JENNIFER M. BRENNAN
Cal. Bar No. 225473, jmbrennan@ftc.gov
STACY R. PROCTER
Cal. Bar No. 221078, sprocter@ftc.gov
JOHN D. JACOBS
Cal. Bar. No. 134154, jjacobs@ftc.gov
FEDERAL TRADE COMMISSION
10877 Wilshire Blvd., Suite 700
Los Angeles, CA 90024
Tel: (310) 824-4343; Fax: (310) 824-4380

EVAN ROSE
Cal Bar No. 253478, erose@ftc.gov
KENNETH H. ABBE
Cal Bar No. 172416, kabbe@ftc.gov
MATTHEW D. GOLD
NY Bar No. 2073963, mgold@ftc.gov
FEDERAL TRADE COMMISSION
901 Market St., Suite 570
San Francisco, CA 94103
Tel: (415) 848-5100; Fax: (415) 848-5184

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION, Plaintiff, v. JOHN BECK AMAZING PROFITS, LLC, et al., Defendants.	Case No. CV-09-04719-FMC (CWx) PLAINTIFF'S [REDACTED] REPLY TO DEFENDANTS' JOINT OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [Redacted pursuant to L.R. 79-5] Date: Sept. 21, 2009 Time: 10:00 a.m. Judge: Hon. Florence-Marie Cooper

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I. Introduction

The FTC has presented sufficient evidence showing it is more likely than not that the FTC will prove, by a preponderance of the evidence, that Defendants and the Inventor Defendants are liable for the allegations in the Complaint. Defendants have failed to rebut this evidence. Thus, a preliminary injunction is warranted.

II. Defendants' infomercials are deceptive (Counts 1 and 5)

A. The Court should consider the net impression of the infomercials

It is the net impression conveyed by a solicitation that determines deception. "The tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context."[1] Furthermore, "[a]dvertisements as a whole may be completely misleading although every sentence separately considered is literally true[.]"[2]

1. The net impression of the John Beck infomercials

The net impression of the John Beck infomercials is that consumers located anywhere in the United States who purchase and use the John Beck system are likely to (1) be able to purchase homes, at government tax sales in their area, "free and clear" of all mortgages and liens, for just "pennies on the dollar;" (2) earn substantial amounts of money from renting or selling homes they purchase at government tax sales; and (3) quickly and easily earn substantial amounts of money with little financial investment.[3] This message is not merely a subtle subliminal message. It is the predominant theme of the infomercials. For

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[1] *Removatron Int'l. Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989) (citing *Beneficial Corp. v. FTC,* 542 F.2d 611, 617 (3d Cir. 1976)); *see also FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (a "solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures.")

[2] *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 188-89 (1948).

[3] *See* FTC's Memorandum of Points and Authorities in Support of FTC's Application for Preliminary Injunction With Asset Freeze and Other Equitable Relief (Dkt #5) (hereinafter, "FTC Memo") at 4-6.

example:

> *MALE ANNOUNCER: Government tax foreclosure sales are coming to your area --*
> *ON SCREEN: [picture of home] Purchased for Only $553.80 With No Monthly Payments! John Beck's Free & Clear Real Estate System*
> *MALE ANNOUNCER: -- offering you the opportunity to purchase homes like these --*
> *ON SCREEN: [picture of home] Purchased for Only $317.67 With No Monthly Payments! John Beck's Free & Clear Real Estate System*
> *MALE ANNOUNCER: -- by simply paying off the back taxes.*[4]

This is just one example of the express representations and imagery that, when viewed as a whole, create the net impression alleged in the FTC's Complaint. It is readily apparent from even a quick viewing of the infomercials that Defendants represent throughout the advertisements that consumers will make substantial profits quickly and easily.

In their Opposition, Defendants make multiple unsupported assertions about what consumers' net impression of the John Beck infomercials "should" be. For example, with respect to the dozens of images of nice homes shown, Defendants state, "[r]easonable consumers understand these visual examples are aspirational, not typical." Opp'n at 7. However, these assertions are not facts; rather, they reflect what Defendants wish the net impression were in an attempt to avoid liability under the FTC Act. Nothing in the infomercials suggests that the homes pictured are "aspirational" rather than typical. Defendants further state in their Opposition that "[t]he John Beck system teaches people how to make money buying distressed or abandoned real estate via tax sales or tax liens." Opp'n at 3. However, there is no mention in the John Beck infomercials of "distressed" or

[4] PX 79 at pp. 205-06.

"abandoned" real estate. Instead, over and over again, the John Beck infomercials show beautiful homes[5] that were supposedly purchased for just a few hundred dollars.

2. The net impression of the Jeff Paul infomercials

The net impression of the Jeff Paul infomercials is that consumers who purchase the Jeff Paul system are likely to quickly and easily earn substantial amounts of money from proven, turnkey Internet businesses.[6] Again, this is more than just a subtle implication of the infomercials; it is the predominant theme. This impression is conveyed over and over again through express claims such as:

> *Well, that's what Jeff's Shortcuts to Internet Millions System is. It's a proven shortcut for quickly and easily starting your own instant Internet business that totally runs on auto pilot, making you money 24 hours a day, so you can literally jump from where you are right now financially to where you want to be.*[7]

Defendants incorrectly state in their Opposition that "[w]hile the Jeff Paul commercials state that the websites are quick and easy to set-up [sic], they indicate that you still have to work to market them." Opp'n at 12. However, there is nothing in either Jeff Paul infomercial about consumers having to "market" anything. Defendants' assertion is directly contradicted by the infomercial itself:

> *STACY: . . . And Jeff has more than 6,000 of these free instant Web site businesses to choose from that run on auto pilot, making you money 24 hours a day, even while you're sleeping.*

---

[5] The overwhelming emphasis in the John Beck infomercials is on habitable houses being readily available for pennies on the dollar. The infomercials expressly states, in every single instance, that "this nice home" or "this beautiful home" was purchased for only a few hundred dollars. *See* PX 1 and PX 79 at pp. 136-237.

[6] FTC Memo at 11-12.

[7] PX 81 at p. 401.

JEFF PAUL : That's right. The Web sites --

ON SCREEN: The Work is Done For You!

*JEFF PAUL: -- **literally do all the work for you**.*

ON SCREEN: NO Inventory!

JEFF PAUL: There's no inventory to buy or ship.

ON SCREEN: NO SELLING! NO CUSTOMER SERVICE!

JEFF PAUL: There's no selling or customer service to deal with and the Web sites automatically deposit cash into your bank account 24/7 without you doing a thing.

STACEY HAYES: So, you make money whether you're sitting at your computer or in the middle of the ocean on a deluxe cruise?

JEFF PAUL: You sure do. And you can start making that money right away.

CARMEN PALUMBO: Mike, how quickly did you start making money using Jeff Paul's shortcuts?

MIKE: Hey, using Jeff's shortcuts, within 72 hours, I'd made over $4,000.

CARMEN PALUMBO: $4,000 in just 72 hours?

MIKE: Absolutely.[8]

B. It is reasonable for consumers to believe Defendants' infomercials

Defendants' advertisements go beyond mere puffing. "'Puffing' refers generally to an expression of opinion not made as a representation of fact. A seller has some latitude in puffing his goods, but he is not authorized to misrepresent them or to assign to them benefits they do not possess. Statements made for the purpose of deceiving prospective purchasers cannot properly be characterized as

[8] PX 81 at pp. 407-08 (emphasis added).

mere puffing."[9]

In their infomercials, Defendants make numerous representations of "fact." This is the opposite of "puffing." For example, the John Beck infomercial expressly represents that the homes shown were purchased for only the cost of the back taxes, when this was not the case.[10] The infomercial also expressly represents that the homes were in the condition depicted in the infomercial at the time they were purchased.[11] For example:

> *DEBBY ROSENTHAL: They sure are. I mean, John, look at this home. Someone actually bought* ***this beautiful three-bedroom home*** *for just $534?*
>
> *JEFF MIRASOLA: And they own it free and clear of any monthly mortgage payments?*
>
> *JOHN BECK: That's right. The county assessor valued that home at over $114,000.*[12]

Similarly, the Jeff Paul infomercial states repeatedly that the Jeff Paul system provides proven, turnkey Internet businesses. For example:

> *CARMEN PALUMBO: -- you don't need to know anything about computers or the Internet to make money.*
>
> *ON SCREEN: The Work is Done For You!*

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[9] *FTC v. U.S. Sales Corp.*, 785 F. Supp. 737, 746 (N.D. Ill. 1992) (finding that representations that consumers using defendants' service could get "hot cars" in good condition for "hot prices" were not mere puffery); *see also Goodman v. FTC*, 244 F.2d 584, 603 (9th Cir. 1957) and *FTC v. Trudeau*, 2009 U.S. App. LEXIS 19318 at *26- 31 (distinguishing facts from *Carlay Co. v. Federal Trade Commission*, 153 F.2d 493, 496 (7th Cir. 1946), (a case cited by Defendants; *see* Opp'n at 25)).

[10] *See* FTC Memo at 10.

[11] Defendants' denials that the John Beck infomercials make these express claims, and insistence that "reasonable" consumers should not actually believe what the infomercial says (*see, e.g.,* Opp'n at 8-9) are disingenuous at best.

[12] PX 79 at p. 142; *see generally* PX 79 at pp. 136-237 (emphasis added).

STACEY HAYES: Because Jeff's shortcuts do all the work for you

ON SCREEN: Your Own Money Machine

STACEY HAYES: -- and immediately turn any computer into your own money machine.[13]

These are clearly statements of fact, not opinion.

It is reasonable for consumers to rely on Defendants' express claims. "'Consumer reliance on express claims is [] presumptively reasonable. . . .It is reasonable to interpret express statements as intending to say exactly what they say.'"[14] Also, the FTC Act protects all consumers, even those who are less educated or skeptical than others. "Consumer protection laws exist to protect 'the public–that vast multitude, which includes the ignorant, the unthinking, and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions.'"[15]

Defendants argue that "[n]o promises are made other than the money-back guarantee." Opp'n at 29.[16] However, Defendants' arguments find no support in the law. As one court in this District held, "the lack of guarantee does not negate the misrepresentations. The guarantee issue is a perfect example of what is misleading about these representations because it is implied in the text, yet it is never given."[17] Here, Defendants make *express* (not implied) false and/or

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[13] PX 81 at pp. 373-74.

[14] *FTC v. Five-Star Auto Club, Inc*., 97 F.Supp. 2d 502, 528 (S.D.N.Y. 2000) (internal citations omitted).

[15] *FTC v. Freecom Communs., Inc*., 401 F.3d 1192,1202 at n.5 (10th Cir. 2005) (internal citations omitted); *see also Read Magazine, Inc*., 333 U.S. at 189 ("Laws are made to protect the trusting as well as the suspicious.").

[16] *But see* PX 81 at p. 407 ("*JEFF PAUL: Exactly. They want a shortcut. And that's why I give everyone who uses my system – [ON SCREEN: 6,000 Amazing Sites To Choose From!] – ten free instant Web site businesses that are already created, totally run themselves and are guaranteed to make you money.*")

[17] *FTC v. Gill,* 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999), *aff'd*, 265 F.3d

(continued...)

unsubstantiated claims that the John Beck and Jeff Paul systems are proven to quickly and easily produce income (and, for users of the John Beck system allow them to purchase homes at tax sales in their area free and clear for pennies on the dollar). Whether they make explicit "guarantees" is immaterial.

C. It is reasonable for viewers to conclude that the consumer testimonials represent the typical consumer experience

In both the John Beck and Jeff Paul infomercials, Defendants present numerous examples of consumer "success stories."[18] Not only do these testimonials bolster the net impression of the infomercials described above, but the overwhelming message is that they represent the typical experience of a consumer who purchases and uses the John Beck or Jeff Paul system.[19]

Defendants argue that disclaimers stating "Unique Experience. Results vary," which are displayed in some instances while the endorsers are speaking, clarify that the testimonials shown do not in fact represent the typical experience of the John Beck or Jeff Paul consumer. As noted above, however, no part of Defendants' sales pitches can be viewed in isolation – it is the net impression of the entire pitch that is important. The disclosures Defendants make during the testimonials must be considered along with the portions of the sales pitch they purport to qualify. Merely having a disclosure somewhere in the ad is not enough.[20] Moreover, such disclaimers or qualifications must be "sufficiently

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[17] (...continued)
944 (9th Cir. 2001).

[18] *See* PX 79 at pp. 136-237 and PX 81 at pp. 296-428; *see generally* PX 1.

[19] *See* FTC Memo at pp. 6, 12, 27. *See also Five Star*, 97 F. Supp. 2d at pp. 528 ("Moreover, at the very least it would have been reasonable for consumers to have assumed that the promised rewards were achieved by the typical Five Star participant.").

[20] *See Gill,* 71 F. Supp. 2d at 1044 (existence of a disclosure does not mean Defendants' other representations were not material misrepresentations); *see also*
(continued...)

prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings."[21] Here, Defendants' mouseprint disclaimers are wholly inadequate to redeem their deceptive advertising.

Finally, Defendants' argument that they are going to air infomercials with "new and improved" disclaimers does not save them. Opp'n at 4. Defendants simply assert, without any basis, that the proposed edits will actually overcome the net impression of the infomercials.[22] A point that cannot be stressed enough is that, whether or not the "new and improved" disclaimers actually effectively address the deceptive net impression of Defendants' infomercials, the old, certainly deceptive, versions of the infomercials *are still running*, causing further consumer injury.

D. Defendants' infomercial claims are false and/or unsubstantiated

The central claims of the Defendants' John Beck and Jeff Paul infomercials are false and/or unsubstantiated.[23]

1. Defendants' infomercial claims are false

In a recent FTC case, the court held that infomercial kingpin Kevin Trudeau's infomercial statements were clear misrepresentations because they were contradicted by the book itself.[24] Here, the Defendants' infomercials are also contradicted by the content of the systems they sell; thus, their misrepresentations

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[20] (...continued)
Cyberspace.com, 453 F.3d at 1200-01.

[21] *Removatron*, 884 F.2d at 1497 (citing *Giant Food, Inc. v. FTC*, 322 F.2d 977, 986 (D.C. Cir. 1963)).

[22] *See* Opp'n at 4-5. The new disclaimers do not appear to change the net impression of the infomercials much, if at all. For example, one of the new disclaimers is made only at the beginning and the end of the 30-minute infomercial (Opp'n at 4-5); what if a consumer tunes in in the middle?

[23] *See* FTC Memo at 7-11 (John Beck) and 12-15 (Jeff Paul).

[24] *FTC v. Trudeau,* 572 F. Supp. 2d. 919, 923 (N.D. Ill. 2008), *aff'd*, 2009 U.S. App. LEXIS 19318 at *31-34.

should be similarly enjoined.[25]

Defendants base much of their defense on the argument that there are some consumers, such as their declarants, who were not deceived, and that it is "possible" to use the John Beck and Jeff Paul systems. The issue before the Court, however, is not whether Defendants conveyed a message that some consumers did not find deceptive. The issue under Section 5 is whether Defendants' infomercials and sales pitches conveyed a message that some consumers *did* find deceptive, or that could have been construed in a misleading way.[26] Furthermore, the FTC is not alleging impossibility, nor does it have to prove it, in order to show deception.[27]

2. Defendants' infomercial claims are unsubstantiated

Advertisements can be deceptive if they are unsubstantiated.[28] "An advertiser's good faith belief that his claim is substantiated is not enough."[29] Defendants have failed to show that they possessed adequate substantiation for the claims in their infomercials.

Defendants spend a great deal of their brief insisting that the consumer endorsers' statements are substantiated. Even if this is the case (which the FTC

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[25] *See* FTC Memo at 7-9, 12-14. It is again worth noting that the FTC is *not* alleging that the John Beck and Jeff Paul materials themselves are deceptive; it is the marketing of these materials (as well as Defendants' coaching services) that is deceptive in violation of the FTC Act. *See* FTC Memo at 28, n. 170.

[26] "An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive." *FTC Policy Statement on Deception*, appended to *In Re Cliffdale Associates*, 1984 FTC LEXIS 71 at *177.

[27] *See US Sales* at pp. 747-48 (finding that FTC did not have to prove that it is impossible for a consumer to find a car in good condition at far below its market value to prove deception).

[28] *See* FTC Memo at 25-26.

[29] *US Sales*, 785 F. Supp. at 748.

does not concede),[30] it is not enough. Defendants must have substantiation for all of the representations that are conveyed by their advertisements.[31] This they simply do not have.[32] Defendants allege only that it is "possible" to make money on the Internet or in real estate; in fact, *they do not know* what their customers have achieved.[33] Thus, they have no basis for making any assertions as to typicality.[34]

Defendants further point to declarations they obtained from consumers who supposedly achieved some success with the John Beck and Jeff Paul systems.[35] However, these declarations reveal that these consumers did not use the systems[36] and/or did not achieve the results as depicted in the John Beck and Jeff Paul infomercials. For example, none of the John Beck declarants proffered by Defendants purchased a nice home for just a few hundred dollars and "turned around" and sold or rented it out for tens of thousands of dollars profit.[37] The John

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[30] Defendants' assertion that "the vast majority of the testimonials are documented as accurate" (Opp'n at p. 11) is false. In numerous instances, the only "documentation" consists of a one-page release form signed by the endorsers. The FTC contends that this is not sufficient. *See* FTC Memo at 14-15.

[31] Defendants offer no basis in law for their assertion that they should be held to a lesser standard. *See* Opp'n at p. 30.

[32] *See* FTC Memo at 9-11, 14-15.

[33] In addition, Defendant Hewitt has admitted that the consumer endorsers do not represent the typical consumer who purchases the John Beck or Jeff Paul system. *See* PX 82 ¶ 7, Att. 1 at pp. 240-41 and Att. 2 at pp. 707, 802-803.

[34] As a result, Defendants' contention that their own consumer declarants "are not outliers" (Opp'n at p. 31) is rank speculation.

[35] Notably, Defendants may not manufacture substantiation after the fact. *US Sales*, 785 F. Supp. at 750 ("Because the testimonials are from after the time the advertisements were aired, Defendants clearly could not have relied upon them as substantiation for their advertising claims.").

[36] [redacted]

(continued...)

Beck consumers also did not earn the types of substantial profits depicted in the infomercials.[38] Similarly, most of the Defendants' Jeff Paul consumer declarants testify only that they applied Jeff Paul's "principles" to their existing brick-and-mortar businesses.[39] These consumer declarations are clearly insufficient to substantiate the claims made in Defendants' infomercials.[40]

Nevertheless, even if Defendants' proffered "satisfied customers" really did achieve success using the John Beck and Jeff Paul systems, a few happy customers cannot save Defendants from liability under the FTC Act.[41] The FTC "need not prove that every consumer was injured. The existence of some satisfied customers does not constitute a defense under the FTCA."[42] Similarly, Defendants' argument

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[37] (...continued)

[redacted]

[38] *Compare* PX 1 and PX 79, Att. 4 (subtracting cost from assessed values, the homes pictured in both infomercials show expected minimum profits of at least $50,000) *with, e.g.,* [redacted]

[39] *See*, *e.g.*, DX 25 (financial planning business); DX 27 (production company); DX 31 (precious metals business).

[40] *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939): "The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. [ ] Silence then becomes evidence of the most convincing character." (internal citations omitted).

[41] Defendants' supposed "positive feedback" amounts to no more than brief, vague, unsworn comments. *See* DX 4 (Hewitt), ¶51, Ex. S; DX 1 (Beck), Ex. D.

[42] *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989); *see also FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) ("The FTC was not required to show that all consumers were deceived . . . it offered substantial evidence that the marketing claims used to sell Stefanchik's program were deceptive and misleading to an overwhelming number of consumers."); *Goodman*, 244 F.2d at (continued...)

that they have provided over $133,000,000 in refunds to consumers is irrelevant.[43] If anything, this enormous sum suggests that a huge percentage of Defendants' customers were not satisfied with their purchase.

III. Defendants fail to adequately disclose their continuity plans *prior to enrolling* consumers in these plans (Counts 2, 6, 8, and 12)

Once again Defendants mischaracterize the FTC's allegations with respect to their continuity plans. The FTC is not alleging that Defendants' continuity plans are deceptive because it is difficult for consumers to get their money back.[44] Rather, Counts 2, 6, 8, and 12 of the FTC's Complaint allege that consumers do not understand, *at the time of purchase*, that they are being enrolled in a continuity plan. This is because Defendants fail to disclose material information about their continuity plans, which is deceptive.

Defendants' assertion that "[d]uring the ordering process, there are multiple disclaimers about the continuity programs" (Opp'n at 36) is false. During the automated recording process for both the John Beck and Jeff Paul kits, there is only one reference to the continuity plan that could possibly be interpreted to be a disclosure, and it is disguised in the form of an upsell. For example, the John Beck automated ordering system states:

> *Congratulations, because you are one of the first 250 people to order today John wants you to continue in his exclusive Property Vault membership, jam packed with over 1.8 million tax sale properties nationwide which is constantly updated. All you have to do is pick the area, and select the perfect tax sale property for you. But that's only*

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[42] (...continued)
602, n. 41.

[43] *See FTC v. Pantron I Corp.*, 33 F.3d 1088, 1103 (9th Cir. 1994) ("the existence of a money-back guarantee is insufficient reason as a matter of law to preclude a monetary remedy").

[44] *See*, *e.g.*, DX 4 (Hewitt) ¶ 24.

> *the beginning because John never wants you to have a question unanswered, the membership includes his trained advisory hotline service to help you every step of the way. It's all here for only $39.95 per month! But today, since you are one of the first 250 callers, John has authorized me to give you a whole year's membership for only $199.95 charged to the card you're using today.*[45]

This statement is not only confusing, but some consumers never even hear it.[46] When it is made, it is played only *after* consumers have already provided their payment information for the John Beck or Jeff Paul kit.[47] Moreover, even if consumers decline the offer of an entire year's membership, they are still enrolled in the continuity plan and charged unless they cancel.[48]

The rest of Defendants' disclosures are too little, too late, if they are made at all.[49] Most of them are defective in that they appear in minuscule font or omit material information, such as the cost of the membership or the fact that consumers have already been enrolled in the plans.[50] For those consumers who were presented with the upsell of a year's worth of the Property Vault or Big League (described above), but who declined it, it stands to reason that they might conclude that any post-enrollment information they receive might not even apply to them, and would therefore disregard it.[51]

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[45] PX 81 at p. 465.

[46] *See* PX 78 ¶ 5; PX 79 ¶ 14.

[47] *See* PX 81 ¶ 22 (John Beck)and ¶ 24 (Jeff Paul).

[48] *See*, *e.g.*, PX 33 ¶¶ 5-6; PX 34 ¶¶ 3-4; PX 37 ¶¶ 3, 6; PX 38 ¶¶ 3, 6; PX 39 ¶¶ 3-4. Defendants assert that they are fixing this problem as well. *See* Opp'n at 23; DX 4 (Hewitt) ¶ 33, Exh. U, at p. 1721. However, even if the newly updated disclosures address the problem, the Defendants are still liable for the injury caused to consumers from the previous versions.

[49] *See* FTC Memo at 16, n. 103.

[50] *Id.*

[51] For example, the FTC has spoken with several consumers who believed

(continued...)

Defendants trumpet their "50% cancellation rate" as evidence that "most people were aware of the charges." Opp'n at 13. However, for both continuity plans, it appears that Defendants' brief misstates the analysis. According to Defendants' [redacted][52] This hardly demonstrates that "most" consumers were aware they would be charged.

Finally, Defendants' argument that the Telemarketing Sales Rule's Statement of Basis and Purpose does not actually mean what it says is untenable. Opp'n at 33. Taken to its logical conclusion, Defendants' argument would mean that a retailer, once it swiped your credit card for one purchase, could charge that same card for something else at a later time, so long as you received a chance to opt out of the charge before it happened.

IV. Defendants' telemarketers deceive consumers (Count 7)

With respect to the marketing of Defendants' coaching services, the Defendants again misstate the FTC's allegations. The FTC is not arguing that Defendants' coaching lacks value. Rather, as with the infomercials, the FTC is alleging that the Defendants' telemarketers make false and/or unsubstantiated claims to convince consumers to purchase Defendants' coaching services.

Specifically, Defendants' telemarketers promise consumers that, if they purchase and use Defendants' coaching services, they will quickly earn back the cost or substantially more than the cost of the coaching.[53] This net impression is evident both from Defendants' scripts and from transcripts of undercover calls

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[51] (...continued)
that they opted out of the continuity plan during the ordering process, but who were charged anyway. *See* note 48, *supra*. However, consumers were not actually able to opt out of enrollment during the automatic ordering process. It comes as no surprise then that these consumers were confused when they were later charged.

[52] *See* DX 3 (O'Connell) ¶¶ 44-45.

[53] *See* FTC Memo at pp. 18-19.

made by FTC investigators. For example:

> *TELEMARKETER (JOHN BECK): Okay, our goal here, when we work with students on the one-on-one level, is to have them doing their first real estate deal for a profit within the first 30 to 60 days working with you. Why do we do that? For one, to pay off the initial investment to begin with. For two, if you're not seeing progress, you're not making money, you will get frustrated and you will quit on us. We can't have that happening.*[54]
>
> * * *
>
> *FTC INVESTIGATOR: So, you think that I could -- I could actually make $80,000? You said 40 to 80,000 - -*
>
> *TELEMARKETER: Absolutely.*
>
> *FTC INVESTIGATOR: - - the very first year?*
>
> *TELEMARKETER: Absolutely.*[55]

It is hard to imagine how consumers would agree to put a $5,000, let alone a $15,000, charge on their credit cards unless they believed they would be able to quickly and easily pay it off.

Unfortunately for consumers, the representations made by Defendants' telemarketers are false and/or unsubstantiated.[56] In response, Defendants aver that the coaching services have value, which is irrelevant.[57] What matters is how many

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[54] PX 79 at pp. 343-44.

[55] PX 79 at p. 367.

[56] *See* FTC Memo at 20-21.

[57] *See FTC v. Figgie Int'l*, 994 F.2d 595, 604 (9th Cir. 1993) (finding that it is the fraud in the selling, not the value of the product itself, that violates the FTC Act, because had consumers known the truth, they might not have purchased the product at all). Much of Defendants' "evidence" in support of their assertion that the coaching programs are valuable, including Defendants' Exhibits 33, 34, 35, 36, 37, 38 is thus also irrelevant. Similarly, Defendants' argument that their coaches (continued...)

consumers have been able to achieve the success promised by Defendants' telemarketers. Defendants have offered no evidence that the typical purchaser of their coaching services will achieve what they promise. Therefore, Defendants' telemarketers claims are unsubstantiated at best, and false at worst.

V. Defendants' "Compliance Department" fails to prevent deception

Defendants claim that their "compliance" process, conducted at the conclusion of the (often lengthy)[58] sales calls, ensures that consumers are disabused of any potential misrepresentations made by Defendants' telemarketers. Like the infomercials, however, no part of Defendants' sales pitches can be viewed in isolation – it is the net impression of the entire pitch that is important. The brief "disclosure" made during the supposed "compliance verification"[59] must be considered along with the portions of the sales pitches it purports to qualify. Defendants ignore the FTC's damning undercover call transcripts and disparage the FTC's consumer testimony, but given Defendants' failure to record any portion of their sales calls, where misrepresentations are most likely to occur, the FTC's evidence is the best available evidence of the actual content of those pitches.[60] Any disclosures made by Defendants in the later recorded part of their sales calls cannot

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[57] (...continued)
really are qualified to teach (Opp'n at 6-18) is also irrelevant.

[58] *See* PX 78 ¶ 4, Att. 1, Atts. 4-8; *see also* PX 87 ¶ 3; PX 82 ¶ 7, Att. 3 at pp. 1261-62.

[59] The entire "disclosure" consists of the following brief statement, buried among three single-spaced pages of other detailed information: "*SCRIPT: We would like to reiterate that this is an education and training program, and as with all businesses, and investments, the income you realize is entirely based on your own personal commitment.*" *See*, *e.g.*, PX 81 at p. 2696.

[60] *See FTC v. Cyberspace.com*, 2002 U.S. Dist. LEXIS 25565 at *13 n.5 (letters and emails from consumer complainants admitted for the truth of the matter pursuant to the "residual exception" to the hearsay rules, Fed. R. Ev. 807). Defendants tout their newly installed $135,000 recording system. However, Defendants offer no evidence as to how the recording system has actually been (or will be) used.

overcome the meaning of all that was said before them – especially given the consumer testimony that Defendants' telemarketers deliberately minimized, contradicted, or obscured those disclosures.[61]

During the compliance process, Defendants unfairly rely on consumers to recognize that they have been deceived.[62] The compliance script states:

> *SCRIPT: And since it would be unethical for us to guarantee any specific income I need to verify that there were no earnings claims made by Mr./Ms./Mrs.____. Were there any earnings claims made? (An earning claim means that the director guaranteed the client a specific amount of money by a specific date. If this is true you must STOP the compliance taping).*[63]

Defendants' *reductio ad absurdum* definition of "earnings claim" would provide scam artists who make outrageous profit guarantees with a defense under the FTC Act if only they withhold the date the promised riches were to arrive. Fortunately for the consuming public, this is not, and never has been, the law. The FTC Act forbids all deceptive claims, whether express or implied – and implied earnings claims by definition will not include the level of detail urged by Defendants.[64]

Defendants' own papers reveal that their "Compliance Department" is designed not to prevent deception, but to ensure that coaching sales go through. This is evident from the [redacted]

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[61] *See* FTC Memo at 20, notes 127 and 128.

[62] *See* DX 3, ¶ 16.

[63] PX 81 at p. 2702. This portion of the script is the same for the John Beck and Jeff Paul coaching programs. *See* PX 81 at pp. 2693-2703.

[64] *See also* pp. 6-7 and note 21, *supra*.

[65] *See* DX 3 (O'Connell), Exh. P, pp. 179-80.

[redacted] The document sums it up: [redacted][66]

In light of all of the above, it is clear that Defendants have overstated the Compliance Department's policing duties. In the end, Defendants spend a great deal of time making self-serving, conclusory statements about their policies,[67] but offer virtually no evidence that these policies are enforced.[68] Indeed, conspicuously absent from Defendants' proffer is any evidence from anyone with first-hand knowledge of whether the policies are actually enforced, such as sales team leaders or managers who directly supervise the telemarketers working out of Defendants' five boiler rooms. However, Defendants' policies, even if enforced, are not sufficient to stop the misrepresentations from being made.

VI. Defendants violate the company-specific Do Not Call rule (Count 14)

Count Fourteen of the FTC's Complaint alleges that Defendants' telemarketers violate the Telemarketing Sales Rule by making repeated, harassing calls to consumers after consumers request that they stop calling. In response, Defendants admit that these violations have occurred,[69] but point to policies which

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[66] *Id.* at 179.

[67] *See*, *e.g.*, DX 3 (O'Connell), ¶¶ 20-28.

[68] The only information Defendants offer regarding actual enforcement of their policies is contained in Exhibit V of DX 3 (O'Connell), pp. 196-200. Not only does this document [redacted] Given that many coaching customers pay upwards of $10,000 (or even $15,000) for Defendants' coaching services, taking $50 or $100 off even a 10% commission would amount to a mere slap on the wrist.

[69] *See* DX 3 (O'Connell) at ¶ 30.

they say, if implemented, would prevent these abusive practices.[70] However, Defendants provide no evidence that their policies were ever actually implemented, and the experience of the FTC's consumer declarants indicates that they were not.[71]

VII. Defendants are recidivists

In their papers, Defendants lay out in great detail their repeated run-ins with the State of Utah and the FTC.[72] Incredibly, Defendants then claim that they have a "track-record [sic] of complying with state and federal rules and regulations." Opp'n at 2-3. In fact, their track record is precisely the opposite. After repeatedly being cited by the Division of Consumer Protection, the State of Utah finally sued Defendants in April 2006, stating in its complaint that, despite the previous citations and settlement agreements, "MOA failed to reform its business practices and the Division has continued to receive complaints from consumers buying the John Beck and Jeff Paul programs from MOA."[73] Another citation, issued in December 2007, alleged that MOA violated the stipulation agreement that settled the 2006 complaint.[74] This is the very definition of "recidivist."

The FTC's current case is defendant Hewitt's second appearance in an FTC action, and Gravink's third.[75] Contrary to Defendants' assertions, both of the stipulated final orders in those matters contain injunctive relief.[76] Just because they pay their fines and promise not to do it again, Defendants cannot argue that they have not actually repeatedly violated the law.

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[70] *See id.* at ¶¶ 29-31.

[71] *See generally*, PX 41 through PX 65 (consumer declarations); *see also* PX 70 ¶¶ 12-13 (lead lists recycled).

[72] *See* DX 3 (O'Connell), ¶¶ 4-19; DX 4 (Hewitt), ¶¶ 27-29; and DX 5 (Gravink), ¶¶ 3-6.

[73] PX 73 at p. 730.

[74] *Id.* at pp. 782-87.

[75] *See* FTC Memo at 3.

[76] *See* PX 79 at pp. 461-67 and 495-502.

VIII. A preliminary injunction is warranted

The FTC has presented sufficient evidence demonstrating that it is more likely than not that the FTC will ultimately prove, by a preponderance of the evidence, that Defendants and the Inventor Defendants are liable for the allegations in the Complaint. Defendants have failed to controvert this evidence.[77] The equities balance in the FTC's favor.[78] Therefore, a preliminary injunction is warranted.

A. The FTC does not have to show all consumers were deceived

Defendants have no basis in fact for their contention that because most of their customers did not complain, these consumers were satisfied. Opp'n at 31. Defendants' conclusions utterly lack foundation, and erroneously assume that if a consumer did not file a complaint, then he or she was not deceived. This argument is also completely irrelevant, because the number of consumer complaints filed against a business is not the test for deception under the FTC Act.[79]

In fact, the FTC's burden is not even to show that *most* consumers were deceived. The FTC can prove its claims through a small number of injured consumers, from which a court can infer a pattern or practice of deceptive

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[77] Defendants cite several cases in their brief, all of which are either erroneous or inapposite: *FTC v. Kennedy*, 574 F.Supp.2d 714 (S.D. Tex. 2008) (case involved unfairness rather than deception standard), *FTC v. Rhodes Pharmacal Co., Inc*., 1951 U.S. Dist. LEXIS 1890, 1951 Trade Cas. (CCH) p62, 782 (ND Ill. 1951) (case does not represent standard in Ninth Circuit), *FTC v. Simeon Management Corp*., 532 F.2d 708 (9th Cir. 1976) (case sets forth outdated standard for issuance of PI); *Winter v. Natural Resources Defense Council, Inc.,* 129 S.Ct. 365 (2008) (private litigants, not a government law enforcement action).

[78] *See* FTC Memo at 32-33.

[79] If anything, the hundreds of consumer complaints filed with the BBB, which Defendants admit they received, demonstrate that Defendants Hewitt and Gravink had knowledge sufficient to impose individual liability.

behavior.[80] "Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice to one consumer would provide proof for all."[81]

B. Defendants cannot negate the FTC's case or the need for a preliminary injunction through their "voluntary" conduct

Defendants spend a significant portion of their brief and in their self-serving declarations discussing all of the supposed improvements and changes that have been made to their business and the infomercials. They argue, implausibly, that these efforts have both rendered the FTC's case moot and are sufficient to protect the public, and that a preliminary injunction is therefore unnecessary.[82]

The FTC's case is not moot. Defendants' bald assertion that "[t]he FTC will not have issues with the new version" (Opp'n at 4) of the John Beck infomercial has absolutely no basis in fact. The FTC has neither reviewed nor approved this new infomercial. Indeed, based on the transcript submitted,[83] the changes to the John Beck infomercial appear to be minimal, and do not even begin to cure the deception alleged in the FTC's Complaint.

Furthermore, Defendants' conduct from the outset of the FTC's

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[80] *See FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *Amy Travel*, 875 F.2d at 573.

[81] *FTC v. Int'l Diamond*, 1983-2 Trade Cas. (CCH) ¶65,725 at 69,709 (N.D. Cal. 1983). *See also FTC v. Jordan Ashley, Inc.*, 1994-1 Trade Cas. (CCH) ¶ 70,570 at 72,094-96, 72,099 (S.D. Fla. 1994) (FTC proved income and sales misrepresentations and received over $9 million in consumer redress based on the testimony of four witnesses "whose experiences with Defendants is characteristic of those who purchased Defendants' business opportunities"); *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1293-94 (D. Minn. 1985) (FTC proved its case through the testimony of eight consumers in a plastic products business opportunity scheme).

[82] Defendants even *admit* that their conduct should be subject to injunctive relief: "Given these significant changes, the John Beck commercial is **no longer** subject to injunctive relief." Opp'n at 5 (emphasis added).

[83] *See* DX 4 (Hewitt), Exh. H, pp. 638-56.

investigation suggests that Defendants cannot be trusted to police themselves. In March 2008, the FTC sent extremely detailed subpoenas to Defendants that called into question multiple aspects of Defendants' marketing practices.[84] Yet, the infomercials have remained on the air, unchanged. Only now, when the threat of injunctive relief is imminent, have Defendants come running in with promises of "we can change . . . as soon as we stop making money with the old infomercials." This is exactly why injunctive relief is necessary.

In short, Defendants have failed to meet the "stringent" test they must satisfy to show that their voluntary change of conduct (e.g., the discontinuance of their current infomercials) has made injunctive relief moot.[85] Defendants are required to show that "subsequent events [have] made it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur," or that "events have completely and irrevocably eradicated the effects of the alleged violation."[86] Defendants may indeed soon change their infomercials, but without a preliminary injunction, they are free to stop airing their new infomercials at any time and return to their old commercials, or to revise their commercials yet again.[87] Absent

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[84] *See* PX 79 at pp. 30-119. Defendants have known since March 2008 the FTC's concerns about their business practices. Since that time, counsel have had extensive communications about the substance of the FTC's investigation. *See, e.g.*, PX 81 pp. 176-257 (declaration of Gary Hewitt); *see also* DX 4 (Hewitt) ¶ 6. They have thus had ample time to prepare their defense.

[85] *See FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1238 (9th Cir. 1999), citing *United States v. Concentrated Phosphate Export Ass'n., Inc.*, 393 U.S. 199, 203 (1968).

[86] *Affordable Media*, 179 F.3d at 1238, citing *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1274 (9th Cir. 1998), and *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 854 (9th Cir. 1985).

[87] In *FTC v. Evans Products Co.*, 775 F.2d 1084 (9th Cir. 1985), cited by Defendants, evidence that the alleged violations had ceased did not end the court's inquiry of whether the injunction action was a "proper case." The inquiry in that case met an abrupt conclusion since "no finding of likelihood of recurrence" had

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injunctive relief, a "defendant is free to return to his old ways."[88] Moreover, even if Plaintiff's evidence consisted only of past violations, such evidence can support a finding that future violations are likely.[89]

Finally, Defendants' mootness argument is inapplicable to the Commission's request for an asset freeze. The Ninth Circuit rejected an identical argument in *Affordable Media*, 173 F.3d at 1237, holding that, "the [defendants'] cessation of sales . . . could in no way affect the need to have [them] repatriate [or freeze] their assets"). Accordingly, Defendants' mootness arguments are unavailing, and this Court should grant the requested injunctive relief.

C. The preliminary injunction will not destroy Defendants' business

Defendants summarily state, without explanation, that the entry of a preliminary injunction will put them out of business.[90] The counter-argument is simple: if Defendants cannot run their business in full compliance with the FTC Act, they do not deserve to remain in business. Compliance with the law is hardly an unreasonable burden.[91] Defendants "can have no vested interest in a business

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[87] (...continued)
been requested by the FTC or made by the court. *Id.* Here, the FTC asserts that there is a likelihood of recurrence in the absence of injunctive relief.

[88] *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (U.S. 1953).

[89] *See SEC v. Murphy*, 626 F.2d 633, 655-56 (9th Cir. 1980).

[90] Furthermore, Defendants' claim that the proposed order will put them out of business rings hollow. In their application for an order allowing oral testimony (Dkt #63), Defendants argued that the proposed preliminary injunction would put them out of business because they would have to discontinue their current infomercials. Their statements here that they were voluntarily planning to discontinue their infomercials shows that their earlier claim was disingenuous.

[91] *See FTC v. World Wide Factors*, 882 F.2d 344, 347 (9th Cir. 1989) ("there is no oppressive hardship to defendants in requiring them to comply with the FTC Act, refraining from fraudulent representation or preserve their assets from dissipation or concealment.").

activity found to be illegal."[92] Thus, the conduct prohibitions in the proposed preliminary injunction would work no hardship on Defendants, as they have no right to engage in practices that violate the law.[93]

Defendants further maintain that an asset freeze is unwarranted because there is no evidence that they will hide their assets. This is not the issue. The issue is whether Defendants are likely to thwart the ability of the court to award complete relief by dissipating assets that would otherwise have gone to the victims of their fraud. In this case, there is no doubt that the amount of consumer injury vastly exceeds the Defendants' combined assets.[94] This is because the appropriate starting point for calculating injury is the total amount of Defendants' sales.[95] Here, the amount of total redress that Plaintiff will seek if it prevails will almost certainly exceed the amount of frozen assets. Any expenditure of frozen funds therefore represents a dissipation of assets that might well belong to the victims of Defendants' fraud. Therefore, imposition of an asset freeze is necessary to preserve the possibility of effective final relief.[96]

Furthermore, as explained in the FTC's Memo, Plaintiff's proposed preliminary injunction would allow the Corporate Defendants, after completing financial disclosure forms, to pay their ordinary and necessary business expenses

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[92] *United States v. Diapulse Corp. of America*, 457 F.2d 25, 29 (2d Cir. 1972).

[93] *World Wide Factors*, 882 F.2d at 347; *Diapulse Corp.*, 457 F.2d at 29.

[94] *See* FTC Memo at p. 37.

[95] *See Stefanchik*, 559 F.3d at 929-31; *see also Figgie*, 994 F.2d at 606 (finding that even if items consumers received had value, "the fraud in the selling, not the value of the thing sold," is what entitles consumers to redress). According to Defendants' evidence, their total sales since 2004 (even after subtracting the $133,000,000 in refunds supposedly made) amounts to an absolutely staggering number. *See* DX 3 (O'Connell), Exh. DD, p. 302.

[96] *See* FTC Memo at 36-38.

in the normal course of business.[97] The proposed preliminary injunction thus expressly contemplates that the corporate Defendants would be allowed to remain in business, under the supervision of a monitor.

Finally, while Defendants attempt to equate the appointment of a monitor with the imposition of a receiver, these are two vastly different remedies. Whereas a receiver, for example, would have complete control over how to run the business and how (and even whether) its products are marketed, the proposed monitor would have no such power. The monitor's job would be to determine whether Defendants are complying with the provisions of the preliminary injunction. He would have no supervisory authority.

D. Individual liability is appropriate

As explained in the FTC's Memo, Defendants are liable for injunctive relief as well as for restitution.[98] Defendants' citation to the *Transure* case (Opp'n at 38) is inapposite.[99]

IX. Conclusion

For the foregoing reasons, the FTC requests that the court enter a preliminary injunction, with asset freeze and monitor, against Defendants.

Dated: August 31, 2009

FOR PLAINTIFF FTC

/s/ Jennifer M. Brennan
Jennifer M. Brennan
Stacy R. Procter
John D. Jacobs
Evan Rose
Kenneth H. Abbe
Matthew D. Gold
Attorneys for FTC

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[97] *See* FTC Memo 13; Proposed PI (Dkt #2-2) § V.D.2 at 18.

[98] *See* FTC Memo at 34-36.

[99] Defendants' corporate structure is irrelevant, because the FTC does not have to pierce the corporate veil to establish that individual defendants are liable under the FTC Act. *See Stefanchik*, 559 F.3d at 93; *see also* Cyberspace.com, 453 F.3d at 1202.