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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

1 on Defendants’¹ motion in limine to exclude the FTC’s expert survey and testimony
2 (docket no. 426) because consideration of Defendants’ objections raised in the
3 motion in limine is necessary to the determination of the FTC’s motion for summary
4 judgment. Both motions are opposed. On November 28, 2011, the Court held a
5 hearing on these matters, ordered the parties to submit supplemental briefings, and
6 took the matter under submission. (Docket No. 576.) For the reasons discussed
7 below, the FTC’s motion is GRANTED. Defendants’ motion in limine is DENIED.
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10 **I. FACTUAL BACKGROUND²**

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12 This case involves the advertising, marketing, and sale of three wealth-
13 creation products: (1) John Beck’s Free and Clear Real Estate System (the “John
14 Beck System”); (2) John Alexander’s Real Estate Riches in 14 Days (the “John
15 Alexander System”); and (3) Jeff Paul’s Shortcuts to Internet Millions (the “Jeff
16 Paul System”). These products were marketed through Defendants’ infomercials,
17 which the FTC contends were deceptive.
18

19 **A. THE DEFENDANTS**

20
21 Hewitt and Gravink, the founders and sole members of FP, directly or
22 indirectly owned and controlled the corporate defendants in this lawsuit.³ Hewitt
23

24
25 ¹ Individual defendants Gary Hewitt (“Hewitt”), Douglas Gravink (“Gravink”), John Beck
26 (“Beck”), John Alexander (“Alexander”), and Jeff Paul (“Paul”), and corporate defendants
27 Mentoring of America, LLC (“MOA”); Family Products, LLC (“FP”); John Beck Amazing
28 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.

1 and Gravink made the final decisions on all the infomercials at issue.⁴ FP
2 advertised, marketed, telemarketed, and sold each of the “systems” in this action.⁵
3
4 FP, in turn, was the sole member of Defendants MOA, JBAP, John Alexander, LLC,
5 and Jeff Paul, LLC (also d/b/a Shortcuts to Millions).⁶ MOA telemarketed and sold
6 personalized coaching programs for the systems.⁷
7

8 Defendant Beck is the “originator” or developer of the John Beck System that
9 was advertised in the 2005 and 2007 John Beck infomercials (hereinafter, the 2005
10 John Beck infomercial and the 2007 John Beck infomercial, respectively).⁸ Beck
11 appeared in these infomercials.⁹ JBAP marketed the John Beck System.¹⁰
12

13 Defendant Alexander is the “originator” or developer of the John Alexander
14 System that was advertised in an infomercial that aired from approximately
15 November 2005 until approximately mid-2007.¹¹ Alexander appeared in the John
16 Alexander infomercial.¹² John Alexander, LLC marketed the John Alexander
17 System.¹³
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22 ³ D. Gravink Decl. ¶ 2, docket no. 5448; Answer ¶ 13, Am. Answer ¶ 13, docket no. 219.

23 ⁴ D. Gravink Decl. ¶ 3.

24 ⁵ Am. Answer ¶¶ 10-12.

25 ⁶ Gravink Decl. ¶ 2. (Docket No. 448.)

26 ⁷ Am. Answer ¶ 8.

27 ⁸ J. Beck Decl. ¶¶ 1, 14. (Docket No. 443.)

28 ⁹ Am. Answer ¶ 15.

¹⁰ *Id.* ¶ 5.

¹¹ Alexander Decl. ¶ 1. (Docket No. 441.)

¹² Am. Answer ¶ 16.

¹³ *Id.* ¶ 6.

1 Defendant Paul is the co-creator and primary spokesman for the Jeff Paul
2 System that was advertised in the 2007 and 2008 Jeff Paul infomercials (hereinafter,
3 “the 2007 Jeff Paul infomercial” and “the 2008 Jeff Paul infomercial,”
4 respectively).¹⁴ Paul appeared in the Jeff Paul infomercials.¹⁵ Jeff Paul , LLC
5 marketed the Jeff Paul System.
6

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8 **B. DEFENDANTS’ BUSINESS PRACTICES**

9 Defendants marketed the products using infomercials aired nationwide and on
10 the Internet.¹⁶ Each of these infomercials advertised a “system” that costs \$39.95,
11 plus shipping and handling, and consists of a front-end kit of educational
12 materials— including written materials, DVDs, and/or CDs— and a purportedly free
13 month-long membership in a value-added “club.”¹⁷
14

15
16 Since at least 2004, Defendants have aired at least two versions of the John
17 Beck System infomercial.¹⁸ The John Beck System teaches consumers how to buy
18 real estate at government tax foreclosure sales by paying the delinquent back taxes
19 owed on the property.¹⁹ The FTC alleges that the infomercials falsely represent that
20 consumers can use the John Beck System to quickly and easily earn substantial
21 amounts of money by purchasing homes at tax sales in their area “free and clear” for
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24 ¹⁴ Paul Decl. ¶ 1. (Docket No. 455.)

25 ¹⁵ Am. Answer ¶ 17; Paul Decl. ¶ 6.

26 ¹⁶ Opp’n 8; Am. Answer ¶ 22.

27 ¹⁷ Am. Answer ¶ 22.

28 ¹⁸ *Id.* ¶ 24.

¹⁹ DVD of John Beck infomercials, docket no. 6; Russ Decl. ¶ 5, docket no. 460; Compl. ¶ 25, docket no. 1.

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

8
9 Similarly, Defendants also aired the “John Alexander’s Real Estate Riches in
10 14 days” infomercial.²² The infomercial markets materials on Alexander’s “inverse
11 ownership system” of acquiring real estate.²³ Under the “inverse ownership
12 system,” consumers put together real estate transactions and get “the cash out at
13 closing” without using any of their own money or credit.²⁴ The infomercial falsely
14 represents that consumers will be able to complete an inverse purchase transaction
15 within 14 days.²⁵ The FTC alleges that Defendants falsely represent that consumers
16 who purchase this system would receive a free 30-day membership to “John’s
17 Club,” Alexander’s hotline advisory service. However, the infomercial fails to
18 adequately disclose that “John’s Club” is actually a continuity plan which, upon
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24 ²⁰ Compl. ¶ 25.

25 ²¹ *Id.* ¶¶ 33-34.

26 ²² Am. Answer ¶ 48.

27 ²³ Stahl 6th Decl., Attach. 4, DVD of John Alexander infomercial, docket no. 521; Russ Decl.
28 ¶ 5.

²⁴ Compl. ¶ 49.

²⁵ *Id.*

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

3
4 Since at least January 2006, Defendants have also aired at least two versions
5 of the “Jeff Paul’s Shortcuts to Internet Millions” infomercial.²⁷ The infomercials
6 market materials on “proven, turnkey internet businesses,” a system that is “so
7 simple that consumers do not need any prior experience with internet business to
8 make it work.”²⁸ The FTC claims that consumers who purchase the Jeff Paul
9 System receive a free 30-day membership to “Big League,” also known as Jeff
10 Paul’s “Internet Millionaires Club,” a service that includes seminars and access to
11 advisors who can answer consumers’ questions. However, the FTC alleges that the
12 infomercials did not adequately disclose that “Big League” is actually a continuity
13 plan which, upon expiration of the free trial period, charges consumers \$39.95 per
14 month, unless consumers take the affirmative step of canceling their memberships.²⁹

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18 On June 30, 2009, the FTC brought this suit against Defendants, alleging
19 violation of the Federal Trade Commission Act (“FTCA”), 15 U.S.C. § 45(a)
20 (hereinafter, “Section 5”) based on Defendants’ representations in connection with
21 the advertising, marketing, promoting, offering for sale, or sale of the John Beck
22 System (Claim 1), the John Alexander System (Claim 3), and the Jeff Paul System
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26 ²⁶ *Id.* ¶ 64.

27 ²⁷ Am. Answer ¶ 64.

28 ²⁸ DVD of Jeff Paul infomercials, docket no. 6; Russ Decl. ¶ 5; Compl. ¶ 65.

29 ²⁹ Compl. ¶ 69.

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

13 The FTC now moves for summary judgment.

14 **II. LEGAL STANDARD**

15 Rule 56 of the Federal Rules of Civil Procedure allows a party to move for
16 summary judgment of a claim or defense. Fed. R. Civ. P. 56(a). Summary
17 judgment is proper if there is no genuine dispute as to any material fact and the
18 movant is entitled to judgment as a matter of law. *Id.*; *see also, Anderson v. Liberty*
19 *Lobby, Inc.*, 477 U.S. 242, 247 (1986). The movant bears the initial burden of
20 informing the court of the basis of its motion, and identifying those portions of
21 “‘pleadings, depositions, answers to interrogatories, and admissions on file, together
22 with the affidavits, if any,’ which it believes demonstrate the absence of a genuine
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1 issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting
2 Fed. R. Civ. P. 56(c)). Once the moving party has met this initial burden, the
3 burden shifts to the nonmoving party to present evidence showing that a genuine
4 issue of fact remains. *Anderson*, 477 U.S. at 248. The nonmoving party “must do
5 more than simply show that there is some metaphysical doubt as to the material
6 facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
7 (1986). If the nonmoving party “fails to make a showing sufficient to establish the
8 existence of an element essential to that party’s case, and on which that party will
9 bear the burden of proof at trial,” then summary judgment is proper. *Celotex*, 477
10 U.S. at 322. Where the opposing party is able to identify specific, relevant facts
11 evidencing a genuine issue of material fact, the court must draw all inferences in
12 favor of the opposing party and accordingly deny summary judgment. *T.W. Elec.
13 Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987).

18 **III. EVIDENTIARY OBJECTIONS**

19 **A. DEFENDANTS’ EVIDENTIARY OBJECTIONS**

20 **1. Objections to Beck and Alexander Consumer Declarations**

21 In connection with its claims relating to the John Beck System, the FTC has
22 filed, *inter alia*, 14 consumer declarations consisting of approximately 200
23 paragraphs. (Docket No. 369.) In connection with its claims pertaining to the John
24 Alexander System, the FTC has filed, *inter alia*, 16 consumer declarations
25 consisting of over 100 paragraphs. (Docket No. 370.) Defendants object to almost
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1 every paragraph on various grounds, including best evidence, relevance, lacks
2 foundation, hearsay, argumentative, and lack of opportunity to cross-examine the
3 declarants. (Docket Nos. 408, 409.) The FTC filed a response addressing each
4 objection. (Docket Nos. 484, 502.) These objections are **OVERRULED**.³⁰

6 **2. Objections to the Declarations of Former MOA Employees**

7
8 Defendants object to almost every paragraph of the declarations made by the
9 following former employees of MOA: (1) Tabatha Contreras, (2) Brenda Fox, (3)
10 Segun Hinckson, and (4) Timothy Lawson.³¹ The FTC filed a response to these
11 objections.³² To the extent the Court relies on any evidence to which Defendants
12 object, the objections are **OVERRULED** for the reasons discussed in the FTC's
13 responsive pleadings.
14

16 **3. Objections to Various Declarations**

17 Defendants object to portions of the Gordon Declaration and Attachment 1 to
18 that declaration. (Docket Nos. 333, 414, 487, 543.) Attachment 1 is an Excel
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21 ³⁰ The statements made by the telemarketers are party admissions that are non-hearsay under
22 Rule 801(d)(2)(D) of the Federal Rules of Evidence (hereinafter, "FRE"). Further, as the Court
23 explained in its 11/17/2009 Order, Defendants' best evidence objection is without merit because
24 these declarations do not seek to establish the contents of the infomercials or program materials.
25 Instead, the declarations are relevant to show the consumer's understanding of the statements
26 made in the infomercials and materials. The remaining grounds for Defendants' objections are
27 equally without merit, and it is unnecessary and unduly burdensome for the Court to address these
28 objections individually. Accordingly, to the extent that the Court relied on portions of
29 declarations that have been objected to, such objections are **OVERRULED** for the reasons stated
30 in the FTC's response.

³¹ Docket Nos. 373, 410, 411, 412, 413.

³² Docket Nos. 485, 486, 513, 514.

1 spreadsheet summarizing consumer complaints relating to the John Beck System,
2 John Alexander System, and Jeff Paul System. Defendants also object to portions of
3 the (1) Fifth Stahl Declaration³³; (2) Sixth Stahl Declaration³⁴; (3) Billings
4 Declaration³⁵; (4) Papenfuss Declaration³⁶; and (5) Williams Declaration.³⁷ The
5 Court need not address these objections because the Court did not rely on any
6 portion of the evidence to which Defendants objected.
7

9 **4. Objections to the McClellan Declaration**

10 Defendants object to portions of the declaration made by Charles McClellan,
11 a consumer who purchased an introductory Jeff Paul Kit. (Docket Nos. 371, 419,
12 505.) To the extent that the Court relied on paragraph 7 of the McClellan
13 Declaration, Defendants' objection is **OVERRULED** because the declarant has
14 personal knowledge of his conversation with the telemarketer and the statements
15 made by the telemarketer were non-hearsay party admissions. The Court need not
16 rule on Defendants' objections to other portions of the declaration because the Court
17 did not rely on them.
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21 **5. Objections to the Rose Declaration**

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25 ³³ Docket Nos. 367, 415, 488.

26 ³⁴ Docket Nos. 343, 416, 489, 539.

27 ³⁵ Docket Nos. 345, 417, 503, 542.

28 ³⁶ Docket Nos. 368, 418, 517.

³⁷ Docket Nos. 380, 425, 516.

1 Defendants object to portions of the Rose Declaration. (Docket Nos. 342, 420
2 506.) The Court **OVERRULES** the objections to Paragraph 5 of the declaration for
3 the reasons stated by the FTC on its response. (Docket No. 506.) The Court need
4 not rule on Defendants' objections to other portions of the declaration because the
5 Court did not rely on them.
6

7 **6. Objections to the Declarations of the FTC Attorneys**

8
9 Defendants object to almost every paragraph of the declaration made by
10 Jennifer Brennan. (Docket Nos. 421, 490, 537.) Defendants also object to portions
11 of the declaration made by John Jacobs. (Docket Nos. 422, 504.) Likewise,
12 Defendants object to Paragraph 5 of the Procter Declaration on the basis of hearsay
13 and best evidence rule. (Docket Nos. 423, 332, 491.) The Court need not rule on
14 these objections because the Court did not rely on the challenged evidence.
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17 **7. Objections to the First Conrey Declaration**

18 Defendants object to Paragraph 1 of the first declaration made by Dr.
19 Frederica Conrey ("Dr. Conrey") on the grounds of best evidence rule and
20 mischaracterization of the evidence. (Docket Nos. 376, 424, 507.)
21 Mischaracterization of evidence is not a cognizable evidentiary objection. Further,
22 the best evidence objection has no merit as the survey referenced in the First Conrey
23 Declaration is attached to said declaration. Accordingly, this objection is
24 **OVERRULED.**
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27 **B. THE FTC'S EVIDENTIARY OBJECTIONS**

1 The FTC filed evidentiary objections to portions of the declarations filed by
2 Defendants in support of their opposition to the motion for summary judgment. The
3 FTC objects to the declarations made by the following: (1) Jason Han³⁸; (2) Jeff
4 Paul³⁹; (3) John Alexander⁴⁰; (4) Christopher Gravink⁴¹; (5) Jeff Devoll; (6) Darryl
5 Fields; (7) Kelvin Bell; (8) Greg Whiting; (9) Stephens⁴²; (10) Douglas Gravink⁴³;
6 Erica Brutocao-Kemp⁴⁴; (12) Erica Stahura⁴⁵; (13) Gary Hewitt⁴⁶; (14) Michael
7 O'Connell⁴⁷; (15) Ana Alicia Pelaez⁴⁸; (16) Laura Beck⁴⁹; (17) John Beck⁵⁰; (18)
8 Eric Barry⁵¹; and (18) Tobey Waggoner.⁵² To the extent that the Court relied on
9 Defendants' proffered evidence, the objections are **OVERRULED**. The Court need
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15 ³⁸ Han Decl., docket no. 442; Pl.'s Evidentiary Objection to Han Decl., docket no. 482.

16 ³⁹ Paul Decl., docket no. 455; Pl.'s Evidentiary Objection to Paul Decl., docket no. 483.

17 ⁴⁰ Alexander Decl., docket no. 441; Pl.'s Evidentiary Objection to Alexander Decl., docket no.
18 441.

19 ⁴¹ C. Gravink Decl., docket no. 444; Pl.'s Evidentiary Objection to C. Gravink Decl., docket
20 no. 493.

21 ⁴² Devoll Decl., docket no. 446; Fields Decl., docket no. 447; Bell Decl., docket no. 453;
22 Whiting Decl., docket no. 457; Stephens Decl., docket no. 459; Pl.'s Evidentiary Objection to the
23 Devoll Decl., Fields Decl., Bell Decl., Whiting Decl., and Stephens Decl., docket no. 494.

24 ⁴³ D. Gravink Decl., docket no. 448; Pl.'s Evidentiary Objection to D. Gravink Decl., docket
25 no. 495.

26 ⁴⁴ Brutocao-Kemp Decl., docket no. 449; Pl.'s Evidentiary Objection to Brutocao-Kemp Decl.,
27 docket no. 496.

28 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 Waggoner Decl., docket no. 458; Pl.'s Evidentiary Objection to Waggoner Decl., docket
no. 518.

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

3
4 **C. DEFENDANTS' MOTION IN LIMINE NO. 1**

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

9
10 Dr. Conrey is a Survey Methodologist at ICF Macro, a firm retained by the
11 FTC to conduct the telephone survey at issue.⁵⁵ The Conrey Survey "measured the
12 earnings and profit experienced by consumers who had purchased one of the three
13 products. [It] also investigated whether investment in coaching services or
14 investment of time was related to consumers' earnings or profit."⁵⁶ The FTC
15 provided ICF Macro with the list of people whose names appeared in customer
16 databases of the three products. From these lists, ICF Macro pulled a sample of
17 records to contact for telephone interviews. Each person in the sample was mailed a
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25 ⁵³ Conrey 1st Decl., Attach. 1. (Docket No. 376.)

26 ⁵⁴ In support of the Motion in Limine, Defendants have submitted a Rebuttal Report prepared
27 by their expert, Michael Kamins ("Dr. Kamins"). See Kamins Decl. ¶ 8, Ex. 2, Docket No. 426-3.

28 ⁵⁵ Conrey 1st Decl. ¶ 1.

⁵⁶ Conrey 1st Decl. ¶ 1, Attach. 1 at 1.

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

3
4 **The Federal Trade Commission needs your help.** Since 1914, the
5 Federal Trade Commission (the FTC) has protected American
6 consumers by monitoring and regulating businesses. In order to fulfill
7 this responsibility, it periodically conducts research into the
8 experiences of customers who have purchased certain types of products
9 and services. **As part of a current research study, the FTC has
10 enlisted the help of ICF Macro, an independent research firm, to
11 learn about customers' experiences with [PRODUCT NAME].**
12 A few days from now, you will receive a phone call from an ICF Macro
13 interviewer who will ask for your assistance in this important research
14 effort

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

20 Defendants move to exclude evidence relating to the Conrey Survey,
21 including the First Conrey Declaration (docket no. 376), on the ground that the
22 survey's Prenotification Letter, "poisoned the well in such a way as to invalidate
23 whatever survey finding the FTC obtained." (Mot. in Limine 1.) Defendants
24 contend that the entire structure of the Prenotification Letter, which positions the
25

26 ⁵⁷ Conrey 1st Decl., Attach. 1 at 1.

27 ⁵⁸ Conrey 1st Decl., Attach. 1 at 20.

28 ⁵⁹ Conrey 1st Decl., Attach. 1 at 5.

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

6 The admissibility of expert testimony is governed by FRE 702, which
7 provides that:
8

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

16 Fed. R. Evid. 702.

17 “The proponent of the survey bears the burden of establishing its
18 admissibility.” *Keith v. Volpe*, 858 F.2d 467, 480 (9th Cir. 1988). In the
19 Ninth Circuit, a party seeking to admit survey evidence must show that the
20 survey was “conducted according to accepted principles.” *Clicks Billiards,*
21 *Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1262 (9th Cir. 2001); *see also,*
22 *Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt.*, 618 F.3d
23 1025, 1036 (9th Cir. 2010) (“We have long held that survey evidence should
24 be admitted ‘as long as [it is] conducted according to accepted principles and
25 [is] relevant.’”) (alterations in the original). Criticisms related to “the format
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1 of the questions or the manner in which [the survey] was taken” go to the
2 weight of the evidence, not its admissibility. *Fortune Dynamic*, 618 F.3d at
3 1036 (“[T]echnical inadequacies’ in a survey, ‘including the format of the
4 questions or the manner in which it was taken, bear on the weight of the
5 evidence, not its admissibility.’”); *Wendt v. Host Int’l*, 125 F.3d 806, 814 (9th
6 Cir. 1997) (“Challenges to survey methodology go to the weight given the
7 survey, not its admissibility.”).

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10 In *Keith*, the party challenging the admission of a survey had contested,
11 *inter alia*, the objectivity of the survey. However, the survey director had
12 testified that the methods used were “accepted social science techniques in
13 accord with generally accepted standards in the field.” *Keith*, 858 F.2d at
14 481. Based on this testimony, the Ninth Circuit held that district court did not
15 err in admitting the survey.

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18 In *Fortune Dynamic*, the trial court excluded a survey on various
19 grounds including the fact that the survey may have been “highly suggestive.”
20 618 F.3d at 1037. The Ninth Circuit reversed, holding that a survey should be
21 admitted as long as it is based on accepted principles and is relevant. *Id.*

22
23
24 Much like in *Keith* and *Fortune Dynamic*, here, Defendants challenge the
25 admissibility of the survey and testimony relating to that survey on the ground that it
26 lacked objectivity and was highly suggestive. In response, much like the expert in
27 *Keith*, Dr. Conrey testified that the survey methods she used were in accord with
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1 generally accepted standards in the field.⁶⁰ Further, Dr. Conrey attested to the
2 objectivity of her survey and has responded to the various shortcomings raised by
3 Dr. Kamins.⁶¹ In addition, with regard to the allegedly prejudicial Prenotification
4 Letter, Dr. Conrey explained that there was no feasible alternative to such disclosure
5 given the privacy and legitimacy concerns of the survey participants.⁶² As Dr.
6 Conrey noted, it was important to give respondents confidence that the sponsor of
7 the survey was credible and legitimate to avoid any confusion or suspicion about
8 who was sponsoring the survey.⁶³ The Court finds that the Conrey Survey was
9 performed under accepted principles used by experts in the field and is therefore
10 admissible under Rule 702. Accordingly, Defendants' motion to preclude the FTC
11 from using the Conrey Survey or any expert testimony premised thereon is
12 DENIED.⁶⁴

17 IV. DISCUSSION

18 A. SECTION 5 VIOLATIONS

20 ⁶⁰ Conrey 2nd Decl. ¶ 18, Docket No. 508.

21 ⁶¹ Conrey 2nd Decl. ¶¶ 19-32.

22 ⁶² Conrey 2nd Decl. ¶¶ 5-7.

23 ⁶³ Conrey 2nd Decl. ¶ 7.

24 ⁶⁴ On November 14, 2011, the FTC filed a Notice of Errata to the First Conrey Declaration.
25 (Docket No. 568.) Attached to the Notice was the Third Conrey Declaration, which explained that
26 there was a "minor reporting error" in the "Methodological Notes" section (Appendix D) of her
27 expert report. (Docket No. 376, Attachment 1 at 40 [Appendix D at D-6].) Dr. Conrey submits
28 that this reporting error does not affect the underlying survey data or any of her tables or
conclusions. In response, Defendants filed an evidentiary objection to the Third Conrey
Declaration. (Docket No. 570.) Because Dr. Conrey attests that the reporting error does not affect
any of the data upon which FTC relies and the Third Conrey Declaration merely explains context
upon which that error arose, the Court **OVERRULES** Defendants' objection.

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

10 An advertisement can make both express claims and implied claims. Express
11 claims “are ones that directly state the representation at issue.” *In re Thompson*
12 *Med. Co., Inc.*, 1984 FTC LEXIS 6, *311 (1984), *aff’d*, *Thompson Med. Co. v. FTC*,
13 791 F.2d 189, 197 (D.C. Cir. 1986), *cert. denied*, *Thompson Med. Co. v. FTC*, 479
14 U.S. 1086 (1987). Implied claims “are any claims that are not express. They range
15 from claims that would be virtually synonymous with an express claim through
16 language that literally says one thing but strongly suggests another, to language
17 which relatively few consumers would interpret as making a particular
18 representation.” *Id.* at *312. The law does not recognize any distinction between
19 express and implied misleading claims. *FTC v. Figgie Int’l*, 994 F.2d 595, 604 (9th
20 Cir. 1993) (“Figgie frequently argues that some of the representations that the
21 Commission found false or misleading were implied, not express. This is a
22 distinction without a difference. Figgie can point to nothing in statute or case law
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1 which protects from liability those who merely imply their deceptive claims; there is
2 no such loophole.”).

3
4 “Advertisements as a whole may be completely misleading although every
5 sentence separately considered is literally true.” *Donaldson v. Read Magazine, Inc.*,
6 333 U.S. 178, 188 (1948). In assessing whether a representation or practice is likely
7 to mislead consumers, a court may consider the overall net impression conveyed by
8 the representation. *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir.
9 2006) (“A solicitation may be likely to mislead by virtue of the net impression it
10 creates even though the solicitation also contains truthful disclosures.”); *FTC v.*
11 *Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (“Deception may be found based on
12 the ‘net impression’ created by a representation.”). Further, “[t]he failure to disclose
13 material information may cause an advertisement to be deceptive, even if it does not
14 state false facts,” *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1154 (9th Cir. 1984),
15 and the deception may not be sufficiently cured merely by the inclusion of
16 disclaimers in small print. *Cyberspace.com*, 453 F.3d at 1200.

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18 In demonstrating that a representation is likely to mislead, the FTC must
19 establish that (1) such representation was false or (2) the advertiser lacked a
20 reasonable basis for its claims. *See In re Thompson*, 1984 FTC LEXIS 6, at * 379
21 (stating that to make a case that advertising is deceptive, the FTC has the burden of
22 showing that the material claims communicated to reasonable consumers by the
23 advertising are false in some manner); *FTC v. US Sales Corp.*, 785 F. Supp. 737,
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1 748 (N.D. Ill. 1992) (“Apart from challenging the truthfulness of an advertiser’s
2 representations, the FTC may challenge the representation as unsubstantiated if the
3 advertiser lacked a reasonable basis for its claims.”).

4
5 “For an advertiser to have had a ‘reasonable basis’ for a representation, it
6 must have had some recognizable substantiation for the representation prior to
7 making it in an advertisement.” *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp.
8 2d 285, 298 (D. Mass. 2008) (citations omitted). “Defendants have the burden of
9 establishing what substantiation they relied on for their product claims.” *FTC v. QT,*
10 *Inc.*, 448 F. Supp. 2d 908, 959 (N.D. Ill. 2006). “The FTC has the burden of
11 proving that Defendants’ purported substantiation is inadequate” *Id.* “In
12 determining whether an advertiser has satisfied the reasonable basis requirement, the
13 Commission or court must first determine what level of substantiation the advertiser
14 is required to have for his advertising claims. Then, the adjudicator must determine
15 whether the advertiser possessed that level of substantiation.” *Pantron I Corp.*, 33
16 F.3d at 1096.

17
18 A claim is material if it “involves information that is important to consumers
19 and, hence, likely to affect their choice of, or conduct regarding, a product.”
20 *Cyberspace.com*, 453 F.3d at 1201. A representation or practice is material if it “is
21 likely to affect a consumer’s choice of or conduct regarding a product or service.”
22 *In re Southwest Sunsites, Inc.*, 1980 FTC LEXIS 86, at *328 (F.T.C. 1980) (citing
23 *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 387 (1965)).
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1 **1. Deceptive Infomercial Claims— Claims 1, 3, and 5**

2 **a. Claim 1 – Deceptive 2005 and 2007 Beck Infomercials**

3
4 The FTC alleges that in connection with the John Beck system, Defendant
5 Beck, the “guru” of the system, and Defendants JBAP, MOA, FP, Hewitt, and
6 Gravink have expressly or implicitly represented that consumers who purchase and
7 use the John Beck System are likely to be able to: (1) purchase homes, at
8 government tax sales in their area, “free and clear” of all mortgages or liens, for just
9 “pennies on the dollar”; (2) earn substantial amounts of money renting or selling
10 homes they purchase at government tax sales; and (3) quickly and easily earn
11 substantial amounts of money with little financial investment. (Compl. ¶ 89.) The
12 FTC claims that these representations were material and were either false or
13 unsubstantiated at the time they were made. Because John Alexander, LLC and Jeff
14 Paul, LLC are part of a “common enterprise,” the FTC also claims that these
15 corporate entities should be held liable for their co-defendants’ actions. (Mot. 37.)⁶⁵
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17 The Court finds that the Beck infomercials violated Section 5 as a matter of law.

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21 As a preliminary matter, the Court rejects the FTC’s suggestion that the Court
22 is bound by Judge Cooper’s findings in the preliminary injunction order.
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26 ⁶⁵ “Where one or more corporate entities operate in common enterprise, each may be held
27 liable for the deceptive acts and practices of the others.” *FTC v. Think Achievement Corp.*, 144 F.
28 Supp. 2d 993, 1011 (N.D. Ind. 2000) (citing *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171,
1175 (1st Cir. 1973); *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746-47 (2d Cir. 1964)).

1 Preliminary findings at injunction proceedings are not law of the case. *Sierra*
2 *On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984) (“A
3 preliminary injunction, of course, is not a preliminary adjudication on the merits but
4 rather a device for preserving the status quo and preventing the irreparable loss of
5 rights before judgment”). Therefore, the Court cannot grant the FTC’s motion
6 merely because the Court has previously issued a preliminary injunction. The FTC
7 must establish a negative net impression anew based on the more rigorous standards
8 courts employ in summary judgment proceedings.
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12 The Court finds that the FTC has met its burden in showing that it is entitled
13 to summary judgment as to Claim 1 because Defendants have made material
14 misrepresentations that are either false or unsubstantiated.⁶⁶
15

16 The FTC has established that Defendants falsely represented that consumers
17 could “purchase” homes and other real estates for “pennies on the dollar”⁶⁷; buy
18 homes at tax sales in consumers’ own area, regardless of where they live”;⁶⁸ make
19 money “easily” and with “little financial investment required”⁶⁹; and make money
20 “free and clear of all mortgages.”⁷⁰
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24 ⁶⁶ Stahl 1st Decl. ¶¶ 5-6, Attachs. 2, 3. (Docket No. 20.)

25 ⁶⁷ Stahl 1st Decl., ¶¶ 5-6; Attach. 2 at 139-70; Attach. 3 at 205; Attach. 5 at 248; Beck Dep.
Tr. 171:1-172:11, July 13, 2011, docket no. 331; DVD of John Beck Infomercials.

26 ⁶⁸ Stahl 1st Decl. Attachs. 2-3.

27 ⁶⁹ Stahl 1st Decl. ¶ 7(g), Attach. 4 at 243-47; ¶ 7(r), Attach. 3 at 194; ¶ 7(m), Attach. 7 at 251-
52.

28 ⁷⁰ Stahl 1st Decl. ¶ 6, Attach. 3 at 197-99; Attach. 4 at 243-47.

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

13 Further, Beck himself confirms the falsity of his infomercials'
14 representations. Contrary to his express claims in the infomercials that he has
15 bought “thousands” of properties by using his system, Beck admitted at his
16 deposition that he purchased homes using his system “very infrequently.”⁷⁴ Indeed,
17 Beck has purchased only 10 homes at tax foreclosure sales.⁷⁵ Moreover, while Beck
18 claims that his daughter, Kate Beck, purchased over 90 properties using his
19 system,⁷⁶ Beck knows only 4 of his “students” who have been able to get title to
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23 ⁷¹ Stahl 2nd Decl. ¶ 30, Attach. 15 at 514, 676, 831-32, docket no. 6; Beck RFA nos. 26-27,
24 docket no. 352.

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

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

27 ⁷⁴ Beck Dep. Tr. 112:3-5.

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

28 ⁷⁶ J. Beck Decl. ¶ 36.

1 homes like those featured in the infomercial, and in those instances, the students had
2 to wait several years before acquiring full ownership and had to go to court to
3 foreclose on the right to redemption.⁷⁷ Beck also admitted that there are elaborate
4 and time-consuming steps that consumers need to take before purchasing properties
5 at tax sales, including payment of penalties for late payment and other associated
6 costs.⁷⁸
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9 The falsity of the infomercials' representations is also confirmed by dozens of
10 consumer witnesses, who testified that it is difficult or impossible to find
11 government tax sales in their area, and it is difficult or impossible to earn substantial
12 money by purchasing homes or land using the John Beck System.⁷⁹ These
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18 ⁷⁷ Beck Dep. Tr. 174:1-177:8.

19 ⁷⁸ Beck Dep. Tr. 113:7-120:16, 247:21-248:6; Stahl 2nd Decl. ¶ 36, Attach. 15 at 515-516.

20 ⁷⁹ See e.g., Coonrod Decl. ¶¶ 12, 14-15, docket no. 369 (only about half of the states in the
21 United States allow tax foreclosure sales of property deeds); Day Decl. ¶ 25, docket no. 369 (made
22 less than \$1,000 profit after selling eight properties using the John Beck System); Fatula Decl. ¶¶
23 16-17, docket no. 369 (he realized that the John Beck System is not going to work for him no
24 matter how hard he tried); Jensen Decl. ¶¶ 20, 22-23, 26, docket no. 369 (the results are not “quick
25 and easy”); Kaminski Decl. ¶¶ 17-21, docket no. 369 (finding properties “was nothing like what I
26 had been led to expect”); Morton Decl. ¶ 9, docket no. 369 (“during a year spent working with the
27 program, I did not complete a single transaction”); Rowold Decl. ¶ 14, docket no. 369 (the
28 sessions were not very helpful); Schomp Decl. ¶¶ 4, 14-15, docket no. 369 (she “had no success at
all with this program”); Stansell Decl. ¶¶ 14, 19, docket no. 369 (she “had made no money using
the John Beck System”); Contreras Decl., ¶¶ 92-94, docket no. 373 (“Despite my best efforts, I
found that it was extremely difficult to make the program work and that I could not and I could not
find properties for ‘pennies on the dollar’ anywhere in the United States that I wanted to
purchase.”); Badora Decl. ¶ 39, docket no. 14 (“I learned that . . . not all of the properties offered
for sale in California were ‘free and clear’,” like those advertised on the infomercial).

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

3
4 The declarations of these consumers are corroborated by the Conrey Survey.
5 According to the survey results, less than 2% of all consumers made any revenues
6 whatsoever.⁸¹ Additionally, less than 0.2% of all consumers who purchased the kit
7 materials have made any profits using the system, and only 1.9% of those who
8 purchased coaching materials made any revenues using the system.⁸² Lastly, of the
9 consumers who spent ten or more hours per week using the product, only 3.5% of
10 them made any revenues.⁸³

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

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18 First, Defendants argue that the representations made in the infomercials are
19 not false. For example, the houses featured in its commercials did in fact sell for the
20 displayed prices.⁸⁵ Further, the John Beck System does not solely encourage
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24 ⁸⁰ See e.g., Coonrod Decl. ¶ 12, Fatula Decl. ¶ 12, Jensen Decl. ¶ 26, Contreras Decl. ¶¶ 92-94, Schomp Decl. ¶ 12, Stansell Decl. ¶ 10.

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

26 ⁸² Conrey 1st Decl., Attach. 1 at 8, 10.

27 ⁸³ Conrey 1st Decl., Attach. 1 at 11.

28 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.)

1 purchasing homes, but also raw land and house sites.⁸⁶ Likewise, Defendants argue
2 that as claimed in the infomercials, tax sale properties are not difficult to find and
3 Beck's strategies can be applied in all 50 states because even if the consumer does
4 not live in a non-tax lien state, he or she can use the Internet to purchase properties
5 in other states.
6

7
8 For purposes of this motion, the Court has reviewed the Beck infomercials.
9 The Court agrees with Judge Cooper's conclusion in the preliminary injunction
10 order that "[b]ased upon the statements and visual representations made in the
11 infomercials, the overall net impression communicates to the viewer that a typical
12 consumer can easily purchase high-valued properties for pennies on the dollar and
13 therefore quickly earn tens of thousands of dollars, if not hundreds of thousands of
14 dollars." (11/17/2009 Order at 11-12.) It is immaterial that the kit also encourages
15 purchasing raw land and house sites, because the visual representations of the
16 infomercials themselves focus heavily on large homes and vacation properties.
17 Further, even if it were true that houses featured in its commercials did in fact sell
18 for the displayed price and consumers from non-tax lien state can buy properties in
19 tax-lien states via the Internet, these facts are immaterial because an advertisement
20 could be misleading or deceptive by virtue of the net impression it creates even
21 though it also contains truthful disclosures. *Cyberspace.com*, 453 F.3d at 1200.
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27 ⁸⁶ Kamins Decl., Ex. 1 at 20-21, Table 11. (Docket No. 426.)
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1 Here, the infomercials’ net impression communicates to the viewer that nice homes,
2 such as those prominently displayed in these advertisements, are easily available in
3 all 50 states with or without the use of the Internet and one can obtain a deed to
4 these properties easily for pennies on the dollar. What the John Beck infomercials
5 fail to disclose is that in most states, a government tax foreclosure sale transfers a
6 tax lien instead of a tax deed. A tax lien permits the purchaser to collect the
7 delinquent taxes owed on the property, but does not transfer title to the property. In
8 the remaining states where tax deeds are sold, an auction process makes it very
9 difficult to purchase high-value properties for “pennies on the dollar.” (11/17/2009
10 Order at 12.)

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

22 ⁸⁷ DVD of John Beck infomercials.

23 ⁸⁸ Defendants offered the results of a copy test. (Kamins Decl.) However, that test fails to
24 show a triable issue of material fact. In the event that a valid copy test is proffered, evidence
25 showing that 10.5% to 17.3% of copy-test respondents took away the message at issue is sufficient
26 to prove the complaint allegation that the challenged representation had been made. *See In re*
27 *Telebrands Corp.*, 140 F.T.C. 278, 325 (F.T.C. 2005) (“Regardless of the reduction in the
28 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)

1 The Court finds that the misrepresentations in the John Beck infomercials are
2 material, and no reasonable trier of fact could conclude that the misrepresentations
3 were not likely to mislead consumers acting reasonably under the circumstances.
4 Accordingly, summary adjudication of Claim 1 is **GRANTED**.

6 **b. Claim 3 – Deceptive John Alexander Infomercial**

7
8 The FTC alleges that in connection with the John Alexander System
9 infomercials, Defendants Alexander, FP, MOA, Hewitt and Gravink violated
10 Section 5 by making numerous material misrepresentations. (Compl. ¶ 95.)
11 Further, because John Alexander, LLC, Jeff Paul, LLC, and JBAP are part of a
12 “common enterprise,” the FTC claims that these corporate entities should also be
13 held liable for their co-defendants’ actions.⁸⁹ The Court concludes that the
14 infomercial at issue violated Section 5 as a matter of law.
15
16

17 The FTC has submitted evidence showing that Defendants represented that
18 consumers would be able to earn substantial amounts of money quickly using the
19 John Alexander system.⁹⁰ Among other things, the FTC has lodged a copy of the
20 infomercial.⁹¹ The FTC has also submitted corroborating evidence showing that
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25 were communicated to them exceeds 10.5%. Accordingly, the copy test supports FTC’s
26 conclusion.

27 ⁸⁹ Stahl 6th Decl., Attach. 4, DVD of John Alexander infomercial. (Docket No. 521.)

28 ⁹⁰ Stahl 5th Decl. ¶ 5, Attach. 2 at 99:9-12, docket no. 367; Hrdlichka Decl. ¶ 4 docket no. 370.

⁹¹ Stahl 6th Decl., Attach. 4.

1 Defendants represented that consumers would make money easily and that they
2 would be able to earn money without using any of their own money or credit.⁹²

3
4 Defendants' representations were false. While the John Alexander materials
5 contained disclosures, such as "[t]o become successful, time, persistence,
6 knowledge, capitalization, and common sense are necessary,"⁹³ consumers could not
7 make the system work even though they spent their own money, and devoted
8 considerable time and effort.⁹⁴ Furthermore, the materials were confusing, and it
9 was difficult or impossible to arrange financing for the buyers.⁹⁵ Defendants
10 concede that during the time period in which the John Alexander infomercial was
11 aired, Defendants did not have any evidence showing that most purchasers of the
12 John Alexander System had made a profit using the system.⁹⁶

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16 Further, the Conrey Survey reveals that the representations in the infomercial
17 are unsubstantiated. The survey shows that consumers were unable to make any
18 money using the John Alexander system. Specifically, less than one percent (0.8%
19 of all consumers who purchased the John Alexander kit) made any revenues
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22 ⁹² Hrdlichka Decl. ¶ 3; Jabbour Decl. ¶ 2, docket no. 370; Pinkney Decl. ¶ 2, docket no. 370;
23 Selitto ¶ 2, docket no. 370; Smyth Decl. ¶ 2, docket no. 370.

24 ⁹³ Stahl 6th Decl., Attach. 7 at 158.

25 ⁹⁴ Stahl MSJ Decl. ¶ 15, Attach. 7 at 158; Grubbs Decl. ¶ 10, docket no. 370; Selitto Decl. ¶¶
26 8-9; Sohnly Decl. ¶¶ 8-10 docket no. 370; Stroughter Decl. ¶ 5, docket no. 370; Dohrn Decl. ¶ 9,
27 docket no. 370; Hrdlichka Decl. ¶ 7; Selitto Decl. ¶ 8; Sohnly Decl. ¶ 4; Stroughter Decl. ¶ 6;
28 Torres Decl. ¶ 12.

⁹⁵ Dohrn Decl. ¶ 9; Hrdlichka Decl. ¶ 7; Selitto Decl. ¶ 8; Sohnly Decl. ¶ 4.

⁹⁶ Alexander LLC RFA no. 37-38, docket no. 358; Alexander RFA no. 36-37, docket no. 351;
FP RFA nos. 202-203.

1 whatsoever and less than one percent of all consumers who purchased the kit
2 materials have made any profit using the system.⁹⁷ Of those who spent ten or more
3 hours per week using the product, only 2.5% of consumers made any revenues.⁹⁸
4

5 Defendants counter that the representations made in the infomercial were true
6 and there were satisfied customers.⁹⁹ Defendants also claim that the testimonials of
7 the endorsers were disclaimed in the infomercial with the inclusion of this
8 statement: “Unique experience. Individual results may vary.”¹⁰⁰ Moreover,
9 Defendants argue that the commercial is clear that money can be made only by
10 following the system, which indicates, at a minimum, that consumers have to
11 educate themselves with the materials, and the words “quickly and easily” never
12 appear in the commercial. (Opp’n 16-17.) Lastly, Defendants dispute the results of
13 the Conrey Survey.
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17 As stated previously, representations made in advertisements may be
18 deceptive even if it also contains truthful disclosures. *See Donaldson*, 333 U.S. at
19 188 (“Advertisements as a whole may be completely misleading although every
20 sentence separately considered is literally true. This may be because things are
21 omitted that should be said, or because advertisements are composed . . . in such
22 way as to mislead.”). Accordingly, even if Defendants’ claim—that there were
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26 ⁹⁷ Conrey Decl., Attach. 1 at 9-11.

⁹⁸ Conrey Decl., Attach. 1 at 10.

⁹⁹ Devoll Decl. ¶¶ 4-9, 11, Ex. E, docket no. 446; Alexander Decl., Ex. 1.

¹⁰⁰ DVD of John Alexander infomercial.

1 satisfied customers who used Alexander’s product and strategies— were true, this
2 alone does not shield Defendants from Section 5 liability. Likewise, the small print
3 disclaimers in the Alexander infomercial do not preclude liability. The prints are so
4 tiny that, under the circumstances, consumers are unlikely to read them while
5 watching and listening to the testimonials of the endorsers.
6

7
8 Having viewed the infomercial and considered all admissible evidence, the
9 Court finds that the infomercials’ net impression—that a typical consumer can earn
10 fast cash with no financial investment by purchasing and using the John Alexander
11 system—is false. Defendants also lack a reasonable basis to assert that such a claim
12 is true.
13

14 The Court finds that the misrepresentations in the John Alexander infomercial
15 are material, and no reasonable trier of fact could conclude that the
16 misrepresentations were not likely to mislead consumers acting reasonably under the
17 circumstances. Accordingly, summary adjudication of Claim 3 is **GRANTED**.
18
19

20 **c. Claim 5 – Deceptive Jeff Paul Infomercials**

21 The two Jeff Paul infomercials at issue are “Jeff Paul’s Shortcuts to Internet
22 Millions.” Each infomercial includes numerous testimonials from people who
23 purportedly used the Jeff Paul System, along with screen shots showing how much
24 money the endorsers made. Each infomercial includes numerous references to how
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1 fast and easy it is to make money using the Jeff Paul System front-end kits.¹⁰¹ The
2 FTC contends that the infomercials' references to making large sums of money
3 quickly and easily and the use of the term "millions" in the name "Shortcuts to
4 Internet Millions" were intended to convey the message that the product was about
5 making lots of money. The FTC further argues that these representations were
6 material to consumers. Having reviewed the admissible evidence, including the two
7 infomercials, the Court agrees with Judge Cooper's conclusion that the
8 infomercials' overall net impression falsely communicates to the viewer that a
9 typical consumer can easily and quickly earn thousands of dollars per week simply
10 by purchasing and using the Jeff Paul System. (11/17/2009 Order at 16.) Paul
11 himself admitted that his system does not teach consumers to make substantial
12 amount of money easily.¹⁰² Further, while Paul claims in the infomercials that he
13 has changed the lives of "countless people," he did not have the slightest inkling of
14 how many people's lives were changed by using his products and methods.¹⁰³

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20 The falsity of the representations made in the infomercials is confirmed by the
21 kit materials. For example, while it is technically possible for a consumer to create
22 and use the free websites described in the infomercials, each "website" is a single,
23 unattractive webpage with a basic white background and boilerplate text.
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26 ¹⁰¹ DVD of Jeff Paul infomercials.

27 ¹⁰² Paul Dep. Tr. 97:4-98:19. (Docket No. 556.)

28 ¹⁰³ Paul Dep. Tr. 104:7-106:13.

1 (11/17/2009 Order at 16-17.)¹⁰⁴ According to the Jeff Paul materials, consumers
2 must start their own businesses from scratch by creating and marketing their own
3 products.¹⁰⁵

4
5 Further, the falsity of the infomercials is confirmed by testimony from
6 consumer witnesses who purchased the Jeff Paul materials. Consumers attest that
7 they were unable to earn any money using the Jeff Paul System.¹⁰⁶ Consumers also
8 found that the kit materials provided little or no instruction on how to make money
9 using the Internet.¹⁰⁷

10
11 Moreover, the falsity of the representations is also confirmed by the Conrey
12 Survey, which states that less than one percent (0.7%) of all consumers who
13 purchased the Jeff Paul kit materials made any revenues.¹⁰⁸ Less than one-half of
14 one percent (0.4%) of all Jeff Paul customers have made any profit (revenues less
15 expenses) using the Jeff Paul System.¹⁰⁹ The purchase of MOA's coaching services
16 did little to enhance consumers' success. Only 1.4% of consumers who purchased
17 coaching services made any revenues whatsoever using the system.¹¹⁰ Of those
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23 ¹⁰⁴ See also, Gale Decl. ¶ 28. (Docket No. 19.)

24 ¹⁰⁵ Brennan Decl., Attach. 1 at 77-79. (Docket No. 14.)

25 ¹⁰⁶ See e.g., Collins Decl. ¶ 21; King Decl. ¶ 9; Ryan Decl. ¶ 24. (Docket Nos. 16 at Exs. 23,
26, 28.)

26 ¹⁰⁷ See e.g., Griffith Decl., ¶ 13; Scheck Decl. ¶ 4. (Docket No. 16 at Exs. 24, 29.)

27 ¹⁰⁸ Conrey 1st Decl., Attach. 1 at 12.

27 ¹⁰⁹ Conrey 1st Decl., Attach. 1 at 12.

28 ¹¹⁰ Conrey 1st Decl., Attach. 1 at 13.

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

3
4 The FTC has also established that during the time these infomercials were
5 aired, Defendants did not have evidence or documentation to substantiate their
6 representations. Indeed, Defendants concede that during the time period in which
7 the 2007 Jeff Paul infomercial was aired, they did not have any evidence to show
8 that there were more than 5 people who made \$50,000 or more using the Jeff Paul
9 System.¹¹²

10
11
12 Defendants counter that the front-end materials make it clear that it is up to
13 the individual to go out and market the products and to do the things outlined in the
14 detailed step-by-step program. (Opp'n 18.) This argument is unavailing because
15 the infomercials do not disclose these additional steps. Instead, these infomercials
16 gave the overall impression that a typical consumer can easily, quickly, and
17 "magically" earn thousands of dollars per week simply by purchasing and using the
18 Jeff Paul System.¹¹³ The Court finds that the misrepresentations are material, and no
19 reasonable trier of fact could conclude that the misrepresentations were not likely to
20 mislead consumers acting reasonably under the circumstances. Accordingly,
21 summary adjudication of Claim 5 is **GRANTED**.

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26 ¹¹¹ Conrey Decl., Attach. 1 at 12.

27 ¹¹² 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.

28 ¹¹³ DVD of Jeff Paul infomercials.

1 **2. Deceptive Continuity Programs Claims— Claims 2, 4, and 6**

2 In connection with each wealth-creation products, Defendants represented
3 that consumers who purchase these products will receive a free 30-day membership
4 to the “John Beck Property Vault” (Claim 2), “John’s Club” (Claim 4), and “Jeff
5 Paul’s Big League” (Claim 6), respectively. The FTC alleges that Defendants failed
6 to disclose, or failed to disclose adequately, that after the trial period ends,
7 consumers who purchase these systems are still enrolled in a continuity membership
8 plan that costs \$39.95 per month, and the consumers are charged \$39.95 each month
9 unless consumers take affirmative action to cancel their memberships.
10

11

12 The evidence relied upon by the FTC in support of Claims 2, 4, and 6 is the
13 same evidence it cited in support of the TSR claims, Claims 8, 10, and 12. As such,
14 the FTC conflates its analysis of these six claims. (Mot. 42, Reply 26.) As
15 explained more thoroughly below, information that purchasers would be
16 automatically enrolled in continuity programs upon their purchase of the front-end
17 kits is material, and Defendants’ failure to disclose this information to consumers is
18 likely to mislead the consumers acting reasonably under the circumstances.
19 Accordingly, summary judgment is **GRANTED** on Claims 2, 4, and 6.
20

21

22

23

24 **3. Deceptive Coaching Claims— Claim 7**

25 The FTC alleges that in connection with the coaching programs, Defendants
26 have expressly or implicitly represented that consumers who purchase and complete
27 the coaching program will quickly earn back the cost or substantially more than the
28

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

4
5 For example, FTC has submitted evidence showing that through their
6 telemarketers, Defendants falsely represented that consumers would quickly and
7 easily earn back the cost of coaching and the coaching substantially enhances
8 consumers’ chances of making money.¹¹⁴ Moreover, the evidence shows that the
9 telemarketers often made express earnings claims¹¹⁵ and guaranteed that the
10 consumers will make money.¹¹⁶ The telemarketers represented to consumers that
11 Defendants’ personal coaches will ensure consumers’ success by holding their hands
12 and walking them “step by step” through the systems.¹¹⁷ Some telemarketers even
13 suggested that absent coaching, failure is guaranteed.¹¹⁸ These representations are
14 false and unsubstantiated.
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21 ¹¹⁴ Coonrod Decl. ¶ 8 (Beck System); Kaminski Decl. ¶ 12 (Beck System); Schomp Decl. ¶¶
22 7, 9 (Beck System); Selitto Decl. ¶¶ 5-6, Attach. 1 (Alexander System); Grubbs ¶ 4 (Alexander
23 System); Stahl 2nd Decl. ¶ 58 b, Attach. 22, Chart 2 (Paul System).

24 ¹¹⁵ Fox Decl. ¶ 6 (salespeople were allowed to say that some consumers earned a lot of money
25 using the coaching programs); Fatula Decl. ¶¶ 5, 8 (earnings claims in Beck System); Dohrn Decl.
26 ¶ 5 (earnings claims in Alexander System); Grubbs Decl. ¶ 4 (earnings claims in Alexander
27 System).

28 ¹¹⁶ Contreras Decl. ¶¶ 34, 36; Lawson Decl. ¶ 37; Coonrod Decl. ¶ 8; Kaminski Decl. ¶ 12;
Schomp Decl. ¶¶ 7, 9; McClellan Decl. ¶ 7; Grubbs Decl. ¶ 4; Jabbour Decl. ¶ 3; Stroughter Decl.
¶ 4; Torres Decl. ¶ 4.

¹¹⁷ Stahl 1st Decl. ¶ 17; Coonrod Decl. ¶ 6; Kaminski Decl. ¶ 6; Mendoza Decl. ¶ 6; Rowold
Decl. ¶ 7.

¹¹⁸ Fatula Decl. ¶ 5; Coonrod Decl. ¶ 6; Kaminski Decl. ¶ 6.

1 The Conrey Survey shows that almost all who purchased coaching programs
2 lost money, and more than 17 percent lost at least \$10,000.¹¹⁹ Only 1.7% of
3 consumers who purchased coaching services made any profit whatsoever.¹²⁰
4 Further, the evidence showing that the coaches failed to answer their questions and
5 did not walk them step-by-step as promised by the telemarketers.¹²¹
6

7
8 Defendants counter that the FTC failed to take into account FP's generous
9 refund policies; its recording program; its Quality Assurance ("QA") program; and
10 its fining policies.¹²² Defendants also note that they "undertook costly and extensive
11 efforts to reign in rogue staff and to keep their sales legally compliant."¹²³
12 Defendants also argue that disputes exist as to the extent of the allegedly improper
13 conduct and whether such conduct was confined to one call center, American Fork,
14 which closed years ago. (Opp'n 22.) Defendants also claim that ample evidence
15 shows that that these mentoring services developed students' valuable Internet
16 marketing and real estate investing skills.¹²⁴
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22 ¹¹⁹ Conrey Decl., Attach. 1 at 5.

23 ¹²⁰ Conrey Decl., Attach. 1 at 5.

24 ¹²¹ See e.g., Fatula ¶ 14; Kaminski, ¶¶ 17-18.

25 ¹²² Opp'n 22; Gravink Dep. Tr. 58:17-59:15, docket no. 558 (fining policy); O'Connell MSJ
Decl. ¶ 12, docket no. 454 (formal training of telemarketers); D. Gravink Decl. ¶¶ 10-12 (QA
policy, sophisticated recording system, and fining reports), docket no. 448.

26 ¹²³ See Hewitt Decl. ¶ 10; ¶¶ 23-26 (MOA fining policy); ¶ 28 (sophisticated recording
system), docket no. 451. See also, O'Connell MSJ Decl. ¶ 12 (formal training program of
27 telemarketers at MOA, American Fork).

28 ¹²⁴ Hewitt Decl., Exs. 10, 15, 17-19 (emails from consumers providing positive reviews).

1 Defendants' argument misses the mark. Viewing the facts in the light most
2 favorable to the Defendants, they have failed to controvert the fact that their
3 telemarketers made false and unsubstantiated misrepresentations. Regardless of the
4 existence of Defendants' policies and approved scripts, Defendants failed to point to
5 any evidence showing that misleading representations were *not* made. Further,
6 despite its "sophisticated recording program," there is no evidence showing that
7 recording of telemarketing transactions has reduced or eliminated the false claims.
8 Moreover, it is undisputed that the claim that consumers could quickly and easily
9 earn back the money they spent on these coaching programs are unsubstantiated. In
10 addition to the findings of the Conrey Survey, the FTC has submitted evidence that
11 shows that Defendants did not know if most of the purchasers of the coaching
12 programs made a profit after using their programs, despite Beck, Paul, and
13 Alexander's claims that it is easy to make money using their system.¹²⁵

14 Further, the Court finds that Defendants' representations in connection with
15 the coaching programs were material. All express representations are material, and
16 implied representations are material "when they pertain to the central characteristics
17 of the products or services being marketed." *In re Southwest Sunsites*, 1980 FTC
18 LEXIS 86, at *329. Defendants have made both express and implied false
19 representations, and no reasonable finder of fact would conclude otherwise.

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¹²⁵ Gravink RFA no. 142; FP RFA no. 142; MOA RFA no. 83; JBAP RFA no. 80.

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

2 **B. TSR VIOLATIONS**

3
4 **1. Claims 8, 10, and 12 – Failure to Disclose Clearly and Conspicuously**
5 **Enrollment in a Continuity Plan**

6 The FTC alleges that the continuity charges imposed in the systems violate
7 section 310.3(a)(1)(vii) of the TSR. The continuity charges are monthly recurring
8 charges to the purchasers after the 30-day trial period ended unless the purchasers
9 take affirmative steps to cancel the charges.
10

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

12
13 It is a deceptive telemarketing act or practice and a violation of this Rule for
14 any seller or telemarketer to engage in the following conduct:

15 (1) *Before a customer consents to pay for goods or services*
16 *offered, failing to disclose truthfully, in a clear and*
17 *conspicuous manner, the following material information: . .*

18
19 (vii) If the offer includes a negative option feature, *all*
20 *material terms and conditions of the negative option*
21 *feature*, including, but not limited to, *the fact that the*
22 *customer's account will be charged unless the customer*
23 *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).

24 16 C.F.R. § 310.3(a)(1)(vii) (emphasis added).

25 Here, there is no reasonable dispute that Defendants failed to adequately
26 disclose to purchasers of the three systems that they would be automatically enrolled
27 in continuity programs. The FTC's evidence shows that, following the placement of
28

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

6
7
8 As the Court previously found in its preliminary injunction order, by enrolling
9 consumers in the continuity service programs and obtaining consumers' payment
10 information without first disclosing all material terms of the negative option,
11 Defendants have violated the TSR. (11/17/2009 Order at 20-21.)

12
13 Defendants cite to the transcripts of the initial voice recording (IVR) for the
14 three systems to support their argument that sufficient disclosures were made in
15 accordance with § 310.3(a)(1)(vii).¹²⁸ (Opp'n 38.) Defendants explain that at the
16 time of the purchase, the customers were informed that only the first month of
17 membership will be free.¹²⁹ Further, the invoice and package disclosures shipped
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21 ¹²⁶ Stahl 2nd Decl. ¶¶ 21-24, Attachs. 13 (Beck Interactive Agent Script) and 14 (Paul
22 Interactive Agent Script); Stahl 6th Decl. ¶¶ 11-12, Attach. 5, docket no. 540 (Alexander
23 Interactive Agent Script).

24 ¹²⁷ Coonrod Decl. ¶ 3 (John Beck System); Day Decl. ¶ 20 (John Beck System); Gorzen Decl.
25 ¶ 3, docket no. 369 (John Beck System); Hudson Decl. ¶ 4, docket no. 369 (John Beck System);
26 Kaminski Decl. ¶ 5 (John Beck System); Fernandez Decl. ¶ 3, docket no. 370 (John Alexander
27 System); Humber Decl. ¶ 4, docket no. 370 (John Alexander System); Kemper Decl. ¶ 3, docket
28 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.)

1 with the product provide the same disclosures. Customers also receive post card
2 disclosures, telephonic expiration notice disclosures, and coaching disclosures.
3
4 (Opp'n 20-21.)

5 The critical issue is *when* disclosures must be made. (Reply 27; 11/28/2011
6 Hearing Tr. at 6:16.) Section 310.3(a)(1)(vii) requires that disclosures be made
7
8 *before* the consumer divulges his credit-card or bank account information.¹³⁰
9 Therefore, any disclosures made after the initial call are inadequate. Defendants
10 have not directed the Court to any evidence showing that they complied with the
11 mandate of section 310.3(a)(1) by making disclosures *before* the consumers
12 divulged their credit card account information. The Court has reviewed the
13 transcripts of the IVR and concludes that no reasonable trier of fact would conclude
14 that Defendants complied with the TSR. The transcripts show that, before
15 consumers were asked for their credit card information, they heard the "Greeting"
16 portion of the script, and if they were ready to order, they were immediately asked
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20 ¹³⁰ The Court's reading of section 310.3(a)(1) is consistent with the legislative history of this
21 rule. In the "Statement of Basis and Purpose" for the original rule, the FTC "noted that for a
22 telemarketer to make the required disclosures 'before a customer pays,' *the disclosures must be*
23 *made 'before the consumer sends funds to a seller or telemarketer or divulges to a telemarketer or*
24 *seller credit card or bank account information.'*" 68 F.R. 4580, 4599 (2003) (emphasis added)
25 (citation omitted). In the original rule's TSR Compliance Guide, the FTC further clarified that the
26 disclosures required by § 310.3(a)(1) must be made "[b]efore a seller or telemarketer obtains a
27 consumer's consent to purchase, or persuades a consumer to send any full or partial payment . . ."
28 68 F.R. at 4599. The Guide goes on to say that "[a] seller or telemarketer also must provide the
required information before requesting any credit card, bank account, or other information that a
seller or telemarketer will or could use to obtain payment." 68 F.R. at 4599. In amending section
310.3(a)(1) in 2003, the FTC expressed that "its statements to date on the meaning of the term
'before the customer pay' in the original rule are sufficiently clear," and modification is
unnecessary. 68 F.R. at 4599.

1 for their payment information. (Hewitt Decl., Ex. 6 at 000681, 000704, 000732.)
2 Prior to divulging their credit card information, consumers were not told that (1)
3 their account would be charged unless they take an affirmative action to avoid the
4 charge(s); (2) the date(s) the charge(s) will be submitted for payment; and (3) the
5 specific steps the consumer must take to avoid the charge(s). 16 C.F.R. §
6 310.3(a)(1)(vii). Further, the recording only states that the consumers would get a
7 30-day free trial membership to Defendants' "clubs," but it fails to clearly and
8 conspicuously disclose that the consumers would need to take affirmative action at
9 the end of the free trial to avoid being charged.
10
11
12

13 For these reasons, summary adjudication of Claims 8, 10, and 12 is

14 **GRANTED.**¹³¹

15
16 **2. Claims 9, 11, and 13 – Submission of Consumer Payment Information**

17 **Without the Consumer's Express Consent**

18 The FTC alleges in Claims 9, 11, and 13 that Defendants violated Section
19 310.4(a)(6) of the TSR by representing that consumers who purchased one of the
20 systems would receive a free 30-day membership to a special service, and then
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26 ¹³¹ Claims 8, 10, and 12 only affect Family Products, Hewitt, Gravink, and other corporate
27 defendants. (Mot. 43.)
28

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

3
4 Here, there is no reasonable dispute that Defendants automatically charged
5 consumers \$39.95 per month after a 30-day free trial period without the expressed
6 informed consent of the consumers.¹³³ Although Defendants counter that the
7 infomercials and other materials make it clear that only the first 30 days are free
8 (Opp'n 20), as previously discussed, any disclosures made after the initial call are
9 irrelevant. Accordingly, summary adjudication of Claims 9, 11, and 13 is
10

11 **GRANTED.**¹³⁴

12 **3. Claim 14 – Do Not Call Violations**

13
14 The FTC alleges that Defendants violated section 310.4(b)(1)(iii)(A) of the
15 TSR. Section 310.4(b)(1)(iii)(A) prohibits “a telemarketer to . . . [initiate] any
16 outbound telephone call to a person when . . . that person previously has stated that
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20 ¹³² The parties erroneously cite to section 310.4(a)(6), but section 310.4 (a)(7) is the more
21 appropriate rule. As amended, section 310.4(a)(6) prohibits any seller or telemarketer to
22 “disclos[e] or receiv[e], for consideration, unencrypted consumer account numbers for use in
23 telemarketing” 16 C.F.R. § 310.4(a)(6). On the other hand, section 310.4(a)(7) prohibits
24 any seller or telemarketer to “caus[e] billing information to be submitted for payment, directly or
25 indirectly, without the express informed consent of the customer In any telemarketing
26 transaction, the seller or telemarketer must obtain the express informed consent of the customer . .
27 . to be charged for the goods or services” 16 C.F.R. § 310.4(a)(7). Therefore, the Court finds
28 that section 310.4(a)(7) fits squarely with the facts of this case.

25 ¹³³ See e.g., Coonrod Decl. ¶ 3 (Beck System); Day Decl. ¶ 20 (Beck System); Fernandez
26 Decl. ¶ 4 (Alexander System); Humber Decl. ¶ 4 (Alexander System); Kemper Decl. ¶ 3
27 (Alexander System); Stahl 2nd Decl., Attach 14 at 484 (Paul System); Collins Decl., ¶ 9 (Jeff Paul
28 System).

25 ¹³⁴ Claims 9, 11, and 13 only affect FP, Hewitt, Gravink, and other corporate defendants.
26 (Mot. 43-44.)

1 he or she does not wish to receive an outbound telephone call made by or on behalf
2 of the seller whose goods or services are being offered.”

3
4 Here, there is no reasonable dispute that Defendants’ telemarketers repeatedly
5 initiated calls to consumers who previously asked Defendants not to contact them.¹³⁵
6 The FTC has submitted overwhelming evidence showing that Defendants failed to
7 set up a meaningful compliance program; lack written procedures; and do not appear
8 to train their staff in a meaningful way.¹³⁶ Moreover, the evidence shows that
9 Defendants allowed paper leads to pile up on boiler room floors before marking
10 them as “do not call” requests in their lead generation database.¹³⁷ Defendants’
11 telemarketers also engaged in “lead recycling,” which ensures that consumers,
12 including those who have asked to receive no further calls, will be called multiple
13 times.¹³⁸

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16
17 Defendants argue that the violations were isolated incidents that should not be
18 the basis for liability under § 310.4(b)(1)(iii)(A). (Opp’n 40.) Further, Defendants
19 claim that the FTC has failed to show that these violations fell outside the 30-day
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24 ¹³⁵ Contreras Decl. ¶ 84; Hinckson Decl. ¶ 22 at 43-44, docket no. 373; Hudson Decl. ¶ 5; B.
25 Petrarca Decl. ¶ 13; L. Petrarca Decl. ¶ 13.

26 ¹³⁶ O’Connell Dep. Tr. 95:21-96:5, 222:4-17, 223:7-16; 225:18-23, docket no. 555; Lawson
27 Decl. ¶¶ 53, 55-56; Hinckson Decl. ¶ 22; Contreras Decl. ¶ 89.

28 ¹³⁷ Lawson Decl. ¶ 55; Contreras Decl. ¶ 87.

¹³⁸ Hinckson Decl. ¶ 22; Lawson Decl. ¶¶ 55, 57; O’Connell Dep. 225:18-228:4; Contreras
Decl. ¶ 90.

1 grace period that Defendants had to place those customers on the company’s internal
2 “do not call” list.¹³⁹

3
4 However, there is no dispute that Defendants have no written policies and
5 procedures with regard to handling “do not call” complaints. Indeed, the Chief
6 Operating Officer of MOA, Michael O’Connell, admits that MOA had no written
7 policy with regard to the TSR’s “do not call” provision.¹⁴⁰ Moreover, the safe
8 harbor provision that Defendants cite has no application to this case. That provision
9 provides that a seller or telemarketer will not be liable for violating §
10 310.4(b)(1)(iii)(A) if it can show that “as part of the seller’s or telemarketer’s
11 routine business practice . . . (iv) The seller or a telemarketer uses a process to
12 prevent telemarketing to any telephone number on any list established pursuant to §
13 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the ‘do-not-call’
14 registry obtained from the Commission no more than thirty-one (31) days prior to
15 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
17 policies and procedures that relate to the maintenance of any registry. For all these
18 reasons, summary adjudication of Claim 14 is **GRANTED**.
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24 **C. REMEDIES**

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

28 ¹⁴⁰ O’Connell Dep. Tr. 213-217.

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

3
4 **1. Injunctive Relief**

5 The FTC may seek a permanent injunction “in proper cases.” 15 U.S.C. §
6 53(1)(2). A routine deception case such as the case at bar qualifies as a “proper
7 case.” *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982) (holding that
8 § 13(b) of the FTCA authorizes courts to grant permanent injunctions “in proper
9 cases” and “a routine fraud case is a ‘proper case’”); *FTC v. Gill*, 71 F. Supp. 2d
10 1030, 1049 (C.D. Cal. 1999) (finding that a case based on a § 5 violation is a
11 “proper case” for purposes of injunctive relief under the FTCA).

12
13
14 Upon finding that a business or an individual has engaged in deceptive
15 conduct in violation of the FTCA, the court may issue a permanent injunction under
16 Section 13(b). *Gill*, 71 F. Supp. 2d at 1046. Individuals may be held liable for
17 injunctive relief not only for their own deceptive conduct, but also in certain
18 circumstances, for a corporation’s deceptive conduct. “An officer of a corporation
19 may be held individually liable for injunctive relief under the FTCA for corporate
20 practices if the FTC can prove (1) that the corporation committed misrepresentations
21 or omissions of a kind usually relied on by a reasonably prudent person, resulting in
22 consumer injury, and (2) that the individual defendants participated directly in the
23 acts or practices or had authority to control them.” *FTC v. American Standard*
24 *Credit Sys.*, 874 F. Supp. 1080, 1087 (C.D. Cal. 1994) (citing *FTC v. Amy Travel*

1 *Service, Inc.*, 875 F.2d 564, 573 (7th Cir. 1989), cert. denied, 493 U.S. 954, 107 L.
2 Ed. 2d 352, 110 S. Ct. 366 (1989); *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282,
3 1292 (D. Minn. 1985)).
4

5 Here, the FTC seeks injunctive relief against Hewitt, Gravink, and the
6 companies they control. (Reply 7-8, 27-28.) Status as a corporate officer is
7 sufficient to establish individual liability. *Amy Travel Service*, 875 F.2d at 573
8 (“Authority to control the company can be evidenced by active involvement in
9 business affairs and the making of corporate policy, including assuming the duties
10 of a corporate officer.”); *FTC v. Nat’l Urological Group, Inc.*, 645 F. Supp. 2d
11 1167, 1207 (N.D. Ga. 2008) (“If a defendant was a corporate officer of a small,
12 closely-held corporation, that individual’s status gives rise to a presumption of
13 ability to control the corporation.”). Because the Court finds that liability has been
14 established, and it is undisputed that Hewitt and Gravink own and control FP,
15 which, in turn, is the sole member of MOA, JBAP, LLC, Jeff Paul, LLC d/b/a
16 Shortcuts to Internet Millions, LLC, and John Alexander, LLC, Hewitt and Gravink
17 are liable for injunctive relief.¹⁴¹
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19
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21

22 The FTC also seeks to enjoin Beck, Alexander, and Paul. (Reply 14,18-19,
23 21-22, respectively.) In FTC cases, individual defendants are directly liable for their
24 own violations of Section 5. *FTC v. Windward Mktg.*, 1997 U.S. Dist. LEXIS
25
26

27 ¹⁴¹ Hewitt Decl., ¶¶ 2-5, docket no. 451; D. Gravink Decl. ¶ 2-3.
28

1 17114, at *38 (N.D. Ga. Sept. 30, 1997). Further, they are also liable for the
2 corporate defendant's violations if the FTC demonstrates that: (1) the corporate
3 defendant violated the FTCA; (2) *the individual defendants participated directly in*
4 *the wrongful acts or practices*; and (3) the individual defendants had some
5 knowledge of the wrongful acts or practices. *Id.* (emphasis added) (citing *FTC v.*
6 *GEM Merchandising Corp.*, 87 F.3d 466, 470 (11th Cir. 1996)).
7
8

9 Here, Beck, Alexander, and Paul are personally liable for the false and
10 unsubstantiated claims they made in their respective infomercials. Unlike a paid
11 spokesperson, there is no dispute that Beck, Paul, and Alexander were the
12 developers of the systems that bear their names and gave the impression in the
13 infomercials that they were experts in using the system.¹⁴² Beck himself admits that
14 he is the "primary author of the John Beck kit material sold by Defendants."¹⁴³
15
16 Likewise, Paul admits that he is the "co-creator" of the Jeff Paul kit.¹⁴⁴ Alexander
17 also played a key role in the creation of the John Alexander kit.¹⁴⁵ Therefore, these
18 "gurus" knew that their claims in the infomercials regarding how easy it is to make
19 money using their system are false and unsubstantiated.
20
21

22 Because the record is clear that these "gurus" participated directly in the
23 advertising of the deceptive produces, knew that the infomercials made material
24

25
26 ¹⁴² Alexander Decl. ¶ 1; Beck Decl. ¶ 1; Paul Decl. ¶ 1.

27 ¹⁴³ Beck Decl. ¶ 14.

28 ¹⁴⁴ Paul Decl. ¶ 5.

¹⁴⁵ Alexander Decl. ¶ 5.

1 misrepresentations regarding the products, or at least were recklessly indifferent to
2 the truth or falsity of the infomercials, the Court finds that they are liable for
3 injunctive relief with respect to the system they developed. *Nat'l Urological Group*,
4 645 F. Supp. 2d at 1207-1208 (holding a medical doctor who promoted and
5 endorsed the deceptive products individually liable because he helped develop the
6 products; reviewed the substantiation regarding the ingredients in the products;
7 reviewed and edited the advertisements before they were disseminated; allowed
8 himself to be called “Chief of Staff” and “Medical Director” in the advertisements;
9 and did not contest his individual liability for the corporate defendants’ wrongs;
10 instead, he simply joins the corporate defendants in arguing that no violations
11 occurred).

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16 With regard to the scope of the injunction, the FTC submits that the type of
17 injunctive relief it seeks includes standard provisions obtained in other FTC cases.
18 (Reply 44.)¹⁴⁶ Among other things, the FTC asks that Gravink, Hewitt, and FP—
19 whether acting directly or through any other person or entity, and each such
20 person— be “permanently restrained and enjoined from engaging or participating in
21 the production or dissemination of any infomercial, and also from assisting others
22 engaged in the production or dissemination of any infomercial.” (Docket No. 350,
23 Proposed Final J. 9, hereinafter, “Ban on Infomercials”). The FTC also asks that
24
25

26
27 ¹⁴⁶ See generally, Proposed Final J. for Permanent Injunction and other Equitable Relief
28 against Defendants (hereinafter, “Proposed Final J.”). (Docket No. 350.)

1 Gravink, Hewitt, FP and MOA be “permanently restrained and enjoined from
2 engaging or participating in telemarketing, and from assisting others engaged in
3 telemarketing.” (*Id.*, hereinafter, “Ban on Telemarketing”).
4

5 The FTC argues that given Hewitt and Gravink’s history, particularly the
6 prior lawsuits that have been filed by the FTC against them, and the amount of the
7 consumer injury involved, a lifetime ban is warranted.¹⁴⁷ The parties’ briefing on
8 the duration and scope of the ban with respect to Hewitt and Gravink and the scope
9 of injunctive relief against all individual defendants is insufficient to enable the
10 Court to fashion the appropriate equitable relief. A number of cases the FTC relied
11 upon in support of the lifetime ban were not included in the FTC’s opening brief but
12 appeared in the reply. Accordingly, Defendants did not have a full opportunity to
13 address this issue. Therefore, the Court believes that additional briefing would be
14 helpful to the Court, particularly on the issue on whether a lifetime ban is
15 appropriate under the facts of this case.
16
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19

20 **2. Monetary Relief**

21 In addition to injunctive relief, the FTC seeks equitable monetary relief in the
22 form of restitution under Section 13(b). The authority granted by Section 13(b) is
23 not limited to the power to issue an injunction. Rather, it includes the authority to
24 grant any “ancillary relief” necessary to accomplish complete justice, including the
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27 ¹⁴⁷ Pl.’s Fact Nos. 2328-37.
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1 authority to order restitution or “disgorge[ment] of unjust enrichment.” *Pantron I*,
2 33 F.3d at 1102-1103; *Amy Travel Serv.*, 875 F.2d at 571 (stating that restitution is
3 an “ancillary relief” authorized by Section 13(b)"); *Gem Merchandising*, 87 F.3d at
4 469 (“Among the equitable powers of a court is the power to grant restitution and
5 disgorgement.”).

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

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18 Here, the FTC argues that Hewitt and Gravink should be held monetarily
19 liable as owners of the corporate defendants. In addition, the FTC seeks to hold the
20 developers of the three systems, Beck, Alexander, and Paul, personally liable for
21 their roles as the “gurus” in the infomercials.

22 23 24 **A. Liability Hewitt and Gravink**

25 For the reasons discussed above, Hewitt and Gravink are liable for equitable
26 monetary relief for their roles as principals of FP and their control of the other
27 corporate defendants.
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1 **B. Liability of Beck, Alexander, and Paul**

2 As stated previously, the gurus should be held liable for injunctive relief. For
3 the same reasons cited above, the Court finds that the individual gurus should be
4 monetarily liable with respect to their products.
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6 **C. Liability of the Corporate Defendants**

7 There is no dispute that FP developed the deceptive infomercials; JBAP,
8 LLC, Jeff Paul, LLC, and John Alexander LLC marketed the systems, and MOA
9 telemarketed and sold personalized coaching programs for the systems. There is
10 also no dispute that FP is the controlling member of the other corporate defendants.
11 “Where one or more corporate entities operate in common enterprise, each may be
12 held liable for the deceptive acts and practices of the others.” *Think Achievement*,
13 144 F. Supp. 2d at 1011 (citing *Sunshine Art Studios*, 481 F.2d at 1175; *Delaware*
14 *Watch*, 332 F.2d at 746-47). Factors in determining common enterprise include: (1)
15 common control; (2) sharing office space and offices; (3) whether business is
16 transacted through a “maze of interrelated companies”; and (4) commingling of
17 funds. *Think Achievement*, 144 F. Supp. 2d at 1011 (citations omitted). Here, there
18 is no dispute that these corporate defendants are controlled by Hewitt and Gravink
19 and they share the same business address and office space. Accordingly, the Court
20 finds that the corporate defendants operate as a common enterprise, and each of
21 them are jointly and severally liable for any corporate defendant’s violations.
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28 **D. Amount of Damages**

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

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

21 22 23 24 V. CONCLUSION

25 For the foregoing reasons, (1) Defendants' Motion in Limine is **DENIED**,
26 and (2) the FTC's Motion for Summary Judgment is **GRANTED**. The Court orders
27 the parties to submit supplemental briefing and additional evidence, if any,
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1 addressing the scope of injunctive relief and the appropriate amount of monetary
2 damages. The FTC's supplemental brief is due by **May 7, 2012**. Defendants'
3 responsive brief is due by **May 14, 2012**. The FTC's Reply is due by **May 21,**
4 **2012. Each brief is limited to 15 pages.** The Court will take the matter under
5 submission and will schedule further hearing if it deems necessary.
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8 **IT IS SO ORDERED.**

9 Dated: April 20, 2012

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12 Honorable Jacqueline H. Nguyen
13 UNITED STATES DISTRICT COURT
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