

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

NHS SYSTEMS, INC., et al.,

Defendants.

Civ. Action No. 08-cv-2215

MOTION FOR SUMMARY JUDGMENT AGAINST THE NHS/PHS DEFENDANTS

Plaintiff, Federal Trade Commission (“FTC”) hereby moves this Court, pursuant to Federal Rule of Civil Procedure 56, for summary judgment against the seventeen Defendants designated as the NHS/PHS Defendants in the Amended Complaint: NHS Systems, Inc.; Harry F. Bell, Jr.; Physician Health Service, LLC; Donna Newman; Plus Health Savings, Inc.; Physicians Health Systems, Inc.; Health Management, LLC; 6676529 Canada, Inc.; Nicole Bertrand; Barry Kirstein; David James Greer, known as “Dannie Boie;” PHS Enterprises, Inc.; First Step Management, Inc.; Gold Dot, Inc.; Linke Jn Paul; Tasha Jn Paul; and Nevada Business Solutions, Inc. As discussed in the FTC’s Memorandum in support of this Motion, and as supported by exhibits previously filed with this Court and additional exhibits being filed herewith, summary judgment is appropriate in this case because there are no genuine issues of material fact requiring a trial. The uncontroverted evidence shows that the NHS/PHS Defendants violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310.

The FTC seeks a permanent injunction and order: (1) banning the NHS/PHS Defendants from telemarketing, and from debiting consumer bank accounts; (2) enjoining the NHS/PHS

Defendants from making misrepresentations and from violating the TSR; (3) ordering monetary relief in the amount of \$6,879,162.22; and (4) permitting conduct and compliance monitoring and requiring records to be kept. A proposed Order is being filed together with this Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff Federal Trade Commission's Motion for Summary Judgment Against the NHS/PHS Defendants was served on the following via electronic filing (as to counsel) and via mail or courier (as to parties unrepresented in this action), on this 1st day of October, 2010, and that the Memorandum in Support of this Motion and Proposed Permanent Injunction were served in the same fashion on the same date, and that electronic copies of previously unfiled exhibits being submitted in support of this Motion were served upon all of the following via mail or courier on the same date:

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**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AGAINST THE NHS/PHS DEFENDANTS**

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I. INTRODUCTION

There is a recording of Morris O. McCall of Hampton, Virginia. The recording begins with a computerized voice stating the date: March 24, 2008.

The voice asks a series of questions, and Morris McCall responds. After the 87-year-old man gives his name, the questions are all about his checking account. He dutifully provides the name of his bank, then reads his account number from the bottom of one of his checks, then provides the city and state where he opened his account.

Other questions follow, and he answers repeatedly with a clear “yes.” Is he an authorized signer on the account? “Yes.” He understands that there is a one-time processing fee of \$29.95, and he authorizes that draft from his checking account in two days, right? “Yes.” He does understand that the \$29.95 is for a risk-free trial with “American Health Benefits Online,” and “has nothing to do with receiving a government grant.” “Yes.” He understands that he has to make sure the money is available in the account, or his bank might charge him a fee? “Yes.”

Then, the computerized voice speeds through a 155 word explanation of what Morris McCall will receive in return for authorizing this \$29.95 debit to his account. In sum, he is paying to receive a letter that will give him the opportunity to review a program offering “discounted health benefits” (“this is not insurance,” says the voice). If the company does not hear from him, it will charge his bank account \$19.95 per month, and also an additional \$299.95 enrollment fee. He is assured that he can cancel anytime after he receives the “welcome letter.” As a bonus, he’ll get “\$100 in gasoline vouchers and the Super Savings Discount card” (no mention of what those are or how they work). Does he understand the terms? “Yes.”

Now, *again*, the computerized voice brings up government grants. He understands that the company is not offering a grant, and it is not “affiliated with Medicare, Medicaid, or any

other government agency.” “Yes,” he responds. Then he is given a customer service phone number and hours, and he is asked to hold.

Suddenly, the voice offers him yet another opportunity: he’ll get a free trial in the Galaxy Member Benefits program, which offers substantial savings on a variety of consumer goods and services. “If you love it, do nothing, and it’s only \$19.95, billed monthly to your checking account after the seven-day trial.” If he decides to cancel, he can just call another toll-free number (not the one for the health program). Okay? “Yes.”

There is no doubt that the recording is of Morris McCall. His daughter, Eileen, recognizes the voice without hesitation. His bank account was, in fact, charged \$29.95 by American Health Benefits Online shortly after the date of the recording. Then \$299.95. Then \$19.95. Galaxy issued two charges to the account, too, for \$19.95 each time.

The recording raises a lot of questions. Morris McCall worked nearly 40 years as a nursing assistant for the VA hospital in Hampton. He had health insurance in his retirement. Why would he pay money just for the chance to review an expensive “discounted health benefits” program? How is the offer “risk-free” if he has to pay \$29.95 just to see its terms? Why are the primary and clearest questions only about his bank account? Why does the voice keep talking about government grants? Why didn’t he cancel?

But as many questions as it raises, the recording gives one definitive answer that cuts through all other issues. For while the man’s voice on the recording is unquestionably that of Morris McCall, there is absolutely no doubt that the recording is a fake.

The recording is dated March 24, 2008. Morris McCall passed away on December 20, 2007.

* * *

Plaintiff Federal Trade Commission (FTC) moves for affirmative summary judgment against the seventeen Defendants designated as the NHS/PHS Defendants in the Amended Complaint. The uncontroverted evidence shows that these Defendants worked together in an international enterprise that took millions of dollars in US consumers' money through grossly deceptive marketing practices and unauthorized charges. The deceptive and unfair acts and practices of the NHS/PHS Defendants violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the Telemarketing Sales Rule (TSR), 16 C.F.R. Part 310. The FTC is entitled to judgment as a matter of law under Rule 56(c) because there is no genuine issue as to any material fact regarding these violations.

The Court has already granted preliminary injunctive relief against all seventeen of the NHS/PHS Defendants. Four of the NHS/PHS Defendants were named in the original Complaint filed in May 2008.¹ The other thirteen NHS/PHS Defendants were added as named defendants by means of the Amended Complaint filed in July 2009.²

Now, after all of these Defendants have been provided notice, the FTC seeks permanent injunctive relief and equitable monetary relief against them. In light of the scope, breadth, and persistence of the activities at issue, the FTC seeks an order permanently banning these

¹ NHS Systems, Inc.; Harry F. Bell, Jr.; Physician Health Service, LLC (PHS-4); and Donna Newman were named as Defendants to the original Complaint. Initially, counsel appeared for these Defendants, but a motion to withdraw was granted in July 2009 and no successor counsel has appeared.

² Plus Health Savings, Inc. (PHS-2); Physicians Health Systems, Inc. (PHS-3); Health Management, LLC (NHS-2); 6676529 Canada, Inc.; Nicole Bertrand; Barry Kirstein; "Dannie Boie" (now known to be David James Greer); PHS Enterprises, Inc. (PHS-1); First Step Management, Inc.; Gold Dot, Inc.; Linke Jn Paul; Tasha Jn Paul; and Nevada Business Solutions, Inc. (NBS), were named as added Defendants to the Amended Complaint. No counsel has appeared in this matter for any of these Defendants. A Montreal-based attorney has communicated with the FTC on behalf of Defendants Kirstein, Bertrand, and 6676529 Canada, Inc., and appeared at the depositions of Kirstein and Bertrand. However, that attorney informed the undersigned that no counsel would be appearing for the Montreal-based Defendants before this Court.

Defendants from engaging in telemarketing and from debiting consumer bank accounts. The FTC also seeks additional order provisions to promote compliance with the FTC Act and to permit the Commission to monitor these Defendants' business conduct as may be necessary.³

Supporting this motion for summary judgment are the exhibits previously introduced in support of the motions for temporary restraining orders (previously marked as PX 1-23, with attachments), as well as additional evidentiary materials, including a Supplemental Declaration of FTC Investigator Mary Jo Vantusko in Support of Summary Judgment Against the NHS/PHS Defendants ("Vantusko SJ NHS/PHS") (PX 24); two Declarations of Jane Larimer, General Counsel of NACHA ("Larimer" and "Supp. Larimer") (PX 25 and PX 26); a declaration of counsel attaching deposition transcript excerpts and exhibits (PX 27); and a Declaration of FTC Paralegal Meeran Ahn (PX 28).⁴

³ The Amended Complaint also names three other Defendants: John E. Bartholomew, Interface Management, Inc., and Beginning Again, Inc. Collectively, these three Defendants are designated as the "Galaxy Defendants" in the Amended Complaint. By the Court's scheduling Order of September 27, 2010 (Doc. #135), discovery remains open between the FTC and the Galaxy Defendants, and any summary judgment filings among them are not due until after the close of the discovery period.

⁴ The declaration of counsel attaches excerpts from the following depositions cited herein, and the transcripts and exhibits to those depositions are abbreviated for citation as noted:
Deposition of Harry F. Bell, Jr., May 18, 2010 ("Bell Tr." and "Bell Ex.")
Deposition of Nicole Bertrand, May 12-13, 2010 ("Br. Tr." and "Br. Ex.")
Deposition of Martin Dettelbach, May 17, 2010 ("Det. Tr.")
Deposition of Arnold Harrison, May 21 and 27, 2010 ("Har. Tr." and "NBS Ex.")
Deposition of James Kachel-Slanga, May 18, 2010 ("K.-S. Tr")
Deposition of Barry Kirstein, May 13, 2010 ("Kr. Tr.")
Deposition of Michael Laramie, May 25, 2010 ("Lar. Tr.")
Deposition of Eileen McCall, May 24, 2010 ("McC. Tr." and "McC. Ex.")
Deposition of Donna Newman, May 21, 2010 ("Newm. Tr." and "Newm. Ex.")
Deposition of Jan Sessor, May 20, 2010 ("Ses. Tr." and "Ses. Ex.")
Deposition of Suzanne Tallarico, May 19, 2010 ("Tal. Tr.")

BACKGROUND AND FACTUAL HISTORY

II. THE PARTIES

A. The Federal Trade Commission.

Plaintiff, the **FTC**, is an independent agency of the United States Government created by statute. 15 U.S.C. § 41. It is charged, *inter alia*, with enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce, and the TSR, which requires telemarketers to make certain disclosures and to refrain from deceptive and abusive practices. 16 C.F.R. Part 310. The FTC is authorized to initiate federal district court proceedings to enjoin violations of the FTC Act and the Telemarketing Sales Rule and to secure equitable relief that is appropriate in each case, including restitution for injured consumers. 15 U.S.C. §§ 53(b) and 57b.

B. The Corporate NHS/PHS Defendants, and Related Entities.

The evidence sets forth a history of these defendants' activities that is perhaps best described along two intersecting paths. These paths follow two sets of thousands of consumers whose bank accounts were charged by the enterprise. The first set came to be designated "**Database 1**" (or **DB1**), and the second set became known as "**Database 2**" (or **DB2**). Each set of consumers was passed through multiple front companies, which were in turn used primarily to distribute funds to call centers and to the central figures of the enterprise.⁵

⁵ The original four NHS/PHS Defendants were described in some detail in the FTC's original 2008 Memorandum in Support of its Motion for *Ex Parte* Temporary Restraining Order, etc. (Doc. #3) (hereinafter, the "2008 XTRO Brief"). The thirteen additional NHS/PHS Defendants were described in detail in the FTC's 2009 Memorandum in Support of its Motion for Temporary Restraining Order (Doc. #77) (the "2009 TRO Brief"). All are described again here for ease of reference.

1. Database 1 Fronts

As explained by Defendants Bertrand and Kirstein, DB1 was a database of consumers consolidated from multiple pre-December 2006 telemarketing campaigns overseen by several of the individual Defendants. According to Bertrand and Kirstein, these consumers were “sold” various health discount programs in the earlier period, and their bank accounts were charged monthly “residuals,” supposedly to maintain their memberships in a series of health discount programs.⁶

a. Defendant PHS Enterprises, Inc. (PHS-1)

Defendant **PHS Enterprises (PHS-1)**, a Nevada corporation, was formed in December 2006, at approximately the same time NHS Systems was formed. In January 2007, it opened a payment processing account with Modern Payments, with Bertrand and Defendant Kirstein as the primary contacts.⁷

PHS-1 was formed to consolidate under a single umbrella (i.e., DB1) consumers who had been “sold” in previous telemarketing campaigns. Consumers whose bank accounts were charged under the auspices of PHS-1 were charged monthly fees of \$19.95. No new consumers were enrolled as customers of PHS-1 after the consolidated group was set. The number of PHS-1 customers declined over time, as any consumer who complained about a charge from PHS-1 was refunded one month’s payment and was canceled out of the program, no questions asked.⁸

b. Defendant Plus Health Savings, Inc. (PHS-2)

Defendant **Plus Health Savings (PHS-2)** a Pennsylvania corporation, was organized in

⁶ Br. Tr. at 30-38, 42-56; Br. Ex. 2; Kr. Tr. at 12-20, 26-27.

⁷ PX 17 (Supplemental Vantusko) at ¶¶ 29, 31, 33, 40, 42, 64; PX 20 (Declaration of Wayne D. Geisser) at ¶ 37.

⁸ Br. Tr. at 30-38, 42-56, 104-08, 276-77; Br. Exs. 2, 6; Kr. Tr. at 12-20, 26-27.

June 2007, with its principal place of business at the same suburban Philadelphia address as NHS Systems. Defendant Bell was the president of PHS-2, and he formed the company on instructions from Bertrand and Kirstein. Shortly after it was formed, PHS-2 took over the customers of PHS-1.⁹

There was no written agreement between PHS-1 and PHS-2 regarding the transfer of the customers. According to Kirstein, the PHS-1 customers were transferred to PHS-2 when he, Bertrand, and Defendant Tasha Jn Paul agreed that it would be more convenient to have Bell manage the bank account. PHS-2 continued to charge DB1 consumers until the initial filing of this action.¹⁰

2. Database 2 Fronts

At approximately the same time as PHS-1 was formed, a separate entity was formed to begin to accumulate a database of consumers who were to be “sold” on a going forward basis (i.e., DB2). This group included all post-December 2006 new NHS/PHS enrollees, who were immediately charged \$29.95 to receive information, then \$299.95 to enroll, and then \$19.95 per month as residuals thereafter.¹¹

a. Defendant NHS Systems, Inc.

Defendant **NHS Systems** is a Pennsylvania corporation formed in December 2006, with its principal place of business in Collegeville, Pennsylvania. For purposes of dealing with consumers, NHS Systems used a rented mail box in Miami, Florida. It represented itself to consumers by more than one name, including National Healthcare Solutions (the “**NHS**

⁹ PX 17 (Supplemental Vantusko) at ¶¶ 25, 55, 58-70.

¹⁰ Br. Tr. at 150-53, 158, 214-15; Br. Ex. 2; Kr. Tr. at 37-38.

¹¹ Br. Tr. at 27-29, 58-60, 276-78; Br. Ex. 1.

Campaign”) and, later, National Health Net Online (the “NHN Campaign”).¹²

b. Defendant Health Management, LLC. (NHS-2)

Defendant **Health Management** is a Missouri limited liability company, formed in late 2007 by Defendant Newman. In February 2008, Health Management took over charging monthly residuals against the customers of NHS Systems (thus the abbreviation NHS-2), and no new customers were enrolled as customers of NHS-2.¹³

There was no written agreement between NHS Systems and NHS-2 to transfer customers. According to Kirstein, the transfer happened because “we didn’t want to have anything to do with Hank Bell anymore.”¹⁴

c. Defendant Physicians Health Systems, Inc. (PHS-3) (AHBO-1)

Defendant **Physicians Health Systems (PHS-3)** is a Delaware corporation with its principal place of business at the same Collegetown address as NHS Systems. It was formed in early November 2007, with Bell as its president, and began charging consumers’ accounts in the spring of 2008. PHS-3 also did business under the name American Health Benefits On Line (part of the “AHBO campaign”).¹⁵ PHS-3 was sometimes called “AHBO-1.”¹⁶

d. Defendant Physician Health Service, LLC. (PHS-4) (AHBO-2)

Defendant **Physician Health Service (PHS-4)** was organized by Newman in Missouri in late November 2007, and did business as American Health Benefits On Line (also part of the

¹² PX 1 (Declaration of Mary Jo Vantusko) at ¶¶ 17, 25, 41. *See also*, PX 17 (Supplemental Declaration of Mary Jo Vantusko) at ¶¶ 47-57, 74-76; Br. Ex. 1.

¹³ PX 17 (Supplemental Vantusko) at ¶¶ 27, 78, 83, 85, 91-92, 94; Br. Tr. at 234-40, 353; Kr. Tr. at 51.

¹⁴ PX 17 (Supplemental Vantusko) at ¶ 83; Kr. Tr. at 51.

¹⁵ PX 17 (Supplemental Vantusko) at ¶¶ 26, 77, 83-84, 87.

¹⁶ Br. Tr. at 216-19; Br. Ex. 1 at FTC-NHS-0014141/2.

“AHBO Campaign”). PHS-4 was sometimes called “AHBO-2.”¹⁷

3. Defendant Nevada Business Solutions (NBS): The Post-Injunction Front

After this Court issued temporary and preliminary injunctive relief against the DB1 and DB 2 front entities, certain Defendants determined to carry on operations under a new name.

Defendant **NBS** is a Nevada corporation. NBS was incorporated on May 27, 2008, approximately two weeks after service of this Court’s TRO. Its registered address is identical to the registered address of PHS-1.¹⁸

In early July 2008, after negotiations authorized by Kirstein and in which it was represented by Greer, NBS entered into a written contract by which thousands of consumers were to be enrolled in and charged for a medical discount program called Med Values Plus, which was provided by a company called Financial Marketing Concepts (FMC). Those consumers’ names were derived from a combined list of DB1 and DB2 consumer victims of the NHS/PHS enterprise. Kirstein and Greer moved forward with the NBS program to charge DB1 and DB2 consumers, while never intending to provide anyone any evidence that any DB1 or DB2 consumer had actually authorized charges.¹⁹

4. The Siphoning Entities

The final group of corporate NHS/PHS Defendants includes several key companies that

¹⁷ PX 1 (Vantusko) at ¶ 26; PX 17 (Supplemental Vantusko) at ¶¶ 84, 96; Br. Tr. at 216-19, 228-32; Br. Ex. 1 at FTC-NHS-0014141/2; Br. Ex. 19.

¹⁸ PX 17 (Supplemental Vantusko) at ¶¶ 33, 38, 99. The nominal president of NBS was Arnold Harrison, but he has testified that he did not authorize the formation of NBS and was not aware of its existence until late 2008. He learned limited information about NBS’s function from Tasha Jn Paul, and dealt with her in winding down the company. The corporate formation record produced by the incorporating service that registered NBS shows that “Dannie Boie” was the primary contact. Har. Tr. at 9-11, 16-23, 28-32, 36-38, 59-65, 109-11; NBS Ex. 3.

¹⁹ PX 17 (Supplemental Vantusko) at ¶¶ 100-17; PX 23 (Declaration of Peter Dykstra) at ¶¶ 7, 11; Kr. Tr. at 63-64, 67-69, 72-73.

were controlled by Defendants Tasha and Linke Jn Paul, Kirstein, Bertrand, and Greer.

a. Defendant First Step Management, Inc.

Defendant **First Step (FSMI)** is a St. Lucia company. Over one million dollars taken from consumers by the NHS/PHS scheme were transferred to a St. Lucia bank account in the name of FSMI, making FSMI the largest single recipient of such transfers. Linke Jn Paul is the sole listed director of FSMI, and Tasha Jn Paul and Greer operated the company.²⁰

In its St. Lucia incorporation documents, FSMI describes its business as “Providing Information For US Government Grants And Health Care Services.”²¹ Telemarketers’ claims to offer grants were central and recurrent features of the NHS/PHS scheme.²²

b. Defendant Gold Dot, Inc.

Defendant **Gold Dot** is a St. Lucia company. Linke Jn Paul and Tasha Jn Paul are the two listed directors of Gold Dot. Gold Dot’s address in St. Lucia is identical to FSMI’s address. In its St. Lucia incorporation documents, Gold Dot describes its business as “Providing Internet Sales And Telemarketing Services.”²³

Frequent payments were made by NHS/PHS entities to Gold Dot. Hundreds of thousands of dollars taken from consumers through the NHS/PHS scheme were transferred to a St. Lucia bank account in the name of Gold Dot.²⁴

²⁰ PX 17 (Supplemental Vantusko) at ¶¶ 29, 34, 36, 45, 50, 52, 68, 93, 95, 122; PX 20 (Geisser) at ¶ 48; PX 18 (Gruwell) at ¶ 5; Br. Tr. at 53-54, 72, 80, 188-92, 219-20; Br. Ex. 14.

²¹ PX 17 (Supplemental Vantusko) at ¶ 34.

²² See 2008 XTRO Brief at 6-13 and 18-19, and evidence cited therein. See also PX 17 (Supplemental Vantusko) at ¶¶ 54, 74, 125; Br. Tr. at 108-09, 114-15 ; Br. Ex. 7; Det. Tr. at 13-14, 24-25.

²³ PX 17 (Supplemental Vantusko) at ¶ 35.

²⁴ PX 17 (Supplemental Vantusko) at ¶¶ 52, 93, 95; PX 20 (Geisser) at ¶ 49.

c. Non-Defendant First Souolutions, Inc.

Like FSMI and Gold Dot, Non-Defendant **First Souolutions** (in some records also called **First Solutions**, and abbreviated here as **FSOL**) was used by Tasha Jn Paul and Greer as a conduit to move money from front entities to their personal accounts. Non-Defendant Arnold Harrison, the nominal president of FSOL, testified that Greer asked him to form FSOL to sell leads to telemarketing rooms that Greer was supervising. Once Harrison formed FSOL, Greer explained that they had to split all profits with Tasha Jn Paul, who Greer called his “partner.” Harrison performed no function in FSOL other than to form the entity and hold its bank account; Greer and Tasha Jn Paul operated the company.²⁵

d. Defendant 6676529 Canada, Inc.

Defendant **6676529 Canada** is a Canadian corporation, with its principal place of business at Bertrand and Kirstein’s address in Montreal, Quebec. Bertrand is the president of 6676529 Canada. Although Kirstein had no official position with the company, he and Bertrand shared in controlling and profiting from it.²⁶

Bell, in his capacity as president of NHS Systems, entered into a contract with 6676529 Canada for the Canadian entity to “manage” NHS Systems as a purported independent contractor. Funds obtained through the NHS/PHS scheme were transferred to a Canadian bank account in the name of 6676529 Canada.²⁷

e. Non-Defendant Delway Trading

Non-Defendant **Delway Trading** is an entity with an address in Barbados. It was nominally headed by Non-Defendant Don Nyveen, a Canadian citizen and friend of Kirstein’s.

²⁵ Har. Tr. at 9-14.

²⁶ PX 17 (Supplemental Vantusko) at ¶¶ 28-29, 31; Br. Tr. at 380-81.

²⁷ PX 17 (Supplemental Vantusko) at ¶¶ 52-53, 68, 93, 95; PX 20 (Geisser) at ¶ 49.

Late in 2008, Kirstein decided that revenues from the customers of NBS should flow through Delway Trading instead of through NBS. Nyveen performed no function other than to hold the Delway account through which money flowed to the NHS/PHS principals.²⁸

C. The Individual NHS/PHS Defendants

The Individual NHS/PHS Defendants fall into three categories. In the first group are Kirstein and Bertrand, a couple who performed central and leading roles in the enterprise while splitting their time between Montreal and south Florida.²⁹ Tasha Jn Paul and Greer worked from Las Vegas and St. Lucia, while Linke Jn Paul rounded out the second group by playing the role of corporate officer for two key St. Lucia companies. Finally, Hank Bell and Donna Newman, although they did not know each other, performed parallel roles as presidents of domestic front businesses.

1. Defendant Barry Kirstein.

Defendant **Kirstein** is a resident of Montreal, Quebec. Kirstein has acted as a ranking authority in the NHS/PHS enterprise. He negotiated with payment processors, and he and Bertrand instructed others on the formation and operations of the front entities. Kirstein was a primary contact on the payment processing accounts of NHS Systems, PHS-1, PHS-2, NHS-2, PHS-3, and PHS-4. He also played a central role in the resumption of charges through NBS.³⁰

2. Defendant Nicole Bertrand.

Defendant **Bertrand** is a resident of Montreal, Quebec. Bertrand served as a primary point of contact between multiple NHS/PHS entities and their payment processors and vendors.

²⁸ Kr. Tr. at 74-75; Br. Ex. 26.

²⁹ PX 17 (Supplemental Vantusko) at ¶¶ 13-14, 29, 31, 47.

³⁰ PX 17 (Supplemental Vantusko) at ¶¶ 9-11, 13, 16, 31-32, 47, 50, 55, 64, 70-72, 74, 80-81, 83, 91, 128-29; Kr. Tr. at 63-64, 72-75.

Bertrand also routinely instructed others how to distribute funds taken from consumers, particularly to offshore accounts. Bertrand was a primary contact on the payment processing accounts of NHS Systems, PHS-1, PHS-2, NHS-2, PHS-3, and PHS-4.³¹ She, too, played a central role in the resumed campaign to charge consumers after this action was filed.³²

Bertrand was a defendant in a telemarketing fraud case brought by the New York Attorney General in 2001 (*Spitzer v. Alini International Marketing, et al.*), and is subject to a permanent injunction and a criminal and civil contempt order in connection with that action.³³

3. Defendant Tasha Jn Paul.

Until shortly after service of the Amended Complaint on her husband, **Tasha Jn Paul** (f/k/a Tasha Swensen) was a Nevada resident who divided her time between Las Vegas, Nevada, and St. Lucia. She is one of the two directors of Gold Dot.³⁴ She described herself as being employed by FSMI, but in fact was a leading figure in the operations of the entire NHS/PHS enterprise.³⁵

4. Defendant “Dannie Boie,” Legal Name David James Greer

“**Dannie Boie**” is a name used by **David James Greer**.³⁶ Greer acted as a primary

³¹ PX 17 (Supplemental Vantusko) at ¶¶ 13-16, 29, 41-42, 45, 47-48, 50, 53, 55, 59, 64, 68, 70-71, 74-76, 80, 83, 90-91; PX 18 (Declaration of Sean D. Gruwell) at ¶¶ 7-10.

³² PX 17 (Supplemental Vantusko) at ¶¶ 118, 126-29.

³³ PX 17 (Supplemental Vantusko) at ¶ 30. See also Br. Tr. at 17, 22, 75-76.

³⁴ PX 17 (Supplemental Vantusko) at ¶¶ 35, 37, 98.

³⁵ Br. Tr. at 53, 80, 83-84, 115, 191; Br. Exs. 4, 14; Kr. Tr. at 10-11, 26-27, 31, 38.

³⁶ The evidence overwhelmingly establishes that Greer is “Dannie Boie.” Br. Tr. at 89, 192, 306; Kr. Tr. at 52; Har. Tr. at 18, 28, 110; PX 24 (Vantusko SJ NHS/PHS) at ¶¶ 13, 15-17. Should the Court so find, Plaintiff would respectfully request the opportunity to move to amend the Amended Complaint to conform to the evidence, in order to add Greer’s legal name to the Amended Complaint and ensure that any judgment (including any injunction) run against him by
(continued...)

contact and operational manager in the NHS/PHS scheme. The evidence irrefutably links him to NHS Systems, PHS-3, PHS-4, NBS, FSMI, Gold Dot, and FSOL.³⁷

5. Defendant Linke Jn Paul.

Defendant **Linke Jn Paul** lived in St. Lucia while his wife Tasha worked between Las Vegas and St. Lucia. He is the sole director of FSMI and one of two directors of Gold Dot. Wire transfers of funds moved through the NHS/PHS scheme to FSMI's St. Lucia bank account listed Linke Jn Paul as the contact person for FSMI.³⁸

6. Defendant Harry F. Bell, Jr.

Defendant **Bell** served as president of NHS Systems, PHS-2, and PHS-3, opened and maintained bank accounts in their names, and rented NHS Systems's mail box in Miami.³⁹

7. Defendant Donna Newman.

Defendant **Newman** served as president of NHS-2 and PHS-4, opened and maintained bank accounts in their names, and also processed complaint mail for NHS Systems.⁴⁰

III. NHS/PHS DEFENDANTS' ACTS AND PRACTICES AGAINST CONSUMERS

The general practices of the NHS/PHS enterprise prior to the filing of this action were described in the FTC's 2008 XTRO Brief. Telemarketers posed as government representatives

³⁶ (...continued)
his legal name.

³⁷ PX 17 (Supplemental Vantusko) at ¶¶ 11, 32, 48, 51, 54, 87, 100-06, 118, 122 (see Att. L at FTC-NHS-0004036/4), 126, 128-29; Har. Tr. at 11.

³⁸ PX 17 (Supplemental Vantusko) at ¶¶ 34-36, 48, 50; PX 20 (Geisser) at ¶ 48.

³⁹ PX 1 (Vantusko) at ¶¶ 25, 41; PX 17 (Supplemental Vantusko) at ¶¶ 25-26, 55, 58, 62, 77, 86.

⁴⁰ PX 1 (Vantusko) at ¶ 26, 42; PX 17 (Supplemental Vantusko) at ¶¶ 27, 78, 85; Br. Tr. at 203-04; Newm. Tr. at 9-12; Newm. Ex. 1.

to obtain by deception consumers' bank account information and supposed assent to enroll in health care discount programs. NHS/PHS also generated thousands of unauthorized debit transactions to consumer accounts, in the form of ACH and remotely created check transactions.⁴¹ Moreover, the FTC's 2009 TRO Brief described evidence showing post-filing conduct consistent with the pre-filing pattern.⁴² Rather than requiring the reader to refer to the prior briefs, we cite and attempt to summarize evidence cited in those briefs here.⁴³

A. Overview: Unauthorized Charges and Deceptive Marketing

In the Amended Complaint, and in prior briefing and evidence, the FTC has emphasized consistent themes of deception that emerge from consumer complaints about NHS/PHS. Tales of telemarketers falsely claiming government affiliation and offering grants are pervasive and recurring throughout the history of the enterprise, from early 2007 through the spring of 2009.

As additional information has been gathered, however, it has become apparent that not a single bank debit issued by NHS/PHS can be supported as authorized by any competent evidence. The primary business practice of the enterprise was to charge consumers' bank accounts, and it can now be demonstrated that it did so wrongfully in every instance. That being the case, attention in this brief is first focused on NHS/PHS's unlawful charging practices, and then on the recurrent deception in its purported marketing programs.

B. NHS/PHS's Charging Practices Were Fundamentally Wrong

As explained in prior briefing, NHS/PHS took money from consumers' bank accounts

⁴¹ See 2008 XTRO Brief at 6-16 and 18-24, and evidence cited therein.

⁴² See 2009 TRO Brief 18-21, and evidence cited therein.

⁴³ The prior briefs are not replicated word-for-word here. To be clear, however, the FTC does not abandon or waive any previously-asserted argument or evidence not repeated here. To the contrary, the prior assertions and argument have been borne out through discovery.

using ACH debits and remotely created checks.⁴⁴ Although there are differences in the rules governing these payment channels, both are based on the essential premise that the person whose bank account is debited has actually authorized the debit.

The NHS/PHS programs purported to rely solely on recorded telephone authorizations to justify the debits against consumer accounts.⁴⁵ However, none of the purported authorizations can be trusted at all. Moreover, it is evident that the enterprise was unconcerned with actually ensuring that it had reliable evidence of authorization before charging consumers' bank accounts, or otherwise with respecting the rules of the financial systems it exploited.

1. Obviously faked verification recordings undermine them all.

As previously reported by the FTC, many consumers complained that NHS/PHS used altered or entirely fake voice verification recordings. While some consumers complained that the recordings featured imposters,⁴⁶ others admitted that the recordings were their own voices but asserted that the recordings were incomplete or manipulated. There is conclusive evidence of these practices.

The Introduction to this brief provides details concerning the purported authorization of Morris O. McCall.⁴⁷ The fact that NHS/PHS was able to generate this superficially convincing

⁴⁴ See *FTC v. NHS Systems, Inc., et al.*, 2009 U.S. Dist. LEXIS 88853 at *4-*5 (E.D. Pa. 2009). Regarding the ACH system, see generally PX 2 (McEntee), PX 25 (Larimer), and PX 26 (Supp. Larimer). Regarding remotely created checks, see generally *United States v. Payment Processing Ctr.*, 461 F. Supp. 2d 319, 321-22 (E.D. Pa. 2006). Remotely created checks look like paper checks, but do not bear the written signature of the account holder. Examples of remotely created checks are attached to the Declarations of Steven Blanchard and Destiny Clawson. PX 9 (Blanchard); PX 12 (Clawson).

⁴⁵ Br. Tr. at 273-78.

⁴⁶ K.-S. Tr. at 13-16; PX 3 (Davenport).

⁴⁷ McC. Tr. at 7, 13-20; PX 24 (Vantusko SJ NHS/PHS) at ¶¶ 28-31. Plaintiff will seek leave of Court to file the full digital audio recording under seal, as the bank account information
(continued...)

but obviously fake “verification” undermines the reliability of any and every verification recording on which any consumer charge in this case may be based.⁴⁸ This is true regardless of whether the fake recording was generated on the specific instruction of any named Defendant or simply as an effect of the Defendants having set in motion “the engine of fraud.” *See FTC v. Inc21.com Corp.*, 688 F.Supp.2d 927, 939 (N.D. Cal. 2010).⁴⁹

Simply put, any transaction had to be authorized. NHS/PHS relied on nothing but voice verification recordings to show such authorization. The voice verification recordings were manipulable and manipulated. There is no competent evidence of authorization for any transaction.

2. The enterprise was unconcerned with authorization.

After this action was commenced, Kirstein worked with Greer to resume charges against the same consumers. He instructed Greer to go forward despite this action, and to represent that there were no recordings available to justify any of the charges. Thus, while Kirstein described one of his primary duties as working with payment processors to keep unauthorized transaction complaint rates low,⁵⁰ it is evident that he did not think of this task in the simple affirmative of trying to make sure that transactions were actually authorized and properly supported. The object was to charge accounts, even without any verifiable authorization to do so.

Moreover, as Bertrand noted, for months the scheme was sending “welcome letters”

⁴⁷ (...continued)
divulged in the recording is not obsolete.

⁴⁸ See also Br. Tr. at 316-19 (stating that on reviewing a 2009 verification tape she heard “click click” sounds and wondered if someone had “played with the tape”); Br. Ex. 28.

⁴⁹ The *Inc21* matter also involved “doctored” verification recordings. *See* 688 F.Supp.2d at 937.

⁵⁰ Kr. Tr. at 7-8, 44.

listing an incorrect toll-free number as the one to call if the consumer wanted to cancel. When the error was discovered, it was corrected for future letters. But the consumers who had been victimized over that period stayed victimized – unless a specific complaint was received, NHS/PHS made no effort to refund charges to consumers, or to contact them to verify whether they indeed wanted to be charged.⁵¹ Similarly, Bertrand acknowledged that the campaign in the first half of 2007 had to be shut down due to misrepresentations by the telemarketing rooms, yet no effort was made to undo the effects of the purportedly out-of-control telemarketers unless a specific complaint was received.⁵² Moreover, a massive amount of returned mail – which by logic should have signaled major problems with the campaigns and which inherently denied consumers the purported opportunity to review and cancel the program – was disposed of.⁵³

And when all of the consumers were shifted over to NBS after this action was filed, mailings were sent to all of them.⁵⁴ It would have been simple to include a form for the consumer to sign and return to confirm enrollment and authorize charges going forward. But actual authorizations were not the priority, and no written permission was ever requested of any consumer. It is likely none would have been forthcoming. *See Inc21* PI, 688 F.Supp. at 936-37.

The consistent practice of NHS/PHS was to take money from consumers' bank accounts as long as the consumers did not complain. That is not express authorization, and it is not verifiable authorization. It is not a lawful business practice at all.

⁵¹ Br. Tr. at 169-70.

⁵² *Id.*

⁵³ Tal. Tr. at 47-48, 50-51. When Newman later became active in NHS/PHS, she suggested that the enterprise should keep track of the identities of consumers whose mail was returned; as she recalls, she was told that this was a “good idea.” Newm. Tr. at 51.

⁵⁴ Det. Tr. at 12 (package to DB1), 33 (letter to DB2). Not surprisingly, one such letter was addressed to Morris McCall. McC. Tr. 12, 20-22; McC. Ex. 1.

3. The business model inherently violated banking rules.

As this Court has noted, at all times relevant to this matter NACHA rules strictly limited the use of voice verification recordings to justify ACH debits.⁵⁵ A debit could be supported by a voice recording from an outbound telemarketing call only if there was a preexisting business relationship, and even then the authorization could only be used for a single transaction – not recurring transactions.

In response to an inquiry from payment processor Modern Payments, Bertrand explained that NHS Systems had no prior relationship with the consumers it called.⁵⁶ Kirstein related in his deposition that NHS/PHS bought leads for its telemarketers, and that he felt that he could reduce the unauthorized returns by investing in better purchased leads.⁵⁷ There never was any existing business relationship.

Moreover, beginning with the very first charge to a DB1 consumer by PHS-1, the rule against using voice authorizations for multiple debits was violated each and every time any DB1 or DB2 consumer was charged the \$19.95 residual monthly fee. As the DB1 consumers were only charged monthly fees, purportedly based on earlier sales authorized by voice recordings, every single DB1 transaction inherently violated this rule regardless of the circumstances of the original sale.⁵⁸

⁵⁵ PX 2 (McEntee) at ¶ 17; PX 25 (Larimer) at ¶ 3; PX 26 (Supp. Larimer) at ¶ 4. Kirstein testified that he was well aware of NACHA and its role in the ACH system. Kr. Tr. 40-42, 45.

⁵⁶ Br. Tr. at 117-18; Br. Ex. 8 at FTC-NHS-0001884/3.

⁵⁷ Kr. Tr. at 32.

⁵⁸ The only NHS/PHS transactions initiated by demand draft (i.e., not by ACH) were those of DB2 fronts NHS-2, PHS-3, and PHS-4 processed by Teledraft, and Teledraft ceased providing demand draft processing in early May 2008. PX 17 (Supplemental Vantusko) at ¶ 83. *See generally*, Plaintiff's Motion for an Order Requiring Teledraft, Inc., to Turn Over Funds

(continued...)

Every ACH transaction initiated by NHS/PHS was a violation of the NACHA rules. It is small wonder that there were over 18,000 documented NACHA “unauthorized” ACH returns in Modern Payments’ database for NHS Systems alone, and that dealings with NHS/PHS caused vendor Financial Marketing Concepts to lose its account with its payment processor.⁵⁹

Bertrand’s own payment processing calculations covering the NHS, NHN, and AHBO campaigns indicate that NHS/PHS knew that its attempted transactions were invalidated at a rate above 50%, and were specifically returned as “unauthorized” at a rate over 4%.⁶⁰ Given that debit transaction returns for all reasons in the ACH system never reached even 2% in the same period, and returns of telephone-based debits for “unauthorized” reasons never reached 0.15%,⁶¹ it is apparent that even under NHS/PHS’s own calculations it experienced overall return rates more than 25 times the average, and “unauthorized” return rates more than 30 times the average.⁶² The numbers are enormous.

⁵⁸ (...continued)
(Doc. #51) at 11-12, and evidence submitted therewith. Of course, although the demand draft transactions were not subject to NACHA rules, they, too, are undermined because no purported authorization is supported by reliable evidence. See McC. Tr. at 16-20 (Morris McCall supposedly agrees to a “draft” against his account).

⁵⁹ Det. Tr. at 27-28.

⁶⁰ Br. Tr. at 349-54; Br. Ex. 1 at FTC-NHS-0014141/1-2. The FTC does not offer these as valid calculations, but rather to illustrate that even NHS/PHS’s own payment processing calculations showed massive problems with the campaigns.

⁶¹ PX 2 (McEntee) at ¶¶ 19, 22; PX 25 (Larimer) (adopting PX 2); PX 26 (Supp. Larimer) at ¶¶ 2, 6.

⁶² According to Bertrand’s calculations, 87,821 of 168,670 transactions for “NHS,” “AHBO-1,” and “AHBO-2” were immediately returned as invalid, leaving 80,849. Given that her calculations show an additional 8,144 “revoked” (i.e., specifically returned as unauthorized), it is evident that NHS/PHS knew the unauthorized returns actually numbered more than 10% of the transactions that were not immediately returned as invalid.

C. NHS/PHS Had No Regard For Its Purported Products

The FTC takes no position in this case as to whether all of the underlying medical discount programs in which NHS/PHS purported to enroll consumers were, themselves, genuine. Rather, the focus is the manner in which NHS/PHS obtained consumers' bank information and charged consumers' bank accounts. Obtaining bank information and charging accounts was NHS/PHS's primary purpose, not the sale of anything useful.

As Newman testified, "The way it was explained to me was this was a discount program for people who . . . didn't have health insurance[.]"⁶³ It is clear that this is not the way the programs were explained in sales calls to consumers (if they were explained at all), given that enrollees included active-duty military personnel (whose health care needs are addressed by the military) and retirees with health insurance coverage.⁶⁴

Moreover, CEO Jan Sessor of Universal RX ("U-RX"), a prescription discount benefit provider whose program was purportedly sold by NHS/PHS, testified that the program was intended to be offered to consumers free of charge.⁶⁵ Needless to say, U-RX did not authorize NHS/PHS to sell its program, and the company became alarmed when it received multiple calls from complaining consumers indicating that AHBO (which was unknown to U-RX) had charged them hundreds of dollars to enroll in the program.⁶⁶

That NHS/PHS was not terribly concerned with the products it purported to sell is

⁶³ Newm. Tr. at 13.

⁶⁴ Lar. Tr. at 8, 14 (Navy); PX 12 (Clawson) (Air Force); Br. Ex. 16 and PX 7 (both Koch) ("I am well taken care of under my current plans"); PX 17 (Supplemental Vantusko) at ¶¶ 116, 117.

⁶⁵ Ses. Tr. at 7-8. Sessor testified that Universal RX sometimes permits a marketer to charge a one-time fee for shipping and handling, "maybe up to a 9.95 fee." Ses. Tr. at 34.

⁶⁶ Ses. Tr. at 15, 19-20, 33-35; Ses. Exs. 1A, 1B. Consumers who were enrolled in the NHN campaign were also charged for Universal RX's program. Ses. Tr. at 40-42; Ses. Ex. 6.

illustrated by the fact that Sessor's staff, and he himself as CEO of U-RX, were given the runaround and hung up on when they tried to contact AHBO.⁶⁷ In the same vein, it is notable that once U-RX learned the group number that was being distributed to consumers enrolled with NHS/PHS, it was able to determine that in the nine-month period from October 2007 through June 2008 there were fewer than 150 total claims made using the Universal RX group number distributed by NHS/PHS.⁶⁸ In that same time period, payment processing records indicate that over 20,000 people were charged as new customers by NHS/PHS.⁶⁹

D. Deception Was Rampant

The FTC has presented substantial evidence from individual consumers and Better Business Bureaus to document how NHS/PHS tricked consumers into giving up bank account information and used lies, stonewalling, and the runaround to keep up the pressure even after the initial charge was debited.

In the spring of 2007, Tenesha Davenport reported that NHS Systems' telemarketers were impersonating the IRS and representing that they were collecting information so that a tax refund could be deposited.⁷⁰ In the summer of that year, Alexis Savage-Bey got a call from an NHS Systems telemarketer posing as a representative of the Social Security Administration, telling her that she would receive money from the government if she provided her account information.⁷¹ In the fall, Michael Laramie was targeted by an NHS Systems telemarketer who

⁶⁷ Ses. Tr. at 24-26; Ses. Ex. 1B. This experience parallels that of Investigator Jesse Woodard. PX 6.

⁶⁸ Ses. Tr. at 37-40; Ses. Ex. 4.

⁶⁹ PX 24 (Vantusko SJ NHS/PHS) at ¶ 44-46.

⁷⁰ PX 3 (Davenport).

⁷¹ PX 4 (Savage-Bey).

claimed to be calling from the IRS to offer him a “kicker” money benefit for being in the military.⁷² In November, an NHS Systems telemarketer posing as a Medicare representative took advantage of Bruno Koch.⁷³ In the spring of 2008, Steven Blanchard, Destiny Clawson, and Clinton Eyke were victimized by AHBO telemarketers claiming government affiliation (IRS, IRS, and “US Government Welfare,” respectively) and offering money.⁷⁴ When an AHBO telemarketer called 87-year-old Dorothy Danziger, the company pretended to be Medicare.⁷⁵

These individual consumer stories are well-corroborated by the hundreds of consumer complaints about NHS/PHS lodged with Better Business Bureaus, the FTC, and multiple state and local consumer protection agencies. The complaints support not only the allegations of false representations of government affiliation, but also support the allegations that the NHS/PHS telemarketers misled consumers as to the nature of what was being offered to them and the costs that would be imposed upon them.⁷⁶ Moreover, the same types of claims arose again when NHS/PHS began a new outbound telemarketing campaign with FMC in the spring of 2009.⁷⁷

The abuse of consumers did not only occur in the initial call. Consumers who realized that they had been scammed encountered substantial obstacles to getting their money back. The “customer service” representatives who fielded calls from Tenesha Davenport and Alexis

⁷² Lar. Tr. at 8, 26.

⁷³ PX 7 (Koch).

⁷⁴ PX 9 (Declaration of Steven Blanchard); PX 12 (Declaration of Destiny Clawson); PX 13 (Declaration of Clinton Eyke).

⁷⁵ PX 10 (D. Danziger).

⁷⁶ PX 14 (Declaration of Bob Colmerauer); PX 15 (Declaration of Judy Mills); PX 24 (Vantusko SJ NHS/PHS) at ¶¶ 32-42.

⁷⁷ Br. Tr. at 313-14; Br. Ex. 28; Det. Tr. at 13-14.

Savage-Bey played fake or altered recordings and refused refunds.⁷⁸ When Investigator Jesse Woodard of the Shelby County Sheriff's Office tried multiple times to contact NHS Systems on behalf of a consumer, identifying himself as a law enforcement officer, he was given the run-around and stonewalled.⁷⁹

Even after consumers called to complain and "cancel" something they never ordered, the scheme still tried to debit their bank accounts. Although Michael Laramie made clear to a customer service representative that he was on active duty in the military and had no need for outside health benefits, neither he nor his bank could persuade NHS Systems to issue a refund. Instead, he was informed repeatedly that he could not obtain a refund or stop the debits until he had received a "welcome letter," even as his overdraft fees mounted because of the fraudulent charges.⁸⁰ The company knew he had been tricked, but showed no mercy. Steven Blanchard was told that he could not cancel until he received his "welcome kit," which never arrived; then, even after telling him that he had to wait for the "welcome kit" before he could cancel, NHS/PHS tried several more times to debit his account for \$299.95.⁸¹ Before ever being charged, Destiny Clawson realized she had been scammed and called customer service to tell them she did not want to do business with the company; NHS/PHS still charged her account and told her it would not refund her money.⁸²

⁷⁸ PX 3 (Davenport); PX 4 (Savage-Bey).

⁷⁹ PX 6 (Declaration of Jesse Woodard).

⁸⁰ Lar. Tr. at 14-16.

⁸¹ PX 9 (Blanchard).

⁸² PX 12 (Clawson).

IV. THE INTERNAL HISTORY OF THE ENTERPRISE

The FTC's 2009 TRO brief and the Supplemental Declaration of Mary Jo Vantusko attached thereto set forth a detailed history of NHS/PHS compiled from then-available evidence. Discovery has borne out that history, which is summarized here.

The control group (the "Group") of the NHS/PHS enterprise consisted of the Montreal-based Kirstein and Bertrand, on the one hand, and the St. Lucia/Las Vegas-based Tasha Jn Paul, Linke Jn Paul, and Greer, on the other. According to Kirstein and Bertrand, Tasha Jn Paul was the main contact on the St. Lucia side for most of the relevant period, and then Greer emerged as main contact after the filing of this action; Linke Jn Paul's name, however, is prominent in the corporate documents and wire transfer records.⁸³

In late 2006, the Group directed the formation of PHS-1 and NHS Systems, described above. The DB1 consumers who were charged under the auspices of PHS-1 had been accumulated in prior marketing campaigns overseen by the Group.⁸⁴

The division of labor for the first NHS Systems campaign (the NHS campaign), a model that was followed with all of the campaigns, was set forth in a contemporaneous email sent by Bertrand to a payment processing representative. Bertrand (with Kirstein in the background) was called the "Administrative Manager." Tasha Jn Paul (using the name "Erika Roberts" but listing her home phone number) was the "Operations Manager," and an FSMI employee who reported to Tasha Jn Paul was listed as "Director of Customer Service and Compliance."⁸⁵ Bell's function was to create a US company, open and maintain the bank account through which

⁸³ See generally Section X below, discussing the roles of the Individual Defendants.

⁸⁴ Br. Ex. 2; Kr. Tr. at 12-17.

⁸⁵ Br. Ex. 3; Br. Tr. at 66-67, 70. See PX 24 (Vantusko SJ NHS/PHS) at ¶¶ 18, 23.

revenues would pass, and to collect complaint mail and forward it to be addressed by those working under Tasha Jn Paul's supervision.⁸⁶

Almost immediately, the NHS campaign ran into problems with consumers complaining that telemarketers were falsely offering grants.⁸⁷ The Group decided to insert a statement into the verification recordings disclaiming any offer of a grant, and claimed that they would terminate any room making misrepresentations. Nevertheless, by mid-2007 the NHS campaign had to be shut down as to new consumers due to repeated problems with misrepresentations. However, consumers who had previously been charged under the NHS campaign were to be continuously charged the monthly residual payments unless and until they complained.⁸⁸

NHS Systems launched its second campaign, the NHN campaign, in mid-2007.⁸⁹ At the same time, for reasons of convenience, the Group agreed that the DB1 consumers should no longer be customers of PHS-1 but should be moved to a new company, of which Bell would also be the nominal president. Thus PHS-2 was formed and operated to charge DB1 consumers.⁹⁰

By November 2007 Bell and his staff were overwhelmed with NHS Systems' complaints and returned mail. On reviewing the complaints, Bell became physically ill and extremely concerned. He sent an email to Bertrand captioned "Major Concerns," in which he listed several of the matters that were troubling him. His concerns included the fact that numerous consumers were told they were being offered a grant, and that NHN was "all over the internet regarding

⁸⁶ Kr. Tr. at 23-24; Br. Tr. at 204, 209-10.

⁸⁷ Br. Tr. at 108-09, 114-15; Br. Ex. 7.

⁸⁸ Br. Tr. at 169-70.

⁸⁹ Br. Ex. 1. See also PX 27 (Declaration of Counsel) at Att. N (explaining that NHS campaign was closed due to telemarketer misconduct and NHN began in mid-2007).

⁹⁰ PX 17 (Supplemental Vantusko) at ¶¶ 55-70; Kr. Tr. at 37-38; Br. Ex. 2.

bogus grant promises.”⁹¹ Although Bertrand responded to the “Major Concerns” email, she does not recall looking on the internet to see the complaints and reports for herself.⁹²

Kirstein and Bertrand felt that the complaint problems were exacerbated because Bell had not been diligent in reviewing and forwarding complaint mail. They were extremely upset with Bell. When Newman offered to help, Bertrand decided to bring Newman into the business and train her so that she could ultimately replace Bell’s role in the enterprise. In the same month that Bell sent the “Major Concerns” email, PHS-3, PHS-4, and NHS-2 were formed.⁹³

Kirstein and Bertrand were also upset with Tasha Jn Paul, who they felt should have been managing the marketing and complaint side of the business. They had a call with Tasha Jn Paul in which Kirstein “read[] her the riot act.”⁹⁴ On December 4, 2007, Tasha Jn Paul sent a detailed email to Bertrand in which she apologized for having “dropped the ball on this” and proposed a program of improvements, “including using Dave more” (i.e., giving Greer, who was already managing sales, more responsibility).⁹⁵

The next day, Bertrand circulated an email to let Tasha Jn Paul and Greer know about a new tool to keep track of refunds. The only glitch she noted was that the person who designed the tool had used the word “GRANT” to describe what the consumer was rejecting, which she wanted corrected to say “MEDICAL.” Despite having been on notice since at least February 2007 that false offers of grants were a recurring problem, Bertrand testified that she did not

⁹¹ PX 27 (Declaration of Counsel) at Att. M; Bell Tr. at 16, 122-23.

⁹² Br. Tr. at 169-76.

⁹³ Br. Tr. at 204, 209-12; Kr. Tr. at 35-37; PX 17 (Supplemental Vantusko) at ¶¶ 25-27, 77-79.

⁹⁴ Kr. Tr. at 53-55; Br. Ex. 14.

⁹⁵ *Id.*; Br. Tr. at 188-92; Br. Ex. 14.

know why the word “GRANT” was used instead of “MEDICAL,” and suspected it was just a language error because the person who had created the refund-tracking tool is French-speaking.⁹⁶

Meanwhile, Kirstein had personally intervened with Modern Payments to “plead my case” to continue processing despite enormously high rates of unauthorized transactions.⁹⁷ He was successful for a time, but in January 2008 Modern Payments sent a letter informing him that Modern Payments would cease processing for NHS Systems in 30 days. Modern Payments terminated the NHS Systems account, but continued to process for PHS-1/PHS-2.⁹⁸ After the NHS Systems account was closed, however, large numbers of returns of unauthorized transactions continued to come in. When the NHS Systems reserves ran out, Bertrand and Kirstein instructed Modern Payments to take funds from the reserves for PHS-1/PHS-2 to cover the NHS Systems shortfall. Then, Bertrand and Kirstein instructed Modern Payments that on a continuing basis it could obtain reimbursement for late NHS Systems returns from the bank account for NHS-2 (which had been opened by Newman and was receiving deposits from the next payment processor, Teledraft).⁹⁹

In January 2008, Newman registered “American Health Benefits On Line” as a fictitious name of PHS-4. In February 2008, Kirstein and Bertrand set up three accounts at payment processor Teledraft in the names of NHS-2, PHS-3, and PHS-4. On the account documents, they

⁹⁶ Br Tr. at 194-200; Br. Ex. 15.

⁹⁷ PX 17 (Supplemental Vantusko) at ¶¶ 71-72.

⁹⁸ PX 17 (Supplemental Vantusko) at ¶ 81. The DB1 consumers, being charged \$19.95 per month and being winnowed away whenever a complaint was made, had lower return rates than the DB2 consumers. As noted above, however, every DB1 transaction was improper and bore no verifiable authorization. See Section III.B, above. See also illustrations regarding DB1 consumers who were repeatedly charged without authorization: PX 17 (Supplemental Vantusko) at ¶¶ 108, 109; PX 19 (Swartz); PX 24 (Vantusko SJ NHS/PHS) at ¶ 50.

⁹⁹ PX 17 (Supplemental Vantusko) at ¶¶ 67, 69, 81, 90-92; PX 20 (Geisser) at ¶¶ 30, 37; Br. Tr. at 256-58.

noted that NHS-2 was doing business as “NHS/NHN,” and in correspondence around the opening of the account it was referred to as the “NHS” account. The PHS-3 and PHS-4 accounts indicate that those entities were both intended to do business as “AHBO.”¹⁰⁰ Teledraft processed for NHS-2, PHS-3, and PHS-4 until early May, 2008. At the beginning of May 2008, Teledraft ceased providing demand draft services. Teledraft shifted these clients to ACH transactions, and began processing for them again on May 12, 2008.¹⁰¹

Two separate AHBO companies were formed in order to accomplish a gradual shift of business to Newman from Bell.¹⁰² During the spring of 2008, Bertrand and Greer were working to shift more transactions over to PHS-4 (Newman’s AHBO company) and away from PHS-3 (Bell’s AHBO company).¹⁰³ They accomplished this task by assigning different telemarketing rooms’ sales to the two front entities. Among the rooms that was shifted to PHS-4 was one designated RY329.¹⁰⁴ That particular room is of interest because some of its history can be documented in its dealings with consumer victims identified in this matter. In November 2007, consumer (and declarant herein) Bruno Koch had complained in a letter to NHS Systems (as NHN) that he had been “fraudulently enrolled” in its program. He told the company that he intended to lodge a complaint with governmental authorities. Koch’s complaint was received

¹⁰⁰ PX 17 (Supplemental Vantusko) at ¶¶ 83-84.

¹⁰¹ PX 17 (Supplemental Vantusko) at ¶¶ 89, 95-96. *See generally*, Plaintiff’s Motion for an Order Requiring Teledraft, Inc., to Turn Over Funds (Doc. #51), and evidence submitted therewith.

¹⁰² Br. Tr. at 211-12.

¹⁰³ Br. Tr. at 229-30.

¹⁰⁴ Br. Tr. at 229-30; Br. Ex. 19. As Bertrand testified, each telemarketing room was assigned a particular code so that its sales could be tracked and payments made accordingly. Br. Tr. at 80, 229-30, 245, 258.

and processed, and he was issued a refund in January 2008.¹⁰⁵ Records show that the telemarketing room that claimed credit for the sale to Koch was RY329.¹⁰⁶ Yet despite promises to “fire the rooms who were misrepresenting,”¹⁰⁷ in the spring of 2008 NHS/PHS was still doing business with RY329, and in fact shifted that room’s sales to the PHS-4 business that the enterprise wanted to grow. It is likely no coincidence that the fraudulent Morris McCall sale was also claimed by RY329.¹⁰⁸

On May 13, 2008, this action was filed, and the Court issued the XTRO at the end of the day on May 14. The next day, May 15, the Receiver accessed Bell’s office in Collegeville. Also on May 15, 2008, Teledraft was served with the XTRO and a subpoena, and it ceased all processing for NHS/PHS entities. Among others, Tasha Jn Paul was similarly served with the XTRO and a subpoena that day.¹⁰⁹ There is no doubt that the members of the Group were well aware of this action and the Court’s injunction.¹¹⁰

On May 27, 2008, two weeks after this Court issued the XTRO, NBS was incorporated in Nevada.¹¹¹ By early June 2008, Greer (still using the Dannie Boie alias) was in contact with FMC. FMC had a health discount program product called MedValues Plus. Greer told FMC that he represented a company that had thousands of existing clients whose discount health care

¹⁰⁵ Br. Ex. 16; PX 7 (Koch).

¹⁰⁶ PX 24 (Vantusko SJ NHS/PHS) at ¶¶ 26-27.

¹⁰⁷ Br. Tr. at 172.

¹⁰⁸ PX 24 (Vantusko SJ NHS/PHS) at ¶¶ 26-27.

¹⁰⁹ PX 17 (Supplemental Vantusko) at ¶¶ 97-98. In response to the subpoena, Tasha Jn Paul – one of two directors of Gold Dot – provided an affidavit that she had no documents related to the original defendants to this action. *Id.* at ¶ 98.

¹¹⁰ Br. Tr. at 259-63. See also PX 20 (Geisser) at ¶¶ 20-33.

¹¹¹ PX 17 (Supplemental Vantusko) at ¶¶ 38, 99.

plan provider could no longer serve them. FMC agreed to accept these clients for its MedValues Plus discount program, believing that NBS had sold plans to all of the consumers.¹¹²

In July 2008, NBS executed a written agreement with FMC.¹¹³ The agreement noted that “the initial 8,000 to 9,000 existing NBS members are the sole property of NBS.” In fact, the initial “existing NBS members” were divided into two groups. The first group of approximately 2500 consumers was the remainder of DB1. The second group included thousands of consumers from DB2.¹¹⁴

Before beginning to bill the first group, the DB1 consumers, that same vendor asked for “an explanation of what the NBS program was, who sold it, how it was sold, basically in case people ask about the situation before the transfer of the database.” “Also,” he wrote, “I would like to have a customer service number to refer the callers to if they want to discuss prior charges.” Greer replied to him by email, “The customers came from three different health campaigns and were merged together. As of January 2007 they were billed under PHS enterprises [sic]. Since we do not expect many of those requests, the easiest would be for you to issue a refund and deduct from our wire.”¹¹⁵

In other words, any “NBS” customers who raised questions about charges to their bank accounts were simply to be refunded. There was no verifiable basis for charging them, and

¹¹² PX 17 (Supplemental Vantusko) at ¶¶ 100-01; Det. Tr. at 16.

¹¹³ Harrison testified that while initials and a signature on the document appear to be his, he had never seen it before. Har. Tr. at 18-20. In context, his testimony is credible.

¹¹⁴ Kr. Tr. at 67. See also PX 17 (Supplemental Vantusko) at ¶¶ 102-17; PX 23 (Dykstra) at ¶¶ 7, 11.

¹¹⁵ PX 17 (Supplemental Vantusko) at ¶¶ 105.

Kirstein has admitted as much.¹¹⁶ After the billing of the first group of “NBS” consumers (DB1) was underway, Greer asked FMC to begin billing the second group (DB2).¹¹⁷ NHS/PHS had no verifiable authorizations for any of those consumers, either.¹¹⁸

Then, in late 2008, Bertrand and Greer proposed beginning a new telemarketing campaign to sell FMC benefit programs. This new campaign came to be referred to as the “Triple Read” or “Triple” program, as it purported to sell three different products through a single scripted telemarketing pitch.¹¹⁹

Early in January 2009, a “package” of materials related to the new campaign was distributed from an email address – csdept121@gmail.com – that had been associated with NHS Systems. Included in this package was a “Contract for services provided by Telemarketer to FMC- Triple sell,” in which various conditions were proposed to be agreed between “Telemarketer” and FSMI. The package also included scripts, among them a set of “Program Rebuttals” closely matching the “Program Rebuttals” for the NHS (2007) and AHBO (2008) campaigns. Shortly after this package was circulated, sales of the “Triple” began.¹²⁰

Thereafter, FMC began receiving complaints very similar to those that generated this action. Telemarketers were representing themselves to be affiliated with the government, or were promising government grants. Others complained that their bank accounts had been

¹¹⁶ Kr. Tr. at 63-64.

¹¹⁷ PX 17 (Supplemental Vantusko) at ¶ 106.

¹¹⁸ Kr. Tr. at 68-69; Br. Tr. at 273-75; Br. Ex. 22.

¹¹⁹ PX 17 (Supplemental Vantusko) at ¶¶ 118-22; Det. Tr. 13-14, 24-25, 27-28.

¹²⁰ PX 17 (Supplemental Vantusko) at ¶¶ 119-24.

charged without any contact from the company.¹²¹

When FMC received a subpoena in this action at the end of March 2009, it contacted Greer and Bertrand to request an explanation.¹²² On April 3, 2009, FMC addressed Bertrand, Kirstein, and Greer with the news that FMC's payment processor had frozen FMC's funds and terminated its merchant accounts due to the high rate of transactions returned as unauthorized since July 2008 – the month FMC began charging the accounts of victims of the NHS/PHS scheme.¹²³

¹²¹ PX 17 (Supplemental Vantusko) at ¶ 125; Det. Tr. at 14, 24-25.

¹²² Br. Tr. at 321-22. This request ultimately led Bertrand to forward to FMC the emails that are Br. Ex. 1 and Br. Ex. 2.

¹²³ PX 17 (Supplemental Vantusko) at ¶¶ 126-29; Det. Tr. at 27-28.

PROCEDURAL HISTORY AND ARGUMENT

V. HISTORY OF COMPLAINTS AND ORDERS

A. The 2008 Original Complaint, XTRO, and Stipulated Preliminary Injunctions

There is no dispute that the 2008 Complaint and XTRO were served on the original NHS/PHS Defendants, including Bell, Newman, NHS Systems and PHS-4, each of whom appeared. In addition, the XTRO was served on Tasha Jn Paul, and Kirstein and Bertrand also received copies of the documents. By its terms, the Receivership created by the XTRO included NHS Systems and any of its “affiliates, subsidiaries, or divisions.” (Doc. #6 at 5).

On May 15, 2008, Tasha Jn Paul was personally served with a copy of the XTRO and a subpoena in this case. In response, she submitted an affidavit dated May 27, 2008, stating that she had no documents referring or relating to NHS Systems, Bell, PHS-3, PHS-4, or Newman, including evidence of payments relating to any of them.¹²⁴ However, at the time Tasha Jn Paul was served with that subpoena, Gold Dot had received funds from the account of PHS-3 (which was specifically identified in the subpoena) as recently as May 8, 2008 – one week earlier.¹²⁵ Moreover, in the month before she signed that affidavit, she had received several transfers to her domestic bank accounts from FSMI, Gold Dot, and FSOL.¹²⁶

In June 2008, the Court entered a Stipulated Preliminary Injunction against the original NHS/PHS Defendants (the 2008 NHS/PHS SPI) (Doc. # 15). By its terms, the 2008 NHS/PHS SPI explicitly included NHS Systems, NHS-2, PHS-2, PHS-3, and PHS-4, and these entities and

¹²⁴ PX 17 (Supplemental Vantusko) at Att. M.

¹²⁵ PX 17 (Supplemental Vantusko) at ¶¶ 35, 37, 48, 52, 93, 95, 98; PX 20 (Geisser) at ¶ 49.

¹²⁶ PX 24 (Vantusko SJ NHS/PHS) at ¶¶ 13-15.

any affiliates were subject to Receivership.¹²⁷ Thus, none of the customers of DB1 (who by that time were all customers of PHS-2) or DB2 (who were all customers of one or more of NHS Systems, NHS-2, PHS-3, and PHS-4) could be subjected to further charges. Nevertheless, as noted above, Kirstein and Greer took the customer lists of the Receivership entities and unilaterally transferred them all to NBS.

B. The 2009 Amended Complaint, TRO, and Preliminary Injunction

When the Amended Complaint was filed in 2009, thirteen more NHS/PHS defendants were added. None of them has appeared before this Court. In order to satisfy the Court that notice and service have been accomplished over the non-appearing individual defendants,¹²⁸ we offer the following brief discussion of the subject.

It is relevant to note at the outset that Plaintiff anticipated potential difficulties in serving the Amended Complaint and related papers. In filing its Motion for Leave to File and Serve an Amended Complaint (Doc. #76), the FTC requested authorization to employ alternative means of service in the event traditional service was frustrated. On July 6, 2009, the Court issued an Order granting leave to file and serve the Amended Complaint, and authorized alternative means of service including overnight delivery or electronic mail. (Doc. #87).

1. Defendants Kirstein and Bertrand.

Defendants Kirstein and Bertrand were served personally with the Amended Complaint and accompanying papers on July 8, 2009. (See Doc. #90 (Rule 65 Certification); Doc. #95 (Certification in Support of Preliminary Injunction)).

¹²⁷ It also included any affiliates of those entities, and given the way PHS-1 and PHS-2 were related, there is no reasonable reading of the 2008 NHS/PHS SPI to exclude PHS-1.

¹²⁸ All of the non-appearing corporate NHS/PHS Defendants were promptly served via their registered agents. See Doc. #90 (Rule 65 Certification); Doc. #95 (Certification Regarding TRO and PI); and Doc. #99.

2. Defendant Linke Jn Paul.

Defendant Linke Jn Paul was served personally with the Amended Complaint and accompanying papers on July 8, 2009, and was subsequently personally served with the 2009 TRO on July 15, 2009. (See Doc. #90; Doc. #95; Doc. #99 (Supplemental Certification in Support of Preliminary Injunction)).

3. Defendant Greer.

Under the authority granted by the Court, “Dannie Boie” was served with the Amended Complaint and certain accompanying papers by electronic mail on July 7, 2009. The next day, he responded by email identifying himself as Greer and providing Greer’s address in Las Vegas. However, attempts to follow the electronic mail communication with personal service were unsuccessful. (See Doc. #90; Doc. #95). The evidence indicates that Greer has been intentionally ignoring communications from the FTC, apparently in the belief that he is evading service.¹²⁹ However, service by electronic mail was authorized by this Court and is valid, particularly under the circumstances presented. *See generally Power Corp. of Canada v. Power Financial*, 2009 U.S. Dist. LEXIS 31058 at *2-*3 (M.D. Pa. April 13, 2009).

4. Defendant Tasha Jn Paul.

Multiple attempts to serve Tasha Jn Paul at her Las Vegas address on Starling View Court, at which she had been served with the XTRO and subpoena in May 2008, were unsuccessful. (See Doc. #90; Doc. #95).¹³⁰ Bank records indicate that Tasha Jn Paul bought

¹²⁹ Har. Tr. at 41-42, 44, 54-55, 129-30.

¹³⁰ A process server encountered Tasha Jn Paul’s nanny at the Starling View address, and this was also the address she used for her bank accounts. There is no doubt that it was her address, and remains her last known US address. The FTC has continued to serve copies of all of its pleadings and filings to the Starling View Court address, as well as to the registered business addresses of the St. Lucia companies so closely tied to her (FSMI and Gold Dot), and none have been returned.

airline tickets on Philippine Airlines on or about July 9, 2009, immediately after personal service was obtained on her husband and on her Canadian business partners.¹³¹ On July 13, 2009, the FTC sent an electronic copy of the 2009 TRO to Tasha Jn Paul at her “erkroberts” email address, but received no response. (Doc. #95).

In the spring of 2010, the FTC obtained, via subpoena in this action, records from an airline showing another email address associated with Tasha Jn Paul. On May 18, 2010, FTC staff sent an email to Tasha Jn Paul at “writetasha@yahoo.com.” The email subject line stated the name of this matter, and the email attached electronic copies of the Summons, Amended Complaint, and the July 24, 2009, Preliminary Injunction issued by this Court. Although there was no reply to the May 18 email, there was also no automated response indicating any failure of delivery.¹³²

On June 4, 2010, the FTC case team leading a case called *FTC v. Grant Connect, LLC, et al.*, a separate matter in which Tasha Jn Paul was recently added as a defendant,¹³³ received a letter from Tasha Jn Paul in which she reported that she is living with her family in the Philippines, and in which she disclaimed liability in the *Grant Connect* matter. In closing the

¹³¹ PX 24 (Vantusko SJ NHS/PHS) at ¶ 19. The first transaction for the airline tickets posted to her account on July 9, but the descriptors on the bank statement itself include the notation “0708” on each of the Phillipine Airlines transactions, indicating that she may have purchased the tickets the same day that her husband and other defendants were personally served. PX 24 (Vantusko SJ NHS/PHS) at Att. O (BOA 880). According to publicly available information, the airline has a route from Las Vegas to Vancouver, British Columbia. Thus, while the FTC had evidence that Tasha Jn Paul had fled the United States, it was not certain of her actual whereabouts until receiving the letter attached to PX 28.

¹³² PX 28 (Declaration of Meeran Ahn) at ¶¶ 2-4.

¹³³ *FTC v. Grant Connect, LLC*, No: 2:09-CV-01349-PMP-RJJ (D.Nev., Amended Complaint filed April 21, 2010).

letter, she stated that the “writetasha” address is the “best way of contact” for her.¹³⁴

Because this Court authorized service by electronic mail, and because Tasha Jn Paul evidently fled the United States at the same time that her husband and business associates were served in this action, and because she has confirmed that the “writetasha” email address is the “best way of contact” for her, service of the Amended Complaint upon her via the email of May 18, 2010, is valid. *See generally, Power Corp.* 2009 U.S. Dist. LEXIS 31058 at *2-*3.¹³⁵

VI. THE SUMMARY JUDGMENT STANDARD

The Court may grant summary judgment when “there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law.”¹³⁶ The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact.¹³⁷ After the movant has met its burden under Rule 56(c), the burden of production shifts. Fed. R. Civ. P. 56(e). To defeat summary judgment, the non-moving party must provide evidence that there is a genuine issue of material fact.¹³⁸ As explained below, there is no genuine issue of material fact that the NHS/PHS Defendants’ practices violated Section 5 of the FTC Act and the TSR.

¹³⁴ PX 28 (Ahn) at ¶ 5. It is not clear why the Jn Pauls have chosen to ignore this matter, while Tasha Jn Paul has acknowledged the *Grant Connect* case.

¹³⁵ Although domestic service of process would ordinarily have been required within 120 days of the filing of the Amended Complaint under Fed.R.Civ.P. 4(m), Tasha Jn Paul’s flight overseas renders that time limit inapplicable. Even if the Court were to find Rule 4(m) applicable, the FTC would respectfully submit that it has shown good cause to extend the time for service.

¹³⁶ Fed. R. Civ. P. 56(c). *See also Gammino v. Cellco Partnership*, 527 F. Supp. 2d 395, 397 (E.D. Pa. 2007).

¹³⁷ *Gammino v. Cellco Partnership*, 527 F. Supp. 2d at 397 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed. 2d 265).

¹³⁸ *Id.* (quoting *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 238 (3d Cir. 2007)).

VII. ADMISSIBILITY OF EVIDENCE

On March 31, 2010, the FTC sent notice to all parties that it intends to rely on the declarations and evidence previously submitted to this Court. All parties were also notified that the FTC intends to rely on hundreds of consumer complaints as substantive evidence, and made available all of the complaints (including the consumers' contact information). The FTC also requested that any party intending to challenge the admissibility or authenticity of any records assert such objection.¹³⁹ No objections were made.

Rather than inundate the Court with the hundreds of complaints reviewed, and particularly because notice was given months ago and no objection raised, the FTC relies on Fed.R.Evid. 1006 and submits the summary of those complaints as compiled by Investigator Vantusko, as well as the Better Business Bureau declarations previously submitted with representative samples of complaints.¹⁴⁰ *See Elliott v. Kiesewetter*, 112 Fed. Appx. 821, 823-24 (3rd Cir. 2004) (Rule 1006 "allows presentation of voluminous writings in summary form provided the underlying materials be available for examination"); *see also, FTC v. Magazine Solutions, LLC*, No. 07-692, 2009 U.S. Dist. LEXIS 20629 (W.D. Pa. Mar. 16, 2009) (admitting for trial large numbers of consumer complaints, pursuant to Fed. R. Evid. 807).

Moreover, it bears noting that statements of party-opponents offered against them are not hearsay. Fed. R. Evid. 801(d)(2). Much of the evidence submitted herewith falls into this category. Similarly, based on a reading of the evidence in context and considering the

¹³⁹ Ordinarily, Plaintiff would seek stipulations in this regard. However, the presence of multiple unrepresented corporations and defendants who have not appeared makes obtaining a formal stipulation essentially impossible. Plaintiff asserts that the provision of notice and invitation to objections serves the purpose of a stipulation in this context.

¹⁴⁰ PX 14 (Declaration of Bob Colmerauer); PX 15 (Declaration of Judy Mills); PX 24 (Vantusko SJ NHS/PHS) at ¶¶ 32-42.

circumstances under which it has been gathered, the FTC submits that there is no genuine question as to the authenticity of any of the submitted evidence. Fed. R. Evid. 901(a) and 901(b)(4); *see United States v. Reilly*, 33 F.3d 1396, 1404 (3rd Cir. 1994) (“[t]he burden of proof for authentication is slight ”); *United Nat’l Ins. Co. v. Aon Ltd.*, 2008 U.S. Dist. LEXIS 81825, at *4 (E.D. Pa. Oct. 15, 2008) (same); PX 17 (Supplemental Vantusko) at ¶¶ 130-45; PX 27 (Declaration of Counsel) at Att. A.

VIII. DEFENDANTS’ PRACTICES VIOLATE SECTION 5 OF THE FTC ACT

A. This Court Has Jurisdiction over the Defendants and Venue Is Proper in this District.

This Court has subject matter jurisdiction over the Commission’s claims pursuant to 15 U.S.C. §§ 45(a), 53(b), 57b, 6102(c) and 6105(b), and 28 U.S.C. §§ 1331, 1337(a) and 1345.

The FTC Act provides that “process may be served on any person, partnership, or corporation wherever it may be found.” 15 U.S.C. § 53(b). By this provision, Congress authorized nationwide and worldwide service of process. In the Third Circuit, when a federal statute authorizes nationwide service of process, “personal jurisdiction may be assessed on the basis of the defendant’s national contacts[.]”¹⁴¹ The NHS/PHS Defendants have all conducted substantial business in the United States directed at many thousands of United States consumers.¹⁴²

Venue in the Eastern District of Pennsylvania is proper. Given each of the NHS/PHS Defendants’ connections to NHS Systems, PHS-2, and PHS-3 (all of which operated from Bell’s

¹⁴¹ *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 369 (3d Cir 2002).

¹⁴² Even if personal jurisdiction were to be measured by contacts with the forum state, NHS Systems and PHS-2 are Pennsylvania corporations with their principal place of business in the Eastern District of Pennsylvania, and PHS-3 has its principal place of business in this district, and all the NHS/PHS Defendants have contacts with these entities relevant to this scheme.

office in Collegeville), it is apparent that venue lies in this District under 28 U.S.C. § 1391(b), as a substantial part of the events giving rise to the claims in this case occurred in this district.

Moreover, venue in this District is proper for the corporate NHS/PHS Defendants under 28 U.S.C. § 1391(c), which provides that a corporation “shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.”¹⁴³

Those NHS/PHS Defendants who are aliens may be sued in any district. 28 U.S.C. § 1391(d).

Additionally, the FTC Act provides that, if the interests of justice require, any person may be “added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought.” 15 U.S.C. § 53(b).

B. A Misrepresentation Is Deceptive under Section 5 If it Is Likely to Mislead Consumers Acting Reasonably under the Circumstances about a Material Fact.

Section 5 of the FTC Act, 15 U.S.C. § 45, broadly prohibits deceptive acts or practices in or affecting commerce. Section 5 condemns as deceptive any material representation, practice, or omission, likely to mislead consumers acting reasonably under the circumstances.¹⁴⁴ As the focus of the statute is on the protection of consumers, Section 5 does not have a threshold intent element; to be actionable, a misrepresentation or deceptive practice need not be made with an intent to deceive.¹⁴⁵

¹⁴³ See *Pippett v. Waterford Dev., LLC*, 166 F. Supp. 2d 233, 238 (E.D. Pa. 2001) (applying § 1391(c) to a limited liability company).

¹⁴⁴ See *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984). See also *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976); *FTC v. Davison Assocs., Inc.*, 431 F. Supp. 2d 548, 559 (W.D. Pa. 2006); *In Re Nat’l Credit Mgmt. Group*, 21 F. Supp. 2d 424, 441 (D.N.J. 1998).

¹⁴⁵ *Beneficial Corp.*, 542 F.2d at 617; *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963); *Nat’l Credit Mgmt.*, 21 F. Supp. 2d at 441; *FTC v. Inc21.com Corp.*, No. 10-00022, 2010 U.S. Dist. LEXIS 98944, at *64-*65 (N.D. Ca. Sept. 21, 2010); *FTC v. Hope Now Modifications, LLC*, No. 09-1204, 2009 U.S. Dist. LEXIS 102596, at *3 (D.N.J., Nov. 4, 2009).

Express claims and deliberately made implied claims are presumed material.¹⁴⁶ In determining whether a reasonable consumer would likely rely on the claims, a court is entitled to make a common-sense interpretation of the claims, and it must judge those claims from the standpoint of their overall net impression.¹⁴⁷ As the Commission commented in one administrative action, deception is often more subtle than an outright falsehood: “representations which violate section 5 are often found not in bold assertions, but in exaggeration, innuendo, ambiguity, half-truths, and the omission of material facts.”¹⁴⁸ In addition, consumers are entitled to interpret reasonably each representation as meaning precisely what it purports to mean, and are under no obligation to doubt the veracity of a claim.¹⁴⁹

C. The NHS/PHS Defendants Joined in a Common Enterprise for Purposes of Liability Under the FTC Act.

The NHS/PHS Defendants operated their scheme as one common enterprise, rendering each NHS/PHS Defendant jointly and severally liable for the acts and practices of that enterprise. In cases involving the FTC Act, courts have long disregarded corporate formalities where necessary to avoid an inequitable result and to prevent the purposes of the FTC Act from

¹⁴⁶ See *Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 441; *FTC v. Wolf*, 1996 U.S. Dist. LEXIS 1760, *15, 1997-1 Trade Cas. (CCH) ¶ 71,713, at 79,079 (S.D. Fla. 1996).

¹⁴⁷ See *Beneficial Corp.*, 542 F.2d at 617; *Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 441; *Davison*, 431 F. Supp. 2d at 559-60.

¹⁴⁸ *In re Raymond Lee Org.*, 92 F.T.C. 489, 616 (1978), *aff'd*, 679 F.2d 905 (D.C. Cir. 1980). See also *Regina Corp.*, 322 F.2d at 768 (violation where statement misleads “by innuendo rather than by outright false statements”); *Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 461.

¹⁴⁹ *FTC v. Atlantex Assocs.*, 1987 U.S. Dist. LEXIS 10911, *28, 1987-2 Trade Cas. (CCH) ¶ 67,788, at 59,254 (S.D. Fla. 1987), *aff'd*, 872 F.2d 966 (11th Cir. 1989); *In re Thompson Med. Co.*, 104 F.T.C. 648, 788 and n.6, 792 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

being thwarted.¹⁵⁰ In determining whether a common enterprise exists,

courts look at a variety of factors, including: common control, sharing of office space and officers, whether business is transacted through a “maze of interrelated companies,” the commingling of corporate funds, unified advertising, and any other evidence revealing that no real distinction existed between the corporate defendants.¹⁵¹

The above are just “some” of the factors that courts take into account.¹⁵² No comprehensive list is possible, as the entire ““pattern and framework of the whole enterprise must be taken into consideration.””¹⁵³

Here, the evidence demonstrates overwhelmingly a “pattern and framework” by which the NHS/PHS Defendants engaged in a single enterprise. First, there is the interrelationship among the various companies. For example, Tasha Jn Paul would be invoiced for customer-verification services, but would send the invoice to Bertrand for payment.¹⁵⁴ When problems arose in late 2007 with NHS Systems, Bertrand and Kirstein called and read her “the riot act” as though she were a negligent partner rather than an independent supplier of services.¹⁵⁵ As explained above, various companies were formed and customers were moved from company simply by decision among the leadership. When Kirstein and Bertrand decided they no longer

¹⁵⁰ *FTC v. U.S. Oil & Gas Corp.*, 1987 U.S. Dist LEXIS 16137, *57-58, *61 (S.D. Fla July 10, 1987).

¹⁵¹ *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1116 (S.D. Cal. 2008) (emphasis added) (citing *FTC v. J.K. Publ’ns. Inc.*, 99 F. Supp. 2d 1176, 1201-02 (C.D. Cal. 2000), *FTC v. Wolf*, 1996 U.S. Dist. LEXIS 1760 at * 22-23, *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973), and *Delaware Watch Co. v. FTC*, 322 F.2d 745, 746 (2d Cir. 1964)).

¹⁵² *FTC v. National Urological Group, Inc.*, 2008 U.S. Dist. LEXIS 44145, *20-21 (N.D. Ga. June 4, 2008).

¹⁵³ *Id.* at *20 (quoting *Delaware Watch Co.*, 322 F.2d at 746).

¹⁵⁴ Br. Tr. at 36.

¹⁵⁵ Kr. Tr. at 54-55.

wanted to do business with Bell, Bertrand had her friend Newman form an entity to gradually take business from Bell in increasing amounts as she learned the ropes.¹⁵⁶ Profits were split between the St. Lucia side and the Montreal side not by any formal agreement, but in consultation between Kirstein and Tasha Jn Paul.¹⁵⁷

The enterprise migrated customers through a dizzying array of companies. As described above, and to illustrate: PHS-1 was formed to collect on earlier sales; customers of PHS-1 became customers of PHS-2; NHS-2 was formed to take NHS Systems' customers from Bell; some AHBO customers were customers of PHS-3, while some AHBO customers were customers of PHS-4; and then, after the XTRO was entered in this matter, Defendants transferred the DB1 and DB2 customers to FMC (by way of NBS) for further charges. In explaining why it would take longer to transfer the DB2 customers to FMC, Greer told FMC that names from several campaigns were being merged into one database.¹⁵⁸

Even the DB1 and DB2 structures were not maintained as separate. NHS/PHS moved the DB1 customers from PHS-1, which was not in Bell's name, to PHS-2, which was in Bell's name, as a matter of convenience.¹⁵⁹ When Modern Payments told Bertrand that returns in the NHS Systems (DB2) account had overwhelmed the reserves, she instructed the processor to use reserves from PHS-1/PHS-2 (DB1) to cover the deficiency.¹⁶⁰

Defendants' practice of ignoring corporate formalities is well-described above, but is particularly illustrated by Kirstein's decision to reward an old friend with a share of sales

¹⁵⁶ Br. Tr. at 210-12.

¹⁵⁷ Br. Tr. 53.

¹⁵⁸ Br. Tr. at 47-48, 150-53, 210-11, 219, 235-36; Det. Tr. at 16.

¹⁵⁹ Kr. Tr. at 37-38.

¹⁶⁰ PX 17 (Supplemental Vantusko) at ¶ 90; Br. Tr. at 256-58.

proceeds. FMC was initially instructed to wire Defendants' share of sales proceeds to NBS, but then was told to wire them instead to Delway Trading in the Bahamas. Delway was owned by Nyveen, who had helped Kirstein in the past. Money would pass from FMC to Delway's account, and then be managed by Bertrand. Other than holding the account and transferring funds as instructed, Nyveen, in Kirstein's words, did "absolutely nothing."¹⁶¹

D. Defendants' Representations of Government Affiliation Are False and Violate Section 5 of the FTC Act (Count I).

Numerous consumers complain that NHS/PHS Defendants' telemarketers claimed to be calling from or on behalf of agencies of the United States government, including Social Security, the IRS, and Medicare.¹⁶² These were express or deliberately implied claims or representations, therefore they are presumed material and consumers were entitled to rely on them. NHS/PHS Defendants' representations about their affiliation with government agencies are false and, therefore, violate Section 5.

E. Defendants' Representations That Consumers Will Receive Government Grants, Tax Refunds, or Tax Rebates Are False and Violate Section 5 of the FTC Act (Count II).

Numerous consumers complain that NHS/PHS Defendants' telemarketers claimed to offer government grants, tax refunds, or tax rebates.¹⁶³ These were express or deliberately implied claims or representations, therefore they are presumed material and consumers were entitled to rely on them. NHS/PHS Defendants' representations about government grants, tax

¹⁶¹ Kr. Tr. at 72-75.

¹⁶² PX 24 (Vantusko SJ NHS/PHS) at ¶ 35; PX 1 (Vantusko) at ¶ 6; PX 3 (Davenport); PX 4 (Savage-Bey); PX 7 (Koch); PX 9 (Blanchard); PX 10 (D. Danziger); PX 12 (Clawson); PX 13 (Eyke); PX 14 (Colmerauer); PX 15 (Mills); PX 17 (Supplemental Vantusko) at ¶ 125; Lar. Tr. at 8.

¹⁶³ PX 24 (Vantusko SJ NHS/PHS) at ¶ 36; PX 1 (Vantusko) at ¶ 6; PX 3 (Davenport); PX 4 (Savage-Bey); PX 5 (Laramie); PX 9 (Blanchard); PX 12 (Clawson); PX 13 (Eyke); PX 14 (Colmerauer); PX 15 (Mills); PX 17 (Supplemental Vantusko) at ¶ 125.

refunds, or tax rebates are false and, therefore, violate Section 5.

F. Defendants' Representations That Consumers Will Not Be Charged or Will Receive Substantial Deposits That Will More than Offset Any Charges Are False and Violate Section 5 of the FTC Act (Count III).

Numerous consumers complain that NHS/PHS Defendants' telemarketers claimed that consumers who provide account information will not be charged or that any charges will be offset by substantially greater deposits into the consumers' accounts.¹⁶⁴ These were express or deliberately implied claims or representations, therefore they are presumed material and consumers were entitled to rely on them. NHS/PHS Defendants' representations that consumers will not be charged or that any charges will be offset by substantially greater deposits are false and, therefore, violate Section 5.

G. NHS/PHS Defendants' Failures to Disclose Material Terms and Conditions of Their Offer Before Charging Consumers Are Deceptive and Violate Section 5 of the FTC Act (Count IV).

Based on the evidence in this case, it seems extremely unlikely that any of NHS/PHS's telemarketers made sales using the official front-end scripts (i.e., for the unrecorded portions of their sales calls) found in the record. However, even if they did, the sales process was inherently deceptive. This is illustrated by the scripts for "Program Rebuttals" that were circulated for the NHS and AHBO campaigns.¹⁶⁵

According to the "rebuttals," if any consumer were to ask, "How do the benefits work?" the telemarketer was to reply, "That's the best part[,] all I'm trying to do is send out the

¹⁶⁴ PX 24 (Vantusko SJ NHS/PHS) at ¶ 37; PX 1 (Vantusko) at ¶ 6; PX 9 (Blanchard); PX 14 (Colmerauer); PX 15 (Mills).

¹⁶⁵ PX 17 (Supplemental Vantusko), Att. J at FTC-IT-01-07970 and Att. E at TDRAFT 369-70.

information so you can review it on your own time.”¹⁶⁶ Consumers were to be told repeatedly that they were only being asked to agree to a “risk-free” review of the NHS/PHS programs.¹⁶⁷ In fact, however, it was the NHS/PHS scheme’s practice to charge every consumer \$29.95 before providing any piece of information to explain how the supposed benefits that were being sold would work. The telemarketers were not merely “trying to . . . send out the information,” and there was nothing “risk-free” about the offer.¹⁶⁸

Given that even an on-script telemarketer was not to disclose any terms or conditions of the supposed benefits programs, the NHS/PHS Defendants engaged in a practice of charging consumers for access to their programs before disclosing any material terms or conditions of those programs. This is a deceptive practice in violation of Section 5.

H. Defendants’ Practice of Debiting Consumers’ Accounts Without the Consumers’ Authorization Is an Unfair Practice in Violation of Section 5 of the FTC Act (Count V).

Section 5(a) of the FTC Act also prohibits unfair acts or practices in or affecting commerce. 15 U.S.C. § 45(a). For an act or practice to be “unfair” it must satisfy a three prong test: (1) it must cause substantial consumer injury; (2) it must be injury that consumers themselves could not reasonably have avoided; and (3) it must not be outweighed by countervailing benefits to consumers or competition. 15 U.S.C. § 45(n).¹⁶⁹ Like its counterpart

¹⁶⁶ PX 17 (Supplemental Vantusko), Att. J at FTC-IT01-007970/5 and Att. E at TDRAFT 370.

¹⁶⁷ PX 17 (Supplemental Vantusko), Att. J at FTC-IT01-007970/2-4 and Att. E at TDRAFT 367-69.

¹⁶⁸ *See, e.g.*, PX 12 (Clawson) (consumer unable to stop \$29.95 charge or obtain refund).

¹⁶⁹ *See also Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1364 (11th Cir. 1988) (citing FTC’s 1980 Policy Statement); *FTC v. Inc21.com Corp.*, 688 F. Supp. 2d 927, 938 (N.D. Ca. 2010); *J.K. Publ’ns*, 99 F. Supp. 2d at 1201; *FTC v. Windward Mktg., Ltd.*, No. 1:96-CV-615, 1997 U.S. Dist. LEXIS 17114, at *29-30 (N.D. Ga. Sept. 30, 1997).

standard for deception, the unfairness test does not require the court to take into account the mental state of the party accused of a Section 5 violation. A practice may be found unfair to consumers without a showing that the offending party intended to cause consumer injury.¹⁷⁰

The NHS/PHS Defendants have engaged in a massive program of charging consumers' bank accounts without authorization.¹⁷¹ NHS/PHS Defendants' practices in this regard meet each of the three elements of the Section 5 unfairness standard. Consumers who are charged without their authorization suffer substantial injury, particularly upon aggregation of the injuries the NHS/PHS Defendants have caused to multiple consumers through this practice.¹⁷²

Consumers who have not authorized the debiting of their accounts cannot reasonably have avoided the unauthorized debits, and NHS/PHS Defendants' practices in billing consumers without the consumers' authorization offer not the slightest countervailing benefit to consumers or competition. Indeed, several courts have observed that widespread unauthorized billing violates the FTC Act's prohibition against unfair acts or practices.¹⁷³ NHS/PHS Defendants' practice of charging consumers' bank accounts without the consumers' authorization, therefore, violates Section 5.

¹⁷⁰ *Orkin*, 849 F.2d at 1368.

¹⁷¹ See Section III.B, above. See also PX 24 (Vantusko SJ NHS/PHS) at ¶ 38; PX 1 (Vantusko) at ¶ 4; PX 17 (Supplemental Vantusko) at ¶¶ 21-22, 108-09, 125; PX 19 (Swartz); PX 21 (Stephens); PX 22 (Bozikis); *see generally* PXs 3-15 (recounting complaints of unauthorized charges).

¹⁷² For purposes of measuring the substantiality of the injury caused by an unfair practice, the injury may be considered sufficiently substantial if it causes a small harm to a large number of people. *J.K. Publ'ns*, 99 F. Supp. 2d at 1201.

¹⁷³ *FTC v. Crescent Publ'g Group, Inc.*, 129 F. Supp. 2d 311, 321-22 (S.D.N.Y. 2001); *J.K. Publ'ns*, 99 F. Supp. 2d at 1201-03; *Windward Mktg.*, 1997 U.S. Dist. LEXIS 17114, at *31-38.

IX. DEFENDANTS' PRACTICES VIOLATE THE TELEMARKETING SALES RULE ("TSR")

The Telemarketing Sales Rule was originally promulgated in 1995 after Congress, in the Telemarketing Act,¹⁷⁴ directed the FTC to establish regulations prohibiting deceptive and abusive practices in telemarketing. The amended TSR, which included the Do Not Call Registry, was promulgated in 2003.¹⁷⁵ The TSR prohibits a number of deceptive and abusive acts and practices.¹⁷⁶ Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the TSR constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

NHS/PHS Defendants' deceptive and unfair practices, as described above, are not only prohibited generally by Section 5 of the FTC Act but are also prohibited specifically by the TSR. The TSR prohibits sellers and telemarketers¹⁷⁷ from "failing to disclose truthfully in a clear and conspicuous manner, before a customer pays for goods or services, among other things, all material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer."¹⁷⁸ As noted in Section VIII.G, above, even to the extent

¹⁷⁴ 15 U.S.C. §§ 6101-08.

¹⁷⁵ 68 Fed. Reg. 4580, 4669 (Jan. 29, 2003).

¹⁷⁶ 16 C.F.R. § 310.3 (deceptive practices); 16 C.F.R. § 310.4 (abusive practices).

¹⁷⁷ The definitions of "sellers" and "telemarketers" under the TSR are intentionally broad, and the NHS/PHS Defendants' central roles in this telemarketing scheme bring them within the ambit of the Rule. 16 C.F.R. §§ 310.2(z), -(bb). The definition of "seller" (§ 310.2(z)) includes "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."

¹⁷⁸ 16 C.F.R. § 310.3(a)(1)(ii).

any of the NHS/PHS Defendants' telemarketers followed their scripts, those scripts were designed to induce consumers to agree to a charge of \$29.95 even when the consumers had no information on any terms and conditions that would apply to any supposed benefits they were being sold. Thus, the NHS/PHS Defendants have violated this provision of the TSR, as alleged in Count VI of the Amended Complaint.

The TSR also prohibits sellers and telemarketers from "misrepresenting, directly or by implication, in the sale of goods or services . . . the total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer."¹⁷⁹ The NHS/PHS Defendants violated this provision of the TSR by misrepresenting to consumers the total cost to the consumers of dealing with the NHS/PHS Defendants. Numerous consumers complain that NHS/PHS Defendants' telemarketers have claimed that consumers who provide account information will not be charged or that any charges will be offset by substantially greater deposits into the consumers' accounts.¹⁸⁰ Such false claims about total costs violate the TSR, as alleged in Count VII of the Amended Complaint .

The TSR prohibits sellers and telemarketers from "misrepresenting, directly or by implication, in the sale of goods or services . . . any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer."¹⁸¹ The NHS/PHS Defendants' representatives violated this provision of the TSR, by claiming that consumers who provide their account information will thereby receive substantial government grants, tax refunds, or tax rebates. As explained above, numerous consumers complained about

¹⁷⁹ 16 C.F.R. § 310.3(a)(2)(i).

¹⁸⁰ As described above, and at PX 24 (Vantusko SJ NHS/PHS) at ¶ 39.

¹⁸¹ 16 C.F.R. § 310.3(a)(2)(iii).

the NHS/PHS Defendants making these claims¹⁸². Such false claims about the nature of goods or services violate the TSR, as alleged in Count VIII of the Amended Complaint.

The TSR prohibits any seller or telemarketer from making a false or misleading statement about the seller's or telemarketer's "affiliation with, or endorsement or sponsorship by, any person or government entity."¹⁸³ As described above, NHS/PHS Defendants' telemarketing campaigns have involved numerous misrepresentations of government affiliation.¹⁸⁴ Such misrepresentations violate the TSR, as alleged in Count IX of the Amended Complaint.

The TSR prohibits any seller or telemarketer from causing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services, directly or indirectly, without the customer's express verifiable authorization, except when the method of payment used is a credit card subject to the protections of the Truth in Lending Act, 15 U.S.C. § 1601-77, and Regulation Z, 12 C.F.R. Part 226, or a debit card subject to the protections of the Electronic Funds Transfer Act, 15 U.S.C. §§ 1693-93r, and Regulation E, 12 C.F.R. Part 205. When an audio recording of the customer's express oral authorization is used to satisfy this requirement, the TSR requires that the recording must evidence clearly the customer's authorization of payment for the goods or services that are the subject of the telemarketing transaction and the customer's receipt of all of the following information, among other information:

- a. the number of debits, charges, or payments (if more than one);
- b. the date(s) the debit(s), charge(s), or payment(s) will be submitted for

¹⁸² As described above, and at PX 24 (Vantusko SJ NHS/PHS) at ¶ 40.

¹⁸³ 16 C.F.R. § 310.3(a)(2)(vii).

¹⁸⁴ As described above, and at PX 24 (Vantusko SJ NHS/PHS) at ¶ 41.

payment;

- c. the amount(s) of the debit(s), charge(s), or payment(s); and
- d. a telephone number for customer inquiry that is answered during normal business hours.¹⁸⁵

As described above, numerous consumers complain that NHS/PHS Defendants' scheme has debited their bank accounts directly (i.e., not through the use of a credit card or debit card) without the consumers' authorization, and that when consumers call to complain they are played recordings that are not in the consumers' voices or that are otherwise fake or doctored.¹⁸⁶ In addition, as explained above, none of the NHS/PHS charges are supported by reliable verifiable authorization. As alleged in Count X of the Amended Complaint, all of the NHS/PHS Defendants' charges thus violated the TSR.¹⁸⁷

X. THE INDIVIDUAL DEFENDANTS ARE LIABLE FOR THE ACTS AND PRACTICES OF THE CORPORATE DEFENDANTS

Once corporate liability is established, individual defendants may be held personally liable for injunctive relief for a business entity's Section 5 violations if they (1) participated directly in the violative acts, or (2) had a role in directing, controlling, or formulating the policies and practices of the company which resulted in the violative acts, or (3) had the authority to control the actions of others that they knew or should have known were taking

¹⁸⁵ 16 C.F.R. § 310.3(a)(3)(ii).

¹⁸⁶ As described above, and at PX 24 (Vantusko SJ NHS/PHS) at ¶ 42.

¹⁸⁷ Counts XI and XII of the Amended Complaint pertain to the Galaxy Defendants (Defendants Bartholomew, Interface, and Beginning Again), as to whom discovery remains open, and no summary judgment motions are yet due under the current schedule. (Doc. #135, scheduling Order of September 27, 2010).

place.¹⁸⁸

In addition, individual defendants may be held personally liable for monetary relief for corporate violations where they “had actual knowledge of material misrepresentations, [were] recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth.”¹⁸⁹ Moreover, the “degree of participation in business affairs is probative of knowledge.”¹⁹⁰

Individual Defendants Kirstein, Bertrand, Tasha Jn Paul, Greer, Linke Jn Paul, Bell, and Newman, all meet both thresholds.

A. Defendant Kirstein

Kirstein appears to have been the individual with the highest overall authority over the NHS/PHS operation. He worked in conjunction and consultation with Bertrand and the St. Lucia side of the operation, but some key decisions were his; for example, it was he who authorized Greer to negotiate the NBS deal with FMC, and it was he who decided that revenues through the FMC deal would flow through Nyveen’s Delway Trading.¹⁹¹

Kirstein described his general responsibility in the period before this action was filed as working with the payment processors, getting the best deal possible, and getting the “revokes” (consumers’ documented complaints to their banks concerning unauthorized transactions) as low

¹⁸⁸ *Nat’l Credit Mgmt.*, 21 F. Supp. 2d at 461. See also *FTC v. Amy Travel Serv.*, 875 F.2d 564, 573-74 (7th Cir. 1989); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 535 (S.D.N.Y. 2000).

¹⁸⁹ *Amy Travel*, 875 F.2d at 573-74.

¹⁹⁰ *Id.*

¹⁹¹ *Kr. Tr.* at 16, 27, 52-55, 63-69, 72-75.

as possible.¹⁹² As far as keeping these complaints of unauthorized debits as low as possible, Kirstein admits that he looked at the numbers on a daily basis.¹⁹³ He spoke to Defendants' payment processor, Modern Payments, about the level of unauthorized returns and discussed how difficult ACH transactions were because of NACHA's 1% rule, which, in his view, was "ridiculous."¹⁹⁴ He discussed NACHA issues with Modern Payments, and when Modern Payments refused to process further payments for NHS Systems, Kirstein acknowledges that he understood it was because of the NACHA rules.¹⁹⁵ Yet Kirstein authorized Greer to negotiate with FMC to resume charges to customers, and did so despite knowing that NHS/PHS could not provide any recordings to justify charges and despite knowing consumers had complained of being misled.¹⁹⁶

Kirstein also had responsibility overseeing telemarketing. He discussed sales and the sales process with the St. Lucia side – initially with Tasha Jn Paul, and then eventually with Defendant Dannie Boie.¹⁹⁷ When he felt that Tasha Jn Paul and the St. Lucia side were not properly overseeing their side of the business, Kirstein read her the "riot act."¹⁹⁸

Kirstein also directed how the profits should be divided. He and Tasha Jn Paul decided

¹⁹² Kr. Tr. at 7; *see also* Br. Tr. at 352-54.

¹⁹³ Kr. Tr. at 8, 33, 44.

¹⁹⁴ Kr. Tr. at 41-42. Of course, it is not surprising that Kirstein saw it as practically impossible to maintain a low rate of unauthorized returns of multi-debit transactions based on outbound cold-calling; those types of transactions were inherently prohibited by the ACH rules.

¹⁹⁵ Kr. Tr. at 46, 50-51; PX 17 (Supplemental Vantusko) Att. L at FTC-NHS-0001989/2.

¹⁹⁶ Kr. Tr. at 35 (recalling Bell's "major concerns" email), 63-64.

¹⁹⁷ Kr. Tr. at 10-11, 52-53.

¹⁹⁸ Kr. Tr. at 54-55.

on a split between Bertrand and FSMI.¹⁹⁹ Later, Kirstein and Bertrand decided how much business to shift to Newman's company.²⁰⁰ The fact that Kirstein was able to direct NHS/PHS revenues to Nyveen for "absolutely nothing," because Nyveen had helped Kirstein in the past, demonstrates substantial control.

Thus, although Kirstein does not appear as an officer or employee of the corporate defendants, it is apparent that he was knowledgeable about all aspects of NHS/PHS operations, including high rates of unauthorized charges and the initiation of charges without proof of authorization. He was a key figure directing operations.

B. Defendant Bertrand

As is evident from her preparation of emails summarizing the history of NHS/PHS prior to the commencement of this action, and the extensive knowledge of operations demonstrated in her deposition, Bertrand was a key principal operating NHS/PHS.²⁰¹

Bertrand had overall responsibility for administering NHS/PHS's finances, frequently directing others on the disposition of funds in various accounts.²⁰² She was the principal of 6676529 Canada, the corporate vehicle that contracted to administer nearly all aspects of NHS Systems.

But in addition to handling the company's finances, Bertrand also played a key role in other aspects of NHS/PHS operations, particularly in representing various entities and explaining their operations. When Defendants hired Modern Payments as a payment processor, Bertrand

¹⁹⁹ Br. Tr. at 53.

²⁰⁰ Br. Tr. at 229.

²⁰¹ See generally Br. Tr. at 27-28; Br. Exs. 1, 2.

²⁰² Br. Tr. at 51-52, 158.

filled out the applications in her own handwriting, listing herself as the primary contact,²⁰³ and later, provided them an overview of the company's refund policy.²⁰⁴ When an agent for a payment processor needed information, it was Bertrand who provided the overview of operations.²⁰⁵ When Bell sent his email raising major concerns, it was Bertrand to whom Bell sent the message, and Bertrand who responded.²⁰⁶ She and Kirstein both criticized Tasha Jn Paul's work, and Tasha Jn Paul sent her "dropped the ball" email to Bertrand (who passed it along to Kirstein).²⁰⁷ In that same period, Bertrand undertook to deal with problems created by Tasha Jn Paul's failures.²⁰⁸ Later, when FMC raised questions about the origins of DB1 and DB2, Bertrand forwarded email she had earlier prepared outlining the history, including attaching sales scripts and spreadsheets.²⁰⁹

Her responsibilities also extended to sales. She forwarded scripts to the companies' payment processors, and was in regular contact with Greer and Tasha Jn Paul, both of whom were responsible for telemarketing.²¹⁰ She also directed Greer and customer service representatives in the Philippines to make refunds if the customer mentioned contacting the

²⁰³ Br. Tr. at 62; PX 17 (Supplemental Vantusko) Att. F at MP 25; *see also* Br. Tr. at 234-35; PX 17 Att. E at TDRAFT 395 (Bertrand filled out account applications for Teledraft).

²⁰⁴ Br. Tr. at 104; Br. Ex. 6.

²⁰⁵ Br. Tr. at 66-67; Br. Ex. 3.

²⁰⁶ Br. Tr. at 128; PX 27 (Declaration of Counsel) at Att. N.

²⁰⁷ Br. Tr. at 189-92; Br. Ex. 14.

²⁰⁸ Br. Tr. at 166.

²⁰⁹ Br. Tr. at 27-28; Br. Exs. 1, 2.

²¹⁰ Br. Tr. at 80, 90, 96,192; Br. Ex. 14.

bank, or threatened to file complaints with the BBB or an Attorney General.²¹¹ She also helped decide, again in consultation with Kirstein, how much business to shift from Bell to Donna Newman.²¹²

Bertrand also acknowledges the accuracy of an email, dated November 14, 2007, which describes business practices including cold-calling and the recording of only the verification portions of calls, not the sales pitches.²¹³ She also knew of the high levels documented unauthorized transactions, including having sent an email showing rates ranging from 4.3% to 14.2% for February – April of 2007.²¹⁴ She further acknowledges hearing that consumers were complaining about being misled from February 2007 all the way through the spring of 2009; she was repeatedly informed of complaints about bogus grant offers.²¹⁵

C. Defendant Tasha Jn Paul.

Tasha Jn Paul's long and inextricable ties to NHS/PHS, especially through FSMI, Gold Dot, and FSOL, are thoroughly documented.²¹⁶ Although her husband Linke was the sole director of FSMI, she reported to her bank that FSMI was her employer, and Kirstein and Bertrand perceived her as being at the top of FSMI and the St. Lucia side of the enterprise generally.²¹⁷ She was a director of Gold Dot, along with her husband, and was actively involved

²¹¹ Br. Tr. at 185-86; Br. Ex. 13.

²¹² Br. Tr. at 229.

²¹³ Br. Tr. at 117-18; Br. Ex. 8.

²¹⁴ Br. Tr. at 109, 352-54; Br. Ex. 7.

²¹⁵ Br. Tr. at 108-09, 114-15, 137-38, 169-70, 313; Br. Ex. 7, 28.

²¹⁶ PX 17 (Supplemental Vantusko) at ¶¶ 35, 37, 39; PX 24 (Vantusko SJ NHS/PHS) at ¶¶ 5, 7, 9-15, 18, 23; Br. Exs. 4, 14; Kr. Tr. 10-12, 16, 26-27, 31-33, 38, 53-55; Har. Tr. at 9-14.

²¹⁷ PX 24 (Vantusko SJ NHS/PHS) at ¶ 18; Br. Tr. at 191-92; Kr. Tr. at 26-27.

in managing that company's affairs, as well.²¹⁸ She was Greer's partner in the operation of FSOL, through which the two siphoned thousands of dollars taken from NHS/PHS victims.²¹⁹

The evidence is irrefutable that she was the "Erika Roberts" referred to in so many documents; she is not only identified as such by Kirstein and Bertrand, but also by her phone number.²²⁰ Her "dropped the ball" email, which she sent after Bertrand shared Bell's "major concerns," is unquestionably that of an extremely knowledgeable management-level operator.²²¹ She also participated in decision-making about how enterprise profits would be split between the Montreal side and the St. Lucia side.²²²

D. Defendant Greer.

As much as Tasha Jn Paul participated in a variety of facets of the NHS/PHS enterprise under the pseudonym "Erika Roberts," so too did Greer have his hand in many aspects of operations as "Dannie Boie."²²³ His participation is not only shown in the fact that his pseudonym appears frequently on relevant communications and documents; Tasha Jn Paul's "dropped the ball" email gives an overview of his historic and future roles in the operation. "For so long," she wrote, "I had Dave really work the rooms and sells, that I forgot he can be more valuable than that." In summarizing her going-forward proposal, she listed Greer's duties as

²¹⁸ PX 17 (Supplemental Vantusko) at ¶ 35; Br. Tr. at 83-84, 115; Br. Ex. 4; Kr. Tr. at 31-32.

²¹⁹ Har. Tr. at 12-14; PX 24 (Vantusko SJ NHS/PHS) at ¶¶ 4-5, 15.

²²⁰ Br. Tr. at 66-67, 70, 83-84, 226; Br. Exs. 3, 4; Kr. Tr. at 53; PX 24 (Vantusko SJ NHS/PHS) at ¶¶ 18, 23.

²²¹ Br. Tr. at 176; Br. Ex. 14.

²²² Br. Tr. at 249.

²²³ Br. Tr. at 89, 192, 306; Kr. Tr. at 52; Har. Tr. at 18, 28, 110. See also PX 24 (Vantusko SJ NHS/PHS) at ¶¶ 5, 10-13, 15-17 (showing multiple streams of income to Greer from NHS/PHS).

overseeing “all daily operation on sales and customer service and for FSMI.”²²⁴

By the spring of 2008, Greer appears to have had more responsibility as Nicole began dealing with him more, including in allocating AHBO sales between PHS-3 and PHS-4.²²⁵ After this action was filed, his increased duties included finding a new way to keep charging the same consumers (using NBS and FMC), negotiating the deal with FMC despite the unavailability of any authorizations, and serving as a primary contact for FMC during the ongoing operation after this action was filed.²²⁶

E. Defendant Linke Jn Paul.

Defendant Linke Jn Paul signed articles of incorporation for FSMI and for Gold Dot in 2005. The articles list him as the sole director of FSMI, and as one of two directors, along with his wife Tasha, of Gold Dot. The articles list Gold Dot’s main type of business as “providing internet sales and marketing services,” a description consistent with that company’s operation, while the FSMI articles describe a main type of business as “providing information for U.S. government grants and health care services,” a description unfortunately all-too-familiar for consumers who had experiences with the NHS/PHS Defendants’ telemarketers.²²⁷ In addition, FSMI was the largest single recipient of funds from accounts controlled through the NHS Systems offices in Collegeville, Pennsylvania.²²⁸ Linke Jn Paul was listed as FSMI’s contact

²²⁴ Br. Ex.14. Greer told Arnold Harrison that he managed call centers, which was why he wanted his lead-brokering company to be in Harrison’s name. Har. Tr. at 9-10.

²²⁵ Br. Tr. at 219-20, 229-31; Ex. 19.

²²⁶ Kr. Tr. at 63-64, 67-68; Br. Tr. at 274, 330; Br. Ex. 22.

²²⁷ PX 17 (Supplemental Vantusko) at Att. D.

²²⁸ PX 20 (Geiser) ¶ 28.

person in wire transfer instructions.²²⁹ Linke Jn Paul thus had authority to control FSMI's and Gold Dot's practices, knew that the sales involved promises of government grants, and profited handsomely from the operations. He is liable.

F. Defendant Bell.

Over the course of the NHS/PHS enterprise, Bell operated NHS Systems, PHS-2, and PHS-3 as president of each.²³⁰ Among Bell's duties were handling the mail and processing consumer complaints. In this connection, he grew so alarmed by what he saw that in November 2007, he sent an email to Defendant Bertrand outlining his major concerns with Defendants' operation.²³¹ Those concerns included his observations that consumers were being promised grants. As president of these three entities, Bell had authority to make these practices stop, but it took this Court's 2008 XTRO, six months later, before he would stop.²³² Indeed, Bell admits that he chose not to stop, despite his concern about his companies' deceptive nature, because he needed the money.²³³ Bell had the authority to control the companies' practices and knowledge of their fundamentally deceptive nature. Bell is liable.

G. Defendant Donna Newman

At Bertrand's request, Newman first became involved in the enterprise by reviewing the numerous complaints received by NHS Systems.²³⁴ Despite reviewing hundreds

²²⁹ PX 17 (Supplemental Vantusko) at ¶ 50.

²³⁰ PX 17 (Supplemental Vantusko) at ¶¶ 25, 58, 77.

²³¹ PX 27 (declaration of counsel) at Att. M; Bell Tr. at 122-123. *See also* Bell Tr. at 16 (Bell's concerns about the complaints he was reading).

²³² PX 20 (Geiser) ¶¶ 5-18.

²³³ Bell Tr. at 195-196.

²³⁴ Newm. Tr. at 8-12.

of complaints from consumers who said that they were promised a grant or never signed up for the program, Newman agreed to become the president of two new companies, NHS-2 and PHS-4, that would run the same program.²³⁵ She incorporated the companies and opened the corporate bank accounts.²³⁶ When Newman's companies began receiving complaints similar to the complaints about NHS Systems, she contacted Bertrand and told her "the grant thing is still happening."²³⁷ Yet she continued to serve as president of NHS-2 and PHS-4 until this Court issued the 2008 XTRO. Newman had the requisite authority to control and knowledge to be held individually liable. As president of NHS-2 and PHS-4 Newman could have shut down the companies at any time. From her review of the many complaints, and the pattern of those complaints, Newman knew, or should have known, that her companies were taking consumers' money through deceptive marketing and unauthorized charges.

XI. THE RELIEF REQUESTED IS APPROPRIATE UNDER SECTION 13(b) OF THE FTC ACT

Because there is no genuine issue of material fact that the NHS/PHS Defendants violated Section 5 of the FTC Act and the TSR, the FTC seeks a permanent injunction: (1) banning the NHS/PHS Defendants from telemarketing, and from debiting consumer bank accounts; (2) enjoining the NHS/PHS Defendants from making misrepresentations and from violating the TSR; (3) ordering monetary relief in the amount of \$6,879,162.22; and (4) permitting conduct and compliance monitoring and requiring records to be kept.

²³⁵ At the very least Newman consciously avoided knowing that the businesses were involved in deception. In the face of hundreds of complaints, many from victims who said that they did not remember giving out their bank account number, Newman claims to have concluded, "[o]bviously they did and they just wanted to cancel." Newm. Tr. at 11-12.

²³⁶ Newm Tr. at 9-12; Newm Ex 1; PX 1 (Vantusko) at ¶ 26, 42; PX 17 (Supplemental Vantusko) at ¶¶ 27, 78, 85, 96.

²³⁷ Newm. Tr. at 46-47.

A. This Court Has the Authority to Grant the Relief Requested.

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC to bring suit in federal district court when it has reason to believe that a party is violating, or is about to violate, “any provision of law” enforced by the FTC, *e.g.*, Section 5(a) of the FTC Act. The second proviso of Section 13(b),²³⁸ under which this action is brought, provides that, “in proper cases²³⁹ the FTC may seek, and after proper proof, the court may issue, a permanent injunction.” Once the FTC has invoked the equitable power of a federal court, the full breadth of the court’s authority is available, including such ancillary final relief as rescission of contracts and restitution.²⁴⁰ Indeed, a district court’s equitable powers “assume an even broader and more flexible character’ when the public interest is involved.”²⁴¹

B. The Injunctive Relief is Appropriate.

The FTC seeks a permanent injunction banning the NHS/PHS Defendants from telemarketing and from debiting consumer bank accounts, and enjoining the NHS/PHS Defendants from making misrepresentations and from violating the TSR. Courts have broad

²³⁸ 15 U.S.C. § 53(b). Because the FTC proceeds under the second proviso of Section 13(b), the conditions set forth in the first proviso of Section 13(b) for the issuance of injunctions in the aid of administrative proceedings do not apply to this case. *See FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982) (routine fraud cases may be brought under the second proviso, without being subject to first proviso requirement that the FTC institute an administrative proceeding); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984) (“Congress did not limit the court’s powers under the [second and] final proviso of 13(b).”)

²³⁹ A case such as this one qualifies as a “proper case” under the second proviso of Section 13(b). Courts have consistently held that it is appropriate to invoke the remedies of Section 13(b) in cases where there is evidence of routine fraud or a straightforward deceptive practice. *FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1026-28 (7th Cir. 1988).

²⁴⁰ *H.N. Singer*, 668 F.2d at 1113; *Nat’l Credit Mgmt.*, 21 F. Supp. 2d at 462. *See also United States v. Lane Labs-USA, Inc.*, 427 F.3d 219, 224 (3d Cir. 2005).

²⁴¹ *Lane Labs*, 427 F.3d at 231 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

authority to enjoin unlawful acts that may be anticipated from defendants' past conduct and to model injunctive orders to fit the exigencies of a particular case. *See FTC v. Kitco of Nev., Inc.*, 612 F. Supp. 1282, 1296 (D.C. Minn. 1985). A court may order injunctive relief even if the illegal conduct has been discontinued if the court finds that there is "some cognizable danger of recurrent violation." *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S. Ct. 894, 898 (1953); *see also FTC v. Davison*, 431 F. Supp. 2d at 560. Injunctive relief is necessary here because there is a cognizable danger of recurrent violation. Indeed, the NHS/PHS Defendants resumed the NHS/PHS scheme in violation of this Court's Order within a month of the XTRO. Without strong injunctive relief, there is a strong likelihood that the NHS/PHS Defendants would continue their deceptive practices. Although Defendants Bell and Newman were not involved in the resurgence of the scheme, injunctive relief is appropriate as to them given that "[p]ast unlawful conduct is a critical element in determining the likelihood of future violations." *Kitco* 612 F. Supp. At 1296 (citing *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir.1979); *CFTC v. British American Commodity Options Corp.*, 560 F.2d 135, 141 (2d Cir. 1977)). Both Bell and Newman saw the complaints that consumers made about their companies and continued to be involved with those companies. Both were involved in the scheme until the day the FTC filed its lawsuit. Such disregard for whether the company was operating lawfully evinces a danger of recurrent violations.

C. The Monetary Relief is Appropriate.

As a matter of law, the FTC need not prove that each individual consumer relied upon Defendants' false claims to obtain consumer redress. *FTC v. Sec. Rare Coin*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d at 573. "Section 13 of the FTC Act differs from a private suit for fraud Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and

frustrate the statutory goals of [Section 13(b)].” *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993) (citing *FTC v. Kitco of Nev., Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985) and *Sec. Rare Coin*, 931 F.2d at 1316); *FTC v. Wilcox*, 926 F. Supp. 1091, 1105 (S.D. Fla. 1995).

Instead, the FTC must show that a defendant (1) made material misrepresentations likely to deceive consumers, (2) that the misrepresentations were widely disseminated, and (3) that consumers paid the defendant as a result. *FTC v. Freecom Commc’ns*, 401 F. 3d 1192, 1206 (10th Cir. 2005). A presumption of actual reliance arises once the FTC satisfies this test, and the burden then shifts to the Defendants to prove that consumers did not rely on the misrepresentations. *Figgie Int’l*, 994 F.2d at 605-06; *Kitco*, 612 F. Supp. at 1293.

As described above the NHS/PHS Defendants made material misrepresentations that they were affiliated with the government, that consumers would receive tax refunds or rebates, that the deposit a consumer will receive will offset any charges, and failed to disclose material terms and conditions before charging consumers. Moreover, Defendants charged consumers’ accounts without their authorization. These representations are material and likely to deceive consumers. They were widely disseminated and consumers testified that they paid as result.

The proper amount of monetary relief is the full amount lost by consumers. *FTC v. Febre*, 128 F.3d 530, 535-36 (7th Cir. 1997); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996).²⁴² To determine the amount of monetary relief, “[t]he Commission must show that its calculations reasonably approximated the amount of customers’ net losses, and then the burden shifts to the defendants to show that those figures were inaccurate.” *Febre*, 128 F.3d at 535. *See also, FTC v. Inc21.com Corp.*, No. 10-00022, 2010 U.S. Dist. LEXIS 98944, at *89 (N.D. Ca. Sept. 21, 2010) (quoting *Febre*). Through their schemes, the NHS/PHS Defendants

²⁴² If redress to consumers is wholly or partially impracticable, disgorgement of ill-gotten gains is also a proper remedy pursuant to Section 13(b). *See Gem Merch. Corp.*, 87 F. 3d at 470.

took, from consumers, a total of \$6,879,162.22 that was not refunded.²⁴³ Since the NHS/PHS Defendants engaged in a common enterprise, they should be held jointly and severally liable for the full amount of the judgment.

D. Conduct and Compliance Monitoring/Record Keeping Provisions Are Appropriate

Provisions calling for monitoring, records retention, and reporting are necessary to ensure compliance by the NHS/PHS Defendants, particularly in light of earlier non-compliance with the XTRO. Courts in the Third Circuit and in other Circuits have included similar provisions in permanent injunctions issued under Section 13(b). *See, e.g., FTC v. Davison & Assocs., supra.*, 431 F. Supp. 2d 548; *FTC v. Check Investors, Inc.*, No. 03-2115, 2005 U.S. Dist. LEXIS 37199 (D.N.J., July 18, 2005).; *FTC v. Dinamica Financiera LLC*, No. 09-03554, 2010 U.S. Dist. LEXIS 88000 (C.D. Ca., Aug. 19, 2010).

²⁴³ PX 24 (Vantusko SJ NHS/PHS) at ¶¶ 48-59.

XII. CONCLUSION

For the foregoing reasons, the FTC requests that the Court grant summary judgment against the seventeen NHS/PHS Defendants and issue the requested Permanent Injunction. A proposed Order is included in the materials with this filing.

Respectfully submitted,

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