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that the OnlineSupplier negative option offer was adequately disclosed, he should not be held liable for Commerce Planet's illegal conduct. (MSJ #1 at 9–15) Defendant's "good faith" argument is irrelevant as a matter of law and is contradicted by the fact that he was informed that there was a problem with the offer. Defendant was aware that customers frequently complained that they did not intend to sign up for OnlineSupplier, that the chargeback rate was high, and that the product usage rate was very low, and he was warned by a subordinate attorney that disclosure of the offer might be inadequate. In any case, the mere fact that Defendant participated in and had the ability to control Commerce Planet's marketing practices is sufficient to raise a genuine issue of material fact as to his knowledge of the company's deceptive conduct.

Defendant also contends that there is no need for injunctive relief (MSJ #2 at 5–6) and that the FTC has a limited or no ability to seek equitable monetary relief (MSJ #2 at 7–11). Defendant's arguments are based on erroneous legal precedent and ignores the overwhelming weight of the evidence generated through discovery in this matter.

The Court has observed that "the FTC's deceptive practices and unfair practices claims are inherently factual inquiries" (Dkt. #145 at 3) and that Defendant "relies on an expert opinion and deposition testimony in order to support his motions, which often raise issues of credibility reserved for the finder of fact at trial" (Dkt. #157 at 1). As detailed in this Opposition, the facts underlying Defendant's motions are in dispute, as is the credibility of Defendant and his experts. Accordingly, De

sufficient evidence that a reasonable trier of fact could resolve the issue in the non-movant's favor, and an issue is "material" when its resolution might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the initial burden of demonstrating either that there are no genuine material issues or that the opposing party lacks sufficient evidence to carry its burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractor Ass'n*, 809 F.2d 626, 630–31 (9th Cir. 1987). Once this burden has been met, the party resisting the motion "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The court does not make credibility determinations, nor does it weigh conflicting evidence. *Anderson*, 477 U.S. at 255.

B. [illegible]

Defendant's claim that "the [OnlineSupplier negative option] disclosures were neither unfair nor deceptive" (MSJ #1 at 6) is contradicted by reliable evidence that consumers were deceived by the OnlineSupplier landing/sign-up pages. The evidence of deception includes thousands of consumer complaints, a long and persistent history of chargebacks, and internal Commerce Planet documents showing that consumers did not understand the terms and conditions of the OnlineSupplier negative option offer and that very few, if any, consumers who were charged for OnlineSupplier ever used the product.

1. [illegible]

Section 5 of the FTC Act, 15 U.S.C. § 45 (2006), prohibits deceptive or unfair acts or practices in or affecting commerce. To establish that Commerce Planet engaged in a deceptive act or practice in violation of Section 5, the FTC

must satisfy three prongs: (1) that Commerce Planet made a representation or omission; (2) that the representation or omission was likely to mislead consumers acting reasonably under the circumstances; and (3) that the representation or omission was material. *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001). The Nin

225:23–226:1) Mr. Eisner's discussion of Doba.com is irrelevant. (Exh. 356 (King Rebuttal Report) at 6–7; Exh. 395 (Shimp Supp. Rebuttal Report) at 7)

Finally, Mr. Vranca's opinions concerning OnlineSupplier cancellation rates are unsubstantiated, incorrect, and irrelevant. Mr. Vranca failed to lay a foundation for or otherwise explain how he arrived at his conclusions. (*See* Becker Decl. ¶¶ 4–5) In addition, his conclusion that 46.32% of consumers cancelled their membership during the "free trial" period is incorrect. Only 25% of OnlineSupplier customers cancelled their membership during the "free trial" period. (Becker Decl. ¶¶ 7–8) In any event, even if 46.32% consumers were aware of the negative option, or became aware before the expiration of the trial period, this figure still indicates that upwards of 50% of consumers were deceived. Likewise, Mr. Vranca's conclusions concerning the percentages of customers whose memberships lasted longer than sixty or ninety days are irrelevant. Negative options do not require affirmative action by the customer, so information on the duration of membership cannot – by definition – support a claim that *any* number of customers "actively" maintained their memberships. (*See* MSJ #1 at 8) Moreover, many consumers do not regularly and carefully check their monthly charges. (*See, e.g.*, Exh. 395 (Shimp Supp. Rebuttal Report) at 6; Becker Depo. at 83:5–87:14) It cannot be inferred that merely because a customer did not cancel before sixty or ninety days that he or she was aware of the negative option offer.

C. [illegible]

Count II of the FAC alleges that Commerce Planet engaged in the unfair practice of assessing monthly charges against consumer's credit cards without their express, informed consent. Defendant does not specifically address Count II in his MSJ #1. Instead, he argues that "[t]here is no empirical evidence of any unfairness or deception arising from the negative option disclosures on the

OnlineSupplier website." (MSJ #1 at 7) In doing so, Defendant conflates Counts I and II, each of which is governed by a different legal standard.

1. Legal Standard

To establish that an act or practice is unfair, the FTC must show (1) that it causes or is likely to cause substantial injury to consumers; (2) that the injury is not reasonably avoidable by consumers themselves; and (3) that the injury is not outweighed by countervailing benefits to consumers or to competition. 15 U.S.C. § 45(n); *FTC v. Neovi*, 604 F.3d 1150, 1155 (9th Cir. 2010).

2. Defendant's Practices Violate the Law

Here, the FTC easily satisfies each prong. As to the first prong, the challenged practice caused substantial injury. The FTC may satisfy this prong with evidence that consumers were injured "by a practice for which they did not bargain." *Id.* at 1157; *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000). Moreover, an injury may be "sufficiently substantial" if it results in a "small harm to a large number of people." *Neovi*, 604 F.3d at 1157; *FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1004 (N.D. Cal. 2010) Here, more than 380,000 consumers were each charged the OnlineSupplier monthly membership fee of between $29.95 and $59.95 for at least one month. (Becker Decl. ¶ 8) The total estimated consumer harm exceeds $39 million. (Exh. 363 (Becker Expert Report) at 4)

As to the second prong, the victims were not able to avoid the injury. To determine unavoidability, "courts look to whether the consumers had a free and informed choice." *Neovi*, 604 F.3d at 1158. As described above, more than 380,000 consumers did not – and could not – consent to have their credit cards charged for the simple reason that they did not see the offer for OnlineSupplier's negative option plan ("negative option plan"). Thus, consumers could not have reasonably avoided the charge.

recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth. *Amy Travel*, 875 F.2d at 574; *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997). Personal participation in the violative practices can demonstrate knowledge. *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1235 (9th Cir. 1999). Similarly, the "degree of participation in business affairs is probative of knowledge." *Am. Standard Credit Sys.*, 874 F. Supp. at 1089. Knowledge can also be established with evidence that the defendant had been advised by counsel about problems with marketing materials. *Stefanchik*, 559 F.3d at 931.

2. Defendant

Defendant personally reviewed and approved OnlineSupplier landing/sign-up pages – the very pages that led many consumers to unwittingly pay for services they had never agreed to. (Exh. 25 (Gravitz Decl.) ¶¶ 12–13; Hill Depo. (Jan. 14, 2011) at 95:8–97:13, 111:1–18; Gravitz Depo. at 141:15–24, 158:25–160:2; Exh. 92; Exh. 97; Exh. 109; Gugliuzza Depo. at 103:11–105:18, 164:23–165:2)

Additionally, Defendant rejected a recommendation that Commerce Planet redesign the OnlineSupplier landing/sign-up pages to obtain consumers' express consent to the OnlineSupplier terms and conditions *before* completing the transaction. (Exh. 25 (Gravitz Decl.) ¶ 13) Defendant also rejected the advice of in-house counsel that the negative option offer be made more clear and conspicuous. (Exh. 252 (Huff Decl.) ¶¶ 21, 23)

3. Defendant

The evidence shows that Defendant was involved in, and had the ability to control, the marketing of OnlineSupplier. Defendant was retained by the board of directors of Commerce Planet in May 2005 to review the company's operations

and offer recommendations for ways to bring the company to profitability.[2] (Exh. 173 (Hill Decl.) ¶ 15) Defendant conducted in-depth interviews of all managers and reviewed the company's books and operations, and presented the board of directors with his findings and recommendations. (*Id.* ¶ 16)

In June 2005, the board of directors hired Defendant to oversee implementation of his recommendations. (*Id.* ¶ 17) Although his position was styled as that of a "consultant," Defendant exercised broad authority over company operations: He had day-to-day management responsibility for profit and

[2] The term "Commerce Planet" as used herein refers to Commerce Planet, Inc., and its predecessor, NeWave, Inc. NeWave was reorganized and renamed Commerce Planet in June 2006. (Exh. 173 (Hill Decl.) ¶¶ 9–10)

to the OnlineSupplier landing/sign-up pages. (Exh. 25 (Gravitz Decl.) ¶ 14) Defendant continued to play a role at Commerce Planet and in the marketing of OnlineSupplier for several months after he resigned his position as president. (Roth Depo. at 69:14–71:5, 167:12–25)

4. D

Finally, there is substantial evidence that Defendant was informed consumers found the OnlineSupplier marketing materials and landing/sign-up pages to be misleading, including evidence of the following:

- Commerce Planet's customer service manager, Jose Guardiola, informed Defendant that large numbers of customers were complaining and requesting refunds because they had not intended to sign up for OnlineSupplier. (Exh. 301 (Guardiola Decl.) ¶¶ 4, 8–9; Guardiola Depo. at 52:23–53:22, 73:21–76:4, 136:10–138:21)
- Defendant was informed about the company's high rate of chargebacks. (Exh. 44 (Brooks Decl.) ¶¶ 10–13; Exh. 25 (Gravitz Decl.) ¶ 13) Defendant even help

business affairs (*see supra* Section II.D.3) gives rise to an inference of knowledge. *See Am. Standard Credit Sys.*, 874 F. Supp. at 1089.

Additionally, Defendant's actions as president of Commerce Planet were consistent with his knowledge that consumers were likely unaware of the negative option offer. When Defendant learned that the FTC was beginning to crack down on negative option schemes, he sent Mr. Huff to attend an FTC workshop on negative options with express instructions not to identify himself as being affiliated with Commerce Planet. (Exh. 252 (Huff Decl.) ¶ 16, Exhibit F ("Very important, do not register with the Commerce Planet name or any affiliated Commerce Planet connections."))

E. [illegible]

Defendant asserts that summary judgment is appropriate on the issue of whether a permanent injunction ("PI") should issue. (MSJ #2 at 5–6) Defendant has misread the relevant cases and ignored the evidence justifying a PI in this case.

1. [illegible]

To support a PI, the FTC must demonstrate some risk of recurrent violation. There must be a "cognizable danger of recurrent violations," *United States v. W.T. Grant Co*., 345 U.S. 629, 633 (1953), or "a reasonable likelihood of future violations." *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980); *FTC v. Magui Publishers, Inc*., 1991 U.S. Dist. LEXIS 20452, at *44 (C.D. Cal Mar. 28, 1991).

None of the cases on which Defendant relies, however, discusses the evidence necessary to demonstrate the risk of a recurrent violation. *FTC v. Braswell*, 2005 U.S. Dist. LEXIS 42976 (C.D. Cal. Sept. 27, 2005), involved a good faith defense, not a claim that the defendant had abandoned the violative conduct. *Id.* at *38. In *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008), *aff'd per curiam*, 2009 U.S. App. LEXIS 27388 (11th Cir.

When a court evaluates the likelihood of recurrent violations, "[t]he existence of past violations may give rise to an inference that there will be future violations." *Murphy*, 626 F.2d at 655. The fact that a defendant is not currently violating the law "does not preclude an injunction." *Id.* A court should assess such factors as "the degree of scienter involved; the isolated or recurrent nature of the infraction; the defendant's recognition of the wrongful nature of his conduct; the likelihood, because of defendant's professional occupation, that future violations might occur; and the sincerity of his assurances against future violations." *Id.* A defendant's promise not to engage in violations in the future carries little or no weight. *Treves v. Servel, Inc.*, 244 F. Supp. 773, 776 (S.D.N.Y. 1965); *see TRW*, 647 F.2d at 953 ("promises to refrain from future violations, no matter how well meant, are not sufficient to establish mootness").

Further, it has "long been recognized that the likelihood of recurrence of challenged activity is more substantial when the cessation is not based upon a recognition of the initial illegality of that conduct." *Armster v. United States District Court for the Cent. Dist.*, 806 F.2d 1347, 1359 (9th Cir. 1986); *see also FTC v. Warner Chilcott Holdings Co. III*, 2007 U.S. Dist. LEXIS 4240, at *27–28 (D.D.C. Jan. 22, 2007) (case is not moot where defendants insist upon legality of challenged practices).

2. Plaintiff's Likelihood of Success on the Merits

Defendant's claim that a PI is unwarranted relies on disputed facts. Even if his facts were not disputed, Defendant could not satisfy his heavy burden to demonstrate that there is no danger of recurrent violation.

First, the timing of Defendant's divorce from Commerce Planet does not support Defendant's position. Although he resigned as president of Commerce Planet in early November 2007 (Gugliuzza Decl. (Dkt. #112) ¶ 18), he continued to exercise executive authority until March 2008 (Gugliuzza Depo. at 150:19–151:8; Roth Depo. at 69:14–71:5, 81:5–83:2, 173:19–174:17; Exh. 252

(Huff Decl.) ¶ 25), and he remained an active member of the Commerce Planet board of directors until May 2008 (Hill Depo. (Jan. 14) at 191:3–5), more than two months after the company received the FTC's Civil Investigative Demand. (*See* Defendant Charles Gugliuzza's Statement of Uncontroverted Facts and

5, 2005, Defendant wrote the board of directors of Commerce Planet to express his interest in the job of CEO. (Exh. 3) He touted his "management expertise in team building and deployment of strategic initiatives" and boasted: "I have throughout my career been involved with entrepreneurial enterprises and have successfully launched companies, built effective management teams and have created effect[ive] marketing, advertising and branding campaigns." (*Id.*) Soon thereafter, he wrote the chair of the board of directors that he was "very excited about the opportunity and believe I can make an immediate impact within the first month." (Exh. 4) Defendant's consulting agreement with Commerce Planet even recited that he "is experienced in matters regarding e-commerce [and] direct marketing." (Exh. 11 at DCM 275)

Moreover, in late June, after delivering the assessment of Commerce Planet that was the subject of his first consulting agreement (Gugliuzza Decl. ¶ 3), he wrote the chair of the board of directors about a second consulting agreement to "train existing management and staff, restructure your current infrastructure (which is in dire need of repair) and ultimately achieve organic profitability for a company that as recent as last quarter lost more than $1,000,000.00. In addition, I would be required to provide your management team with all of my operational knowledge and business contact information within a relatively short time period. . . . I have proven that I than $1,3was "very exciteirle.9(pr TD.0008 Tc-.0019 Tw(itiatives" and.3

expertise to yet again exploit this medium to deceive consumers. Whether his present job involves negative option marketing or direct consumer interface is of no moment. Absent injunctive relief, nothing keeps him from leaving his current job for one more akin to his role

has considered the question has concluded that courts do indeed have that authority. *See, e.g.*, *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir. 1982); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469–70 (11th Cir. 1996). Even the Second Circuit, which in *FTC v. Verity Int'l Ltd.*, 443 F.3d 48 (2d Cir. 2006), appeared to limit the measure of monetary relief that the FTC can seek, has now clarified unequivocally that "Section 13(b) permits a court to order ancillary equitable relief, including monetary relief." *FTC v. Bronson Partners, LLC*, 2011 U.S. App. LEXIS 17203, at *8 (2d Cir. Aug. 19, 2011). The availability of monetary relief for consumers injured by violations of the FTC Act is thus settled law in the Ninth Circuit and in every circuit that has considered the issue; to suggest otherwise is to ask the Court to reject nearly thirty years of unambiguous precedent.

2. The FTC defines the scope of relief under Section 13(b)

Defendant's argument that the FTC's monetary recovery pursuant to Section 13(b) is limited to funds that can be traced to Defendant is inconsistent with Ninth Circuit precedent and, since the time of Defendant's filing, has been explicitly rejected by the Second Circuit.

a. Defendant misreads *Great-West Life* and its progeny

Defendant argues that court decisions that have interpreted Section 13(b) to allow for monetary relief absent tracing consumer money to the defendant are inconsistent with a Supreme Court case interpreting the private enforcement provisions of the Employee Retirement Income Security Act ("ERISA") – *Great-West Life Ins. Co. v. Knudson*. As Defendant acknowledges, the Second Circuit's decision in *Verity* is "the only circuit court decision to squarely address the impact

of *Great-West Life* on the scope of relief available under Section 13(b)." (MSJ #2 at 9) Last week, the Second Circuit revisited and clarified its position on the availability of monetary relief under the FTC Act and, in doing so, has explicitly rejected Defendant's argument. *Bronson Partners*, 2011 U.S. App. LEXIS 17203 at *14, 25–28, 34–36.

In *Bronson Partners*, the Second Circuit upheld the district court's entry of a monetary award in favor of the FTC of $1.9 million against corporate and individual defendants for violations of the FTC Act in connection with the deceptive sale of weight-loss products. *Id.* at *10. The monetary award, entered jointly and severally against the defendants, equaled the amount of full proceeds from the sale of the products in question plus statutory interest. *Id.* at *1, 8; *FTC v. Bronson Partners, LLC*, 674 F. Supp. 2d 373, 392 (D. Conn. 2009).

At issue on appeal were precisely the arguments raised by Defendant's instant motion – (1) that monetary relief is not authorized by Section 13(b) of the FTC Act, and (2) that, even if monetary relief could be awarded, it would have to be limited to the precise funds traceable from the consumer to the defendant. *Bronson Partners*, 2011 U.S. App. LEXIS 17203 at *8, 22. The court rejected the former argument based on "the well-established principle that a court sitting in equity is empowered to 'award complete relief' including relief that customarily 'might be conferred by a court of law.'" *Id.* at *15 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946)).

The court also rejected the defendants' latter argument, which, like Defendant's, was based on *Great-West Life*. The court noted, "It is because Bronson fails to realize the distinction between [*Great-West Life*] and the present case that its tracing argument fails." *Id.* at *28. The court went on to distinguish between a private, equitable claim, for which only a constructive trust or equitable lien could be awarded, and an FTC Act claim, for which disgorgement could be ordered. *Id.* at *28–29. In ultimately concluding that tracing is not required for

disgorgement, the court states that (1) disgorgement is available only to government entities enforcing statutes, *id.* at *31–32, (2) courts of equity will go farther to give relief in furtherance of the public interest than when private interests are involved, *id.*, and (3) public entities seek to deter law violations not claim specific property. *Id.* at 33.

It is worth noting that *Bronson Partners* also clarifies the Second Circuit's holding in *Verity*. *Verity* involved a scheme by which fraudulent charges were placed on consumers' phone bills. *Id.* at *17. During part of the scheme, a phone company deducted its charges from th96h9 TD. 211vai0016 Tc 0 Tw (id -.05at 33.)Tj -8.98

330 (2d Cir. 2005), involved the question whether a bankruptcy trustee's action to recover compensatory damages from corporate officers for breach of their fiduciary duty was legal or equitable, *id.* at 337, again an entirely different legal framework from that presented in an FTC action. Moreover, whatever implied application *Pereira* might have to an FTC action is superseded by the Second Circuit's subsequent opinion in *Verity*, which addresses the issue directly.

b Unclear illegible text

Defendant argues that the Ninth Circuit's decision in *FTC v. Stefanchik* does not apply to his case (MSJ #2 at 10 n.7); Defendant is wrong. Notwithstanding the factual differences between that case and the instant matter, the broad principles in *Stefanchik* are consistent with nearly thirty years of cases in the Ninth Circuit and the majority of other circuits. *Stefanchik* is not a judicial outlier; rather, it reflects the full development of Section 13(b) case law in this circuit and in a majority of those circuits that have considered it.

In *FTC v. H.N. Singer, Inc.*, the Ninth Circuit addressed for the first time the issue of whether Section 13(b)'s grant of authority to issue injunctions carried with it the right to grant other relief. The court held that Section 13(b) invoked the general equitable authority of the courts, which included not only the authority to grant injunctions, but the authority to grant other, ancillary relief, such as rescission and restitution, and, therefore, the authority to grant preliminary relief – 7n5112–13.

Citing *Singer*, the Ninth Circuit held explicitly in *FTC v. Pantron I Corp.* that Section 13(b) gave courts the "authority to grant any ancillary relief necessary to accomplish complete justice," including FTC v. H.Nuth713(b)'s g1/TT6 1 T24f2.6186j1r toth

at 958; *see FTC v. Direct Mktg. Concepts*, 648 F. Supp. 2d 202, 214 (D. Mass. 2009), *aff'd*, 624 F.3d 1 (1st Cir. 2010); *Transnet Wireless*, 506 F. Supp. 2d at 1271. In *FTC v. J.K. Publications*, this Court held that the "applicability of joint and several liability is entirely inconsistent with the proposition that traceability is required," adding that "adopting a traceability requirement would lead to absurd results." 2009 U.S. Dist. LEXIS 36885, at *15 (C.D. Cal. 2009).

3. [illegible]

Defendant also asserts that "the undisputed facts show that Defendant did not receive any amounts paid by Online Supplier customers or the proceeds of such payments." (MSJ #2 at 11) The statement is unsupported by any evidence, particularly the expert report of Stefano Vranca.[3] Mr. Vranca's report opines only that he could not trace specific dollars from the purchase of OnlineSupplier membership sales to Defendant. (Exh. 368 (Vranca Report) at 4) Thus, his analysis did not reveal the source of the compensation that Defendant received. Accordingly, his opinion does not rule out the possibility that Defendant received funds from sales of OnlineSupplier that Mr. Vranca could not trace. (Vranca Depo. at 83:11–13)

In fact, even that narrow and irrelevant opinion is unproven. For example, Mr. Vranca asserts that "there were sufficient revenues [*sic*] inflows to pay Mr. Gugliuzza from sources other than Online Supplier." (Exh. 368 (Vranca Report) at 3) But at his deposition, Mr. Vranca conceded that he had not calculated how much money Defendant actually made. (Vranca Depo. at 41:24–42:5) The statement that there were sufficient revenues from other sources to have paid Defendant's salary, expenses, and bonuses presupposes a comparison between the

[3] The FTC has moved to preclude the testimony of Mr. Vranca because (1) it is irrelevant as a matter of law; (2) he misrepresented his credentials; and (3) he is unable to identify the data upon which his opinions are based. (Motion *in Limine* to Exclude Expert and Rebuttal Testimony of Stefano Vranca (Dkt. #97))

various revenue streams on the one hand and Defendant's income on the other. Mr. Vranca made no effort to calculate the latter, so his conclusion is baseless.

The evidence instead demonstrates that Defendant profited handsomely from his stewardship of the Commerce Planet family of companies. According to a calculation by Jaime Rovelo, Commerce Pl