No. 08-55838

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee

v.

BRIAN K. MacGREGOR, *et al.,*
Defendants-Appellants

On Appeal from the United States District Court
for the Central District of California
D.C. No. 2:06-cv-00849-GW-OP

BRIEF OF PLAINTIFF-APPELLEE
FEDERAL TRADE COMMISSION

FAYE CHEN BARNOUW
JENNIFER M. BRENNAN
Attorneys
Federal Trade Commission
Los Angeles, CA

DAVID C. SHONKA
Acting General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

MICHAEL D. BERGMAN
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3184

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STATEMENT OF JURISDICTION

The Federal Trade Commission ("FTC" or "Commission"), filed a complaint in the United States District Court for the Central District of California, seeking equitable relief under Section 13(b) of the FTC Act, 15 U.S.C. §53(b), against several corporations and individuals alleging unfair and deceptive acts or practices that violated § 5 of the FTC Act, 15 U.S.C. § 45(a), and that violated the Commission's Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310. The district court had subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and Sections 5(a) and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a), 53(b).

On April 21, 2008, the district court entered the final judgment against appellants Brian MacGregor and Membership Services Direct, Inc. ("MSD"). E.R. 1, 409.[1] Final judgments have been entered against the other defendants through settlements. The notice of appeal was timely filed on May 20, 2008, pursuant to F.R.A.P. 4(a)(1)(B). This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court properly found appellants liable under the FTC Act and the Telemarketing Sales Rule, where the defendant corporations engaged

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[1] "E.R." refers to pages contained in Appellants' Excerpts of Record.

in extensive deceptive and abusive telemarketing practices designed to debit consumers' bank accounts without the consumers' express informed consent.

2. Whether the district court properly granted summary judgment in favor of the Commission where the appellants' opposition consisted solely of two conclusory and unsupported declarations that did not create a genuine issue of material fact.

3. Whether the district court properly held appellant MacGregor personally liable for the corporate defendants' deceptive conduct where he controlled or participated directly in the activities of the telemarketing companies and had the requisite knowledge of their material misrepresentations.

4. Whether the district court's order imposing monetary equitable relief was within its broad discretion, where the court found reliable the database on which appellants' revenue calculations were made, and where appellants offered no contrary evidence rebutting the calculations of their revenues, refunds, or costs of operations.

5. Whether the district court's orders permanently barring MacGregor and MSD from telemarketing, from selling program memberships, from making misrepresentations, and from violating the TSR, fell within the court's broad discretion where the bans were reasonably related to appellants' deceptive conduct

and were necessary to prohibit such misconduct in the future.

STATEMENT OF THE CASE

Nature of Case, **Course of Proceedings, and Disposition Below**. This case is about appellant Brian MacGregor's multi-million dollar telemarketing scam, which he operated through appellant MSD (a/k/a "Continuity Partners") and a dozen other corporate shells, and which victimized tens of thousands of consumers throughout the country over several years. The Commission's uncontroverted evidence establishes that appellants' deceptive and abusive telemarketing practices violated FTC Act Section 5 and the TSR.

The Commission filed a seven-count complaint on February 14, 2006, charging defendants with violating Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) and the TSR, 16 C.F.R. Part 310. The complaint named as defendants five corporations: Universal Premium Services, Inc. (also known as Premier Benefits, Inc.), Consumer Reward Network, Inc., Star Communications LLC, Membership Services Direct, Inc., Connect2USA, Inc., and eight individuals, including appellant MacGregor. The Commission also filed an *ex parte* application for a temporary restraining order ("TRO") and appointment of a temporary receiver.

The complaint and the TRO application alleged that defendants ran a telemarketing scam in which they, *inter alia*, misrepresented that they would send consumers a valuable free item upon payment of a nominal shipping and handling fee, harassed consumers to obtain their bank account information, misrepresented their cancellation and refund policies, and continued to call consumers even after being requested to stop, in order to obtain consumers' purported consent to debit their accounts for program membership fees. The complaint and TRO application charged that the individual defendants operated their scam through a series of corporate shells, designed to dodge law enforcement and irate customers. Then, as each company attracted negative attention, defendants created new corporate shells through which to continue their scam.

On February 21, 2006, the district court issued the TRO freezing all of the defendants' assets and appointing a receiver over the corporate defendants' assets. On March 22, 2006, the court entered a preliminary injunction against all of the defendants and appointed a permanent receiver. The Commission filed an amended complaint on May 9, 2006, adding, *inter alia*, four additional corporate defendants (Merchant Risk Management, Inc., Pantel One Corporation, All Star Access, Inc, and Prime Time Ventures, Inc.), and two fraudulent transfer defendants. The Commission subsequently settled its claims against all the defendants except for appellants.

On January 15, 2007, the Commission moved for summary judgment against

MacGregor and MSD, and introduced numerous consumer and third party declarations and other evidentiary materials in support. On February 21, 2007, the district court granted the Commission's motion for summary judgment in part. The court held, based on the Commission's statement of undisputed facts and supporting evidence, that appellants had violated FTC Act Section 5(a) and the TSR, and were therefore liable on all counts in the complaint. E.R. 11. The court stated that appellants had not offered any alternative analysis of the supporting evidence and had objected to the undisputed facts "only based on irrelevant facts or based on self-serving conclusory affidavits." E.R. 16.

The district court, accordingly, concluded that monetary and injunctive relief against appellants were appropriate. The court concluded that, given MacGregor's "direct participation and control over minutia of the telemarketing operations, and given the vast numbers of customer complaints alleging fraud, [he] was at least recklessly indifferent to the truth of falsity of the misrepresentation." E.R. 19. The court also held that it was appropriate to permanently ban MacGregor from telemarketing and from marketing program memberships, because he had "ignored voluminous customer complaints and created numerous business entities to disguise his operations. MacGregor also used front men to hide his ownership and control over the companies. MacGregor has also demonstrated a willingness to continue flouting the law even after assuring state Attorneys General that he would stop." E.R. 20. The court held it was appropriate to impose monetary relief against appellants, but denied summary judgment as to the amount of relief to be awarded, concluding that an evidentiary hearing was needed. E.R. 19-20.

On February 27, 2007, pursuant to the summary judgment decision, the district court entered orders for permanent injunction and other equitable relief against MacGregor and MSD. E.R. 22, 53. On March 14, 2007, the court appointed Hon. Lourdes G. Baird (ret.) as Special Master, to determine the amount of equitable monetary relief, and on June 14, 2007, clarified that the Special Master was "to resolve factual disputes as to amounts of monies involved including any monies taken in, monies remanded to customers and any costs of operations." E.R. 395.

The Special Master held a one-day evidentiary hearing on July 17, 2007. The only witness testifying at the hearing was Kenton Johnson, Executive Vice President of the Receiver, whom the Special Master found to be a credible witness. E.R. 141. In her Report and Recommendation, the Special Master analyzed which database utilized by the corporate defendants should be relied upon in determining their gross revenue and refunds. She concluded that the defendants' DCOMS system, a proprietary customer tracking system, was sufficiently reliable for these purposes, and agreed with Mr. Johnson that the DCOMS system was substantially more reliable than the defendants' MAS-90 accounting system. E.R. 142-45. The Special Master stated that the "Receivership Defendants in their papers do not dispute Mr. Johnson's conclusions that the MAS-90 system was in disarray and unreliable nor have they introduced any evidence whatsoever regarding that system to rebut Johnson's conclusions." E.R. 145. She concluded that "the DCOMS system data may not be perfect, but it is the most reliable evidence in this case to prove damages and, absent any other evidence to the contrary, it is sufficiently reliable for admissibility." E.R. 146. The Special Master accepted Mr. Johnson's calculations based on the DCOMS data that the receivership defendants' gross revenues were $109,553,256, and their chargebacks, consumer-initiated returns and company-generated refunds were $46,509,491. E.R. 146.

The Special Master then determined the receivership defendants' costs of operations. After considering four alternative cost measurements proposed by Mr. Johnson, the Special Master concluded that corporate defendants' costs of operations was $34,810,641 based on defendants' financial statements, which yielded a calculation that, while "not perfect," was the "most complete and reliable among all other amounts proposed." E.R. 148-49.

The district court conducted a *de novo* review of the Special Master's report and recommendation, pursuant to Fed. R. Civ. P. 53(g)(3) & (4), and adopted the Special Master's calculations. S.E.R. 76-97.[2] Based on these amounts, on April 21, 2008, the district court ordered a final monetary judgment against appellants in the amount of $28,233,124. E.R. 7.

STATEMENT OF FACTS

Appellants MacGregor and MSD were integrally involved in an extensive deceptive and abusive telemarketing scam through which consumers were defrauded more than $109 million. As soon as one corporate defendant attracted negative law enforcement attention, new corporate shells were formed to carry out the same telemarketing scam using similar tactics. The undisputed facts show that MacGregor had the authority to control or directly participated in the deceptive acts of these companies.

I. Defendants made numerous material misrepresentations and engaged in abusive telemarketing practices to make unauthorized debits from consumers' bank accounts

A. Defendants' telemarketers made widespread misrepresentations that they would send consumers a valuable free item upon payment of a nominal shipping and handling fee

Defendants' telemarketers cold-called thousands of consumers offering them various valuable free items simply upon payment of a nominal shipping and

[2] "S.E.R." refers to the Commission's Supplemental Excerpts of Record, filed concurrently with this answering brief.

handling fee. For example, the telemarketers made offers consisting of $200 or $500 gift cards for Wal-Mart, Home Depot, Macy's, and other well-known retailers, free movie passes, $200-$500 "shopping sprees" redeemable at well-known retailers, and $200 in gas vouchers. S.E.R. 302-03, 796-97, 1635, 1644-45, 1646, 1648, 1657, 1663, 1666, 1669, 1671, 1672, 1673, 1675, 1678, 1692, 1698, 1707, 1711, 1721, 1726, 1733, 1735. Consumers were told that they only needed to pay a nominal shipping and handling charge (typically either $3.95 or $4.95) to receive the free item, by providing their bank account routing and account information to process a demand draft debit to their accounts. S.E.R. 1644, 1648, 1654, 1657, 1660, 1666, 1669, 1675, 1678, 1692, 1698, 1726-27, 1735. Defendants' telemarketers provided various reasons why the consumer was being given such a generous offer, such as that the consumer was one of a lucky few people selected to receive the valuable item or was receiving the item as a gift for participating in a market survey. S.E.R. 328, 797-98, 1478-79. The telemarketers sometimes stated that they already possessed the consumers' account information and just needed to "confirm" that the information was correct. S.E.R. 1666, 1692, 1727.

The misrepresentations were widespread. The Commission, state Attorneys General and the Better Business Bureau received thousands of consumer complaints. S.E.R. 736-39, 898-99, 1064-65, 1069-71, 1075. The district court concluded that there were "vast numbers of customer complaints alleging fraud." E.R. 20; *see also id.* ("voluminous customer complaints."). MacGregor acknowledged that the telemarketing companies suffered a "high decline rate" (the number of orders declined by the consumers' banks) that ranged from 30-40% of the orders placed. E.R. 194. In fact, the Receiver found that the return ratio (chargebacks initiated by the consumer and company refunds) for all the companies and all their products was *nearly 58%* in 2005. S.E.R. 1327. Some defendants' return ratios were even higher, for example. Prime Time Ventures had a return ratio for its products of nearly 64% for 2005 and 2006. S.E.R. 1326-32. Indeed, *not a single customer* of MSD's products contacted after the TRO stated that they agreed to pay for the MSD product for which their checking accounts had been debited, and *not a single customer* of the more than 900 who contacted the Commission or state Attorneys General after the TRO expressed satisfaction with the defendants' products. S.E.R. 813, 817. MacGregor admitted the companies paid out millions of dollars of refunds. E.R. 189.

B. <u>Defendants' telemarketers misrepresented their affiliation with legitimate companies or the government</u>

Defendants' telemarketers sometimes misrepresented that they were calling on behalf of a major retailer like Wal-Mart, Macy's, Home Depot, or J.C. Penney, and were providing the gift cards or vouchers to consumers for being good customers. S.E.R. 1479, 1071, 1666, 1692, 1707. The defendants were not licensed to use the trademarks of these companies. S.E.R. 1514-16. In other instances, the telemarketers falsely represented they were representatives of agencies within the federal government. S.E.R. 1480, 1648, 1671.

C. Defendants' telemarketers threatened or abused consumers in order to obtain their bank account information

In numerous instances in which the consumer stated that he or she did not want the free item or the "risk free" program memberships, defendants' telemarketers often called back repeatedly to induce the consumer to accept the offer. S.E.R. 1635, 1650, 1654, 1660, 1672, 1675, 1679-80, 1698, 1705-06, 1714, 1733-34. Defendants' telemarketers threatened, harassed, and insulted consumers in order to induce them to accept defendants' offer. For example, telemarketers threatened to take hundreds of dollars out of one consumer's bank account unless he complied, told another consumer that "You are not an educated person, but a stupid lady," told still another consumer that she was being an "a**" for not immediately accepting the offer, and badgered consumers until they agreed to the offer just to get the telemarketer to stop calling. S.E.R 1645, 1666, 1674, 1698, 1714, 1721-22, 1734.

D. Defendants' telemarketers abused and threatened consumers to obtain their purported consent to debit their accounts for membership program fees

After defendants' telemarketers obtained the consumer's bank account information, the consumer was transferred to a "verification process," in which the consumer was asked to affirm that he authorized the debit of the nominal shipping and handling charges. S.E.R. 763-64, 1298, 1657. Many consumers understood that the authorization was to verify only the shipping and handling charges for the "free" item. Because of this, many consumers were surprised when the verification recording asked them to authorize debits of up to $149.90 for various goods and services, including discount membership programs. S.E.R. 801-02, 1711-13, 1698-99, 1735-36. The verification recordings, which consumers found to be barely intelligible or audible, S.E.R. 1709-10, stated that the consumers would receive trial memberships with free review periods, during which the consumers may call to cancel. Defendants represented that, upon timely cancellation, the consumers' bank accounts would not be debited at all, or if the consumer had already paid, he or she would receive a refund. S.E.R. 802, 1625.

In some instances, when consumers declined the verification prompts to authorize the debits, the telemarketer would interject telling the consumers that they must answer "yes." S.E.R. 1662-64, 1675, 1680, 1709, 1735. When consumers protested, telemarketers responded with various threats, including that the consumers could not cancel the order until they answered “yes” to all questions, or that if the consumers did not comply, they would be charged a $400 cancellation fee, their bank account information would be posted on the Internet, or they would be sued. S.E.R. 1661, 1664, 1680, 1698-99, 1722-23, 1735.[3]

E. Defendants’ telemarketers misrepresented the cancellation and refund policies for their membership programs, and made it very difficult to obtain refunds

In order to induce consumers to authorize debits from their bank accounts for the membership programs, defendants’ telemarketers misrepresented to consumers that they could cancel at any time, or during the membership trial period, without incurring charges. S.E.R. 1646, 1650, 1657, 1675-76, 1679, 1692-93, 1711, 1722, 1735. Nonetheless, defendants made it difficult, if not impossible, for consumers to cancel or obtain refunds. S.E.R. 1646-47, 1652, 1712, 1735-40. For example, defendants made consumers call a different telephone number to cancel each of the program memberships defendants had enrolled them in, gave consumers the wrong telephone numbers to call, provided insufficient telephone lines to receive customer calls, and told consumers that their refund and

[3] The verification recording transcripts often were not complete and did not record those portions where the misrepresentations occurred. S.E.R. 1736-37.

cancellation requests could not be processed immediately and required consumers to call back repeatedly. S.E.R. 1502-06, 1519, 1642-43, 1651, 1658-59, 1664, 1670, 1676, 1683, 1693, 1703, 1711-12, 1737-40.

Those customers who successfully reached defendants' representatives were told to fill out a refund authorization form, which required another several weeks of waiting, typically with no positive result. S.E.R. 1651, 1664, 1676, 1684, 1696-97, 1702-03, 1712, 1737-40. Even those consumers who complained to state Attorneys General or the Better Business Bureau only achieved mixed results in their attempts to obtain refunds, and often only after state Attorneys General made several follow-up inquiries or initiated legal action to obtain refunds. S.E.R. 815-816, 1508-09, 1717.

F. <u>Defendants caused consumers' billing information to be submitted without the consumers' express informed consent</u>

Through the misrepresentations and abusive practices described above, defendants made numerous unauthorized debits to the bank accounts of thousands of consumers without their express consent. They often did so before the purported trial period for the membership program ended. S.E.R. 813-817, 1642-43, 1646, 1650-51, 1676, 1694-95, 1700, 1711-12, 1740. Defendants debited the accounts of consumers who simply hung up on defendants' telemarketers, refused defendants' offer or called to cancel their memberships, or were told specifically that they would not be charged. S.E.R. 1646, 1657-58, 1663-64, 1682-83, 1698-99, 1714, 1727-28. Some consumers were charged for certain services (*e.g.*, internet access) which they did not order and could not use. S.E.R. 742, 912.

G. Defendants' telemarketers called persons who asked to stop receiving calls

On numerous occasions, defendants' telemarketers ignored consumers' requests that they receive no more telemarketing calls and continued to make phone solicitations, sometimes calling several times over the course of a week or even during a single day. S.E.R. 1672, 1674-75, 1714, 1728. Consumers who hung up on the telemarketers complained that the telemarketers would call back, sometimes repeatedly and after being told to stop calling, in order to complete the verification recording. S.E.R. 1662, 1698.

H. Defendants failed to send consumers the promised free items

Defendants did not send consumers the promised free items. S.E.R. 739-45, 817-18, 900, 912, 951, 1646, 1664, 1676, 1694, 1699-70, 1708-10, 1713, 1717, 1740. In the Commission's inspection of defendants' business premises after the TRO was issued, other than a file folder containing about 150 movie passes, no inventory was found for the free items that defendants' telemarketers had offered to consumers, nor was there evidence in defendants' business records that defendants had shipped these items by third parties to consumers. S.E.R. 1069-70.

Defendants' accounting records did not reveal entries for payment for any such inventory. S.E.R. 1075. Defendants submitted no evidence which suggested that they had an inventory of the items which they promised to consumers as free gifts.

I. Defendants' telemarketing sales scripts and other business records corroborate the deceptive business practices described by consumers

Scripts found on the defendants' premises corroborate the consumers' descriptions of both the defendants' underlying sales pitches and their torturous cancellation and refund process. The scripts corroborate many of the consumers' complaints that they were offered a free gift for a nominal fee, the purported reasons that they were being given such a generous offer, or that defendants would not debit consumers' accounts during the free trial or review period or that consumers could cancel the program memberships during that period but still receive the free gift. S.E.R. 323-63, 1066-67, 1152-59. Some telemarketers made blatant misrepresentations during the sales pitch, for example, bluntly telling the consumer that "we are not selling anything." S.E.R. 1551-59.

The scripts also provide stock responses that anticipated consumers' many complaints, such as *"This is a scam," "That's not what the telemarketer told me. (Telemarketer misrepresentation)," "I never agreed to this service," "I didn't authorize these charges," "The telemarketer never mentioned this service (upsell)"* and *"I never received it."* S.E.R. 1234-35.

The scripts and other business records confirmed many other aspects of consumers' complaints about defendants' practices, such as the failure to ship the valuable free items they promised to the consumers, unsuccessful attempts by consumers to cancel, not being able to talk to a supervisor, having to wait many weeks for their refund check or the unauthorized debits to their bank accounts. S.E.R. 1066-67, 1076, 1152-1239, 1282.

J. Defendants' improper business practices resulted in thousands of consumer complaints

Defendants' offensive business practices resulted in numerous complaints by consumers. The Commission received over two thousand complaints against the defendants through September 2006. S.E.R. 736-45, 898-1004. Thousands of additional, non-duplicative, consumer complaints were also filed about the corporate defendants with state Attorneys General, multiple Better Business Bureaus, and the U.S. Postal Inspection Service, many of which were forwarded to the defendant companies. S.E.R. 738-39, 934-35, 995-98, 1064-65, 1071. Commission staff found thousands of complaints in defendants' business premises, filling filing cabinets, stacked on top of cabinets and desktops, and on the floor. S.E.R. 1069-70, 1075.

II. MacGregor had control over, or participated in the activities of, the defendant corporations

A. <u>MacGregor's role in the telemarketing scheme</u>

Brian MacGregor formed appellant Continuity Partners (now known as MSD), a "seller" engaged in "telemarketing" under the TSR. S.E.R. 487, 733, 760, 1377-87. MacGregor admits that he was the sole owner, director and officer of Continuity Partners. E.R. 178, 192-93; S.E.R. 564-65, 883, 1085-92, 1251, 1377-87. MacGregor actively supervised the company's operations, was notified of problems with the international calling centers calling on its behalf, and distributed new telemarketing scripts for the company. S.E.R. 751-52, 879-80, 884, 891-93. MacGregor also reviewed customer complaint correspondence on behalf of the company. E.R. 190, 193.

MSD's telemarketers made many of the misrepresentations discussed above. *E.g.*, S.E.R. 302, 303, 740-41, 796-98, 1648-49, 1671-74. MSD claimed to at least one state Attorney General's office that these offensive business practices were due to unauthorized actions of a calling center, and that it had taken corrective measures including terminating the call center. MSD's illegal telemarketing activities nevertheless continued, resulting in civil actions by five state Attorneys General in 2004 and 2005. S.E.R. 311, 1371, 1390-1401, 1473, 1553. MacGregor and Continuity Partners entered into an Assurance of Voluntary Compliance ("AVC") with Oregon officials in February 2004 to resolve allegations of unlawful telemarketing activities. S.E.R. 1473.[4] Continuity Partners' name was changed to Membership Services Direct in April 2005, although it continued to do business as Continuity Partners until February 2006. S.E.R. 1385, 1540-43.

In April 2004, defendant Connect2USA, Inc. was formed to perform certain back-office support work for the telemarketing defendants, including accounting and customer service functions. S.E.R. 765-68. Connect2USA took over Continuity Partners' office staff and its office space, and MacGregor considered Connect2USA to be a d/b/a of Continuity Partners. S.E.R. 768, 1085-92. MacGregor admitted that he worked for Connect2USA, was listed on Connect2USA's intra-office phone list, and had a business card showing his affiliation there. S.E.R. 767-68, 1145, 1251. He admitted that he was involved in any decisions there that "fell within my area of expertise." E.R. 197. Other uncontroverted evidence shows that MacGregor participated in Connect2USA's hiring decisions, helped to negotiate the company's contracts with third parties, completed new account information sheets and opened financials, determined how to improve the companies' return rate and its strategy for its clients, and received

[4] MacGregor similarly had entered in an AVC in June 2003 with Wisconsin officials relating to his previous telemarketing company, Blitz Media. S.E.R. 1361, 1390-1401.

copies of consumer complaints. S.E.R. 767-69, 1098, 1532-45.[5]

Defendant Premier Benefits, Inc. was formed around the same time as defendant Connect2USA as a new company to market program memberships for buyers clubs, calling cards, and movie passes. S.E.R. 682, 769. Premier Benefits' telemarketing activities generated numerous consumer complaints, of which MacGregor was aware. Oregon's Attorney General obtained an AVC from Premier Benefits in September 2005. S.E.R. 772, 898, 1508-09, 1481-85.

MacGregor admitted that he was a marketing "consultant" to Premier Benefits and that he interacted with Connect2USA's staff and outside vendors and consultants. E.R. 199.[6] Premier Benefits' Internet domain name, www.mybuyersunion.com, was initially registered to MacGregor. MacGregor was involved in May 2004 in securing new call centers in India to telemarket for Premier Benefits during which he reflected knowledge of, and a proprietary posture over, Premier Benefits' telemarketing operations. He was also involved in hiring decisions for management of the Indian call centers and negotiated payment terms

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[5] Two of MacGregor's co-defendants, Pranot Sangprasit and Harijinder Sidhu, swore that MacGregor formed and controlled Connect2USA, and made the company's business decisions. S.E.R. 1037, 1042-43.

[6] MacGregor's co-defendant Pranot Sangprasit swore that MacGregor directed and controlled Premier Benefits' operations, including decisions relating to its products, scripts, and marketing strategies. S.E.R. 1011-12.

for the centers. S.E.R. 749-51, 769, 858-62, 872-73, 877-80. MacGregor reviewed and edited Premier Benefits' telemarketing scripts, and approved the content of its website and its marketing brochures. S.E.R. 682, 749-55, 869-71, 884, 887. MacGregor also received information about Premier Benefits' bank transactions, and was aware of Premier Benefits' problems with excessive chargebacks. S.E.R. 679-92, 750, 875.

Two months after Connect2USA and Premier Benefits were formed, in July 2004, defendant Consumer Reward Network, Inc. ("CRN"), was formed also to market discount membership programs. CRN initially used the same fake address (a virtual office address in Orange County, California) and used the same mail drop as Premier Benefits, and considered itself a "sister firm" to Premier Benefits. Connect2USA determined who would serve as CRN's officers and directors, paid the monthly fees associated with its virtual offices, managed its websites and its bulk mail accounts, accessing its bank accounts, and providing its "back end" services. S.E.R. 772-76, 1195-1201, 1585, 1591. CRN's deceptive telemarketing practices resulted in numerous consumer complaints, and at least two state Attorneys General enjoined CRN's deceptive and abusive telemarketing practices. S.E.R. 777-78, 1457-71.

The uncontroverted evidence shows that, at CRN, MacGregor helped to determine which products the company would market and new platforms to market those products, reviewed and edited its marketing materials and its scripts, was kept informed about the calling centers the company used, asked other employees to get testimonials for the Premier Benefits and CRN's web sites and to have those websites running by a set deadline, and was aware of CRN's problems with excessive chargebacks. S.E.R. 747-48, 752-55, 863-70, 874, 882, 885-86, 888-90.

In February 2005, defendant Star Communications, LLC, also was formed to market discount program memberships. S.E.R. 779-80, 1179-94. Connect2USA managed and paid for Star Communications' operations, including its rent, mail drop, virtual office, bulk mail accounts and websites, registered its Internet domain names, filed its fictitious business name statements, and served as its contact for state filings. S.E.R. 780-83, 1488-89, 1447. Consumers lodged hundreds of complaints in 2005 and 2006 against Star Communications. S.E.R. 736, 898-99.[7]

Within four months of Star Communications' formation, defendants acquired three additional companies: defendants Prime Time Ventures, Inc. and Merchant Risk Management, Inc., and related entity Mammoth Consulting Group, LLC. S.E.R. 783-87.

Merchant Risk Management ("MRM") took over Connect2USA's service

[7] MacGregor's co-defendant Sangprasit testified that MacGregor was the owner of Star Communications. S.E.R. 1014.

functions for the telemarketing companies, as well as Connect2USA's lease. S.E.R. 1064, 1094-96. MacGregor is identified in internal corporate papers as the President, Secretary, Treasurer, and Director of the company. S.E.R. 785-86, 1068, 1074, 1099, 1242-43. Other uncontroverted evidence shows that at MRM MacGregor signed a Direct Debit Application and Agreement form for MRM as its "principal" and sole owner, was listed on company phone lists as one of its "executives," participated in MRM's employee hiring decisions, and provided names for the company's new marketing products. S.E.R. 785-86, 881, 1074, 1144, 1267-69. Further, MacGregor maintained an office at MRM's office suite (which he admitted was also Continuity Partners' office suite), had business cards printed to show his affiliation with MRM, and reviewed customer complaints on behalf of MRM. S.E.R. 488, 785-87, 1063-64, 1071, 1251.

Prime Time Ventures, was another related company which sold discount program memberships, and was operated by MRM. S.E.R. 784, 1160-78. MacGregor provided consulting services to Prime Time Ventures and helped author the company's marketing materials, including its product "Protection Plus." S.E.R. 1073, 1265. Mammoth Consulting Group was an entity through which MacGregor received "consulting" fees from defendants. MacGregor received $1,510,052 through Mammoth. S.E.R. 510-26, 747-48, 788-94, In October 2005, defendant All Star Access, Inc. (“ASA”) joined the telemarketing operations. S.E.R. 794-95, 1147-51. ASA’s books and records were maintained at MRM’s offices, where MacGregor was a principal. S.E.R. 794-95. MacGregor performed work at ASA, including naming the membership programs that the company marketed. S.E.R. 794-95, 894-97. 1068, 1244.

B. <u>MacGregor received significant compensation from his participation in and control over the defendants’ deceptive and abusive telemarketing practices</u>

MacGregor admitted that he was compensated a percentage of the companies’ revenues, and that he was paid $250,000 for his work for the defendant companies. S.E.R. 702, 747. In addition to the $1,510,052 he received indirectly from defendants though his company Mammoth Consulting Group, MacGregor received at least $1,150,000 directly from the telemarketing operations.[8] S.E.R. 510-26, 700-14, 747-48, 788-94, 1301, 1337-38. The other individual co-defendants, who were the nominal owners of the defendant companies, earned significantly less in compensation. S.E.R. 748-49, 1014-24, 1035-50.

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[8] An additional amount of at least $661,000 from the operation was transferred from the telemarketing companies through two related entities (Anzali, Inc. and Tax Accounting & Payroll Services, Inc.) to Midwest Properties, a company controlled by MacGregor’s wife. S.E.R. 747-48, 821.

C. Defendants grossed over $109,000,000 from their telemarketing scheme

Based on the undisputed testimony by Mr. Johnson at the Special Master's hearing, the corporate defendants' gross revenues from January 1, 2003 through February 22, 2006 were $109,553,256, their refunds (consisting of chargebacks, consumer-initiated returns and company-generated refunds) were $46,509,491, and their cost of operations was $34,810,641. E.R. 146-49; S.E.R. 284-85, 296, 1300, 1326-32.

SUMMARY OF ARGUMENT

Appellants MacGregor and MSD are liable under the FTC Act and the TSR for running a $109 million deceptive and abusive telemarketing scam that deceived thousands of consumers through more than a dozen corporate shells over several years. (Part I) Based on the Commission's undisputed facts, the district court properly concluded that appellants had violated Section 5(a) of the FTC Act and various provisions of the TSR. MacGregor's telemarketers cold-called consumers offering purportedly free products and made various misrepresentations designed to obtain the consumers' bank account information, and then made unauthorized debits from these accounts. MacGregor assisted and facilitated his companies' violations of the TSR. (Part I.A.) Appellants challenge the Commission's voluminous evidence solely through two entirely conclusory and unsupported declarations that do not create any genuine issue of material fact. (Part I.B.)

MacGregor is personally liable for unlawful acts of the defendant telemarketing companies because he controlled or participated directly in their deceptive and abusive acts, and had the requisite knowledge of their improper business practices. (Part II)

The district court acted well within its discretion in ordering injunctive and equitable monetary relief against appellants. (Part III) With regard to monetary equitable relief, the court properly adopted the findings of the Special Master who accepted the reliable testimony of the Receiver's representative. The Receiver correctly relied upon the defendants' proprietary DCOMS system to calculate the defendants' gross revenues as $109,553,256 and refunds as $46,509,491, and properly relied upon financial disclosure statements to calculate the defendants' costs of operations as $34,810,641. Appellants offered no contrary evidence to counter the Receiver's revenue and cost calculations. (Part III.A.) The district court also properly enjoined appellants from all telemarketing and selling program memberships in the future. Given the egregious nature of appellants' telemarketing scam, including MacGregor's blatant disregard for the law, the injunctions are necessary to ensure that there will be no future law violations and do not constitute an unconstitutional prior restraint. (Part III.B.) Finally, the district court's injunctions prohibiting appellants from making misrepresentations and from violating the TSR are perfectly permissible fencing-in provisions. (Part III.C.)

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo* and may affirm on any ground supported by the record. *Dias v. Elique*, 436 F.3d 1125, 1128 (9th Cir. 2006); *Qwest Comm'ns, Inc. v. Berkeley*, 433 F.3d 1253, 1256 (9th Cir. 2006). Under Fed. R. Civ. P. 56(c), the appellate court's review is governed by the same standard used by the trial court. *Qwest Comm'ns*, 433 F.3d at 1256. On review, the appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004); *Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999). Summary judgment is proper when a rational trier of fact would not be able to find for the non-moving party on the claims at issue. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 578 (1986). The non-moving party "may not rely merely on allegations or denials in its own pleading; rather, its response must . . . set out specific facts showing a genuine issue for trial," Fed. R. Civ. P. 56(e), and must set forth evidence that is "'significantly probative' as to any fact claimed to be disputed." *SEC v. Murphy*, 626 F.2d 633, 640 (9th Cir. 1980) (citations omitted).

A district court's choice of equitable relief is reviewed for abuse of discretion. *Labor/Community Strategy Ctr. v. Los Angeles County Metropolitan Trans. Auth.*, 263 F.3d 1041, 1048 (9th Cir. 2001); *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997). Evidentiary rulings made in determining such relief are reviewed for an abuse of discretion. *See Tritchler v. County of Lake*, 358 F.3d 1150, 1155 (9th Cir. 2004). Findings of fact made after a bench trial may be overturned only for clear error. *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 (9th Cir. 2003).

ARGUMENT

I. MACGREGOR AND MSD VIOLATED THE FTC ACT AND TELEMARKETING SALES RULE

Appellants violated Section 5(a) of the FTC Act and the Telemarketing Sales Rule by engaging in an extensive and prolonged telemarketing scam that deceived thousands of consumers into providing their bank account information, and then debited those accounts for hundreds of dollars without the consumers' express informed consent. The district court's judgment finding the appellants are liable, based on the undisputed record facts, must be affirmed.

A. The Commission was Entitled to Summary Judgment that Appellants Violated the FTC Act and the Telemarketing Sales Rule

1. Appellants Violated the FTC Act (Count 1)

Section 5(a) of the FTC Act prohibits unfair and deceptive acts and practices in or affecting commerce. 15 U.S.C § 45(a). An act or practice is deceptive under Section 5(a) if it involves a material representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances. *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1199-1200 (9th Cir. 2006); *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994). The FTC need not prove reliance by each purchaser. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993). Express claims, or deliberately made implied claims, used to induce a purchase, are presumed to be material. *Pantron I*, 33 F.3d at 1095-96. The FTC need not prove that the misrepresentations were made with an intent to defraud or deceive, or were made in bad faith. *See, e.g., FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989).

As shown above, MacGregor and the corporate defendants made numerous material misrepresentations to thousands of consumers to induce them to disclose their bank account information, including that the consumers would obtain a valuable free item upon the payment of a nominal shipping and handling fee.[9] Once defendants had the consumers' account information, they engaged in various deceptive and abusive tactics designed to enroll the consumer in membership discount programs through which the consumers' bank accounts were debited every month on a negative option basis. *See* Statement of Facts ("SOF"), *supra*, at 8-16. These practices included abusing consumers who objected to providing their account information, making it very difficult or impossible to cancel or obtain refunds, misrepresenting that they were affiliated with major retailers or the government, and continuing to call consumers who asked that the solicitations stop. Further, the telemarketers failed to send the promised free item which initiated each of their sales pitches.

That these misrepresentations were widely disseminated was evidenced by

[9] The Commission's evidence of misrepresentations is primarily adduced through the consumer complaints submitted with the Commission's summary judgment motion and included in the Supplemental Excerpts of Record. These letters have circumstantial guarantees of trustworthiness equivalent to evidence admissible under Fed. R. Evid. 803 and 804, and thus are admissible, reliable evidence under Fed. R. Evid. 807 because: (A) the FTC is offering these statements as evidence of a material fact; (B) the statements are more probative on the point for which they are offered than any other evidence which the FTC can procure through reasonable efforts; and (C) the general purposes of the rules and the interests of justice will best be served by admission of the statements into evidence. *See Figgie*, 994 F.2d at 608-09 (consumer letters admitted under predecessor to Fed. R. Evid. 807). As required under Fed. R. Evid. 807, the Commission provided adequate notice to defendants prior to their use in the summary judgment motion of its intention to introduce the consumer complaint correspondence.

thousands of consumer complaint letters, the defendants' excessively high return rate and high decline rate that was nearly 58% for all products for all companies in 2005, and millions of dollars of refunds. *See* SOF, *supra*, at 9-10, 17. Each of these misrepresentations was central to the transaction and thus material. By making these misrepresentations, appellants engaged in deceptive practices in violation of Section 5 of the FTC Act.

2. Defendants Violated the Telemarketing Sales Rule

The FTC adopted the TSR pursuant to the Telemarketing Act, 15 U.S.C. §§ 6101 *et seq.*, in which Congress directed the FTC to issue rules prohibiting abusive and deceptive telemarketing acts or practices. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), violations of the TSR constitute unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

The district court properly found that appellants violated various provisions of the TSR as alleged in Counts 2 through 7 of the amended complaint. These provisions of the TSR apply to the defendants because they were "sellers" or "telemarketers" engaged in "telemarketing" as those terms are defined in the TSR. *See* 16 C.F.R. ¶310.2; SOF, *supra*, at 18-24; S.E.R. 487, 773, 1066-67, 1147-1241.

a. Defendants made misrepresentations about their refund and cancellation policies (Count 2)

Section 310.3(a)(2)(iv) of the TSR, 16 C.F.R. § 310.3(a)(2)(iv) prohibits telemarketers and sellers from misrepresenting any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies. As discussed above, SOF, *supra* at 13-14, the corporate defendants made numerous such misrepresentations including, but not limited to: (i) that the defendants provided a free trial period during which time the consumers will not be charged fees, (ii) that the defendants provided a cancellation period during which time the consumers may obtain a refund for fees already paid, and (iii) that consumers may cancel their membership in defendants' programs at any time. All such representations were false and violated 16 C.F.R. § 310.3(a)(2)(iv).[10]

b. Defendants made misrepresentations about their affiliations and endorsements (Count 3)

Section 310.3(a)(2)(vii) of the TSR, 16 C.F.R. § 310.3(a)(2)(vii), prohibits telemarketers and sellers from misrepresenting a seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government

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[10] The fact that the corporate defendants purportedly had a refund procedure was entirely ineffective to address the vast majority of consumers' complaints, and does not, as a matter of law, preclude finding that defendants deceived consumers in violation of Section 5(a) of the FTC Act. *See Cyberspace.com*, 453 F.3d at 1201-02; *Pantron*, 33 F.3d at 1103.

entity. As discussed above, SOF, *supra*, at 10-11, defendants made numerous such misrepresentations including, but not limited to, misrepresenting their affiliation with the government and major retailers. All such representations were false and violated 16 C.F.R. § 310.3(a)(2)(vii).

c. Defendants caused billing information to be submitted for payment without the customer's express informed consent (Count 4)

Section 310.4(a)(6) of the TSR, 16 C.F.R. § 310.4(a)(6), prohibits telemarketers and sellers from engaging in abusive telemarketing acts and practices by causing billing information to be submitted for payment without the express informed consent of the customer. As multiple consumer declarations establish, on numerous occasions, defendants caused customers' billing information to be submitted for payment without the express informed consent of the customers. *See* SOF, *supra*, at 14-15.

d. Defendants used threats and intimidation in telemarketing calls (Count 5)

Section 310.4(a)(1) of the TSR, 16 C.F.R. § 310.4(a)(1), prohibits telemarketers and sellers from using threats, intimidation, or the use of profane or obscene language. The consumer declarations establish that, on many occasions, defendants' telemarketers used threats, intimidation, and profane or obscene language in their telemarketing calls to consumers to induce them to provide their bank account information in order to debit their accounts without the consumers' authorization. *See* SOF, *supra*, at 12-13.

e. Defendants ignored consumers' entity-specific do-not-call requests (Count 6)

Section 310.4(b)(1)(iii)(A) of the TSR, 16 C.F.R. § 310.4(b)(1)(iii)(A), prohibits telemarketers from, or sellers from causing a telemarketer to engage in, initiating any outbound telephone call to a person when that person previously has stated that he or she does not wish to receive a telephone call made by or on behalf of the seller whose goods or services are being offered. As shown above, on many occasions, defendants' telemarketers continued to call consumers who had previously asked them to stop calling. *See* SOF, *supra*, at 15.

f. MacGregor assisted and facilitated violations of the TSR (Count 7)

Section 310.3(b) of the TSR, 16 C.F.R. § 310.3(b), prohibits any person from providing substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates the TSR Sections 310.3(a), (c), or (d) or 310.4, 16 C.F.R. § 310.3(a), (c), or (d), § 310.4. As just discussed, the defendant corporations violated several provisions in TSR Sections 310.3(a) and 310.4.

The undisputed facts show that MacGregor provided substantial assistance and support to the defendant telemarketing companies. He was the owner of Continuity Partners, the principal and sole officer at Merchant Risk Management and, at the very least, participated significantly in the operations of the other corporate defendants (even if he considered himself a mere "consultant" at those companies). In those positions, he performed many important managerial functions including reviewing and editing scripts and marketing brochures, interacting with the international calling centers, and making hiring decisions, that show that he had the authority to correct the company's offensive business practices. *See* SOF, *supra*, at 18-24. The record also shows that MacGregor knew or, at the very least, consciously avoided knowing, that the telemarketing defendants were engaging in illegal activities that violated TSR Sections 310.3(a) and 310.4 given his active role at the companies and his review of numerous consumer complaints there. *See* Part II, *infra*.

B. Appellants Fail to Create Any Genuine Issues of Material Fact

Appellants argue that the district court improperly granted the Commission's motion for summary judgment because there are genuine issues of material fact. Appellants' Brief ("App. Br.") 12-33. Appellants' entire argument relies, however, *solely* on two entirely conclusory declarations by MacGregor and Daryl Dupree, an employee at Connect2USA.[11] The MacGregor and Dupree declarations are largely devoid of any reference to the record, and amount to no more than speculative denials or assertions of ultimate facts that are unsupported by any specific, relevant, factual evidence.

Where, as here, an opposition to a summary judgment motion is based solely upon affidavits, the affidavits must be supported by sufficient evidence of record and not be merely conclusory assertions. This Court has held that "[a] conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997). MacGregor's and Dupree's conclusory statements, supported by only irrelevant or insufficient exhibits, cannot defeat summary judgment. *See Dubois v. Assn of Apartment Owners of 2987 Kalakaua*, 453 F.3d 1175, 1180 (9th Cir. 2006); *Thornhill Publ'g Co., Inc.*, 594 F.2d 730, 738 (9th Cir. 1979).

The cases relied upon by defendants, *e.g.*, *Rodriguez v. Airborne Express*, 265 F.3d 890 (9th Cir. 2001); *United States v. Shumway*, 199 F.3d 1093, 1103-05

[11] Appellants only challenge the declarations of two of MacGregor's co-defendants, Harry Sidhu and Pranot Sangprasit. *See* App. Br. 29-30. While those declarations are consistent in many respects with other record evidence, the Commission does not rely solely on the Sidhu and Sangprasit declarations in the Statement of Facts, *supra*, to support liability and monetary relief against MacGregor and MSD.

(9th Cir. 1999), are distinguishable because here, MacGregor's and Dupree's declarations are entirely conclusory and lack any evidentiary support. Moreover, the declarations do not deny certain material facts that, by themselves, support summary judgment. There are simply no *genuinely* disputed material facts that need to be resolved by a fact finder. As the *Shumway* court recognized, "[i]f the affidavit stated only conclusions, and not such facts as would be admissible in evidence (FRCP 56(e)), then it would be too conclusory to be cognizable." 199 F.3d at 1104.

For example, appellants assert that there is a genuine issue whether they authorized improper telemarketing calls. App. Br. 20-24. Significantly, appellants do not dispute the Commission's voluminous evidence showing that their telemarketers made numerous misrepresentations that deceived thousands of consumers into providing their bank account information, and debited those accounts, without their express informed consent. *See* SOF, *supra*, at 8-16. Rather, appellants assert that the calling centers were purportedly "independent" and that any deviations from "approved" scripts were not sanctioned by the defendants. The overwhelming evidence refutes that contention.

A principal may be liable under FTC Act Section 5 for the acts of his agents, if the misconduct occurred within the actual or apparent scope of his authority, even when the acts are unauthorized. *Goodman v. FTC*, 244 F.2d 584, 592 (9th Cir. 1957); *see also Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1438-39 (9th Cir. 1986) (principal liable where there was close business relationship between principal and agent and principal knew of agent's misrepresentations). The principal is liable even if he makes an unsuccessful attempt to prevent the misrepresentations if the deceptive conduct was made within the scope of his authority and was part of the sales inducement which benefitted the principal. *Goodman*, 244 F.2d at 592-93.

Here, the calling centers acted at the express direction of MacGregor and the corporate defendants. There is undisputed evidence that MacGregor was directly involved in preparing and providing the telemarketing scripts used by the calling centers. He was also involved in locating the Indian and Philippine calling centers and assisted in the hiring decisions for their management. SOF, *supra*, at 18-24. The calling centers expressly identified themselves as calling on behalf of the corporate defendants. S.E.R. 324, 328, 332, 356, 1648, 1733, 1707, 1735. The corporate defendants were aware of the massive number of consumer complaints and chargebacks, and knew of several law enforcement actions filed against them over the course of several years, yet failed to stop the flood of offensive telemarketing practices by the calling centers. MacGregor was aware that at least some of these calling centers used "improper sales practices." E.R. 183.

Further, the defendants benefitted directly from the misrepresentations, and whatever purported efforts they took to stop the improper telemarketing practices were entirely ineffective and not reasonably calculated to prevent the misrepresentations. Defendants also did not readily make refunds to consumers which presumably would be the case if they were attempting to act legally, but rather made it virtually impossible for consumers to obtain refunds. SOF, *supra*, at 13-14.[12] Thus, regardless of the formal relationship between defendants and the calling centers in their contracts, "so far as the public was concerned, they were [defendants'] authorized agents and acted not only within the apparent but also within the actual scope of their authority." *See Goodman*, 244 F.2d at 593.[13]

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[12] MacGregor Decl. Exh. 17, purporting to establish that Continuity Partners issued rebate checks to consumers from January - September 2003 does not create a genuine issue, and merely shows that while defendants sent *some* refunds to consumers, many of these consumers never ordered the product in the first place or had to request refunds multiple times, and does not dispute that many other consumers never received the refunds they requested. S.E.R. 1646-47, 1652, 1735-40.

[13] For these reasons, MacGregor Decl. Exh. 1, E.R. 202, purporting to be an "Outbound Telemarketing Services Agreement" with a call center, does not create a genuine issue of material fact. Further, it lacks foundation, is unsigned, relates to a non-defendant, and pre-dates the time period alleged in the complaint by more than a year. Appellants also do not explain how the agreement is similar to other agreements and do not represent that Continuity Partners in fact entered into any agreements with call centers. MacGregor Decl. Exh. 9, E.R. 229, purporting to be the termination letters for the 16 telemarketers simply shows that MacGregor was

Relatedly, defendants fail to defeat summary judgment relying on MacGregor's summary statement that the approved telemarketing scripts did not contain misrepresentations and had been approved by outside counsel. App. Br. 21. In fact, the scripts do facially misrepresent that various "free" items (*e.g.*, "FREE gas rebates") would be sent to consumers for a nominal fee along with a "risk free" trial period for the program memberships. However, consumers did not receive the free items. SOF, *supra*, at 15-16. Further, MacGregor readily admits (and many consumers confirm in their declarations) that at least some telemarketers went "off script" and repeatedly made material misrepresentations to consumers which were often much worse than the misrepresentations in the script. Notwithstanding this awareness of routine misrepresentations by their telemarketers on numerous occasions over a long period of time, defendants failed to stop these practices. Moreover, that defendants' attorneys might have approved the script not only lacks foundation, but is irrelevant, because the fact that a deceptive script was reviewed or approved by counsel does not make the scripts truthful. *FTC v. Am. Standard Credit Systems*, 874 F. Supp. 1080, 1088 (C.D. Cal. 1994).[14]

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aware of the defendants telemarketers' law violations. Also, the fact that some telemarketers may have been terminated does not show that the deceptive practices were mitigated in any way.

[14] For all of these reasons, MacGregor Decl. Exh. 2-7, that purport to be "a representative sample of scripts," do not create genuine issues of material fact. *See*

Further, appellants' assertions that there are genuine issues as to whether they actually engaged in illegal practices are without any support. App. Br. 24-27. For example, appellants posit that there were no improper business "practices," because the Commission only received 2,083 complaints, which constituted a low percentage of the defendants' total sales. App. Br. 24-25. No one, however, has established that these 2,000 complaints represent the universe of injured consumers. This figure ignores the thousands of additional, non-duplicative, complaints received by the defendants themselves, state agencies, and the Better Business Bureau. *See* SOF, *supra,* at 17. Appellants also do not address the percentage of consumers who actually received items complained about (because many consumers received multiple mailings from the defendants) or that many consumers may not have complained because they failed to notice the unauthorized charges. *See, e.g., FTC v. J.K. Publications,* 99 F. Supp.2d 1176, 1192 (C.D. Cal. 2000). Similarly, appellants cannot rely on MacGregor's conclusory statements that the defendants did not have "policy" or "practice" to violate provisions of the TSR. App. Br. 25-26. These unsupported contentions are controverted by the Commission's voluminous record evidencing the thousands of consumers who complained about defendants' acts that unrefutably showed a de facto "policy" of

S.E.R. 323-68.

improper business practices. *See* SOF, *supra*, at 8-17. Even assuming that defendants had some formal "policy" against deception, the evidence is overwhelming that these policies were either ignored or never implemented, and that appellants were fully aware of, and failed to stop, the massive telemarketing scam.[15]

Similarly, appellants provide no support that customers were not charged unless they provided their "express consent" during the tape verification process. App. Br. 24. The evidence is overwhelming that consumers often did not understand the recordings, were threatened or abused during the verification process, or simply did not authorize such charges during the "verification" calls. Further, the corporate defendants' verification recordings do not include the first part of the telemarketing call where many of the misrepresentations occurred. SOF, *supra*, at 12-13; S.E.R. 1736-37.[16]

MacGregor also asserts with no support that there are genuine issues as to

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[15] MacGregor Dec. Exh. 11-16, which purport to show mailings of the defendants' products, lack foundation, and, most importantly, fail to show that consumers actually ordered the items listed. Further, many consumers did not recognize defendants' mailings as a true item of value, but rather as unsolicited junk mail brochures which they resembled. *See* S.E.R. 369-478.

[16] For these reasons, MacGregor's Decl. Exh. 10, purporting to be a transcript of a verification recording, not only lacks foundation and fails to identify the date or the call identified, but is irrelevant and does not create a genuine issue.

whether he participated in or controlled the defendants' illegal acts or practices. App. Br. 27-31. His own admissions, and the voluminous record evidence, clearly show otherwise. For example, MacGregor *admits* that he controlled and was the sole owner of Continuity Partners. In this position, MacGregor was engaged in all aspects of the company's affairs, including dealing with the company's call centers, reviewing complaints, and representing the company before state officials. It is undisputed that, even after MacGregor entered into an AVC with Oregon officials in February 2004, Continuity Partners continued its illegal practices. *See* SOF, *supra*, at 18-19. Further, MacGregor does not deny that he was the sole officer and principal of Merchant Risk Management, which assumed the service functions for Connect2USA, and that, in that position, he performed various managerial functions for the telemarketing defendants other than MSD, such as participating in hiring decisions and providing advice on the companies' new products. SOF, *supra*, at 22-23.

MacGregor summarily claims that he acted solely as a non-employee "consultant" to the corporate defendants other than MSD. App. Br. 28-29. Even disregarding the Sidhu and Sangprasit declarations challenged by MacGregor,[17] the

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[17] MacGregor's co-defendants Sangprasit and Sidhu swore, under oath, that MacGregor made the corporate decisions for Premier Benefits, and formed and was the primary decisionmaker at Connect2USA. *See* SOF, *supra*, at 19-21.

undisputed documentary evidence shows that MacGregor directly participated in:

- Connect2USA's business operations, including negotiating contracts with third parties, completing new account information forms, and strategizing on how to improve the company's return rate. SOF, *supra*, at 19-20;

- Premier Benefits' business operations, including approving the content of its telemarketing scripts, website and marketing brochures, and secured and hired management for its new international calling centers. SOF, *supra*, at 20-21;

- other corporate defendants' business operations, including determining which products they would market, approving scripts and marketing materials, and detailing the content of their websites. SOF, *supra*, at 21-24.

Finally, MacGregor's conclusory statements that there are genuine issues as to his mental state or requisite knowledge to support liability or restitution, App. Br. 31, 32, are belied by the substantial record evidence showing his direct control over or participation in the business activities of the corporate defendants, his knowledge of the high number of consumer complaints, the excessive chargebacks and "high decline rates" incurred by the defendants, and his knowledge about and failure to abide by the AVCs entered into with Oregon and Wisconsin officials.

The Declaration of Daryl Dupree, E.R. 241-42, is even more conclusory and speculative than the MacGregor declaration and is rebutted by the Commission's voluminous documentary evidence. Neither declaration (or accompanying exhibits) creates a genuine issue of material fact to defeat summary judgment.

II. THE DISTRICT COURT PROPERLY HELD THAT MACGREGOR WAS PERSONALLY LIABLE FOR THE UNLAWFUL ACTS OF THE TELEMARKETING COMPANIES

This Court should affirm the district court's order finding that MacGregor was personally liable for the law violations committed by corporate defendants. An individual may be held personally liable for the defendant corporations' Section 5(a) violations if he (1) "participated directly in the acts or practices or had authority to control them"; and (2) "'had actual knowledge of material misrepresentations, was recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth.'" *Cyberspace.com,* 453 F.3d at 1202; *see also Publishing Clearing House*, 104 F.3d at 1170-71; *Garvey*, 383 F.3d at 901; *Pantron I*, 33 F.3d at 1103; *FTC v. Amy Travel Service*, 875 F.2d 564, 573 (7th Cir. 1989); *Affordable Media*, 179 F.3d at 1234. To meet this knowledge element "the FTC is not required to show that a defendant *intended* to defraud consumers," *Publishing Clearing House*, at 1171; *accord Cyberspace.com,* 453 F.3d at 1202 (subjective good faith is immaterial to liability). Assuming the duties of a corporate officer is probative of an individual's participation or authority, and participation in corporate affairs is probative of knowledge. *Publishing Clearing House*, 104 F.3d at 1170-71; *Affordable Media*, 179 F.3d at 1235; *Amy Travel*, 875 F.2d at 574.

The undisputed evidence shows that MacGregor owned and controlled MSD, made critical business decisions about, and was fully responsible for, its improper telemarketing operations. SOF, *supra*, at 18-19. Given the breadth and volume of misrepresentations by MSD's telemarketers, this fact alone establishes that MacGregor is liable for violations of the FTC Act and the TSR.

The uncontroverted evidence also shows that MacGregor held senior positions at defendant Merchant Risk Management, and was responsible for business decisions at the company. SOF, *supra*, at 22-23. Even if the disputed Sidhu and Sangprasit declarations are excluded, the uncontroverted evidence shows that MacGregor directly and significantly participated in the acts of the other corporate defendants, making critical business decisions such as deciding which products would be sold, creating and reviewing telemarketing scripts and marketing materials, and deciding which telemarketers, banks, marketing strategies, incentives and other service providers the defendants would use. *See* SOF, *supra*, at 18-24.

MacGregor also had the requisite knowledge to be found liable for the corporate acts. He was or should have been aware of the high volume of written complaints that consumers sent to his companies, as well as the very high chargeback rates incurred by the corporate defendants. SOF, *supra*, at 9-10, 17. Further, he knew that several state Attorneys General investigated the telemarketing scheme, and he had personally signed the AVC with Oregon to stop MSD's improper telemarketing practices. As the district court found, "Brian MacGregor was at least recklessly indifferent to the truth or falsity of a misrepresentation." E.R. 19.

Finally, the level of MacGregor's involvement should also be inferred from the extent to which he was compensated from the scam. MacGregor admits that he received $250,000 for performing "consulting" work for the defendants. Uncontroverted documentary evidence also shows that he received at least $1,150,000 directly from the telemarketing operations, and $1,510,052 indirectly from the telemarketing operations through Mammoth Consulting Group. SOF, *supra*, at 24.

For all these reasons, MacGregor is personally liable for misrepresentations and abusive telemarketing practices of the corporate defendants.

III. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN IMPOSING INJUNCTIVE AND MONETARY RELIEF AGAINST MACGREGOR AND MSD

The district court properly exercised its authority to grant the permanent equitable relief sought by the Commission. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides that a court may grant a permanent injunction against violations of "any provision of law enforced by the Federal Trade Commission."

See FTC v. H. N. Singer, 668 F.2d 1107, 1111-13 (9th Cir. 1982). The exercise of broad equitable authority is particularly appropriate where, as here, the public interest is implicated, because this Court's equitable powers "'assume an even broader and more flexible character than when only a private controversy is at stake.'" *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *United States v. Laerdal Mfg.*, 73 F.3d 852, 857 (9th Cir. 1995); *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989). Further, Section 19(b) of the FTC Act, 15 U.S.C. § 57b, authorizes this Court to grant relief as it finds necessary to redress injury to consumers resulting from violations of a trade regulation rule, including the TSR, that "may include, but not be limited to, rescission or reformation of contracts, the refund of money [and] return of property."

A. The District Court's Determination of the Amount of Equitable Monetary Relief was Well Within its Discretion.

Under Section 13(b), a court may utilize the full range of its equitable powers, and may impose a broad array of ancillary relief "necessary to accomplish complete justice," including redress or restitution to fully compensate consumers. *See, e.g.*, *Pantron I*, 33 F.3d at 1102; *Figgie Int'l, Inc.*, 994 F.2d at 606-09; *Singer*, 668 F.2d at 1112-13. A court may award equitable restitution under Section 5 equal to the amount of consumer losses based on total sales of a deceptively sold product, even where that amount exceeded the amount of the defendants' unjust enrichment.

See, e.g., *Figgie*, 994 F.2d at 606.

In order to ascertain an appropriate level of consumer redress for defendants' widespread deceptive practices, the district court assigned a Special Master to hold an evidentiary hearing to determine the receivership defendants' (1) gross revenues; (2) refunds (including chargebacks, consumer-initiated returns, and company-generated refunds); and (3) costs of operations. After a one-day hearing, the Special Master determined that defendants' gross revenues were $109,553,256, their refunds were $46,509,491, and their costs of operations were $34,810,641. E.R. 139-49. The district court agreed with the findings of the Special Master, and ordered that appellants pay the Commission a monetary judgment in the amount of $28,233,124. E.R. 7; S.E.R. 76-97. Under *Figgie*, the court could have set the relief equal to the amount of total sales to customers; the court's ultimate monetary judgment in the lower amount of $28,233,124 was well within the district court's broad discretion and should be affirmed on appeal. Appellants' challenge to these findings, App. Br. 33-44, must be rejected.

As a threshold matter, appellants incorrectly assert that the Special Master (and then the district court) improperly shifted the burden of proof onto defendants. App. Br. 36-37. The Commission, as plaintiff, bears the initial burden of proof to show that its calculation of consumer injury "reasonably approximated" the amount of customers' net losses or the unjust enrichment of the defendants, after which the burden shifts to appellants to prove this figure was inaccurate. *Febre*, 128 F.3d at 535; *FTC v. Medicor, LLC*, 217 F. Supp. 2d 1048, 1058 (C.D. Cal. 2002); *FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 534 (S.D.N.Y. 2000). The Commission met its initial burden here through the sworn declarations and underlying supporting documentation of its witness Kenton Johnson, Executive Vice President of the Receiver, who provided the Commission's direct testimony. *See* S.E.R. 14-75, 279-300. Mr. Johnson's testimony and supporting documentation constituted the best evidence of the corporate defendants' gross and net revenues and costs of operations. The district court expressly found that the Commission had "met its burden." S.E.R. 88-89. At that point, the burden shifted to MacGregor to offer competing evidence, but he offered no contrary evidence whatsoever at the hearing. MacGregor must now bear the consequences of his own legal strategy of not offering competing evidence.

The Special Master found Mr. Johnson to be a credible witness and accepted Mr. Johnson's calculations of the receivership defendants' gross revenue and refund calculations based on data derived from the defendants' DCOMS proprietary customer transaction tracking database. E.R. 141-46; S.E.R. 294-96. Appellants argue, however, that Mr. Johnson's testimony should be rejected, because he lacked personal knowledge of the DCOMS system, and because DCOMS data was unreliable because it was not an accounting system. App. Br. 37-40.

While DCOMS admittedly was not an accounting system *per se*, the Receiver concluded that DCOMS data was by far the most reliable of defendants' business records to make his calculations. S.E.R. 282. Mr. Johnson testified that the DCOMS database was used regularly by the receivership defendants to keep track of customers' accounts, and included information such as each customer's bank account information, the date and amounts of demand draft debits and returns from customers' accounts, the products defendants "sold" to customers, and refund details. He testified that the DCOMS data was the most reliable source of information upon which to base defendants' gross revenue, refund, and net revenue calculations because the receivership defendants regularly updated the DCOMS database with daily data feeds from third parties, including payment processors the defendants used to debit customers' accounts. S.E.R. 17-69, 280-82. Mr. Johnson also found that the receivership defendants themselves regularly relied upon DCOMS data in their business operations. The reliability of DCOMS was consistent with defendants' business interest in maintaining current and accurate information about their customer transactions. S.E.R. 24-25, 54-57, 282.

The Receiver concluded that the DCOMS system was substantially more reliable than any other of defendants' systems, including its MAS-90 accounting system and its other books and records.[18] S.E.R. 25-27, 282. The Special Master found that "the DCOMS system data may not be perfect, but it is the most reliable evidence in this case to prove damages and sufficiently reliable for admissibility." E.R. 146.

Appellants argue that this testimony constituted inadmissible hearsay, because the Receiver lacked personal knowledge of how and whether all data was put into the system. App. Br. 38-40. Mr. Johnson, however, testified that he gained knowledge of DCOMS "through direct observation and from my review and consultation with staff that I supervise as part of my duties." S.E.R. 293. He consulted with his staff, which included certified public accountants and experienced forensic accountants, as well as with the person who helped to create the DCOMS system. S.E.R. 18-21, 36; E.R. 141. Based on his personal experience and knowledge of the system, Mr. Johnson believed DCOMS to be sufficiently

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[18] Appellants argued below that their MAS-90 system, that had the capability of generating accounting reports, was a more accurate database to measure their revenues. S.E.R. 14-18. However, the Special Master credited the Receiver's testimony that the accounting reports generated by MAS-90 "contradicted each other," that the system did not keep accurate track of revenues, and that sales income was not recorded. S.E.R. 54-57, 59-61, 72-75, 280-81. As the Receiver concluded, the MAS-90 system was in "complete disarray" and "woefully deficient" as an accounting tool. S.E.R. 62-65, 280-81. Appellants do not contend on appeal that the Receiver should have relied upon MAS-90 data.

trustworthy and reliable. S.E.R. 25-27, 282, 287. To the extent any of his testimony was hearsay, the surrounding circumstances show that the testimony had adequate guarantees of trustworthiness and should be admissible under Fed. R. Evid. 807.

Further, the DCOMS system constituted the defendants' own business records that they relied on in the ordinary course of business. This Court has approved calculations of a defendant's costs based on the defendant's own business records and rejected the defendant's unsubstantiated claims disputing those business records. *See FTC v. Magui Publishers, Inc.*, 9 F.3d 1551, 1993 WL 430102 at *5 (9th Cir. 1993) (unpublished opinion). Further, any uncertainty as to the accuracy of the defendants' revenue figures must be borne by the defendants because the uncertainty was due to their own poor record-keeping practices. In these circumstances, "the risk of uncertainty . . . [fall]s on the wrongdoer whose illegal conduct created the uncertainty." *Febre*, 128 F.3d at 535 (citation omitted); *see also SEC v. First Jersey Securities*, 101 F.3d 1450, 1475 (2d Cir. 1996).

Appellants' further argument that the accounting and bank records of the payment processors would be more reliable than the DCOMS data, App. Br. 40, is utter speculation. Indeed, it was in defendants' interest that the DCOMS system receive complete and accurate daily data feeds from the payment processors. Mr.

Johnson testified that there was no reason to get processor records, because he "believe[d] that we already have the records from the processors because they were sent back to the companies on a daily basis or periodically." S.E.R. 34-36. Appellants provide no reason why the Receiver should have expended significant expense to obtain processor records when virtually all such records would have already been recorded in DCOMS, and thus were already part of the evidence considered by the Receiver.

Appellants further assert that the Special Master (and the district court) should not have accepted the DCOMS revenue figures because the Receiver did not rely on those figures when they prepared the tax returns and valuations for the receivership defendants. App. Br. 41-42. Mr. Johnson stated, however, that while the appellants' MAS-90 accounting system was "woefully deficient" and "completely unreliable," outside accountants advised that the available books and records must be relied upon for purposes of filing the companies' tax returns, regardless of their serious deficiencies. S.E.R. 40-44. Indeed, the Receiver felt obligated, in doing so, to file a disclaimer with the tax returns. S.E.R. 41-43. The Receiver, however, was not constrained to rely on such unreliable books and records to calculate the defendants' revenue in this proceeding, and instead relied on the DCOMS system which he concluded, and the Special Master agreed, generated the most accurate and reliable revenue data. S.E.R. 25-27, 282; E.R. 146.

Appellants offered no evidence whatsoever at the hearing that the Receiver's figures based on the DCOMS data were inaccurate or unreliable. They failed to produce any books and records relating to the defendant corporations' finances or costs of operations, even though they were under a legal obligation pursuant to the TRO and the preliminary injunction to turn over documents to the Receiver. S.E.R. 65-68, 282. The district court did not abuse its discretion in determining defendants' gross revenues and refunds based upon the uncontroverted testimony of Mr. Johnson.

MacGregor also challenges as unreliable the Special Master's finding that defendants' cost of operations was $34,810,641, arguing that the Receiver conducted no accounting to determine actual expenses and that the figure is based on defendants' financial disclosure statements which consisted of incomplete and unverified statements. App. Br. 42-44. The Special Master considered four different cost estimates based on calculations by the Receiver. E.R. 147-49; S.E.R. 284-89. The Special Master concluded that the best estimate of the costs of operations was $34,810,641, based on financial disclosure statements for the receivership defendants that had been submitted in this proceeding in or around March 2006. The financial disclosure statements (two of which were unsigned and undated, and several of which did not contain supporting documentation), included income statements, balance sheets, trial balances, and/or tax returns of the corporate defendants.

While appellants now challenge the district court's cost calculation as unreliable, they do not argue that any other cost amount (such as one of the other three alternative approaches considered by the Receiver and Special Master) should be adopted in the alternative. Further, appellants did not object to the admissibility of the financial disclosure statements below or to the Special Master's consideration of the statements. As with the revenue data, appellants failed to produce *any* evidence of actual operating costs at the Special Master's hearing. Appellants should bear the risk of any uncertainty due to their incomplete or inaccurate records of their operating costs. *See Febre*, 128 F.3d at 535. As the Special Master concluded, the $34,810,641 cost figure is "certainly not perfect, but is the most complete and reliable among all other amounts proposed." E.R. 149.

The district court ordered the monetary judgment against MacGregor and CPI in the amount $28,233,124, essentially consisting of net revenues less cost of operations, or defendants' unjust enrichment. As discussed above, the Ninth Circuit has permitted higher monetary judgments equal to the defendant's total sales and *not* reduced by the defendant's costs in Section 5 cases. *Figgie*, 994 F.2d at 606.

The district court, therefore, had the authority to order a monetary judgment to fully redress injured consumers.[19] The district court's order imposing the lower amount of $28,233,124 equal to defendants' unjust enrichment falls well within its broad discretion to order relief to compensate injured consumers and should be affirmed.

B. The District Court Order Prohibiting MacGregor from All Telemarketing Activities and from Selling Program Memberships is Entirely Permissible

Based on its determination that MacGregor was the mastermind behind the egregious telemarketing scam, and that earlier law enforcement efforts failed to stop him, the district court imposed a permanent ban on MacGregor "from engaging or participating in telemarketing of any kind, in any manner or capacity whatsoever," and a permanent ban on MacGregor "from engaging in, participating in, assisting in, or facilitating the sale or marketing of any program memberships." E.R. 27-28. Appellants argue that these bans constitute an unconstitutional prior restraint. App. Br. 44-49. Because these bans are necessary to prevent MacGregor from engaging once again in another telemarketing or program membership scam, they are permissible and do not constitute an unconstitutional prior restraint.

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[19] The Commission argued below that the receivership defendants' legitimate costs of operations were *zero* because all costs were incurred to further the illegal telemarketing scam, and that the district court should therefore order relief equal to defendants' net revenue of $63,043,765. The Special Master and the district court rejected this argument, and the Commission did not appeal the amount of the monetary judgment ordered against the appellants.

Prior restraints "describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. U.S.*, 509 U.S. 544, 550 (1993). A permanent injunction that forbids future speech activities constitutes a prior restraint. *Id.* However, such bans are not *per se* illegal, but must be analyzed under existing First Amendment principles.

Appellants do not dispute that their telemarketing activities constitute commercial speech. As an initial matter, commercial speech that is fraudulent, misleading or related to an unlawful activity is unprotected. *Thompson v. Western States Medical Center*, 535 U.S. 357, 367 (2002); *U.S. v. Schiff*, 379 F.3d 621, 626 (9th Cir. 2004). If it is not, then a government regulation of speech is permissible if (1) "the asserted government interest is substantial"; (2) "if the regulation directly advances the government interest asserted"; and (3) if the regulation "is not more extensive than is necessary to protect that interest." *Western States*, 535 U.S. at 367; *Central Hudson Gas & Elec. Corp. v. Public Service Comm.*, 447 U.S. 457, 566 (1980). The state may impose a complete ban on commercial speech if it satisfies this test. *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 905 (9th Cir. 2007) (complete ban on off-site commercial billboards where necessary to reduce clutter and traffic hazards). "Any remedy formulated by the

FTC that is reasonably necessary to the prevention of future violations does not impinge upon constitutionally protected commercial speech." *Litton Industries, Inc. v. FTC*, 676 F.2d 364, 373 (9th Cir. 1982).

Section 13(b) of the FTC Act gives courts very broad authority "to fashion appropriate remedies for violations of the Act." *Pantron I*, 33 F.3d at 1102. Courts in equitable actions may enjoin otherwise lawful conduct that is reasonably related to unlawful acts which the court has found to be committed where there is a cognizable danger of recurrent violation to ensure that final relief is effective. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969); *U.S. v. Loew's Inc.*, 371 U.S. 38, 53 (1962). Past unlawful conduct is "highly suggestive of the likelihood of future violations." *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979). "In deciding whether to issue an injunction in light of past violations, courts should consider factors such as the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations." *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013 (N.D. Ind. 2000), *aff'd*, 312 F.3d 259 (7th Cir. 2002).

Similarly, courts have upheld broad injunctive provisions issued by the Commission administratively to bar future illegal conduct unless "the remedy selected has no reasonable relation to the unlawful practices found to exist." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965) (upholding all-products order because sufficient basis to conclude that respondent would repeat deceptive advertisements with its other products); *see also Litton Industries, Inc. v FTC,* 676 F.2d 364, 370-72 (9th Cir. 1982) (upholding multi-products order where violation was not inadvertent, was national in scope, and continued after questioned by Commission staff); *Standard Oil Co. v. FTC,* 577 F.2d 653, 662 (9th Cir. 1978). "Among the circumstances which should be considered in evaluating the relation between the order and the unlawful practice are whether the respondents acted in blatant and utter disregard of the law, and whether they had a history of engaging in unfair trade practices," *Standard Oil,* 577 F.2d at 662, and whether the deceptive conduct can easily be transferred to another product. *Litton,* 676 F.2d at 371.

Based on these standards, federal courts regularly impose permanent bans on telemarketing based on past egregious conduct. *See, e.g., FTC v. Global Marketing Group, Inc.*, No. 8:06-cv-2272-T-33TGW, 2008 WL 5553718 (M.D. Fla. 2008) (principal involved in all aspects of fraudulent telemarketing, reviewed scripts, processed funds, and handled consumer complaints and law enforcement inquiries);

Think Achievement, 144 F. Supp. 2d at 1018 ("extensive and prolonged" fraudulent telemarketing activities, failure of prior law enforcement efforts to stop unlawful activity, and likelihood of future violations); *FTC v. Wetherill*, No. CV 92-2295, 1993 WL 264557 (C.D. Cal. June 10, 1993) (ban appropriate to ensure no future violations).

Here, the district court's order imposing the permanent bans based on MacGregor's past egregious conduct and blatant disregard of the law falls well within its discretion. As the court determined in imposing the permanent bans, "Brian MacGregor ignored voluminous customer complaints and created numerous business entities to disguise his operations. Brian MacGregor also used front men to hide his ownership and control over the companies. Brian MacGregor has demonstrated a willingness to continue flouting the law even after assuring state attorney generals that he would stop." E.R. 20. The permanent injunctions are crucial to ensure that MacGregor does not continue his illegal conduct, through new corporate entities, with foreseeable ongoing consumer injury. Because the injunctive provisions are reasonably necessary to prevent future violations, the order does not constitute an unconstitutional prior restraint under the First Amendment. *See Litton*, 676 F.2d at 373-74.[20]

[20] MacGregor's supposition that the injunction would preclude involvement in "legitimate" and "worthwhile" causes (App. Br. 48) is without substance. It is

C. The District Court Orders Prohibiting Misrepresentations and Violations of the Telemarketing Sales Rule are Permissible

MacGregor also argues that the lower court's injunctions imposed on appellants against misrepresentations is somehow faulty. App. Br. 49-50. As noted, a court may impose a remedy upon a person found to have violated Section 5 unless "the remedy selected has no reasonable relation to the unlawful practices found to exist." *Colgate-Palmolive*, 380 U.S. at 394-95. This Court has long upheld injunctions against making misrepresentations related to the consumer deceptions that were found to violate Section 5. *See Goodman v. FTC*, 244 F.2d 584, 598-600 (9th Cir. 1957). As shown above, MacGregor and his telemarketing companies committed numerous and varied misrepresentations to consumers to obtain their bank account information and to debit those accounts without the consumers' express informed consent. SOF, *supra*, at 8-17. The injunction targets specific misrepresentations that are directly related to the telemarketing scam and that the district court found violated Section 5(a) of the FTC Act and the TSR. To the extent the injunction bars misrepresentations beyond those specifically found by the district court here, given the extensive and varied series of misrepresentations

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questionable whether MacGregor's example of making calls to two friends to donate to a charity would constitute a "plan, program or campaign," and thus would fall within the order's definition of "telemarketing." *See* E.R. 27; 16 C.F.R. § 310.2(cc). There is no reason to suppose that the Commission would seek or the district court would make a finding of contempt for any such activities.

MacGregor's telemarketers made to consumers, the injunction is a reasonable "fencing-in" provision that is necessary to prevent future violations and must be upheld. *See, e.g.*, *Litton Industries*, 676 F.2d at 372-73 (upholding prohibition against misrepresentations of all surveys for all respondents' products beyond particular product at issue).

MacGregor also argues erroneously that the order prohibitions against violating the TSR are improper. App. Br. 50. Prohibitions against violating the TSR are reasonably related to the court's finding that appellants violated the TSR. MacGregor improperly relies on *Standard Oil*, 577 F.2d at 661, for the proposition that such injunctions are "disfavored." The injunctions here, however, were not issued by the Commission, but by the district court, so there is no improper "transferring" of enforcement responsibilities from the agency to the courts. Further, the provisions are sufficiently clear to avoid ambiguity about their meaning. The final orders' injunctions against misrepresentations and TSR violations must be upheld.[21]

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[21] Appellants' reliance on *Country Tweeds, Inc. v. FTC*, 326 F.2d 144,149 (2d Cir. 1964), App. Br. 46, 49, is misplaced. *Country Tweeds* relied in part on the fact that the respondent had ceased the offending activity voluntarily well before the complaint was issued. *Id.* Further, *Country Tweeds* was issued prior to the Supreme Court's decision in *Colgate-Palmolive* upholding the Commission's authority to issue broad remedial orders where the offending company would likely use similar deceptions in other products.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's orders.

Respectfully submitted,

DAVID C. SHONKA
Acting General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

s/ Michael D. Bergman
MICHAEL D. BERGMAN
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3184
Fax (202) 326-2477

FAYE CHEN BARNOUW
JENNIFER M. BRENNAN
Attorneys
Federal Trade Commission
Los Angeles, CA 90024

April 2, 2009

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached corrected answering brief is proportionately spaced, has a typeface of 14 points or more and contains 13,973 words, as measured by the computer program used to prepare this brief.

Date: April 2, 2009 s/ Michael D. Bergman

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, plaintiff-appellee Federal Trade Commission is not aware of any known related case pending in this Court.

Date: April 2, 2009 s/ Michael D. Bergman

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Michael D. Bergman

No. 08-55838

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee

v.

BRIAN K. MacGREGOR, *et al.*,
Defendants-Appellants

On Appeal from the United States District Court
for the Central District of California
D.C. No. 2:06-cv-00849-GW-OP

MOTION OF PLAINTIFF-APPELLEE
FEDERAL TRADE COMMISSION TO FILE A CORRECTED BRIEF

FAYE CHEN BARNOUW
JENNIFER M. BRENNAN
Attorneys
Federal Trade Commission
Los Angeles, CA

DAVID C. SHONKA
Acting General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

MICHAEL D. BERGMAN
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3184

Pursuant to Fed. R. App. P. 27 and 28, plaintiff-appellee Federal Trade Commission ("Commission") hereby moves to file a corrected answering brief in this matter. The Commission filed its answering brief on February 18, 2009. The reply brief of defendants-appellants Brian K. MacGregor and Membership Services Direct, Inc. ("appellants") is due April 20, 2009.

The Commission has recently determined that certain record citations in its brief to its Supplemental Excerpts of Record were incorrect. It has made those corrections in the attached corrected brief. The Commission has made no other edits to the text of its brief.

Pursuant to 9th Cir. R. 27-1, on April 2, 2009, the undersigned Commission counsel gave appellants' counsel, Gary Bostwick, telephonic notice of the Commission's intention to file this motion. Mr. Bostwick stated that he had no objection to this motion if Commission counsel sent to him the changes in the record citations from the original February 18, 2009 brief (which Commission counsel will do shortly), accurately described the nature of those changes, and the number of changes does not impose a great burden on appellants.

The Commission respectfully requests that the Court accept for filing its corrected brief.

Respectfully submitted,

DAVID C. SHONKA
Acting General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

s/ Michael D. Bergman
MICHAEL D. BERGMAN
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3184
Fax (202) 326-2477

FAYE CHEN BARNOUW
JENNIFER M. BRENNAN
Attorneys
Federal Trade Commission
Los Angeles, CA 90024

April 2, 2009

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Michael D. Bergman