IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-35359

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

JOHN STEFANCHIK, *et al.*
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Washington

BRIEF FOR PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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STATEMENT OF JURISDICTION

The Federal Trade Commission ("FTC" or "Commission"), an independent agency of the United States, brought this action in the United States District Court for the Western District of Washington, pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, for acts that violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) and the Commission's Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310. The FTC sought preliminary and permanent injunctive relief to halt false and unsubstantiated representations that defendants and others were using to market products and services that purported to teach consumers how to earn substantial sums of money on a part-time basis by locating and brokering privately held mortgages. The FTC also sought restitution for injured consumers. The district court's jurisdiction derived from 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 53(b), 57b, 6102(c) and 6105(b).

On April 3, 2007, the district court (per Hon. Ricardo S. Martinez) issued an order granting the Commission's motion for summary judgment against defendants Beringer Corp. and John Stefanchik (ER Vol. 1 Tab 3)[1] and rendered a final judgment for a permanent injunction and equitable monetary relief in the amount

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[1] Citations to documents in defendant Beringer's Excerpts of Record are in the form "ER__." Citations to the FTC's Supplemental Excerpts of Record are in the form "SER__."

of $17,775,369. ER Vol. 1 Tab 2. A notice of appeal was timely filed on May 3, 2007, pursuant to Fed. R. App. P. 4(a)(1)(B).

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly held that the Federal Trade Commission was entitled to summary judgment on the question whether defendants had violated Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) and the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, by making false, deceptive, and unsubstantiated earnings and coaching claims for their Stefanchik Program of building wealth by brokering privately held mortgages.

2. Whether the district court erred in holding defendant Beringer Corporation liable – as a principal and as a "seller" under Section 310.2(z) of the TSR, 16 C.F.R. § 310.2(z) – for its marketing agents' false, deceptive, and unsubstantiated representations to consumers.

4. Whether the district court erred in holding the individual defendant, John Stefanchik, liable for injunctive and equitable monetary relief, given his participation in and control over Beringer corporate affairs and knowledge of false, deceptive, and unsubstantiated representations that were made to induce consumers to purchase the Stefanchik Program.

5. Whether the district court properly calculated the amount of equitable monetary relief that it awarded the FTC.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

This appeal arises from an action by the Federal Trade Commission ("FTC" or "Commission"), pursuant to Sections 5 and 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45 and 53(b), and the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101-08, seeking preliminary and permanent relief against defendants' false and unsubstantiated representations in the sale of products and services that defendants claimed would enable consumers, working five to ten hours per week, to make a substantial amount of money by finding and brokering sales of privately held mortgages. The Commission also sought restitution for consumers – many of whom were retired or inexperienced in real estate matters – who paid as much as $8000 in reliance on defendants' false and unsubstantiated claims about the earnings potential of their "Stefanchik Program" and the nature of the assistance that defendants would provide.

In this appeal, John Stefanchik and his closely held corporation, the Beringer Corporation, seek review of a summary judgment order finding them liable for

violating the prohibitions of Section 5(a) of the FTC Act and the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310.[2] The district court held that uncontroverted evidence established that, in marketing and selling the Stefanchik Program, Beringer and its marketing agent – Atlas Marketing, Inc. – made false representations that (1) purchasers of the Stefanchik Program would make large amounts of money in their spare time; (2) the program's personal coaching services were staffed by experienced persons who would be readily available and able to assist purchasers; and (3) defendants possessed a reasonable basis for their earnings claims. ER Vol. 1, Tab 2 at 3. The district court further held that defendant Beringer – as a principal and as a "seller" under the TSR, 16 C.F.R. § 310.2(z) – was liable for Atlas's wrongful acts.

With regard to the individual defendant, John Stefanchik, the district court found that injunctive relief was appropriate given Stefanchik's control over the corporate entity and its agents. ER Vol. 1 Tab 2 at 4; ER Vol. 1 Tab 3 at 10-12. The district court also found that Stefanchik had "actual knowledge" of Beringer's and Atlas's misrepresentations to consumers, was "recklessly indifferent" to their

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[2] The Commission's complaint also named Beringer's marketers and telemarketers – Atlas Marketing, Inc., Premier Consulting Group, Inc., and their principals, Justin Ely and Scott Christensen. ER Vol. 5 Tab 2 (First Amended Complaint). All the marketing defendants stipulated to entry of final judgments, which the district court entered on November 14, 2006. Dkt. ## 110-11.

truth or falsity, or, at a minimum, was "aware of the high probability of fraud" and "intentionally avoided the truth." ER Vol. 1 Tab 2 at 5; ER Vol. 1 Tab 3 at 12. Accordingly, the district court held that Stefanchik was jointly and severally liable with Beringer for monetary equitable relief in the amount of $17,775,369. ER Vol. 1 Tab 2 at 10.

This appeal followed.

B. Facts and Proceedings Below

1. Background

Defendant John Stefanchik is a self-styled real estate guru who, since at least 1987, has produced products – *e.g.*, course materials, in-person workshops, videotapes and audiotapes – that purport to teach consumers his methods for locating, purchasing, and brokering privately held mortgages (commonly known as "paper" or "the paper business").[3] At some point prior to 1990, Stefanchik published *Wealth Without Boundaries* – a book describing his wealth-building model (*i.e.*, the "Stefanchik Program"). ER Vol. 3 Tab 1, SJ Ex. 1 at 4; ER Vol. 3 Tab 2, SJ Ex. 2 at 45; ER Vol. 3 Tab 5 at 183-84. *Wealth Without Boundaries* was

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[3] ER Vol. 5 Tab 1 at 2 ¶ 10; ER Vol. 4 Tab 11, SJ Ex. 11 at 422-23; ER Vol. 3 Tab 1, SJ Ex. 1 at 5; ER Vol. 3 Tab 2, SJ Ex. 2 at 46; ER Vol. 3 Tab 5, SJ Ex. 5 at 159-63, 186-87.

sold to consumers at a nominal price.[4] In Stefanchik's words, it was a "teaser book" that was used to "whet consumers' appetites" to spend money for the Stefanchik Program. ER Vol. 3 Tab 5, SJ Ex. 5 at 183-84, 186; ER Vol. 3 Tab 1, SJ Ex. 1 at 7-8; ER Vol. 3 Tab 2, SJ Ex. 2 at 48.

In or around 2001, Stefanchik entered into an oral agreement with former defendants Atlas Marketing, Inc. and its principal, Justin Ely, to market the Stefanchik Program to consumers and to handle customer service.[5] They agreed that Atlas would be responsible for marketing the program while Stefanchik – and later his closely held corporation, defendant Beringer[6] – would remain responsible

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[4] ER Vol. 5 Tab 1 at 3 ¶ 12; ER Vol. 3 Tab 1, SJ Ex. 1 at 7; ER Vol. 3 Tab 2, SJ Ex. 2 at 46-47; ER Vol. 3 Tab 5, SJ Ex. 5 at 195, 197; ER Vol. 4 Tab 11, SJ Ex. 11 at 426-27; SER Vol. I Tab 6, PI Ex. 6 at 46-149; SER Vol. I Tab 7, PI Ex. 7 at 151-69.

[5] ER Vol. 5 Tab 1 at 2 ¶ 11; ER Vol. 3 Tab 1, SJ Ex. 1 at 10; ER Vol. 3 Tab 2, SJ Ex. 2 at 49-50; ER Vol. 3 Tab 3, SJ Ex. 3 at 89; ER Vol. 3 Tab 5, SJ Ex. 5 at 159-60, 190; ER Vol. 4 Tab 7, SJ Ex. 7 at 350-51; ER Vol. 4 Tab 10, SJ Ex. 10 at 384; ER Vol. 4 Tab 11, SJ Ex. 11 at 421-23.

[6] Beringer holds the copyrights to Stefanchik's *Wealth Without Boundaries* and all the course materials that were used in the Stefanchik Program. ER Vol. 3 Tab 1, SJ Ex. 1 at 5; ER Vol. 3 Tab 2, SJ Ex. 2 at 46. Beringer is solely owned by defendant John Stefanchik, who is also Beringer's president, director, and manager. ER Vol. 2 Tab 7 at 1-2 ¶ 3; ER Vol. 3 Tab 1, SJ Ex. 1 at 2-3; ER Vol. 3 Tab 2, SJ Ex. 2 at 43-44; ER Vol. 3 Tab 4, SJ Ex. 4 at 109-10; ER Vol. 3 Tab 5, SJ Ex. 5 at 140-41. Stefanchik was solely responsible for formulating the corporation's business practices and controlled its bank accounts. ER Vol. 3 Tab 1, SJ Ex. 1 at 3-4; ER Vol. 3 Tab 2, SJ Ex. 2 at 44-45; ER Vol. 3 Tab 3, SJ Ex. 3 at 90-91. His daily responsibilities included supervising employees, answering

for content – *i.e.*, staffing workshops and seminars (taught by John Stefanchik), designing course materials, and individual coaching.[7] Atlas agreed to pay Beringer monthly royalties, which were calculated on the basis of a percentage of gross sales that varied over time from 15 to 22 percent.[8]

Under the name "The Stefanchik Organization," Atlas marketed *Wealth Without Boundaries* and the Stefanchik Program by direct mail, the Internet (a "virtual" mail piece), and outbound telemarketing.[9] Stefanchik's signature and photograph appear on many of the direct mail pieces. Many of these were in the form of a testimonial by Stefanchik describing how he made his wealth in the paper business.[10] The central message of the promotion was that consumers who

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questions relating to coaching, and teaching live seminars. ER Vol. 3 Tab 3, SJ Ex. 3 at 89-90.

[7] ER Vol. 3 Tab 1, SJ Ex. 1 at 10; ER Vol. 3 Tab 2, SJ Ex. 2 at 51; ER Vol. 5 Tab 5, SJ Ex. 5 at 159-60, 190, 192-93; ER Vol. 4 Tab 7, SJ Ex. 7 at 350-51; ER Vol. 4 Tab 10, SJ Ex. 10 at 384, 387-88; ER Vol. 4 Tab 11, SJ Ex. 11 at 422-23.

[8] ER Vol. 3 Tab 1, SJ Ex. 1 at 11; ER Vol. 3 Tab 2, SJ Ex. 2 at 51-52; ER Vol. 3 Tab 5, SJ Ex. 5 at 191; ER Vol. 4 Tab 10, SJ Ex. 10 at 387-88; ER Vol. 4 Tab 11, SJ Ex. 11 at 424-25.

[9] ER Vol. 5 at 3 ¶ 12; ER Vol. 3 Tab 1, SJ Ex. 1 at 6; ER Vol. 3 Tab 2, SJ Ex. 2 at 46-47; ER Vol. 3 Tab 5, SJ Ex. 5 at 195, 197, 287-88; ER Vol. 4 Tab 11, SJ Ex. 11 at 426-27; SER Vol. I Tab 6, PI Ex. 6 at 46-149; SER Vol. I Tab 7, PI Ex. 7 at 151-69.

[10] ER Vol. 3 Tab 1, SJ Ex. 1 at 20-21; ER Vol. 3 Tab 2, SJ Ex. 2 at 60; ER Vol. 3 Tab 5, SJ Ex. 5 at 222-23; ER Vol. 4 Tab 11, SJ Ex. 11 at 429; SER Vol.

purchased the Stefanchik Program, attended the seminars and workshops, and used defendants' coaching services would easily and quickly earn substantial sums by working part-time – five to ten hours per week. These representations appeared on the direct mail pieces, the website, and in telemarketing presentations.[11] A typical and illustrative direct mail piece promised consumers earnings of "$10,000 or more profit every 30 days easily * * * from the comfort of your home * * * in your spare time * * * with no money to start * * * no selling * * * just like myself and people like you are doing right now!" (emphasis and ellipses in original). SER Vol. I Tab 6, PI Ex. 6 at 46; SER Vol. I Tab 7, PI Ex. 7 at 151. In many instances, defendants bolstered claims in the direct mail pieces with purported testimonials from other consumers that highlighted substantial earnings of, for example, "$2,700 for five or six hours of work" (SER Vol. I Tab 7, PI Ex. 7 at 163) or $6600 on the fourth day

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I Tab 6, PI Ex. 6 at 46-149; SER Vol. I Tab 7, PI Ex. 7 at 151-69. The details about his life story came directly from Stefanchik. ER Vol. 3 Tab 1, SJ Ex. 1 at 21; ER Vol. 3 Tab 2, SJ Ex. 2 at 61; ER Vol. 3 Tab 5, SJ Ex. 5 at 223; ER Vol. 4 Tab 11, SJ Ex. 11 at 429.

[11] *See, e.g.*, SER Vol. I Tab 6, PI Ex. 6 at 46-149; SER Vol. I Tab 7, PI Ex. 7 at 151-69; SER Vol. I Tab 8, PI Ex. 8 at 171-73; SER Vol. I Tab 9, PI Ex. 9 at 176-77; SER Vol. I Tab 10, PI Ex. 10 at 187-88; SER Vol. I Tab 11, PI Ex. 11 at 202-03; SER Vol. I Tab 12, PI Ex. 12 at 218-19; SER Vol. II Tab 13, PI Ex. 13 at 248-49; SER Vol. II Tab 14, PI Ex. 14 at 402-03; SER Vol. II Tab 15, PI Ex. 15 at 415; SER Vol. II Tab 16, PI Ex. 16 at 423-24; SER Vol. II Tab 17, PI Ex. 17 at 435-36; SER Vol. II Tab 18, PI Ex. 18 at 444-45; SER Vol. II Tab 19, PI Ex. 19 at 450; SER Vol. II Tab 20, PI Ex. 20 at 454-55; SER Vol. II, Tab 21, PI Ex. 21 at 460, 464, 479.

after reading the material. SER Vol. I Tab 6, PI Ex. 6 at 121; SER Vol. I Tab 7, PI Ex. 7 at 164.

Consumers who responded to these promotions were targeted for telemarketing calls from defendants' agents, who offered them the additional products and services that constituted the Stefanchik Program – *i.e.*, in-person, audiotaped, and videotaped seminars and workshops, all featuring defendant John Stefanchik, course materials, and private coaching.[12] The telemarketing script that defendants provided the FTC touted the ease with which consumers would learn the "Stefanchik way" (*i.e.*, after 90 days), the part-time nature of the work (*i.e.*, 5-10 hours per week), and the substantial earnings (*i.e.*, between $3000 and $5000 on each deal). SER Vol. II Tab 21, PI Ex. 21 at 460, 476. Telemarketers embellished these representations with additional claims about the ease and speed with which consumers could achieve substantial earnings in a few hours each week. *See, e.g.*, SER Vol. II Tab, 14, PI Ex. 14 at 402, SER Vol. II Tab 16, PI Ex. 16 at 424, SER Vol. II Tab 20, PI Ex. 20 at 455 (minimum commission of $3000 to $4000 per deal and average commission of $6000 to $7000 per deal); SER Vol. II Tab 14, PI Ex. 14 at 402 (one deal working five to ten hours per week); SER Vol. II Tab 14, PI

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[12] ER Vol. 3 Tab 1, SJ Ex. 1 at 4-5; ER Vol. 3 Tab 2, SJ Ex. 2 at 45-46; ER Vol. 3 Tab 5, SJ Ex. 5 at 188-89, 208; ER Vol. 4 Tab 7, SJ Ex. 7 at 347, 351-52; ER Vol. 4 Tab 8, SJ Ex. 8 at 362; ER Vol. 4 Tab 9, SJ Ex. 9 at 368-69; ER Vol. 4 Tab 10, SJ Ex. 10 at 384; ER Vol. 2 Tab 11, SJ Ex. 11 at 422-23.

Ex. 14 at 402, SER Vol. II Tab 16, PI Ex. 16 at 424 ("usually" takes around 60 days to complete the first deal). They also told consumers that large numbers of mortgages are privately held, implying that it would be easy for consumers to find them.[13] They also assured consumers that there are ready buyers for privately held mortgages and that the Stefanchik Organization would assist them by referring them to an investment company that would purchase any privately held mortgages that they found.[14]

Defendants' telemarketers also sold personal coaching services, which they claimed would ensure consumers ready access to experienced individuals who would be easy to reach and available to help them with all aspects of their transactions.[15] Consumers who decided to purchase the Stefanchik Program – in

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[13] *See* SER Vol. I Tab 11, PI Ex. 11 at 203; SER Vol. II Tab 13, PI Ex. 13 at 248; SER Vol. II Tab 16, PI Ex. 16 at 424; SER Vol. II Tab 17, PI Ex. 17 at 434; SER Vol. II Tab 18, PI Ex. 18 at 444; SER Vol. II Tab 19, PI Ex. 19 at 450; SER Vol. II Tab 20, PI Ex. 20 at 454.

[14] *See* SER Vol. II Tab 13, PI Ex. 13 at 249; SER Vol. II Tab 14, PI Ex. 14 at 404; SER Vol. II Tab 15, PI Ex. 15 at 416; SER Vol. II Tab 16, PI Ex. 16 at 423-24; SER Vol. II Tab 17, PI Ex. 17 at 435; SER Vol. II Tab 19, PI Ex. 19 at 450-51; SER Vol. II Tab 20, PI Ex. 20 at 455.

[15] *See* SER Vol. I Tab 8, PI Ex. 8 at 172; SER Vol. I Tab 9, PI Ex. 9 at 176; SER Vol. I Tab 10, PI Ex. 10 at 187; SER Vol. I Tab 11, PI Ex. 11 at 203-04; SER Vol. I Tab 12, PI Ex. 12 at 219; SER Vol. II Tab 13, PI Ex. 13 at 248-49, 285; SER Vol. II Tab 16, PI Ex. 16 at 424; SER Vol. II Tab 17, PI Ex. 17 at 435; SER Vol. II Tab 20, PI Ex. 20 at 455; SER Vol. II Tab 21, PI Ex. 21 at 469.

most cases retirees or novices in real estate – paid from $5,000 to $8,000, depending on the particular package of products and services they purchased.[16]

Contrary to defendants' claims, the Stefanchik Program did not enable consumers to make money regardless of the time and effort they expended. *See, e.g.*, SER Vol. II Tab 23, PI Ex. 23 at 508 (FTC survey results, including verbatim responses); ER Vol. 4 Tab 14, SJ Ex. 14 (investigator's declaration describing coaches' notes in company database). As consumers reported in their sworn declarations, saleable privately held paper was difficult to find.[17] Furthermore, contrary to defendants' claim that consumers who purchased coaching services would have ready access to experienced coaches who would assist them in finding and completing their transactions, defendants' coaches had little to no experience or expertise in real estate, did not provide consumers with the promised assistance,

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[16] ER Vol. 4 Tab 11, SJ Ex. 11 at 446-48, 511-12; SER Vol. I Tab 8, PI Ex. 8 at 172; SER Vol. I Tab 9, PI Ex. 9 at 176; SER Vol. I Tab 11, PI Ex. 11 at 204; SER Vol. I Tab 12, PI Ex. 12 at 218; SER Vol. II Tab 14, PI Ex. 14 at 403; SER Vol. II Tab 15, PI Ex. 15 at 416; SER Vol. II Tab 16, PI Ex. 16 at 424-25; SER Vol. II Tab 17, PI Ex. 17 at 436-37; SER Vol. II Tab 20, PI Ex. 20 at 455-56.

[17] *See* SER Vol. I Tab 8, PI Ex. 8 at 173; SER Vol. I Tab 9, PI Ex. 9 at 177-78; SER Vol. I Tab 10, PI Ex. 10 at 188; SER Vol. I Tab 12, PI Ex. 12 at 221-22; SER Vol. II Tab 13, PI Ex. 13 at 250; SER Vol. II Tab. 14, PI Ex. 14 at 403-05; SER Vol. II Tab 15, PI Ex. 15 at 417-18; SER Vol. II Tab 16, PI Ex. 16 at 426; SER Vol. II Tab 17, PI Ex. 17 at 438; SER Vol. II Tab 18, PI Ex. 18 at 447-48; SER Vol. II Tab 19, PI Ex. 19 at 452; SER Vol. II Tab 20, PI Ex. 20 at 456.

and were not readily available.[18]

2. Proceedings Below

On August 24, 2004, the Commission, pursuant to Sections 5(a), 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 53(b), and 57b, and the TSR, 16 C.F.R. Part 310, filed a complaint in the United States District Court for the Western District of Washington charging defendants and their agents with making false, misleading, and unsubstantiated representations about the Stefanchik Program. ER Vol. 5 Tab 3. Specifically, the Commission alleged that the defendants were violating Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by (a) making false and misleading representations that consumers, by purchasing defendants' program and using the methods taught, will quickly make large amounts of money in their spare time and that their coaches are experienced and readily available to help them locate mortgages and complete transactions (Count I) and (b) representing that they had a reasonable basis for their earnings claims (Count II). ER Vol. 5, Tab 3 at 6-7. The Commission also alleged that defendants were "sellers" or "telemarketers" for purposes of the Telemarketing Sales Rule ("TSR"), 16 C.F.R. §§ 310.2(z), (bb),

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[18] *See, e.g.*, ER Vol. 3 Tab 5, SJ Ex. 5 at 260-62; SER Vol II Tab 13, PI Ex. 13 at 250; ER Vol. 4 Tab 13, SJ Ex. 13 at 518; SER Vol. I Tab 9, PI Ex. 9 at 178; SER Vol. I Tab 10, PI Ex. 10 at 188; SER Vol. II Tab 13, PI Ex. 13 at 250-51; SER Vol. II Tab 14, PI Ex. 14 at 404-05; SER Vol. II Tab 15, PI Ex. 15 at 418; SER Vol. II Tab 19, PI Ex. 19 at 452; SER Vol. II Tab 20, PI Ex. 20 at 456.

and (cc), and, accordingly, that their false and misleading statements about the Stefanchik Program were also in violation of Sections 310.3(a)(2)(iii) and 310.3(a)(4) of the TSR, 16 C.F.R. §§ 310.3(a)(2)(iii) and 310.3(a)(4) (Count III).[19] ER Vol. 5 Tab 3 at 7-8.

On December 16, 2004, the district court entered a preliminary injunction, finding that the consumer declarations, telemarketing scripts, direct mail pieces, and results of an FTC consumer survey – with a response rate of more than 50% – all demonstrated a likelihood of success on the merits under Section 5 of the FTC Act and the TSR.[20] ER Vol. 2 Tab 1; ER Vol. 1 Tab 8.

On January 26, 2007, having reached a settlement with defendants' marketing agents (ER Vol. 1 Tabs 4-5),[21] the Commission moved for summary

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[19] The Commission later amended its complaint by adding two defendants – Premier Consulting Group, Inc. and Justin W. Ely – both of whom the Commission alleged were involved in marketing the Stefanchik Program. ER Vol. 5 Tab 2.

[20] The Commission submitted a voluminous set of exhibits in support of its motion for preliminary injunction, including the results of an FTC-sponsored survey of purchasers of the Stefanchik program and 13 consumer declarations with relevant supporting documents.

[21] Beringer errs in stating that defendants' marketing agents stipulated to a dismissal of the Commission's action. Beringer Br. 3. The cited stipulation of dismissal relates to cross-claims that defendants brought against their marketing agents – *i.e.*, Scott Christensen, Premier Consulting Group, Justin Ely, and Atlas Marketing. ER Vol. 1 Tab 6.

judgment against defendants Beringer and Stefanchik on all three counts of the Commission's complaint. ER Vol. 2 Tab 14. In addition to the voluminous submission already made at the preliminary injunction stage (SER Vols. I and II), the FTC submitted an additional two volumes of evidence, including excerpts of depositions, admissions, interrogatory responses, and the sworn declarations of defendants' former counsel, a corporate insider, and an FTC investigator who reported on her analysis of Beringer's database. ER Vol. 3 Tabs 1-5 (SJ Exs. 1-5); ER Vol. 4 Tabs 6-15 (SJ Exs. 6-15).[22] Defendants Beringer and Stefanchik cross-moved for partial summary judgment on the telemarketing claim, contending they had no control over their telemarketers' conduct. ER Vol. 2 Tab 13.

Defendants responded to the Commission's motion for summary judgment by moving to strike the sworn declarations of consumers and a former Stefanchik Program coach on the ground that they were inadmissible hearsay. ER Vol. 1 Tab 3 at 2, 6-7. They also mounted an attack on purported flaws in the methodology used by the FTC's consumer survey expert, Dr. Manoj Hastak – a professor and widely-published former marketing department chair at American University's Kogod School of Business. SER Vol. II Tab 23 (survey report); ER Vol. 2 Tab 4

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[22] Thus, there is no basis for the statement that the fact evidence submitted by the FTC "boiled down" to 13 consumer declarations and the opinion of the Commission's survey expert. Beringer Br. 7.

at Ex. A (Declaration of Manoj Hastak (March 9, 2007)).

On April 3, 2007, the district court granted the FTC's motion for summary judgment (ER Vol. 1 Tab 3), entered findings of fact and conclusions of law (ER Vol. 1 Tab 2 at 1-6), and denied defendants' cross-motion for partial summary judgment.[23] ER Vol. 1 Tab 3. The district court concluded that undisputed facts demonstrated that, in marketing and selling the Stefanchik Program, Beringer and its agent, former defendant Atlas Marketing, made false and misleading representations that (1) purchasers of the Stefanchik Program would make large amounts of money in their spare time; (2) the program's personal coaching services were staffed by experienced persons who would be readily available and able to assist purchasers; and (3) defendants possessed a reasonable basis for their earnings claims. ER Vol. 1 Tab 2 at 3. Consistent with these conclusions, the district court entered a Final Order for Judgment and Permanent Injunction permanently enjoining Beringer and Stefanchik from, *inter alia*, making any future

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[23] The district court heard oral argument on the Commission's motion for a preliminary injunction, but did not find it necessary to hear oral argument at the summary judgment stage, a decision that Beringer now seems to contest. *See* Beringer Br. 3. The submissions already before the district court reflected a complete absence of disputed issues of material fact. Moreover, defendants had ample opportunity to participate in discovery, yet came forward with no evidence to contradict the Commission's facts other than John Stefanchik's unsupported self-serving statements. Given these circumstances, the district court plainly did not abuse its discretion in deciding to rule on the papers.

misrepresentations in connection with the sale or promotion of any money-making venture or investment opportunity and from representing that consumers will make a substantial amount of money in the absence of a reasonable basis to support such claims. ER Vol. 1 Tab 2 at 7-8. The court also held them jointly and severally liable for equitable monetary relief in the amount of consumers' total investment in the Stefanchik Program less refunds – *i.e.*, $17,775,369. ER Vol. 1 Tab 2 at 10.

The district court denied defendants' motion to strike consumer declarations, explaining that the Commission was using them merely "as evidence of what the telemarketers said to consumers, not for the truth of the matter asserted * * *." ER Vol. 1 Tab 3 at 6. The district court similarly rejected defendants' efforts to strike the telemarketing script. According to the district court, the script was a business record that had been used in the "ordinary course of business of defendants' telemarketing activities" and, as such, it was not inadmissible hearsay. ER Vol. 1 Tab 3 at 7-8. The district court, noting defendants' failure to offer any consumer declarations or any other evidence to show that consumers made money by using the Stefanchik Program (ER Vol. 1 Tab 3 at 9), held that defendants' allegations of flaws in the Commission's survey of purchasers went to the admissibility of the survey results, but did not create a factual dispute or a "'battle of the experts,'" as defendants had argued. *Id.* Furthermore, the district court observed that, despite

these allegations of flaws in survey methodology, defendants had not argued that the Commission's survey was inadmissible or even attempted to demonstrate inadmissibility under the standards for expert testimony, as set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 580 (1993). ER Vol. 1 Tab 3 at 9 n.2. With regard to defendants' coaching claims, the district court held that defendants' generalized assertions about the coaches' knowledge and experience were not sufficient to controvert statements in sworn consumer declarations showing that many of the coaches "did not have even a basic knowledge of the real estate industry * * *." *Id.*

Turning to the question of liability, the district court found that the marketing agreement between Beringer and Atlas created an agency relationship. Therefore, the court held, Beringer was liable as a principal for the false and misleading representations that its telemarketers used to sell the Stefanchik Program to consumers. ER Vol. 1 Tab 3 at 10. Additionally, because the deceptive earnings and coaching claims were made in sales calls by Beringer's telemarketing agent, the district court also ruled that Beringer was liable as a "seller" under Sections 310.3(a)(2)(iii) and 310.3(a)(4) of the TSR.[24] ER Vol. 1

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[24] Section 310.3(a)(2)(iii) of the TSR, 16 C.F.R. § 310.3(a)(2)(iii), prohibits any "seller" or "telemarketer" from misrepresenting any material aspect of the performance, efficacy, nature, or central characteristic of goods or services. Section 310.3(a)(4) of the TSR, 16 C.F.R. § 310.3(a)(4), broadly prohibits sellers

Tab 2 at 2; ER Vol. 1 Tab 3 at 11.

With regard to the individual defendant, John Stefanchik, the district court held that his participation in the challenged practices and authority to control the corporation were sufficient to warrant permanent injunctive relief. ER Vol. 1 Tab 2 at 4. The district court further found that Stefanchik had "actual knowledge" of Beringer's and Atlas's misrepresentations to consumers, was "recklessly indifferent" to their truth or falsity, or, at a minimum, was "aware of the high probability of fraud" and "intentionally avoided the truth." ER Vol. 1 Tab 2 at 5. Accordingly, the district court held that Stefanchik was jointly liable with Beringer to provide restitution for consumers. *Id.*

SUMMARY OF ARGUMENT

This is a routine case of deception. The Commission presented overwhelming evidence that the net impression created by defendants' promotional literature and oral representations was that consumers would make a substantial amount of money working five to ten hours a week by using the Stefanchik Program and that defendants' coaching services would be readily available to help them. In actuality, defendants' representations were false and deceptive and

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and telemarketers from using false or misleading statements in order to induce the purchase of goods or services. For purposes of the TSR, a "seller" includes any person who arranges for others to provide goods or services. *See* 16 C.F.R. § 310.2(z).

defendants did not have a reasonable basis for the earnings claims that they made. Indeed, consumers did not make any money, let alone the substantial sums that defendants had promised. The district court properly determined that there was no genuine issue of material fact as to the deceptive nature of defendants' promotion of the Stefanchik Program. While defendants contend there were flaws in the Commission's consumer survey, they did not come forward with any evidence of their own either to controvert the Commission's evidence or to support their claims. Even without the consumer survey, other evidence – including sworn consumer declarations, defendants' own database, and their admissions – show that defendants' claims for their Stefanchik Program were both false and unsubstantiated.

The district court likewise applied the correct legal standard in concluding that defendant Beringer was liable for its telemarketers' false and misleading promotion of the Stefanchik Program and that the individual defendant, John Stefanchik – Beringer's president, director, and manager – was personally liable with Beringer for injunctive relief. The record is replete with evidence of Mr. Stefanchik's participation in corporate affairs, his authority to exert control over the day-to-day operations of the business, and his role in creating and implementing the program that Beringer's telemarketers sold to consumers.

Additionally, with respect to Stefanchik's liability for monetary equitable relief, the district court correctly concluded that the evidence established the requisite awareness of the deception that Beringer and its telemarketers were practicing on consumers. Finally, the district court's determination of the appropriate amount of equitable monetary relief was well within its discretion.

ARGUMENT

I. The District Court Properly Determined That There Were No Genuine Issues of Material Fact for Trial

A. Standard of Review

This Court reviews a grant of summary judgment *de novo* (*FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1199 n.1 (9th Cir. 2006); *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997)), and may affirm on any basis that is supported by the record, whether or not it has been relied on by the district court. *See, e.g., Applied Info. Sciences Corp. v. eBay, Inc.*, 511 F.3d 966, 973 (9th Cir. 2007).

B. Defendants Failed to Controvert the Commission's Showing That Consumers Had Been Deceived

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices." 15 U.S.C. § 45(a)(1). To establish that an act or practice is deceptive, the FTC must establish that the representation, omission, or practice likely would mislead

consumers, acting reasonably under the circumstances, and that it is material to the consumer's purchasing decision. *See, e.g., Cyberspace.com, LLC*, 453 F.3d at 1199-1200; *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1154 (9th Cir. 1984). Deception may be by implication rather than outright false statements, and a statement may be deceptive even if the constituent words may be literally true. Thus, under Section 5, the tendency of a particular representation to deceive is determined by the net impression that it is likely to make, not its constituent parts. *See, e.g., Cyberspace.com*, 453 F.3d at 1200; *Sterling Drug, Inc.*, 741 F.2d at 1154.

The district court correctly determined that there was no genuine issue of material fact as to whether defendants' earnings and coaching claims were false and deceptive under the foregoing standards. The Commission made a voluminous submission that more than satisfied the Commission's initial burden – *i.e.*, to identify those portions of the pleadings and discovery responses that established the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In addition to its submission at the preliminary injunction stage (SER Vols. I-II (PI Exs. 1-23)), the FTC submitted and relied on an

additional two volumes of evidence.[25] *See* ER Vol. 3 (SJ Exs. 1-5); ER Vol. 4 (SJ Exs. 6-15). The FTC submission showed that, contrary to defendants' express earnings claims, consumers who purchased the Stefanchik Program did not achieve the promised level of earnings even with efforts that surpassed by far the five to ten hours per week touted by their marketers. Indeed, consumers did not make *any* money using the Stefanchik Program, regardless of the time and effort they expended. In sworn declarations, consumers reported that saleable paper was virtually impossible to find.[26]

The results of the Commission's consumer survey corroborate the experiences that consumers reported in sworn declarations.[27] SER Vol. II Tab 23,

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[25] Beringer's brief implies that the Commission, in moving for summary judgment, relied solely on the materials submitted at the summary judgment stage. Beringer Br. 6. As noted above, the Commission previously had submitted numerous exhibits – most notably, consumer declarations and survey results – in support of its motion for preliminary injunction. The Commission specifically relied on and cited these exhibits in asking the district court to grant its motion for summary judgment. These omitted exhibits appear in the FTC's Supplemental Excerpts of Record ("SER").

[26] SER Vol. I Tab 8, PI Ex. 8 at 173; SER Vol. I Tab 9, PI Ex. 9 at 177-78; SER Vol. I Tab 10, PI Ex. 10 at 188; SER Vol. II Tab 13, PI Ex. 13 at 250; SER Vol. II Tab 14, PI Ex. 14 at 403-04; SER Vol. II Tab 15, PI Ex. 15 at 417-18; SER Vol. II Tab 16, PI Ex. 16 at 425-26.

[27] In any event, as this Court has recognized, the Commission does not need to show that every consumer was deceived. *See FTC v. Figgie International, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993); *accord, FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 572 (7th Cir. 1989).

PI Ex. 23; ER Vol. 2 Tab 4 Ex. A. Surveys were mailed to 1,002 consumers who were selected at random from defendants' list of 7,745 purchasers of the Stefanchik Program. SER Vol. II Tab 23, PI Ex. 23 at 510. Although some surveys were returned as undeliverable, 427 responses were received of the remaining 833 – resulting in an impressively high 51.3% response rate.[28] *Id.* The results – based on the 380 respondents who indicated they had invested in the program and not received a refund – showed that over 92% of consumers who invested in the Stefanchik Program made no money regardless of the amount of time they put into the program. SER Vol. II Tab, 23, PI Ex. 23 at 508 ¶¶ 10(A)-(B). These results were consistent with purchasers' open-ended comments (SER Vol. II Tab 23, PI Ex. 23 at 508, 513-14) and with comments by coaches in the company's database. ER Vol. 4 Tab 14, SJ Ex. 14 at 523 ¶¶ 6-7, 523-24 ¶ 8; *see also* ER Vol. 4 Tab 13, SJ Ex. 13 at 520 ¶ 11.

The Commission's submission to the district court satisfied its initial burden under applicable law. The burden of going forward then switched to defendants to show that a genuine issue remained for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). It was defendants' obligation to "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*

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[28] Defendant Stefanchik therefore errs in stating that the FTC took a random sample of only "50 students."

Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "[M]ere disagreement or the bald assertion that a genuine issue of material fact exists no longer precludes the use of summary judgment." *Harper v. Wallingford*, 877 F.2d 728, 731 (9th Cir. 1989) (*citing California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987)). Rather, according to the plain language of Fed. R. Civ. P. 56(e), "an opposing party may not rely merely on allegations or denials in its own pleading," but must come forward with "specific facts showing a genuine issue for trial." *See Matsushita*, 475 U.S. at 587; *FTC v. Gill*, 265 F.3d at 954 (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)); *see also FTC v. Publishing Clearing House, Inc.*, 104 F.3d at 1170 (defendant cannot rely on general denials, but must produce significant probative evidence demonstrating a genuine issue of material fact for trial).

Defendants did not satisfy these standards. In opposing summary judgment, they made no effort to counter the Commission's factual showing with a factual showing of their own – *i.e.*, by showing that there were consumers who actually made money by using the Stefanchik Program. As the district court observed (ER Vol. 1 Tab 3 at 9), defendants did not submit a consumer survey of their own, offer any consumer declarations, or controvert sworn consumer declarations that

reported the difficulties that consumers experienced in finding saleable privately held mortgages and in obtaining the coaching services that defendants had promised.[29] Instead, they mounted an attack on purported flaws in the Commission's consumer survey.[30] But, as the district court correctly ruled, efforts such as these – without more – are not sufficient to defeat summary judgment. As there is no such thing as a "perfect" survey, it is "notoriously easy" for one expert to criticize immaterial design details in another expert's survey. 5 J. T. McCarthy, *Trademarks & Unfair Competition* § 32:178 (4th ed. 2000); *see, e.g., Steak N*

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[29] Stefanchik's vague and unsupported assertion before this Court that "one in three consumers" made money using the Stefanchik program (*see* Stefanchik Br. 7) is no substitute for the factual showing that is necessary to avert summary judgment. *See, e.g., FTC v. Publishing Clearing House*, 104 F.3d at 1171.

[30] The district court noted that defendants objected to purported technical flaws, but did not move to strike the survey or file a motion in limine. ER Vol. 1, Tab 3 at 9. Having failed to object to admissibility below, defendants cannot do so for the first time on appeal. *See Bias v. Moynihan*, 508 F.3d 1212, 1224 (9th Cir. 2007). Such an objection would be futile in any event. Defendants did not challenge Dr. Hastak's status as a consumer survey expert. Moreover, as Dr. Hastak explained, his methodologies are generally accepted in the literature and practiced by other survey experts. ER Vol. 2 Tab 4 Ex. A ¶¶ 9-10, 13, 15, 19 & Attachs. D-E. For example, his decision to identify the FTC as sponsor of the survey was made only after considering the options, and determining that he could design a survey that would increase the response rate without introducing response bias. ER Vol. 2 Tab 4 Ex. A at ¶¶ 9-11. Given these circumstances, even if defendants' summary judgment opposition were viewed as an objection to admissibility, the district court plainly did not abuse its discretion in deciding to receive and consider this evidence.

Shake Co. v. Burger King Corp., 323 F. Supp. 2d 983, 994 (E.D. Mo. 2004). Given these limitations, courts have recognized that – although reasonable minds can differ about the details of an ideal survey – a variety of survey designs may nonetheless all attain reliable results. *See, e.g., Classic Foods Int'l Corp. v. Kettle Foods, Inc.*, 2006 U.S. Dist. LEXIS 97200 at *26 (C.D. Cal. March 2, 2006); *Selchow & Righter Co. v. Decipher, Inc.*, 598 F. Supp. 1489, 1502 (E.D. Va. 1984). To allow minor criticisms of survey design to defeat summary judgment would effectively require a trial on the merits in nearly every case in which a litigant tenders survey evidence.

Beringer asserts that this case "involves technical facts and expert testimony." Beringer Br. 10. But a litigant is not entitled to a trial merely because there are technical facts and expert testimony. While warring expert opinions "can" create disputed issues of material fact (*see* Beringer Br. 9, 13), the point here is that the *relevant* material fact – *i.e.*, that consumers did not make money – was not placed in dispute merely by listing purported flaws in the FTC survey. A mere dispute about a minor fact is not enough to avoid summary judgment. There must be a dispute of *material* fact – *i.e.*, one that affects the outcome of the case under governing law.[31] *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248; *FTC*

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[31] Beringer's reliance on the patent and employment discrimination cases cited in its brief is misplaced. *See* Beringer Br. 9-10. While summary

v. Bay Area Bus. Council, Inc., 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. Natural Solution, Inc.*, 2007 U.S. Dist. LEXIS 60783 at *13-16 (C.D. Cal. Aug. 7, 2007). Given defendants' representations about how easy it is to make money using the Stefanchik Program, one would expect that they would be able to adduce evidence that consumers had indeed profited from the program. But despite ample opportunity to do so, they adduced no such evidence, and therefore failed to establish disputed material facts.

Defendants' efforts to discredit the Commission's survey evidence are unavailing in any event because other evidence demonstrated the falsity of defendants' claims. The consistent theme of consumers' sworn declarations is that saleable paper is very difficult to find, even working far more than the five to ten

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judgment is less commonly granted in patent cases in light of the prevalence of highly technical issues of material fact (*see, e.g., Schroeder v. Owens-Corning Fiberglas Corp.*, 514 F.2d 901, 902 (9th Cir. 1975)), this Court has recognized that the standards of Fed. R. Civ. P. 56 apply nonetheless. *See Houston v. Polymer Corp.*, 637 F.2d 617, 619 (9th Cir. 1980). For example, in *Northrop Architectural Systems v. Lupton Mfg. Co.*, 437 F.2d 889, 891 (9th Cir. 1971), the legal question of patent validity turned on *material* and "highly technical" factual issues that were disputed by warring experts. Given these circumstances, this Court held that summary judgment was not appropriate. Likewise, in *Rosario v. New York Times Co.*, 84 F.R.D. 626, 630 (S.D.N.Y. 1979), the district court denied summary judgment in light of expert opinion that – in addition to criticizing the methodology of reports that had been submitted by the plaintiffs – "clearly evidence[d] the absence of any discrimination * * *." Defendants made no such factual showing in the present case. They merely identified purported flaws in FTC's consumer survey.

hours per week that defendants had advertised. SER Vol. I Tabs 8-12; SER Vol. II Tabs 13-20. Defendants' database of nearly 8000 purchasers presents the same picture – of the few transactions submitted to a potential buyer, fewer still proceeded to a successful outcome. ER Vol. 4 Tab 14, SJ Ex. at 523-24 ¶ 8; *see also* ER Vol. 4 Tab 13, SJ Ex. at 519-20 ¶¶ 9, 11 (sworn declaration of former coach). Defendants seem to contend that these records are incomplete or inaccurate, but, again, they made no factual showing that this is so, notwithstanding their access to purchasers' records and names.

Furthermore, defendants' failure to have a "reasonable basis" for their earnings claims is a separate basis for liability that independently supports the relief granted. It is a basic tenet of FTC deception law that advertisers must have a reasonable basis for objective claims for the performance or efficacy of a product. *See, e.g., Thompson Medical Co. v. FTC*, 791 F.2d 189, 193 (D.C. Cir. 1986); *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 302 (7th Cir. 1979); *see also FTC v. Pantron I*, 33 F.3d at 1096 n.22. In the present case, defendants claimed that, by using the Stefanchik Program, consumers would easily make substantial amounts of money by buying and brokering privately held mortgages. Defendants, however, produced no evidence to show that their customers made a substantial amount of money – or even any money. Defendants admitted they did not conduct

any surveys of their purchasers, or any other analysis to determine the amount of money that consumers who purchased the Stefanchik Program were making. ER Vol. 3 Tab 5, SJ Ex. 5 at 244-46; ER Vol. 4 Tab 9, SJ Ex. 9 at 374. Indeed, they admitted that they did not know of any substantial number of consumers who completed transactions for privately held mortgages or made money. ER Vol. 3 Tab 5, SJ Ex. 5 at 227, 252; ER Vol. 4 Tab 9, SJ Ex. 9 at 372-73. They likewise conceded they had no basis for their representations that consumers could make money in 60 days to 6 months (ER Vol. 3 Tab 5, SJ Ex. 5 at 242-43), or by working five to ten hours per week. ER Vol. 3 Tab 5, SJ Ex. 5 at 241-42. As for defendants' claim of $10,000 profit every 30 days, Stefanchik, describing his own experience in the paper business, asserted that this was the amount that one *could* make in monthly payments if one had enough money to be able to purchase and hold private mortgages in lieu of brokering them to an investor. ER Vol. 3 Tab 5, SJ Ex. 5 at 228-29, 231. Such a scheme, however, bears little resemblance to the Stefanchik program of finding privately held mortgages and brokering them to third parties.

The claims in defendants' telemarketing script likewise were pulled from thin air. *See* ER Vol. 3 Tab 5, SJ Ex. 5 at 241-42; ER Vol. 4 Tab 11, SJ Ex. 11 at 436-37. Most notably, the claim that "[e]ach deal may be worth between three and

five thousand dollars" did not take into account how much money consumers had expended to make the deal and, in any event, only reflected the few deals that consumers had been able to close and broker to a third-party investor. ER Vol. 3 Tab 5, SJ Ex. 5 at 246-47. Given the shortage of saleable privately held paper (*see* pp. 11, 22, 25, 27-28, *supra*), such deals are not a reasonable basis for the grandiose earnings claims that defendants made.

C. The District Court Properly Found No Genuine Issue For Trial Regarding Beringer's Liability for False and Unsubstantiated Representations Made to Consumers

1. The district court correctly found Beringer liable for false and unsubstantiated representations by its telemarketers

The district court concluded that there was no material dispute that Atlas acted as Beringer's agent in marketing the Stefanchik Program. Accordingly, the court held, Beringer was liable as a principal for Atlas's misconduct. *See* ER Vol. 1 Tab 3 at 10-11. Beringer contends that summary judgment was improper because Atlas was an "independent legal entity." Beringer further contends that Beringer's president, John Stefanchik, was "not a corporate officer of Atlas" and that the firms "shared no office space or employees."[32] Beringer Br. 19-20.

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[32] Beringer's contentions with respect to corporate liability for its agent's misrepresentations are set forth in a section of its brief that purports to relate to its TSR liability. It appears that these contentions also relate to Beringer's FTC Act liability. *See* Beringer Br. 18.

Beringer's status as an "independent legal entity" is not dispositive of its liability under the FTC Act. As this Court has held, a principal is liable for the unlawful conduct of its agent regardless of the corporate formalities. *See, e.g., Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1438-39 (9th Cir. 1986); *Goodman v. FTC*, 244 F.2d at 584, 591-93 (9th Cir. 1957); *Standard Distributors v. FTC*, 211 F.2d 7, 13 (2d Cir. 1954). The only relevant question is whether Atlas acted within the scope of "actual" or "apparent" authority in promoting the Stefanchik Program to consumers.[33] *See Southwest Sunsites, Inc.*, 785 F.2d at 1438; *Goodman*, 244 F.2d at 592-93; *Standard Distributors*, 211 F.2d at 13.

As the district court found, undisputed facts established that Atlas acted within the scope of both actual and apparent authority in marketing the Stefanchik Program. Stefanchik authorized Atlas to market and sell the Stefanchik Program for Beringer using "The Stefanchik Organization" name. While it was agreed that Atlas would market the program and handle customer service relating to sales, Beringer was responsible for providing the program content. Stefanchik, as

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[33] Actual authority is "the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him. Restatement (Third) of Agency § 2.01 & Comment *f* (2006). By contrast, under principles of "apparent authority" a principal is bound by the acts of its agent when his conduct has caused third parties – *i.e.*, Stefanchik Program purchasers – to believe, correctly or not, that the principal has authorized the agent to engage in particular conduct. *Id.* § 2.03 & Comments *c-d.*

Beringer's President, not only retained authority to review and approve copy for direct mail pieces and the website,[34] but also exercised that authority by, *inter alia*, providing "final review" of "most" advertising copy. ER Vol. 3 Tab 3, SJ Ex. 3 at 92. Stefanchik and Atlas's Justin Ely maintained a close working relationship, and spoke frequently regarding problems with purchasers, workshop scheduling, and "anything at all." ER Vol. 3 Tab 5, SJ Ex. 5 at 212. Indeed, Stefanchik recognized that consumers perceived them as "one seamless operation." ER Vol. 3 Tab 5, SJ Ex. 5 at 287-88. While Beringer denies suggesting edits, changes, or directing the style of Atlas's telemarketing scripts (Beringer Br. 20), Stefanchik, as Beringer's president, controlled the contents *indirectly*, shown most clearly by the letter from his counsel describing the results of Stefanchik's requested review of the telemarketing script's marketing claims. Based on this showing, the district court correctly determined that Beringer had "substantial authority to control what consumers were told in the marketing of the Stefanchik Program" and therefore was responsible for the marketing claims. ER Vol. 1 Tab 3 at 11.

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[34] ER Vol. 3 Tab 1, SJ Ex. 1 at 13, 16-17; ER Vol. 3 Tab 2, SJ Ex. 2 at 54; ER Vol. 3 Tab 5, SJ Ex. 5 at 203-04, 206; ER Vol. 4 Tab 11, SJ Ex. 11 at 432, 435

2. The district court correctly found that Beringer was liable as a "seller" under the TSR

Defendants' contention that the district court erred in finding Beringer liable for violating the TSR is wholly without merit.[35] The relevant provisions of the TSR prohibits any "seller" or "telemarketer" from misrepresenting "[a]ny material aspect of the performance, efficacy, nature, or central characteristics of goods or services." 16 C.F.R. § 310.3(a)(2)(iii). Section 310.3(a)(4) of the TSR contains a broad prohibition – applicable to both "sellers" and "telemarketers" – against making *any* false or misleading statement that is used "to induce any person to pay for goods or services * * *." 16 C.F.R. § 310.3(a)(4). Having determined that deceptive earnings and coaching claims that were central to the offer were made in telemarketing sales calls in violation of Section 5, the district court concluded that Beringer was liable for violating the TSR as well.[36] ER Vol. 1 Tab 2 at 3-4.

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[35] The Commission promulgated the TSR in response to a directive from Congress in the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101-08. Congress directed the FTC to "prescribe rules prohibiting deceptive * * * and other abusive telemarketing acts and practices" (15 U.S.C. § 6102(a)(1)), and authorized it to enforce violations of the rules in the same manner, and by the same means, as the provisions of the FTC Act. *See* 15 U.S.C. § 6105.

[36] Thus, the TSR provides a basis for finding Beringer liable for the deceptive earnings and coaching claims that Atlas made in its telemarketing sales calls that is separate from the question whether Atlas acted with "actual" or "apparent" authority, as discussed above.

Defendants contend that because Atlas and Beringer are separate legal entities, the district court erred in granting the summary judgment on the TSR claims. Beringer Br. 19. This argument is unavailing, however, because the TSR was drafted to afford broad coverage of *all* entities that benefit economically from telemarketing transactions. As noted above, the proscriptions of the TSR apply to "telemarketers" *and* "sellers" – *i.e.*, "any person who, in connection with a telemarketing transaction, provides, offers to provide, *or arranges for others to provide goods or services to the customer in exchange for consideration.*" 16 C.F.R. § 310.2(z) (emphasis added). The Commission retained the definition of "seller" when it amended the rule in 2003, noting that a "seller" is not necessarily the manufacturer of a product, or the sole financial beneficiary of its sale. Accordingly, the Commission explained, the definition of "seller" should continue to apply to a person's provision of goods or services, regardless of whether they are offered or even simply "arranged for." 68 Fed. Reg. 4580, 4598 n.204 (Jan. 29, 2003).

Having made arrangements with Atlas to promote its Stefanchik Program to consumers (*see* p. 6, *supra*), Beringer is a "seller" under the terms of the TSR and therefore is responsible with Atlas for any violations of the TSR in the telemarketing sales calls regardless of the formalities of its relationship to Atlas or

its status as a separate legal entity. Because Beringer's assertions of separate legal status are simply not relevant to liability under the TSR, they do not create disputed issues of material fact. Thus, contrary to defendants' contention, the district court did not err in granting summary judgment on the Commission's TSR claims.[37]

3. There were no disputed material facts for trial as to Stefanchik's personal liability for Beringer's unlawful conduct

The relevant standards for personal liability for violations of the FTC Act are well established. An individual may be held liable for injunctive relief for the corporate defendant's violations of the FTC Act if he either (a) participated in the challenged conduct, or (b) had authority to control it. *See, e.g., Cyberspace.com*, 453 F.3d at 1202; *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1234 (9th Cir. 1999); *FTC v. Pantron I*, 33 F.3d at 1103. Authority to control the company can be shown by active involvement in business affairs and the making of corporate policy. An individual's status as a corporate officer, authority to sign documents on behalf of the corporate defendant, and active involvement in the making of

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[37] Beringer's formulation of the standard for its liability under the TSR Rule confuses individual and corporate liability. *See* Beringer Br. 19. The standard described in its brief relates to an individual's liability to pay monetary equitable relief for a corporation's wrongdoing, not to corporate liability. *See, e.g., Cyberspace.com*, 453 F.3d at 1202; *Amy Travel Service, Inc.*, 875 F.2d at 573.

corporate policy are all factors that tend to demonstrate an individual's authority to control the corporation. *See, e.g., FTC v. Publishing Clearing House, Inc.*, 104 F.3d at 1170; *FTC v. Amy Travel Service, Inc.*, 875 F.2d at 573-74. To hold an individual defendant jointly and severally liable for restitution, the FTC must show, in addition to the above, that he has actual knowledge of material misrepresentations, was recklessly indifferent to their truth or falsity, or, at a minimum, was aware of a high probability of fraud and intentionally avoided the truth. *See, e.g., Amy Travel Service*, 875 F.2d at 574. The degree of an individual's participation in business affairs is probative of his knowledge.

In support of its motion for summary judgment, the Commission made a strong showing that Stefanchik not only controlled Beringer, but also that he had actual knowledge of the spectacular earnings claims that were being made for the Stefanchik Program. As president, director, manager, and sole owner, Stefanchik was involved in virtually every aspect of corporate operations, and had sole authority to control its business practices and manage its bank accounts. ER Vol. 3 Tab 1, SJ Ex. 1 at 3-4; ER Vol. 3 Tab 2, SJ Ex. 2 at 44-45; SJ Ex. 3 at 90-91. In addition to managing the business on a daily basis (*see* ER Vol. 3 Tab 3, SJ Ex. 3 at 89-90), Stefanchik produced many of the written course materials, videotapes, and audiotapes that Beringer later sold as part of the Stefanchik Program. He also

wrote the "teaser" book, *Wealth Without Boundaries*, whose purchasers were targeted for telemarketing sales calls.[38] In addition to his role in preparing the course materials, Stefanchik made arrangements on behalf of Beringer for marketing and telemarketing the Stefanchik Program.[39] He also taught at workshops and seminars that Beringer sold to consumers.[40]

While the telemarking script and many of the marketing materials may have been written by others, undisputed evidence establishes that Stefanchik knew that false and unsubstantiated representations were being made, but did not stop them. Most notably, the record shows that in September 2000, Stefanchik provided his attorney with promotional materials and telemarketing scripts. ER Vol. 4 Tab 6, SJ Ex. 6 at 337-45, Exs. 2-3; ER Vol. 4 Tab 15, SJ Ex. 15 at 582-83, 585-86. After reviewing the materials, Stefanchik's attorney advised him – in writing – that he

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[38] ER Vol. 5 Tab 1 at 2 ¶ 10; ER Vol. 4 Tab 11, SJ Ex. 11 at 422-23; ER Vol. 3 Tab 1, SJ Ex. 1 at 4-5; ER Vol. 3 Tab 2, SJ Ex. 2 at 45-46; ER Vol. 3 Tab 5, SJ Ex. 5 at 159-60, 161, 183-84; 186-87.

[39] ER Vol. 5 Tab 1 at 2 ¶ 11; ER Vol. 3 Tab 1, SJ Ex. 1 at 10; ER Vol. 3 Tab 2, SJ Ex. 2 at 49-50; ER Vol. 3 Tab 3, SJ Ex. 3 at 89; ER Vol 3 Tab 5, SJ Ex. 5 at 159-60, 190; ER Vol. 4 Tab 7, SJ Ex. 7 at 350-51; ER Vol. 4 Tab 10, SJ Ex. 10 at 384; ER Vol. 4 Tab 11, SJ Ex. 11 at 421-23.

[40] ER Vol. 3 Tab 1, SJ Ex. 1 at 10; ER Vol. 3 Tab 2, SJ Ex. 2 at 51; ER Vol. 3 Tab 5, SJ Ex. 5 at 159-60, 190, 192-93; ER Vol. 4 Tab 7, SJ Ex. 7 at 350-51; ER Vol. 4 Tab 10, SJ Ex. 10 at 384, 387-88; ER Vol. 4 Tab 11, SJ Ex. 11 at 422-23.

needed to add disclosures and substantiation for the earnings claims, including, specifically, claims that, on average, consumers will earn $3500-$5000 a month within 60 days. ER Vol. 4 Tab 6, SJ Ex. 6 at 343. In subsequent conversations, Stefanchik's attorney described the requirements of the TSR and reiterated the need to have substantiation for the earnings claims. ER Vol. 4 Tab 6, SJ Ex. 6 at 323-24, 327-29. He never obtained it, however, even after hearing about complaints that consumers had with the program.[41]

In light of this evidence, there is no genuine dispute that – as the district court concluded – Stefanchik "had actual knowledge of the earnings and coaching claims * * *, or, at the very least, was recklessly indifferent to the truth or falsity of those claims." ER Vol. 1 Tab 3 at 12. While Stefanchik asserts that he does not "own, operate, or control" the marketing firm (Stefanchik Br. 8), the overwhelming and undisputed evidence of knowledge and control render that assertion irrelevant. Thus, the district court was amply justified in rendering summary judgment on the Commission's claims.

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[41] *See* pp. 28-30, *supra*; ER Vol. 3 Tab 5, SJ Ex. 5 at 218-20; ER Vol. 4 Tab 6, SJ Ex. 6 at 332-33; ER Vol. 4 Tab 13, SJ Ex. 13 at 520 ¶ 13.

II. The District Court's Determination of the Amount of Equitable Monetary Relief Was Well Within Its Discretion

A. Standard of Review

A district court's choice of equitable monetary relief is reviewed for an abuse of discretion. *See, e.g., Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (9th Cir. 2001); *FTC v. Febre*, 128 F.3d 530, 533 (7th Cir. 1997). Any underlying factual findings are reviewed for clear error. *See, e.g., Ting v. AT&T*, 319 F.3d 1126, 1134-35 (9th Cir. 2003).

B. The District Court Properly Awarded Restitution Based On Consumers' Losses

In addition to injunctive relief, the Commission asked the district court to award equitable monetary relief in the amount of $17,775,369 – *i.e.*, the full purchase price of the Stefanchik Program in the roughly 2 ½ year period at issue. Contrary to Beringer's contention that "there was not one shred of evidence" to support this figure (Beringer Br. 24), in fact the Commission submitted an affidavit from an Atlas official, who reported the figures from the company's files. *See* ER Vol. 4 Tab 12, SJ Ex. 12 at 514 ¶ 8, 516. Beringer asserts that it received only a percentage of net revenues. Accordingly, it contends, the amount of the judgment is unwarranted. Beringer Br. 24.

Beringer's objection to the size of the judgment is premised on the erroneous

assumption that "unjust enrichment" is the only proper measure of monetary equitable relief. *See id.* While that formula might be appropriate in another case,[42] it was not appropriate here. As we have shown, virtually no one made money using the Stefanchik Program. Where consumers have paid for something that has virtually no value, this Court and others have recognized that it is appropriate to make them whole. *See, e.g., FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1207 (10th Cir. 2005); *FTC v. Febre*, 128 F.3d at 536; *FTC v. Figgie International, Inc.*, 994 F.2d at 606-07; *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991). Furthermore, even assuming that "Beringer's royalties revenue [was] only a small percentage, per the oral agreement" (Beringer Br. 24), the evidence shows that – even as they outsourced the marketing component of the scheme – Beringer and Stefanchik remained the driving force behind it. Given these circumstances, it was not an abuse of discretion for the district court to use the full amount of consumers' losses as the basis for an award.

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[42] For example, disgorgement of a wrongdoer's profits may be the only feasible remedy where measurement of consumers' losses is impossible or in the case of victimless regulatory violations. *See, e.g., SEC v. Lorin*, 869 F. Supp. 1117, 1129 (S.D.N.Y. 1994) (listing cases).

CONCLUSION

For all the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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March 13, 2008

CERTIFICATE OF COMPLIANCE

Federal Trade Commission v. Stefanchik *et al.*, No. 07-35359

Pursuant to Fed. R. App. P. 32(A)(7)(C), I certify that the foregoing Brief for Plaintiff-Appellee Federal Trade Commission is proportionally spaced, has a typeface of 14 points, and contains 10,933 words.

Dated: March 13, 2008

Leslie Rice Melman

CERTIFICATE OF SERVICE

This is to certify that on this 13th day of March, 2008, copies of the foregoing Brief for Plaintiff-Appellee Federal Trade Commission, together with the Federal Trade Commission's Supplemental Excerpts of Record, were served by overnight courier, postage prepaid, on the persons listed below:

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