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12 Resident Counsel

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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 SCHANG; 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.  
27  
28

Case no. 2:08-cv-00620-PMP-PAL

FTC'S OPENING BRIEF ON THE  
ISSUE OF DAMAGES

Evidentiary hearing  
Date: May 18, 2010  
Time: 9:30 a.m.  
Place: Courtroom 7C  
333 S. Las Vegas Blvd.  
Las Vegas, NV 89101

TABLE OF CONTENTS

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I. Section 13(b) of the FTC Act authorizes the Court to order full restitution against Defendants for their violations of Section 5(a) of the FTC Act. . . . . 1

II. equitable monetary relief awarded pursuant to Section 13(b) of the FTC Act is not restricted by onr subject's use of limitations. . . . . 1

III. The FTC has met its burden of proof for showing that Defendants' net revenues "reasonably approximate" the amount of consumers' net losses. . . . . 2

IV. The Court should reject Defendants' evidence as to "satisfied customers 32006489600 TDt10S0.0000 T

TABLE OF AUTHORITIES

FEDERAL CASES

*CFTC v. Amer*

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1 15 U.S.C. § 57b(e). . . . . 1, 2

2 15 U.S.C. § 6102(c). . . . . 1

3 FEDERAL RULES

4 FRCP 26(a)(1)(A)(ii). . . . . 5

5 FRCP 37(c)(1). . . . . 6

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1 *in lieu of*, any other remedy or right of action provided by State or Fede

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<sup>3</sup> PBS does not consider consumers who complain by telephone to be “complaints”:

Q: ... What about people who call in asking for[,] say John Marley, general manager[,] saying, [“]I don't know what this agreement form is. It's saying I owe \$717.60, but I never agree to that. Somebody lied to me.[“] Do you consider a complaint like that, a call like that[,] a complaint?

A: I consider that a [“]problem.[“] In other words, [what] a customer service rep needs to do is find out what the problem is with the accounts and solve that problem.



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1 their defense that customers who paid for magazines were satisfied were documents entitled “First  
2 Payment Coupons” and their lists of new customer for a four-month period.<sup>5</sup>

3 The First Payment Coupon does not in fact attempt to elicit consumers’ opinions on  
4 whether they are in fact satisfied customers. The first question, “1. *How do you rate the way our*  
5 *representative presented your order?*”, is ambiguous since consumers have spoken to more than  
6 one representative by the time they receives the First Payment Coupon, and the question does not  
7 allow for a negative response (the only answers allowed are “Excellent,” “Good,” or “Fair”). The  
8 second question, “2. *Were your magazines lists correctly on your order?*”, does not have even  
9 colorable relevance to the issue of whether consumers were satisfied customers. Moreover, as the  
10 Court noted in its Order, some of the First Payment Coupons included written complaints which  
11 show or suggest customer *dissatisfaction*. Doc. #151 at p.12, Ins.18-25. Thus, the Court should  
12 conclude as a matter of law that Defendants’ First Payment Coupons are insufficient to support  
13 Defendants’ claim that they had satisfied customers.

14 The Court should likewise find that Defendants’ “new customer” lists are insufficient as a  
15 matter of law to establish that Defendants had any satisfied customers. The Court found that  
16 Defendants’ abusive collection tactics included threatening legal action or negative credit  
17 repercussions if the consumer failed to pay. In addition, consumer declarations show that at least  
18 some of the consumers who are on Defendants’ “new customer” lists were extremely dissatisfied  
19 with Defendants’ sales and collections tactics, and that these consumers paid money to PBS  
20 because they were either afraid that PBS would damage their credit if they didn’t pay, or felt as  
21 though they had been tricked into a binding contract. *See* doc. #90 (FTC’s undisputed fact #151);  
22 doc. #96 at p.410 (Campbell declaration ¶ 11); doc. #135-16 (Shepard declaration ¶¶ 2, 5). Thus,  
23 the Court should reject Defendants’ proposed inference that the fact that a consumer paid money to  
24 PBS and is a current “customer” should somehow lead to the conclusion that the consumer is a

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25 <sup>5</sup> Defendants initially refused to produce this evidence to the FTC, and ultimately produced new  
26 customer lists covering a four-month period, only after the Court compelled their production.  
27 Pursuant to FRCP 37(c)(1), the Court should exclude any new evidence that Defendants attempt to  
28 introduce on this issue at the evidentiary hearing. If the Court allows Defendants to present new  
evidence, it should also allow the FTC to present new evidence, including on consumer injury for  
the period September 1, 2008 to date.

1 satisfied customer. To the contrary, given the Court's findings and the FTC's uncontroverted  
2 evidence which shows that consumers who paid money to PBS did so because PBS's collections  
3 tactics made them feel coerced to pay, the Court should infer that the typical paying consumer felt  
4 coerced into paying because of Defendants' deceptive and abusive collections tactics.

5 In short, Defendants' First Payment Coupons and new customer lists are not reliable and  
6 are insufficient to support Defendants' argument that consumers paid money to PBS because they  
7 were satisfied with Defendants' sales and collections tactics.

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1 Defendants' consumer victims should not be monetarily penalized for expenses incurred by  
2 Defendants and over which the consumers had no control.

3 VI. THE COURT SHOULD HOLD EACH OF THE INDIVIDUAL DEFENDANTS JOINTLY AND SEVERALLY  
4 LIABLE FOR THE FULL AMOUNT OF RESTITUTION  
5 In ordering equitable monetary relief under Section 13(b), the Court may hold individual  
6 corporate officers and owners personally liable for the monetary relief if the individuals:

7 had knowledge that the corporation or one of its agents engaged in dishonest or  
8 fraudulent conduct, that the misrepresentations were the type upon which a  
9 reasonable and prudent person would rely, and that consumer injury resulted.

10 *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1234 (9th Cir. 1999) (citing *FTC v. Publishing  
11 Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997)). The knowledge requirement can be  
12 satisfied if:

13 the individuals had actual knowledge of material misrepresentations, [were]  
14 recklessly indifferent to the truth or falsity of a misrepresentation, or had awareness  
15 of a high probability of fraud along with an intentional avoidance of the truth.

16 *Id.* Accordingly, an individual may be held personally liable for restitution without a showing of  
17 an actual intent to defraud consumers. *Id.*

18 Among the factors that courts have considered in determining whether an individual  
19 defendant had knowledge of the underlying corporate fraud are the individual's active role in  
20 developing deceptive materials used to market to consumers, such as telemarketing scripts, and  
21 responsibility for corporate financial matters. See, e.g., *FTC v. Cyberspace.com, LLC*, 2002 U.S.  
22 Dist LEXIS 25565 at \*17-19, 2003-1 Trade Cas. (CCH) ¶ 73,960 (W.D. Wash. 2002), *aff'd*, 453  
23 F.3d 1196 (9th Cir. 2006); *FTC v. Amy Travel*, 875 F.2d 564, 574 (8th Cir. 1989) (telemarketing  
24 scripts); *FTC v. Am. Standard Credit Sys.*, 874 F. Supp. 1080, 1089 (C.D. Cal. 1994) (developing  
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1 should make the additional findings that: (1) consumer injury has resulted; and (2) each individual  
2 Defendant (Edward Dantuma, Persis Dantuma, Brenda Dantuma Schang, Dirk Dantuma, Jeffrey  
3 Dantuma, and Dries Dantuma) had actual knowledge of material misrepresentations, was  
4 recklessly indifferent to the truth or falsity of a misrepresentation, or had awareness of a high  
5 probability of fraud along with an intentional avoidance of the truth. Based on these findings and  
6 the Court's previous findings that (1) PBS's sales and collections tactics violated Section 5 of the  
7 FTC Act and four provisions of the FTC's TSR; and (2) the misrepresentations are the type upon  
8 which a reasonable and prudent person would rely, the Court should hold each of the individual  
9 Defendants personally liable for monetary relief.

10 Further, the Court should find that the Defendants acted as a "common enterprise." *See*  
11 discussion at Sections II.H. and III.D of doc. #88. Based on the Court's findings that Defendants  
12 acted as a common enterprise in engaging in the acts and practices that violate Section 5(a) of the  
13 FTC Act and the TSR, the Court should hold each of the defendants jointly and severally liable  
14 with the Corporate Defendants for the monetary judgment.

15 VII. THE FTC REQUESTS THAT THE COURT ORDER ANCILLARY RELIEF TO FACILITATE  
16 ADMINISTRATION BY THE FTC OF ANY MONETARY RELIEF AWARDED

17 Section VIII of the proposed final judgment lodged by the FTC in connection with its  
18 summary judgment motion set forth various ancillary equitable provisions designed to assist and  
19 provide guidance to the FTC in administering the requested monetary relief. *See* doc. #109. The  
20 FTC respectfully requests that the Court include the following sections of doc. #109 with any  
21 monetary relief it awards: Sections VIII.B. (allowing for creation of restitution fund), VIII.C.  
22 (requiring Defendants to produce customer information to FTC, to facilitate administration of a  
23 restitution program), VIII.D. (providing for accrual of interest on unpaid balance of monetary  
24 award), and VIII.E (disclosing Defendants' taxpayer identifying numbers to FTC to facilitate  
25 collecting and reporting on delinquent amounts).

26 Dated: April 20, 2010

27 Respectfully submitted,  
28 /s/ Faye Chen Barnouw  
FAYE CHEN BARNOUW  
RAYMOND E. MCKOWN  
MARICELA SEGURA  
Attorneys for Plaintiff FTC