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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

FEDERAL TRADE COMMISSION, Plaintiff, v. INC21.com CORPORATION, et. al., Defendants.	Case No. CV 10-00022 WHA **FTC'S MOTION FOR SUMMARY JUDGMENT** Hearing Date: July 29, 2010 Hearing Time: 8:00 a.m.

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The Federal Trade Commission ("FTC" or "Commission") hereby moves this Court for summary judgment against Defendants Inc21.com Corp., Jumpage Solutions, Inc., GST U.S.A., Inc., Roy Lin, and John Lin for violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and the Telemarketing Sales Rule, 16 C.F.R. Part 310. The Commission also moves for summary judgment against Relief Defendant Sheng Lin to disgorge the benefits he received from Defendants' unlawful practices, and to which he had no legal or equitable title.

The uncontroverted evidence establishes the material facts, about which there is no genuine issue, to support a finding that Defendants are liable as a matter of law. In particular, an expert scientific survey of Defendants' so-called "customers" provides irrefutable evidence that virtually all of Defendants' billing was unauthorized. The FTC is entitled to summary judgment against all Defendants, including an award of monetary relief for injured consumers and a permanent injunction to prevent future violations of the law.

I. STATEMENT OF MATERIAL FACTS

A. The Defendants

Defendant **Roy Lin** incorporated Defendant **Inc21.com Corporation ("Inc21")** in 1999 to provide web design services to local businesses in northern California.[1] The web design business lost money, and in 2003, Roy Lin converted Inc21 into a re-seller of long distance services, a business reliant on LEC billing.[2] That same year Defendant **John Lin** joined his brother to run Inc21.[3] In 2004, the Lins shifted from providing long distance to selling Internet services, but maintained their LEC billing platform.[4] Inc21 has operated under various d/b/a's including Inc21.com, GlobalYP, MetroYP, NetOpus, Jumpage Solutions, and GoFaxer.[5] Roy Lin is the President, Secretary, CEO, CFO, and a director of Inc21, and John Lin is a director of

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[1] Wolfe, Att. A (Roy Lin Depo. p.71:7-72:4; 74:23-77:17).

[2] Id., Att. A (Roy Lin Depo. p.33:12-36:15; 43:3-51:12; 53:8-56:11; 77:19-78:16).

[3] Id., Att. A (Roy Lin Depo. p.59:12-60:4).

[4] Id., Att. A (Roy Lin Depo. p.82:15-83:9).

[5] Id., Att. A (Roy Lin Depo. p.14-15); Att. B (John Lin Depo. p.65:22-66:2; 68:18-69:8); Att. C (Walch Depo. p.17:13-24; 27:23-28:21).

Inc21.[6] Together, Roy and John Lin (**"Individual Defendants"**) manage and have authority over all aspects of the business.[7]

Roy Lin incorporated Defendant **GST U.S.A., Inc. ("GST USA")** in California in 1995 to serve as a corporate entity for his parents' various endeavors.[8] He admitted to later using the company as part of his own ventures, including his LEC billing operation.[9] GST USA has a bank account that received funds associated with Defendants' business practices.[10]

Defendant **Jumpage Solutions, Inc. ("Jumpage")** is a California corporation. John Lin is the CEO, CFO, and director of Jumpage and owns its shares.[11] Jumpage has a bank account that received funds associated with Defendants' business practices.[12]

Relief Defendant Sheng Lin is Roy and John Lin's father. He speaks no English and had no involvement with Inc21 or its LEC billing business.[13] Roy Lin nonetheless named him President of GoFaxer, and Sheng Lin drew a salary and periodic bonuses from Inc21 of at least $434,000.[14]

B. Defendants' Business Operation

Defendants ran a classic cramming operation that fleeced thousands of unsuspecting businesses, public entities, non-profits, and individuals by placing unauthorized (and often unnoticed) charges on their phone bills. Beginning in 2004, Defendants sold Internet services such as website hosting, online directory listings, search engine advertising, and Internet-based

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[6] Id., Att. B (John Lin Depo. p.42:14-43:1).

[7] Id., Att. A (Roy Lin Depo. p.60:5-22; 63:14-64:16); Att. B (John Lin Depo. p.93:27-96:15); Att. C (Walch Depo. p.11:4-13:11); Att. E (Yakubova Depo. p.10:25-12:8); Att. D (Tran Depo. p.12:8-25).

[8] Id., Att. A (Roy Lin Depo. p.37:1-42:16).

[9] Id., Att. A (Roy Lin Depo. p.42:23-45:15).

[10] Id., Att. A (Walch Depo. p.28:5-21); Sihota, ¶11.

[11] Id., Att. B (John Lin Depo. p.91:11-15).

[12] Id., Att. C (Walch Depo. p.28:17-18); Sihota, ¶12.

[13] Id., Att. B (John Lin Depo. p.108:18-111:8); Att. A (Roy Lin Depo. p.110:20-111:3).

[14] Id., Att. A (Roy Lin Depo. p.286:24-287:24); Att. K (Sheng Lin Depo. p.12:18-14:12); Att. C (Walch Depo. p.113:11-114:8; 115:8-11; 116:14-16; 118:24-120:5); Att. DD p.6.

faxing – packaged in various combinations and sold as five different "products."[15] The three products comprising the vast majority of Defendants' sales – Global YP, Metro YP, and NetOpus – were identical and featured a website template as well as a listing in an online business directory, for which Defendants charged between $29.99 and 34.95 monthly.[16] Defendants' own employees admitted that these products had little functionality and were plagued with defects.[17]

As with most cramming schemes, however, the products served as little more than window dressing – maintaining the illusion that Inc21's customers received some benefit in exchange for the unauthorized monthly charges that Defendants placed on their phone bills. Every aspect of the operation exposes Defendants' fraud: (1) their deceptive marketing campaigns; (2) their failure to obtain authorization for billing; and (3) their lack of responsiveness to complaints and refund requests.

1. Deceptive Marketing and the Pretense of Obtaining Authorizations

To sell their illusory products, Defendants resorted to a marketing strategy guaranteed to generate sales: deception. Defendants marketed via telephone and the Internet and obtained "billing authorization" only by pretending not to be selling anything at all.

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[15] GlobalYP, MetroYP, NetOpus, Jumpage, and GoFaxer. Wolfe, Att. H (Nelson Dep. p.22:6-23:14). GlobalYP alone billed an estimated 20,000 customers per month. Id., Att. D (Tran Dep. p.16:20-18:10).

[16] Id., Att. A (Roy Lin Dep. p.124:7-24; 129:11-24; 138:14-139:25). Defendants charged $39.99 monthly for Jumpage, its search engine advertising product, and $12.95 monthly for GoFaxer, its online faxing product. Id., Att. A (Roy Lin Depo. p.128:13-129:10; 140:1-10; 142:1-13).

[17] For example, the website service that Inc21 hawked as a marketing tool for small businesses, offered sparsely populated, rudimentary sites that Inc21 neither customized nor enhanced, requiring their customers to do most of the real work. Id., Att. H (Nelson Depo. p.23:15-24:2; 32:24-34:5; 35:11-39:21); Att. D (Tran Depo. p.13:13-14:14); Att. A (Roy Lin Depo. p.117:8-118:7; 119:7-16). In many cases, even the basic customer information Inc21 plugged into these templates was incorrect, and the graphics – selected at random – did not match the customers' products or services. Id., Att. H (Nelson Depo. p.38:1-39:10). Additionally, the directory listing feature that Inc21 described as similar to Yellow Pages could be accessed only on Defendants' obscure home websites, essentially nullifying its utility, and the search function had technical bugs and often produced faulty results, thereby further diminishing the value of a virtually worthless product. Id., Att. H (Nelson Depo. p.57:1-18).

a. Telemarketing

Inc21 generated most of its sales by employing overseas call centers to conduct telemarketing campaigns on its behalf.[18] Defendants' telemarketing scripts portray their offer as a "free" trial that required customers to cancel within 15 days to avoid recurring charges.[19] To the extent the call centers followed them, the scripts themselves instruct the call centers to mislead consumers into believing the call is to update a Yellow Pages listing,[20] but the reality of the telemarketing operation was far worse than even the questionable scripts.[21]

Defendants admit that they did not require or maintain recordings of the sales calls.[22] Defendants only required recordings of the "third party verification" ("TPV" or "verification") portion that came at the tail end of the call purportedly to confirm acceptance of the key terms of Inc21's offer.[23] The verification process followed a pre-determined script that required the consumer to answer "yes" or "no" to a series of questions.[24] For purposes of validating the sale,

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[18] Wolfe, Att. D (Tran Depo. p.18:11-15; 20:17-21:9); Att. E (Yakubova Depo. p.19:17-20:13).

[19] Id., Att. D (Tran Depo. p.24:24-26:12). Defendants purportedly sent "welcome letters" to new customers regarding the 15-day free trial. Often, letters came back "undeliverable," but the 15-day clock nonetheless started ticking from the date of the telemarketing call. Id., Att. D (Tran Depo. p.37:17-39:19); Att. E (Yakubova Depo. p.39:6-40:8) (estimating as many as 100-200 returned letters per week). A customer whose welcome letter was returned as undeliverable was not refunded if the customer did not complain. Id., Att. D (Tran Depo. p.83:4-9).

[20] "Hi. May I speak with the owner or manager to verify their Business Yellow Page listings?" "Hello, my name is _____ and I need to speak with someone who can verify some business information for the Metro Yellow Pages listing." Gross (DE 35-9, 35-10), Att. A at 457, 587, 619. Importantly, Roy Lin was warned by a billing aggregator in 2005 that this was a misrepresentation. Wolfe, Att. A (Roy Lin Depo. p. 250:2 - 255:14); Att. BB p.5 (Exh 21).

[21] Id., Att. G (Du Depo. p.61:25-63:25) (if call centers felt they had a more effective way of selling then Roy would approve it, but the scripts were not always revised to reflect that).

[22] Id., Att. A (Roy Lin Depo. p.55:16-25; 235:22-23; 244:5-249:3).

[23] As reflected by its moniker, someone other than the telemarketer was meant to conduct the TPV portion of the call, but in Inc21's case, the call centers themselves often "verified" their own sales. Id., Att. D (Tran Depo. p.27:3-28:15); Att. H (Nelson Depo. p.64:6-22) ("You've got a company that's doing the sales and verifying the sales are good which, in my mind, just doesn't work. It's not a third party verification. It's a same party verification.").

[24] Id., Att. D (Tran Depo. p.26:13-27:2); Att. E (Yakubova Depo. p.26:5-27:3; 29:2-8; 49:5-11).

Inc21 considered the recording of a "yes" to each question sufficient confirmation of the person's authorization.[25]

Defendants' contractors testify that the TPV recordings themselves were doctored. Indeed, Defendants hired various third parties to perform pass/fail reviews of the recordings.[26] Since 2007, Quality Calls, Inc ("QCI") conducted these reviews for Inc21 and provided daily reports of the results to Defendants. The review process involved little more than listening to recordings through headphones and making pass/fail determinations in accordance with pre-set criteria.[27] Inc21 gave QCI a specified list of reasons TPVs could fail: incomplete recording, interruption, disturbance, no TPV recording, not authorized, poor audio quality, or misleading; and QCI did not provide its employees with specialized training or equipment to aid the review process.[28] Apparently no such training was necessary because QCI repeatedly warned Inc21 that call centers were splicing TPV tapes.[29] The daily reports to Inc21 indicated manipulated TPV recordings, forced sales, and "major infractions" like lying to the customers about material aspects of the offer.[30] In fact, Inc21 received at least one daily report showing that 100% of its TPVs had failed.[31]

Additionally, Inc21 itself admitted that the TPV recordings were falsified. In this very Court, Inc21 sued eleven of its call centers in the Philippines, alleging that in 2007 they had:

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[25] Cf. id., Att. E (Yakubova Depo. p.49:5-11); Att. L (Lutich Depo. p.96:12-24).

[26] Id., Att. D (Tran Depo. p.28:16-29:13). Notably, neither the verification process nor the pass/fail review establishes that the customer being billed is the one on the phone and authorized to accept charges. Id., Att. D (Tran Depo. p.84:20-24); see also, Frederickson (DE 36-30). QCI's President testified that it is simply not possible to use a TPV recording to authenticate the identity of the persons on the recording. Wolfe, Att. L (Lutich Depo. p.95:16-96:1).

[27] Id., Att. L (Lutich Depo. p.90:3-91:24).

[28] Id., Att. L (Lutich Depo. p.78:4-81:19;-79:6; 93:15-96:11; 101:23-102:17; 185:7-9); Att. EE p.1-2 (FTC Exh 76,77).

[29] Id., Att. L (Lutich Depo. p.76:23-77:15); Att. J (Adams Depo. p.40:4-45:17).

[30] Id., Att. L (Lutich Depo. p.104:22-111:7; 169:12-177:7); Att. EE pp.1, 8-10 (FTC Exhs 76, 79, 80, 87). The reports evidenced in FTC Exhs 76, 79, and 80 show TPV doctoring in 2008 and 2009, dates after the Philippine call centers engaged in the same behavior.

[31] Id., Att. L (Lutich Depo. p.99:24-102:12).

> employed fraudulent techniques, including, but not limited to using digitized and recorded responses to the questions posed by the TPV. Inc21 learned that, in most instances, no customer was actually on the telephone line during the TPV process. Instead, the call center would connect to the TPV and simply play the digitized or recorded responses in such a way that the TPV review would classify the call as a valid sale.[32]

Notwithstanding the lawsuit, Defendants admitted that they continued to reap the benefits of LEC billing those who had been "signed up" by these call centers.[33] John Lin also admitted that, in late 2008, Inc21 was still blaming these call centers for its inability to meet Verizon's cramming thresholds,[34] and Inc21's customer service manager testified that her department continued to receive complaints associated with those call centers well into 2009.[35]

Because of the admission that recordings were doctored and because none of Inc21's employees listened to live telemarketing calls,[36] consumer testimony is the only evidence of Defendants' telemarketing and "verification" tactics. Victims – whom Defendants did not depose – describe how Defendants' telemarketers misled them into "authorizing" charges. Rather than explaining the services and the true terms of the sales offer, the telemarketers often lied to consumers about the purpose of the call and whether and how charges would be incurred.[37] Consumers who expressly turned down the "offer" often discovered later that they had been billed anyway.[38]

Far from ensuring the reliability of authorizations, the real purpose of the recorded "verifications" was to shield Defendants from later allegations of unauthorized billing. Defendants often used falsified TPV recordings as a basis for denying refund requests or fending

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[32] Inc21.com Corp., d/b/a Global YP.net v. Flora, Case No. C 08-02967 WHA (N.D. Cal.), DE 9 at ¶ 29.

[33] John Lin admitted that Inc21 did not refund all customers signed up by those call centers, waiting instead until customers complained. Wolfe, Att. B (John Lin Depo. p.174:25-177:6).

[34] Id., Att. B (John Lin Depo. p.204:11-205:12); Att. Z (FTC Exh 12, 13).

[35] Id., Att. D (Tran Depo. p.153:1-154:2).

[36] Id., Att. D (Tran Depo. p.25:16-18); Att. E (Yakubova Depo. p.60:4-10).

[37] See Cronk (DE 36-26), Fogel (36-28), Gerber (36-31), Gold (36-33), Groppe (36-34), Koval (36-39), Machen (36-41), Sommerfeld (36-47), Weber (36-51).

[38] See Bryan (DE 36-23), Cronk (36-26), Fogel (36-28), Rumphol (36-45), Winn (36-52), Pesoat (52-1).

off law enforcement investigations.[39] In fact, all the consumer declarants who listened to the TPVs relied upon by Defendants as proof of their authorization testify that the recordings did not accurately reflect their conversations and were likely falsified.[40] **Barbara Winn**, whose experience is typical, answered a call in April 2008 that she was led to believe related to the Yellow Pages.[41] She provided the caller her address and telephone number, but ended the call when she was asked to state her date of birth, a question she found suspicious.[42] The next month she discovered a charge for Jumpage Solutions on her phone bill and called to dispute the charge.[43] Defendants insisted she had agreed to purchase their service and played her the TPV recording.[44] Ms. Winn describes the recording as obviously spliced and manipulated because it had her saying "yes" to questions she had never been asked, and the response to the question about her birthday was garbled and inaudible.[45]

b. Internet Marketing

Although the bulk of Inc21's business relied on telemarketing, in 2008, Inc21 began selling its GoFaxer product online using an approach known as "co-registration marketing."[46] Roy Lin told Inc21 employees that he expected the Internet marketing campaign to produce 2000

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[39] Witt (DE 36-53), Frederickson (36-30); see also Wolfe, Att. D (Tran Depo. p.59:4-13; 83:13-86:21; 89:19-91:4); Att. FF p.1 (FTC Exh. 96).

[40] Gold (DE 36-33), Hartig (36-36), Koval (36-39), Morris-Meyer (36-43), Smerud (36-46), Weber (36-51), Winn (36-52), Witt (36-53).

[41] Winn (DE 36-52).

[42] Id.

[43] Id.

[44] Id.

[45] Id.

[46] Co-registration is often initiated by presenting consumers who are surfing the Internet with a "pop-up" window that promises something "free," like a television. Once lured into the trap, consumers find that they must sign up for countless other offers and subscriptions before the television materializes, if ever. An offer for GoFaxer was one of the many that bombarded consumers while navigating this type of online maze. Id., Att. A (Roy Lin Depo. p.172:1-178:13); Att. H (Nelson Depo. p.26:25-28:8).

sales of GoFaxer per day,[47] and despite at least one Inc21 employee's vocal disbelief about the legitimacy of such sales, Defendants pressed forward and quickly racked up thousands of GoFaxer "customers."[48]

Defendants' Internet sales campaign for GoFaxer was no less deceptive than its telemarketing campaign, resulting in a raft of unauthorized billing and customer cancellations. In 2009, Inc21 filed a lawsuit admitting the fraud.[49] Specifically, Inc21 alleged that approximately 70% of the 78,071 GoFaxer "customers" had complained of unauthorized charges, and admitted that less than 1% of these "customers" actually used the GoFaxer service.[50]

2. Unauthorized Billing

The evidence establishes that Defendants charged virtually all their "customers" without authorization. An expert survey of these customers as well as direct testimony from numerous victims provide uncontroverted, conclusive evidence of Defendants' unauthorized billing scam.

a. The Gateway: LEC Billing

Defendants charged for their Internet services via LEC billing,[51] a mainstay of Inc21's business throughout its many years of operation.[52] In simple terms, LEC billing works as follows: in exchange for fees, LECs place charges on behalf of pre-approved third party vendors

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[47] Id., Att. H (Nelson Depo. p.66:3-19).

[48] Id., Att. H (Nelson Depo. p.66:20-67:22).

[49] Inc21.com v. Delicate Data, LLC, Case No. C 09-1824 WHA (N.D. Cal.); see also Wolfe, Att. B (John Lin Depo. p.199:1-200:22); Att. AA p.11 (FTC Exh 17).

[50] Id.; see also Wolfe, Att. J (Adams Depo. p.47:9-21).

[51] As a result of the AT&T break-up in the 1980's, telephone services fell to "local exchange carriers" or "LECs." See United States v. American Tel. & Telegraph Co., 552 F.Supp. 131, 227 (D.D.C. 1982); 47 C.F.R. § 702, et. seq. The FCC's detariffing of the LECs' billing and collection services gave rise to a peculiar form of commerce founded upon third party exploitation of this uncommon payment method for things other than phone usage. See In re: Matter of Detariffing Billing & Collection, 102 F.C.C.2d 1150 (1986).

[52] Tellingly, John Lin described Defendants as being part of the "LEC billing industry," not the Internet services industry. Wolfe, Att. B (John Lin Depo. p.65:22-66:7).

– like Inc21 – onto their customers' telephone bills.[53] Intermediaries known as "billing aggregators" or clearinghouses contract with vendors and facilitate the formatting and submission of charges to LECs for placement on their customers' phone bills.[54] Customers pay the LECs, and the LECs pay the billing aggregators less their fees and reserves. The aggregators then pay the vendors, less their own fees and reserves.[55] Although the vendors' charges appear on a separate page of the phone bill, the "total" includes these charges.[56] Therefore, paying the bill in full means paying the third party vendors, wittingly or not. As the Court stated in its Preliminary Injunction, customers pay their phone bills often unaware of the charges buried inside.[57] Indeed, the success of cramming operations like this one depends on billed customers' misconceptions about what they are paying for and who ultimately pockets their money.

b. Expert Survey Definitively Shows Virtually No "Customers" Agreed to Services or Billing

A scientific survey of Defendants' entire database of "customers" establishes conclusively that virtually none agreed to purchase Defendants' services or knew of the LEC billing. Dr. Howard Marylander, an authority on survey research with over 45 years of experience, supervised a methodologically rigorous survey of customers spanning all five products.

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[53] See Press Release, Federal Communications Commission, FCC and Industry Announce Best Practices Guidelines to Protect Consumers from Cramming, 1998 WL 406058 (July 22, 1998).

[54] Federal Communications Commission, Truth in Billing First Report and Order, 14 F.C.C.R. 7492, 7510 n.73, 1999 WL 292765, *10 n.73 (May 11, 1999). Billing aggregators must apply for, and obtain, a four-digit Carrier Identification Code ("CIC"), enabling them to submit charges to LECs. Each vendor, in turn, is identified by a unique code ("SubCIC") for purposes of properly assigning that vendor's charges to particular customers' bills. Wolfe, Att. A (Roy Lin Depo. p.326:24-328:23). At various times, Defendants worked with the following billing aggregators: Integretel, PaymentOne, The Billing Resource, BSG Clearing Solutions, and ILD. Id., Att. B (John Lin Depo. p.86:2-87:4; 160:23-161:12).

[55] Wolfe, Att. F (Lavino Depo., p.16:3-17:8).

[56] See, e.g., Hoferer (DE 7-3) p.1-2 (bill pages 1, 28 of 29); Gerber (DE 36-31) p.2 (bill page 5 of 6); Hammond (DE 36-35) p.7 (bill page 5 of 5).

[57] See DE 57 at 1-3; see also Comment, Chief Legal Officers of 24 States and American Samoa, http://fjallfoss.fcc.gov/ecfs2/comment/view?id=6015292806, p.9 (Oct. 28, 2009); NASUCA Comment, http://fjallfoss.fcc.gov/ecfs2/comment/view?id=6015394755, p.42-43 (Oct 28, 2009)("consumers often do not notice the unauthorized charges due to the length of the LEC bills").

The survey had three objectives: (1) to determine whether customers had authorized Defendants to provide Internet services; (2) to determine whether customers had received Internet services from Defendants; and (3) to determine whether customers were aware that charges for Defendants' Internet services had appeared on their phone bills. To this end, Mr. Marylander drafted a telephone survey questionnaire that was administered by interviewers at California Survey Research Services ("CSRS"). CSRS interviewed 1087 randomly-selected Inc21 customers, allowing Mr. Marylander to analyze the results and draw conclusions at a 95% confidence level.

The astounding results are consistent across all the products.[58] Of the 1087 respondents, 97% stated that they had not agreed to purchase the product for which Defendants had billed them, and 3% were unsure.[59] Similarly, 96% of respondents indicated that they had not received any services from Defendants, while 4% were unsure.[60] Finally, only 5% of respondents were even aware that they had been charged for Defendants' Internet services.[61] Consequently, Mr. Marylander concludes:

- "Virtually none of the Defendants' alleged customers had agreed to purchase services from them."
- "The vast majority of alleged customers were unaware that they were being charged for services on their phone bill by the Defendants."[62]

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[58] The survey was tailored so that each respondent was asked questions about the specific product – Global YP, Metro YP, NetOpus, Jumpage Solutions, or GoFaxer – for which they had been billed, as indicated by Defendants' records. Marylander, ¶23; Watt, ¶¶ 10-12.

[59] Marylander, ¶31.

[60] Id., ¶28.

[61] Id.

[62] Id., ¶35. The results are consistent with those found by the Court in its survey conducted at the Preliminary Injunction stage of this matter. See Memorandum Opinion and Findings in Support of Preliminary Injunction, DE 57 p.7 ("only 27 customers – or 0.25% of Inc21's customer base – returned a response indicating that they expressly authorized Inc21's charges").

The survey results thus show that Defendants have few, if any, true "customers," but instead, tens of thousands of victims. Defendants have no evidence refuting the survey's conclusive results.

c. Testimony of Defendants' "Customers" Corroborates Unauthorized Billing

The survey evidence is corroborated by many of Defendants "customers" who testify that they neither agreed to purchase Defendants' services nor authorized charges for those services. The FTC filed 36 signed consumer declarations in support of its application for a preliminary injunction. Shortly thereafter, the FTC received an additional nine declarations consistent in tone and substance with those originally presented to the Court.[63] Defendants failed to depose any of these declarants, leaving unchallenged the testimony from all 45, who testify that they had been subject to Defendants' unauthorized billing. Many of the declarations expose the flagrancy of Defendants' scam, including their billing of entities with no use for Inc21's services[64] and their reliance on TPVs from individuals who were either non-existent or without authority to incur charges.[65]

For example, **Diane Haney**, who works for a *non-profit* organization, received a call in early 2008 asking her to "verify contact information." Not long after that call, Ms. Haney discovered that the phone bill included a $39.95 charge for Jumpage Solutions, Defendants'

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[63] Although not received in time for the preliminary injunction, these declarations were disclosed to defense counsel consistent with the date provided in the Case Management Order for timely Rule 26 disclosures. Wolfe, ¶ 9. Ballard, Haney, Henningsen, Molina, Stokley, Strickland, Van Diest, Webster, West (declarations filed herewith).

[64] Ballard, Haney, Urso (DE 36-50), Weber (36-51). John Lin told this Court that Inc21 supposedly "filters out" schools, banks and franchises from its telemarketing lead lists. DE 18-4, ¶ 20. Nonetheless, even as of the date of that statement to the Court, Inc21 counted among its customers McDonald's, 7-Eleven, Starbucks, Enterprise Rent-a-Car, Ralph's grocery stores, Blockbuster Video, Wells Fargo Bank, as well as numerous public schools. Wolfe, Att. B (John Lin Depo. p.130:4-138-23); Att. X (FTC Exh. 4).

[65] Abbate (DE 36-19), Cillian (36-25), Davis (36-27), Groppe (36-34), Knight (36-38), Morris-Meyer (36-43), Sommerfeld (36-47), Urso (36-50), Weber (36-51).

website advertising product. Ms. Haney's non-profit group does not even have a website and never authorized the service or phone bill charges.[66]

Similarly, **Rhonda Cillian** called Defendants in August 2006 after receiving a mailing indicating that her business, Biopro, had supposedly signed up for Global YP. The Global YP representative informed her that the service had been authorized by someone at Biopro named "Onye Dea." Biopro has never employed anyone by that name and never authorized the service or charges from Global YP.[67]

3. Hiding From Complaints and Denying Refund Requests

"Customers" who discovered the fraud (and not all of them did) often attempted to lodge complaints, sometimes directly with Defendants and sometimes through state law enforcement authorities or the Better Business Bureau ("BBB"). Inc21's customer service manager estimated that the company fielded a weekly average of 90 consumer complaints alleging unauthorized billing.[68] Notably, this figure only captures the complaints that Defendants *chose to hear*. Defendants often ignored complaints, as one Inc21 employee learned firsthand from John Lin, who supervised Inc21's customer service operation. When this employee first came to Inc21's office, he noticed that the phones on employees' desks were ringing continuously but going unanswered.[69] When he asked why this was, John Lin responded with a laugh, "oh, they're just customers that need assistance. We never answer those phones."[70] Consumers' experiences bear out the truth of John Lin's remark. Twenty victims testify that they either could not reach Defendants, or reached Defendants but were still unable to cancel or obtain refunds.[71]

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[66] Haney.

[67] Cillian (DE 36-25).

[68] Wolfe, Att. D (Tran Depo. p.91:5-20).

[69] Id., Att. H (Nelson Depo. p.74:14-75:9).

[70] Id. Defendants' employees testified that if a customer called back numerous times, made complaints to the BBB or state law enforcement, or was otherwise considered "problematic," they sometimes relented and provided the customer with a partial refund – typically only half of the amount that had been billed. Id., Att. E (Yakubova Depo. p.62:22-63:4).

[71] Abbate, Ballard, Bloom, Brown, Bryan, Buesing, Cronk, Gerber, Groppe, Hammond, (continued...)

The undisputed evidence thus reveals that no aspect of consumer interaction with Defendants was safe from crookedness and deceit. They lied to consumers during the solicitation, signed up "customers" without their knowledge, falsified TPVs, and then made it difficult, if not impossible, for the consumers who discovered their treachery to extract themselves from the LEC billing or obtain refunds.

C. Individual Defendants Perpetuated and Covered Up the Cramming Operation

Individual Defendants Roy and John Lin orchestrated Inc21's illegitimate cramming operation with full knowledge of its phoney underpinnings. Specifically, Roy and John Lin: (1) were aware of their customers' lack of interaction with the services they had supposedly purchased; (2) received cramming complaints from numerous sources that resulted in terminations by LECs; and (3) lied to LECs and state authorities, and colluded with another vendor to charge consumers who were beyond their LEC billing purview.

1. Roy and John Lin Knew that "Customers" Were Unaware of Services or Charges

Individual Defendants knew that Inc21's "customers" were not utilizing the services they had supposedly purchased and likely were unaware of the charges. Inc21 employees joked amongst themselves about the company's sub-standard products,[72] and one of them repeatedly informed Roy and John Lin of his concerns not only about the "broken" products but also about "the fact that almost none of our customers knew that they were our customers."[73] Not only were

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[71] (...continued)
Henningsen, Maklari, O'Neil, Rumphol, Smerud, Strickland, Thompson, Van Diest, Webster, West (DE 36-19 through 36-49, and new declarations filed herewith).

[72] Wolfe, Att. I (Kingery Depo. p.21:6-22:16).

[73] Id., Att. H (Nelson Depo. p.59:22-60:19). Defendants' employees could readily observe the lack of customer interaction with the website templates because the computer script that passed new customers' information to the templates contained a "bug" that prevented customers from making any changes to their websites without first contacting Inc21 for assistance. Id., Att. H (Nelson Depo. p.39:22-42:1) As discussed in fn.17, supra, without modification the templates were of little use. Nonetheless, Inc21 received only 10 to 20 requests to modify their websites over the span of nearly four years, indicating that nearly all the "customers" were unaware of having been signed up for the service. Id., Att. H (Nelson Depo. p.35:11-39:21; 41:11-42:10); (continued...)

Roy and John Lin unmoved by these concerns, they found it funny when this employee derisively described Inc21's business model as "gee, I hope we don't get caught."[74]

Additionally, Defendants deliberately set prices at levels that would go unnoticed on monthly phone bills. Roy Lin admitted that in 2004, as he was learning from those experienced in LEC billing, he had been given a document titled "Rules to LEC Billing Programs," which specifically states, "Never bill more than $29.95 per month. The average small business sees this as phone charges and does not review for 5 months."[75] Federal law enforcement found this document in his desk upon execution of search warrants at Defendants' premises last June [76]

2. Roy and John Lin Put on Notice by LEC Billing Suspensions

In addition to hearing directly from outraged consumers, the BBB, and various law enforcement authorities,[77] the Lins also received notice of cramming problems from the LECs and aggregators. At various times, Verizon, Quest, AT&T, and PaymentOne each warned or suspended Inc21 for exceeding their thresholds for unauthorized charges:

- July 2005: Verizon terminated MetroYP's LEC billing.[78]
- March 2007: AT&T required action plans for GlobalYP and NetOpus.[79]
- June 2008: Qwest terminated Jumpage's LEC billing.[80]
- November 2008: Verizon warned Jumpage about excessive unauthorized charges.[81]
- May 2009: Verizon terminated Jumpage's LEC billing.[82]

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[73] (...continued)
Att. D (Tran Depo. p.40:14-41:10; 55:23-56:12); Att. I (Kingery Depo. p.24:21-26:1).

[74] Wolfe, Att. H (Nelson Depo. p.59:22-60:22).

[75] Id., Att. A (Roy Lin Depo. p.166:23-171:23); Att. BB p.1 (FTC Exh 18).

[76] Id.

[77] Id., Att. E (Yakubova Depo. p.34:7-18)

[78] Id., Att. B (John Lin Depo. p.191:1 - 192:1).

[79] Id., Att. D (Tran Depo. p.125:4-127:11); Att. BB p.9 (FTC Exh 23).

[80] Id., Att. F (Lavino Depo. p.60:23-63:3); Att. GG p.9-10 (FTC Exhs 142, 143).

[81] Id., Att. B (John Lin Depo. p.185:20-189:22); Att. Z p.1-2 (FTC Exh 12).

[82] Id., Att. B (John Lin Depo. p.185:20-188:12); Att. Y p.2 (FTC Exh 11).

- May 2009: PaymentOne terminated GoFaxer LEC billing.[83]

3. Roy and John Lin Lied and Schemed to Maintain Access to LEC Billing

In order to protect their access to LEC billing, the Lins created a false picture of the relationship between themselves and Inc21's various d/b/a's and misled the LECs about their responsiveness to cramming complaints. Finally, they colluded with another vendor to charge consumers outside their LEC billing reach.

Individual Defendants controlled Inc21 and all the d/b/a's as one enterprise, but lied to LECs and state authorities to create the appearance that their entities were unrelated. For example, they used a false business address for NetOpus[84] and named their mother, Sherry Yu, as its President despite the fact that she had nothing to do with Defendants' business.[85] John Lin even admitted that their mother's signature had been forged on a state filing after she died.[86] Similarly, they named Sheng Lin as GoFaxer's President and used his name and signature on GoFaxer documents despite the fact that their father, like their mother, did nothing for the business and did not even speak English.[87] The Lins also admitted to making several false statements on sub-CIC applications to gain access to LEC billing for various products[88] and to lying to LECs about the steps they were taking to address cramming problems.[89]

Compounding their deceit, Roy Lin colluded with another vendor – Jeff Lavino – to bill customers in regions where Inc21's LEC billing privileges had been suspended or not yet

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[83] Wolfe, Att. B (John Lin Depo. p.197:22-200:22); Att. AA p.2, 11 (FTC Exhs 15, 17).

[84] 1152 Kamas Avenue is Roy Lin's rental property. Id., Att. B (John Lin Depo. p.105:4-23).

[85] Id., Att. A (Roy Lin Depo. p.288:17-294:14); Att. D (Tran Depo. p.125:4-127:22); Att. BB p.9 (FTC Exh 23).

[86] Id., Att. B (John Lin Depo. p.148:1-149:9); Att. Y p.1 (FTC Exh 8).

[87] Id., Att. A (Roy Lin Depo. p. 285:17-288:13; 294:15-295:5)

[88] Id., Att. A (Roy Lin Depo. p.329:4 - 345:25; p.346:20 - 362:1); Atts. S, T, U, V (Gov 4, 6-9). Roy Lin also admitted that, in 2006, he sought to "re-apply" to bill through Verizon using "a different principal" because he wanted Verizon to believe the application was from someone other than himself. Id., Att. A. (Roy Lin Depo. p.301:4-306:2); Att. BB p.11 (FTC Exh 25).

[89] Roy Lin admitted that, in a 2005 "action plan," he had misled Verizon about implementing a new verification process that would minimize cramming complaints. Id., Att. A (Roy Lin Depo. p.271:1-276:7; 281:7-283:21); Att. BB p.7-8 (FTC Exh 22).

approved.[90] Because Mr. Lavino had access to LEC billing in those regions, Roy Lin "sold" Inc21 customers to him in exchange for half the revenues realized from those customers.[91] Mr. Lavino simply LEC billed these customers through his own aggregators and wired half of the proceeds to a GST USA bank account.[92] Mr. Lavino testified at his deposition that he had no involvement with the telemarketing of Defendants' products or the provision of services to their customers and that his role was limited to billing Defendants' customers, collecting the revenue, and forwarding 50% of it to Roy Lin.[93]

D. Consumers Lost Millions to Defendants' Cramming Operation

Since 2004, Defendants' LEC billing scam has resulted in millions of dollars of consumer losses. Defendants' billing aggregators – PaymentOne, The Billing Resource, BSG, and ILD – produced documents showing total net billings of $43,824,970.35 from 2004 to January 2010.[94] Further, Roy Lin's "customer sharing" arrangement with Jeff Lavino produced at least an additional $649,712.30 in net billings.[95]

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[90] Wolfe, Att. F (Lavino Depo. p.9:2-12:1; 13:5-14:3; 15:19-16:2; 19:10-22:15; 67:5-6). Mr. Lavino is affiliated with LaRoss Partners, AJAL Partners, Best Web U.S.A., EZ Webmasters, National Connect, and Website On Demand. Each of these companies made deposits to Defendant GST U.S.A.'s bank account. Sihota, ¶11.C, and Att. B.

[91] This occurred on three occasions: (1) in 2005, after Verizon terminated MetroYP's LEC billing for excessive unauthorized charges (Wolfe, Att. F (Lavino Depo. p.22:20-24:9; 31:7-35:12); Att. GG p.1 (FTC 133)); (2) in 2008, after Qwest suspended billing for Jumpage (Id., Att. F (Lavino Depo. p.60:23-62:3); Att. GG p.9 (FTC 142)); and (3) when Defendants had yet to receive billing approval from a LEC whose customers Inc21's telemarketers had already called (Id., Att. F (Lavino Depo. p.45:22-47:6)).

[92] Id., Att. F (Lavino Depo. p.66:15-25).

[93] Id., Att. F (Lavino Depo. p.67:5-25; 70:15-71:11; 72:8-15).

[94] Id., Atts. M-Q (Declarations of TBR, PaymentOne, BSG, and Integretel bankruptcy trustee).

[95] Records indicate that Mr. Lavino funneled at least $324,856.15 to Defendants as a result of their arrangement. Sihota, Att. B. Because he billed Defendants' customers through his own sub-CICs and because the revenues were co-mingled with his own billing traffic, there is no way to confirm the total billings attributable solely to Defendants' customers. Id., Att. F (Lavino Depo. p.71:12-72:3). Therefore, the FTC conservatively calculates consumer losses at double the amount Mr. Lavino paid into the GST USA bank account, which would not include fees and reserves held back by the LECs and aggregators.

II. LAW AND ARGUMENT

A. Summary Judgment Standard

Summary judgment "should be rendered if the pleadings, discovery and disclosure materials on file, and any affidavits, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). Material facts are "those which might affect the outcome of the suit," Rivera v. Philip Morris, Inc., 395 F.3d 1142, 1146 (9th Cir. 2005), and the Court views the evidence in the light most favorable to the non-moving party. Ting v. United States, 927 F.2d 1504, 1509 (9th Cir. 1991). The FTC routinely seeks and is granted summary judgment in its cases. See, e.g., FTC v. Stefanchik, 559 F.3d 924 (9th Cir. 2009); FTC v. Medlab, 615 F. Supp. 2d 1068 (N.D. Cal. 2009).

B. FTC Entitled to Summary Judgment on All Counts

The FTC has alleged five counts of Defendants' violations of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, and the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, as well as one count for Relief Defendant's unjust enrichment traceable to those violations. The uncontroverted evidence establishes that the FTC is entitled to judgment as a matter of law on each.

1. Deceptive Billing Practices (Count I)

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). To prove deception, the FTC must show "first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material." Stefanchik, 559 F.3d at 928 (citing FTC v. Gill, 265 F.3d 944, 950 (9th Cir. 2001)); Medlab, 615 F. Supp. 2d at 1076.

First, Defendants, by placing charges on consumers' LEC bills, make express representations that these consumers owe payment for their products. Second, the representations are false and misleading because the expert survey shows conclusively that virtually no consumers agreed to purchase Defendants' products or authorized the charges. Additionally, consumers acted reasonably in paying their LEC bills even if they did not authorize particular

charges contained within. As this Court has observed, consumers often fail to detect third party charges for any number of reasons, including the lack of public awareness that such charges could be on phone bills as well as the difficulty of identifying specific line items on lengthy bills. See Preliminary Injunction, DE 57. Indeed, the inclusion of such charges on LEC bills also "capitalize[s] on the common and well-founded perception held by consumers that they must pay their telephone bills." FTC v. Verity Int'l., Ltd., 443 F.3d 48, 63 (2d Cir. 2006).

Finally, Defendants' LEC charges are material as a matter of law because false, express representations are presumed material. See FTC v. Cliffdale Assocs., 103 F.T.C. 110, 168 (1984). The representation that consumers owed payment for these charges is unquestionably false. Thus, the FTC is entitled to summary judgment on its Count I allegation that Defendants deceived consumers in violation of Section 5 of the FTC Act.

2. Unfair Billing Practices (Count II)

To prove unfairness, the FTC must show: (1) Defendants' billing practices cause, or are likely to cause, substantial injury to consumers; (2) the harm is not outweighed by any countervailing benefits to consumers or competition; and (3) the harm is not reasonably avoidable by consumers. 15 U.S.C. § 45(n); FTC v. Neovi, 604 F.3d 1150, 1155 (9th Cir. 2010). If a practice harms a large class of people, injury may be measured in the aggregate and deemed "substantial" even if the harm to each member of the affected class is small. Neovi, 604 F.3d at 1157; FTC v. J.K. Publications, Inc., 99 F. Supp. 2d 1176, 1201 (C.D.Cal. 2000).

Defendants' LEC billing conduct falls squarely within the three-part test. First, Defendants injure consumers by charging them on a monthly basis without authorization. Although any given consumer's losses may range from around $30 to a few hundreds of dollars, the aggregate harm totals more than $44 million – undoubtedly "substantial." Second, Defendants' practices amount to little more than theft (i.e., billing consumers for a product they neither authorized nor wanted), providing no countervailing benefit to consumers or competition. See J.K. Publications, 99 F. Supp. 2d at 1201 ("The second prong of the test is easily satisfied when a practice produces clear adverse consequences for consumers that are not accompanied by an increase in services or benefits. . . ."). Finally, consumers cannot reasonably avoid the harm because Defendants place

the charges on their phone bills without their knowledge or consent. Courts have consistently held that unauthorized billing, including LEC billing, satisfies the three-part test, making it an unfair practice. See FTC v. Kennedy, 574 F. Supp. 2d 714, 720-21 (S.D. Tex. 2008) (LEC billing); FTC v. The Crescent Publishing Group, Inc., 129 F. Supp. 2d 311, 322 (S.D.N.Y. 2001) (credit card billing); J.K. Publications, 99 F. Supp. 2d at 1201 (credit card billing). Because the undisputed evidence establishes Defendants' unfairness, the FTC is entitled to summary judgment on Count II of the Complaint.

3. Violations of the TSR (Counts III-V)

The FTC has alleged three distinct TSR violations: (1) failure to disclose the negative option feature of their sales offer; (2) use of preacquired account information to charge consumers without their "express informed consent"; and (3) failure to obtain "express verifiable authorization" before placing charges on consumers' telephone bills. Because the TSR exempts calls to a "business," Defendants' violative conduct is limited to their telemarketing of non-businesses.[96] Defendants' own list of "customers" includes numerous individuals, public and government entities (schools, libraries, police departments, etc.), and churches – indisputably non-businesses – bringing their telemarketing practices within the ambit of the TSR and making their violations actionable.[97] While these non-businesses do not comprise a large portion of Defendants' telemarketed customer base, the TSR applies to each instance of such telemarketing.

a. Failure to Disclose Negative Option Feature of the Offer

The TSR states that it is a deceptive telemarketing act to fail to disclose truthfully, and in a clear and conspicuous manner, all material terms of the negative option feature of an offer, including: (1) the fact that the customer will be charged unless affirmative steps are taken to avoid it; (2) the date(s) charges will be submitted for payment; and (3) the specific steps the customer must take to avoid being charged. See 16 C.F.R. § 310.3(a)(1)(vii).[98]

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[96] 16 C.F.R. § 310.6(b)(7).

[97] Defendants telemarketed to at least 524 such non-businesses. See Wolfe, Att. HH.

[98] A "negative option" is a provision in an offer or agreement under which a customer's failure (continued...)

There is no genuine issue regarding Defendants' failure to inform customers about the negative option feature of their offer during the telemarketing calls. Roger Gerber (DE 36-31), an individual consumer, and Diane Haney (filed herewith), who works for a non-profit, both testify that Defendants called them under the guise of updating contact information, making no mention of any offer or charges connected with the call. Shortly after receiving Defendants' call, both Mr. Gerber and Ms. Haney discovered unauthorized charges on their telephone bills, Mr. Gerber for NetOpus and Ms. Haney for Jumpage Solutions. Defendants thus failed to present consumers with any "offer" at all, much less the offers' "material terms." Consequently, Defendants violated the TSR, and the FTC is entitled to summary judgment on Count III of the Complaint.

b. Use of Preacquired Account Information to Charge Consumers Without Their Express Informed Consent

When a seller seeks to impose charges using "preacquired account information" after the expiration of a free trial period, the TSR requires that its telemarketers obtain the customer's express informed consent before billing. 16 C.F.R. § 310.4(a)(6)(i). For such transactions, the telemarketer must: (1) obtain from the customer at least the last four digits of the account number being charged; (2) obtain the customer's express agreement to be charged for the services and to be charged using that account; and (3) make and maintain an audio recording of the *entire* telemarketing transaction. 16 C.F.R. § 310.4(a)(6)(i) (emphasis added).

The TSR defines "preacquired account information" as "any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer." 16 C.F.R. § 310.2(w). Here, because Inc21 engages in LEC billing, the account at issue is nothing more than a person's telephone number, and is indisputably "preacquired" for every consumer on the receiving end of an Inc21 telephone call. Importantly, a telephone number only becomes "preacquired account

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[98] (...continued)
to take an affirmative step to cancel is interpreted by the seller as acceptance of the offer. 16 C.F.R. § 310.2(t). When combined with a free trial offer that converts to a paid subscription unless the consumer takes affirmative steps to stop the billing, the TSR describes the offer as a "free-to-pay conversion." 16 C.F.R. § 310.2(o).

information" when in the hands of vendors like Inc21 who have specific contractual arrangements with LECs and billing aggregators that allow them to place charges on telephone bills.[99]

By their own admission, Defendants failed to make and maintain audio recordings of the entirety of their telemarketing transactions. Defendants' list of telemarketed customers submitted to this Court in February, includes a batch labeled "No TPV Located,"[100] and among that group are two public schools and two churches. Therefore, Defendants have evidenced their own liability by admitting to telemarketing non-businesses without maintaining recordings of the transactions. Defendants have thus violated the TSR, and the FTC is entitled to judgment as a matter of law on Count IV of the Complaint.

c. Failure to Obtain Express Verifiable Authorization Before Charging Consumers' Telephone Bills

Finally, the TSR requires that telemarketers obtain "express verifiable authorization" if they intend to use payment methods other than a credit or debit card. To satisfy the express verifiable authorization requirement, an audio recording[101] of the transaction must evidence clearly the customer's authorization of payment for the services, as well as the customer's receipt of all the following information: (1) the number of charges (if more than one) to be submitted for payment; (2) the dates the charges will be submitted for payment; (3) the amount of the charges; (4) the customer's name; (5) the customer's billing information identified with sufficient specificity that the customer understands what account will be used to collect payment; (6) a telephone number

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[99] The TSR requires the telemarketer to obtain the billing information and document the transaction because consumers do not expect someone to charge an account they have not voluntarily given the caller during the course of a telemarketing call. See TSR Statement of Basis and Purpose, 68 Fed. Reg. 4580, 4616-23. "The record shows that the specific harm resulting from the use of preacquired account information is manifested in unauthorized charges. These may appear not only on consumers' credit card or checking accounts, but also on mortgage statements and *other account sources not traditionally used to pay for purchases*." Id., at 4620 (emphasis added).

[100] DE 47-3, at p.123-25. Of course, the TPV covers only the end of the call. See fn. 24, supra.

[101] Telemarketers are generally free to document authorization either by audio recording or written confirmation. However, written authorizations are insufficient for offers involving free-to-pay conversion and preacquired account information, and therefore Defendants had no option but to obtain recorded oral authorization. See 16 C.F.R. § 310.3(a)(3)(iii). Defendants of course obtained neither.

for customer inquiries that is answered during normal business hours; and (7) the date of the customer's oral authorization. 16 C.F.R. § 310.3(a)(3)(ii). Similar to failing to meet their other disclosure obligations, as evidenced by the testimony of Roger Gerber and Diane Haney discussed in Section II.B.3.a, Defendants failed to communicate any of the information required by this provision of the TSR or to obtain authorization for their charges. Additionally, the Defendants possess no "verifiable" authorizations because their TPV recordings – to the extent they would be sufficient to show that Defendants conveyed the requisite seven pieces of information – were admittedly doctored and falsified. Therefore, the FTC is entitled to judgment as a matter of law on Count V of the Complaint.

4. Disgorgement from Relief Defendant (Count VI)

Relief Defendant Sheng Lin has no legal or equitable title to the funds he received as a result of Defendants' deceptive, unfair, and abusive practices. The disgorgement of such funds is proper where "it is established that the relief defendant possesses property or profits illegally obtained and the relief defendant has no legitimate claim to them." FTC v. Think Achievement Corp., 144 F. Supp 2d 1013, 1020 (N.D. Ind. 2000); see also FTC v. Transnet Wireless Corp., 506 F. Supp 2d 1247, 1273 (S.D. Fla. 2007) (citing SEC v. Collelo, 139 F.3d 674 (9th Cir 1998)). Defendants and Relief Defendant admit that, although he performed no work for Defendants, Sheng Lin drew a substantial salary and periodic bonuses, which were derived from Defendants' illegal cramming operation. Sheng Lin has no legitimate claim to these funds as they rightfully belong to Defendants' victims. Therefore the FTC is entitled to summary judgment on Count VI of the Complaint, requiring Sheng Lin to disgorge the illegitimate benefit he received.

C. Remedy for Defendants' Violations

The FTC seeks both monetary and injunctive relief to remedy Defendants' violations and fence in their future conduct. Section 13(b) of the FTC Act provides that "in proper cases the Commission may seek and after proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). This grant of permanent injunctive power gives the Court broad equitable authority "to grant any ancillary relief necessary to accomplish complete justice," which extends to ordering

monetary judgment for restitution FTC v. H.N. Singer, Inc., 668 F.2d 1107**,** 1113 (9th Cir. 1982); FTC v. Pantron I Corp., 33 F.3d 1088, 1102 (9th Cir. 1994).

The proper measure of such recovery is the full amount that consumers paid as a result of the unlawful conduct. Gill, 265 F.3d at 958. The Commission need not prove that every consumer actually relied upon the misrepresentations to prevail. Stefanchik, 559 F.3d at 929 fn.12 (quoting FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 572 (7th Cir. 1989). "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 (9th Cir. 1993) (citing FTC v. Kitco of Nev., Inc., 612 F. Supp. 1282, 1293 (D. Minn. 1985) and FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1316 (8th Cir. 1991)); FTC v. Wilcox, 926 F. Supp. 1091, 1105 (S.D. Fla. 1995). It is sufficient to show that misrepresentations were widely disseminated and caused actual consumer injury.[102] See Figgie, 994 F.2d at 605-606; Kitco, 612 F. Supp. at 1293-94. Once the Commission satisfies its burden on these elements, "[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." FTC v. Febre, 128 F.3d 530, 535 (7th Cir. 1997). The uncontroverted evidence, including a definitive scientific survey of alleged "customers," establishes that virtually all of them were injured by the widespread unauthorized billing, entitling the FTC to a judgment in the amount of consumers' net losses. Defendants' net revenues – $44,474,682.65 – is the starting point for determining net consumer losses because this figure accounts for total billings minus refunds already paid. The net revenues are evidenced by billing records received directly from Defendants' aggregators – the entities responsible for recording billing and collections transactions on Defendants' behalf – as well as records of wire transfers from Mr. Lavino to Defendants. For purposes of summary judgment, and taking every inference in Defendants' favor, the FTC deducts $134,366.40 from the net

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[102] To the extent Defendants introduce evidence that some of their customers are legitimate, this would not create a genuine issue of fact because "the existence of some satisfied customers does not constitute a defense under the FTCA." Stefanchik, 559 F.3d at 929 n.12.

revenues figure to account for the possibility that Defendants' have some legitimate customers.[103] Therefore, $44,340,316.25 is a "reasonable approximation" of net consumer losses that allows the Court to determine the amount of monetary relief as a matter of law.

The Defendants' conduct demonstrates that permanent injunctive relief is also necessary to prevent future harm to consumers. A permanent injunction restraining conduct is justified when there is "some cognizable danger of recurring violation." Gill, 71 F. Supp. 2d at 1047 (citing United States v. W.T. Grant, 345 U.S. 629, 633, 73 S. Ct. 894, 898 (1953)). Determining the likelihood of future violations "may involve the consideration of past unlawful conduct." Id. (citing CFTC v. Co Petro Mktg. Group, Inc., 502 F. Supp. 806, 818 (C.D. Cal. 1980)). Where the past violation "has been predicated upon systematic wrongdoing, rather than isolated occurrences, a court should be more willing to enjoin future conduct." Id. Finally, an order need not be "limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. . . . [Defendants] must expect some fencing in." FTC v. Colgate-Palmolive Co., 380 U.S. 374, 395, 85 S. Ct. 1035, 1048 (1965). It is proper to fence in Defendants' conduct by: (1) banning their participation in LEC billing related activities;[104] and (2) setting strict parameters on

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[103] Responses to the Court-ordered verification survey indicated that 36 customers authorized Defendants' billing. Wolfe, Att. II (this includes the 22 customers specifically identified by the Court in the Preliminary Injunction as well as an additional 14 that sent in notifications following entry of the Preliminary Injunction). Also, an Inc21 employee's testimony indicates that up to 20 customers sought to modify their websites, and therefore may have in fact agreed to purchase Defendants' services. See fn. 73, supra. To give Defendants the maximum credit, the FTC is assuming for purposes of summary judgment that there is no overlap between these two groups of potentially legitimate customers and that all of them were billed for the maximum monthly amount ($39.99) and for the maximum total time (2004 to 2009 = 5 years). This provides Defendants with a credit of $134,366.40 (56 customers x $39.99/month x 60 months) to be subtracted from the net revenue figure of $44,474,682.65, resulting in $44,340,316.25 as a "reasonable approximation" of net consumer losses.

To the extent Defendants come forward with admissible evidence – in the form of signed declarations – showing the existence of additional legitimate customers, the reasonable approximation put forward by the FTC could be reduced by the amount of authorized billings for those particular customers. Importantly, coming forward with such admissible evidence is squarely Defendants' burden. See Febre, 128 F.3d at 535.

[104] Numerous courts have imposed bans enjoining future participation in a particular line of business. See, e.g., FTC v. Gill, 265 F.3d 944, 957-58 (9th Cir. 2001) (ban on engaging in the (continued...)

any future telemarketing. Such provisions are necessary to protect consumers in the face of Defendants' flagrantly unscrupulous conduct with respect to both LEC billing and telemarketing.

Additionally, Individual Defendants Roy and John Lin should be found personally liable. An individual is liable for a corporation's violations of the FTC Act if the Court finds that the individual participated in the violative practices or had authority to control them and had "actual knowledge of material misrepresentations, was 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." FTC v. Publ'g Clearing House, Inc., 104 F.3d 1168, 1170-71 (9th Cir. 1997). The Commission need not show intent to defraud. Id. at 1171. The extent of an individual's participation in the violative conduct alone is sufficient to establish the requisite knowledge for restitution. FTC v. Affordable Media, LLC, 179 F.3d 1228, 1235 (9th Cir. 1999). Together, Roy and John Lin orchestrated every element of Inc21's cramming operation. They also lied to LECs and state authorities about their business, and colluded with another vendor to bill consumers outside their LEC billing purview. See Section II.C. The FTC has thus more than met its burden in showing that no genuine issues of fact remain regarding Roy and John Lins' individual liability.

III. CONCLUSION

For the foregoing reasons, the FTC requests that the Court grant summary judgment and enter the concurrently filed Proposed Order for Permanent Injunction and Final Judgment.

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[104] (...continued)
credit repair business); FTC v. Holiday Enter., Inc., Civ. No. 1:06-CV-2939 (N.D. Ga. Feb. 5, 2008) (ban on involvement in franchises, and business opportunities); FTC v. Neiswonger, 494 F. Supp. 2d 1067, 1084 (E.D. Mo. 2007) (ban on marketing of business opportunities); FTC v. Int'l Prod. Design, Inc., No. 1:97-CV-01114-AVB (E.D. Va. Jul 12, 2007) (ban on participating in invention promotion services); FTC v. Credit Enhancement Serv, CV-02-2134 (E.D.N.Y. Mar. 31, 2004) (ban on marketing or selling any credit-related goods or services); FTC v.Five Star Auto Club, 97 F. Supp. 2d 502, 536 (S.D.N.Y. 2000) (ban on multi-level marketing); FTC v. Int'l Computer Concepts, Inc., No. 5:94CV1678, 1995 WL 767810, at *7 (N.D. Ohio Oct. 24, 1995) (ban on involvement in business opportunities and franchises).

Respectfully submitted,

Date: June 17, 2010

/s Sandhya P. Brown

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PROOF OF SERVICE

I am a resident of the State of Virginia and over the age of 18 years, and I am not a party to the this action. My business address is 600 Pennsylvania Avenue, N.W., Mailstop M-8102B, Washington, DC 20580. On June 17, 2010, I caused to be served FTC'S MOTION FOR SUMMARY JUDGMENT and supporting documents as indicated on:

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