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NO JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Case No. CV 12-09631 DDP (MANx)
)	
Plaintiff,)	
)	
v.)	
)	ORDER GRANTING PLAINTIFF'S MOTION
THE ZAKEN CORP., a)	FOR SUMMARY JUDGMENT
California corporation also)	
d/b/a The Zaken Corproation,)	
QuickSell and QuickSell and)	
TIRAN ZAKEN, individually)	
and as an officer of The)	[Dkt. No. 52]
Zaken Corp.,)	
)	
Defendants.)	
)	
_____)	

Presently before the court is Plaintiff's Motion for Summary Judgment. Having considered the submissions of the parties, the court is inclined to grant the motion and adopt the following order.

I. Background

Defendants (collectively, "Zaken") offer a "Wealth Building Home Business Plan" to consumers.¹ (Declaration of Dani Stagg, Ex. D at 44.) For \$148.00, plus shipping, purchasers become Associates

¹ This order uses the term "consumer" and "purchaser" interchangeably.

1 of QuikSell Liquidations and receive a "kit" including instructions
2 on how to locate excess inventories, "[i]nsider' secret
3 techniques," "powerful and proven strategies," "a simple seven-word
4 phrase that instantly pays [purchasers] cash profits," and other
5 information. (Id. at 57-58, 97.) Zaken also offers purchasers
6 additional "tools" for an additional charge. (Stagg Dec., Ex. E.
7 at 85-86.)

8 Under Zaken's plan, consumers identify businesses seeking to
9 liquidate excess inventory. Consumers then notify Zaken, which may
10 proceed to negotiate an acquisition of the excess merchandise. If
11 Zaken is successful in 1) buying the products identified by the
12 consumer and 2) reselling the products at a profit, then Zaken pays
13 purchasers fifty percent of the net proceeds. (Id. at 52-53.)
14 Zaken advertises a "realistic ballpark figure" estimate that "2 to
15 4 hours a week working this business will earn [participants] an
16 average of \$3,000 to \$6,0000." (Stagg Dec. Ex. D. at 61.)

17 Effective March 1, 2012, the Federal Trade Commission
18 broadened the scope of its "Business Opportunity Rule," 16 CFR §
19 437.0 et seq., the earliest form of which was first promulgated in
20 1978. 76 FR 76816. Prior versions of the rule regulated and
21 imposed certain disclosure requirements upon the sale of business
22 opportunities, but only those costing over \$500. 76 FR 76818. The
23 2012 revision eliminated this monetary threshold. 76 FR 76821.
24 The 2012 changes also seek "to address the sale of deceptive work-
25 at home schemes, where unfair and deceptive practices have been
26 both prevalent and persistent." 76 FR 76826. The FTC elaborated
27 that "[s]ellers of fraudulent work-at-home opportunities deceive
28 their victims with promises of an ongoing relationship in which the

1 seller will buy the output that business opportunity purchasers
2 produce, often misrepresenting to purchasers that there is a market
3 for the purchasers' goods and services," and that these schemes
4 "frequently dupe consumers with false earnings claims." Id.

5 On November 9, 2012, Plaintiff filed a complaint against
6 Defendants for violations of the FTC's Business Opportunity Rule
7 and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §
8 45(a).

9 **II. Legal Standard**

10 Summary judgment is appropriate where the pleadings,
11 depositions, answers to interrogatories, and admissions on file,
12 together with the affidavits, if any, show "that there is no
13 genuine dispute as to any material fact and the movant is entitled
14 to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party
15 seeking summary judgment bears the initial burden of informing the
16 court of the basis for its motion and of identifying those portions
17 of the pleadings and discovery responses that demonstrate the
18 absence of a genuine issue of material fact. See Celotex Corp. v.
19 Catrett, 477 U.S. 317, 323 (1986). All reasonable inferences from
20 the evidence must be drawn in favor of the nonmoving party. See
21 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242 (1986).
22 If the moving party does not bear the burden of proof at trial, it
23 is entitled to summary judgment if it can demonstrate that "there
24 is an absence of evidence to support the nonmoving party's case."
25 Celotex, 477 U.S. at 323.

26 Once the moving party meets its burden, the burden shifts to
27 the nonmoving party opposing the motion, who must "set forth
28 specific facts showing that there is a genuine issue for trial."

1 Anderson, 477 U.S. at 256. Summary judgment is warranted if a
2 party "fails to make a showing sufficient to establish the
3 existence of an element essential to that party's case, and on
4 which that party will bear the burden of proof at trial." Celotex,
5 477 U.S. at 322. A genuine issue exists if "the evidence is such
6 that a reasonable jury could return a verdict for the nonmoving
7 party," and material facts are those "that might affect the outcome
8 of the suit under the governing law." Anderson, 477 U.S. at 248.
9 There is no genuine issue of fact "[w]here the record taken as a
10 whole could not lead a rational trier of fact to find for the non-
11 moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
12 475 U.S. 574, 587 (1986).

13 It is not the court's task "to scour the record in search of a
14 genuine issue of triable fact." Keenan v. Allan, 91 F.3d 1275,
15 1278 (9th Cir. 1996). Counsel has an obligation to lay out their
16 support clearly. Carmen v. San Francisco Sch. Dist., 237 F.3d
17 1026, 1031 (9th Cir. 2001). The court "need not examine the entire
18 file for evidence establishing a genuine issue of fact, where the
19 evidence is not set forth in the opposition papers with adequate
20 references so that it could conveniently be found." Id.

21 **III. Discussion**

22 A. Section 5(a) of the FTC Act

23 Section 5(a) of the FTC Act prohibits unfair or deceptive acts
24 or practices in or affecting commerce, and provides for injunctive
25 and equitable relief against violators. 15 U.S.C. § 45(a); F.T.C.
26 v. Network Servs. Depot, Inc., 617 F.3d 1127, 1138 (9th Cir. 2010).
27 A practice or representation is deceptive if it is likely to
28 mislead consumers acting reasonably under the circumstances, and is

1 material. F.T.C. v. Stefanchik, 559 F.3d 924, 928 (9th Cir. 2009).
2 Courts look to the overall impression conveyed by a representation,
3 and not merely to literal truth. F.T.C. v. Cyberspace.Com LLC, 453
4 F.3d 1196, 1200 (9th Cir. 2006).

5 While Zaken disputes that it violated Section 5(a) of the FTC
6 Act, it provides no argument, authority, or evidence to support
7 that position. Plaintiff, in contrast, cites to numerous instances
8 in which Zaken directly or indirectly represented that purchasers
9 of Defendants' business opportunity would earn substantial income.
10 Defendants, for example, explicitly guaranteed that the "entire
11 good-faith deposit of \$148 will be sent right back" if consumers
12 "haven't made at least \$4,000" and they "return the kit" in the
13 first thirty days of purchase. (Pl.'s Ex. 11, Attach. F.)
14 Defendants suggested that such an outcome was unlikely,
15 representing, for example, that "the average commission check
16 [associates] get . . . will be approximately \$4,280!" and
17 presenting a "realistic ballpark figure" estimate that "2 to 4
18 hours a week working this business will earn [participants] an
19 average of \$3,000 to \$6,0000" (Pl.'s Ex. 12 at 67:15-15;)
20 Stagg Decl., Ex. D. at 61.)

21 In truth, purchasers of Defendants' business opportunity have
22 not earned a substantial income. (Pl.'s Ex. 29, Attach. A.) Over
23 the business's ten-year history, over 100,000 consumers bought the
24 basic QuikSell kit for \$148. Fewer than 1% of consumers ever
25 earned any income at all. Consumers collectively earned
26 approximately \$260,000 in sales commission payments, based on
27 available records and testimonials. (Pl.'s Ex. 29, Attach. A.) In
28 2011 and 2013, not a single consumer made any income using

1 QuikSell. (Id.) In 2012, Zaken paid commissions to only five
2 QuikSell purchasers, and those commissions were a fraction of the
3 amounts Zaken claimed consumers would earn. (Pl.'s Ex. 29, Attach.
4 A.)

5 Consumers spent an additional \$10,130,433 total on other
6 QuikSell "upsell" tools. (Pl.'s Ex. 30, Attach. A.) Some consumers
7 were encouraged to "spend [an additional] \$2,300" to purchase one
8 such tool if they were "serious about this business and . . .
9 really want[ed] to make the kind of money others have made." (Yee
10 Dep., Pl.'s Ex. 14 at 105:21-23) . This particular tool, however,
11 consisted of largely outdated telephone numbers of companies who
12 were out of business. (Yee Dep., Pl.'s Ex. 14 at 108:15-21.)

13 It was reasonable for consumers to rely on Zaken's
14 representations. The Government need not prove that each individual
15 consumer relied on the deceptive acts or practices. FTC v.
16 Commerce Planet, Inc., 878 F.Supp.2d 1048, 1072 (C.D. Cal. 2012).
17 Here, reliance is shown by the undisputed fact that more than
18 110,000 consumers bought Zaken's products. FTC v. Figgie Int'l,
19 Inc., 994 F.2d 595, 605-6 (9th Cir. 1993). Further, it was
20 reasonable for consumers to believe that Defendants' statements of
21 earnings potential represented typical or average earnings. FTC v.
22 Medicor LLC, 217 F. Supp. 2d 1048, 1053-54 (C.D. Cal. 2002); FTC v.
23 Data Med. Capital, Inc., No. SA CV 99-1266 AHS, 2010 WL 1049977 at
24 * 27 (C.D. Cal. Jan. 15, 2010).

25 Defendants' misrepresentations were material. A misleading
26 impression is material if it "involves information that is
27 important to consumers and, hence, likely to affect their choice
28 of, or conduct regarding, a product." Commerce Planet, Inc., 878

1 F.Supp.2d at 1063 (citing FTC v. Cyberspace.com, LLC, 453 F.3d
2 1196, 1201 (9th Cir.2006)). Express claims concerning the earnings
3 potential of business opportunities are presumed to be material, as
4 the potential to earn a profit is an essential consideration for
5 anyone considering purchasing a business opportunity. FTC v. Febre,
6 1996 WL 396117 at *2 (N.D. Cal. 1996.) Defendants'
7 misrepresentations of potentially large earnings in exchange for
8 very little work were explicitly presented to consumers in
9 advertisements, with titles like "Start Locating lots of deals and
10 Make BIG MONEY mailing out this Postcard." (Pl.'s Ex. 24, Attach.
11 B.) These express claims concerned the earnings potential of
12 QuikSell associates, an essential consideration for anyone
13 considering purchasing this program. As such, these
14 misrepresentations were material. Plaintiffs have established that
15 Defendants violated Section 5.

16 B. Business Opportunity Rule

17 As described in this court's earlier order, effective March 1,
18 2012, the Federal Trade Commission broadened the scope of its
19 "Business Opportunity Rule," 16 CFR § 437.0 et seq., the earliest
20 form of which was first promulgated in 1978. 76 FR 76816. Prior
21 versions of the rule regulated and imposed certain disclosure
22 requirements upon the sale of business opportunities, but only
23 those costing over \$500. 76 FR 76818. The 2012 revision
24 eliminated this monetary threshold. 76 FR 76821. The 2012 changes
25 also seek "to address the sale of deceptive work-at home schemes,
26 where unfair and deceptive practices have been both prevalent and
27 persistent." 76 FR 76826. The FTC elaborated that "[s]ellers of
28 fraudulent work-at-home opportunities deceive their victims with

1 promises of an ongoing relationship in which the seller will buy
2 the output that business opportunity purchasers produce, often
3 misrepresenting to purchasers that there is a market for the
4 purchasers' goods and services," and that these schemes "frequently
5 dupe consumers with false earnings claims." Id.

6 The Rule defines a business opportunity as a commercial
7 arrangement in which:

- 8
- 9 (1) A seller solicits a prospective purchaser to enter into
10 a new business; and
- 11 (2) The prospective purchaser makes a required payment; and
- 12 (3) The seller, expressly or by implication, orally or in
13 writing, represents that the seller or one or more
14 designated persons will:
- 15 (i) Provide locations for the use or operation of
16 equipment, displays, vending machines, or similar devices,
17 owned, leased, controlled, or paid for by the purchaser; or
- 18 (ii) Provide outlets, accounts, or customers, including,
19 but not limited to, Internet outlets, accounts, or
20 customers, for the purchaser's goods or services; or
- 21 (iii) Buy back any or all of the goods or services that the
22 purchaser makes, produces, fabricates, grows, breeds,
23 modifies, or provides, including but not limited to
24 providing payment for such services as, for example,
25 stuffing envelopes from the purchaser's home.

26 16 C.F.R. § 437.1(c).

27 The first two elements of the Rule's inquiry are clearly met
28 here.

As to third prong, Plaintiff contends that sub-prongs (ii) and
(iii), the "outlet" and "buy back" provisions, apply to Zaken's
QuikSell program.

"Providing outlets, accounts, or customers means furnishing
the prospective purchaser with existing or potential locations,

1 outlets, accounts, or customers . . . or otherwise assisting the
2 prospective purchaser in obtaining his or her own locations,
3 outlets, accounts or customers" 16 C.F.R. § 437.1(m).

4 At the preliminary injunction stage, it was unclear from the
5 record presented whether Zaken represented to consumers that it
6 would take certain actions, or, alternatively, only that it might
7 take those actions. Now, after the completion of discovery, the
8 court is satisfied that Zaken represented that it would act. One
9 mailing, for example, claimed that Zaken's product and method would
10 yield "deals that *WILL* sell fast and *WILL* produce commission checks
11 for [consumers]!" (Ex. 11G.) Indeed, Zaken "absolutely
12 guarantee[d]" consumers' "success." (Ex. 1 at 4.) Implicit in
13 these statements is the representation that Zaken would take the
14 steps necessary for consumers to earn commissions.

15 The question remains whether those steps constitute the
16 furnishing of "customers" or "outlets" to consumers, or assistance
17 in finding customers or outlets. "When a statute does not define a
18 term, a court should construe that term in accordance with its
19 'ordinary, contemporary, common meaning.'" Cleveland v. City of
20 Los Angeles, 420 F.3d 981, 988 (9th Cir. 2005) (quoting San Jose
21 Christian College v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th
22 Cir. 2004).). Courts may look to dictionary definitions to
23 determine the "plain meaning" of a term. Id. at 1034. A customer
24 is "one that purchases a commodity or service." Merriam-Webster
25 Online Dictionary, Merriam-Webster, Inc., [http://](http://www.merriam-webster.com)
26 www.merriam-webster.com (June 2014). An outlet is "a market for a
27 commodity." Id.

28

1 Plaintiff's argument is slightly inconsistent. Plaintiff
2 argues that "Zaken was the sole customer who bought the service
3 offered by [consumers]," but also that Zaken "would provide outlets
4 for [consumers'] services - *i.e.*, third-party buyers of liquidated
5 merchandise." (Mot. at 17.) Third-party buyers of merchandise,
6 however, did not comprise the market for consumers' services.
7 Rather, as suggested by Plaintiff, Zaken itself made up the
8 entirety of that market.

9 At the preliminary injunction phase, this court noted that it
10 was unclear whether consumers could or did provide information to
11 entities other than Zaken. On summary judgment, Plaintiff asserts,
12 and Zaken does not dispute, that consumers "could only earn money
13 from Zaken." (Mot. at 16.) To the extent that Zaken's conditional
14 promise to pay consumers a portion of any realized profits
15 constituted a "purchase" of information, Zaken was consumers'
16 customer. Even putting aside that question aside, however, it
17 appears that Zaken was also the sole outlet for consumers'
18 services. There is no evidence that consumers did, or could,
19 provide "lead finding" information to anyone other than Zaken
20 itself.

21 To summarize, Zaken was the only market for consumers'
22 services. Consumers could only receive commissions if Zaken made
23 use of those services. Zaken guaranteed that consumers would
24 receive commission checks. Thus, at the very least, Zaken
25 implicitly represented to consumers that it would provide them with
26 an outlet for their services, namely, Zaken itself. Zaken's
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1 QuikSell program therefore falls within the ambit of the Business
2 Opportunity Rule.²

3 C. Scope of Relief

4 Almost the entirety of Zaken's opposition to the instant
5 motion is directed at the relief sought by Plaintiff.
6 Specifically, Zaken argues that (1) the proposed lifetime ban on
7 Tiran Zaken's involvement in marketing work-at-home business
8 opportunities is overbroad and punitive and (2) the proposed \$25
9 million judgment lacks evidentiary support, particularly with
10 respect to Tiran Zaken's scienter. (Opp. at 2.)

11 1. Injunctive Relief

12 In "proper cases," the FTC may seek a permanent injunction.
13 15 U.S.C. § 53(b). The scope of injunctive relief depends on the
14 facts of the particular case, and should be tailored to prevent
15 future violations. See F.T.C. v. John Beck Amazing Profits LLC,
16 888 F.Supp.2d 1006, 1012 (C.D. Cal. 2012). Violators of the FTC
17 act "must expect some 'fencing in.'" Sears, Roebuck and Co. v.
18 F.T.C., 676 F.2d 385, 391 (9th Cir. 1982). Relevant factors
19 include the degree of scienter, frequency of violative acts, the
20 defendant's ability to commit future violations, the degree of harm
21 consumers suffered, and the defendant's recognition of his own
22 culpability. FTC v. Commerce Planet, Inc., 878 F.Supp.2d 1048,
23 1086 (C.D. Cal. 2012).

24 A lifetime ban is appropriate here. As president of The Zaken
25 Corp., Tiran Zaken oversaw most Zaken departments, including

27 ² Having so concluded, the court need not address whether the
28 QuikSell program also constitutes a "buy back" under 16 C.F.R. §
437.1(c)(3)(iii).

1 QuikSell. (Id. at 52, 53, 56.) He approved the advertising of
2 QuikSell and reviewed all of the Zaken Corp.'s marketing materials
3 prior to their disbursement. (Zaken Dep., Pl.'s Ex. 12 at 54-55.)
4 Though it is somewhat unclear from the record when Zaken's
5 misrepresentations began, Plaintiff has submitted a plethora of
6 examples of misrepresentations made in direct mailings,
7 advertisements, and product materials. Over a ten year span, Zaken
8 sold the QuikSell program to over 110,000 consumers. Of those, the
9 evidence submitted indicates that over 99.8% never earned any
10 commissions whatsoever. Fewer than 9,000 consumers received
11 refunds of the \$148 purchase price. Furthermore, many consumers
12 were taken in by Zaken's exhortations to "invest" additional money,
13 sometimes thousands of dollars, in additional QuikSell "tools."
14 (E.g., Ex. 14 at 105:21-23.)

15 Nor does Zaken appear contrite about his decade of deceptive
16 conduct. To the contrary, Zaken firmly stands behind the marketing
17 tactics of his "legitimate" business opportunity, and has insisted
18 that at no time did he ever believe consumers were misled by
19 QuikSell's advertisements. (Zaken Dep., Pl.'s Ex. 12 at 65:21-22.)
20 The risk of future misconduct is high. Though Zaken claims that he
21 "is out of the distressed merchandise business for good," (Zaken
22 Decl. 2 ¶¶ 2, 4), he appears to intend to, if permitted, continue
23 marketing work-at-home business opportunities. Here, his
24 misrepresentations had less to do with "the distressed merchandise
25 business" than with the illusory benefits of a work-at-home
26 business "opportunity" of precisely the type Zaken intends to keep
27 marketing. Zaken's proposed alternative injunction, which would
28 replace the lifetime ban with essentially a "follow the law"

1 injunction forbidding him from violating the Business Opportunity
2 Rule, would be wholly inadequate to protect consumers in the
3 future.³

4 2. Restitution

5 i. Individual Liability

6 Courts may award equitable monetary relief in the form of
7 restitution or disgorgement. Commerce Planet, 878 F.Supp.2d at
8 1088-89. Tiran Zaken may only be held individually liable,
9 however, "if (1) he participated directly in the deceptive acts or
10 had the authority to control them and (2) he had knowledge of the
11 misrepresentations, was recklessly indifferent to the truth or
12 falsity of the misrepresentation, or was aware of a high
13 probability of fraud along with an intentional avoidance of the
14 truth." Stefanchik, 559 F.3d at 931.

15 Tiran Zaken does not dispute that, as president of the Zaken
16 Corp., he had authority to control the misrepresentations about the
17 QuikSell program. (Opp. at 17.) Zaken contends, however, that he
18 did not intentionally or recklessly deceive consumers. To support
19 his contention, Zaken cites testimonials from "high earner"
20 QuikSell consumers, Mr. Zaken's own success "using the principles
21 of the QuikSell program," and substantial earnings consumers made
22 "on their own after learning the QuickSell program." (Id.)

23 As an initial matter, Zaken points to no evidence to support
24 the assertion that some people went on to make money after learning
25

26 ³ Nor is the court persuaded that a lifetime ban would
27 inordinately burden Zaken or prevent him from earning a livelihood.
28 As Zaken himself states, he earned between \$100,000 and \$200,000
per year in the distressed merchandise industry before ever
entering the work-at-home marketing industry.

1 QuikSell. Second, Zaken's own personal experience making \$100,000
2 to \$200,000 in the distressed merchandise industry has little
3 bearing on the experiences of over 110,000 consumers, whose paltry
4 earnings figures were readily available to Zaken. Lastly, Zaken's
5 supposed reliance on testimonials from "high earners" appears to be
6 based on one of his own advertisements, which includes 14 short
7 quotes from supposed QuikSell associates. (Ex 11 at 42.) While
8 the quotes are attributed to named individuals, all are unsworn,
9 and some are as short as four words. Even crediting each of these
10 14 testimonials as true, Zaken's reliance on them, in the face of
11 dozens of consumer complaints and the fact that the overwhelming
12 majority of QuikSell associates never saw a dime from the program,
13 constitutes intentional avoidance of the truth, at best.

14 iii. Amount of Restitution

15 "Consumer loss is calculated by 'the amount of money paid by
16 the consumers, less any refunds made.'" Commerce Planet, 878
17 F.Supp.2d. at 1088. The FTC bears the burden of providing a
18 reasonable estimate of the appropriate monetary relief. Id. The
19 burden then shifts to Defendant to show that the FTC's calculations
20 are inaccurate. Id.

21 The FTC calculates consumer losses of \$25,666,437. Zaken sold
22 Quiksell to 113,596 consumers at \$148 per kit, and issued 8,623
23 refunds, for a net total of \$15,536,004. Zaken sold another
24 \$10,130,433 of upsell tools, for a grand total of \$25,666,437.

25 Zaken first argues that the FTC's figure is not a reasonable
26 approximation because it is based on all of Zaken's sales between
27 2003 and 2013, even though the record only contains evidence of
28 misrepresentations from 2010-2013. The FTC replies that Zaken

1 represented that it produced all documents relating to its
2 marketing of QuikSell, from 2003 to the present. Tiran Zaken
3 testified at his deposition that he could not identify the year in
4 which advertisements were used because, "I mean, like, they're all
5 similar." (Ex. 36.) The FTC's estimate is a reasonable
6 approximation of consumers' losses resulting from Zaken's
7 misrepresentations.

8 Zaken next posits that amounts paid to consumers as
9 commissions, and chargebacks, should be deducted from the FTC's
10 estimate. Zaken points to no evidence that any chargebacks
11 occurred, let alone the amount of such chargebacks, and has thus
12 failed to carry its burden with respect to those amounts. Zaken
13 has, however, provided evidence that it paid out \$259,656 in
14 commissions. (Ex. 29A.) Though commissions and refunds are
15 different in nature, consumer losses were mitigated, to some small
16 degree, by these payments. Accordingly, a reduction in the amount
17 of commissions paid is warranted. The court therefore awards
18 restitution of \$25,406,781 for consumer redress.⁴

19 **IV. Conclusion**

20 For the reasons stated above, Plaintiff's Motion for Summary
21 Judgment is GRANTED, on all counts. The court awards restitution
22 of \$25,406,781 and finds injunctive relief warranted in the form
23 proposed by Plaintiff. Plaintiff is ordered to file a proposed
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26 ⁴ Defendants' opposition focuses almost entirely on the
27 argument that the FTC has not met its initial burden to reasonably
28 approximate the appropriate amount of monetary relief. (Opp. at
21-23.) The commissions figure, discussed above, is the only
quantified inaccuracy identified by Defendants.

1 judgment and injunction in accordance with this Order within ten
2 days of the issuance of this Order.

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5 IT IS SO ORDERED.

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8 Dated: September 18, 2014

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DEAN D. PREGERSON

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United States District Judge

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