's evidence on liability is not "credible," "admissible," and
 5 undisputed. The Court should reject Defendants' argument for two reasons. First, the Court has
 6 already ruled on Defendants' evidentiary objections (see doc. #123), so Defendants' objections
 7 regarding credibility and admissibility are misplaced. Second, the district court may properly
 8 resolve both the liability and monetary relief issues on a motion for summary judgment. *See, e.g.,*
 9 *FTC v. Stefanchik*, 559 F.3d 924 (9th Cir. 2009). This is so even when the amount in controversy
 10 is "astronomical." *See id.* (district court's \$17 million summary judgment award affirmed). Thus,
 11 if the Court finds Defendants liable for violations of the FTC Act, it may impose monetary
 12 judgment in the amount of \$40,429,893.25, which is the undisputed amount collected by
 13 Defendants from consumers during the time period 2004-2008. *See* Defendants' response to
 14 FTC's UF163.

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

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

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

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

27 15 U.S.C. § 57b(d). Thus, the FTC's TSR claims are subject to a three-year statute of limitations.

28 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

1 Trade Commission.” Under Ninth Circuit law, a common fraud case such as this one qualifies as a
2 “proper case” for injunctive relief under Section 13(b). *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107,
3 1111 (9th Cir. 1992). No statute of limitations bars the FTC’s claims for Section 5 claims brought
4 pursuant to Section 13(b) of the FTC Act. *See FTC v. Minuteman Press*, 53 F.Supp.2d 248,263
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1 representative” refers. The First Payment Coupon form also does not specify to what the phrase
2 “presented your order” refers (e.g., does it refer to the telemarketer’s demeanor? diction?
3 politeness?). The “survey” also impermissibly encourages the consumer to give a positive rating,
4 and in fact does not give consumers the option to rate “the way our representative presented your
5 order” as “POOR.”

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

10 These First Payment Coupons are probative on a different point, however. A review of
11 Defendant’s First Payment Coupons shows that, in many instances even when consumers rated the
12 way PBS’s “representative presented your order” as “excellent,” “good,” or “fair,” they often wrote
13 in negative comments which indicated that the consumers were dissatisfied with the sales pitch.

14 See SJ Exhibit 70 (fifth Gale declaration ¶¶ 4-8, Attachment 1). These negative comments are probative of the fact that consumers were dissatisfied with the sales pitch. 759.3600 0.00

27 ¹ Moreover, the FTC need not prove that every consumer was injured. *FTC v. Amy Travel*
28 *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.*

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4. THE COURT SHOULD REJ

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

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

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

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

24 Finally, Defendants attack some of the consumer declarations on the ground that were
 25 executed "months, if not years," after Defendants' salespeople made the telemarketing calls to
 26 those consumers, and that therefore they are "rendered suspect by the natural tendency of human
 27 memory to fade over time." (Doc. #131 at 17:12-14, 19:22-23.) The declarations are clear,
 28 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

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

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

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

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

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

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Factswhich are undis

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

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

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

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

15 – their sales pitch consists of the lead scripts (Attachment 5 to FTC's SJ Exhibit 42), the
16 shift supervisor scripts (Attachment 6 to FTC's SJ Exhibit 42), and the verification scripts
17 (Attachment 7 to FTC's SJ Exhibit 42) (*see, e.g.,* Defendants' resp

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

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1 whether each Defendant, acting as a “common enterprise,” knew the business practices employed
2 by PBS are illegal, and if they did not, whether Defendants *should have known* these practices are
3 illegal, *were “recklessly indifferent”* to the truth or falsity of the misrepresentations their
4 employees made, or were “*aware of the high probability of fraud along with an intentional*
5 *avoidance of the truth.*”⁶ Defendants have been put on notice repeatedly that their business
6 practices are illegal. Defendants have represented in consent judgments and assurances of
7 voluntary compliance that they would stop these specifically-described bad practices. Despite this
8 notice and their promises to stop their bad conduct, they continue violating the law unabated. The
9 Court may conclude from this that Defendants will not stop the

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26 ⁶ Followed to its logical conclusion, Defendants’ argument would require the Court to give
27 Defendants a “free pass” because they formed PBS after those orders and settlements were entered,
28 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.

1 connection with PBS and SOSales Ninth Circuit law provides that if the Court concludes that
 2 Defendants' telemarketing sales pitch violated the FTC Act, the Court may award equitable
 3 monetary relief in the full amount of loss incurred by consumers. *FTC v. Stefanchik*, 559 F3d 924,
 4 931 (9th Cir. 2009).

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

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

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

23 The Court may grant monetary relief against each of the individual Defendants if it
 24 concludes that: (1) the misrepresentations that Defendants made to consumers were the type upon
 25 which a reasonable and prudent person would rely; (2) consumer injury resulted; and (3) the
 26 individual Defendant "had knowledge that the corporation or one of its agents engaged in dishonest
 27 or fraudulent conduct." *FTC v. Affordable Media, LLC*, 179 F3d 1228, 1234 (9th Cir. 1999)
 28 (citing *Publ'g Clearing House*, 104 F3d at 1171). As discussed above, the Court should find that
 each of the individual Defendants either had actual knowledge of material misrepresentations, were

1 recklessly indifferent to the truth or falsity of a misrepresentation, or had a
2 probability of fraud along with an intentional avoidance of the truth. Under the Ninth Circuit's
3 *Stefanchik, Cyberspace, and Cy*

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