UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

JOHN BECK AMAZING PROFITS, LLC, ET AL.,

Defendants.

CASE NO. 2:09-cv-04719-JHN-CWx

ORDER: (1) GRANTING FTC'S MOTION FOR SUMMARY JUDGMENT; (2) DENYING DEFENDANTS' MOTION IN LIMINE; AND (3) ORDERING SUPPLEMENTAL BRIEFING ON SCOPE OF INJUNCTIVE RELIEF AND MONETARY DAMAGES [350, 426]

Judge: Honorable Jacqueline H. Nguyen

The matter is before the Court on Plaintiff Federal Trade Commission's ("FTC") motion for summary judgment or, alternatively, for partial summary adjudication ("Motion"). (Docket No. 350.) The Court will also consider and rule

on Defendants'[1] motion in limine to exclude the FTC's expert survey and testimony (docket no. 426) because consideration of Defendants' objections raised in the motion in limine is necessary to the determination of the FTC's motion for summary judgment. Both motions are opposed. On November 28, 2011, the Court held a hearing on these matters, ordered the parties to submit supplemental briefings, and took the matter under submission. (Docket No. 576.) For the reasons discussed below, the FTC's motion is GRANTED. Defendants' motion in limine is DENIED.

I. FACTUAL BACKGROUND[2]

This case involves the advertising, marketing, and sale of three wealth-creation products: (1) John Beck's Free and Clear Real Estate System (the "John Beck System"); (2) John Alexander's Real Estate Riches in 14 Days (the "John Alexander System"); and (3) Jeff Paul's Shortcuts to Internet Millions (the "Jeff Paul System"). These products were marketed through Defendants' infomercials, which the FTC contends were deceptive.

A. THE DEFENDANTS

Hewitt and Gravink, the founders and sole members of FP, directly or indirectly owned and controlled the corporate defendants in this lawsuit.[3] Hewitt

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[1] Individual defendants Gary Hewitt ("Hewitt"), Douglas Gravink ("Gravink"), John Beck ("Beck"), John Alexander ("Alexander"), and Jeff Paul ("Paul"), and corporate defendants Mentoring of America, LLC ("MOA"); Family Products, LLC ("FP"); John Beck Amazing Profits, LLC ("JBAP"); Jeff Paul, LLC; and John Alexander, LLC are collectively referred to herein as "Defendants."

[2] The facts are not in dispute unless otherwise indicated.

just "pennies on the dollar," and then turning around and selling these homes for full market value or renting them out for a profit.[20] Moreover, the infomercials represent that consumers who purchase the system would receive a free 30-day membership to "John Beck's Property Vault." However, the infomercials fail to adequately disclose that "John Beck's Property Vault" is actually a continuity plan which, upon expiration of the free trial period, charges consumers $39.95 per month unless consumers take the affirmative step of canceling their memberships.[21]

Similarly, Defendants also aired the "John Alexander's Real Estate Riches in 14 days" infomercial.[22] The infomercial markets materials on Alexander's "inverse ownership system" of acquiring real estate.[23] Under the "inverse ownership system," consumers put together real estate transactions and get "the cash out at closing" without using any of their own money or credit.[24] The infomercial falsely represents that consumers will be able to complete an inverse purchase transaction within 14 days.[25] The FTC alleges that Defendants falsely represent that consumers who purchase this system would receive a free 30-day membership to "John's Club," Alexander's hotline advisory service. However, the infomercial fails to adequately disclose that "John's Club" is actually a continuity plan which, upon

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[20] Compl. ¶ 25.
[21] *Id.* ¶¶ 33-34.
[22] Am. Answer ¶ 48.
[23] Stahl 6th Decl., Attach. 4, DVD of John Alexander infomercial, docket no. 521; Russ Decl. ¶ 5.
[24] Compl. ¶ 49.
[25] *Id.*

expiration of the free trial period, charges consumers $39.95 per month unless consumers take the affirmative step of canceling their memberships.[26]

Since at least January 2006, Defendants have also aired at least two versions of the "Jeff Paul's Shortcuts to Internet Millions" infomercial.[27] The infomercials market materials on "proven, turnkey internet businesses," a system that is "so simple that consumers do not need any prior experience with internet business to make it work."[28] The FTC claims that consumers who purchase the Jeff Paul

(Claim 5). The FTC also alleges Section 5 violations based on Defendants' representations in connection with the "continuity membership plans" (Claims 2, 4, and 6) and the sale of coaching programs (Claim 7). In addition, the FTC claims that Defendants violated the Telemarketing Sales Rule ("TSR"), 16 C.F.R. §§ 310.3(a)(1)(vii), 310.4(a)(6), and 310.4(b)(1)(iii)(A), by failing to adequately disclose the enrollment of consumers in continuity membership plans (Claims 8, 10, and 12); by submitting payment information of consumers without their express consent (Claims 9, 11, and 13); and by placing outbound calls to consumers who previously stated that they do not wish to receive calls from Defendants (Claim 14). The FTC seeks injunctive relief as well as equitable monetary relief in the amount of $300 million.

The FTC now moves for summary judgment.

II. LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure allows a party to move for summary judgment of a claim or defense. Fed. R. Civ. P. 56(a). Summary judgment is proper if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Id.; see also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The movant bears the initial burden of informing the court of the basis of its motion, and identifying those portions of "'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine

issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). Once the moving party has met this initial burden, the burden shifts to the nonmoving party to present evidence showing that a genuine issue of fact remains. *Anderson*, 477 U.S. at 248. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). If the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then summary judgment is proper. *Celotex*, 477 U.S. at 322. Where the opposing party is able to identify specific, relevant facts evidencing a genuine issue of material fact, the court must draw all inferences in favor of the opposing party and accordingly deny summary judgment. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987).

III. EVIDENTIARY OBJECTIONS

A. DEFENDANTS' EVIDENTIARY OBJECTIONS

1. Objections to Beck and Alexander Consumer Declarations

In connection with its claims relating to the John Beck System, the FTC has filed, *inter alia*, 14 consumer declarations consisting of approximately 200 paragraphs. (Docket No. 369.) In connection with its claims pertaining to the John Alexander System, the FTC has filed, *inter alia*, 16 consumer declarations consisting of over 100 paragraphs. (Docket No. 370.) Defendants object to almost

spreadsheet summarizing consumer complaints relating to the John Beck System, John Alexander System, and Jeff Paul System. Defendants also object to portions of the (1) Fifth Stahl Declaration[33]; (2) Sixth Stahl Declaration[34]; (3) Billings Declaration[35]; (4) Papenfuss Declaration[36]; and (5) Williams Declaration.[37] The

Defendants object to portions of the Rose Declaration. (Docket Nos. 342, 420 506.) The Court **OVERRULES** the objections to Paragraph 5 of the declaration for the reasons stated by the FTC on its response. (Docket No. 506.) The Court need not rule on Defendants' objections to other portions of the declaration because the Court did not rely on them.

6. Objections to the Declarations of the FTC Attorneys

Defendants object to almost every paragraph of the declaration made by Jennifer Brennan. (Docket Nos. 421, 490, 537.) Defendants also object to portions of the declaration made by John Jacobs. (Docket Nos. 422, 504.) Likewise, Defendants object to Paragraph 5 of the Procter Declaration on the basis of hearsay and best evidence rule. (Docket Nos. 423, 332, 491.) The Court need not rule on these objections because the Court did not rely on the challenged evidence.

7. Objections to the First Conrey Declaration

Defendants object to Paragraph 1 of the first declaration made by Dr. Frederica Conrey ("Dr. Conrey") on the grounds of best evidence rule and mischaracterization of the evidence. (Docket Nos. 376, 424, 507.) Mischaracterization of evidence is not a cognizable evidentiary objection. Further, the best evidence objection has no merit as the survey referenced in the First Conrey Declaration is attached to said declaration. Accordingly, this objection is **OVERRULED.**

B. <u>THE FTC'S EVIDENTIARY OBJECTIONS</u>

The FTC filed evidentiary objections to portions of the declarations filed by Defendants in support of their opposition to the motion for summary judgment. The FTC objects to the declarations made by the following: (1) Jason Han[38]; (2) Jeff Paul[39]; (3) John Alexander[40]; (4) Christopher Gravink[41]; (5) Jeff Devoll; (6) Darryl Fields; (7) Kelvin Bell; (8) Greg Whiting; (9) Stephens[42]; (10) Douglas Gravink[43]; Erica Brutocao-Kemp[44]; (12) Erica Stahura[45]; (13) Gary Hewitt[46]; (14) Michael O'Connell[47]; (15) Ana Alicia Pelaez[48]; (16) Laura Beck[49]; (17) John Beck[50]; (18) Eric Barry[51]; and (18) Tobey Wagonner.[52] To the extent that the Court relied on Defendants' proffered evidence, the objections are **OVERRULED.** The Court need

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[38] Han Decl., docket no. 442; Pl.'s Evidentiary Objection to Han Decl., docket no. 482.
[39] Paul Decl., docket no. 455; Pl.'s Evidentiary Objection to Paul Decl., docket no. 483.
[40] Alexander Decl., docket no. 441; Pl.'s Evidentiary Objection to Alexander Decl., docket no. 441.
[41] C. Gravink Decl., docket no. 444; Pl.'s Evidentiary Objection to C. Gravink Decl., docket no. 493.
[42] Devoll Decl., docket no. 446; Fields Decl., docket no. 447; Bell Decl., docket no. 453; Whiting Decl., docket no. 457; Stephens Decl., docket no. 459; Pl.'s Evidentiary Objection to the Devoll Decl., Fields Decl, Bell Decl., Whiting Decl., and Stephens Decl., docket no. 494.
[43] D. Gravink Decl., docket no. 448; Pl.'s Evidentiary Objection to D. Gravink Decl., docket no. 495.
[44] Brutocao-Kemp Decl., docket no. 449; Pl.'s Evidentiary Objection to Brutocao-Kemp Decl., docket no. 496.
[45] Stahura Decl., docket no. 450; Pl.'s Evidentiary Objection to Stahura Decl., docket no. 497.
[46] Hewitt Decl., docket no. 451; Pl.'s Evidentiary Objection to Hewitt Decl., docket no. 498.
[47] O'Connell Decl., docket no. 444; Pl.'s Evidentiary Objection to O'Connell Decl., docket no. 499.
[48] Pelaez Decl., docket no. 500; Pl.'s Evidentiary Objection to Pelaez Decl., docket no. 500.
[49] L. Beck Decl., docket no. 461; Pl.'s Evidentiary Objection to L. Beck Decl., docket no. 501.
[50] J. Beck Decl. docket no. 443; Pl.'s Evidentiary Objection to J. Beck Decl., docket no. 512.
[51] Barry Decl., docket no. 442; Pl.'s Evidentiary Objection to Barry Decl., docket no. 515.
[52] Waggonner Decl., docket no. 458; Pl.'s Evidentiary Objection to Waggonner Decl., docket no. 518.

not rule on FTC's objections to the extent that they pertain to matters that are not expressly cited in this order.

C. DEFENDANTS' MOTION IN LIMINE NO. 1

While couched as a "motion in limine", this motion, docket no. 426, is essentially an evidentiary objection to the FTC's use of a survey conducted by Dr. Conrey, who was designated by the FTC as an expert.[53] Defendants also seek to preclude any testimony of Dr. Conrey regarding the survey and its findings.[54]

Dr. Conrey is a Survey Methodologist at ICF Macro, a firm retained by the FTC to conduct the telephone survey at issue.[55] The Conrey Survey "measured the earnings and profit experienced by consumers who had purchased one of the three products. [It] also investigated whether investment in coaching services or

Prenotification Letter notifying them about the research study.[57] The Prenotification Letter read in pertinent part:

> **The Federal Trade Commission needs your help.** Since 1914, the Federal Trade Commission (the FTC) has protected American consumers by monitoring and regulating businesses. In order to fulfill this responsibility, it periodically conducts research into the experiences of customers who have purchased certain types of products and services. **As part of a current research study, the FTC has enlisted the help of ICF Macro, an independent research firm, to learn about customers' experiences with [PRODUCT NAME].** A few days from now, you will receive a phone call from an ICF Macro interviewer who will ask for your assistance in this important research effort . . . .

(Emphasis in the original.)[58] Between August and November 2010, ICF Macro conducted 5,990 telephone interviews. The questionnaire was developed by the FTC. Dr. Conrey reviewed the questionnaire, consulted with the FTC on revisions, and confirmed that the final product was consistent with best practices in survey design.[59]

Defendants move to exclude evidence relating to the Conrey Survey, including the First Conrey Declaration (docket no. 376), on the ground that the survey's Prenotification Letter, "poisoned the well in such a way as to invalidate whatever survey finding the FTC obtained." (Mot. in Limine 1.) Defendants contend that the entire structure of the Prenotification Letter, which positions the

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[57] Conrey 1st Decl., Attach. 1 at 1.
[58] Conrey 1st Decl., Attach. 1 at 20.
[59] Conrey 1st Decl., Attach. 1 at 5.

FTC as the "good guy" fighting "to protect" "American consumers", is deeply prejudicial and preconditions responders to respond favorably for the FTC. Further, Defendants challenge the manner in which Dr. Conrey conducted her survey, which renders the results unreliable.

The admissibility of expert testimony is governed by FRE 702, which provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

"The proponent of the survey bears the burden of establishing its admissibility." *Keith v. Volpe*, 858 F.2d 467, 480 (9th Cir. 1988). In the Ninth Circuit, a party seeking to admit survey evidence must show that the survey was "conducted according to accepted principles." *Clicks Billiards, Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1262 (9th Cir. 2001); *see also, Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt.*, 618 F.3d 1025, 1036 (9th Cir. 2010) ("We have long held that survey evidence should be admitted 'as long as [it is] conducted according to accepted principles and [is] relevant.'") (alterations in the original). Criticisms related to "the format

generally accepted standards in the field.[60] Further, Dr. Conrey attested to the objectivity of her survey and has responded to the various shortcomings raised by Dr. Kamins.[61] In addition, with regard to the allegedly prejudicial Prenotification Letter, Dr. Conrey explained that there was no feasible alternative to such disclosure given the privacy and legitimacy concerns of the survey participants.[62] As Dr. Conrey noted, it was important to give respondents confidence that the sponsor of the survey was credible and legitimate to avoid any confusion or suspicion about who was sponsoring the survey.[63] The Court finds that the Conrey Survey was performed under accepted principles used by experts in the field and is therefore admissible under Rule 702. Accordingly, Defendants' motion to preclude the FTC from using the Conrey Survey or any expert testimony premised thereon is DENIED.[64]

IV. DISCUSSION

A. SECTION 5 VIOLATIONS

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[60] Conrey 2nd Decl. ¶ 18, Docket No. 508.
[61] Conrey 2nd Decl. ¶¶ 19-32.
[62] Conrey 2nd Decl. ¶¶ 5-7.
[63] Conrey 2nd Decl. ¶ 7.
[64] On November 14, 2011, the FTC filed a Notice ofS E

Section 5 of the FTCA prohibits "unfair methods of competition in or affecting commerce[] and unfair or deceptive acts or practices in or affecting commerce. . . ." 15 U.S.C. § 45(a)(1). An act is deceptive if (1) there is a representation, omission, or practice that, (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material. *FTC v. Pantron I Corp*., 33 F.3d 1088, 1095 (9th Cir. 1994) (adopting standard in *Cliffdale Assocs., Inc*., 103 F.T.C. 110, 164-65 (1984)).

An advertisement can make both express claims and implied claims. Express claims "are ones that directly state the representation at issue." *In re Thompson Med. Co., Inc.*, 1984 FTC LEXIS 6, *311 (1984), aff'd, *Thompson Med. Co. v. FTC*, 791 F.2d 189, 197 (D.C. Cir. 1986), cert. denied, *Thompson Med. Co. v. FTC*, 479 U.S. 1086 (1987). Implied claims "are any claims that are not express. They range from claims that would be virtually synonymous with an express claim through language that literally says one thing but strongly suggests another, to language which relatively few consumers would interpret as making a particular representation." *Id.* at *312. The law does not recognize any distinction between express and implied misleading claims. *FTC v. Figgie Int'l*, 994 F.2d 595, 604 (9th Cir. 1993) ("Figgie frequently argues that some of the representations that the Commission found false or misleading were implied, not express. This is a distinction without a difference. Figgie can point to nothing in statute or case law

748 (N.D. Ill. 1992) ("Apart from challenging the truthfulness of an advertiser's representations, the FTC may challenge the representation as unsubstantiated if the advertiser lacked a reasonable basis for its claims.").

"For an advertiser to have had a 'reasonable basis' for a representation, it must have had some recognizable substantiation for the representation prior to making it in an advertisement." *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 298 (D. Mass. 2008) (citations omitted). "Defendants have the burden of establishing what substantiation they relied on for their product claims." *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 959 (N.D. Ill. 2006). "The FTC has the burden of proving that Defendants' purported substantiation is inadequate . . . ." *Id.* "In determining whether an advertiser has satisfied the reasonable basis requirement, the Commission or court must first determine what level of substantiation the advertiser is required to have for his advertising claims. Then, the adjudicator must determine whether the advertiser possessed that level of substantiation." *Pantron I Corp.*, 33 F.3d at 1096.

A claim is material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *Cyberspace.com*, 453 F.3d at 1201. A representation or practice is material if it "is likely to affect a consumer's choice of or conduct regarding a product or service." *In re Southwest Sunsites, Inc.*, 1980 FTC LEXIS 86, at *328 (F.T.C. 1980) (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 387 (1965)).

1. Deceptive Infomercial Claims— Claims 1, 3, and 5

a. Claim 1 – Deceptive 2005 and 2007 Beck Infomercials

The FTC alleges that in connection with the John Beck system, Defendant Beck, the "guru" of the system, and Defendants JBAP, MOA, FP, Hewitt, and Gravink have expressly or implicitly represented that consumers who purchase and use the John Beck System are likely to be able to: (1) purchase homes, at government tax sales in their area, "free and clear" of all mortgages or liens, for just "pennies on the dollar"; (2) earn substantial amounts of money renting or selling homes they purchase at government tax sales; and (3) quickly and easily earn substantial amounts of money with little financial investment. (Compl. ¶ 89.) The FTC claims that these representations were material and were either false or unsubstantiated at the time they were made. Because John Alexander, LLC and Jeff Paul, LLC are part of a "common enterprise," the FTC also claims that these corporate entities should be held liable for

Preliminary findings at injunction proceedings are not law of the case. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) ("A preliminary injunction, of course, is not a preliminary adjudication on the merits but

The falsity of these representations is confirmed by the kit materials. Specifically, the materials teach consumers how to purchase tax liens and certificates, but the purchaser of a tax lien or certificate does not walk out of the tax sale with a deed or the right to turn around and sell the property.[71] Instead, consumers have a right to collect delinquent taxes, and only in exceptional circumstances will the purchaser of a tax lien end up with title and the right to possess or sell the property.[72] Additionally, tax sales are held only once a year and bidding typically starts at a very high percentage of the current fair market value of the property.[73]

Further, Beck himself confirms the falsity of his infomercials' representations. Contrary to his express claims in the infomercials that he has bought "thousands" of properties by using his system, Beck admitted at his deposition that he purchased homes using his system "very infrequently."[74] Indeed, Beck has purchased only 10 homes at tax foreclosure sales.[75] Moreover, while Beck claims that his daughter, Kate Beck, purchased over 90 properties using his system,[76] Beck knows only 4 of his "students" who have been able to get title to

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[71] Stahl 2nd Decl. ¶ 30, Attach. 15 at 514, 676, 831-32, docket no. 6; Beck RFA nos. 26-27, docket no. 352.

[72] Stahl 2nd Decl. ¶ 29-31, Attachs. 15 at 514, 674, 831; Attach. 16 at 1132-33; Beck RFA no. 28.

[73] Stahl 2nd Decl. ¶¶ 31, 36, Attach. 15 at 516, 773.

[74] Beck Dep. Tr. 112:3-5.

[75] *Compare* 2005 John Beck infomercial *with* Beck Dep. Tr. 113:3-6, 174:1-176:24.

[76] J. Beck Decl. ¶ 36.

consumers had to invest a significant amount of money if they were going to be able to use the system for a profit.[80]

The declarations of these consumers are corroborated by the Conrey Survey. According to the survey results, less than 2% of all consumers made any revenues whatsoever.[81] Additionally, less than 0.2% of all consumers who purchased the kit materials have made any profits using the system, and only 1.9% of those who purchased coaching materials made any revenues using the system.[82] Lastly, of the consumers who spent ten or more hours per week using the product, only 3.5% of them made any revenues.[83]

In addition to the falsity of Defendants' claims in the infomercials, at the time these infomercials were produced and aired, Beck, FP, Gravink, Hewitt, and the consumer endorsers did not have any evidence or documentation to show that most purchasers of the John Beck System had made a profit using that system.[84]

First, Defendants argue that the representations made in the infomercials are not false. For example, the houses featured in its commercials did in fact sell for the displayed prices.[85] Further, the John Beck System does not solely encourage

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[80] *See e.g.*, Coonrod Decl. ¶ 12, Fatula Decl. ¶ 12, Jensen Decl. ¶ 26, Contreras Decl. ¶¶ 92-94, Schomp Decl. ¶ 12, Stansell Decl. ¶ 10.

[81] Conrey 1st Decl., Attach. 1 at 10. (Docket No. 376.)

[82] Conrey 1st Decl., Attach. 1 at 8, 10.

[83] Conrey 1st Decl., Attach. 1 at 11.

[84] Beck RFA nos. 69-71, 75, 77, docket no. 352; FP RFA no. 70, docket no. 355; Gravink RFA no. 58, 70-71, docket no. 356; Hewitt RFA nos. 58, 70-71,docket no. 357.

[85] Hewitt Decl., Ex. 2. (Docket No. 451.)

purchasing homes, but also raw land and house sites.[86] Likewise, Defendants argue that as claimed in the infomercials, tax sale properties are not difficult to find and Beck's strategies can be applied in all 50 states because even if the consumer does not live in a non-tax lien state, he or she can use the Internet to purchase properties in other states.

For purposes of this motion, the Court has reviewed the Beck infomercials. The Court agrees with Judge Cooper's conclusion in the preliminary injunction order that "[b]ased upon the statements and visual representations made in the infomercials, the overall net impression communicates to the viewer that a typical consumer can easily purchase high-valued properties for pennies on the dollar and therefore quickly earn tens of thousands of dollars, if not hundreds of thousands of dollars." (11/17/2009 Order at 11-12.) It is immaterial that the kit also encourages purchasing raw land and house sites, because the visual representations of the infomercials themselves focus heavily on large homes and vacation properties. Further, even if it were true that houses featured in its commercials did in fact sell for the displayed price and consumers from non-tax lien state can buy properties in

Here, the infomercials' net impression communicates to the viewer that nice homes, such as those prominently displayed in these advertisements, are easily available in all 50 states with or without the use of the Internet and one can a obtain a deed to these properties easily for pennies on the dollar. What the John Beck infomercials fail to disclose is that in most states, a government tax foreclosure sale transfers a tax lien instead of a tax deed. A tax lien permits the purchaser to collect the delinquent taxes owed on the property, but does not transfer title to the property. In the remaining states where tax deeds are sold, an auction process makes it very difficult to purchase high-value properties for "pennies on the dollar." (11/17/2009 Order at 12.)

Next, Defendants argue that the phrase "quick and easy" is never spoken and never appears in either of the John Beck commercials.[87] On the contrary, the words "quick" and "easy" or similar concepts are used repeatedly in the infomercials, and the net impression viewers get— that they can quickly and easily acquire a property for pennies on the dollar— is false.[88]

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[87] DVD of John Beck infomercials.

[88] Defendants offered the results of a copy test. (Kamins Decl.) However, that test fails to show a triable issue of material fact. In the event that a valid copy test is proffered, evidence showing that 10.5% to 17.3% of copy-test respondents took away the message at issue is sufficient to prove the complaint allegation that the challenged representation had been made. *See In re Telebrands Corp.*, 140 F.T.C. 278, 325 (F.T.C. 2005) ("Regardless of the reduction in the difference between the test group and control group responses, the ALJ held correctly that as a matter of law the net takeaway -- which ranged from 10.5% to 17.3% for all claims except the fat deposit claim-- was sufficient to conclude that the challenged claims were communicated."). As explained in the FTC's reply brief, the number of respondents who reported the challenged claims

(footnote continued)

whatsoever and less than one percent of all consumers who purchased the kit materials have made any profit using the system.[97] Of those who spent ten or more

fast and easy it is to make money usi

(11/17/2009 Order at 16-17.) [104] According to the Jeff Paul materials, consumers must start their own businesses from scratch by creating and marketing their own products.[105]

Further, the falsity of the infomercials is confirmed by testimony from consumer witnesses who purchased the Jeff Paul materials. Consumers attest that they were unable to earn any money using the Jeff Paul System.[106] Consumers also found that the kit materials provided little or no instruction on how to make money using the Internet. [107]

Moreover, the falsity of the representations is also confirmed by the Conrey Survey, which states that less than one percent (0.7%) of all consumers who purchased the Jeff Paul kit materials made any revenues.[108] Less than one-half of one percent (0.4%) of all Jeff Paul customers have made any profit (revenues less expenses) using the Jeff Paul System.[109] The purchase of MOA's coaching services did little to enhance consumers' success. Only 1.4% of consumers who purchased coaching services made any revenues whatsoever using the system.[110] Of those

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[104] *See also*, Gale Decl. ¶ 28. (Docket No. 19.)
[105] Brennan Decl., Attach. 1 at 77-79. (Docket No. 14.)
[106] *See e.g.*,

consumers who spent ten or more hours per week using the product, only 2.4% of consumers made any revenues whatsoever using the system.[111]

The FTC has also established that during the time these infomercials were aired, Defendants did not have evidence or documentation to substantiate their representations. Indeed, Defendants concede that during the time period in which the 2007 Jeff Paul infomercial was aired, they did not have any evidence to show that there were more than 5 people who made $50,000 or more using the Jeff Paul System.[112]

Defendants counter that the front-end materials make it clear that it is up to the individual to go out and market the products and to do the things outlined in the detailed step-by-step program. (Opp'n 18.) This argument is unavailing because the infomercials do not disclose these additional steps. Instead, these infomercials gave the overall impression that a typical consumer can easily, quickly, and "magically" earn thousands of dollars per week simply by purchasing and using the Jeff Paul System.[113] The Court finds that the misrepresentations are material, and no reasonable trier of fact could conclude that the misrepresentations were not likely to mislead consumers acting reasonably under the circumstances. Accordingly, summary adjudication of Claim 5 is **GRANTED**.

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[111] Conrey Decl., Attach. 1 at 12.

[112] Paul nos. 35, 40, docket no. 355; Jeff Paul LLC RFA nos. 47-50, docket no. 360; FP RFA no. 142; Gravink RFA no. 142; Hewitt RFA no. 142.

[113] DVD of Jeff Paul infomercials.

cost of the coaching program. (Compl. ¶ 107.) The FTC argues that Defendants' representations are likely to mislead because such representations were *both* false and unsubstantiated. (Mot. 10-13.) The Court agrees.

For example, FTC has submitted evidence showing that through their telemarketers, Defendants falsely represented that consumers would quickly and easily earn back the cost of coaching and the coaching substantially enhances consumers' chances of making money.[114] Moreover, the evidence shows that the telemarketers often made express earnings claims[115] and guaranteed that the consumers will make money.[116] The telemarketers represented to consumers that Defendants' personal coaches will ensure consumers' success by holding their hands and walking them "step by step" through the systems.

The Conrey Survey shows that almost all who purchased coaching programs lost money, and more than 17 percent lost at least $10,000.[119] Only 1.7% of consumers who purchased coaching services made any profit whatsoever.[120] Further, the evidence showing that the coaches failed to answer their questions and did not walk them step-by-step as promised by the telemarketers.[121]

Defendants counter that the FTC failed to take into account FP's generous refund policies; its recording program; its Quality Assurance ("QA") program; and its fining policies.[122] Defendants also note that they "undertook costly and extensive efforts to reign in rogue staff and to keep their sales legally compliant."[123] Defendants also argue that disputes exist as to the extent of the allegedly improper

Accordingly, summary adjudication of Claim 7 is **GRANTED.**

B. <u>TSR VIOLATIONS</u>

1. Claims 8, 10, and 12 – Failure to Disclose Clearly and Conspicuously Enrollment in a Continuity Plan

The FTC alleges that the continuity charges imposed in the systems violate section 310.3(a)(1)(vii) of the TSR. The continuity charges are monthly recurring charges to the purchasers after the 30-day trial period ended unless the purchasers take affirmative steps to cancel the charges.

Section 310.3(a)(1)(vii) provides:

> It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:
>
> (1) ***Before a customer consents to pay for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information***: . . .
>
> (vii) If the offer includes a negative option feature, ***all material terms and conditions of the negative option feature***, including, but not limited to, ***the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge***(s), the date(s) the charge(s) will be submitted for payment, and the ***specific steps the customer must take to avoid the charge(s).***

16 C.F.R. § 310.3(a)(1)(vii) (emphasis added).

Here, there is no reasonable dispute that Defendants failed to adequately disclose to purchasers of the three systems that they would be automatically enrolled in continuity programs. The FTC's evidence shows that, following the placement of

the order for the front-end kits, consumers were automatically charged $39.95 per month after the 30-day free trial period expired, and they had to contact Defendants to avoid future charges.[126] In numerous instances, consumers were unaware they had been enrolled in the continuity plans until they noticed the $39.95 charges on their credit card statements.[127]

As the Court previously found in its preliminary injunction order, by enrolling consumers in the continuity service programs and obtaining consumers' payment information without first disclosing all material terms of the negative option, Defendants have violated the TSR. (11/17/2009 Order at 20-21.)

Defendants cite to the transcripts of the initial voice recording (IVR) for the three systems to support their argument that sufficient disclosures were made in accordance with § 310.3(a)(1)(vii).[128] (Opp'n 38.) Defendants explain that at the time of the purchase, the customers were informed that only the first month of membership will be free.[129] Further, the invoice and package disclosures shipped

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[126] Stahl 2nd Decl. ¶¶ 21-24, Attachs. 13 (Beck Interactive Agent Script) and 14 (Paul Interactive Agent Script); Stahl 6th Decl. ¶¶ 11-12, Attach. 5, docket no. 540 (Alexander Interactive Agent Script).

[127] Coonrod Decl. ¶ 3 (John Beck System); Day Decl. ¶ 20(John Beck System); Gorzen Decl. ¶ 3, docket no. 369 (John Beck System); Hudson Decl. ¶ 4, docket no. 369 (John Beck System); Kaminski Decl. ¶ 5 (John Beck System); Fernandez Decl. ¶ 3, docket no. 370 (John Alexander System); Humber Decl. ¶ 4, docket no. 370 (John Alexander System); Kemper Decl. ¶ 3, docket no. 370 (John Alexander System); Mahlum Decl. ¶ 5, docket no. 370 (John Alexander System); Smyth Decl. ¶ 8, docket no. 370 (John Alexander System); Somers Decl. ¶ 4, docket no. 370 (John Alexander System).

[128] Hewitt Decl. ¶ 40, Ex. 6. (Docket No. 451-7.)

[129] Gabor Supplemental Decl. ¶ 6. (Docket No. 583.)

for their payment information. (Hewitt Decl., Ex. 6 at 000681, 000704, 000732.) Prior to divulging their credit card information, consumers were not told that (1) their account would be charged unless they take an affirmative action to avoid the charge(s); (2) the date(s) the charge(s) will be submitted for payment; and (3) the specific steps the consumer must take to avoid the charge(s). 16 C.F.R. § 310.3(a)(1)(vii). Further, the recording only states that the consumers would get a 30-day free trial membership to Defendants' "clubs," but it fails to clearly and conspicuously disclose that the consumers would need to take affirmative action at the end of the free trial to avoid being charged.

For these reasons, summary adjudication of Claims 8, 10, and 12 is **GRANTED**.[131]

2. Claims 9, 11, and 13 – Submission of Consumer Payment Information Without the Consumer's Express Consent

The FTC alleges in Claims 9, 11, and 13 that Defendants violated Section 310.4(a)(6) of the TSR by representing that consumers who purchased one of the systems would receive a free 30-day membership to a special service, and then

[131] Claims 8, 10, and 12 only affect Family Products, Hewitt, Gravink, and other corporate defendants. (Mot. 43.)

causing consumers' billing information to be submitted for payment without the express informed consent of the consumer after the trial period ended.[132]

Here, there is no reasonable dispute that Defendants automatically charged consumers $39.95 per month after a 30-day free trial period without the expressed informed consent of the consumers.[133] Although Defendants counter that the infomercials and other materials make it clear that only the first 30 days are free (Opp'n 20), as previously discussed, any disclosures made after the initial call are

grace period that Defendants had to place those customers on the company's internal "do not call" list.[139]

However, there is no dispute that Defendants have no written policies and procedures with regard to handling "do not call" complaints. Indeed, the Chief Operating Officer of MOA, Michael O'Connell, admits that MOA had no written policy with regard to the TSR's "do not call" provision.[140] Moreover, the safe harbor provision that Defendants cite has no application to this case. That provision provides that a seller or telemarketer will not be liable for violating § 310.4(b)(1)(iii)(A) if it can show that "as part of the seller's or telemarketer's routine business practice . . . (iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to § 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the 'do-not-call' registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process . . . ." 16 C.F.R. § 310.4(b)(3)(iv). Here, Defendants point to no evidence of any concrete policies and procedures that relate to the maintenance of any registry. For all these reasons, summary adjudication of Claim 14 is **GRANTED**.

C. REMEDIES

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[139] O'Connell Dep. Tr. 135:21-136:8, 213:3-214:16; 215:9-13, 217, 221:8-10; Johnson Dep. Tr. 2-13.

[140] O'Connell Dep. Tr. 213-217.

The FTC asks for both injunctive and monetary relief of over $300 million dollars. (Mot. 1.)

1. Injunctive Relief

The FTC may seek a permanent injunction "in proper cases." 15 U.S.C. § 53(1)(2). A routine deception case such as the case at bar qualifies as a "proper case." *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982) (holding that § 13(b) of the FTCA authorizes courts to grant permanent injunctions "in proper cases" and "a routine fraud case is a 'proper case'"); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1049 (C.D. Cal. 1999) (finding that a case based on a § 5 violation is a "proper case" for purposes of injunctive relief under the FTCA).

Upon finding that a business or an individual has engaged in deceptive conduct in violation of the FTCA, the court may issue a permanent injunction under Section 13(b). *Gill*, 71 F. Supp. 2d at 1046. Individuals may be held liable for injunctive relief not only for their own deceptive conduct, but also in certain circumstances, for a corporation's deceptive

Service, Inc., 875 F.2d 564, 573 (7th Cir. 1989), cert. denied, 493 U.S. 954, 107 L. Ed. 2d 352, 110 S. Ct. 366 (1989); *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1292 (D. Minn. 1985)).

Here, the FTC seeks injunctive relief against Hewitt, Gravink, and the companies they control. (Reply 7-8, 27-28.) Status as a corporate officer is sufficient to establish individual liability. *Amy Travel Service*, 875 F.2d at 573 ("Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer."); *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1207 (N.D. Ga. 2008) ("If a defendant was a corporate officer of a small, closely-held corporation, that individual's status gives rise to a presumption of ability to control the corporation."). Because the Court finds that liability has been established, and it is undisputed that Hewitt and Gravink own and control FP, which, in turn, is the sole member of MOA, JBAP, LLC, Jeff Paul, LLC d/b/a Shortcuts to Internet Millions, LLC, and John Alexander, LLC, Hewitt and Gravink are liable for injunctive relief.[141]

The FTC also seeks to enjoin Beck, Alexander, and Paul. (Reply 14,18-19, 21-22, respectively.) In FTC cases, individual defendants are directly liable for their own violations of Section 5. *FTC v. Windward Mktg.*, 1997 U.S. Dist. LEXIS

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[141] Hewitt Decl., ¶¶ 2-5, docket no. 451; D. Gravink Decl. ¶ 2-3.

Gravink, Hewitt, FP and MOA be "permanently restrained and enjoined from engaging or participating in telemarketing, and from assisting others engaged in telemarketing." (*Id.*, hereinafter, "Ban on Telemarketing).

The FTC argues that given Hewitt and Gravink's history, particularly the prior lawsuits that have been filed by the FTC against them, and the amount of the consumer injury involved, a lifetime ban is warranted.[147] The parties' briefing on the duration and scope of the ban with respect to Hewitt and Gravink and the scope of injunctive relief against all individual defendants is insufficient to enable the Court to fashion the appropriate equitable relief. A number of cases the FTC relied upon in support of the lifetime ban were not included in the FTC's opening brief but appeared in the reply. Accordingly, Defendants did not have a full opportunity to address this issue. Therefore, the Court believes that additional briefing would be helpful to the Court, particularly on the issue on whether a lifetime ban is appropriate under the facts of this case.

2. Monetary Relief

In addition to injunctive relief, the FTC seeks equitable monetary relief in the form of restitution under Section 13(b). The authority granted by Section 13(b) is not limited to the power to issue an injunction. Rather, it includes the authority to grant any "ancillary relief" necessary to accomplish complete justice, including the

[147] Pl.'s Fact Nos. 2328-37.

authority to order restitution or "disgorge[ment] of unjust enrichment." *Pantron I*, 33 F.3d at 1102-1103; *Amy Travel Serv.*, 875 F.2d at 571 (stating that restitution is an "ancillary relief" authorized by Section 13(b)"); *Gem Merchandising*, 87 F.3d at 469 ("Among the equitable powers of a court is the power to grant restitution and disgorgement.").

As with injunctive relief, individuals may be held liable for monetary relief in their own right for their own deceptive conduct. *Gill*, 71 F. Supp. 2d at 1046; *Kitco of Nevada*, 612 F. Supp. at 1292-1293 (finding liability of individuals for their roles as principals). An individual is liable for corporate violations of the FTCA if "(1) he participated directly in the deceptive acts or had the authority to control them and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *Stefanchik*, 559 F.3d at 931.

Here, the FTC argues that Hewitt and Gravink should be held monetarily liable as owners of the corporate defendants. In addition, the FTC seeks the hold the developers of the three systems, Beck, 2es.,6soicemTj16.189endaddition,

Again, the Court believes that because the parties' briefing focused primarily on liability, additional briefing is appropriate in order for the Court to determine the appropriate monetary award as to each defendant. The FTC submitted summaries of Defendants' revenue, refunds, and chargebacks by year for sales of the kits and coaching services. (Rose Decl. ¶¶ 4-7, Attach. A.) The FTC also submitted a summary of the revenue for the sale of the continuity programs. (Rose Decl. ¶¶ 10-11, Attach. B.) These summaries are allegedly based on documents produced by Defendants. (Rose Decl., Attach. B.)

However, Defendants counter that summary adjudication of the measure of damages is improper because the FTC made no effort to exclude the consumers who benefitted from the programs or to subtract the benefit of actual services rendered. (Opp'n 43.) Defendants also argue that the FTC should subtract the amounts actually earned by consumers using the educational products to avoid providing consumer windfalls. (Opp'n 43.) As the Conrey Survey shows, a small number of purchasers of the kits have benefitted from the program. Because the relief sought by FTC is grounded on equity, the FTC should, at a minimum, address why Defendants' arguments are not meritorious. In its Reply, the FTC failed to do so.

V. CONCLUSION

For the foregoing reasons, (1) Defendants' Motion in Limine is **DENIED**, and (2) the FTC's Motion for Summary Judgment is **GRANTED.** The Court orders the parties to submit supplemental briefing and additional evidence, if any,

addressing the scope of injunctive relief and the appropriate amount of monetary damages. The FTC's supplemental brief is due by **May 7, 2012**. Defendants' responsive brief is due by **May 14, 2012**. The FTC's Reply is due by **May 21, 2012**. **Each brief is limited to 15 pages.** The Court will take the matter under submission and will schedule further hearing if it deems necessary.

IT IS SO ORDERED.

Dated: H.