UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

FEDERAL TRADE COMMISSION, **Plaintiff,** **v.**	)	
DIRECT BENEFITS GROUP, LLC, a Wyoming limited liability company, also dba Direct Benefits Online, and Unified Savings; **VOICE NET GLOBAL, LLC,** a Wyoming limited liability company, also dba Thrifty Dial; **SOLID CORE SOLUTIONS, INC.,** a Utah corporation; **WKMS, INC.,** a Utah corporation; **KYLE WOOD, individually and as owner, officer, or manager of Direct Benefits Group, LLC; and WKMS, Inc., and** **MARK BERRY, individually and as owner, officer, or manager of Voice Net Global, LLC; and Solid Core Solutions, Inc.,** **Defendants.**	)	**Case No. 6:11-CV-1186-JA-GJK**

PLAINTIFF FEDERAL TRADE COMMISSION'S
MOTION FOR SUMMARY JUDGMENT, STATEMENT OF MATERIAL FACTS,
AND SUPPORTING MEMORANDUM
[DISPOSITIVE MOTION]

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Concordance List: Where Plaintiff Exhibits are found within the Docket Numbers

Docket Number	**PX (Plaintiff's Exhibit) Number**	**Title**
6	1	Declaration of Michael Liggins, FTC Investigator
7	2	Declaration of Reeve Tyndall, FTC Investigator
7	3	Declaration of Christine Sauers, BBB of Delaware
8	4	Declaration of Judy Pepper, BBB of Central Florida
8	5	Declaration of Pam King, BBB of Northern Colorado and Wyoming
8	6	Declaration of Jane Driggs, BBB of Utah
9	7	Declaration of Chad Arseneau, consumer
9	8	Declaration of Susan Battaglia, consumer
9	9	Declaration of Stephanie Beaty, consumer
9	10	Declaration of Peggy Bloch, consumer
9	11	Declaration of Veronica Bolyard, consumer
9	12	Declaration of Dick Bontatibus, consumer
9	13	Declaration of James Brown, consumer
9	14	Declaration of Luis Calvo, consumer
9	15	Declaration of John Chagoya, consumer
9	16	Declaration of Christine Conner, consumer
9	17	Declaration of John Derenge, consumer
9	20	Declaration of Megan Feeley, consumer
9	21	Declaration of Jessica Gallegos-Whitfield, consumer

9	22	Declaration of Felicia George, consumer
9	23	Declaration of Abimael Ginesta, consumer
9	24	Declaration of Shelby Hanning, consumer
9	25	Declaration of Amanda Lightaul, consumer
9	26	Declaration of Donnajane Palmer, consumer
9	27	Declaration of Danielle Reynolds, consumer
9	28	Declaration of Mary Sambo, consumer
9	29	Declaration of Luis Tosado, consumer
9	30	Declaration of Kevin Willis, consumer
56	31	Supplemental Declaration of Michael Liggins, FTC Investigator
57	32	Declaration of Jeffrey Barton, official, Public Savings Bank
58	33	Declaration of Brian Bonfiglio, official, Checkgateway
59	34	Declaration of Joseph Costa, consumer
60	35	Declaration of Angela Hardmon, consumer
61	36	Declaration of Thomas Mayer, President, Direct Benefits, Inc., St. Paul, Minnesota
62	37	Letter from Richard Todd, official, Federal Reserve Bank of Minneapolis

66	38	Second Declaration of Reeve Tyndall, FTC Investigator
67	39	Declaration of Kenneth Kelly, FTC Economist (part of expert report)
131	40	Supplemental Declaration of Dr. Kenneth Kelly (part of expert report)
132	41	Plaintiff's Interrogatories to Defendant Kyle Wood and Mr. Wood's Responses
133	42	Plaintiff's Interrogatories to Defendant Mark Berry and Mr. Berry's Responses
134	43	Deposition Transcript of Defendant Kyle Wood and accompanying exhibits
135	44	Deposition Transcript of Defendant Mark Berry and accompanying exhibits
136	45	Deposition Transcript of Gabrielle Lynn and accompanying exhibits
137	46	Deposition Transcript of Thomas Cohn and accompanying exhibits
138	47	Deposition Transcript of Taylor Anderson and accompanying exhibits
139	48	Page Designations for the Depositions

I. INTRODUCTION

The FTC moves for summary judgment because there are no genuine issues of material fact that need to be decided at trial. Defendants violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), in connection with their debiting consumers' bank accounts without authorization. Section 5(a) prohibits unfair and deceptive acts and practices. For nearly two years, Defendants collectively operated a scheme to debit the bank accounts of consumers without their knowledge or consent. The Defendants operated numerous websites that advertised payday loans. Consumers seeking payday loans often search on-line to secure such a loan. In the course of their search, numerous consumers found Defendants' payday loan websites. Defendants' website applications required consumers to provide financial information, including their bank account information. After obtaining consumers' bank account information, Defendants then unfairly debited consumers' bank accounts without the consumers' consent. (Count I of Complaint.) Defendants also failed to disclose adequately to consumers that, in addition to obtaining consumers' financial information for the purpose of furthering their payday loan applications, Defendants also used consumers' bank account information to charge consumers for enrollment in programs and services unrelated to the payday loan. (Count II of the Complaint.) Defendants sold consumers programs and services, such as buyers' clubs and long distance telephone services, causing consumers to lose over $9.5 million as a result of this unfair and deceptive scheme.

The cumulative evidence proves that the business practices of the corporate Defendants were unfair and deceptive and violated Section 5 of the FTC Act. The evidence

further proves that the individual Defendants, Kyle Wood and Mark Berry, controlled the acts and practices of and participated in Corporate Defendants' unfair and deceptive activity and had knowledge of such activity. Plaintiff is therefore entitled to summary judgment against all Defendants as a matter of law. A permanent injunction, including injunctive and equitable monetary relief, should be entered against Defendants.

II. THE RELEVANT EVIDENCE COMPELS SUMMARY JUDGMENT[1]

In support of its motion for summary judgment, the FTC submits overwhelming evidence, including consumer declarations, Better Business Bureau declarations and complaints, copies of Defendants' websites, declarations of other witnesses, including two FTC investigators, depositions of Defendants and others, interrogatory answers of Defendants, and pertinent business records.

III. STATEMENT OF MATERIAL FACTS

A. JURISDICTION AND VENUE

1. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a), 53(b), and 57b.[2]

2. Venue is proper under 28 U.S.C. § 1391(b) and (c) and 15 U.S.C. § 53(b).[3]

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1 **Citations throughout refer to either Plaintiff's Exhibit Number ("PX ___"), the Document Number on the Court's ECF-filer Pacer System ("Doc. ___"), or Defendants' Exhibit Number ("DX ___"), and to the Attachment ("Att."), paragraph ("¶"), page ("p.") number, or line number(s) (l. or ll.), as appropriate. "SMF___" refers to specific findings of fact in the Statement of Material Facts.**

2 Admitted in Answer: Doc. 104, ¶2.

3 See SMF 5.

B. **THE PARTIES**

3. Plaintiff **Federal Trade Commission** (FTC) is an independent agency of the U.S. government charged with enforcement of the FTC Act.[4]

4. Defendant **Direct Benefits Group, LLC**, ("Direct Benefits") is a Wyoming limited liability company with its principal place of business in Bluffdale, Utah. Direct Benefits transacted business in the Middle District of Florida and throughout the United States and was an on-line marketer of the Direct Benefits Online and Unified Savings discount savings programs, which were sold to consumers nationwide from mid-2009 through July 2011.[5] Direct Benefits Group used the fictitious name of Unified Savings, with an address in Delaware.[6]

5. Defendant **Voice Net Global, LLC**, ("Voice Net Global") is a Wyoming limited liability company with its principal place of business in Bluffdale, Utah. Voice Net Global transacted business in this district and throughout the United States as an on-line marketer of long distance discount products to consumers nationwide from mid-2009 through July 2011.[7] Voice Net Global used the fictitious name of Thrifty Dial, which had a business location in

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[4] 15 U.S.C. § 45(a).

[5] Admitted in Answer: Direct Benefits is or was a Wyoming limited liability company that transacted business in the United States. Doc. 104, ¶6; PX 1,¶9; PX 3-6; Doc. 38, ¶3.

[6] PX 3, ¶¶9-12.

[7] Admitted in Answer: Voice Net Global is or was a Wyoming limited liability company that transacted business in the United States. Doc. 104, ¶7; PX 1, ¶12; PX 3-6; Doc. 39, ¶ 3.

Lake Mary, Florida.[8]

6. Defendant **Solid Core Solutions, Inc.**, ("Solid Core") is a Utah corporation with its principal place of business in Bluffdale, Utah. Solid Core transacted business in this district and throughout the United States and provided software development, operational, and administrative services for the other defendants from mid-2009 through July 2011.[9]

7. Defendant **WKMS, Inc.**, ("WKMS) is a Utah corporation with its principal place of business in Bluffdale, Utah. WKMS transacted business in this district and throughout the United States. It operated an online payday loan referral service that sold customer leads to payday lenders from mid-2009 through July 2011.[10]

8. Defendant **Kyle Wood** is an individual who resides in Utah. Kyle Wood has transacted business in this district and throughout the United States.[11] He was sole owner and officer of WKMS, and sole owner and manager of Direct Benefits.[12]

9. Defendant **Mark Berry** is an individual who resides in Utah. Mark Berry has

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8 PX 44 [Berry Dep.], p.18, l.8 – p.19, l.1; p. 20, ll.21-24; p.40, l.17 – p.41, l.17.

9 Admitted in Answer: Solid Core is or was a Utah corporation that transacted business in the United States. Doc. 104, ¶8; PX 1, ¶16; Doc. 38, ¶3; PX 44 [Berry Dep.], p.20, l.21 – p.21, l.4.

10 Admitted in Answer: WKMS is or was a Utah corporation that transacted business in the United States. Doc. 104, ¶9; PX 1, ¶¶19, 23-24; Doc. 38, ¶¶4-5.

11 Admitted in Answer: Kyle Wood resides in Utah and has transacted business in the United States. Doc. 104, ¶10; Doc. 38, ¶ 2.

12 Doc. 38, ¶3.

transacted business in this district and throughout the United States.[13] He was sole owner and manager of Voice Net Global and sole owner and officer of Solid Core.[14]

10. Defendants Direct Benefits, Voice Net Global, Solid Core, and WKMS (collectively "Corporate Defendants") operated as a common enterprise while engaging in the unfair and deceptive practices. Defendants conducted the business practices described below through an interrelated network of companies that have common ownership, managers, employees, business functions, office locations, and substantially similar sales techniques. Defendants Wood and Berry formulated, directed, controlled, had the authority to control, or participated in the acts and practices of the Corporate Defendants that constituted the common enterprise.[15]

C. COMMERCE

11. Throughout the time of their operation, Defendants were engaged in "commerce," as defined at 15 U.S.C. § 44.[16]

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13 Admitted in Answer: Mark Berry resides in Utah and has transacted business in the United States. Doc. 104, ¶11; Doc. 39, ¶2.

14 Doc. 39, ¶3.

15 Doc. 38, ¶3; Doc. 39, ¶3; PX 44 [Berry Dep.], p.32, l.16 – p.34, l.13; PX 45 [Lynn], p.10, l.17 – p. 11, l.19.

16 PX 3-6, showing commerce occurring in many states.

D. Defendants' Unfair and Deceptive Business Practices

1. Operations of the Business

12. Since at least 2009 until July 2011, Defendants engaged in a scheme to debit consumers' bank accounts without their knowledge or consent.[17]

13. Consumers seeking payday loans often searched online to secure such a loan and were directed to one or more of Defendants' websites.[18] Defendants operated numerous payday loan matching websites, including citywestfinancial.com, mypaydayangel.com, paydaypickup.com, juniperloans.com, northcitymutual.com, southcitymutual.com, and mycashpickup.com.[19]

14. The websites featured a payday loan matching form ("loan application" or "application form"). The websites induced consumers who were interested in a payday loan with language such as: "Get cash up to $500 as soon as 1 hour!"; "How it Works: Fast, Easy and Secure"; "Your online application is free of charge"; and "Easy to Apply--Approved in Minutes--Cash in Your Account."[20] A header for the citywestfinancial.com site simply states: "your payday loan specialists." [21]

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[17] SMF 13 - 20.

[18] *E.g.*, PX 7 [Arseneau], ¶3; PX 8 [Battaglia], ¶3; PX 9 [Beaty], ¶3; PX 10 [Bloch], ¶3.

[19] PX 2 [Tyndall], ¶¶11-14; PX 41, pp.14, 32-33 [Plaintiff's First Set of Interrogatories; Wood's Interrogatory Response 13].

[20] PX 2 [Tyndall], pp.23-24.

[21] PX 2 [Tyndall], p.52.

15. Apart from the application form itself, the websites focused almost exclusively on the payday loan and what information was needed to obtain it. However, Defendants' websites were not only on-line applications for payday loans, but they were also vehicles to collect financial information from consumers. With this information, Defendants enrolled consumers into their programs for which Defendants charged membership fees.[22]

16. To complete the on-line application form, consumers were required to provide personal and financial information, such as their name, Social Security number, driver's license number, bank routing number, and bank account number.[23]

17. On the application form, Defendants included an offer for unrelated programs and services, such as the Direct Benefits discount programs, which purported to provide consumers a variety of savings on gas, restaurants, travel, groceries, and merchandise, and Voice Net calling programs, which purported to offer long distance calling services and internet access.[24]

18. After filling out the payday loan application form, consumers were directed to click on a "submit" or "confirm" button to complete the process and submit their application.

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22 *E.g.,* PX 2 [Tyndall], p. 53; PX 7 [Arseneau], ¶¶3, 5; PX 8 [Battaglia], ¶¶3-5; PX 9 [Beaty], ¶5; PX 10 [Bloch], ¶5; PX 11 [Bolyard], ¶6; PX 12 [Bontatibus], ¶4; PX 13 [Brown], ¶5; PX 14 [Calvo], ¶¶5, 7.

23 PX 7 [Arseneau], ¶3; PX 8 [Battaglia], ¶3; PX 10 [Bloch], ¶3; PX 11[Bolyard], ¶4; PX 12 [Bontatibus], ¶3; PX 13 [Brown], ¶3; PX 14 [Calvo], ¶3; PX 15 [Chagoya], ¶4; PX 16 [Conner], ¶4; PX 20 [Feeley], ¶4; PX 21 [Gallegos-Whitfield], ¶3; PX 23 [Ginesta], ¶3; PX 24 [Hanning], ¶3; PX 25 [Lightaul], ¶3; PX 26 [Palmer], ¶3; PX 27 [Reynolds], ¶3; PX 28 [Sambo], ¶3; PX 29 [Tosado], ¶3; PX 2 [Tyndall], pp.42-3, 52, 67-8 [website form].

24 *E.g.*, PX 2 [Tyndall], pp. 39, 69, 77, 90; PX 20 [Feeley], ¶ 4.

Thereafter, consumers began to receive emails from various payday lenders,[25] because Defendants sold consumers' financial information, or leads, to various payday lenders.[26] At the same time, consumers were enrolled unwittingly into one of Defendants' programs, such as the Direct Benefits discount programs or the Voice Net Global long distance calling programs.[27]

19. Defendants charged consumers various fees for membership in their discount programs. For example, the Direct Benefits and Voice Net Global programs were initially offered as continuity plans in which consumers were charged monthly fees ranging from $39.95 to $59.90.[28] However, in or around January 2011, both programs changed their structure to charge an annual fee for the programs ranging from $98.40 to $99.90.[29]

20. Having obtained consumers' bank account information from their websites, Defendants sent this information to their payment processors, including, but not limited to,

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25 PX 7 [Arseneau], ¶4; PX 8 [Battaglia], ¶4; PX 9 [Beaty], ¶4; PX 10 [Bloch], ¶4; PX 11 [Bolyard], ¶4; PX 12 [Bontatibus], ¶3; PX 13 [Brown], ¶5; PX 14 [Calvo], ¶4; PX 16 [Conner], ¶7; PX 17 [Derenge], ¶5; PX 20 [Feeley], ¶5; PX 23 [Ginesta], ¶4; PX 24 [Hanning], ¶5; PX 26 [Palmer], ¶5; PX 27 [Reynolds], ¶4; PX 28 [Sambo], ¶4; PX 29 [Tosado], ¶5.

26 PX 43 [Wood Dep.], p.25, l.5 - p.26, l.4.

27 *E.g.*, PX 8 [Battaglia], ¶¶6, 8; PX 11 [Bolyard], ¶7; PX 12 [Bontatibus], ¶ 5; PX 16 [Conner], ¶¶ 7, 10; PX 22 [George], ¶8; PX 2 [Tyndall], pp.39, 53, 62.

28 PX 8 [Battaglia], ¶5; PX 9 [Beaty], ¶5; PX 11 [Bolyard], ¶6; PX 12 [Bontatibus], ¶4; PX 13 [Brown], ¶5; PX 14 [Calvo], ¶5; PX 16 [Conner], ¶7; PX 21 [Gallegos-Whitfield], ¶7; PX 22 [George], ¶4; PX 23 [Ginesta], ¶5; PX 26 [Palmer], ¶12; PX 30 [Willis], ¶13.

29 PX 7 [Arseneau], ¶5; PX 10 [Bloch], ¶5; PX 24 [Hanning], ¶6; PX 25 [Lightaul], ¶4; PX 27 [Reynolds], ¶5; PX 28 [Sambo], ¶5; PX 29 [Tosado], ¶5.

Landmark Clearing, Inc., to create and deposit remotely created payment orders ("RCPOs"), which debited consumers' bank accounts as payment for the programs. These RCPOs, which were created and processed electronically, look like pre-authorized bank checks made payable to Direct Benefits, Voice Net Global, Unified Savings, or Thrifty Dial, where, in place of the account holder's signature, there was the statement "Authorization on File." Upon receipt, the consumers' bank processed the RCPOs as if they were ordinary checks.[30]

2. Defendants unfairly obtained consumers' bank account information and debited those accounts without consumers' consent. (Count I)

21. In numerous instances, consumers state that Defendants obtained their bank account information and debited those accounts without the consumers' consent. The consumers state that they had not authorized Defendants to debit their bank accounts.[31]

22. Even some consumers who never completed the on-line application found that their bank accounts were debited by Defendants.[32]

23. Consumers typically did not discover that they had been enrolled in one of the Defendants' programs until they saw a debit that they did not recognize on their bank

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30 PX 2 [Tyndall], ¶¶ 6, 20.

31 PX 7 [Arseneau], ¶6; PX 8 [Battaglia], ¶6; PX 10 [Bloch], ¶6; PX 11 [Bolyard], ¶¶6-7; PX 12 [Bontatibus], ¶7; PX 13 [Brown], ¶5; PX 14 [Calvo], ¶6; PX 16 [Conner], ¶9; PX 17 [Derenge], ¶6; PX 20 [Feeley], ¶7; PX 21 [Gallegos-Whitfield], ¶10; PX 23 [Ginesta], ¶6; PX 25 [Lightaul], ¶5; PX 26 [Palmer], ¶7; PX 27 [Reynolds], ¶7; PX 28 [Sambo], ¶¶8, 10; PX 29 [Tosado], ¶7; PX 30 [Willis], ¶¶8, 9.

32 PX 15 [Chagoya], ¶4; PX 22 [George], ¶ 3.

statement[33] or until they were contacted by their bank because their accounts were overdrawn as a result of the unanticipated debit.[34] It was only after they saw a copy of the RCPO online or contacted their bank for more information that consumers discovered that either Direct Benefits or Voice Net Global, or one of their d/b/a's, debited their accounts. One of the Defendants' names was listed as the payee, and the company's toll-free customer number was listed on the face of the instrument.[35]

24. Many consumers did not see or did not recall ever seeing any advertisement regarding programs offered by Defendants.[36]

25. Other consumers remember seeing an advertisement for a program offering discounts on products, but they were not interested in the program and did not click on the advertisement to accept the program.[37]

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[33] PX 7 [Arseneau], ¶5; PX 8 [Battaglia], ¶5; PX 9 [Beaty], ¶5; PX 10 [Bloch], ¶5; PX 11 [Bolyard], ¶6; PX 12 [Bontatibus], ¶4; PX 13 [Brown], ¶5; PX 16 [Conner], ¶7; PX 21 [Gallegos-Whitfield], ¶5; PX 23 [Ginesta], ¶5; PX 25 [Lightaul], ¶4; PX 27 [Reynolds], ¶5; PX 28 [Sambo], ¶5; PX 30 [Willis], ¶8

[34] PX 14 [Calvo], ¶5.

[35] PX 10 [Bloch], ¶5; PX 12 [Bontatibus], ¶4; PX 13 [Brown], ¶¶5-6; PX 16 [Conner], ¶¶7-8; PX 22 [George], ¶4; PX 28 [Sambo], ¶5; PX 30 [Willis], ¶8.

[36] *E.g.*, PX 7 [Arseneau], ¶8; PX 8 [Battaglia], ¶7; PX 9 [Beaty], ¶7; PX 10 [Bloch], ¶8; PX 11 [Bolyard], ¶5; PX 12 [Bontatibus], ¶8; PX 13 [Brown], ¶¶7-8; PX 14 [Calvo], ¶10; PX 16 [Conner], ¶¶11-12; PX 17 [Derenge], ¶9; PX 23 [Ginesta], ¶ 7; PX 24 [Hanning], ¶ 10; PX 25 [Lightaul], ¶ 9; PX 27 [Reynolds], ¶8; PX 28 [Sambo], ¶11; PX 29 [Tosado], ¶8; PX 30 [Willis], ¶¶6, 10.

[37] At least one consumer stated that she actually read through the pop-up (opt-in) box and specifically declined the offer; she intended only to complete the on-line payday loan application. However, she was charged anyway by Defendants for Defendants' programs. PX 20 [Feeley], ¶5. Another consumer saw the pop-up box but also refused the offer. PX 21 [Gallegos-Whitfield], ¶4. Still another consumer, who describes herself as careful about reading fine print and about signing up for things, did not notice anything on the website

26. Some consumers were charged for the programs even when they specifically declined the offer for enrollment.[38]

27. Consumers often reported that they did not and would not have enrolled in any buying club program that cost them money, especially at a time when they did not have enough money and were looking for a payday loan.[39]

28. Defendants made it very difficult for consumers to obtain a refund. Consumers calling the toll-free numbers frequently found it difficult to reach a live representative. Usually, there was a lengthy recorded message explaining the program and, thereafter, consumers were either placed on hold for long periods of time or not provided the opportunity to leave a voicemail message. When consumers finally spoke with a "real person," the representatives routinely dismissed the consumers' complaints and told the consumers that they, the consumers, had signed up for the program and had agreed to pay the enrollment fee.[40] One consumer even experienced further debits after she was told by

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mentioning or advertising any kind of club or authorizing a membership club to withdraw money from her bank account. PX 8 [Battaglia], ¶7.

[38] *E.g.,* PX 16 [Conner], ¶6; PX 20 [Feeley], ¶ 4; PX 21 [Gallegos-Whitfield], ¶4.

[39] PX 8 [Battaglia], page 5; PX 9 [Beaty], ¶8; PX 10 [Bloch], ¶9; PX 11 [Bolyard], ¶5; PX 12 [Bontatibus], ¶9; PX 13 [Brown], ¶10; PX 14 [Calvo], ¶11; PX 15 [Chagoya], ¶5; PX 17 [Derenge], ¶¶9-10; PX 21 [Gallegos-Whitfield], ¶9; PX 22 [George], ¶9; PX 23 [Ginesta], ¶8; PX 24 [Hanning], ¶10; PX 25 [Lightaul], ¶9; PX 26 [Palmer], ¶13;PX 27 [Reynolds], ¶9; PX 28 [Sambo], ¶10; PX 29 [Tosado], ¶9; PX 30 [Willis], ¶11.

[40] PX 8 [Battaglia], ¶8; PX 11 [Bolyard], ¶¶7-10; PX 12 [Bontatibus], ¶¶5-6, 10; PX 13 [Brown], ¶¶7, 11-12; PX 14 [Calvo], ¶¶9, 12; PX 15 [Chagoya], ¶¶11-15; PX 16 [Conner], ¶¶8-10, 12-18; PX 17 [Derenge], ¶¶7-8, 11-12; PX 21 [Gallegos-Whitfield], ¶¶6-7, 10; PX 22 [George], ¶¶8, 10; PX 23 [Ginesta], ¶¶9-11; PX 24 [Hanning], ¶9; PX 25, ¶¶6-7, 10; PX 26 [Palmer], ¶¶7-8, 10-13; PX 27 [Reynolds], ¶6; PX 29 [Tosado], ¶6, 10-11; PX 30 [Willis], ¶¶10-11, 13.

Defendants that they were cancelling her membership.[41]

3. Defendants failed to adequately disclose that they were going to use consumers' bank information to charge for products and services. (Count II)

29. Defendants never told consumers that, in addition to using their financial information for the purpose of furthering their payday loan applications, the bank account information would also be used to charge consumers for enrollment in programs unrelated to the payday loan.[42]

30. Consumers, who were unsuspectingly enrolled in Defendants' programs and charged for that, did not recognize the name of the Defendants that was on their bank statements. Consumers did not understand how they could have authorized Defendants to debit their bank accounts.[43]

31. Many consumers did not see any advertisements for Defendants' programs.[44] Even if consumers had seen the advertisements, they state that they had no interest in joining such

41 PX 26 [Palmer], ¶¶7-8, 12-13.

42 PX 7 [Arseneau], ¶6; PX 8 [Battaglia], ¶6; PX 9 [Beaty], ¶6; PX 10 [Bloch],¶6; PX 12 [Bontatibus], ¶7; PX 14 [Calvo], ¶6; PX 23 [Ginesta], ¶6; PX 25 [Lightaul], ¶5; PX 27 [Reynolds], ¶7; PX 29 [Tosado], ¶7.

43 PX 7 [Arseneau], ¶5; PX 8 [Battaglia], ¶5; PX 9 [Beaty], ¶5; PX 10 [Bloch], ¶5; PX 11 [Bolyard], ¶6; PX 12 [Bontatibus], ¶4; PX 14 [Calvo], ¶5; PX 15 [Chagoya], ¶7; PX 16 [Conner], ¶7; PX 17 [Derenge], ¶6; PA 23 [Ginesta], ¶5; PX 24 [Hanning], ¶6; PX 25 [Lightaul], ¶4; PX 26 [Palmer], ¶6; PX 27 [Reynolds], ¶5; PX 28 [Sambo], ¶6; PX 29 [Tosado], ¶5; PX 30 [Willis], ¶8.

44 (PX 7 [Arseneau], ¶8; PX 8 [Battaglia], ¶7; PX 9 [Beaty], ¶7; PX 10 [Bloch], ¶8; PX 11 [Bolyard], ¶5; PX 12 [Bontatibus], ¶8; PX 13 [Brown], ¶8; PX 14 [Calvo], ¶10; PX 16 [Conner], ¶11;PX 22 [George], ¶9; PX 25 [Lightaul], ¶12; PX 27 [Reynolds], ¶8; PX 28 [Sambo], ¶11; PX 29 [Tosado], ¶8; PX 30 [Willis], ¶6.)

programs.[45] Those who did see the advertisements usually had no interest in joining such a program.[46]

32. Many consumers stated that the only reason for using Defendants' websites was to obtain a payday loan.[47]

33. An investigator with the FTC made two undercover buys that support the consumers' experiences with the Defendants. He carefully ensured that the check-box on the advertisements for Defendants' products, where an interest to purchase would be indicated, was NOT checked and then proceeded on with the application. When the opt-in box, or Windows Dialog Box, popped up on the screen, the box had two buttons — OK and Cancel. The OK box was pre-selected, and the investigator pressed the enter bar to continue. Although there was no indication that he had bought a program or service, he had.[48]

4. Additional evidence of unfairness and deception

a. The transactions triggered voluminous complaints.

34. Over 270 consumer complaints were received by Better Business Bureaus nationwide

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45 PX 7 [Arseneau], ¶9; PX 9 [Beaty], ¶7; PX 10 [Bloch], ¶9; PX 12 [Bontatibus], ¶9; PX 13 [Brown], ¶10; PX 14 [Calvo], ¶11; PX 17 [Derenge], ¶9; PX 23 [Ginesta], ¶8; PX 24 [Hanning], ¶10; PX 25 [Lightaul], ¶9; PX 27 [Reynolds], ¶9; PX 29 [Tosado], ¶9.

46 PX 15 [Chagoya], ¶5; PX 20 [Feeley], ¶4.

47 PX 7 [Arseneau], ¶8; PX 8 [Battaglia], ¶6; PX 9 [Beaty], ¶7; PX 10 [Bloch], ¶8; PX 11 [Bolyard], ¶5; PX 12 [Bontatibus], ¶8; PX 14 [Calvo], ¶10; PX 23 [Ginesta], ¶7; PX 27 [Reynolds], ¶8.

48 PX 2 [Tyndall], ¶4d-f and ¶8d-g.

about the Defendants unfair and deceptive practices.[49] The gist of these complaints submitted to the Defendants from the BBBs was that consumers' bank accounts had been debited without authorization.[50] Gabrielle Lynn was the office manager for the Defendants, and she testified that she was the person at the Defendant companies who sent replies to the complaints to the BBBs, under a different pseudonym for each company.[51]

35. Defendants also received numerous complaints by telephone. Over 90% of customers who placed telephone calls to the four corporate defendants were calling to complain. Ms. Lynn described that 50% were irate about what Defendants did. And the other 40% were confused, i.e., the consumers said "I got charged. I don't know what this is. How did this happen."[52]

36. Near the end of the business in July 2011, Defendants were getting 50-60 calls a day from consumers complaining about the charge being unauthorized. The number of consumer calls was even larger prior to July 2011.[53]

37. Defendants also received e-mail complaints. These e-mails often complained that the company had charged the consumers' accounts without authorization and often sought a

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49 PX 3, ¶6; PX 4, ¶6; PX 5, ¶5;PX 6, ¶6.

50 PX 3 - 6.

51 PX 45 [Lynn Dep.], p.19, l.9 – p.20, l.4.

52 PX 45 [Lynn Dep.], p.38, l.22 – p.39, ll.16-25.

53 PX 45 [Lynn Dep.], p.15, l.3 – p.16, l.1.

refund.[54]

38. Documents found on the desk of Gabrielle Lynn included a number of additional complaints about Defendants' practices, mostly from the offices of State Attorneys General or private law firms, complaining about the unauthorized debits from consumers' bank accounts. Fifteen of those complaints from the May-June 2011 period are not duplicative of the complaints previously filed by the Plaintiff.[55]

39. Similarly, hundreds of complaints were received by a company with a very similar name to Defendant Direct Benefits Group, LLC. Thomas Mayer, the President of a company named "Direct Benefits, Inc.," of St. Paul, Minnesota, received at least 1800 complaints over the course of 18 months, beginning in early 2010, that complained about a company named Direct Benefits Online (which is a dba of Defendant Direct Benefits Group, LLC). These complaints alleged that consumers' bank accounts were debited without consumers' authorization. (Attached to the declaration of Thomas Mayer are 58 sample complaints.)[56] According to Mr. Mayer, his company forwarded every complaint that it received to Direct Benefits Group.[57]

40. The Federal Trade Commission also received more than 70 complaints from consumers against Defendants. These complaints spell out that consumers consistently

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54 PX 45 [Lynn Dep.], p.14, l.19 – p.15, l.2.

55 PX 31[Liggins II], ¶4.

56 PX 36 [Mayer], ¶¶3-8.

57 PX 36 [Mayer], ¶10.

reported that their bank account information was obtained and their bank accounts were charged without their authorization.[58]

b. The transactions yielded a massive return rate.

41. From July 2010 until July 2011, Defendants had bank accounts with Public Savings Bank. During this period, the Defendants had an extremely high return rate, according to the "Returns Report Detail" provided by the Director of Operations at Public Savings Bank. The overall return rate for Defendants, while processing through Public Savings Bank, ranged from 57.5% to 79.9%. The overall return rate for Direct Benefits Group was 57.5%; for Voice Net Global, it was 61.7%; for Unified Savings, it was 78.3%; and for Thrifty Dial, it was 79.9%.[59]

42. The Defendants have produced a chart that indicates that 73% of the consumers who were processed for Defendants' programs or services either had their transaction returned, obtained chargebacks, or received refunds.[60]

43. Defendants also had some of their consumers' transactions processed by Landmark Clearing, a payment processor.[61] During the Landmark time period of May 2010 to January 2011, the overall return rate for Defendants was 73.78%.[62]

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58 PX 1 [Liggins], ¶¶33-37.

59 PX 32 [Barton], pp.1-3.

60 Doc. 77-2, p. 1516.

61 PX 43 [Wood Dep.], p.105, ll.13-17.

62 PX 2 [Tyndall], p.98.

5. Consumer Injury

44. Total consumer injury from Defendants' unfair and deceptive scheme is $9,512,172. According to Defendants' chart,[63] they billed $35,628,176 in revenues from their operation, but had returns, chargebacks, and refunds totaling $26,116,004. Approximately 120,000 consumers did not receive a return, chargeback or refund of their money from Defendants.

E. Individual Liability

45. As owners, officers, or managers of Corporate Defendants, Kyle Wood and Mark Berry both participated in or had authority to control the acts and practices of Corporate Defendants, and each had actual knowledge of or recklessly disregarded the violations of law that Defendants engaged in.[64]

1. Kyle Wood

46. Kyle Wood was sole owner and manager of Defendants Direct Benefits Group, LLC, and sole owner and officer of WKMS, Inc.[65] As owner and principal of Direct Benefits and WKMS, and as close working partner to Mark Berry, Voice Net Global and Solid Core Solutions, Wood was personally involved in and personally knowledgeable about all of the operations of these businesses, including marketing activities, customer service, and payment processing.[66]

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[63] Doc. 77-2, p.1516.

[64] SMF 46 - 61.

[65] Doc. 38, ¶3; PX 43 [Wood Dep.], p.10, ll.5-8 and p.11, l.16.

[66] Doc. 38, ¶3; PX 43 [Wood Dep.], p.10, ll. 9-11.

47. Kyle Wood wrote the text for all of Defendants' websites, including the text of the product offerings and the text in the pop-up opt-in box regarding the discount membership club or travel club.[67]

48. Kyle Wood wrote the customer service scripts used by the customer service employees of the Defendants. He also helped write the scripts used by call center personnel who were directing consumers to Defendants' websites.[68]

49. Kyle Wood obviously knew the high return rate of Defendants' sales. On April 21, 2010, when Defendants were applying for payment processors, Kyle Wood gave Defendants' return rate numbers to Gabrielle Lynn when she filled out the Required Survey for High Risk Clients, which was part of the application for a payment processor, Landmark Clearing.[69]

50. Both Kyle Wood and Mark Berry were Gabrielle Lynn's supervisors.[70] Ms. Lynn's job included answering complaints that came into the Defendants directly from consumers and from the BBBs.[71] She sent Kyle a list every few weeks or every month to show him what

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67 PX 43 [Wood Dep.], p.39, l.4 -- p. 40, ll.7, 17-23; p. 134, ll.1-6.

68 PX 43 [Wood Dep.], p.41, ll.7-13; p.42, l.25 – p.43, l.2; p. 47, ll.1-16.

69 PX 45 [Lynn Dep.], p. 33, l.16 – p.34,l.14, answering about Mark Berry Dep. Ex. 14; PX 43 [Wood Dep.], p.106, l.15 – p. 107, l.7; PX 2 [Tyndall], pp. 129-131. Return rate of 70%.

70 PX 45 [Lynn Dep.], p.12, ll.4-5.

71 PX 43 [Wood Dep], p.81, ll.1-7. PX 43 [Wood Dep.], p.82, l.4 – p.83, l.10. Defendants' letters to Better Business Bureaus confirm the knowledge of Defendants about the complaints that consumers believe their bank accounts had been unfairly and deceptively debited. The Declaration of Gabrielle Lynn, Defendants' Office Manager, attached many consumer complaints and responses to those consumer complaints. What they show was that consumers claimed that they were being misled by the failure of Defendants to adequately disclose the debiting of the consumers' bank accounts. As examples, customers Carolyn Duggan, Christine

sort of complaints were coming in.[72]

51. Gabrielle Lynn also received return rate statistics for the companies on a regular basis.[73]

52. Kyle Wood gave instructions to Gabrielle Lynn and other customer service managers on customer service functions, including on how to handle complaints.[74]

53. Kyle Wood and Gabrielle Lynn had regular meetings, on a daily or weekly basis, during which Ms. Lynn informed Mr. Wood of the nature of the complaints received, and they discussed how the complaints were being handled.[75]

54. Gabrielle Lynn forwarded complaints received from State Attorneys General's offices to Kyle Wood.[76]

2. Mark Berry

55. Mark Berry was the sole owner and manager of Voice Net Global, LLC, and sole owner and officer of Solid Core Solutions, Inc.[77]

56. Mark Berry and his companies, Voice Net Global and Solid Core, were close working

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Conner, David Muehlberger, and Dennis Geter complained that they did not know how he got enrolled in Defendants' programs. Many other consumers told the BBBs the same thing. Doc. 41-4, pp.588, 590, 603, 606.

[72] PX 45 [Lynn Dep.], p.14, ll.4-9.

[73] PX 2 [Tyndall], pp. 174-195.

[74] PX 43 [Wood Dep.], p.81, l.8 – p.82, l.3; PX 45 [Lynn Dep.], p.13, ll.2-7.

[75] PX 43 [Wood Dep.], p.82, l.4 – p.83, l.10.

[76] PX 43 [Wood Dep.], p.82, ll.17-22; PX 45 [Lynn Dep.], p.13, ll.14-25.

[77] Doc. 39, ¶3; PX 44 [Berry Dep.], p.11, l.21 – p. 12, l.14; p.19, ll.2-5.

partners to Kyle Wood and his companies, Direct Benefits and WKMS, in coordinating their operations, marketing, sales, and customer service activities. Mr. Berry was personally familiar with the operations, systems, technology, marketing activities, customer service functions, and records of these businesses.[78]

57. Mark Berry was involved with the websites of Voice Net Global and Thrifty Dial.[79]

58. Mark Berry reviewed scripts drafted by Gabrielle Lynn and used by customer service representatives of Voice Net Global and Thrifty Dial.[80]

59. Mark Berry assisted with the companies' payday loan websites by producing software for managing applications for short-term loans and placement of those applications to lenders.[81]

60. Mark Berry obviously knew the high return rate of Defendants' sales. His companies used Landmark Clearing as one of its payment processors to process payments received from consumers. Mark Berry signed the High Risk Survey form that was included as part of the application to Landmark Clearing. In this survey, he stated that Voice Net Global and Thrifty Dial had rates of return of 70%.[82]

61. In addition to working for Kyle Wood and his companies, Gabrielle Lynn also worked

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78 Doc. 39, ¶3.

79 PX 43 [Wood Dep.], p.134, ll.18-22.

80 PX 44 [Berry Dep.], p.47, ll.14-23.

81 PX 44 [Berry Dep.], p. 13, l. 13 – p. 17, l. 2; p.27, l.6 – p.28, l.13.

82 PX 45 [Lynn Dep.], p.34, ll. 3-14; Mark Berry Dep. Ex.14; PX 44 [Berry Dep.], p.82, l.22 – p.83, l.20.

for Voice Net Global and Solid Core doing customer service as well as serving as office manager. Mark Berry supervised Gabrielle Lynn at Voice Net Global and Thrifty Dial. He assigned to her the task of handling consumer complaints and provided her with instructions on how to handle customer service functions. She kept Mr. Berry informed about the nature and handling of those complaints.[83]

IV. THE COMMISSION IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

A. THE SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[84] The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate an absence of a genuine issue of material fact."[85]

Once the moving party has met its burden under Rule 56(c), the burden shifts to the non-moving party to produce facts to show that there is a genuine issue for trial.[86] "A mere

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83 PX 45 [Lynn Dep.], p.12, ll.4-5; p.13, ll.2-13; PX 44 [Berry Dep.], p.34, l.5 – p.39, l.21.

84 Fed. R. Civ. P. 56(a); *FTC v. Global Marketing Group*, 594 F. Supp. 2d 1281, 1286 (M.D. Fla. 2008).

85 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *FTC v. USA Financial, LLC,* 415 Fed. Appx. 970, 973 (11th Cir. 2011); *see also FTC v. Stefanchik*, 559 F.3d 924, 927 (9th Cir. 2009).

86 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *see also Harris v. United States*, 110 F. Supp. 2d 1362, 1363 (S.D. Fla. 2000) ("[A]n adverse party may not rest upon mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.").

scintilla of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party."[87] If the non-moving party's evidence "is merely colorable, or is not significantly probative, summary judgment may be granted."[88]

B. THE FTC IS ENTITLED TO SUMMARY JUDGMENT ON BOTH COUNTS

The pleadings, documents, affidavits, and other evidence show that there is no material dispute that Defendants violated Section 5 of the FTC Act (1) by unfairly obtaining consumers' bank account information and debiting consumers' bank accounts without consumers' consent and (2) by failing to disclose adequately to consumers that, in addition to using consumers' financial information for the purpose of furthering their payday loan applications, Defendants used consumers' bank account information to charge consumers for enrollment in unwanted programs offering products and services unrelated to the payday loan. Therefore, the Commission is entitled to judgment against Defendants as a matter of law.

1. UNFAIR BILLING PRACTICES (COUNT I)

A three-part test is used to analyze "unfair practices":

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87 *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1266 (S.D. Fla. 2007) (internal quotation marks omitted) (citing *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990), *rev'g* 706 F. Supp. 1467 (N.D. Ala. 1989)).

88 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); *see also USA Financial, LLC*, 415 Fed. Appx. at 973; *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997)("the basic issue before the court on a motion for summary judgment is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'")

> To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.[89]

a. The challenged practice caused substantial injury.

Here, the injury is substantial. Defendants' practice of unauthorized debiting of consumers' ban accounts caused considerable harm. The FTC may satisfy this prong with evidence that consumers were injured "by a practice for which they did not bargain."[90] Moreover, an injury may be "sufficiently substantial" if it results in a "small harm to a large class of people."[91] In this case, more than one hundred twenty thousand consumers (120,000) each suffered an injury of between $39.95 to $99.90, for a total of more than $9.5 million.[92]

b. There are no countervailing benefits.

The second prong of the unfairness test is easily satisfied "when a practice produces clear adverse consequences for consumers that are not accompanied by an increase in

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89 *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1364 (11th Cir. 1988), *cert denied*, 488 U.S. 1041 (1989)*; American. Financial Services Ass'n v. FTC*, 767 F.2d 957, 971 (D.C. Cir. 1985); *Global Marketing Group,* 594 F. Supp. 2d at 1288-9; *FTC v. J.K. Publications, Inc.*, 99 F. Supp. 2d 1176, 1203 (C.D. Cal. 2000)*; FTC v. Direct Marketing Concepts, Inc.,* 569 F. Supp. 2d 285 (D. Mass. 2008); *see also* letter from FTC to Senators Ford and Danforth (Dec. 17, 1980), appended to *In the Matter of International Harvester Co.*, 104 F.T.C. 949 (1984). *See also* 15 U.S.C. § 45(n).

90 *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010); *J.K. Publications*, 99 F. Supp. 2d at 1201.

91 *Neovi*, 604 F.3d at 1157; *FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1004 (N.D. Cal. 2010), *aff'd*, 2012 U.S. App. LEXIS 6466 (9th Cir. March 30, 2012).

92 SMF 19, 44.

services or benefits to consumers or by benefits to competition."[93] In this case, the consumer victims received no countervailing benefits from being tricked into paying for Defendants' products or services without their consent. As evidenced by the large number of consumer complaints,[94] the extraordinarily high return rates of 58 - 79%,[95] and the low redemption rates for the supposed products being offered by Defendants,[96] consumers were clearly charged for products or services that they did not order and did not want.[97] Consumers usually withdrew

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[93] *J.K. Publications*, 99 F. Supp. 2d at 1201.

[94] Defendants have argued that the complaints submitted by the FTC represent .0004% of all customers. However, this only takes into account the 270 complaints obtained from the BBBs. It does not take into account the complaints about Defendants from so many other sources, including complaints received directly by Defendants through telephone, e-mail, and letter as well as the 1800 complaints from Thomas Mayer. (SMF 39.) Moreover, looking at just the Landmark Clearing statistics, of the 32,073 consumers ("cleared" plus "unauthorized") that Direct Benefits successfully debited for that period of time, 2971 consumers – almost 10% – filed a complaint with their bank to dispute the debit as unauthorized. (PX 2 [Tyndall], p.98.) This is an exceedingly high number for the "unauthorized" category. (See ftn. 130, *infra*.)

[95] In a recent Middle District of Florida case, the court characterized an overall return rate of 71.5% as "extraordinarily high." *Global Marketing Group*, 594 F. Supp. 2d at 1285; *see also FTC v. MacGregor*, 360 Fed. Appx. 891, 894-5 (9th Cir. 2009) (citing high volume of consumer complaints, high refund and return rates, and the number of investigations by the state Attorneys General and Better Business Bureaus as being indicative of knowledge). The extraordinarily high levels of returned transactions encountered by the Defendants here serve as red flags of likely fraudulent, deceptive, or unauthorized debiting activity. PX 40 [Kelly II], ¶4.

[96] Defendants may argue that some consumers actually wanted and used Defendants' discount membership program. The evidence indicates, however, that Defendants' program was little used. The Receiver's Second Report (Doc. 126, pp. 1933-4) states that he "observed virtually no expenses incurred by Direct Benefits for the payment of rebates or redemption of other benefits." Internal business records showed $2130 in redemption/rebate expense in 2010; the 2010 tax returns showed zero dollars in redemption expense. In addition, the Receiver "concluded that this business would not support any material amount of redemptions for rebates, if any. A close examination of the available financial records revealed that this business model could work, only if its customers did not use" many of the benefits that Direct Benefits touted. In fact, "Mr. Wood described this business model to the Receiver as a 'breakage' model, meaning it made money by customers not redeeming the benefits."

[97] SMF 21-27, 31-32.

from the programs or services upon discovering they were "paying-members" and, even while they were "paying-members," consumers typically did not use any products or benefits.[98]

c. Consumers could not reasonably avoid the substantial injury.

Finally, as to the third prong, the victims were not able to avoid the injury. To determine unavoidability, "courts look to whether the consumers had a free and informed choice."[99] Consumers may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it.[100] As described above, many consumers did not consent to have their bank information used to debit their bank accounts by Defendants. Consumers uniformly stated that the sole purpose of their loan application was to obtain a loan. They also uniformly report that they did not click on advertisements for Defendants' programs, and many do not recall ever seeing advertisements for Defendants' programs. As a result, consumers have never had a "free and informed choice" to avoid enrollment in the programs.[101] In this case, Defendants took advantage of financially distressed consumers leading them to believe that they were giving their bank account

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[98] SMF 31-32.

[99] *Neovi*, 604 F.3d at 1158; *Orkin Exterminating*, 849 F.2d at 1365 (citing *American Financial Services*, 767 F.2d at 976; *see also Inc21.com Corp.*, 745 F. Supp. 2d at 1004 (holding "the burden should not be placed on defrauded consumers to avoid charges that were never authorized to begin with.").

[100] *Global Marketing Group*, 594 F. Supp. 2d at 1289 (citing *Orkin Exterminating*, 849 F.2d at 1365).

[101] *Orkin Exterminating*, 849 F.2d at 1365 (citing *American Financial Services Assoc.*, 767 F.2d at 976.)

information to apply for a payday loan. Defendants failed to provide adequate notice that they intended to use consumers' bank account information to enroll consumers in programs that most consumers did not want and many could ill afford. Thus, consumers could not have reasonably avoided the charge.[102]

For these reasons, summary judgment is appropriate as to Count I.

2. **Failure to Disclose (Count II)**

Individuals or companies violate the Section 5 prohibition on deception when they engage in material representations or omissions that are likely to mislead consumers acting reasonably under the circumstances.[103]

A representation or omission is material if it is of a kind usually relied upon by a reasonably prudent person and is likely to affect their choice of, or conduct regarding, a product or service.[104] Courts consider the overall net impression created by the acts or practices when evaluating their deceptiveness.[105] The Commission, however, need not

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102 SMF 21-26, 29-31, 33.

103 *USA Financial, LLC,* 415 Fed. Appx. at 973; *FTC v. Peoples Credit First, LLC*, 244 Fed. Appx. 942, 944 (11th Cir. 2007), *affirming FTC v. Peoples Credit First, LLC*, No. 8:03-CV-2353, 2005 U.S. Dist. LEXIS 38545, at **19-20 (M.D. Fla. Dec. 18, 2005); *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003); *FTC v. Jordan Ashley, Inc.*, 1994-1 Trade Cas.(CCH) ¶70,570 at 72,096 (S.D. Fla. 1994) (citing *FTC v. Amy Travel Serv. Inc.*, 875 F.2d 564 (7th Cir.), *cert. denied*, 493 U.S. 954 (1989)); *FTC v. Atlantex Assocs.*, No. 87-0045-CIV-Nesbitt, 1987 U.S. Dist LEXIS 10911 (S.D. Fla. Nov. 25, 1987), *aff'd*, 872 F.2d 966 (11th Cir. 1989).

104 *Id.*

105 *FTC v. Tashman*, 318 F.3d at 1283; *Atlantex Assocs.*, 1987 U.S. Dist LEXIS 10911, at *29; *FTC v. Peoples Credit First,* 2005 U.S. Dist. LEXIS 38545, at *20-25.

present proof of subjective reliance by each victim.[106] "A presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product."[107]

Finally, proof of intent to deceive is not required under Section 5.[108] "A company that deceives consumers through reckless or even simply negligent disregard of the truth may do just as much harm as one that deceives consumers knowingly."[109]

The evidence before this Court provides ample proof that, when the Defendants routinely and knowingly debited consumers' bank accounts without their authorization, they failed to adequately disclose to consumers that, in addition to using consumers' financial information for the purpose of furthering their payday loan applications, Defendants also used

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106 *FTC v. Windward Marketing*, No. 1:98-CV-615-FMH, 1997 U.S. Dist. Lexis 17114 at *27 (N.D. Ga. Sept. 30, 1997) (citing *FTC v. U.S. Oil & Gas Corp.*, No. 83-1702-CIV-WMH, 1987 U.S. Dist. LEXIS 16137, at *68 (S.D. Fla. July 10, 1987)); *see also MacGregor v. Chericio*, 206 F.3d 1378, 1388 (11th Cir. 2000) (citing *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994)); *FTC v. JPM Accelerated Services*, No. 6:09-cv-2021-ORL-28KRS, 2011 U.S. Dist. LEXIS 15433, at *7 (M.D. Fla. Jan. 25, 2011) (citing *Transnet Wireless*, 506 F. Supp.2d at 1266-7).

107 *MacGregor v. Chericio*, 206 F.3d at 1388 (citing *Figgie Int'l, Inc.*, 994 F.2d at 605-6); *see also FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1206 (10th Cir. 2005); *FTC v. Kuykendall*, 371 F3d 745, 765 (10th Cir. 2004).

108 *FTC v. National Urological Group,* 645 F. Supp. 2d 1167, 1185 (N.D. Ga. 2008), *aff'd*, 356 Fed. Appx. 358 (11th Cir. 2009); *FTC v. Bay Area Business Council,* Inc., 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1202 (10th Cir. 2005); *Amy Travel*, 875 F.2d at 573.

109 *Windward Marketing*, 1997 U.S. Dist. Lexis 17114, at *28-29 (*citing In the Matter of Sears, Roebuck & Co.*, 95 F.T.C. 406, 517 n.9 (1980), *affd., Sears Roebuck & Co. v. FTC*, 676 F.2d 385 (9th Cir. 1982)).

their bank information to charge consumers for enrollment in programs offering products and services unrelated to the payday loans. Defendants' failure to disclose adequately was material because this failure was likely to and did affect consumers' decisions. The information that Defendants omitted, *i.e.*, whether consumers were being charged for Defendants' products and services, was of critical importance to consumers.[110] The thousands of consumer complaints show that consumers were charged for programs and products they never agreed to or did not understand they were authorizing when they gave their bank account information.[111]

For these reasons, summary judgment is appropriate as to Count II.

3. DEFENDANTS' PURPORTED DISCLOSURES WERE INADEQUATE AND CONFUSING

Defendants may argue that their websites disclosed the programs and services that they were selling. This argument is untenable. In this case, most of the consumers reported that they did not see any disclosures at all.

Even if disclosures were made by Defendants, they were clearly inadequate.

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E.g., PX 7 [Arseneau], ¶12; PX 8 [Battaglia], ¶12; PX 9 [Beaty], ¶11; PX 10 [Bloch], ¶12; PX 12 [Bontatibus], ¶10; PX 13 [Brown], ¶14; PX 14 [Calvo], ¶14; PX 15 [Chagoya], ¶16; PX 16 [Conner[, ¶19; PX 17 [Derenge], ¶13; PX 20 [Feeley], ¶11; PX 21 [Gallegos-Whitfield], ¶11; PX 22 [George], ¶11; PX 23 [Ginesta], ¶12; PX 24 [Hanning], ¶12; PX 25 [Lightaul], ¶12; PX 26 [Palmer], ¶14; PX 27 [Reynolds], ¶12; PX 29 [Tosado], ¶13.

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FTC v. Grant Connect, LLC, No. 2:09-cv-01349-PMP-RJJ, 2009 U.S. Dist. LEXIS 94201, at *18-19, 25-26 (D. Nev. Sept. 22, 2009) (where consumers complained that they had been charged for services they never agreed to.)

Disclosures must be clear and conspicuous.[112] Factors in determining whether disclosures are clear and conspicuous include proximity to the claim it is qualifying; prominence of the disclosure; whether items in other parts of the advertisement distract attention from the disclosure; length of the disclosure; and whether the language of the disclosure is understandable to the intended audience.[113] The Defendants argue that a pop-up screen at the end of the transaction disclosed what they were offering. This argument, like Defendants' purported disclosure, is inadequate and counter-intuitive.

During the August 2011 Preliminary Injunction hearing, the Defendants demonstrated their website. Even during their demonstration, it was clear how unclear and confusing this pop-up screen disclosure would be to a financially vulnerable consumer who was desperately searching to secure a payday loan. The pop-up screen unexpectedly appeared at the end of the transaction after the consumers had input their personal and financial information required to secure a payday loan.[114] Many consumers hit the OK button, thinking that all that they were doing was submitting their payday loan application form.[115] In addition, the pop-up screen appeared after the consumer had already rejected or ignored advertisements

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112 *Thompson Medical Co.*, 104 F.T.C. 648, 842-3 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *see also FTC v. Cyberspace.com*, 453 F.3d 1196 (9th Cir. 2006).

113 *U.S. v. Locasio*, 357 F. Supp. 2d 536, 549 (E.D.N.Y. 2004).

114 PX 2 [Tyndall], pp. 45, 71, 78 – this is the version of the website from April 7, 2011; Doc. 38-2, page 268; PX 20 [Feeley], ¶5.

115 *E.g.*, PX 20 [Feeley], ¶5; PX 30 [Willis], ¶11.

unrelated to payday loans.

Moreover, this supposed disclosure was confusing and counter-intuitive. Consumers had to push "cancel" to actually have their payday loan applications submitted without purchasing Defendants' programs or services. Alternatively, the "OK" button was pre-checked and if the consumer just hit "enter" or ignored it, he or she was automatically enrolled in the programs and unwittingly purchased Defendants programs without their knowledge, using the financial information from the payday loan application.

The deceptive nature of the websites is proved not only by their inadequacy but also by their results. Declarations and testimony in the record point to thousands of complaints and "show that some of the recipients were deceived by the form of the solicitation or, at the very least, ended up paying for a service that they did not want and/or could not use."[116]

V. INDIVIDUAL DEFENDANTS ARE LIABLE FOR VIOLATIONS OF THE FTC ACT

A. LEGAL STANDARD

In order to find individual Defendants liable for violations of the FTC Act, the Commission must first demonstrate corporate liability. Once the FTC has established corporate liability, "the FTC must show that the individual defendants participated directly in the practices or acts or had authority to control them . . . The FTC must then demonstrate the

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[116] *FTC v. Cyberspace.com*, No. C00-1806L, 2002 U.S. Dist. LEXIS 25565, at *14 (W.D. Wash. July 10, 2002), *aff'd*, 453 F.3d 1196 (9th Cir. 2006).

individual had some knowledge of the practices."[117] The FTC may establish the knowledge requirement by showing "actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth." [118]

The Commission has presented substantial evidence to establish corporate liability. This evidence clearly demonstrates that Corporate Defendants by and through their owners, officers, employees and others, violated Section 5 of the FTC Act. Once the FTC has established corporate liability, the analysis then focuses upon a showing that either (1) the individual Defendants participated directly in the practices or acts or (2) had authority to control them; (3) then the FTC must demonstrate that the Defendants had some knowledge of the deceptive practices. As discussed below, the evidence is uncontroverted that the individual Defendants both had the authority to control and participated in the deceptive acts and practices of the Corporate Defendants and had knowledge of those acts and practices.[119]

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117 *USA Financial,* 415 Fed. Appx. at 974; *FTC v. Stefanchik,* 559 F.3d 924, 931 (9th Cir. 2009); *FTC v. Gem Merchandising Corp*., 87 F.3d 466, 470 (11th Cir. 1996) (quoting *Amy Travel*, 875 F.2d at 573); *FTC v. Washington Data Resources*, No. 8:09-cv-2309-T-23TBM, 2012 U.S. Dist. LEXIS 56233, at *70-71 (M.D. Fla. April 23, 2012).

118 *Amy Travel*, 875 F.2d at 574 (quoting *FTC v. Kitco*, 612 F. Supp. 1282, 1292 (D. Minn. 1985)). The FTC "need not demonstrate . . . that the individual defendant possessed the intent to defraud." *Jordan Ashley*, 1994-1 Trade Case. (CCH) at 72,096 (citing *Amy Travel*, 875 F.2d at 573-4). In addition, "direct participation in the fraudulent practices is not a requirement for liability. Awareness of fraudulent practices and failure to act within one's authority to control such practices is sufficient to establish liability." *Atlantex Assocs.*, 1987-2 Trade Cas. (CCH) at 59,254 (citations omitted).

119 Defendants may argue that, as soon as consumers submitted their application form, Defendants sent out an e-mail confirmation to consumers, which would have arrived in consumers' inboxes immediately and ten days before Defendants took money out of the consumers' bank accounts. However, many consumers state that

"An individual's status as a corporate officer gives rise to a presumption of ability to control a small, closely-held corporation. 'A heavy burden of exculpation rests on the chief executive and primary shareholder of a closely-held corporation whose stock-in-trade is overreaching and deception.'"[120] In this case, both of the individual Defendants were corporate officers of the closely-held corporations; and, in fact, they were the only corporate officers of the corporate Defendants.

B. IT IS UNDISPUTED THAT DEFENDANT KYLE WOOD HAD THE AUTHORITY TO CONTROL AND DIRECTLY PARTICIPATED IN THE ACTS AND PRACTICES OF THE CORPORATE DEFENDANTS AND HAD KNOWLEDGE OF THE VIOLATIVE ACTS AND PRACTICES.

Kyle Wood had the authority to control the acts and practices of the Corporate Defendants, which were closely-held corporations. He was owner and manager of Direct Benefits as well as owner and officer of WKMS. He ran the operations and supervised the customer service manager, who received thousands of complaints.[121]

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they never received any e-mail confirmations. (PX 7 [Arseneau], ¶6; PX 9 [Beaty], ¶6; PX 10 [Bloch], ¶6; PX 14 [Calvo], ¶6; PX 16 [Conner], ¶11; PX 23 [Ginesta], ¶12; PX 28 [Sambo], ¶11; PX 29 [Tosado], ¶7; PX 30 [Willis], ¶6.) These e-mails were not being expected by consumers (PX 7 [Arseneau], ¶6) and, if they arrived, may have gone into their spam or junk files, which they were not checking. (PX 7 [Arseneau], ¶6.)

120 *Windward Marketing*, 1997 U.S. Dist. Lexis 17114, at *27 (quoting *Standard Educators, Inc. v. FTC*, 475 F.2d 401, 403 (D.C. Cir. 1973)).

121 SMF 8, 10, 46, 50, 52.

In addition, Kyle Wood participated in the alleged acts and practices of Corporate Defendants. He wrote the text of the websites and the payday loan application form, which form was used to obtain consumers' bank account information and then to debit consumers' bank accounts. He also wrote the customer service scripts used to deal with irate consumers who complained about Defendants' unfair and deceptive practices.[122]

Mr. Wood also had the requisite knowledge of the unlawful acts and practices. As discussed above, he wrote the website texts and the customer service scripts, supervised the customer service manager, and was regularly informed about the thousands of consumer complaints coming into the business, including reviewing consumer complaints coming from State Attorneys General's offices, and discussing how to respond to them. He also knew of the high return rate and, in fact, informed his processor that his return rate would be extremely high, at 70%.[123]

C. IT IS UNDISPUTED THAT DEFENDANT MARK BERRY HAD THE AUTHORITY TO CONTROL AND DIRECTLY PARTICIPATED IN THE ACTS AND PRACTICES OF THE CORPORATE DEFENDANTS AND HAD KNOWLEDGE OF THE VIOLATIVE ACTS AND PRACTICES.

[122] SMF 47-48.

[123] SMF 47-54. Defendants may argue that the 57% - 79% return rates experienced by their banks or payment processors show that consumers were bad money managers and could not keep enough money in the bank to cover their bills. However, the consumer declarations show that many consumers arrived at insufficient funds BECAUSE of Defendants' surprise debits; the "Non-Sufficient Funds" designations in the high return rates (see PX 32, ¶¶ 9, 12, 15, 18) indicate that many consumers' banks returned the uncashed RCPO's to Defendants' banks or payment processors.

Mr. Berry had the authority to control the acts and practices of the corporate defendants. Mr. Berry was sole owner and manager of Voice Net Global, LLC, and sole owner and officer of Solid Core Solutions, Inc.[124]

He also participated in the unlawful acts and practices of Corporate Defendants. He oversaw his company's websites and reviewed scripts used by customer service representatives. He also produced the software that allowed Defendants' websites to operate as they did.[125]

It is undisputed that Mark Berry also had the requisite level of knowledge of Corporate Defendants' unlawful acts and practices. He knew and supervised the operations, systems, marketing activities, and customer service functions of the businesses and supervised the customer service manager for Voice Net Global. As with Kyle Wood, he knew that many consumers were complaining and that Defendants were experiencing high rates of return.[126]

Thus, Kyle Wood's and Mark Berry's participation in the acts and practices and their knowledge and positions within Corporate Defendants show that they both meet the standards for individual liability.

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[124] SMF 55.

[125] SMF 56-59.

[126] SMF 60-61.

D. <u>**DEFENDANTS' LIKELY DEFENSE**</u>[127]

Kyle Wood and Mark Berry may attempt to argue that they have no personal monetary liability because they relied on qualified legal opinions and had no "actual knowledge" of any violation. This defense is untenable. A defendant cannot avoid liability under Section 5 of the FTC Act by showing that he acted in good faith because the statute does not require an intent to deceive.[128] Moreover, the Defendants cannot rely on "advice of counsel" to overcome their violations of law. Both the Seventh and Ninth Circuits have already addressed this very issue. In *Amy Travel*, the Defendants argued that their efforts to gain approval from counsel for their activities demonstrated that they did not have the necessary knowledge that they were engaging in deceptive practices. The Seventh Circuit held that "[o]btaining the advice of counsel did not change the fact that the business was engaged in deceptive practices."[129] Moreover, the court determined that reliance on advice of counsel was not a valid defense on the question of knowledge; counsel could not sanction something that the defendants should have known was wrong. The defendant in *Amy Travel* wrote and reviewed many of the scripts that were found to be deceptive and they were

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[127] In their Answer, Defendants also listed an Affirmative Defense of Independent Causes. The Defendants seek to blame the consumers themselves for their injury. However, the Statement of Material Facts and accompanying memorandum demonstrate that it was the Defendants who created a scheme, including websites of confusion and distraction, to ensure that consumers were injured.

[128] *USA Financial*, 415 Fed. Appx. at 974 n.2.

[129] *Amy Travel*, 875 F.2d at 575.

undoubtedly aware of the avalanche of consumer complaints.[130]

Similarly in this case, the Defendants created the problematic websites and knew of an avalanche of consumers complaining that they had not authorized the debits from their bank accounts. In addition, Defendants knew that they were experiencing extremely high return rates, which serve as a red flag of possible fraudulent, deceptive, or unauthorized debiting activity.[131]

Even if advice of counsel were applicable, the factors taken into account are "if a

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Amy Travel, 875 F.2d at 575; *Cyberspace.com, LLC.*, 453 F. 3d at 1202 ("'Reliance on advice of counsel [is] not a valid defense on the question of knowledge' required for individual liability," citing *Amy Travel*); *see also Grant Connect, LLC*, 2009 U.S. Dist. LEXIS 94201, at *28 (holding that defendant's "consultation with an attorney does not negate the knowledge element"); *FTC v. Pioneer Enters, Inc.*, No. CV-S-92-615-LDG, 1992 U.S. Dist. LEXIS 19699, at *36 (D. Nev. Nov. 12, 1992) (ruling that "'counsel could not sanction something that the defendants should have known was wrong'"); *FTC v. Hope Now Modifications, LLC*, No. 09-1204 (JBS/JS), 2009 U.S. Dist. LEXIS 102596, at *3 (D.N.J. Nov. 4, 2009) (holding that "reliance on counsel is not a defense to liability under the FTC Act").

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Banking regulatory agencies also have concluded that high levels of returned transactions in the ACH Network serve as red flags of possible fraudulent, deceptive, or unauthorized debiting activity. In particular, the FDIC has provided guidance to the effect that "Another indication of the potential for heightened risk in a payment processor relationship is a large number of returns or chargebacks," including "items may be returned if insufficient funds are available to cover the unauthorized items, resulting in the consumer's account being overdrawn. In these circumstances, the items are often returned as 'NSF' rather than as 'unauthorized'." Federal Deposit Insurance Corp., *Federal Deposit Supervisory Insights*, pp. 8, 11(PX 39)(The study was initially cited by Defendants in this matter but contains materials and conclusions that support Plaintiff's counts). Consistent with those conclusions, economists at the Federal Reserve Bank of Minneapolis noted in a study that high Internet-initiated ("WEB") and one-time Telephone-initiated ("TEL") automated clearing house (ACH) transactions have "raised concerns about a growing risk to banks from irresponsible or fraudulent consumer debits, such as those submitted by abusive retailers or outright scam artists using call centers or websites to obtain consumers' account information and/or less-than-fully informed consent." PX 39 [Kelly], ¶¶5-6.

According to NACHA [Electronic Payments Association] statistics, the average total return rate for ACH debit transactions was 1.56% and the average unauthorized return rate was 0.03%. According to NACHA, an unauthorized return rate greater than 1% may indicate fraud or abuse. PX 2[Tyndall], ¶ 19. The statistics from Defendants' business are substantially higher, as seen in SMF 41-43.

client seeks counsel's advice in a timely manner, makes adequate disclosure to counsel, and receives counsel's opinion and then acts on it."[132] In this case, Defendants did not seek advice in a timely manner, almost a year after starting their unfair and deceptive practices. Moreover, Defendants failed to make adequate disclosure to counsel. The attorneys who provided advice did not have enough information to make a truly informed opinion. For example, attorney Thomas Cohn, who wrote three letters in 2011 for Defendants, did not have information about the complaints received by Defendants or the return rates experienced by the Defendants. He was never given consumer complaints[133] and did not know how many consumer complaints were received by Defendants.[134] Defendants also did not share with him the Better Business Bureau complaints[135] or the 1800 complaints forwarded to Defendants by Thomas Mayer.[136] Moreover, he was not made aware of the high return rates that the Defendants were experiencing.[137] He was not made aware that Defendants had told their own payment processor (Landmark) that they expected to experience rates of return of 70%.[138]

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[132] *Takecare Corp. v. Takecare of Oklahoma, Inc.*, 889 F.2d 955, 957 (10th Cir. 1989).

[133] PX 46 [Cohn Dep.], p.15, ll.20-21; p.16, ll.3-5.

[134] PX 46 [Cohn Dep.], p.15, l.23 - p.16, l.2.

[135] PX 46 [Cohn Dep.], p.16, ll.18-24.

[136] PX 46 [Cohn Dep.], p.18, l.25 - p.19, l.20.

[137] PX 46 [Cohn Dep.], p.20, ll.4-7.

[138] PX 46 [Cohn Dep.], p.23, l.23 - p.24, l.2.

Similarly, another attorney, Taylor Anderson, who provided a letter in June 2011 for Defendants, was not given any consumer complaints to evaluate in relation to his advice to Defendants.[139] Although he did look at the Utah Better Business Bureau website and talked with Kyle Wood, he was not privy to the hundreds of additional consumers who complained about Defendants' unfair and deceptive practices.[140] Mr. Anderson was not told of the thousands of complaints from the BBBs and others that had been received by Defendants.[141] He also did not know the return rates that Defendants were experiencing in their bank accounts.[142]

VI. REMEDIES

A. THE DEFENDANTS SHOULD BE HELD JOINTLY AND SEVERALLY LIABLE TO THE COMMISSION FOR A $9,500,000 JUDGMENT.

This Court has the authority to exercise its full equitable powers under Section 13(b) of the FTC Act in order to remedy violations of Section 5 of the FTC Act.[143] The remedies for which the Defendants may be held liable include the equitable monetary remedy of

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139 PX 47 [Anderson Dep.], p.24, ll.3-7.

140 PX 47 [Anderson Dep.], p.24, l.9 - p.25, l.10.

141 PX 47 [Anderson Dep.], p.25, ll.15 – p. 27, l.7.

142 PX 47 [Anderson Dep.], p.28, ll.2 – p.29, l.6.

143 *Gem Merchandising*, 87 F. 3d at 470; *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432, 1434 (11th Cir. 1984); *Washington Data Resources*, 2012 U.S. Dist. LEXIS 56233, at *17.

restitution.[144] Each of the Defendants is jointly and severally liable[145] for the total amount of unjust gain, which is measured as net revenue (gross receipts minus refunds).[146]

The primary purpose of restitution in the context of a deceptive sales scheme is to restore victims to their position prior to the deceptive sale.[147] The amount of restitution to be paid usually equals the amount paid to the Defendants by the victims of an illegal scheme less any amounts previously returned to the victims by the Defendants.[148] In calculating a refund, the Court looks to the price paid by the consumer and does not deduct expenses of Defendants or any value received.[149]

Based on the Defendants' own records submitted in Defendants' motion for attorneys'

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144 *Gem Merchandising*, 87 F.3d at 469; *U.S. Oil & Gas*, 748 F. 2d at 1432, 1434; *FTC v. Silueta Distrib. Inc.*, 1995-1 Trade Cas. (CCH) ¶ 70,918 at 74,100 (N.D. Cal. 1995); *FTC v. Pantron I Corp.*, 33 F. 3d 1088, 1103 & n.34 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995).

145 The Defendants form a common enterprise and are jointly responsible for their practices that violate § 5 of the FTC Act. SMF 10.

146 *Washington Data Resources,* 2012 U.S. Dist. LEXIS 56233 at *75-82; *Global Marketing Group*, 594 F. Supp. 2d at 1290; *see also Atlantex Assocs.*, 1987-2 Trade Cas. at 59,256; *Silueta Distrib.*, 1995-1 Trade Cas. at 74,100; *FTC v. Sharp*, 782 F. Supp. 1445, 1452-54 (D.Nev.1991); *FTC v. Magui Publishers, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,425 at 65,729 (C.D. Cal. 1991).

147 *See Atlantex Assoc.*, 1987-2 Trade Cas. at 59,256.

148 *FTC v. Febre,* 128 F.3d 530, 536 (7th Cir. 1997); *Atlantex Assoc.*, 1987-2 Trade Cas. at 59,256; *Figgie Int'l*, 994 F.2d at 606-7.

149 *Figgie Int'l*, 994 F.2d at 607; *Washington Data Resources,* 2012 U.S. Dist. LEXIS 56233 at *81; *see Silueta*, 1995-1 Trade Cas. at 74,099 (restitution of full amount consumers paid to Defendants); *Atlantex Assoc.,* 872 F.2d at 969.

fees and living expenses, Defendants processed over $37 million from consumers and had over $25 million returned. Therefore, Defendants received funds totaling $12,057,419. After $2,545,247 in refunds and chargebacks, the Defendants cleared $9,512,172, which represents total consumer injury.[150] The Commission requests that this Court order Defendants to pay, jointly and severally, $9,512,172 to be used for consumer redress or disgorgement. (Paragraph V of the Final Order.)

B. BROAD INJUNCTIVE PROVISIONS ARE APPROPRIATE IN ORDER TO PROHIBIT FUTURE MISREPRESENTATIONS BY DEFENDANTS

Broad injunctive provisions are necessary to prevent transgressors from violating the law in a new guise.[151] "[I]t is entirely reasonable for the Commission to frame its order broadly enough to prohibit petitioner's use of identical illegal practices for any purpose, or in conjunction with the sale of any and all products."[152] For this reason, the Commission is requesting that Individual Defendants Kyle Wood and Mark Berry and the Corporate Defendants be banned from using consumers' billing information when seeking subsequent sales after an initial sale, unless they obtain the billing information again directly from the consumer; be prohibited from charging consumers unless Defendants get the express

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150 Doc. 77-2, p.1516.

151 *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *FTC v. Wells,* 385 Fed. Appx. 712, 713-4 (9th Cir. 2010); *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 215 (9th Cir. 1979).

152 *Carter Prods. v. FTC*, 323 F.2d 523, 533 (5th Cir. 1963), *quoting Niresk Indust. Inc. v. FTC*, 278 F.2d 337, 343 (7th Cir.), *cert. denied,* 364 U.S. 883 (1960).

informed consent of consumers; be prohibited from obtaining billing information unless all material terms have been clearly and conspicuously disclosed; and be prohibited from misrepresenting any material fact in the sale of a good or service. (Paragraphs I - III.)

In addition, the Commission requests that all Defendants be prohibited from distributing any of the customer information specified in the proposed Final Order. (Paragraph IV.) The proposed Final Order also contains compliance and monitoring requirements so that the Plaintiff can ensure that violations of the Final Order do not occur. (Paragraphs X - XIII.) Paragraphs VI - VIII govern the remaining duties of the Receiver and the winding down of the Receivership estate.

VII. CONCLUSION

The evidence submitted in this case shows that no genuine issue of material fact remains in dispute. Accordingly, the Court should enter summary judgment in the Commission's favor, holding the Defendants Direct Benefits Group, LLC; Voice Net Global, LLC; Solid Core Solutions, Inc.; WKM, Inc.; Kyle Wood; and Mark Berry jointly and severally liable for their violations of the FTC Act. The Commission respectfully requests that the Court enter the proposed Final Judgment and Order for Permanent Injunction, Restitution, and Other Equitable Relief, filed with the Commission's Motion for Summary Judgment.

Date: May 15, 2012 Respectfully submitted,

/s/ Harold E. Kirtz

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