UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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FEDERAL TRADE COMMISSION, Plaintiff,	)	2:08-CV-00620-PMP-PAL
v.	)	
PUBLISHERS BUSINESS SERVICES, INC., et al., Defendants.	)	<u>ORDER</u>

Presently before the Court is Plaintiff the Federal Trade Commission's ("FTC") Motion for Summary Judgment (Doc. #86), filed on July 31, 2009. Defendants filed an Opposition (Doc. #131) on November 23, 2009. Plaintiff filed a Reply (Doc. #145) on December 7, 2009.

Also before the Court is Defendants' Motion for Summary Judgment (Doc. #99), filed on July 31, 2009. Plaintiff filed an Opposition (Doc. #134) on November 23, 2009. Plaintiff also filed Evidentiary Objections to Defendants' Motion (Doc. #139) on November 23, 2009. Defendants filed a Reply (Doc. #144) on December 7, 2009.

I. BACKGROUND

A. The Defendants

Edward Dantuma ("Edward")[1] is the President and owner of Ed Dantuma

[1] Due to the fact that Defendants share the last name "Dantuma," the Court hereinafter will refer to them by their first names.

law. (Id. at 39-41.) Dries is in charge of the companies' verification, collections, and customer service departments, all located at the Altamonte Springs office. (FTC SJ Ex. 9 at 26, Ex. 10 at 53-54.) Brenda is in charge of the companies' Miami sales office, accounts payable, and correspondence with the magazine publishers. (FTC SJ Ex. 13 at 18-19.)

B. The PBS Process

PBS offers two different types of magazine subscriptions: Paid by Subscription orders and Single Order Subscription ("SOS") orders. (Defs.' Mot., Ex. C at ¶ 5.) Paid by Subscription orders are multiple subscriptions usually consisting of between five and seven different magazines and lasting sixty months. (Id. at ¶ 6.) The customer typically pays for the order over a period of months. (Id.

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receive the next 60 issues of:[4]

(Man) = Mens Journal, Car & Driver, Inc., and also for your enjoyment Woman's Day and Rolling Stone

(Woman) = Bon Appetit, Men's Journal, Woman's Day and also for your enjoyment Rolling Stone and Elle.

Now, let me assure you that there is no catch involved, however, there is a sound business reason behind the whole thing. The advertisers have authorized us to send the magazines I mentioned to assure them that their ads will be read. Now, you will receive a guarantee stating that everything I am promising you is correct, and we will be mailing this to you, do you want me to mail it to your home or business address? . . .

Now we're not going to ask you to buy any cash subscriptions or anything like that. The only thing we have been asking people like yourself is to thank us in return by helping to defray the cost of getting them out to you, and I'm sure that you wouldn't mind that because it's only $2 dollars and 76 cents a week which covers all 5 of the publications and there is absolutely no other charge, and it's payable by the month, most people I've talked to today have been more than happy to go along with this and I'm sure that you too will agree that 5 magazines is quite a lot for just $2 dollars and 76 cents a week right!

Now we don't collect the $2 dollars and 76 cents each week, that would be sort of a nuisance, so what we do is send you a small supply of self-addressed envelopes and you can send it in by our monthly honor plan, or faster if you like. Most people send it in two months at a time since it is such a small amount, and, you will receive a written guarantee to assure you what I have told you is correct, now, just in case we cannot contact you at work, do you have another phone number we can reach you at.

And also ____, for all the people who are taking advantage of our offer today, we are sending out the Go & Lucky to your business at no extra charge, hold for one second

Ex. C at ¶ 16.) The shift supervisor also follows a script:

> Hi Mr./Mrs. ____, I just wanted to take a moment to double check all of the information we have on your order to make sure everything is correct. Now I see that you want these to go to your *Business/Home* address at *read address* and you are *age* and *occupation* and you use *check/credit card* most often.
>
> Now just as *name* told you , it's all 7 publications for just $2.76 cents a week, which is 11.96 a month, now instead of paying 11.96 each month for the full 60 months, we ask that you send it in two months at a time, which is 29.90 a month for the first 24 and nothing the remaining 36 months, do you see how that works?...
>
> Ok _____, to guarantee these low rates, I'll lock in the price right now and we will be calling you back shortly to confirm this with you. Now do you have any questions concerning your order Mr./Mrs. _____, thanks again, and we know that you will enjoy the publications. Bye.

(Id., Ex. C, Attach. 3.) At the end of the lead call, the shift supervisor notifies the customer that he or she will receive another call in the near future to confirm the order. (Id., Ex. C at ¶ 17.)

In their depositions, Dirk, Edward and Brenda explain the meaning of certain statements in the script. For example, despite what the script says, PBS does not actually provide the information it gathers from customers to advertisers. (FTC SJ Ex. 8 at 71-72.) The statement "helping to defray the cost of getting them out to you" refers to the cost of the magazine subscription, not the cost of shipping. (Id. at 198.) The statement "cash subscriptions," Edward explains, is in reference to subscriptions where the publisher requires the consumer to pay for the subscriptions up front. (FTC SJ Ex. 10 at 127.) The statement "monthly honor plan" refers to a plan where the consumer makes monthly payments. (FTC SJ Ex. 14 at 148.)

Although PBS instructs its employees to follow the script, former PBS employees heard other representatives routinely deviate from the script. (FTC SJ Ex. 17 at ¶ 14, Ex. 18 at ¶ 13-14, Ex. 19 at ¶ 14.) One former PBS sales representative personally recounted that deviating from the script often resulted in higher sales. (FTC SJ Ex. 18 at ¶ 14.) According to another former PBS sales representative, in the Miami office, experienced sales

> manager with Publishers Business Services. I'm just calling to thank you for doing the survey and the maga[z]ine order with us a little while ago, and I just need to quickly tape verify the information with you ok? **(TURN TAPE ON)** Can you hear me ok Mr./Mrs. <u>(Full Name)</u>? **We are now on tape and I do have your permission correct? (WAIT FOR RESPONSE)**
>
> Today is <u>(Date)</u> and we processed your order on <u>(Date)</u>. We will be mailing these to <u>Address</u>. Your order calls for <u>(Read Magazines)</u>. Your payment plan and total cost as explained to you and also listed on your order will be $____/per month for only the first ____ months and you will pay nothing the remaining ____ months. Do you understand how that works Mr./Mrs. ____? **(WAIT FOR RESPONSE)**
>
> **It does cost our company a great deal of time and money to enter the order for you, and because of this we do ask that you will take the magazines for the full term and make the monthly payments as agreed. This order cannot be cancelled during the term of the agreement, however it will cancel automatically after that, is that acceptable to you Mr./Mrs. ____? (WAIT FOR RESPONSE)** Now it does take approximately 8-10 weeks to get your services started. And just to quickly review your credit information, I see that you are <u>(Age)</u> and a <u>(Occupation)</u> at <u>(Business)</u>.
>
> **(If they are not the owners, ask the following)**
>
> And how long have you been employed at <u>(Business)</u> ? And would you say that your monthly income is more than $1,000 per month? **(WAIT FOR RESPONSE)** And your home phone # is <u>(Read Home Phone)</u> (If none listed ask; Do you have another # we can reach you at?)*****(INFORMATION REQUIRED)*****
>
> **(If it is going to a residence)**
>
> Are you renting, buying or living with family? Are you married or single? **(If Married)** May I have your spouse's name? How long have you lived at your residence?
>
> Okay, Mr./Mrs ____. How will you be making payments on this by credit or checking account? . . . That's fine, we will send out a monthly statement and an envelope for mailing in your payments. You will receive you[r] first statement within two weeks. Can you mail that back to us by <u>(Date)</u>? **(WAIT FOR RESPONSE)** Now I've done all the talking, do you have any questions at this time Mr./Mrs. ____? . . .

(<u>Id.</u>, Attach. 5.)

Kristen Cholewin ("Cholewin"), a former PDS verifier, worked for PDS for about a month at the end of 2005. (FTC SJ Ex. 16 at ¶ 2.) Cholewin explains that although she was given a script to follow word for word, she never heard of anyone being fired for deviating from the script. (<u>Id.</u> at ¶¶ 8, 32.) As training, the supervisor made a few verification calls in Cholewin's presence. (<u>Id.</u> at ¶ 7.) Ms. Cholewin had a quota of tape verifications that she needed to complete in a day. (Id. at ¶ 17.) Cholewin recounts that verifiers were fired for not making their numbers and for generally giving up easily when a customer would say that they did not want the magazines. (Id. at ¶ 32.)

Verifiers would receive sales slips filled out by the sales department containing the salesperson is not following the script, she receives a warning, and if it happens a second time she is fired. (Id. at 82.) Later in Dries' deposition, Dries testified that if he finds on the tape that the salesperson is not following the script, or she is doing the order improperly, she is fired immediately. (Id. at 85.)

If a customer calls and complains that they did not agree to the order, the customer service representative is directed to check the verification tape. (FTC SJ Ex. 65 at 88.) If the tape reveals the verification was done incorrectly, the order is cancelled and put in the "bad tapes report." (FTC SJ Ex. 65 at 88.) The FTC highlights four PBS verifiers who had numerous "bad tape reports" and as of June 10, 2008 were listed as current PBS employees. (FTC SJ Ex. 42, Attach. 18-22 & 25.) For example, between August 2005 and April 2008, Bianca Gonzalez incorrectly explained PBS's cancellation policy or did not clearly inform customers that they were entering into a commitment to purchase magazines twenty-one times. (Id. at 948, 950, 952-957, 959, 963, 966.) Between April 2006 and June 2007, Ashley Fulford processed orders notwithstanding the customers' statements that they did not agree to purchase the subscription or she did not inform the customer about the company's cancellation policy thirty times. (FTC SJ Ex. 42, Attach. 19 at 968, 970-979.) Between July 2006 and February 2007, Yolanda Woodbury ("Woodbury") did not clearly inform customers of PBS's cancellation policy or processed the order as complete even where the customers stated they were not agreeing to purchase the magazines twenty-eight times. (Id., Attach. 21 at 987-995.) On December 12, 2006, an account was cancelled after Dries listened to the verification tape and found Woodbury was evasive and was not consistent in her responses to the customer's questions. (Id. at 992.) Between July 2005 and August 2007, Renee Spagnol's ("Spagnol") verification recordings either cut off at

customer is four months delinquent he or she receives a letter from "John Carlton" which informs the customer that if he or she "fails to pay this account in full, we will move forward reviewing our rights against you for all monies due plus interests and costs, as provided by the agreement." (Id.

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complained to either the BBB or the FTC. (FTC TRO Vol. 1 at 1-112; FTC SJ Exs. 27-40, 48-62.)[8] Out of all the consumers who provided declarations, seven consumers paid PBS some, if not all, that PBS said they owed. (FTC SJ Exs. 29, 36, 40, 54, 62; FTC TRO Vol. 1 at 29,[9] 82.[10]) The consumers' complaints regarding PBS, as well as the experiences of former PBS employees, are summarized below.

1. Initial & Verification Calls

Many consumers said the PBS representative spoke rapidly, and that they were confused by the terms of the offer because the PBS representative was speaking so fast. (FTC SJ Exs. 20-23, 25, 29, 40, 50, 54, 57, 61; FTC TRO Vol. 1 at 22, 105.) Eleven consumers said they were busy at work and distracted when the PBS representative called. (FTC SJ Exs. 20, 30-32, 34, 40, 48, 50, 55; FTC TRO Vol. 1 at 22, 105.) According to former PDS verifier Cholewin, she was instructed "to talk fast so that the customer would not be able to follow what [she] was saying and would not have time to ask questions." (FTC SJ Ex. 16 at ¶ 28.) Additionally, two former PBS sales representatives noted that they were more successful selling to stores with younger employees who were busy with their own customers because often they were too busy to listen carefully. (FTC SJ Ex. 18 at ¶ 16, Ex. 19 at ¶ 24.)

After the initial PBS sales call, seventeen consumers were left with the impression that PBS was offering free magazines. (FTC SJ Exs. 30-31, 34, 37, 39-40, 50-

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[8] Nine of the declarations are parents, spouses, or supervisors of the consumer. (FTC TRO Vol. 1 at 14, 56, 96; FTC SJ Exs. 27-28, 38, 51, 57, 60.)

[9] PBS reimbursed the consumer $841, the total PBS charged her for the magazines. However, PBS did not reimburse the consumer for the overdraft charges she incurred when PBS withdrew money from her account. (FTC TRO Vol. 1 at 29, 38-42, 54-55.)

[10] PBS refunded the consumer $25 of the $125 PBS had charged her. (FTC TRO Vol. 1 at 82.)

55, 60-62; FTC TRO Vol. 1 at 27 & 101.) Alternatively, seventeen consumers believed that the magazines were free with a nominal charge for shipping and handling. (FTC SJ Ex. 20 at 42-43 (one time $24 charge), Ex. 23 (one time $3 charge), Ex. 25, Ex. 29, Ex. 31, Ex. 36 ($18 a month for 6 months), Ex. 57 (less than $10 total); FTC TRO Vol. 1 at 1 ($20), 2, 20 ($24 for the year), 27 ($2 per magazine for 5 years), 62 ($3), 86 (less than $3), 96, 99 (less than $ 3 per magazine), 105, 136.) Four of the remaining consumers who do not recall being told the magazines were free, nonetheless, recall a total amount different from the actual amount they were charged. (FTC SJ Ex. 29 ($185 for 5 years), Ex. 48 ($29.90), Ex. 49 (same), Ex. 58 ($31.40).) In sum, many of the consumers believed the initial conversation represented the entire agreement between them and PBS: that the offer was either free or a nominal amount, and that there was no long-term obligation or no obligation at all. (FTC SJ Exs. 20-21, 23-24, 26, 29-30, 40; FTC SJ TRO Vol. 1 at 20, 22, 27, 60, 99, 101, 105.) A number of consumers believed they were not agreeing to accept the magazines or to make any payments, but instead were agreeing to receive written materials on the offer. (FTC SJ Exs. 20, 22, 24, 32; FTC TRO Vol. 1 at 20, 27.)

During the verification call, when the PBS verifier tells the consumer the purpose of the call is to "verify" information, fifteen consumers believed this to mean that the verifier was just going to confirm the terms previously disclosed in the initial call. (FTC SJ Exs. 20-21, 24, 26, 29, 30-32, 36, 39, 40; FTC TRO Vol. 1 at 22, 27, 99, 101.) In several verification recordings, consumers asked questions about whether they would be allowed to review a written offer before committing to the subscriptions, the total price of the magazines, the company's cancellation policy, or a clarification on the length of the subscription term. (FTC SJ Ex. 42 at ¶ 38, Attach. 8 at 738, 741, 763, 775-76, 803, 812-13.) In these recordings, the verifier either ignored the consumer's question, responded by repeating parts of the script, or replied that they could not answer the question. (Id. at 738, 741, 763, 775-76, 803, 812-13.) In several of the verification recording transcripts, the

materials. (FTC TRO Vol. 1 at 101). However, the consumer never says that in the verification recording. (FTC SJ Ex. 42, Attach. 8 at 833.)

According to Dirk, PBS sufficiently informs the customer of the total cost of the magazines by telling the customer the amount per week or month and the total number of months. (FTC SJ Ex. 64 at 56.) Additionally, Dirk states that the total cost is on the written materials and is disclosed to the customer before PBS collects any money. (Id. at 56.) However, Dirk also notes that PBS uses the recorded verification call, which is placed before the written materials are sent out, to "save an order" by explaining to the customer that they have agreed to the terms on tape. (FTC SJ Ex. 8 at 214.)

Despite the PBS collections protocol, many consumers aver that PBS collections agents called them at work even after they told the collections agent to stop. (FTC SJ Exs. 20, 23, 49, 55, 60, 62; FTC TRO Vol. 1 at 29, 60, 62.) Consumers also averred that PBS agents called them numerous times a day. (FTC SJ Exs. 32, 49, 55, 62; FTC TRO Vol. 1 at 1, 29, 60, 62, 82, 105.) Many of the consumers reported that PBS threatened them. (FTC SJ Exs. 22, 30, 50, 54, 60; FTC TRO Vol. 1 at 20, 82, 96, 101, 112.) For example seven consumers said the PBS collections agents threatened to report the consumer to the local credit bureau or collection agency, or that PBS would garnish the consumer's wages. (FTC SJ Exs. 22, 50; FTC TRO Vol. 1 at 20, 82, 96, 101, 112.) In addition, five consumers said the collections agents represented themselves as PBS's attorneys or threatened to take the consumer to court. (FTC SJ Exs. 20, 30, 54; FTC TRO Vol. 1 at 82, 112.)

D. Procedural History

On May 14, 2008, the FTC filed a Complaint for injunctive and other equitable relief alleging PBS engaged in unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), and in violation of the FTC's Telemarketing Sales Rule, 16 C.F.R Part 310. (FTC Compl. (Doc. #1).) On June 3, 2008, the parties entered into a Stipulated Preliminary Injunction. (Stipulated Prelim. Inj. (Doc. #25).) On February 5, 2009, the FTC filed an Amended Complaint (Doc. #62) adding Defendants Dries, Dirk and Jeffrey Dantuma. The parties completed discovery on May 22, 2009.

On July 31, 2009, the parties filed cross motions for summary judgment. The FTC contends PBS is in violation of the FTC Act, 15 U.S.C. § 45(a), because PBS makes material misrepresentations to consumers in the initial telemarketing calls and in subsequent communications with consumers. Additionally, the FTC argues PBS is subject to the Telemarketing Sales Rule, 16 C.F.R. § 310, because it sells to consumers at their place of business. FTC contends PBS is in violation of the Telemarketing Sales Rule because PBS fails to disclose the purpose of its call to consumers, misrepresents the total cost of the magazine subscriptions, makes false and misleading statements to induce payment for goods, and engages in a pattern of abusive calls. The FTC seeks a permanent injunction against Defendants, including the individual Defendants, which prohibits them from engaging in telemarketing and the sale of magazines. The FTC also seeks monetary relief in an amount equal to the Defendants' gross revenues less the amount Defendants have refunded consumers.

PBS contends it is not in violation of the FTC Act because all the material persuasion at trial." Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1102 (9th Cir. 2000). The Court views all evidence in the light most favorable to the non-moving party. Leisek, 278 F.3d at 898.

III. DISCUSSION

Section 5 of the FTC Act prohibits "deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). The FTC enacted the Telemarketing Sales Rule ("TSR") as a result of a directive from Congress to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." 15 U.S.C. § 1602(a)(1). Any violation of the TSR constitutes an unfair and deceptive act or practice in violation of Section 5 of the FTC Act. 15 U.S.C. § 57a(d)(3), § 6102(c)(b). The TSR includes a "business-to-business exemption" that exempts from its requirements "[t]elephone calls between a telemarketer and any business, except calls to induce the retail sale of nondurable office or cleaning supplies." 16 C.F.R. § 310.6(b)(7).

A. The Business-To-Business Exemption to the TSR

PBS contends the plain language of the business-to-business exemption to the TSR exempts PBS from its requirements because PBS only calls businesses. Additionally, PBS contends the FTC's interpretation of the TSR–that the exemption depends on whether a telemarketer sells to the business rather than an individual–is unworkable and unfair because it would depend on whether the person answering the phone was listening on behalf of the business or as an individual. PBS contends due process prohibits the FTC from reading in a specializge of th .96001 764.8lf4.1667 gs9berson answering thr[(PBSfring thr[(0)c

suggests would produce an absurd result in that consumers would be protected at home but not at work. Moreover, it is not unduly burdensome or unfair to require telemarketers to ask, at the outset of the call, for the person responsible for purchases on behalf of the business. Such a protocol would have been particularly easy here as the "lead" cards PBS receives from Dun & Bradstreet include the name of the business's manager or owner.

The Court need look at the published notices of the administrative agency only to determine if the Court's interpretation is clearly contrary to the intent of the administration. The Court's interpretation is consistent with the administrative agency's intent, as well as congressional intent to protect consumers from abusive telemarketing practices. See Notice of Proposed Rulemaking, 67 Fed. Reg. 4492 (January 30, 2002); 15 U.S.C. §§ 6101-02. Soliciting an individual consumer while they are at work is at least as abusive, if not more so, than when they are at home. The FTC provides numerous examples of consumers who complained that PBS attempted to sell them magazines and collect money while the consumer was busy at work. One consumer states that the numerous phone calls from PBS at her work caused problems with her employer. The limited scope of the exemption is apparent, to exclude only telemarketing calls to businesses for business purchases. Accordingly, for the reasons set forth above, the Court finds PBS is subject to the TSR's requirements.

B. The Federal Trade Commission Act & Telemarketing Sales Rule

PBS contends it does not violate Section of 5 of the FTC Act or the TSR because it clearly discloses the purpose of the call, truthfully represents all material terms including the total cost of the magazines and how PBS collects payments, and strictly limits the number of times a consumer may be contacted. PBS contends its qualification questions at the beginning of the call are proper because they are intended to ensure PBS is in compliance with the law. As for comments such as "we have a small surprise for you," "with our best wishes," "monthly honor plan," and "customers are not being asked to buy a

the potential customer if they would answer a few questions and telling consumers they have a “small surprise” for them and there is “no catch involved.” Although the dollar amounts provided in PBS’s scripts may be literally true, the FTC argues that the net impression of the sales call is that customers will receive free magazines upon payment of nominal shipping and handling fees. The FTC also contends that PBS targets consumers who are distracted and busy with their own customers. The FTC contends in the verification recordings that the verifiers often fail to make the material disclosures by deviating from the script and failing to answer consumer questions clearly. The FTC argues that the verification recording and the ten day internal control period are illusory safeguards that do not cure the misrepresentations PBS employees make in their lead call.

The FTC contends that in subsequent communications, PBS misrepresents to consumers that they have entered into binding contracts and that consumers’ orders cannot be cancelled because PBS already has submitted orders to the publishers for five year subscriptions when PBS has not done so. The FTC also argues that in the collections omission, or practice is (1) “likely to mislead consumers acting reasonably under the circumstances (2) in a way that is material.” F.T.C. v. Cyberspace.Com LLC, 453 F.3d 1196, 1199 (9th Cir. 2006). The representation may be either implied or express. F.T.C. v. Figgie Int’l Inc., 994 F.2d 595, 604 (9th Cir. 1993). Additionally, any violation of the TSR an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." Cliffdale Assocs., Inc., 103 F.T.C. 110, 175 (1984).

In Kraft, Inc. v. Federal Trade Commission, the United States Court of Appeals for the Seventh Circuit found that although Kraft's representation that it used five ounces of milk in making each Kraft single was literally true, the implied representation that each Kraft single was equivalent to five ounces of milk was false, as the average consumer would not know that roughly thirty percent of the calcium was lost during processing. 970 F.2d 311, 322 (7th Cir. 1992). In Removatron International Corp. v. Federal Trade Commission, the First Circuit found that, although Removatron never represented that its machine could permanently remove hair one hundred percent of the time, by representing that it could effectively remove hair permanently, and comparing it favorably to electrolysis, Removatron created the net impression that the machine would "permanently remove hair for most people most of the time." 884 F.2d 1489, 1497 (1st Cir. 1989). The Court thus held that there was substantial evidence to support the Commission's finding that Removatron's representations were misleading, as the effectiveness of the hair removaremoitsm clear and conspicuous manner . . .[t]hat the purpose of the call is to sell goods or services." 16 C.F.R. § 310.4(d). The TSR prohibits a telemarketer to misrepresent, directly or by implication, the total cost of the goods, or to make a "false or misleading statement to induce any person to pay for goods or services . . ." 16 C.F.R. § 310.3(a)(2) & § 310.3(a)(4). The TSR further prohibits a telemarketer from engaging in a pattern of abusive calls including "[c]ausing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number." 16 C.F.R. § 310.4(b)(1)(i).

1. Initial & Verification Calls

Viewing the facts in the light most favorable to PBS on the FTC's Motion, no material question of fact remains that PBS's initial and verification calls are in violation of the FTC Act and the TSR. In the initial call, PBS begins by asking the consumer if they will answer a few questions and in return PBS has a "small surprise, nothing big but it's weekly or even monthly. Rather, the PBS representative making the initial call tells the consumer that "most people send it in two months at a time." When the consumer is transferred to the supervisor to confirm some information, the supervisor informs the consumer that the initial suggestion to pay doubled-up monthly payments is made a term of the agreement.

Likewise, the verification call begins by thanking the consumer for doing the survey and asking the consumer if he or she would consent to having their information verified on tape. The verifier subsequently adds an additional term to the agreement, informing the consumer that the order cannot be cancelled. Albeit true that by the end of the verification call PBS has informed the consumer of all the terms of the agreement, the way in which PBS selectively discloses the material terms throughout the various calls, prefaces subsequent calls by informing the consumer PBS is just confirming information, and then adding new required terms is likely to mislead.

PBS contends the FTC's evidence is insufficient to establish PBS's representations are misleading because, based on PBS's First Payment coupons, the number of charge backs, and the percentage of consumer complaints PBS and other agencies received, the majority of PBS consumers are satisfied. PBS contends that the FTC does not provide any legitimate survey evidence to rebut this fact. However, where the Court finds the deception "self-evident," the FTC need not establish that a majority of PBS consumers were misled, nor does it need to provide empirical survey evidence that the representation has a capacity to deceive a majority of consumers. Furthermore, the FTC presents supporting evidence from consumers and former PBS employees. Thus, the Court need not rely only on its own interpretation of PBS's representations.

The FTC presents declarations from numerous consumers who believed the initial conversation represented the entire agreement–that the offer was either free or for a nominal amount, and that there was no long-term obligation or no obligation at all.

Consumers also reported being confused by the terms of the offer because the PBS if, as PBS suggests, the consumer listened carefully, and notwithstanding PBS's selective disclosure of material terms, there is undisputed evidence that PBS employees speak quickly, deviate from the script, and evade consumer questions. Besides bare assertions, PBS presents no evidence that employees are reprimanded for such conduct.

Viewing the facts in the light most favorable to PBS, the Court finds no question of material fact remains that in the initial and verification calls, while some of PBS's representations may be literally true, the net impression of the representations is likely to mislead a consumer acting reasonably under the circumstances in a way that is material. Accordingly, the Court finds PBS is in violation of Section 5 of the FTC Act and the TSR with respect to its initial and verification calls. The Court therefore will grant the FTC's Summary Judgment Motion on counts one, three, and four with respect to the initial communications, and deny PBS's Motion for Summary Judgment on counts one, three, and four with respect to the initial communications.

2. Subsequent Communications

Viewing the facts most favorable to PBS on the FTC's Motion, no question of material fact remains that PBS's subsequent communications violate Section 5 of the FTC Act and the TSR.

PBS makes at least two undisputed misleading representations to induce payment. When consumers call to cancel, a PBS customer service agent represents to the consumer that they cannot cancel because PBS already has put in the full order with the publisher. Dirk Dantuma admits PBS representatives do not inform consumers that in some cases the entire five year subscription has not been pre-paid. PBS contends the representation that the full order has been processed when in fact representatives at some point will have to renew the subscription with the publishers is immaterial and irrelevant because PBS has no duty to inform consumers of the terms of its agreement with the magazine publishers. PBS's argument, however, does not diminish the misleading nature of

PBS's statement that the consumer cannot cancel because the order already has been placed, thereby inducing the consumer to pay for the full five year subscription.

Additionally, PBS sends a collection letter representing the sender as part of PBS's legal department when PBS admits it has no such department and never initiates legal proceedings against consumers with delinquent accounts. Although the letter does not explicitly state PBS will commence legal proceedings against the consumer for failure to pay, the net impression of the letter is that PBS has a legal department and legal action is a possibility. Both representations are false and induce the consumer to pay PBS for the magazine subscriptions to avoid legal or other action.

With respect to the FTC's claim that PBS engages in a pattern of abusive calling with intent to annoy, abuse, or harass, the FTC presents evidence from consumers that PBS called the consumers repeatedly even after they asked PBS to stop. A number of consumers also state that PBS agents threatened them. Although the FTC does not present evidence from PBS collections agents admitting they engaged in this type of misconduct, the FTC presents evidence from former PBS employees that in the initial and verification calls, the employees were instructed to, or at least not reprimanded for, calling the consumer repeatedly even when the consumer said they were not interested.

Admittedly, the FTC does not present the same kind of compelling evidence of PBS's failure to enforce the stated company policy prohibiting harassing phone calls as the FTC presented with respect to PBS employees making repeated misleading representations in the verification call. Nevertheless, that PBS fails to enforce company policy with respect to its verification employees at least suggests it approaches its collections employees with evidence of specific employees that were fired for engaging in such misconduct. PBS's assertions that its official policy prohibits harassment does not raise a genuine issue of material fact that PBS's de facto policy was to engage in harassing collections efforts.

Accordingly, viewing the facts in the light most favorable to PBS, no question of material fact remains that PBS's subsequent communications are in violation of Section 5 of the FTC Act and the TSR. The Court therefore will grant the FTC's Summary Judgment Motion on counts five and six with respect to the initial communications, and deny PBS's Motion for Summary Judgment on counts five and six with respect to the initial communications.

C. Damages

The FTC seeks a permanent injunction prohibiting PBS and the individual Defendants from engaging in telemarketing and the sale of magazines. The FTC contends a permanent injunction is proper in this case because Defendants have demonstrated an unwillingness to change their magazines sales practices to comply with the law. The FTC also seeks monetary restitution for consumers injured by Defendants. The FTC measures the restitution as the full amount of the purchase price or payment less any refunds, which equals approximately forty million dollars.

PBS argues, notwithstanding its contention that it is not in violation of the FTC Act or subject to the TSR, that any evaluation of damages is improper on summary judgment. PBS contends an assessment of damages must be determined at an evidentiary hearing because there is a lack of correlation between the FTC's demand of PBS's gross revenue less refunds and the less than one percent of total consumer complaints lodged against PBS. Additionally, PBS argues the FTC's assessment of damages includes conduct beyond the applicable three year statute of limitations pursuant to Section 19(d) of the FTC Act.

Section 13(b) of the FTC Act provides "that in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). To obtain consumer redress against an individual subject to injunctive relief under Section 13, the FTC must establish "proof of injury caused by those practices" and "the relief must be necessary to redress the injury." Figgie Int'l, 994 F.2d at 605 (citing 15 U.S.C. § 57(b)). Additionally, "[n]o action may be brought by the Commission under this section more than 3 years after the rule violation . . . or the unfair or deceptive act or practice to which an action" relates. 15 U.S.C. § 57b(d).

The Court will enter a permanent injunction coterminously with this Order. The FTC also requests significant monetary relief. The parties, however, focus their briefs on summary judgment on the merits rather than on relief. The Court concludes an evidentiary hearing is warranted to fully evaluate the appropriate monetary relief, if any, to award.

IV. CONCLUSION

IT IS HEREBY ORDERED that the Federal Trade Commission's Motion for Summary Judgment (Doc. #86) is hereby GRANTED on all counts and a permanent injunction will be entered coterminously with this Order.

IT IS FURTHER ORDERED that Publisher Business Services' Motion for Summary Judgment (Doc. #99) is hereby DENIED on all counts.

IT IS FURTHER ORDERED that counsel for the parties shall appear on May 18, 2010 at 9:30 a.m. in Courtroom

IT IS FURTHER ORDERED the FTC shall file an opening brief on the issue of damages by April 20, 2010. PBS shall file a response brief by April 30, 2010. The FTC shall file a reply brief by May 7, 2010. No brief shall exceed ten (10) pages in length.

DATED: April 7, 2010.

PHILIP M. PRO
United States District Judge