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Plaintiff Federal Trade Commission (“FTC” or “Commission”) moves this Court for summary judgment against Defendants Dario A. Jimenez Lopez (“Jimenez”) and Victor M. Ramirez (“Ramirez”) for violations of Section 5 of the FTC Act, 15 U.S.C. § 45. The Defendants preyed on Spanish-speaking consumers with a scheme offering vacation prizes through television and radio advertisements. Defendants told all consumers who responded to the ads that they had “won”; however, to obtain their prize, they had to pay Defendants between $200 and $400. After collecting the money, Defendants failed to deliver what they promised. Worse, Defendants then charged consumers a second time without any authorization. These facts, about which there is no genuine issue, establish that Defendants are

see Document 3, Motion for Temporary Restraining Order, and Documents 4 and 5, exhibits thereto.)[1] Defendants have not challenged or contested any of this evidence.

This Court's Temporary Restraining Order included a provision directing Defendants to turn over all of their business records. (Document 9, section IV.) Pursuant to this provision, Defendants se the FTC a single 13"x11"x2" FedEx box containing their financial disclosures, business and personal tax returns, bank statements, a set of 1099 forms for their telemarketers, and a single lead generation contract. (PX7 at ¶¶9-11, Att. A.) Defendants repeatedly stated under oath that no other records of their two-year business venture exist. (PX1 at 135:21-136:14, 137:22-139:10; PX2 at 104:21-108:11.)

Following this Court's entry of preliminary orders, the FTC conducted discovery from Defendants and third parties. FTC counsel sent third-party subpoenas and demands under the Temporary Restraining Order to banks, payment processors, and credit card networks for Defendants business and personal financial records. (PX2, Att. A–D; PX9.) Additionally, in August of 2011, FTC counsel deposed both Defendants over the course of two days. (PX1 and PX2.) Extensive excerpts from these depositions are attached as exhibits to this motion.

B. The Defendants

see]TJ /TT5 Lopez th9( endants)]TJ /TT10:

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[1] In this memorandum, the FTC uses the following formats for evidentiary citations: "PX1 at 135:21-136:14" refers to Plaintiff's Exhibit 1 at page 135, line 21 through page 136, line 14; "PX7 at ¶¶9-12, Att. A" refers to Paragraphs 9 through 12 of and Attachment A to Exhibit 7.

Exhibits containing sensitive personally identifiable information have been redacted, pursuant to the District of Maryland's Civil Procedures Manual Section IV.A and Federal Trade Commission policy, to protect individuals' privacy. Additionally, individuals' financial account statements attached to PX2 and PX10-PX21 have been redacted to show only the relevant transactions.

vacation-sales scam using a series of corporations as fronts. Jimenez and Ramirez had a history in the telemarketing business, starting as phone salesmen with a company that sold English courses. (PX1 16:19-17:8; PX2 at 11:18-12:14.) They patterned their vacation scheme after the activities of Five Star Vacations and All Star Vacation Marketing Corp., which employed Defendants as telemarketers from 2006 until 2008. (PX1 at 14:15-15:11 and 16:1-8; PX2 at 14:1-10 and 15:1-14.) In 2008, Defendants decided to leave All Star and run their own operation. (PX1 at 20:11-21:17; PX2 at 15:15-20.)

Jimenez and Ramirez founded six corporations over the next two years,[2] which they operated as a single enterprise. (PX1 at 21:7-17, 33:13-17, 50:12-25, 63:6-64:2, 65:10-19, 69:15-24; 72:13-19; 80:3-13; PX2 at 16:7-21.) The Defendants admit they created this series of corporations solely to obtain new merchant accounts after they reached monthly limits on the amount banks would process through older accounts, or after banks closed accounts for excessive chargebacks. (PX1 at 29:21-31:15, 51:14-52:25, 63:23-64:2, 72:23-73:1, 73:7-17; PX2 at 16:7-17:7, 17:21-18:4.) Each corporation operated from the same location with the same employees and activities. (PX1 at 55:1-57:12.) Defendants generally presented themselves to the public as "Holiday Vacations" regardless of which corporation's merchant account they used. (PX1 at 52:16-25; PX3; PX4.) As Ramirez testified, "It's not that Holiday Vacations was a different office. The reason for opening another corporation was to be able to get another machine [merchant processing account] and open up more, you know, sales." (PX1 at 53:25-54:3.)

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[2] This Court entered a default judgment against three of Defendants' corporations (Holiday Vacations Marketing Corp., Happy Life Carribbean [sic] Corp., and Happy Life Corporation of America, Inc.) on September 27, 2011. The Commission did not name Defendants' other corporations as defendants in this matter.

(PX3 and PX4.) For example, over images of smiling vacationers at Disney theme parks, the announc in Defendants' television advertisement said, "[T]oday [w]e will offer prizes to the first fifteen people that can say what animal lays eggs and is not a bird. Call right now to the number that appears on the screen and win four days and three nights to the magical world of Disney in Orlando or Anaheim, with a full paid hotel for you and your family, meals and tickets to the parks of your choice." (PX3, translated from Spanish.) The ads also offered trips to all-inclusive resorts in the United States and the Caribbea promising "[m]ore than four-thousand dollars in prizes to use whenever you want." (Id.)

Defendants admit there was no contest. Defendants' Spanish-speaking telemarketers took all o the calls they could answer, as there was no limit to the number of vacations available. (PX1 at 89:34 91:5.) If the caller did not know the response to the trivia question, Defendants' telemarketers "helped the caller come up with the answer." (Id.; PX2 at 47:10-15.) Consumers then won only the opportunity to pay $200 to $400 for vacation packages, costs which Defendants' telemarketers told consumers we for taxes or fees. (PX1 at 26:18-28:8; 40:3-41:10; PX11 at ¶3; PX19 at ¶4.) If consumers balked at paying so much, Defendants' telemarketers reinforced the advertisements' message that the packages were worth much more than the represented "fees." For example, telemarketers told Alcira Llanos and Mariajose Viteri that they were getting a good deal and a wonderful opportunity. (PX17 at ¶ 7; PX21 at ¶¶4-5.) When Egle Espinosa hesitated, they offered to include an extra vacation for the same price.

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In every instance, the purported vacation packages were actually inducements from timeshare sales companies to listen to a sales pitch. (PX1 at 59:17-20.) As a result, consumers could receive th services they had "won" only by meeting a set of demographic requirements, which varied by destination, and attending a sales presentation after arriving at their destinations. (PX1 at 59:17-20; PX2 at 73:2-74:12; PX8 at ¶5(g); PX14 at ¶6; PX19 at ¶11.) Some of the timeshare companies that fulfilled Defendants' packages required that consumers be 25 or older, accepted only married couples, or charged additional fees. (Id.) Defendants admit they failed to disclose these location-specific requirements before taking payment. Ramirez testified that he was unaware of any requirement beyond the sales presentation, and thus could not disclose these additional requirements. (PX1 at 59:21-60:7.) Jimenez admitted that the telemarketers only told consumers they must be over 21 and attend a sales pitch, regardless of the actual requirements at the consumers' chosen destinations. (PX2 at 74:13-75:8.) Additionally, while Defendants claim they disclosed the timeshare pitch requirement during the initial call with consumers, they contend any evidence that could have corroborated this claim has been lost destroyed. (PX2 at 104:21-108:11) Finally, consumers declared in complaints to law enforcement and in sworn statements that they were unaware of some or all of the limitations. (PX8 at ¶5(g); PX14 at ¶6; PX19 at ¶11.)

After Defendants completed a sale and took the consumer's money, they mailed the consumer packet containing a printed invoice, a color brochure, and sometimes a page of terms and conditions. (PX1 at 42:24-43:22; PX10 at ¶6, Att. A-C; PX11 at ¶¶5-6, Att. A-D; PX12 at ¶¶6-7, Att. A; PX13 at ¶¶7-8, Att. A-D; PX14 at ¶4, Att. A; PX15 at ¶¶6-7, Att. A-C; PX17 at ¶¶8-9, Att. A-C; PX19 at ¶¶6-7, Att. A-C; PX20 at ¶¶5, 8-9, Att. A-C; PX21 at ¶¶7-8, Att. A-C.) Even these materials, sent after

Defendants charged or debited consumers' accounts, failed to alert consumers to their vacation packages' requirements. The "terms and conditions" materials Defendants mailed appeared only in English, though Defendants admit they advertised only in Spanish and many customers spoke only Spanish. (PX2 at 94:16-96:13.) The sole mention of any kind of sales presentation appears on the eleventh page of a twelve-page brochure, near the end of a block of small-print English text. (*Id.*; PX11 Att. B.) It states, confusingly, "90 Minutes presentation is required for this promotion" [sic], without further explanation of what exactly is required. (PX11 Att. B.)

To make matters worse, even after consumers paid for packages with undisclosed or inadequately disclosed terms, many never received their vacations. (PX8 at ¶5(d); PX10 at ¶14; PX11 at ¶13; PX12 at ¶17; PX13 at ¶11; PX16 at ¶6; PX20 at ¶15; PX21 at ¶¶13-15.) Consumers' sole method of booking vacations was to call Defendants' "reservation line," which Defendants admit did not have an answering machine. (PX2 at 54:12-55:20, 56:10-20.) Many consumers never reached Defendants to make reservations despite numerous efforts. (PX8 at ¶5(d); PX11 at ¶7; PX13 at ¶9; PX21 at ¶14.)

Even if a consumer got through to a representative, Defendants' employees merely collected consumers' information, then passed it along to one of several "intermediary" companies responsible f contacting the timeshare companies and booking the trip. (PX2 at 61:8-23.) Defendants never explained this process or gave consumers the intermediaries' contact information. (PX2 at 58:3-10.) Once Defendants passed consumers' information on to the intermediaries, their involvement ended. Defendants kept very few records on their customers after making a sale, failing even to keep information about whether customers used their vacations. (PX1 at 99:12-100:8.) What little

information Defendants admit keeping – copies of the invoices – included "invented" certificate numbers and verification numbers Defendants included solely to make their materials "appear to be more serious." (PX2 at 91:2-20; *see also* PX1 at 99:8-18.) As Ramirez testified, "[Y]ou have to understand that for us all the paperwork didn't mean anything to us. It was the sale had been done already. That's how we worked through 2008, 2009, and part of 2010. ... We did not see the need to f things. We were selling vacation package for some destinations, people would call, we would sell it to them. Everything was okay." (PX1 at 161:14-18, 164:18-21.)

Defendants admit that the intermediary companies they relied on to provide the vacations they sold were unreliable from the beginning. (PX2 at 57:7-59:20.) Customers regularly complained to Defendants that they had not received reservation confirmations for the trips they were promised. (*Id.*; PX2 at 54:21-55:10, 136:7-24.) As Jimenez said, consumers who had already arranged to travel but could not reach anyone to finalize their reservations would "become desperate because [they] were, you know, two days away from the trip." (PX2 at 57:11-13.) These failures prevented many consumers from receiving the trips they had paid for. As Defendants admit, all or almost all of their packages included multiple vacations. (PX2 at 132:16-133:10.) However, many consumers – including any who paid for their vacations shortly before Defendants' scam failed in 2010 – never received a single vacation. (PX8 at ¶5(d); PX10 at ¶14; PX11 at ¶13; PX12 at ¶17; PX13 at ¶11; PX16 at ¶6; PX20 at ¶15; PX21 at ¶¶13-15.) Furthermore, even among the subset of consumers who received anything, very few ever used more than one of the trips included in the multi-vacation packages. (PX2 at 70:16-17.) As a result, many consumers complained to their banks or their credit card companies to seek refunds Visa and Discover consider chargeback rates, or the ratio of reversed charges to total charges, above

and 2% (respectively) as possible indicators of fraud. (PX5 at ¶5; PX6 at ¶¶6-7.) Merchant accounts Defendants used during this first phase of their scam, from mid-2008 through early 2010, posted chargeback rates ranging from 3.58% to 4.24%. (PX5 at ¶9; PX6 at ¶¶13, 14.)[3]

In the fall of 2010, Defendants' scheme failed, they vacated their offices, and their phone lines were cut off, leaving consumers with no way to fulfill their vacation packages. (PX1 at 108:2-109:3, 111:5-9; PX2 at 132:7-19.) Defendants continued to sell packages until they ran out of money to operate their scam, even as they saw signs that their scheme would soon collapse. (PX1 at 175:20-176:9; PX2 at 132:1-19.) All of these packages purportedly included multiple vacations and were valid for at least a year. (PX2 at 132:16-133:10.) Once Defendants' "reservation line" was no longer operating, their customers had no way to obtain the services they had purchased. (PX2 at 132:7-14.) Defendants admit they made no arrangements to ensure that clients with unused vacations received w they were promised. (PX2 at 132:15-18.) Defendants could hardly have done so, as they admit they did

[3]The nature of Defendants' scam likely explains why chargeback rates were not even higher during this first phase. As Defendants admitted, each of the vacation packages they sold were valid for at least a year, sometimes more. (PX2 at 132:16-133:10.) However, credit card companies limit the time period following a charge in which the cardholder can initiate a chargeback dispute – the Truth in Lending Act's Regulation Z sets a minimum of 60 days. 12 C.F.R. § 226.13(b)(1). Thus, many consumers did not try to make reservations and could not have learned that Defendants' "vacation packages" were illusory or not as promised until after the chargeback period had expired. (See PX10 at ¶7 (Blanca Arias did not attempt to make reservations for several months after paying for her package); PX12 at ¶¶7-9 (Egle Espinosa had not decided when she wanted to travel about a year after paying); PX13 at ¶¶7-9 (Paola Flores began seeking reservations about six months after paying); PX14 at ¶¶4-6 (Juanita Garcia discovered the limitations several months after paying); PX15 at ¶8 (Amparo Lebron had not yet made reservations about a year after paying); PX17 at ¶¶9-12 (Alcira Llanos had not yet made reservations more than a year after paying); PX19 at ¶¶6, 9, 11 (Ruth Melendez discovered the limitations four months after paying); PX21 at ¶¶2, 13 (Mariajose Viteri began seeking reservations about five months after paying).)

not even keep records of which customers had unused vacations. (PX1 at 166:4-19.)

2. Unauthorized Billing

In the late summer and fall of 2010, as Defendants' scheme was failing, they began charging some of their customers again. (PX2 at 145:7-18; PX8 at ¶5(h); PX10 at ¶8; PX12 at ¶¶9, 13; PX14 at ¶10; PX15 at ¶¶6, 9; PX17 at ¶18; PX19 at ¶18.) Consumers gave sworn statements that they never authorized these charges. (PX10 at ¶8; PX12 at ¶¶9, 13; PX14 at ¶10; PX15 at ¶¶6, 9; PX17 at ¶18; PX19 at ¶18.) Some of these consumers said they had no contact with Defendants' companies for a y or more before the new charges appeared on the credit or bank accounts they had previously used to packages. (PX10 at ¶¶6-8; PX12 at ¶¶7-9; PX14 at ¶10; PX15 at ¶¶8-9; PX17 at ¶12; PX19 at ¶¶17-18) Indeed, none of these consumers took all of the vacations included in their original packages. (PX10 at ¶7; PX12 at ¶8; PX14 at ¶¶8-9; PX15 at ¶8; PX17 at ¶¶10-12; PX19 at ¶17.) Defendants state that these charges must have been for "reactivations" of packages consumers had not used. (PX1 at 111:10-112:17; PX2 at 145:2-11.) They claim they did not retain consumers' financial information after making the initial charge. (PX2 at 82:2-18.) Instead, Defendants say they sometimes called consume whose packages were about to expire and offered to extend the package in exchange for a new paym (PX1 at 165:23-167:14; PX2 at 147:14-148:12.) They admit, however, that different packages were valid for different lengths of time, and they kept no record of the expiration date or remaining vacations on any particular consumer's package. (PX1 at 71:2-6, 99:21-101:2.) Thus, Defendants could not have known which customers held unused packages that were about to expire. Additionally, as discussed above, Defendants can offer no evidence to corroborate their assertions about "reactivations" because they claim nearly all of their business records were lost or destroyed. (PX1 at 135:21-136:14, 137:22-

139:10; PX2 at 104:21-108:11.) Thus, Defendants offer only nonsensical, self-serving, and uncorroborated statements in response to evidence that they charged consumers without authorization.

While the majority of consumers paid these second charges, many reported the new charges to their banks or credit card companies as unauthorized. (PX5 at ¶¶9-10; PX6 at ¶¶10-17; PX10 at ¶9; PX12 at ¶¶10-11; PX14 at ¶¶10-12; PX16 at ¶8; PX18 at ¶11; PX19 at ¶18.) Defendants admit they had always had problems with chargebacks and concocted a plan to win these disputes. (PX2 at 85:10-90:13.) Defendants sent consumers they charged an invoice and brochure via certified mail. (PX1 at 161:3-163:22; PX2 at 86:13-89:11.) Consumers had to sign the return receipt in order to accept the envelope. (PX2 at 89:12-90:3; PX12 at ¶12; PX15 at ¶11; PX17 at ¶15; PX19 at ¶19.) Defendants then sent the signed return receipt to the bank or credit card company along with a statement that the signature evidenced the consumer's "participation" in the transaction or "acceptance" of their services. (PX2 at 86:13-23; PX 5 at ¶10, Att. A; PX10 at ¶10, Att. D; PX16 at ¶¶11-12, Att. G.) Jimenez wrote these responses to consumers' complaints about unauthorized charges. (PX2 at 86:13-23.) Several consumers who were charged again stated that they did not receive the certified letters until after filing a dispute with the bank or credit card company. (PX12 at ¶¶11-12; PX14 at ¶¶12-13; PX15 at ¶¶10-11; PX17 at ¶¶12-15; PX19 at ¶¶18-19.) Other evidence supports this indication that Defendants sent certified letters only after consumers complained; the certified mail receipts Defendants submitted to Discover show the packets were routinely mailed weeks after Defendants made the charges rather than immediately upon completion of the "sale." (PX7 at ¶14-15, Att. B.)

Of course, the consumers who paid the second charges could not have received anything even if the sales had been legitimate, as Defendants admit they conducted these "reactivations" shortly before

their scheme failed and they could no longer fulfill vacations for any of their customers. (PX1 at 111:15-113:24; PX2 at 122:15-25, 132:7-133:18.) But even the subset of consumers who challenged the charges did not escape injury. In some instances, banks and credit card companies initially accepted Defendants' explanation and refused to process chargebacks. (PX10 at ¶10, Att. A; PX12 at ¶16; PX16 at ¶¶11-13, Att. A; PX19 at ¶20, Att. J) Some of those consumers expended more time to continue the dispute process – often weeks or months – and ultimately succeeded. (PX5 at ¶¶9-10; PX6 at ¶¶12-15; PX10 at ¶12, Att. F; PX12 at ¶16.) As a result, chargeback rates in Defendants' merchant accounts,

deposition, Jimenez offered only vague, nonsensical explanations for these deposits. He stated that these deposits were repayments of loans he made to his businesses at various times during their two-year lifespan. (PX2 at 154:9-16.) When asked why his businesses would repay loans through their merchant processing accounts rather than by check or cash – how he usually took his salary – Jimenez responded, “No particular reason.” (PX2 at 159:2.) Nor did he explain why the payments occurred in such unusual amounts and installments. (PX2 at 155:22-156:13, 162:13-164:5.)

D. Additional Facts Supporting Telemarketing Ban Against Defendant Jimenez

As Defendants’ scam was failing, Jimenez turned to a new way of making money. His personal bank statements show that, in the first few months of 2011, he received a series of deposits from

and reported all of their companies' earnings on Holiday Vacations' tax returns. (PX1 at 55:17-56:6, 62:18-63:2.) The Holiday Vacations tax returns show that in 2008, the business had gross receipts of $391,375, minus returns and allowances of $18,008, for a net income of $373,367; in 2009, gross receipts of $1,097,434, minus returns and allowances of $65,164, for a net of $1,032,270; and in 2010 gross receipts of $814,867, minus returns and allowances of $91,260, for a net of $723,607. (PX1 Att A, Line 1(c); Att. B, Line 1(c); Att. C, Line 1(c).) Thus, the scheme took in a net of $2,129,244 from consumers during the three years in which it operated.[4]

[4]Defendants' companies' bank records confirm that this figure is a floor for the amount they took in from consumers. As noted in Plaintiff's Memorandum in Support of its *Ex Parte* Motion for Temporary Restraining Order (Document 3) and attached exhibits, bank records show deposits of $3,109,212 into the corporate defendants' accounts from 2008 through the end of the scam. This figure is higher than Defendants' net receipts, as it includes inter-company transfers by cash or check and does not account for returns, but it confirms that $2,129,244 is a reasonable estimate of what consumers spent on the scam.

service are presumed material. *See, e.g.*, *Kraft*, 970 F.2d at 322; *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999). Consumer reliance on express claims is presumed reasonable. *FTC v. Pac. First Benefit, LLC*, 472 F. Supp. 2d 974, 979 (N.D. Ill. 2007); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000); *FTC v. Febre*, No. 94-C-3625, 1994 U.S. Dist. LEXIS 9787, at *54 (N.D. Ill. July 15, 1994), *aff'd*, 128 F.3d 530 (7th Cir. 1997).

Defendants made three express misrepresentations in advertisements and through telemarkete Specifically, Defendants admit they claimed that: (1) consumers who responded to Defendants' promotions had won a prize; (2) consumers who made a payment would receive a vacation package; a (3) vacation packages would include hotel accommodations of a specified duration. In fact, each of these claims was false in most instances.

First, callers were not singled out as prizewinners; Defendants admit they took money from any consumer who called in and agreed to pay. This representation convinced consumers the "prize package" was worth substantially more than the amount they paid to claim it. Consumer statements a Defendants' admissions show that Defendants reinforced this false claim by telling consumers that the required payment covered "fees" or "taxes," implying that the payment represented only a fraction of the prize package's total value.

Second, Defendants routinely failed to deliver any vacation packages. Several consumers gav sworn statements that they never received anything in return for the money they paid. This is not surprising, as Defendants admit they simply passed their customers off to unreliable intermediaries an failed to monitor whether consumers ever received vacations. Indeed, Defendants admit they continu to sell vacations even as their scam failed and their phones were cut off, leaving many consumers with

useless packages they had no way to redeem.

Third, those few consumers who received anything from Defendants received fewer trips than Defendants promised. Defendants admitted very few people ever received more than one of the trips their multi-vacation packages.

Defendants made each of these representations expressly, through advertisements and telmarketers, as part of a sales pitch designed to induce the purchase of their services. Thus, each of the representations was material, and consumer reliance on them is presumed reasonable. *See, e.g.*

the advertised use was material misrepresentation.[5] Third, consumers were required to attend timeshare or vacation sales presentations to receive accommodations. Several consumers gave sworn statemen that they were not aware of the presentation requirement in advance. This is unsurprising, as Defendants have not clearly described or corrected any oral disclosure of the presentation requirement made before the sale, and the only written disclosures were made after the sale, in Englis and buried in a block of small-print text inside a brochure. Information about the presentation requirement was material because consumers who were unable to meet the undisclosed or inadequat disclosed requirements received nothing in exchange for the money they paid. Defendants' failure to disclose material information before consumers paid for their services violated Section 5 of the FTC Act.

3. Defendants' Unauthorized Billing Practices Were Unfair (Count 3)

Unauthorized billing is an unfair practice that violates Section 5. *E.g.*, *FTC v. Inc21.com Corp.*, 688 F. Supp. 2d 927, 939 (N.D. Cal. 2010); *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1112-1116 (S.D. Cal. 2008), *aff'd by FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010); *FTC v. Verity Int'l, Ltd.*, 335 F. Supp. 2d 479, 499 (S.D.N.Y. 2004), *aff'd in relevant part and vacated on other grounds by* 443 F.3d 48 (2d Cir. 2006); *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1203 (C.D. Cal. 2003). The

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[5]Defendants attempt to muddy this issue by claiming to have paid hotels directly when notified that consumers who did not meet demographic requirements were turned away. (PX2 at 67:16-69:12). However, this claim creates neither a material nor a genuine issue of fact. First, events that occurred so long after consumers paid Defendants' fees are not material to whether Defendants misrepresented their services or failed to disclose information before taking payment. Rather, any hotel costs Defendants paid would serve only to mitigate the harm Defendants' deception caused. Second, this claim does not create a genuine issue of fact because Defendants have presented no evidence of how many times they paid hotels directly – or, in fact, corroborating even one instance in which this ever occurred.

undisputed facts establish that Defendants charged consumers' accounts without authorization. Consumers gave sworn statements that they never authorized the second charges from Defendants' companies. The credit card payment networks' chargeback records confirm these unauthorized charg were not isolated occurrences, as very high numbers of consumers – 48% of those charged through one Happy Life Carribbean account – reported the charges to their credit card companies. Additionally, th spike in Defendants' chargeback rates in the second half of 2010 demonstrates that their scheme transitioned from simple deception to outright theft at that time. While Defendants' accounts posted already-high chargeback rates of about 4% in accounts operating through 2009, their chargeback rates jumped to 10%, 18%, and even 48% in accounts they used later in 2010 for the second phase of the scam.

Defendants' unauthorized billing scheme meet

back, further injuring even those consumers who eventually got refunds. Finally, courts may examine injury in the aggregate to determine whether it is "substantial." *See FTC v. Orkin Exterminating Co.*, 849 F.2d 1354, 1365 (11th Cir. 1988); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985). The high incidence of chargebacks in Defendants' merchant processing accounts during the unauthorized billing period – up to 48% in one account – demonstrates that Defendants charged consumers without authorization, causing a large amount of consumer injury in the aggregate, even to those consumers who managed to receive refunds.

Second, the injury Defendants caused is not outweighed by any countervailing benefits. The unfairness test only takes into account countervailing benefits to "consumers or competition," not benefits to the defendants at the expense of consumers. *See* Unfairness Statement; *International Harvester Co.*, 104 F.T.C. at 1064. Defendants' unauthorized billing amounted to theft, a practice that created no benefits to consumers or to competition. Finally, because consumers did not learn of the unauthorized charges until after they occurred, consumers had no "free and informed choice that would have enabled them to avoid the unfair practice." *FTC v. Windward Mktg.*, No. 1:96-CV-615F, 1997 WL 33642380, *11 (N.D. Ga. Sept. 30, 1997) (citing *Am. Fin. Servs. Ass'n*, 767 F.2d at 976). Indeed, courts have concluded that "consumers who had their bank accounts accessed without authorization had no chance whatsoever to avoid the injury *before* it occurred," holding that unauthorized billing of consumers' bank accounts meets every prong of the unfairness standard. *Neovi*, 598 F. Supp. 2d at 1115-16 (emphasis added); *see also J.K. Publ'ns*, 99 F. Supp. 2d at 1203 (holding that a scheme involving unauthorized charges to both credit cards and debit accounts was unfair in violation of Section 5). Because Defendants caused substantial injury to consumers, without any countervailing benefits,

and which consumers could not reasonably avoid, Defendants' unauthorized billing practices were unfair in violation of Section 5.

Defendants do not dispute any of the facts supporting these conclusions. Instead, they offer conclusory and unsupported testimony that they sometimes called consumers whose packages were about to expire and that any consumer who was charged again must have authorized a renewal. This testimony is vague, uncorroborated, self-serving, and contradicted by all other evidence in the record, and thus cannot serve to defeat summary judgment. *See Scott*, 500 U.S. at 380; *Ozmint*, 578 F.3d at 254 (when objective evidence directly contradicts self-serving testimony such that reasonable jury could no find in one party's favor, summary judgment is appropriate); *Othentec*, 526 F.3d at 140 (self-serving speculation does not create a material issue of fact); *JKC Holding*, 264 F.3d at 465 (court need not accept highly improbable conclusions to determine whether there is an issue of fact). First, six consumers who were charged again gave sworn statements that they never authorized the second charge and had no contact with Defendants for months before it occurred. Indeed, it is patently absurd to contend that consumers would pay for another package after Defendants' failures prevented those consumers from receiving the vacations they bought in the first instance; as Defendants themselves admit, almost no consumers received more than one vacation after paying for multi-vacation packages Second, Defendants do not identify the consumers they supposedly called for renewals and offer no other evidence to corroborate their claims. As set forth above, Defendants admit they never kept records of the remaining vacations or expiration dates on any particular consumer's package, so they could not even have known which consumers to call for renewals. Indeed, Defendants claim to have kept no records at all of the "reauthorizations" and have offered no evidence that any renewal phone

in a small, closely held corporation, establishes a presumption of authority to control. Standard Educators, Inc. v. FTC, 475 F.2d 401, 403 (D.C. Cir. 1973). Jimenez and Ramirez are officers of all three Corporate Defendants and the other corporations involved in the scam. All of their corporations were small and closely held – in reality, as Defendants admit, they were just fronts Jimenez and Ramirez created to circumvent payment processors' charge limits. Each corporation's "stock-in-trade" was deception and abuse, giving rise to a presumption of individual liability. Standard Educators, 475 F.2d at 403. Furthermore, Defendants have admitted they participated in and controlled the corporations' day-to-day activities. Jimenez admitted that he was responsible for creating and placing the scheme's deceptive advertisements. Ramirez oversaw the enterprise's staff and handled its financial records. Both Defendants oversaw the telemarketing, billed consumers' financial accounts, and monitored the many complaints from angry consumers. Both admitted to participating in the re-billing of consumers' accounts once the well of new sales ran dry. Defendants' status as corporate officers and direct participation in the corporations' actions make them individually liable for injunctive relief.

Jimenez and Ramirez are also personally liable for monetary relief. To obtain monetary relief, the FTC must prove that, in addition to participation or control, individual defendants had knowledge of the wrongful acts. Publ'g Clearing House, 104 F.3d at 1171; see also FTC v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996). The FTC need not establish intent to defraud or even actual knowledge of the wrongful conduct. See FTC v. Affordable Media, 179 F.3d 1228, 1234 (9th Cir. 1999); Amy Travel, 875 F.2d at 573-74. Instead, reckless indifference to the wrongful conduct or an awareness of a high probability coupled with intentional avoidance of the truth will suffice. Id.; see also FTC v. Atlantex Assocs., No. 87–0045–CIV, 1987 WL 20384, *10 (S.D. Fla. Nov. 25, 1987), aff'd, 872 F.2d 966

(11th Cir. 1989). Participation in corporate affairs is probative of knowledge. Affordable Media, 179 F.3d at 1235; Amy Travel, 875 F.2d at 564; cf. Phoenix Sav. & Loan, Inc. v. Aetna Casualty & Surety Co., 427 F.2d 862, 869 (4th Cir. 1970) (assuming corporate officers who control activities of corporation have knowledge of those activities, and imputing such knowledge to the corporation). Her both Defendants participated directly in the scam and thus knew about it. Defendant Jimenez admitted to creating and placing the deceptive advertisements, and Defendant Ramirez admitted to overseeing deceptive telemarketing operation. Both admit knowing about their merchant accounts' unusually high chargeback rates, testifying that they "always" had problems with their merchant accounts and that the concocted their certified-mail scheme to thwart chargebacks. Indeed, Defendant Jimenez himself responded to the credit-card companies' inquiries about these unauthorized charges. Because both Defendants knew about or were at least recklessly indifferent to the wrongful actions, they are

[6] Although the Fourth Circuit has not directly addressed this issue, courts in this district – including this Court – have entered stipulated or default orders containing bans against

v. Gill, 265 F.3d 944, 957 (9th Cir. 2001) (upholding ban on offering credit repair services because defendants were likely to violate the law again absent a ban); FTC v. Think Achievement Corp., 144 F. Supp. 2d 1013, 1018 (N.D. Ind. 2000), aff'd 312 F.3d 259 (7th Cir. 2002) (banning defendants from telemarketing or selling career advisory services because of their “extensive and prolonged” fraudulent conduct); see also FTC v. Global Mkt'g Grp., Inc., 594 F.Supp.2d 1281, 1290 (M.D. Fla. 2008) (holding that a permanent telemarketing ban is appropriate to protect against future violations); FTC v. Capital Choice Consumer Credit, Inc., No. 20-CV-21050, 2004 WL 5149998, at *4 (S.D. Fla. Feb. 20, 2004) (imposing litigated credit card sales ban). Defendants' fraudulent telemarketing of vacation packages continued for about two years and eventually evolved into unauthorized charging of consumers' accounts. Such prolonged and egregious fraud indicates that Defendants are likely to violate the law again if allowed to continue offering prize promotions and selling vacation packages.

Additionally, the proposed order would ban Defendant Jimenez from engaging in telemarketing. Jimenez testified that, after he gained experience placing his own advertisements, he began brokering advertisements for other telemarketing entities. Each of these entities quickly racked up such high chargeback rates that their payment processors cut off their merchant accounts under suspicion of fra As Jimenez has shown a propensity to both run his own telemarketing scams and to assist others in doing so, to protect consumers, it is appropriate to ban him from the business of telemarketing entirely

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defendants in FTC cases. See, e.g., FTC v. Residential Relief Foundation, Inc., No. 1:10-cv-03214-JFM (D. Md. Sept. 29, 2011) (bans on marketing of debt relief or mortgage assistance services); FTC v. Innovative Mktg., Inc., No. 1:08-cv-03233-RDB (D. Md. Jan. 10, 2011) (ban on marketing of certain type of software); FTC v. Borges, No. 8:09-cv-01634-PJM (D. Md. Jan. 28, 2010) (ban on marketing of employment goods or services); FTC v. D Squared Solutions, LLC, No. 1:03-cv-03108-AMD (D. Md. July 28, 2004) (bans on use of Windows Messenger in marketing and on marketing of message-blocking software).

The proposed injunction would address Defendants' unauthorized billing conduct by enjoining them from charging any consumer without express written or oral authorization. Additionally, the order would enjoin Defendants from making any false or misleading statements in connection with the sale of any goods or services. Courts commonly impose and uphold such "fencing-in" relief to prevent future deception and unfairness, as practices like those Defendants employed are easily transferred to many types of scams. *See, e.g.*, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965) (upholding order enjoining deception in the sale of "any product" and noting that courts should not interfere with relief as long as it bears a reasonable relationship to the unlawful practices); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) (upholding order prohibiting all price differentials even though only certain price differentials were found to exist). Finally, the proposed injunctions contain various standard provisions, including record-keeping and monitoring provisions, which federal courts routinely grant in FTC cases to ensure future compliance. *See SlimAmerica*, 77 F. Supp. 2d at 1276 (holding that record-keeping and monitoring provisions are appropriate to ensure compliance with the order); *FTC v. U.S. Sales Corp.*, 785 F. Supp. 737, 753 (N.D. Ill. 1992) (same); *see also FTC v. Swish Mktg.*, No. 09-CV-03814 RS, 2-3, (N.D. Cal. June 14, 2011) (granting compliance provisions and noting that Ninth Circuit has frequently done so); *FTC v. Data Medical Capital, Inc.*, No. SACV-99-1266 AHS, 4-9 (C.D. Cal. Mar. 16, 2010) (granting compliance provisions in litigated order).

2. Monetary Relief

The Court has equitable authority to order monetary relief under the FTC Act, 15 U.S.C. § 41 *et seq.* *E.g.*, *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. AmeriDebt, Inc.*, 373 F. Supp. 2d 558, 562 (D. Md. 2005). The Court may order restitution in the amount of consumer loss or

disgorgement in the amount of the Defendants' ill-gotten gains. *See, e.g.*, *Febre*, 128 F.3d at 536 (upholding restitution in the amount of net consumer losses); *Gem Merch. Corp.*, 87 F.3d at 470 (upholding disgorgement order). In this case, because Defendants' entire business model was permeated with fraud and their companies directly received all the money consumers paid, either restitution or disgorgement should be based on Defendants' companies' gross receipts minus refunds made to consumers. *Febre*, 128 F.3d at 536; *Think Achievement*, 144 F. Supp. 2d at 1019; *see also FTC v. Stefanchik*, 559 F.3d 924, 931-32 (9th Cir. 2009) (proper remedy is full amount of consumer loss); *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 68 (2d Cir. 2006) (where defendants sell directly to consumers, consumers' loss and defendants' gain are *equal* and measured by amounts defendants received). Once the Commission shows that its calculations "reasonably approximate" net consumer loss, the burden shifts to the defendant to show that the figure is inaccurate. *E.g.*, *FTC v. Trudeau*, 579 F.3d 754, 773 (7th Cir. 2009); *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004); *Febre*, 128 F.3d at 535; *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 214 (D. Mass. 2009).

As discussed more thoroughly above, Defendants' own records show that $2,129,244 is a reasonable approximation of their gross receipts minus refunds. Defendants' corporate tax returns show that their companies' gross receipts minus returns and allowances from 2008-2010 totaled $2,129,244. Because $2,129,244 is a reasonable approximation of the amount Defendants took from consumers by