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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DESIREE MOORE and KAREN JONES individually and on behalf of a class of similarly situated individuals,

Plaintiffs,

vs.

VERIZON COMMUNICATIONS INC., VERIZON CALIFORNIA, INC., VERIZON CORPORATE SERVICES GROUP INC., VERIZON SERVICES CORP., TELESECTOR RESOURCES GROUP, INC. d/b/a VERIZON SERVICES GROUP, VERIZON SERVICES OPERATIONS INC., VERIZON SERVICES ORGANIZATION, INC., VERIZON CORPORATE SERVICES CORP., VERIZON DATA SERVICES, INC., AND DOES 1 through 25,

Defendants.

Case No. CV 09-1823 SBA

MOTION OF FEDERAL TRADE COMMISSION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Hon. Saundra Brown Armstrong

The Federal Trade Commission ("FTC") requests leave of Court to file the attached Brief as *Amicus Curiae*. The FTC – one of the nation's chief consumer protection agencies – has a broad mandate to prevent "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45 (a). As part of its mission, the FTC seeks to halt the placement of unauthorized

1 charges on consumers' phone bills – a practice known as cramming. The Commission has
2 brought dozens of cases against third-party marketers and aggregators who wrongly billed
3 consumers without their knowledge[1] and, through its ongoing contempt case against Billing
4 Services Group ("BSG"), seeks to hold an aggregator in contempt for placing more than $70
5 million in unauthorized charges on consumers' phone bills.[2] The FTC thus has considerable
6 expertise in issues related to cramming that may be useful to this Court in evaluating whether the
7 settlement in this case is fair, reasonable, and adequate.

8 The FTC has also studied how to best protect consumer interests and other fairness issues
9 in the class action context and has a tradition of filing amicus briefs commenting on potentially
10 unfair class settlements.[3] Moreover, in contrast to the parties to this litigation, who represent
11 their own interests, the FTC represents the public interest. Indeed, the distinction between public
12 and private interests – and its implications for aiding the court – is evidenced, *inter alia*, by the
13 fact that in the courts of appeals, where *amicus* briefs are routinely filed, a United States agency
14 like the Commission may file an *amicus curiae* brief as a matter of right, whereas non-
15 government *amicus curiae* are required to obtain either consent of the parties or leave of the
16 court. *See* FRAP Rule 29. Moreover, as outlined in the FTC's brief, the settlement has serious
17 implications for consumers that the parties have not addressed, including an overly broad release
18 that encompasses not only Verizon but also aggregators (including BSG) and unidentified third-
19
20 [1] *See e.g., FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975 (N.D. Cal. 2010), *aff'd* No. 11-5330, 2012 WL 1065543
21 (9th Cir. Mar. 30, 2012); Stipulated Order, *FTC v. Nationwide Connections and BSG Clearing Solutions*, No. 06-
22 80180 (S.D. Fla. Sept. 18, 2008); Stipulated Order, *FTC v. Websource Media, LLC*, No. H-06-1980 (S.D. Tex. July
23 17, 2007); *FTC v. Cyberspace.com*, No. C00-1806L, 2002 WL 32060289 (W.D. Wash. July 10, 2002), *aff'd* 453 F.3d 1196 (9th Cir. 2006); Stipulated Order, *FTC v. Epixtar Corp.*, No. 03-8511 (S.D.N.Y. Nov. 29, 2006); Stipulated Orders, FTC v. 800 Connect, Inc., No. 03-CIV-60150 (S.D. Fla. Feb. 4, 2003); Stipulated Order, *FTC v. Access Resources Servs., Inc.*, No. 02-CIV-60336 (S.D. Fla. Nov. 4, 2002).

24 [2] *See* FTC's Mot. for an Order to Show Cause Why Billing Servs. Grp. Ltd.; Billing Servs. Grp. N. America, Inc.;
25 HBS Billing Servs. Co.; Enhanced Billing Servs., Inc.; Billing Concepts, Inc.; and ACI Billing Servs., Inc. Should Not Be Held in Contempt, *FTC v. Hold Billing Servs.*, No. SA-98-CA-0629-FB (W.D. Tex. Mar. 28, 2012), ECF No. 65.

26 [3] For example, the FTC recently filed a brief in *Vassalle v. Midland Funding*. *See* FTC's Brief as Amicus Curiae,
27 *Vassalle v. Midland Funding*, 3:11-cv-00096 (N.D. Oh. June 11, 2011), available at http://www ftc.gov/
28 os/2011/06/110621midlandfunding.pdf (challenging, among other things, a broad release of claims). For a list of additional *amicus* filings, see http://www ftc.gov/bcp/workshops/classaction/index.shtm.

1 party merchants; the fact that the release operates against the entire class irrespective of whether
2 a class member obtains redress under the settlement; and an arduous claims process that, among
3 other things, allows the parties that wrongfully billed consumers in the first place to challenge
4 consumer claims based on unreliable – and often falsified – records.[4] In addition, the settlement
5 may impair the Commission's ability to provide redress to consumers through its enforcement
6 actions.
7 The FTC's focus on consumer welfare, objectivity, and subject matter expertise make it
8 uniquely situated to comment on the settlement in this case. Accordingly, the court should grant
9 it *amicus* status.[5] *See e.g., Woodfin Suite Hotels, LLC v. City of Emeryville*, No. C-06-1254,
10 2007 WL 81911, at *3 (N.D. Cal. Jan. 9, 2007) (Armstrong, J.) (explaining that "an individual
11 seeking to appear as amicus must merely make a showing that his participation is useful or
12 otherwise desirable to the court.") (internal citations and quotations omitted); *Sonoma Falls*
13 *Developers, LLC v. Nevada Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003)
14 (explaining that *amicus* status may be granted "concerning legal issues that have potential
15 ramifications beyond the parties directly involved or if the amicus has 'unique information or
16 perspective that can help the court beyond the help that lawyers for the parties are able to
17 provide.'") (internal citations omitted). *Cf. In re Roxford Foods Litig.*, 790 F. Supp. 987, 997
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[4] The FTC, Plaintiffs' counsel, and Verizon's counsel discussed issues raised in the attached *amicus* brief but were unable to reach a resolution.

[5] The FTC also requests that the Court allow it to appear at the Final Approval Hearing.

1 (E.D. Cal. 1991) (granting *amicus* status to a government agency where, among other things,
2 agency had oversight authority of act being interpreted).
3
4 Dated: August 17, 2012 Respectfully submitted,
5
 /s/ Robin L. Moore
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CERTIFICATE OF SERVICE

I am a resident of the District of Columbia and over the age of 18 years, and I am not a party to this action. My business address is 600 Pennsylvania Avenue, N.W., M-8102B, Washington, DC 20580. On August 17, 2012, I served the foregoing MOTION OF FEDERAL TRADE COMMISSION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE and the attached FEDERAL TRADE COMMISSION'S MEMORANDUM OF LAW AS AMICUS CURIAE by filing the document electronically with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to:

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DESIREE MOORE and KAREN JONES individually and on behalf of a class of similarly situated individuals, Plaintiffs, vs. VERIZON COMMUNICATIONS INC., VERIZON CALIFORNIA, INC., VERIZON CORPORATE SERVICES GROUP INC., VERIZON SERVICES CORP., TELESECTOR RESOURCES GROUP, INC. d/b/a VERIZON SERVICES GROUP, VERIZON SERVICES OPERATIONS INC., VERIZON SERVICES ORGANIZATION, INC., VERIZON CORPORATE SERVICES CORP., VERIZON DATA SERVICES, INC., AND DOES 1 through 25, Defendants.	Case No. CV 09-1823 SBA FEDERAL TRADE COMMISSION'S MEMORANDUM OF LAW AS AMICUS CURIAE Hon. Saundra Brown Armstrong

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Table of Contents

I. The FTC's Interest in This Matter 2
II. The Allegations Against Verizon and the Terms of the Settlement 3
III. The Settlement Is Inadequate. 6
A. The Structure of the Settlement Is Flawed. 6
B. The Procedure for Challenging Full Restitution Claims Unduly Burdens Class Members. 10
C. The Notices of Settlement Are Flawed. 13
D. The Injunctive Relief Does Not Protect Consumers from Cramming. 14
E. The Attorneys' Fees Raise Concerns. 17
IV. The Defined Class Does Not Meet Rule 23's Requirements. 18
V. The Settlement Implicates Important Public Policy Issues 19
VI. Conclusion 21

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Unauthorized Charges on Telephone Bills: Why Crammers Win and Consumers Lose, Hearing Before the S. Comm. on Commerce, Science, and Transportation, 112th Cong. (2011), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112shrg71640/pdf/CHRG-112shrg71640.pdf 14

Rules

Fed. R. Civ. P. 23(c)(2)(B) 13

Fed. R. Civ. P. 23(e) 6

1 The Federal Trade Commission ("FTC") opposes the pending class action settlement in
2 this case because it is not fundamentally fair, adequate, and reasonable. Specifically, the
3 settlement provides only illusory recovery for most consumers who have had unauthorized
4 charges placed on their phone bills (a practice known as "cramming"), does not prevent future
5 cramming, fails to provide consumers with adequate notice, and undermines the public interest.
6 Moreover, the proposed settlement handsomely rewards Plaintiffs' counsel without providing
7 adequate safeguards to ensure that consumers are adequately compensated. The central problem
8 with the settlement lies in its broad release – which forecloses class members who fail to opt out
9 of the settlement from asserting claims against Verizon and numerous unnamed non-parties.
10 These consumers waive any ability to recover their losses despite the fact that they did not obtain
11 financial recovery under the settlement.

12 Indeed, because cramming is designed to escape consumers' notice, the vast majority of
13 consumers have no idea that they have been wrongfully billed and thus are likely to disregard a
14 notice of settlement related to such charges. This hurdle to class recovery would be bad enough,
15 but the settlement also contemplates an arduous claims process that creates significant barriers to
16 recovery and a notice that does not clearly inform class members about the breadth of the parties
17 released. Compounding the problem, the notice also fails to identify other avenues class
18 members may have for recovery, such as through ongoing Federal Trade Commission litigation,
19 and fails to explain what, if any, impact the settlement would have on a class member's rights to
20 restitution from such an action.

21 Finally, the settlement may impair the FTC's ability to provide redress to consumers who
22 have been harmed by unauthorized billing. Such a result is particularly troublesome where, as
23 here, the class members have been victims of fraud and the release operates against them
24 regardless of whether they have obtained financial redress for their harm. For all these reasons,
25 the Commission asks the Court to reject the proposed settlement.
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I. The FTC's Interest in This Matter

The FTC is an independent federal law enforcement agency whose mission is to protect consumers from unfair or deceptive acts or practices and to increase consumer choice by promoting vigorous competition. The Commission's primary legislative mandate is to enforce the FTC Act, 15 U.S.C. §§ 41-58, which prohibits unfair or deceptive acts or practices and unfair methods of competition in or affecting commerce. This amicus brief is based on the Commission's extensive experience prosecuting unfair and deceptive acts or practices, including particular experience with regard to unauthorized billing through Local Exchange Carriers ("LECs"), and its interest in ensuring that class action settlements provide appropriate relief for consumers.

As part of the Commission's consumer protection mission, the Commission seeks to halt cramming and redress victimized consumers. Cramming thrives because consumers are unaware that they have been charged. In the FTC's recent *Inc21.com* case, for example, Judge Alsup found that a mere five percent of the defendants' so-called customers were aware of the defendants' charges. *FTC v. Inc21.com*, 745 F. Supp. 2d 975, 996 (N.D. Cal. 2010), *aff'd* No. 11–15330, 2012 WL 1065543 (9th Cir. Mar. 30, 2012). An even smaller percentage of consumers actually use the purported services for which they are billed – a point that underscores that consumers do not knowingly purchase – or want – such services.[1] Indeed, a recent Senate report found usage rates of approximately one to two percent, *see* Senate Report at 27, a result consistent with a contempt case recently filed by the FTC, where the evidence shows consumer usage rates well below one percent.[2]

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[1] STAFF OF S. COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, UNAUTHORIZED CHARGES ON TELEPHONE BILLS 27-28 (2011), available at http://commerce.senate.gov/public/?a=Files. Serve&File_id=9d4113ed-7e9f-40be-9e57-e65016d370de ("Senate Report").

[2] *See* FTC's Mot. for an Order to Show Cause Why Billing Servs. Grp. Ltd.; Billing Servs. Grp. N. America, Inc.; HBS Billing Servs. Co.; Enhanced Billing Servs., Inc.; Billing Concepts, Inc.; and ACI Billing Servs., Inc. Should Not Be Held in Contempt at 4-5, 11-12, *FTC v. Hold Billing Servs.*, No. SA-98-CA-0629-FB (W.D. Tex. Mar. 28, 2012) (describing usage rates of .01 percent for streaming video services) ("BSG Contempt Motion" or "BSG contempt litigation") (attached as Exhibit 1).

1 The Commission has already brought dozens of cases against third-party marketers and
2 billing aggregators[3] who have engaged in cramming[4] and will likely bring more. Indeed, through
3 its ongoing contempt case against Billing Services Group ("BSG"), the FTC seeks to hold an
4 aggregator in contempt for placing more than $70 million in unauthorized charges on consumers'
5 phone bills. The settlement here undermines these efforts by allowing Verizon, these
6 Aggregators, and these Third-Party Service Providers to purchase broad *res judicata* at bargain-
7 basement prices.[5] Specifically, the settlement may foreclose not only those consumers who fail
8 to opt out of it but also may impair the Commission's ability to provide redress to consumers
9 through its enforcement actions.[6] Such a result would not provide sufficient relief to consumers
10 in this class action and could impede important federal enforcement objectives.

11 **II. The Allegations Against Verizon and the Terms of the Settlement**

12 Plaintiffs allege that Verizon, through its third-party billing and collection system, has
13 allowed aggregators and third-party merchants to perpetrate massive fraud on its customers.
14 Plaintiffs allege, among other things, that Verizon failed to ensure that such third-party charges
15 were authorized by consumers, relied on the aggregators and third-party merchants for consumer
16 authorizations, and described such charges on consumers' phone bills in a misleading and

17
[3] Billing aggregators serve as intermediaries between the vendors and the LECs. They contract with the LECs for
18 billing and collection, and they contract with vendors to submit vendors' billing applications to the LECs.

19 [4] *See, e.g., FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975 (N.D. Cal. 2010), *aff'd* No. 11-5330, 2012 WL 1065543
(9th Cir. Mar. 30, 2012); Stipulated Order, *FTC v. Nationwide Connections, Inc.,* No. 06-80180 (S.D. Fla. Sept. 18,
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22 CIV-60150 (S.D. Fla. Feb. 4, 2003); Stipulated Order, *FTC v. Access Resources Servs., Inc.*, No. 02-CIV-60336
(S.D. Fla. Nov. 4, 2002).

23
[5] The term "Third-Party Service Provider(s)" is defined in the settlement as "any Person whose charges were billed
24 by Verizon to the Settlement Class through an Aggregator." Stipulation and Settlement Agreement at Definition 45,
ECF No. 91-1 ("Settlement Agreement"). The term "Aggregators" means "Billing Concepts, Inc. a/k/a Billing
25 Services Group Clearing Solutions or BSG d/b/a USBI and ZPDI, ACI Billing Services Inc. d/b/a OAN, Enhanced
Services Billing, Inc. d/b/a ESBI, and HBS Billing Services Company (collectively, "Billing Concepts Inc."), The
26 Billing Resource d/b/a Integretel ("The Billing Resource"), ILD Teleservices, Inc., ("ILD"), Transaction Clearing,
LLC ("Transaction Clearing") and PaymentOne Corp., d/b/a PaymentOne or Ebillit ("Payment One") or any of
27 them." *Id.* at Definition 2.

28 [6] *See* Section V, *infra*.

1 deceptive manner. Second Am. Compl. ¶¶ 54-55, 65, ECF No. 101. The settlement, if
2 approved, would provide financial recovery only to those few class members who file a
3 successful claim and injunctive relief that is likely ineffective.

4 The settlement provides two types of payments to class members who were charged
5 without their authorization. Class members may submit a claim to obtain a $40 flat payment (an
6 amount that appears to have been pulled out of thin air and likely understates significantly
7 average consumer loss) or a claim for full reimbursement for all documented unauthorized
8 charges. To make either claim, the class member must obtain a form (which is not included in
9 the settlement notice) and submit it electronically or through the mail to the Settlement
10 Administrator. Claimants also must verify under penalty of perjury that they paid for the Third-
11 Party Charges, did not authorize the charges, did not receive a full refund of the charges, did not
12 intentionally use the service associated with the charges, and did not release claims related to the
13 charges.

14 Verizon, the Aggregators, and/or unnamed Third-Party Service Providers may challenge
15 both types of claims for a variety of reasons[7] and may challenge a full payment claim by
16 providing a letter of authorization ("LOA"), a third-party verification ("TPV") recording
17 authorizing the charges, or other evidence showing authorization. Once a claim is approved,
18 Verizon must cease billing for the claimed charges and provide the funds to the Settlement
19 Administrator, who will mail settlement checks to the claimants. However, if the claimant is a
20 current customer, Verizon, at its option, may provide a bill credit to the claimant.[8]

21 Class members who do not submit a claim will not receive any financial compensation.
22 However, they will nonetheless be bound by the settlement and deemed to have released their
23 claims, unless they affirmatively opt out of it. The settlement releases, among other things, the
24 class members' claims against the Verizon defendants, Aggregators, and Third-Party Service
25

26 [7] The challenging party may submit records that show that the claimant did not pay the Third-Party Charges,
27 received a refund for the Third-Party Charges, released claims related to the Third-Party Charges in prior litigation, or used the product or service.

28 [8] The funds represented by uncashed checks will be returned to Verizon for a *cy pres* distribution.

1 Providers arising out of or related to Third-Party Charges billed by Verizon on behalf of the
2 Aggregators for the class period. These released Aggregators and Third-Party Service Providers,
3 of course, are the parties alleged to have fraudulently billed consumers through Verizon in the
4 first place. Moreover, these Third-Party Service Providers are not even identified in the
5 settlement notice, which, as discussed below, makes it impossible for consumers to make an
6 informed decision about releasing their claims against them.

7 To effectuate notice of the settlement, Verizon will use an agreed-upon or approved
8 search methodology of its electronic billing records to identify class members, who will receive a
9 bill stuffer notice, e-mail, or postcard. In addition, the settlement requires Verizon to publish a
10 notice in two issues of USA Today and provide a notice of the settlement on its website with a
11 link to the settlement website. These notices, however, do not make clear the scope of claims
12 being released. Indeed, the only reference to the broad releases discussed above are oblique
13 statements that class members who choose to do nothing relinquish the "right to sue Defendants
14 and other released entities" or will be bound by the settlement and "release claims against
15 Released Persons, as defined in the Settlement Agreement." Settlement Agreement at Exh. C at
16 3; Exh. D at 4; Exh. E at 2; Exh. F; Exh. G at 1. Moreover, Exhibit E, which appears to be the
17 full notice, has inconsistencies regarding the scope of claims released – stating in one place that
18 consumers who take no action give up the "right to sue Defendants and other released entities"
19 and in another that consumers give up the right to sue Verizon. *See id.* at Exhibit E at 2, 11.

20 Finally, the injunctive relief requires Verizon to provide consumers with notices aimed at
21 allowing consumers to discover – and halt – fraudulent charges on their telephone bills. For
22 example, the settlement requires Verizon to send its current customers bill stuffer notices
23 informing them that Third-Party Charges *may* appear on their phone bill and that they have the
24 option to block such charges. Similarly, Verizon must inform new customers that their accounts
25 are subject to Third-Party Charges and give customers an ability to block third-party billing. If
26 these customers fail to block such billing when their account is established, they are in no
27 different position than Verizon's current customers and merely will receive annual notices that
28 their accounts are subject to Third-Party Charges. Finally, the settlement requires Verizon to

1 make Aggregators – who cause consumers' accounts to be charged in the first place – send
2 confirmation letters to consumers they bill for new services resulting in Third-Party Charges.

3 **III. The Settlement Is Inadequate.**

4 A class settlement must be "fundamentally fair, adequate, and reasonable" to gain district
5 court approval. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *see also* Fed. R.
6 Civ. P. 23(e). Moreover, where, as here, the settlement is reached prior to class certification, its
7 approval requires a "more probing inquiry than may normally be required under Rule 23(e)."
8 *Hanlon*, 150 F.3d at 1026 (collecting cases); *see also In re Bluetooth Headset Prods. Liab. Litig.*,
9 654 F.3d 935, 946-47 (9th Cir. 2011) (holding that agreements made prior to formal class
10 certification "must withstand an even higher level of scrutiny for evidence of collusion or other
11 conflicts of interest than is ordinarily required under Rule 23(e) . . ."). Here, the settlement falls
12 well short of Rule 23's standard for three reasons. First, it couples an arduous claims process
13 with a broad release that forecloses class members' claims irrespective of whether they obtain
14 any financial recovery under the settlement. Second, the settlement notices are insufficient. The
15 notices do not identify the vast array of non-party entities the settlement releases. They also do
16 not inform class members that failure affirmatively to opt out of the settlement may impact other
17 avenues of compensation available to them, such as the Federal Trade Commission's recent BSG
18 contempt litigation. Third, the injunctive relief – which largely relies on notices – places the
19 burden of discovering and halting cramming on consumers and, indeed, could not have been
20 designed to be less effective. Because the structure of the settlement does not protect the class
21 members' monetary interests, the settlement notices do not adequately provide consumers with
22 adequate information, and the injunctive relief will not prevent future cramming, the settlement
23 should be rejected.

24 **A. The Structure of the Settlement Is Flawed.**

25 The settlement's requirement that Verizon pay only those class members whose claims
26 are approved, coupled with its arduous claims process and blanket release of claims from the
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1 entire class, does not protect the interests of the class as a whole.[9] As one court in this Circuit
2 has explained, releases that are not tied to class members' receiving compensation give the
3 defendant "an incentive to suppress the number of claimants by undertaking minimal notice
4 procedures and making the process for submitting Proofs of Claim unduly difficult." *Kagan v.*
5 *Wachovia Secs., LLC*, Nos. 09-5337 SC, 11-0412 SC, 2012 WL 1109987, at *7 (N.D. Cal. Apr.
6 2, 2012); *see also Walter v. Hughes Commc'ns, Inc.*, No. 09-2136, 2011 WL 2650711, at *11
7 (N.D. Cal. Jul. 6, 2011) (finding that a settlement contains "no structural protections of the
8 interests of the class as a whole" where, among other things, a defendant receives a release
9 regardless of whether claims were submitted or funds were distributed to the class). These are
10 the exact concerns presented by the current settlement. The settlement releases claims for
11 Verizon and a vast array of fraudulent actors whether or not consumers obtain compensation.
12 Given this fact, it is hardly surprising that the notice is ineffective and the claims process arduous
13 – terms that ensure that few, if any, consumers are likely to receive any compensation at all.
14 The notice – which comes primarily in the form of a bill stuffer for Verizon's current
15 customers – is likely to be overlooked by consumers.[10] Cramming succeeds because, as
16 Plaintiffs concede, "most people – upwards of 95% – do not even realize that the charges have
17 been placed on their bills. . . ." Pls.' Notice of Mot. and Mot. for Prelim. Approval of Class
18 Action Settlement; Mem. of Points and Authorities in Support Thereof 2, ECF No. 91 (emphasis
19 omitted) ("Motion for Approval"); *see also Inc21.com*, 745 F. Supp. 2d at 996 (finding that only
20 5% of defendants' customers were aware of defendants' charges). Indeed, consumers who do
21 not scrutinize their bills for bogus charges are even less likely to read a bill stuffer notice –
22 especially since such notices are usually advertisements. Moreover, the notices do not identify
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24 [9] The fact that consumers may opt out of the settlement does not resolve the settlement's defects. As one court in this Circuit has found, "common sense and empirical study admonish that any belief that a significant number of
25 class members would [opt out] is ill-founded." *Acosta v. Trans Union LLC*, 243 F.R.D. 377, 389 (C.D. Cal. 2007). Thus, courts have rejected the notion that an opt-out provision cures an otherwise defective settlement. *See id.* at
26 389-90; *Zimmerman v. Zwicker*, No. 09-3905, 2011 WL 65912, at *8 (D.N.J. Jan. 10, 2011).

27 [10] Verizon customers who receive Verizon e-bills will receive an e-mail notice. *See* Settlement Agreement at § III.A.3.b. In addition, Verizon will send an e-mail notice to current customers on the Settlement Class List for
28 whom Verizon has e-mail addresses. *See id.* at § III.A.4.

1 any of the Third-Party Service Providers released by the settlement and do not correctly identify
2 Aggregators released by the settlement – flaws which make it more difficult for consumers to
3 discover that they have been wrongfully billed.[11] Finally, crammers employ deceptive and
4 unfair marketing to dupe consumers into providing so-called authorizations and, in many
5 instances, falsify documents or voice recordings to persuade complaining consumers that they
6 agreed to the charges.[12] Accordingly, consumers who receive notice of these unauthorized
7 charges are likely to simply disregard them, erroneously believing that they are not entitled to
8 relief.[13]
9 The settlement also requires class members seeking to file either type of claim to verify
10 numerous statements under penalty of perjury, and, if necessary, fight a challenge by the entities
11 that wrongly billed them – hurdles that are likely to block valid claims. For example, two
12 averments required by the claims form – that the claimant was billed for charges and did not
13 knowingly authorize them – implicate the heart of the cramming problem. As discussed above,
14 cramming victims do not know they have been wrongly charged or, in some instances, have been
15 fraudulently told that they authorized the bogus charges. Thus, when faced with these
16 averments, a large number of consumers are likely to forego the claims process altogether,
17 wrongly believing that they do not meet these two requirements. Moreover, those engaged in
18 fraudulent billing frequently change their names to continue their fraudulent enterprise because
19 they exceed the LECs' cramming complaint levels and are banned from billing through them.
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21 [11] Although the notices identify some aggregators in a section that defines the settlement class, they do not correctly
22 identify aggregators' names (there is no entity known as "Billing Services Group Clearing Solutions"). Nor do the notices correctly identify all names that appear on telephone bills. For example, BSG bills in the name "OAN
23 Services Inc.," not "OAN," as identified in the notice. Moreover, the aggregators are not identified on the notices as "released entities" or "Released Persons." Thus, even if class members are aware that Verizon billed on behalf of
24 the Aggregators, there is nothing in the notice to alert them that their claims against the Aggregators will be released.
25 [12] *See* Senate Report at 12, 15-16; *Inc21.com*, 745 F. Supp. 2d at 990-92 (discussing manipulation and falsification of TPV recordings); BSG Contempt Motion at 9-11, 19-20 (describing an aggregator's use of LOAs that consumers
26 never saw as proof to complaining consumers that they authorized the contested charges).
27 [13] Indeed, even in non-cramming cases, average claim submission rates are extremely low and can easily fall within a range of "ten percent or less." *Walter*, 2011 WL 2650711, at *13 (collecting cases with settlement claims
28 submission rates of 0.1 percent to 9.7 percent).

1 *See Inc21.com*, 745 F. Supp. 2d at 997-98 (describing misrepresentations and falsified LEC
2 billing applications used by defendants to "circumvent[] safeguards designed to prevent known
3 fraudsters from re-entering the LEC billing industry using 'new' products and business entities").
4 This ever-morphing slate of entities that appear on consumers' phone bills is likely to confuse
5 consumers and further deter them from filing a claim, especially where consumers must swear
6 under penalty of perjury that they were billed for charges that they did not knowingly authorize.
7 Assuming consumers decide to investigate whether they have been fraudulently charged,
8 they must obtain and review their bills for a seven-year period to determine whether they were
9 wrongfully charged.[14] The claim form also requires class members to investigate whether they
10 received a refund or intentionally used the services for which they were billed. Finally, the claim
11 form requires claimants to attest to a legal conclusion – namely, that they have not released their
12 claims through prior litigation. This last requirement – which would, among other things,
13 require consumers to know whether they were included in a prior class – is likely to confuse
14 consumers and dissuade them from filing a claim for payment. Because class members are likely
15 to weigh the cash benefit against the amount of effort required to submit a claim, s*ee Walter*,
16 2011 WL 2650711, at *15, the time-consuming and confusing attestations required by the claim
17 form will likely impede class members from filing a claim and thus lower the class' recovery.
18 Balancing the likelihood that the vast majority of consumers will not obtain restitution
19 under the settlement against the extremely low incidence of legitimate Third-Party Charges, the
20 only fair, reasonable, and adequate method for providing monetary relief is to eliminate the
21 claims process and provide refunds to consumers who paid such charges unless there is reliable
22 evidence that the consumer actually used the product.[15] This approach more closely aligns the
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[14] Consumers wishing to file a Full Payment Claim may also obtain charge summaries from Verizon.

[15] Because the fraudulent billing alleged in this case typically emanates from the same Third-Party Service Providers that have the consumer usage data, an independent third party, such as the Settlement Administrator, should review and decide the reliability of any evidence submitted to exclude consumers from recovery based on their use of the product or service. Indeed, in *United States v. Saferstein*, a parallel criminal action to the FTC's *Mercury Mktg*. cramming case, the CEO and CIO were indicted for conspiring to commit perjury through the CIO's false testimony about the number of consumers who used the company's services. *See* Indictment, *United States v. Saferstein*, Crim. No. 07-CR-557 (E.D. Pa. July 17, 2007) 13-15, ECF No. 1. The CIO pleaded guilty to this count. *See* Minute Entry, *United States v. Saferstein*, Crim. No. 07-CR-557 (E.D. Pa. Nov. 16, 2007), ECF No. 52 (entering guilty plea).

1 monetary relief with the reality that the vast majority of consumers who paid Third-Party
2 Charges did not authorize them, have never used the so-called products or services, and would be
3 entitled to recovery under a fair claims process. *See* Senate Report at 27 (describing low usage
4 rates as "strong evidence that consumers did not knowingly purchase the services" for which
5 they were billed); *Inc21.com*, 745 F. Supp. 2d at 1000-01 (finding that, on average, 97 percent of
6 consumers had not agreed to purchase defendants' products). It also places the burden of
7 establishing whether consumers have been billed fraudulently on the parties with the best
8 information – those who billed the consumers in the first place. For example, Verizon has the
9 best information about the Third-Party Charges consumers paid and were refunded.[16] Similarly,
10 the Third-Party Service Providers have the ability to determine whether consumers actually used
11 the products for which they were billed. Moreover, providing a simple refund will solve the
12 structural flaw in the current settlement that allows Verizon, the Aggregators, and the Third-
13 Party Service Providers to obtain a release from the entire class while paying out claims to only a
14 perseverant few.[17]

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16 **B. The Procedure for Challenging Full Restitution Claims Unduly Burdens Class Members.**

17 Allowing Verizon, the Aggregators, and the Third-Party Service Providers to challenge
18 claims for full compensation by presenting an LOA or TPV recording serves no legitimate
19 purpose and will frustrate consumers' efforts to recover the money fraudulently taken from them.
20 Indeed, LOAs and TPV recordings are meant to address a single issue – whether the consumer
21 actually authorized the charge. As discussed above, however, the settlement already requires

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23 [16] That Verizon has the best information about the charges is contemplated by the provision of the settlement that allows consumers to request their billing records. *See* Settlement Agreement at §I.B. Moreover, the settlement
24 contemplates that Verizon, the Aggregators, and the Third-Party Service Providers have the records necessary to
25 mount a credible challenge to any claim and thus should be able to use these same records, with one exception, to affirmatively determine which consumers were crammed and which of those crammed consumers received a refund.
26 The FTC stresses that letters of authorization ("LOAs") or third-party verification ("TPV") recordings – standing alone – should not be used as proof of authorization due to the rampant fraud associated with them. *See* Section
27 III.B, *infra*.

28 [17] This approach would also solve other problems with the settlement, such as the use of LOAs, TPV recordings, or billing data to challenge consumer claims and the flawed notice to consumers, discussed below.

1 consumers to certify – under penalty of perjury – that they did not authorize the charges.
2 Moreover, those engaged in cramming often fabricate or manipulate LOAs and TPV recordings
3 to convince consumers that their charges are legitimate. *See* Senate Report at 12, 15-16
4 (discussing unreliability of LOAs and practice of falsifying TPV recordings); *Inc21.com*, 745 F.
5 Supp. 2d at 990-92, 996 (finding that TPV recordings had been fabricated and manipulated).[18]
6 Given the unreliable nature of these records and the extremely low incidence of consumers who
7 authorize such third-party charges, requiring consumers to rebut the LOAs and TPV recordings
8 erects unfair – and needless – hurdles to recovery.[19] First, consumers must discover that their
9 claim has been challenged and determine how to respond to the challenge. The Settlement
10 Agreement does not specify how consumers will be informed of the challenge or what
11 information they will be provided regarding how to respond to the challenge.[20] Thus, it is
12 impossible to evaluate whether consumers whose claims are challenged will even be aware that
13 they need to rebut such a challenge. Second, because consumers are unlikely to have the
14 wherewithal – or incentive – to prove the falsity of the LOAs and TPV recordings, their rebuttal
15 will likely rest on swearing *for a second time* that they did not authorize the charges – a prospect
16 many consumers may conclude is fruitless and, accordingly, forego. Both of these hurdles likely
17 will reduce the number of consumers who participate in the rebuttal process and, accordingly,
18 could depress the number of successful claims irrespective of their merits. Indeed, even those

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[18] *See also* Press Release, U.S. Dep't of Justice, President of Telemarketing Fraud Business Pleads Guilty (Oct. 30, 2009), http://www.justice.gov/usao/pae/News/2009/oct/safersteinplearelease.pdf (describing the creation of "fake sales-verification tapes" that purported to show consumers' consent as part of the cramming scam).

[19] Enhanced Services Billing Inc. ("ESBI"), a subsidiary of BSG, recently made clear that it plans to challenge Full Payment Claims "rigorously . . . to show that the charges were indeed authorized . . . ." ESBI's Application for Leave to File Supplemental Brief Exh. 1, at 7-8 n.6, ECF No. 125-1. It further explained that "[p]ursuant to ESBI's contracts with its clients, ESBI's clients are required to be able to provide proof of authorization for each charge. Based upon this contractual framework, ESBI believes it will be able to prove that many of the disputed third-party charges were authorized by the consumer." *Id.* Indeed, it appears that ESBI plans to challenge as many consumer claims as possible with these unreliable LOAs and TPV recordings, adding an additional – and unfair – hurdle to consumers' recovery.

[20] Although the Settlement Agreement provides that consumers may use "evidence and/or further sworn testimony" to rebut challenges, *see* Settlement Agreement at § I.D.4, consumers are unlikely to locate the Settlement Agreement and peruse its contents to figure out how to respond to a challenge. Moreover, although the Settlement Agreement requires the challenge to be sent to Class Counsel, *see id.* at § I.D.3, there is no requirement that Class Counsel contact consumers to ensure that they know of, and how to respond to, the challenge.

1 consumers who complete the process are not assured victory – rather, their claims simply will be
2 sent to the Settlement Administrator or the Court to resolve. *See* Settlement Agreement § I.D.5.
3 Similarly, the provision that allows a challenge based on "other evidence showing that
4 the claimed charges were authorized," Settlement Agreement at § I.D.2, is overly broad and is
5 likely to result in challenges based on records that have nothing to do with whether a consumer
6 actually authorized the charges. For example, BSG receives billing data from Third-Party
7 Service Providers that includes coding regarding whether the charges were authorized as well as
8 other billing information, such as the consumer's telephone number.[21] It appears that BSG treats
9 a charge as "authorized" – and thus eligible to be forwarded to a LEC for billing – so long as the
10 coding indicates that the charge is authorized and other billing information, such as the
11 consumer's telephone number, appears valid.[22] Because simply validating a consumer's billing
12 information – much of which is public – says nothing about whether a consumer actually
13 authorized the charge, such data amounts to nothing more than the Third-Party Service
14 Providers' averment that the charge is legitimate. Indeed, that this data (and the so-called
15 verification process used by aggregators) has nothing to do with a consumer's actual
16 authorization is borne out by the staggering percentage of consumers who do not know they have
17 been billed and, in fact, never use the product or service for which they are charged. *See* Section
18 III.A, *supra.* Moreover, because the Aggregators require this data from the Third-Party Service
19 Providers as part of the billing process, they likely have it for every consumer that was billed and
20 could use it to rebut any consumer claim, resulting in a *de facto* additional step that consumers
21 must take to rebut this so-called evidence. Allowing challenges based on such self-serving – and
22 unreliable – information thus imposes unnecessary costs on consumers, likely reduces the
23 number of claims, and serves no legitimate benefit.
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[21] *See* Plaintiff's Combined Appendix of Evidence in Support of: (1) Consolidated Reply in Support of Plaintiff's Motion for Class Certification, and (2) Response in Opposition to ESBI's Motion for Summary Judgment Exh. A at 37:21–39:6; 41:11–42:20; 63:9–64:13*, Lady Di's Inc., v. Enhanced Servs. Billing, Inc.*, 10-3903 (7th Cir. Apr. 20, 2011), ECF No. 23-7 (describing process of validating charges as checking that the data submitted by vendors contains coding that the charge is authorized and checking, among other things, that the phone number is valid).

[22] *Id.*

1 Although allowing parties with the best information to challenge a claim may be
2 appropriate in an ordinary settlement, cramming is perpetrated by "con artists and unscrupulous
3 companies." Senate Report at ii. Thus, permitting the very companies that have defrauded the
4 class members to use unreliable evidence to impose additional hurdles to recovery re-victimizes
5 these consumers, increases the costs of pursuing recovery, and, for most, will foreclose recovery
6 altogether. For all of these reasons, Verizon, the Aggregators, and the Third-Party Service
7 Providers should not be permitted to challenge any consumer claim simply by presenting an
8 LOA, TPV recording, or billing data provided by the Third-Party Service Providers.

9 **C. The Notices of Settlement Are Flawed.**

10 The settlement notices do not provide class members with "the best notice that is
11 practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). Rule 23 requires notices to
12 "clearly and concisely state in plain, easily understood language . . . the binding effect of a class
13 judgment on members." *Id.* As discussed above, it is highly doubtful that any notice can be
14 effective given the inherent fraudulent nature of cramming and low percentage of consumers
15 who are aware that they have been billed. That said, the notices have two significant omissions.
16 First, they do not clearly inform consumers that, by remaining in the settlement, they forego the
17 right to sue not only Verizon but also a vast array of unidentified aggregators and third-party
18 merchants. Instead, they contain a single sentence that, if class members do nothing, they waive
19 their rights to sue Verizon and "released entities" or "Released Persons." These vague
20 descriptions do not alert class members that the settlement extinguishes their claims against all of
21 the parties responsible for wrongly charging them.

22 Second, the notices fail to inform class members of other avenues of recovery, such as
23 the FTC's BSG contempt litigation, and to explain the settlement's potential impact, if any, on
24 the members' ability to pursue such avenues. Unlike the typical case, where class members have
25 the choice of participating in the settlement or undertaking the time and cost of suing class action
26 defendants, class members in this case may have a third option – obtaining restitution through
27 actions brought by the FTC or other law enforcement agencies. Thus, those consumers who fail
28 to opt out may have relinquished something of real value yet received nothing in return.

1 By failing to inform consumers about the implications of the release, the settlement
2 notices do not provide consumers with the necessary information to determine whether they
3 should object, withdraw, or remain in the settlement. These notices should, at a minimum, more
4 fully inform consumers about the parties released under the settlement (including a full list of
5 Aggregators and Third-Party Service Providers the settlement releases and any billing names
6 they use) and the fact that consumers may have alternate means of recovery through law
7 enforcement actions brought on their behalf. Because the notices, as currently structured, do not
8 meet Rule 23's requirements, they are legally deficient.

9 **D. The Injunctive Relief Does Not Protect Consumers from Cramming.**

10 The crux of the settlement's injunctive relief – which places the burden of detecting and
11 halting cramming on consumers – will not deter cramming.[23] Specifically, the settlement
12 provides that for current customers Verizon must: (1) send bill stuffer notices that Third-Party
13 Charges *may* appear on their phone bills and that they have the option to block such charges and
14 (2) annually reiterate such notice. *See* Settlement Agreement at § II.A(1). This provision,
15 however, completely ignores the fundamental nature of cramming – that the vast majority of
16 consumers do not know they have been billed. *See* Section III.A, *supra*. Because consumers are
17 likely to disregard a notice regarding charges they know nothing about, this provision is highly
18 unlikely to cause consumers who are being fraudulently billed to discover – and halt – such
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21 [23] Although the settlement provides additional injunctive relief, this brief focuses on the relief highlighted by Plaintiffs in their motion for preliminary approval of the settlement. *See* Motion for Approval at 4-5. That said,
22 other aspects of the injunctive relief raise additional problems. For example, the settlement purports to lower certain complaint thresholds for the suspension or termination of aggregators and Third-Party Service Providers. *See*
23 Settlement Agreement at § II.A(2). However, because "complaint" in this context is defined as "a customer contact that results in a refund of a Third Party Charge," this provision hinges on consumers discovering and removing
24 crammed charges – a prospect that flies in the face of judicial, legislative, and agency findings. *See* Section III.A, *supra*. Moreover, as the Senate Report found, complaint thresholds are ineffective in "root[ing] out bad actors,"
25 because, among other things, crammers employ a variety of tactics to dilute the number of complaints and lower their thresholds. Senate Report at 35-36; *see also Unauthorized Charges on Telephone Bills: Why Crammers Win*
26 *and Consumers Lose, Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 112th Cong. 106-07 (2011) (testimony of Walter B. McCormick, Jr., President and CEO, United States Telecom Ass'n), *available at*
27 http://www.gpo.gov/fdsys/pkg/CHRG-112shrg71640/pdf/CHRG-112shrg71640.pdf (explaining that it is a "real challenge" for carriers to stop crammers because "once you identify a scammer, . . . those scammers quickly come
28 back in another disguise").

1 charges, especially where, as here, the notice accompanies a lengthy and hard-to-understand
2 phone bill.
3 The injunctive provisions aimed at halting unauthorized Third-Party Charges for new
4 customers are similarly flawed. For example, the settlement requires Verizon to advise new
5 customers that their accounts may be billed for Third-Party Charges and to ask these customers
6 "if they wish to block such charges at no additional cost." *See* Settlement Agreement at
7 § II.A(1). Although class counsel touts this relief as ending the current "'default' in favor of
8 allowing third-party billing," an "essential element" in the cramming problem, Motion for
9 Approval at 4, it does no such thing. The plain language of the settlement makes clear that
10 consumers must opt out of third-party billing when they open their accounts. Moreover, because
11 the settlement does not specify how new consumers will be advised that their accounts are
12 subject to third-party billing or of their ability to block such billing, there is no way to evaluate
13 whether the disclosure will provide consumers adequate notice about these issues. What is clear,
14 however, is that this injunctive provision places the burden of blocking third-party billing on the
15 consumer rather than providing the consumer with meaningful protection from unauthorized
16 charges.[24]
17 Finally, the settlement requires Verizon to require Aggregators to send confirmation
18 letters to consumers they bill for new Third-Party Charges. *See* Settlement Agreement at
19 § II.A(7). As with the notices, consumers are likely to disregard these letters because they relate
20 to charges consumers know nothing about. Moreover, although class counsel makes much of
21 the fact that the Aggregators – rather than the Third-Party Service Providers – send this notice,
22 *see* Motion for Approval at 4-5, this requirement does nothing to protect consumers. Indeed, as
23 discussed above, the FTC has recently sued the largest aggregator for LEC billing for allegedly
24 placing more than $70 million in unauthorized charges on consumers' phone bills. Vesting the
25 responsibility of notifying consumers with such parties – who benefit financially if Third-Party

26 [24] That new customers will be subject to Third-Party Charges is contemplated by the injunctive provisions requiring
27 Verizon to send annual notices and provisions requiring Aggregators to send confirmation letters for new Third-
Party Charges, both of which appear to cover current and new Verizon customers. *See* Settlement Agreement at
28 §§ II.A(1), II.A(7).

1 Charges continue – increases the likelihood that consumers will not receive a simple notice
2 designed to halt fraudulent charges and constitutes an independent reason that this provision does
3 not protect consumers.[25]

4 In short, the injunctive relief in the settlement does little more than preserve the status
5 quo and, in fact, may perpetuate cramming. Consumers currently being fraudulently billed for
6 Third-Party Charges are unlikely to discover – and halt – such charges.[26] Likewise, new Verizon
7 customers must opt out of the third-party billing regime and, if they fail to do so, have no
8 meaningful protection from cramming. Indeed, the settlement does not require Verizon to
9 address the chief flaw in its billing system alleged to have facilitated cramming – its blind
10 reliance on Aggregators and Third-Party Service Providers for consumer authorizations. *See*
11 Second Am. Compl. ¶¶ 55-57, 61, ECF No. 101. Moreover, Verizon has no incentive to ensure
12 that the consumers it bills for Third-Party Charges have authorized them because it can raise the
13 ineffective notices blessed by this settlement as a defense to future claims that its billing
14 practices have facilitated cramming. Given the difficulties with providing notice, the inherently
15 deceptive nature of cramming, and the insignificant number of legitimate Third-Party Charges,
16 the only effective way to stop Verizon from being a conduit of cramming is to prohibit billing for
17 Third-Party Charges unless consumers affirmatively authorize Verizon to place such charges on
18 their bills. That the settlement does not take this simple – and effective – approach and instead
19 largely relies on ineffective notices underscores its inadequacy, especially where, as here,
20 Plaintiffs concede that "the 'default' in favor of allowing third-party billing" is "an essential
21 element" of the cramming problem. Motion for Approval at 4.

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[25] Although the Settlement Agreement provides that the envelope containing the notification have prominent
25 language stating, "CONTAINS IMPORTANT INFORMATION ABOUT CHARGES ON YOUR VERIZON
BILL," *see* Settlement Agreement at § II.A(7), it provides no guidance about what information the actual notice
26 must contain or how the information is presented to consumers.

27 [26] Section I.E. of the Settlement Agreement provides that Verizon must cease billing consumers for charges where
the consumer has submitted a successful claim. However, for the reasons discussed in Section III.A, *supra*, few
28 consumers are likely to undergo this process and, thus, halt fraudulent charges to their phone bills through this
provision.

1 **E. The Attorneys' Fees Raise Concerns.**

2 The Ninth Circuit has long recognized that class action settlements "present unique due
3 process concerns for absent class members." *Bluetooth*, 654 F.3d at 946 (internal citations and
4 quotations omitted). This is because "[t]he incentives for the negotiators to pursue their own
5 self-interest and that of certain class members are implicit in the circumstances. . . ." and can
6 "result in a decree in which 'the rights of [class members, including the named plaintiffs] may
7 not be given due regard by the negotiating parties.'" *Staton v. Boeing Co.*, 327 F.3d 938, 959-60
8 (9th Cir. 2003) (citing *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615
9 (9th Cir. 1982)) (alterations in original). The facts here raise exactly these concerns and
10 therefore call into question the fairness of the settlement. First, Plaintiffs' counsel will receive a
11 lump-sum payment irrespective of the size of the benefit to the class. As one court in this Circuit
12 has noted, where the attorneys' payment "is unaffected by the size of the benefit received by the
13 class," they "lack any structural incentive to ensure that the class benefits from robust notice and
14 simplified claim procedures." *Kagan*, 2012 WL 1109987, at *7. As discussed above, the
15 settlement here, with its nearly insurmountable claims process and ineffective notice framework,
16 suffers from these very flaws. Second, Verizon has agreed not to challenge Plaintiffs' counsel's
17 fee application. *See* Settlement Agreement at § V.A. The Ninth Circuit has found such "clear
18 sailing" arrangements a "subtle sign that class counsel have allowed pursuit of their own self-
19 interests . . . to infect the negotiations." *See Bluetooth*, 654 F.3d at 947 (citation omitted).[27]

20 Moreover, the reasonableness of attorneys' fees must be assessed in light of the results
21 obtained. *Bluetooth*, 654 F.3d at 942-43. Given the small percentage of consumers likely to file

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23 [27] Indeed, although Plaintiffs' counsel have asserted that the fees were negotiated after the relief to the class was agreed upon, the specifics of the settlement and supporting documents, such as the problematic claims form and
24 flawed notice, appear to have been agreed to *after* Verizon and Plaintiffs' counsel agreed to the fees. Specifically,
the parties reached only an "agreement in principle" and executed a term sheet on November 21, 2011. Declaration
25 of the Honorable Daniel H. Weinstein (Ret.) in Support of Motion for Preliminary Approval of Class Action
Settlement ¶ 10, ECF No. 91-2. After this date, they "continued to negotiate and prepare a final settlement
26 agreement that set forth specific terms and language . . ., as well as supporting documents including, among other
things, a claim form and multiple forms of class notice," culminating in an executed settlement on January 25, 2012.
27 *Id.* In the interim, on November 28, 2011, the parties agreed on Plaintiffs' counsel's fees. *Id.* at ¶ 18. That the
parties continued to negotiate for two months after agreeing on fees further calls into question the fairness of the
28 settlement.

a claim and the grossly unfair challenge process, the $7.5 million in uncontested fees may be disproportionate to the actual benefit received by the class. *See Ferrington v. McAfee, Inc.*, No. 10-CV-01455-LHK, 2012 WL 1156399, at *11-12 (N.D. Cal. Apr. 6, 2012) (calculating the benefit to the class on the claims participation rate and rejecting settlement where, among other things, counsel's fee would have been more than 83% percent of the total amount paid by defendants to settle the lawsuit); *Walter*, 2011 WL 2650711, at *12-13 (calculating the benefit to the class based on the likely submission rate of claims).[28] Such a result would be yet another factor suggesting that the settlement is not fair, adequate, or reasonable. *See Bluetooth*, 654 F.3d at 947 (identifying "a disproportionate distribution of the settlement" going to counsel as a sign that class counsel placed their own interests above those of the class).

IV. The Defined Class Does Not Meet Rule 23's Requirements.

To obtain class certification, Plaintiffs must show that they have met the requirements set forth in Rule 23(a) and Rule 23(b). *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *amended by* 273 F.3d 1266 (9th Cir. 2001) (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Among other things, Rule 23(a) requires that class members "be afforded adequate representation before entry of a judgment which binds them." *Hanlon*, 150 F.3d at 1020 (citing *Hansberry v. Lee*, 311 U.S. 32 (1940)). Here, class members have not received such representation. Class counsel has negotiated a settlement with damages that provide only illusory redress for class members and injunctive relief that is highly unlikely to prevent future cramming. *See* Sections III.A, III.D, *supra*. That class counsel accepted this settlement – in spite of its obvious flaws – calls into question their knowledge of cramming and "claims made" settlements and suggests that they cannot adequately represent the class.

Moreover, the claims process – which requires class members seeking full restitution to litigate whether they were charged fraudulently – is a *de facto* adjudication on the merits in which consumers may not have any representation. As discussed above, the claims process allows Verizon, the Aggregators, and Third-Party Service Providers to challenge claims made for

[28] Although the Settlement Agreement also contains injunctive relief, such relief is likely to be ineffective for the reasons discussed in Section III.D, and thus of little value.

1 full restitution by, among other things, presenting an LOA or TPV recording that the disputed
2 charges were authorized. Claimants may rebut such challenges "with evidence and/or further
3 sworn testimony." Settlement Agreement at § I.D.4. Furthermore, there is nothing in the
4 settlement that requires class counsel to provide assistance to class members facing such a
5 challenge.[29] Unlike the typical claims process, where the defendants' liability is not at issue, this
6 settlement gives Verizon, the Aggregators, and the Third-Party Service Providers the ability to
7 re-litigate the crux of the case – whether consumers were billed without their authorization. That
8 the settlement does not require representation of the class members during this process is an
9 independent reason it does not meet Rule 23's requirements.

10 **V. The Settlement Implicates Important Public Policy Issues.**

11 The broad release in the settlement could also stymie the FTC's ability to redress
12 consumers for their harm.[30] One court has found, for example, that the FTC was barred under
13 *res judicata* principles from seeking restitution for those consumers who previously settled
14 claims against an FTC defendant. *See FTC v. Amrep Corp.*, 705 F. Supp. 119, 124 (S.D.N.Y.
15 1988). It is unclear whether courts addressing this issue would follow *Amrep* given the public
16 interest involved.[31] *See FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 969-71 (N.D. Ill. 2006), *amended*

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18 [29] Although the settlement provides that "Class Counsel may participate in the challenge and rebuttal process," Settlement Agreement at § I.D.4, it does not make clear that class counsel will be available to class members who need help navigating the claims process or rebutting the unreliable TPV recordings, LOAs, or other records that may be asserted to thwart their claims.
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20 [30] The release would not bar the FTC from bringing an action. The definition of Releasing Parties specifically excludes "the U.S. government and any State government or instrumentality thereof." Settlement Agreement at Definition 38.
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22 [31] This more than 20-year-old decision, which involved consumer redress under Section 19 of the FTC Act, has not been adopted by other courts. Section 19 of the FTC Act allows the FTC to bring a suit for consumer redress for: (1) a violation of an FTC rule or (2) an unfair or deceptive act or practice where the FTC has issued a final cease and desist order applicable to that entity. 15 U.S.C. § 57b. This section provides that a court may "grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice . . . includ[ing] . . . rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be." *Id.* at § 57b(b). This statutory scheme for consumer redress does not impact the FTC's right to pursue consumer redress through other means, such as through the equitable remedies available in cases brought under Section 13(b) of the FTC Act, 15 U.S.C. § 53. *See id.* at § 57b(e); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (holding that Section 19 of the FTC Act does not restrict "the broad equitable jurisdiction" granted to the district court under Section 13(b) and that Section 13(b) permits a district court to grant any relief ancillary to a permanent injunction "necessary to accomplish complete justice").
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1 *by* 472 F. Supp. 2d 990 (N.D. Ill. 2007), *aff'd* 512 F.3d 858 (7th Cir. 2008) (holding that
2 "fundamental fairness" precluded the application of *res judicata* where an FTC defendant had
3 prevailed in a state law class action).[32] However, the *Amrep* decision would undoubtedly be
4 raised by future FTC defendants released by this settlement, creating risk regarding the extent to
5 which the agency can compensate victims who do not opt out of the settlement.

6 For example, consumers who comprise the class in this case overlap with those in the
7 FTC's ongoing contempt case against BSG, which is, by far, the largest aggregator in the country
8 and one of the entities released by the terms of this settlement. The FTC has alleged that BSG
9 fraudulently billed more than a million telephone numbers in violation of a federal court order
10 and, accordingly, seeks compensatory sanctions for these fraudulent billings, irrespective of
11 which LEC BSG used to bill consumers. *See* BSG Contempt Motion at 13, 20. The class
12 members who are also covered by the BSG contempt litigation – and who are unlikely to recover
13 under the terms of the settlement –simply would be out of luck if the court interprets the release
14 to preclude compensation for them. Such a result – which treats similarly situated consumers
15 differently based upon the LEC they were wrongfully billed through – is manifestly unfair.[33] It
16 also impedes the agency's ability to redress consumer harm – a key objective in fulfilling the
17 FTC's consumer protection mission.[34]

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19 [32] Indeed, *QT, Inc.* drew a distinction between the vindication of the public interest through a case brought under Sections 5 and 12 of the FTC Act and "redress for the private claims" that would flow from a Section 19 action. 448 F. Supp. 2d at 970-71. *QT, Inc.* is distinguishable from *Amrep* in that it involved whether an FTC defendant, who had successfully dismissed a state class action against him, could escape individual liability under the FTC Act. However, the court's reasoning is equally applicable in the redress context – especially since redress for violations of Sections 5 and 12 proceeds under the equitable powers afforded to the court under Section 13(b) of the FTC Act rather than the statutory scheme set forth for consumer redress under Section 19. *Cf. Amrep*, 705 F. Supp. at 124 (noting that "common law fraud remedies and Section 5 remedies continue to exist unaffected by the enactment of Section 19").
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23 [33] Moreover, Verizon is only one of more than a thousand LECs through which consumers can be fraudulently billed. Thus, if a court found that the FTC must exclude Verizon customers from receiving restitution, the process of providing restitution to the remaining consumers – and the administrative costs associated with it – could be greatly increased, thereby reducing the overall funds available for consumer redress in such actions. Accordingly, the settlement could negatively impact consumers who were billed through another LEC and were thus not part of the class.
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27 [34] In Fiscal Year 2010, for example, the FTC obtained 82 judgments and orders requiring the defendants to pay nearly $368 million in consumer redress or disgorgement of ill-gotten gains. *See* FED. TRADE COMM'N, THE FTC IN 2011: FEDERAL TRADE COMMISSION ANNUAL REPORT 21 (2011), available at http://ftc.gov/os/2011/04/2011ChairmansReport.pdf.
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Indeed, in the context of this case, the public interest mandates that consumers who have been wrongfully billed without their authorization have access to restitution through FTC enforcement actions.[35] Because class members are unlikely to recover under the terms of this settlement, their only hope for recovery rests with government enforcement actions. The risk that the settlement poses to their right to receive restitution or compensation as a result of such actions implicates important public policy concerns and provides an independent reason to reject the settlement.[36] Moreover, where, as here, consumers who have been victims of cramming release their claims regardless of whether they receive a benefit, the FTC respectfully suggests that the public interest requires that the settlement include a term that clarifies that it does not impact consumers' right to receive restitution from government enforcement actions.

VI. Conclusion

Everyone involved in this case except consumers who were fraudulently billed benefits from this settlement. Verizon obtains a beneficial release regardless of whether it pays a penny in claims, those who fraudulently billed consumers walk away with their ill-gotten gains and at least partial immunity from making their victims whole, and the Plaintiffs' attorneys receive millions of dollars. Most consumers will have their rights forfeited and will not get a penny.

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[35] In *Hanlon,* the Ninth Circuit analyzed a provision in a class action settlement that permitted the defendants to suspend relief to class members of any jurisdiction implicated by an administrative proceeding or action filed by federal, state, or local governments. The court rejected arguments by several state Attorneys General that such a provision would chill state enforcement, reasoning that any chilling effect would come "from the potential anger of class members . . . at the attorney general of their state for interfering with their receipt of the benefits of the settlement." 150 F.3d at 1028. *Hanlon* is distinguishable from this case. In reaching its decision, the *Hanlon* court emphasized that the class members "knowingly agreed to the settlement provisions . . . did not opt out, and readily accepted the benefits of the agreement." *Id*. For the reasons discussed above, the vast majority of consumers will not receive financial recovery under the settlement in this case, and none of the consumers are aware of the settlement's potential impact on rights they would have pursuant to a federal, state, or local enforcement action. Thus, unlike the class members in *Hanlon,* whose recovery was suspended until the outcome of the suit, class members in this case are in danger of not recovering at all.

[36] In addition, the FTC has an active law enforcement program to combat cramming and cases in the pipeline that have not been publicly filed that could be implicated by the release in this case. Moreover, the release would also foreclose other class actions that might reach a superior result to the settlement in this case.

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Because such a result is not fair, adequate, and reasonable, the settlement should not be approved.

Dated: August 17, 2012

Respectfully submitted,

/s/ Robin L. Moore

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Exhibit 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

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

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

Table of Contents

I. BSG Placed Millions of Unauthorized Charges on Consumers' Telephone Bills. 2

A. BSG billed for nine crammed services. 2

1. Crammed Voicemail Services 2

2. Crammed Streaming Video Service 4

3. Crammed Identity Theft Protection Services 4

4. Crammed Directory Assistance Services 5

5. Crammed Job Skills Training Service 6

B. Contempt Defendants ignored repeated red flags that their billings were fraudulent. 6

1. BSG ignored red flags raised during its inadequate "due diligence." 6

2. BSG failed to investigate the services' marketing even when faced with astronomical complaint rates that were completely inconsistent with purported consumer authorizations. 8

3. BSG never followed up on usage of any of the services. 11

4. BSG continued billing for the services even after AT&T forced them to acknowledge that thousands of consumers were improperly billed. 12

C. BSG billed more than $50,000,000 in net unauthorized charges. 13

II. BSG's Unauthorized Billings Violated the Permanent Injunction. 13

A. The Permanent Injunction binds each of the Contempt Defendants. 13

1. BSGNA's subsidiaries BSG Clearing, ESBI, ACI, and BCI aided and abetted BSGNA and are subject to BSGNA's control. 14

2. Parent company BSG Ltd. aided and abetted BSGNA, and BSG Ltd. is fully identified in interest with BSGNA. 15

B. The Contempt Defendants act as a common enterprise. 17

C. The Contempt Defendants violated the Permanent Injunction. 18

1. Contempt Defendants billed and collected for vendors who did not disclose terms of service clearly and conspicuously. 18

2. Contempt Defendants billed and collected for vendors who sold services that consumers never authorized. 19

3. Contempt Defendants misrepresented that consumers authorized charges for vendors' services. 19

D. Contempt Defendants' violations caused more than $50,000,000 in harm. 20

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

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

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

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

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

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

A. BSG billed for nine crammed services.

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

1. Crammed Voicemail Services

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

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

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

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

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

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

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

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

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

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

2. <u>Crammed Streaming Video Service</u>

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

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

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

3. <u>Crammed Identity Theft Protection Services</u>

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

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

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

4. Crammed Directory Assistance Services

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

5. Crammed Job Skills Training Service

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Contempt Defendants act as a common enterprise.

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

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

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

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

C. The Contempt Defendants violated the Permanent Injunction.

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated: March 28, 2012 Respectfully Submitted,

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