UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, vs. **HOLD BILLING SERVICES, *et. al*.** Defendants.	**Case No. SA-98-CA-0629-FB**

FEDERAL TRADE COMMISSION'S MOTION FOR AN ORDER TO SHOW CAUSE WHY BILLING SERVICES GROUP LIMITED; BILLING SERVICES GROUP NORTH AMERICA, INC.; HBS BILLING SERVICES COMPANY; ENHANCED BILLING SERVICES, INC.; BILLING CONCEPTS, INC.; and ACI BILLING SERVICES, INC. SHOULD NOT BE HELD IN CONTEMPT

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From 2006 through 2010, billing aggregator Billing Services Group ("BSG")[1] violated this Court's Permanent Injunction by putting more than $70 million in bogus charges on consumers' phone bills for "enhanced services," such as voicemail and streaming video, that consumers never authorized or even knew about. BSG billed for these services on behalf of a serial phone bill crammer[2] amid a flood of complaints, while utterly failing to investigate either the highly deceptive marketing for these services or whether consumers actually used them. Rather, in the face of stark evidence of ongoing fraud, BSG continued to bill month after month for these services, even approving billing for new services pitched by the same crammer. In fact, BSG continued to bill and collect for these services after major telephone companies refused to do so. BSG did not turn off its lucrative illicit billing spigot until the FBI forced its hand by executing a search warrant at the crammer's office.

BSG's billing violated three core provisions of the Permanent Injunction this Court entered on September 22, 1999 (the "Permanent Injunction"), which prohibits unauthorized billing, misrepresentations to consumers, and billing for vendors who fail to clearly disclose the

[1] "BSG" or "Contempt Defendants" refers collectively to Billing Services Group Limited ("BSG Ltd."); Billing Services Group North America, Inc. f/k/a HBS, Inc. ("BSGNA"); BSG Clearing Solution North America, LLC ("BSG Clearing"); HBS Billing Services Company f/k/a Hold Billing Services, Ltd. ("HBS"); Enhanced Billing Services, Inc. ("ESBI"); Billing Concepts, Inc. ("BCI"); and ACI Billing Services, Inc. ("ACI"). As discussed below, the seven companies operate as a single enterprise and are all subject to the Permanent Injunction entered by the Court against Defendants Hold Billing Services, Ltd., HBS, Inc., and Avery Communications, Inc. on September 22, 1999.

[2] "Cramming" is the placement of unauthorized charges on a consumer's phone bill. ¶ 1. In the phone billing industry, vendors contract with billing aggregators (such as BSG) to submit their charges to the phone companies, which then include the vendors' charges on consumers' monthly phone bills. ¶¶ 1-2. (All factual citations in this Motion refer to paragraph numbers in the accompanying Fact Appendix, *see* Local Court Rule CV-7(c).)

terms of their services.[3] Accordingly, the FTC moves this Court to find BSG in contempt and order compensatory sanctions of $52,631,224.46, the total amount BSG billed consumers and failed to refund.[4]

I. BSG Placed Millions of Unauthorized Charges on Consumers' Telephone Bills.

A. BSG billed for nine crammed services.

For five lucrative years, BSG billed consumers through Local Exchange Carriers ("LECs," or telephone companies providing local phone service) for nine crammed "enhanced services."[5] ¶¶ 20, 112. As discussed further in Section I.B below, BSG worked with known crammer Cindy Landeen and her associates to bill consumers for these services, which were deceptively marketed on the Internet. They included three voicemail services, one streaming video service, two identity theft protection services, two directory assistance services, and one job skills training service. ¶¶ 38, 63, 81, 83 n.4

1. Crammed Voicemail Services

BSG subsidiary ESBI billed consumers for three of Landeen's voicemail services: **MyIproducts**, **800 Vmailbox**, and **Digital Vmail**. ¶¶ 35-38, 63. It charged consumers for these

[3] This contempt filing marks the fourth FTC action addressing extensive cramming by BSG entities. In addition to the Permanent Injunction, the FTC previously obtained two other cramming orders against BSG: *FTC v. Nationwide Connections, Inc.*, which addressed $34.5 million in charges for collect calls that never occurred, ¶ 13 n.4, and *United States v. Enhanced Services Billing, Inc.*, which, like this action, addressed crammed charges for enhanced services, ¶ 9 n.3.

[4] The FTC contacted BSG on March 13 to initiate the Conference required by Local Court Rule CV-7(h). Although not required by the Rule, the FTC provided BSG with a draft of this motion, as well as the detailed Fact Appendix and all cited documents the FTC received from third parties. Counsel then met on March 21 to discuss a possible resolution, followed by a lengthy teleconference on March 23. The parties, however, did not come close to an agreement to resolve the more than $50 million in consumer harm at issue.

[5] "Enhanced" services are those products or services unrelated to the completion of a call, such as web hosting, directory listings, and e-mail services. ¶ 22.

services without their authorization, as demonstrated by voluminous consumer complaints, astronomical refund rates, and the fact that almost none of the consumers BSG billed for the services ever used them.

The voicemail services generated tens of thousands of complaints, consistently tripping BSG's complaint-to-billings thresholds of 12.5% and, later, 15%.[6] ¶¶ 47-54, 84, 84 n.15, 85, 85 n.17. Specifically, complaints about MyIproducts ranged between 12.68% and 19.92% from October 2006 to October 2007, complaints about 800 Vmailbox ranged from 16.59% to 38.39% from April to November 2009, and complaints about Digital Vmail ranged from 15.19% to 32.21% from April 2009 to February 2010. ¶¶ 48-54, 84.

Not surprisingly, in October 2007, Verizon notified BSG that it was terminating MyIproducts' ability to bill its customers, "as they have not and will not bring cramming complaint level" down. ¶¶ 54-55. AT&T followed suit in early 2010, terminating MyIproducts and refusing to bill for any new sales of 800 Vmailbox or Digital Vmail. ¶ 97. Despite the terminations, BSG continued to bill consumers for the voicemail services through other LECs. ¶¶ 58, 99-101.

These consistently high complaint levels culminated in astronomical refund rates. Approximately 60% of the consumers BSG billed for each of the voicemail services sought and received credit for at least one charge from either BSG or the LECs. ¶ 114. For comparison, in the credit card billing industry, a chargeback rate of 1% is considered suspicious and an indicator of fraud. ¶ 114.

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[6] BSG notifies its vendors when the ratio of consumer inquiries about a service in a one-month period to telephone numbers billed for the service in that period exceeds a certain threshold. *See, e.g.*, ¶¶ 47-54. This threshold was initially 12.5% for non-telecommunications services, but BSG later raised the threshold to 15%. ¶¶ 47-52, 84, 84 n.15.

Moreover, barely anyone used these voicemail services. BSG billed tens of thousands of consumers for voicemail boxes each month from July 2009 through March 2010, but consumers used a mere 209 boxes during that time. ¶ 107. Despite this overwhelming evidence of fraud, BSG billed consumers a net $30,115,928.32 for the voicemail services. ¶ 113.

2. Crammed Streaming Video Service

BSG subsidiary HBS billed consumers for Landeen's **Streaming Flix**, a service that purportedly allowed consumers to stream movies through their computers. ¶¶ 80-83. Like the voicemail services, BSG's charges for the video service were unauthorized, as evidenced by voluminous complaints and credits, and essentially no usage.

BSG knew of at least 65,025 billing complaints about Streaming Flix, comprising 25.67% of the consumers it billed. ¶ 85. Indeed, 46% of the consumers BSG billed sought and received at least one credit. ¶ 114. In July 2010, Verizon terminated Streaming Flix's billing privileges due to excessive cramming complaints. ¶ 103. In early 2010, AT&T terminated the service's ability to bill new customers. ¶ 97. But again, BSG simply continued billing consumers through other LECs for the service. ¶¶ 101; *see also* ¶¶ 108, 112.

Almost none of the hundreds of thousands of consumers BSG billed used the service. The underlying video provider, Rovi Corporation, reports that between July 2009 and December 2010, there were 23 total movies streamed. ¶ 108. In that time, BSG billed 253,269 consumers for the service, meaning that at least 99.99% of the consumers BSG billed for the service never used it. ¶ 108. Still, BSG billed consumers a net $9,700,870.02 for the service. ¶ 113.

3. Crammed Identity Theft Protection Services

BSG also billed two of Landeen's crammed identity theft protection services through subsidiary HBS: **eSafeID** and **eProtectID**. ¶¶ 63, 63 n.12. These vendors were supposed to

place fraud alerts on billed consumers' credit reports, copies of which would purportedly be sent to consumers by the credit bureaus. ¶ 109. However, high complaint and refund rates, along with low usage rates, demonstrate that consumers never authorized the charges.

BSG knew about at least 11,348 eSafeID billing complaints (representing 23.84% of customers), and 6,922 eProtectID complaints (12.64% of customers). ¶ 84. Moreover, about 47% of those billed received at least one credit for the services that consumers never received. ¶ 114. Indeed, "welcome letters" eSafeID and eProtectID supposedly sent their customers directed them to create an online account and provide personal information required to place fraud alerts and order credit reports. ¶ 109. However, 95% of consumers billed by all the crammed services never created such accounts. ¶ 109. But BSG disregarded the overwhelming evidence of cramming and billed a net $4,092,285.25 for these services. ¶ 113.

4. Crammed Directory Assistance Services

BSG also billed for identical directory assistance services, **Instant411** and **InfoCall**, through BSG subsidiary ACI. ¶ 63. Few consumers would knowingly sign up for such a service, as it provided only a toll-free number a consumer could call to ask one of Landeen's employees to perform an Internet search for the requested listing. ¶ 84 n.16. It is no wonder, then, that these services generated significant consumer complaints and credit rates. Instant411 generated at least 25,893 complaints (25.2% of its customers) between June 2009 and April 2010, while InfoCall generated at least 26,665 complaints (27.1% of its customers) between May 2009 and February 2010. ¶ 84. In the end, about 54% of the consumers BSG billed for the two services received credits, and BSG billed a net $8,445,020.80 for these worthless services. ¶¶ 113-114.

5. Crammed Job Skills Training Service

BSG began billing for **Uvolve**, a job skills training service, through subsidiary HBS not long before the FBI executed a search warrant at Landeen's offices. ¶¶ 83 n.14, 111. Like Streaming Flix, Uvolve purported to offer streamed video services. ¶ 83 n.14. Also like Streaming Flix, few if any "customers" ever watched a Uvolve video. While Uvolve's net billings were relatively light – $277,120.07 – it garnered at least 738 complaints in 8 months of billing and tripped BSG's complaint thresholds twice, and 37% of the 13,900 consumers BSG billed received credits. ¶¶ 85 n.17, 113-114.

B. Contempt Defendants ignored repeated red flags that their billings were fraudulent.

BSG billed for these unauthorized services despite numerous red flags. BSG conducted no meaningful pre-billing due diligence and failed to adequately monitor or address the services' deceptive marketing, enormous complaint volume, and near-complete lack of usage. Finally, even after some LECs refused to do business with the crammers, BSG kept billing for their bogus services and even solicited more business from them.

1. BSG ignored red flags raised during its inadequate "due diligence."

Contempt Defendants demonstrated their willingness to bill for crammers by approving **MyIproducts,** the first of Landeen's subject vendors, in 2005. ¶¶ 34-36. As BSG knew, Landeen had a history as a crammer with Phonebillit, a former ESBI client with the same address as MyIproducts. ¶¶ 28-33, 35. During Landeen's time with Phonebillit, her company frequently exceeded the LECs' cramming complaint levels and credit-to-billings ratios; PAC Bell suspended Phonebillit's billing privileges in 2002, and Bell South did the same in 2003. ¶¶ 29-31. When Landeen resigned from Phonebillit in 2005, she wrote to BSG employees that "I plan

on being in the LEC business one way or the other and I can guarantee that you have not seen the last of me!" ¶ 33.

Despite knowing about Landeen's past cramming and her substantial involvement with MyIproducts, BSG agreed to bill for it and permitted Landeen's company, ABC, to handle customer service. ¶¶ 34-39. As noted above, MyIproducts predictably soon spurred voluminous cramming complaints, leading Verizon to terminate it in 2007 and another billing aggregator, ILD, to refuse billing any new sales for it soon thereafter. ¶¶ 43-55, 62.

Nonetheless, in 2008, when Landeen submitted billing applications to BSG for **800 Vmailbox**, **Digital Vmail**, **eSafeID**, **eProtectID**, **Instant411**, and **InfoCall**, plus another directory service, NeedtheInfo, BSG again agreed to bill for her.[7] ¶¶ 63, 83. Even after Verizon notified BSG that it would not allow any billing of its customers for InfoCall, eProtectID, and NeedtheInfo because of their connection to MyIproducts, BSG agreed to "go ahead without Verizon" and bill other LECs' customers for eProtectID and InfoCall. ¶¶ 73-76. BSG also approved billing (including of Verizon's customers) for 800 Vmailbox, Digital Vmail, eSafeID, and Instant411, even though it knew that Landeen would "manage and oversee all the operations" of those vendors. ¶ 77. Soon thereafter, BSG agreed to bill for Landeen's **Streaming Flix**. ¶ 83.

Significantly, BSG agreed to bill for the services even though it knew barely anyone would use them – an important cramming indicator. ¶¶ 69-71. As BSG's General Counsel acknowledged in an email to Landeen, "Usage data has become a sensitive subject for the LECs, regulatory agencies, and BSG" and "is very helpful in showing that the consumer did in fact use

[7] BSG's CEO, Greg Carter, signed each agreement as an officer for each BSG subsidiary, and the same BSG employees handled the due diligence for all seven proposed vendors, no matter which BSG subsidiary proposed to handle the billing. ¶¶ 64, 67.

the service that they were charged for." ¶ 82. But BSG agreed to bill for the services even after Landeen's company submitted "Contract Information Sheets" stating it expected only 20% of those billed to actually use the services. ¶¶ 69-71, 83. Instead of rejecting the applications on the spot, a BSG employee stated, "mention to Cindy [Landeen] during your discussions that we appreciate her honesty on the estimated usage rate." ¶ 71.

2. BSG failed to investigate the services' marketing even when faced with astronomical complaint rates that were completely inconsistent with purported consumer authorizations.

Predictably, after BSG approved billing on behalf of these known crammers and delegated oversight of ensuring "authorized" sales to them,[8] the nine services quickly racked up cramming complaints. ¶¶ 83-85, 95. The specifics of some of these complaints demonstrated unequivocally that BSG billed consumers who did not knowingly sign up for the services. For example, BSG received complaints showing that Streaming Flix billed internal business lines at AT&T for video subscriptions. ¶ 105. BSG also received complaints about billings for identity theft protection services supposedly ordered by minor children, streaming video services supposedly ordered by consumers who lacked Internet access, and directory assistance services supposedly ordered by medical device maker Boston Scientific and a deployed serviceman. ¶¶ 95E, 95G, 95K, 96A, 96B, 96C. BSG even had notice that the streaming video service tried to bill at least 16 deceased consumers. ¶ 102. But these ludicrous billings and emphatic denials of authorization did not prompt BSG to investigate how such charges could have made it onto the consumers' bills. ¶¶ 52, 52 n.8.

Complaint levels for the nine services constantly tripped BSG's inquiry thresholds.

[8] BSG requires no documentation of consumer authorization before submitting a charge for billing. ¶¶ 23-27. Instead, as long as a particular data field in a billing record is populated with the number "4," BSG assumes that charge is "authorized" and submits it for billing. ¶¶ 25-26.

¶¶ 45-54, 84. Specifically, MyIproducts exceeded BSG's 12.5% threshold for five of the last six months in 2006, and four of the first six months in 2007. ¶¶ 45-54. Digital Vmail exceeded the threshold for eight straight months in 2009 with ratios ranging from 15.17% to 32.21%; and 800 Vmailbox exceeded it for seven of those same eight months with ratios ranging from 16.59% to 38.39%. ¶ 84. Also in 2009, Instant411 and InfoCall both exceeded the threshold for seven and eight straight months, respectively. ¶ 84. The identity theft services exceeded the thresholds for five straight months with ratios ranging from 16.35% to 20.23% (eSafeID) and 18.76% to 22.65% (eProtectID). ¶ 84. From October 2009 through January 2010, and again in March and April of 2010, BSG notified ABC that inquiries about Streaming Flix billing greatly exceeded the 15% threshold as follows: 4,157 (25.42%); 7,469 (23.75%); 8,943 (22.42%); 13,907 (20.49%); 15,399 (16.05%); and 14,185 (18.3%). ¶ 85. BSG notified Landeen and ABC of these breaches month after month. ¶¶ 84-85. However, BSG did not contact purported "customers" to ask whether they agreed to be billed, used any of the services, or even knew they existed.

Instead, each time one of the vendors tripped the complaint thresholds, BSG asked Landeen's company for a sample of 30 Letters of Authorization ("LOAs") and the "landing pages" (*i.e.*, the web pages consumers actually saw when they were enrolled). ¶ 86. LOAs are images of web pages with data fields purportedly filled in by consumers with sufficient information to show the consumer agreed to purchase the service, such as name, address, and phone number. ¶¶ 86-87. Significantly, each month, ABC failed to provide any of the landing pages to show how the services were actually marketed to consumers. ¶¶ 52, 52 n.8, 90. Rather, it provided only the purported LOAs. ¶¶ 86-90.

These LOAs prominently displayed the name of the service and the heading "LETTER OF AGENCY" at the top of the page, above data fields consumers had purportedly filled in. ¶ 86. They disclosed the nature, costs, and terms of the service, just above a very prominent "Order Now" button. ¶ 86. These LOAs made it appear that consumers navigated to the service's website, wanted the service, filled in the fields, and clicked the Order Now button to agree to purchase the service. ¶ 86.

Despite the obvious inconsistency between these straightforward LOAs and the astronomical complaint rates, BSG never followed up when ABC failed to produce the marketing consumers actually saw. ¶¶ 52 n.8, 90, 92. This marketing was completely contrary to the LOAs. ¶¶ 86, 93. Specifically, it consisted of Internet "offers" that appeared to be part of the sign-up process for an unrelated, free service or event, such as voting in a picture contest or obtaining a free email account. ¶ 93. As consumers clicked through the web pages related to these free events or services, the offer pages for the crammed services appeared several pages into the click-through and appeared to be part of the unrelated sign-up. ¶ 93. Indeed, the offer pages were pre-populated with information (such as name, address, and phone number) that consumers had initially entered to obtain the free email account or to vote, and contained a prominent heading such as "You're Almost Ready to Cast Your Vote!" or "Your Email Account is Almost Ready!" ¶ 93. Though the offer pages "disclosed" the service, its cost, and that it would be billed to the user's telephone number, these disclosures appeared in a lengthy block of tiny text sandwiched between the large-print headline and the pre-populated data fields.[9] ¶ 93. Moreover, at the bottom of the page, well below the terms, was a button that (like prior screens) said "submit and go to next page", "submit and continue to next page," or "accept and go to next

[9] The offer pages disclosed nothing about any refund policy. ¶93.

page." ¶ 93. However, when consumers clicked that button, they did not just continue to the next page related to the free event or service; they were signed up to be LEC billed for the service. ¶ 93. Nothing in the following screens indicated that they had just agreed to be billed. ¶ 93.

But BSG did nothing to investigate or address this patently deceptive marketing. In fact, when BSG once asked how a particular consumer would have seen an advertisement, ABC responded, "We do not track the signup specific information you are asking about[.]" ¶ 91. BSG never followed up on this admission. ¶¶ 52 n.8, 90. Nor did BSG follow up on, or treat with any urgency, the recorded calls from angry consumers alleging fraud in the online sign-up process.[10]

3. BSG never followed up on usage of any of the services.

Faced with voluminous complaints, Landeen's failure to provide the actual marketing, and woefully inconsistent LOAs, BSG still failed to monitor usage information. That usage

[10] Consumers often stated, in no uncertain terms, that they never signed up for the services. ¶ 95. When a call-center representative told a consumer that his law firm's phone line had paid six months of charges for voicemail ordered by "David Jones," the consumer replied, "Nice gig you guys got, David Jones. I got seven employees and we don't have any Davids or any Joneses." ¶ 95A. Another consumer complained of unauthorized charges for InfoCall, and the representative countered that the LOA included her correct address and telephone number. The consumer responded, "Yeah, which you can look in the phone book and find … I can't even believe that AT&T even allows you guys to bill on this." ¶ 95B. Another representative refused to issue credits to a consumer who was charged for Streaming Flix, even though consumer did not have a computer and the order was in her ex-husband's name. The consumer responded, "But this is not right, how somebody can put something on my phone bill that I don't even have and I have to pay it. … the phone is in my name and I did not okay this." ¶ 95G.

On these calls, representatives sometimes misrepresented the services' sign-up process in an effort to sustain the charges. For example, when a consumer disputed charges for Digital Vmail, the representative told him he could only be charged after "manually enter[ing] all of your information in on the order form and then click[ing] the order now button and submit it to us." ¶ 95H. But the representatives had moments of accidental honesty as well. When a consumer disputed charges for Instant411 that were in her son's name, the representative told her, "Well, he may have been on one of our advertising affiliate sites and thought he was signing up for something else." ¶ 95L.

information reveals that for the hundreds of thousands of the consumers BSG billed, usage was practically nonexistent. ¶¶ 106-110. For example, while BSG was billing between 85,000 and 100,000 "customers" each month for voicemail boxes, only 209 voicemail boxes were used by consumers. ¶ 107. Likewise, during the lucrative year and a half BSG billed over 250,000 consumers a net $9,642,992.00 for Streaming Flix, at least 99.99% of Streaming Flix's "customers" never streamed any movies. ¶ 108.

4. BSG continued billing for the services even after AT&T forced them to acknowledge that thousands of consumers were improperly billed.

In early 2010, in response to continuously high complaint levels, AT&T terminated billing for MyIproducts and stopped all billing of new "customers" for 800 Vmailbox, Digital Vmail, and Streaming Flix. ¶ 97. At AT&T's prompting, BSG then "scrubbed" the existing customer lists for those services in AT&T's southeast region to determine whether the phone numbers it was billing matched the names and addresses purportedly provided by consumers when they "signed up" for the services. ¶ 99. BSG conducted the analysis for 800 Vmailbox and Digital Vmail, finding that 5,430 of the 8,413 telephone numbers it was currently billing in that region for the two services – a stunning 64% – did not match the provided name and address. ¶ 100. Moreover, when Landeen's company conducted a similar scrub for Streaming Flix for all billings (not limited to AT&T's southeast region), it found that 26% of the phone numbers billed did not belong to the consumer who purportedly ordered the service. ¶ 100.

With this stunning information in hand, BSG still did not cut off all billing for the services. ¶¶ 101, 111. Nor did it issue credits to "scrubbed" consumers whose numbers were improperly billed, conduct a full-scale investigation commensurate with such widespread unauthorized billing, or report the matter to law enforcement. ¶ 101. Instead, BSG simply

removed the mismatched numbers from the services' billing rosters and continued billing the rest of the Landeen companies' "customers." ¶ 101. In fact, BSG then doubled down on its relationships with the crammers, approving two new Landeen services for billing in the fall of 2010. ¶ 104. Fortunately for consumers, Verizon caught the services' connections to the terminated Streaming Flix and denied the applications. ¶ 104. However, it was not until the FBI raided Landeen's Minneapolis offices in December 2010 that BSG finally stopped billing for her companies' services. ¶ 111.

C. BSG billed more than $50,000,000 in net unauthorized charges.

In total, BSG billed 1,196,346 telephone numbers for Landeen's services. ¶ 112. This resulted in $52,631,224.46 in net billings collected from consumers. ¶ 112.

II. BSG's Unauthorized Billings Violated the Permanent Injunction.

A. The Permanent Injunction binds each of the Contempt Defendants.

The Permanent Injunction binds HBS and BSGNA as parties to the underlying proceeding. Fed. R. Civ. P. 65(d)(2)(A). When the Court entered the Permanent Injunction, HBS was known as Hold Billing and BSGNA was known as HBS, Inc. ¶¶ 4, 6, 7, 12. Both entities have since changed their names and made superficial adjustments to their corporate forms, none of which affects their status as parties to the Permanent Injunction. ¶¶ 6, 7, 12; *see New York v. Operation Rescue Nat'l*, 80 F.3d 64, 70 (2d Cir. 1996) (an organization may not avoid an order "merely by making superficial changes in the organization's name or form").

Injunctions also bind nonparties who (1) have actual notice of the injunction and (2) are "in active concert or participation with" a party. Fed. R. Civ. P. 65(d)(2)(c). Bound nonparties fall into two categories: first, those who aid or abet a party's violation of an order; and second, those who have "sufficiently close identity of interests [with a party] to justify . . . the

enforcement of an injunction against a nonparty." *Nat'l Spiritual Assembly of the Baha'is of U.S. Under Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of the Baha'is of U.S., Inc.*, 628 F.3d 837, 848-49 (7th Cir. 2010) (internal quotation marks omitted). In the second category, nonparties who have sufficiently close relationships with parties include those who are "identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13-14 (1945); *see Waffenschmidt v. MacKay*, 763 F.2d 711, 717 (5th Cir. 1985).

Here, all of the BSG entities have actual notice of the Permanent Injunction, as evidenced by its disclosure in agreements that each company signed during a 2003 merger. ¶ 10. Additionally, as described below, all of the companies both aided and abetted Defendant BSGNA and are closely identified in interest with BSGNA. Accordingly, they are all bound by the Permanent Injunction.

1. BSGNA's subsidiaries BSG Clearing, ESBI, ACI, and BCI aided and abetted BSGNA and are subject to BSGNA's control.

BSGNA's subsidiaries BSG Clearing, ACI, ESBI, and BCI aided and abetted BSGNA to violate the Permanent Injunction, as the subsidiaries are simply shells through which BSGNA acts. *See Waffenschmidt*, 763 F.2d at 717 ("[D]efendants may not nullify a decree by carrying out prohibited acts through aiders and abettors"), quoting *Regal Knitwear*, 324 U.S. at 14. In fact, CEO Greg Carter testified that the billing subsidiaries (HBS, ACI, ESBI, and BCI) exist only as "identities" on a consumer's telephone bill. ¶ 16. Indeed, the insignificance of the companies' nominal corporate structure is highlighted by their integrated daily operations. Notably, BSGNA and its subsidiaries have operated from one building in San Antonio ever since an "operational merger" of the six companies in 2004. ¶ 13, 15. Moreover, one roster of

employees performs the work of all the entities, and the same officers manage all of them. ¶¶ 14-15. Further, BSGNA files one consolidated tax return for the BSG companies. ¶ 18. BSGNA's subsidiaries are thus "aiders and abettors" through which BSGNA carries out the acts prohibited by the Permanent Injunction.

The companies' intertwined corporate structure also demonstrates BSGNA's control over its subsidiaries and, thus, the "close identity of interests" among the entities. *Baha'is*, 628 F.3d at 849; *see Regal Knitwear*, 324 U.S. at 13-14. As discussed above, BSGNA runs its operations from a single office and uses the same personnel to conduct all of the enterprise's business. Indeed, BSGNA highlighted its subsidiaries' status as mere instruments of its will by covenanting in loan documents to ensure that the subsidiaries – among other things – "comply in all material respects with all applicable . . . orders." ¶ 18. In a similar case, the Fifth Circuit found a "control relationship" that justified enforcing a parent's order against an unnamed subsidiary where, as with BSGNA, the subsidiary and the parent operated from the same office; the same officers, directors, and employees conducted the business of both parent and subsidiary; and the subsidiary existed only to carry out its parent's transactions. *Teas v. Twentieth-Century Fox Film Corp.*, 413 F.2d 1263, 1268-69 (5th Cir. 1969).

2. Parent company BSG Ltd. aided and abetted BSGNA, and BSG Ltd. is fully identified in interest with BSGNA.

BSGNA's parent company BSG Ltd. aided and abetted BSGNA to violate the Permanent Injunction by enabling and overseeing its violative conduct. *See Waffenschmidt*, 763 F.2d at 717; *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 75-76 (1st Cir. 2002) (non-party "played an essential role in consummating the forbidden transaction" by executing contracts to carry out a sale). BSG Ltd.'s board is responsible for approving the budget for all of the

companies and monitoring the companies' financial performance. ¶ 19. BSG Ltd. also authorized the funding that supports BSGNA's billing activities. ¶ 19. Further, BSG Ltd.'s board regularly audits the enterprise's "internal controls," including its supposed anti-cramming measures, and CEO Greg Carter – who oversees the entire billing operation – sits on BSG Ltd.'s board as "executive director." ¶¶ 14, 19. BSG Ltd. therefore aided and abetted BSGNA's violative billing actions because it worked "hand in glove" with BSGNA to determine corporate strategy, fund their operations, and audit billing activities. *See Gemco Latinoamerica, Inc. v. Seiko Time Corp*., 61 F.3d 94, 99 (1st Cir. 1995) (finding a nonparty bank in contempt of an asset remittance order because it controlled the parties' funds).

Because BSG Ltd. is integrated with BSGNA and responsible for its subsidiary's conduct, the companies also have a sufficiently close relationship to justify enforcement of the Permanent Injunction against BSG Ltd. *See Baha'is*, 628 F.3d at 849; *Regal Knitwear*, 324 U.S. at 13-14 (1945). For example, where a parent corporation has knowledge of an order against its subsidiary, is responsible for the subsidiary's conduct, and fails to take action within its power to ensure compliance, it is equally liable with its subsidiary for violations of the order. *Wirtz v. Ocala Gas Co., Inc.*, 336 F.2d 236, 242 (5th Cir. 1964) (quoting *Wilson v. United States*, 221 U.S. 361, 376 (1911)). As noted above, BSG Ltd. has notice of the Permanent Injunction through its predecessor entity. ¶¶ 9-11. Moreover, as BSG Ltd.'s board of directors oversees the group's operations, BSG Ltd. is responsible for setting the group's policies. ¶¶ 14, 19. Oversight of BSGNA is in fact BSG Ltd.'s primary responsibility, as BSGNA is BSG Ltd.'s sole asset. ¶¶ 9, 11-12.[11] In particular, BSG Ltd. has demonstrated its compliance authority over BSGNA's

[11] As the same directors oversee the actions of BSG Ltd. and BSGNA, BSGNA's CEO sits on BSG Ltd.'s board, and BSG Ltd.'s sole asset is BSGNA, it appears the companies' rights and

operations by commissioning audits that examined the group's billing practices. ¶ 19. Yet, BSG's long record of unauthorized billing, described above, demonstrates that BSG Ltd. utterly failed to ensure its subsidiaries' compliance with the Permanent Injunction, rendering it liable for the group's violations of the Permanent Injunction.[12]

B. The Contempt Defendants act as a common enterprise.

The BSG companies operate as a single enterprise. ¶¶ 13-19. As discussed above, all the BSG companies share directors, officers, and employees; all of the companies' operations are integrated and occur in the group's San Antonio office; all of the companies present themselves under the BSG brand. ¶¶ 13-15. *See Zale Corp. v. FTC*, 473 F.2d 1317, 1321-22 (5th Cir. 1973); *Delaware Watch Co., Inc. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964); *FTC v. Kennedy*, 574 F. Supp. 2d 714, 722-23 (S.D. Texas 2008) (common enterprise exists where companies share control group, office space, and officers, and transact business through interrelated companies). It is therefore appropriate not only to bind each of the Contempt Defendants under the Permanent Injunction, but also to consider their actions as a whole rather than company-by-company. *See Zale*, 473 F.2d at 1321-22 (when a group of companies acts as a common enterprise and recognition of their corporate forms would frustrate a statutory policy, the Fifth

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interests are identical. *See Regal Knitwear*, 324 U.S. at 13-14; *Teas*, 413 F.2d at 1269 n.7 (finding "substantial identity" where a subsidiary and parent had integrated operations and a single group of officers and directors acted for both); *compare Harris County v. Carmax Auto Superstores Inc.*, 177 F.3d 306, 314 (5th Cir. 1999) (declining to enforce an order obtained against the El Paso district attorney as to actions taken by the Harris County attorney where the two defendants represented separate jurisdictions and did not have a sufficiently close relationship to establish privity).

[12] Although the facts demonstrate that BSG knew or should have known that it was billing unauthorized charges for vendors who ensnared consumers with deceptive marketing, the Permanent Injunction imposes liability on BSG for such conduct regardless of its knowledge. *See also McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) (willfulness is not an element of civil contempt).

Circuit treats them as one). Turning a blind eye to the realities of BSG's operation would frustrate enforcement of an order obtained in the public interest to protect consumers under the FTC Act. Therefore, all of the BSG companies are responsible for any acts the enterprise took to violate the Permanent Injunction and for all of the harm caused by the enterprise's violative conduct.

C. The Contempt Defendants violated the Permanent Injunction.

BSG violated the Permanent Injunction in three ways. First, the enterprise billed on behalf of corrupt vendors who, instead of clearly and conspicuously disclosing the terms of their services, used deceptive Internet click-through marketing. Second, it billed for services that consumers never authorized. Third, by placing charges for those services on consumers' bills, it misrepresented that consumers authorized the charges.

1. Contempt Defendants billed and collected for vendors who did not disclose terms of service clearly and conspicuously.

Permanent Injunction Paragraph V.A prohibits Defendants from "[b]illing" or "collecting" payments, directly or indirectly, for any vendor that does not "clearly and conspicuously" disclose certain terms before making a sale, including the cost of service, the fact that the service will be LEC-billed, and the vendor's refund policy. Contempt Defendants billed for vendors who buried their "offers" several screens into click-through pages of an unrelated, free service sign-up, and even those offers failed to disclose all required terms.

Contempt Defendants violated Paragraph V.A by billing for all of the vendors described above. Those vendors sold services through click-through advertising for seemingly innocuous, free services or events, such as free email accounts or photo contests. "Offers" for the vendors' crammed services were hidden within numerous pages concerning these innocuous events, were

pre-populated with consumers' information, and only disclosed terms of the crammed services in tiny print. Moreover, the offers were accompanied by a "submit and continue" button, instead of an "Order Now" button or confirmation screen that would have made clear that the user was ordering a LEC-billed service. These offers utterly failed to disclose the services' terms "clearly and conspicuously" and entirely failed to address the refund policy as required by the Permanent Injunction.

2. Contempt Defendants billed and collected for vendors who sold services that consumers never authorized.

Permanent Injunction Paragraph III prohibits Defendants from "billing" or "collecting" payment, directly or indirectly, for any charge that was not "expressly authorized" by the owner of the phone line billed. Similarly, Permanent Injunction Paragraph V.B.1 prohibits Defendants from "[b]illing" or "collecting" payment for any charge on behalf of a vendor that did not obtain "express authorization" for the charge.

Contempt Defendants violated these paragraphs by billing and collecting for the vendors described above. These vendors charged for services that were not expressly authorized, as demonstrated by their deceptive click-through marketing, astronomical complaint rates, and miniscule usage. Additionally, more than 50% of consumers billed for these services sought and received credits for some or all of the charges. In the credit card billing context, such a chargeback rate is extraordinarily high and a clear indicator of fraud.

3. Contempt Defendants misrepresented that consumers authorized charges for vendors' services.

Paragraph II.A.3 of the Permanent Injunction prohibits Defendants from "[m]aking any express or implied misrepresentation of material fact" in connection with LEC billing, including any misrepresentation that a consumer authorized a charge.

Contempt Defendants violated this provision when they billed consumers for the vendors discussed above. These bills to consumers constituted misrepresentations that the charges were authorized, due, and payable. In addition, Contempt Defendants frequently misrepresented that the transactions were authorized in response to consumer complaints by pointing to LOAs that consumers never saw. Misrepresentations that influence consumers' decisions are "material." *See, e.g., FTC v. Figgie Int'l*, 994 F.2d 595, 603-04 (9th Cir. 1993); *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992). By placing charges on consumers' phone bills, and by presenting phony LOAs for those charges, BSG influenced thousands of consumers to pay its charges. BSG thus made material misrepresentations in violation of the Permanent Injunction.

D. Contempt Defendants' violations caused more than $50,000,000 in harm.

The measure of the compensatory civil contempt remedy is the amount required to reimburse the injured party for harm the contemnor caused. *See American Airlines, Inc. v. Allied Pilots Assn.*, 228 F.3d 574, 585 (5th Cir. 2000). Consumer loss is the proper measure of compensation in FTC-initiated contempt proceedings. *See FTC v. Trudeau*, 662 F.3d 947, 950 (7th Cir. 2011); *FTC v. Kuykendall*, 371 F.3d 745, 765 (10th Cir. 2004); *McGregor v. Chierico*, 206 F.3d 1378, 1388-89 (11th Cir. 2000). Contempt Defendants' net billings for the nine bogus services totaled $52,631,224.46. The FTC therefore seeks an Order to show cause why they should not be held in civil contempt and ordered to pay a compensatory sanction in this amount.

Dated: March 28, 2012 Respectfully Submitted,

/s/ Douglas V. Wolfe
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