

1 Douglas V. Wolfe  
Sandhya P. Brown  
2 600 Pennsylvania Avenue, NW  
Mailstop M-8102B  
3 Washington, DC 20580  
Telephone: (202) 326-3113, -2040  
4 Fax: (202) 326-2558  
Email: dwolfe@ftc.gov, sbrown5@ftc.gov

5 Local Counsel  
6 Kerry O'Brien (CSBN 149264)  
901 Market Street, Suite 570  
7 San Francisco, CA 94103  
Telephone: (415) 848-5189  
8 Fax: (415) 848-5184  
Email: kobrien@ftc.gov

9 Attorneys for Plaintiff  
10 Federal Trade Commission

11 **UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**  
**San Francisco Division**

13 FEDERAL TRADE COMMISSION,

14 Plaintiff,

15 v.

16 INC21.com CORPORATION, et. al.,

17 Defendants.  
18

Case No. CV 10-00022 WHA

**FTC'S REPLY IN SUPPORT  
OF ITS MOTION FOR  
SUMMARY JUDGMENT**

Hearing Date: August 19, 2010  
Hearing Time: 8:00 a.m.

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1 The Federal Trade Commission (“FTC” or “Commission”) moved this Court for summary  
2 judgment on all six counts of its Complaint. The uncontroverted evidence establishes that there  
3 is no genuine issue of material fact, and the facts support a finding of liability as a matter of law.  
4 The FTC therefore is entitled to summary judgment against all Defendants, including an award  
5 of monetary relief and a permanent injunction.

#### 6 **I. SUMMARY JUDGMENT STANDARD**

7 Summary judgment “should be rendered if the pleadings, discovery and disclosure  
8 materials on file, and any affidavits, show that there is no genuine issue as to any material fact  
9 and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c)(2). The  
10 Supreme Court has explained that “the substantive law will identify which facts are material.  
11 Only disputes over facts that might affect the outcome of the suit under the governing law will  
12 properly preclude the entry of summary judgment. Factual disputes that are irrelevant or  
13 unnecessary will not be counted.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).  
14 To create a “genuine” factual dispute, the nonmoving party must present “significant probative  
15 evidence” such that a reasonable trier of fact could find in its favor at trial. Id. at 249.  
16 Consequently, summary judgment should be granted if the nonmoving party’s evidence is  
17 “merely colorable” or “not significantly probative.” Id. Defendants’ Opposition to the FTC’s  
18 Motion for Summary Judgment (“Opposition”) concerns itself with immaterial, unsupported  
19 arguments, none of which create any genuine issues of fact necessitating trial.

#### 20 **II. DEFENDANTS’ OPPOSITION HAS CREATED NO GENUINE ISSUES OF 21 MATERIAL FACT ON THE SIX COUNTS OF THE COMPLAINT**

22 The FTC has alleged five counts of Defendants’ violations of the Federal Trade  
23 Commission Act (“FTC Act”), 15 U.S.C. § 45, and the Telemarketing Sales Rule (“TSR”), 16  
24 C.F.R. Part 310, as well as one count for Relief Defendant’s unjust enrichment as a result of  
25 those violations. The uncontroverted evidence establishes that the FTC is entitled to judgment as  
26 a matter of law on each.  
27  
28

1           **A. Count I: Deception**

2           Count I alleges that Defendants violated Section 5 of the FTC Act by misrepresenting that  
3 consumers were obligated to pay the charges associated with Defendants' services appearing on  
4 their telephone bills, when in fact they had no such obligation because the charges were  
5 unauthorized. DE 1, Complaint at ¶¶ 28-30. Resolution of Count I rests on three material facts:  
6 whether Defendants made a representation that consumers were obligated to pay for their  
7 services; whether that representation was likely to mislead consumers acting reasonably under  
8 the circumstances; and whether the misleading representation was material. See FTC v.  
9 Stefanchik, 559 F.3d 924, 928 (9th Cir. 2009).

10           Defendants do not dispute that their LEC charges constitute a representation that  
11 consumers owed payment for their services, and they have no evidence disputing the lack of  
12 authorization for those charges. Defendants appear to argue that placing charges – authorized or  
13 not – on consumers' phone bills was neither misleading nor material because: (1) they “fully  
14 believed” the funds were owed; (2) their telemarketing scripts and “welcome letters” contained  
15 language regarding cancellation and avoiding charges; (3) and the telephone bills themselves had  
16 FCC-required disclosures. Opp at 16-18. Defendants' contentions simply do not raise legally  
17 material issues.

18           First, the law does not shield Defendants from liability based on their “belief” that the  
19 charges were legitimate. See FTC v. Publ'g Clearing House, 104 F.3d 1168, 1171 (9th Cir.  
20 1997) (no intent requirement in Section 5 of the FTC Act). Defendants' description of the  
21 alleged steps they took “to assure that customers were properly signed up” is immaterial because  
22 it ignores the real question: did Defendants mislead consumers by representing that they owed  
23 payment? If consumers did not owe payment because Defendants' charges were unauthorized,  
24 Defendants' representations were misleading. The only genuine evidence before the Court on  
25 this question is: (a) consumers' testimony about the nature of Defendants' telemarketing pitches  
26 and whether the consumers in fact agreed to Defendants' charges,<sup>1</sup> and (b) the FTC's expert

27 \_\_\_\_\_  
28 <sup>1</sup> Many of the consumer declarants report that they were falsely told that the call was meant  
only to update their Yellow Pages listings or confirm their business information, and that no

1 survey showing conclusively that virtually no consumers agreed to purchase Defendants’  
 2 products or authorized the charges. Defendants have no evidence refuting either the survey  
 3 results<sup>2</sup> or the direct testimony of 45 consumer victims.<sup>3</sup> Cf. FTC v. Kennedy, 574 F. Supp. 2d  
 4 714, 720 (S.D. Tex. 2008) (discounting cramming defendant’s assertions that company policies  
 5 were designed to prevent unauthorized charges because the court determined that “the facts show  
 6 otherwise”). Thus, it is uncontroverted that Defendants’ charges were unauthorized, which in  
 7 turn makes their representations that consumers owed them payment false and misleading.  
 8 False, express representations are presumed material. See FTC v. Cliffdale Assocs., 103 F.T.C.  
 9 110, 168 (1984). Defendants present no evidence to rebut this presumption.<sup>4</sup>

10 \_\_\_\_\_  
 11 charges would be incurred. See FTC Motion for Summary Judgment (“SJ Motion”), Section I.B,  
 12 DE 12 at 3-7.

13 <sup>2</sup> Offering only attorney argument and faulty speculation to challenge the methodology of the  
 14 survey, Defendants provide the Court nothing that rises to the level of admissible, probative  
 15 evidence that would create any genuine issues for trial. See FTC v. Stefanchik, 559 F.2d at 929  
 16 (defendants’ mere arguments challenging survey methodology not probative without “competent  
 17 affirmative evidence of their own”). Moreover, some of Defendants’ contentions about the  
 18 survey are demonstrably false. For example, Defendants complain that the survey was  
 19 “automated,” when in fact, the survey was conducted by live interviewers. See Marylander, DE  
 20 123-7 at p.9 ¶25 (describing the training of the interviewers). Defendants also take issue with  
 21 the wording of the questionnaire, specifically the use of the phrase “Internet services,” which  
 22 they contend is not a proper description of what they sell. But Defendants’ own Answer admits  
 23 the FTC’s Complaint allegation that “In some instances, Defendants’ telemarketers offer  
 24 consumers a fifteen-day free trial of their *Internet services*.” DE 67 at ¶19 (emphasis added).  
 25 Additionally, the survey questions specifically included the *name of the product* the individual  
 26 respondent had allegedly purchased (e.g., GlobalYP, NetOpus, etc.). See Marylander, DE 123-7  
 27 at Exs. C, D. Thus, Defendants’ arguments against the survey are both legally immaterial and  
 28 factually baseless, and ignore the critical issue – that respondents were asked whether they  
 agreed to purchase Defendants’ services, and 97% said “No.” Id. at p.11 ¶31.

13 <sup>3</sup> To the extent Defendants would rely on TPV recordings as proof of what their telemarketers  
 14 said during the sales pitches, they have provided no authenticated evidence of such. Cf. United  
 15 States v. King, 587 F.2d 956, 960 (9th Cir. 1978) (proponent has burden to authenticate audio  
 16 recordings, including evidence that no changes, additions or deletions have been made). This is  
 17 particularly important here because there is undisputed evidence that TPVs were doctored. See  
 18 SJ Motion, Section I.B.1, DE 123 at 3-7.

13 <sup>4</sup> Defendants make the silly and baseless contention that the FTC is paraphrasing and hiding  
 14 employee testimony that might harm its case. Opp. at 10. The contention is silly because 16 of  
 15 Defendants’ 22 citations to deposition transcripts are *part of* the excerpts the FTC filed, and none  
 16 (continued...)

1 Second, the wording of Defendants' welcome letters is irrelevant to the deception count.  
2 Deception is not cured by *later* disclosing the terms of the 15-day free trial and the opportunity  
3 to cancel to avoid charges. Exposition Press v. FTC, 295 F.2d 869, 873 (2d Cir. 1961) (It is a  
4 violation of the FTC Act to secure the first contact by deception, even if the true facts are made  
5 known before the purchase); accord Resort Car Rental System, Inc v. FTC, 518 F.2d 962, 964  
6 (9th Cir. 1975); FTC v. Pantron I Corp., 33 F.3d 1088, 1103 (9th Cir. 1994) (money-back  
7 guarantee does not preclude relief for FTC Act violations).

8 Finally, that the telephone bill includes FCC-mandated disclaimers is likewise irrelevant.  
9 Defendants appear to argue that consumers who pay phone bills that include unauthorized  
10 charges are not acting reasonably because the bills inform them of their dispute rights.  
11 Disclaimers notwithstanding, this Court and others have recognized that consumers hold a  
12 common and well-founded perception that they must pay their telephone bills and are not  
13 unreasonable in so doing because third party charges are difficult to detect for any number of  
14 reasons. FTC v. Inc21.com Corp., 688 F. Supp. 2d 927, 938 (N.D. Cal. 2010) ("most consumers  
15 do not carefully read their phone bills or are unaware that their phone bills may include  
16 third-party fees to defraud them"); see also FTC v. Verity Int'l., Ltd., 443 F.3d 48, 63 (2d Cir.  
17 2006). Moreover, the only admissible evidence of what was said during the telemarketing calls  
18 is the testimony of consumers, and it is undisputed that Defendants telemarketers lied to them  
19 about the sales nature of the call and whether and how they would be charged. See fn.1, *supra*.  
20 Under these circumstances, it is more than reasonable for consumers not to expect, or hunt for,  
21 third party charges on their phone bills. Defendants' position – one that shifts the burden to  
22 consumers – if adopted into law, would serve as a clarion call to crammers that they can operate

23  
24 <sup>4</sup> (...continued)

25 contradict the FTC's citations. Additionally, none of the allegedly missing testimony – about  
26 welcome letters, cancellations, weekly staff meetings, customer service, TPV process, changing  
27 TPV providers, training of call centers, the investigation of using U.S.-based telemarketers, and  
28 determining which centers got which leads – creates an issue for trial. Further, Defendants'  
citation to Selena Tran's testimony about "randomly call[ing] new customers to confirm that a  
sale is valid," Opp. at 4, if read in context, undermines their position because she testified that  
80% to 90% of those called said they wanted to cancel or never actually signed up for  
Defendants' service. See DE 123-5 (Tran Depo pp.123:7-124:10).

1 with impunity. Because this is not the law, a disclaimer hidden in a phone bill is simply  
 2 immaterial. Therefore, Defendants have created no genuine issue of material fact necessitating a  
 3 trial to resolve Count I.

4 **B. Count II: Unfairness**

5 Count II alleges that Defendants engaged in an unfair practice in violation of Section 5 by  
 6 causing “consumers’ telephone accounts to be billed without having previously obtained the  
 7 consumers’ express informed consent.” Complaint, DE 1 at ¶¶ 31-33.<sup>5</sup> Resolution of Count II  
 8 rests on three material issues: (1) whether Defendants’ unauthorized billing caused, or was  
 9 likely to cause, substantial injury to consumers; (2) whether that harm is outweighed by any  
 10 countervailing benefits to consumers or competition; and (3) whether the harm was reasonably  
 11 avoidable by consumers. 15 U.S.C. § 45(n); FTC v. Neovi, 604 F.3d 1150, 1155 (9th Cir. 2010).  
 12 Defendants present no evidence disputing the first issue. Therefore, it remains uncontroverted  
 13 that Defendants substantially injured consumers by charging them on a monthly basis without  
 14 authorization.<sup>6</sup> Defendants attempt, but fail, to create a dispute on the question of whether the  
 15 harm to consumers is outweighed by a countervailing benefit, as well as the question of whether  
 16 consumers could reasonably avoid the harm.

17 Defendants appear to argue that their products had “value” and thus provided a “benefit”  
 18 that should be balanced against the harm they caused. But no amount of “value” could *outweigh*  
 19 the harm caused by unauthorized billing because, as one court recently explained, “consumers  
 20 were forced to pay for a service that they never requested . . . [and] were forced to expend  
 21 substantial time and effort to obtain refunds and cancellation of the service.” Kennedy, 574 F.  
 22

23 <sup>5</sup> Despite its clear wording, Defendants curiously persist in their effort to re-cast Count II as  
 24 alleging a TSR violation. Opp. at 18.

25 <sup>6</sup> With respect to GoFaxer – Defendants’ Internet-marketed service – the following evidence is  
 26 uncontroverted: (1) declarations from consumers charged for that service without authorization,  
 27 DE 36-40 (Lapinski), DE 36-42 (Maklari), DE 36-44 (O’Neil); (2) Defendants’ admission that  
 28 less than 1% of customers actually used the service, Inc21.com v. Delicate Data, LLC, Case No.  
 C 09-1824 WHA (N.D. Cal.); and (3) the FTC expert’s conclusion that virtually no one agreed to  
 purchase it, DE123-7. Thus, Defendants’ assertion that “the Complaint as to GoFaxer must be  
 dismissed” is baseless. Opp. at 13.



1 Supp. 2d at 721 (analyzing unfairness caused by unauthorized billing for web-hosting services  
2 similar to Defendants’ products here). As in Kennedy, Defendants here cannot show that any  
3 value inherent in their products outweighs the injury to consumers being billed for something  
4 they did not want.<sup>7</sup>

5 Finally, Defendants argue that consumers could reasonably avoid the harm they caused  
6 because they “had numerous opportunities to avoid the billing.” This argument defines the harm  
7 too narrowly. Consumers experience harm not only in the millions of dollars ultimately lost, but  
8 in the very fact that Defendants set in motion a train that resulted in unauthorized charges being  
9 placed on their phone bills every month *unless consumers took affirmative steps to prevent it*.  
10 Being “forced to expend substantial time and effort” to ferret out unexpected and unauthorized  
11 phone bill charges and engage in the cancellation process is itself harm. Kennedy, 574 F. Supp.  
12 2d at 721; see also Neovi, 604 F.2d at 1158 (when consumers did not initially notice  
13 unauthorized withdrawals, evidence of their trouble, aggravation and time spent is relevant to the  
14 inquiry). Consumers cannot reasonably avoid this harm because Defendants set this train in  
15 motion without their knowledge or consent.

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21 <sup>7</sup> Also, Defendants’ only evidence that they supposedly offered something of value is the  
22 affidavit of an employee – Colette Chien – who, without personal knowledge, testifies about  
23 customer interaction with the products. The FTC submitted the testimony of Michael Nelson  
24 and Jaysen Kingery who, unlike Ms. Chien, were members Inc21’s IT department and actually  
25 observed the limited extent of customer usage of the products. See Wolfe Reply Dec., Att. C  
26 (Roy Lin Depo. pp.99-101). In fact, Roy Lin himself testified that Michael Nelson was the  
27 employee in the best position to testify about this issue. Id. at pp.132-35. By contrast, he  
28 described Ms. Chien’s only responsibility as obtaining “leads” for telemarketers. Id. at pp. 100-  
01. Thus, even were it material, Ms. Chien’s testimony about the technical aspects of customers’  
interaction with the products fails to create any genuine issues. See Kennedy v. Allied Mut. Ins.  
Co., 952 F.2d 262, 266 (9th Cir. 1991) (“The general rule in the Ninth Circuit is that a party  
cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.”).

1           **C.    Counts III-V: TSR**

2           Counts III, IV, and V allege three distinct TSR violations,<sup>8</sup> but Defendants fail to  
3 challenge, or present evidence material to, these specific counts, resting instead on the notion  
4 that the TSR does not apply to them. Defendants wrongly argue that the TSR applies only to  
5 calls made to “residences,” and that the law excuses them for the few hundred “*de minimus*”  
6 violations that might have occurred because they were not “willful.” Opp. at 11-12. Defendants  
7 have presented the Court with a wholly concocted version of the law. The TSR nowhere  
8 mentions “residences,” contains no *de minimus* exception, and does not require that violations be  
9 willful.

10           First, the FTC has no obligation to prove that the calls at issue were made to “solely  
11 residential customers.” Opp. at 12. The TSR exempts calls “between a telemarketer and any  
12 business” and should be “construed to give effect to the natural and plain meaning of its words.”  
13 FTC v. Publishers Bus. Serv., Inc., No. 2:08-CV-00620, 2010 WL 1418866, at \*13 (D. Nev.  
14 April 7, 2010) (citing Bayview Hunters Point Comm. Advocates v. Metro Trans. Comm’n, 366  
15 F.3d 692, 698 (9th Cir. 2004)). The court in Publishers Bus. Serv., relying on a plain reading of  
16 the TSR, expressly rejected the argument that the business exemption hinged on whether the  
17 calls were made to consumers at their residences. Id. “The limited scope of the exemption is  
18 apparent, to exclude only telemarketing calls to businesses for business purchases.” Id. Thus,  
19 whether the calls were made to “residences” is irrelevant to the analysis.

20           Defendants do not refute the evidence that *their own customer list* includes at least 524  
21 individuals, public and government entities (schools, libraries, police departments, etc.), and  
22 churches. See DE 123-35. Instead, they argue that they used a database of “business leads,” but  
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26 <sup>8</sup> The specific counts allege: (1) failure to disclose the negative option feature of their sales  
27 offer; (2) use of preacquired account information to charge consumers without their “express  
28 informed consent”; and (3) failure to obtain “express verifiable authorization” before placing  
charges on consumers’ telephone bills. Complaint, DE 1 at ¶¶ 46-51.

1 fail to submit evidence of these leads to show that they were in fact *only* businesses.<sup>9</sup>  
2 Additionally, Defendants argue that the hundreds of non-businesses identified by the FTC from  
3 among their customers “may be home businesses, sole proprietors or recycled telephone  
4 numbers,” but again Defendants fail to introduce any evidence to support this otherwise bald  
5 assertion.<sup>10</sup> See Publ’g Clearing House, 104 F.3d at 1171 (unsupported statements in court briefs  
6 create no genuine issues of fact). Thus, the only evidence before the Court on this point – DE  
7 123-35 – shows that Defendants telemarketed to non-businesses, and Defendants have failed to  
8 raise any genuine factual dispute to avoid summary judgment.

9 In fact, Defendants concede that they telemarketed to non-businesses, but suggest that any  
10 such telemarketing was *de minimus* and not “willful.” Opp. at 12. Again, Defendants are wrong  
11 as a matter of law. The TSR does not contain any *de minimus* exemption, and the FTC need not  
12 prove that violations are willful. In fact, the Commission expressly rejected a *de minimus* call  
13 threshold prior to formal adoption of the Rule. See Notice of Proposed Rulemaking, 60 F.R.  
14 8313, 8332 (Feb. 14, 1995) (proposing to exempt “solicitation of sales by any person who  
15 engages in fewer than ten (10) sales each year through the use of the telephone”); cf. Revised  
16 Notice of Proposed Rulemaking, 60 F.R. 30406, 30423 (June 8, 1995) (deleting the proposed *de*  
17 *minimus* exemption). Additionally, the FTC need not prove any “willful” intent behind the TSR  
18 violations, which are themselves violations of Section 5 of the FTC Act. See 16 C.F.R. §  
19 310.3(a); Publ’g Clearing House, 104 F.3d at 1171.

20 Relying on fictional legal principles, and having conceded that they telemarketed to non-  
21 businesses, Defendants failed to put forth any evidence creating a dispute regarding Counts III,  
22 IV, or V. The Court may resolve these counts in favor of the FTC as a matter of law.

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25 <sup>9</sup> John Lin has admitted that his declaration claiming that schools, banks, and franchises were  
26 filtered out of Defendants’ lead lists was false. See Inc21, 688 F. Supp. 2d at 930, 934.

27 <sup>10</sup> It is not clear what Defendants mean by “recycled telephone numbers” and how this might be  
28 relevant. Additionally, their argument does not deal with the numerous public schools and  
government entities on their customer list.

1           **D.    Count VI: Disgorgement from Relief Defendant**

2           Defendants do not contend that Relief Defendant Sheng Lin has legal or equitable title to  
3 the funds he received from Defendants’ cramming operation. Rather, Defendants’ only  
4 argument is that the FTC has failed to trace the funds and presumably should not prevail on  
5 Count VI.<sup>11</sup> Defendants again are wrong as a matter of law. The Ninth Circuit recognizes the  
6 propriety of cases against relief defendants who receive the fruits of illegal behavior. See SEC  
7 v. Colello, 139 F.3d 674, 677 (9th Cir. 1998). The power of this Court over Relief Defendant  
8 Sheng Lin derives from equity, SEC v. Hickey, 322 F.3d 1123, 1131 (9th Cir. 2003), and the  
9 FTC Act does not restrict in any fashion the Court’s equitable powers. FTC v. H.N. Singer, 668  
10 F.2d 1107, 1113 (9th Cir. 1982). Courts exercising equitable authority have found that assets  
11 need not be traced to violations of the FTC Act in order to be recoverable. See FTC v.  
12 Windward Marketing, Ltd., Case No. CV-1:96-615-FMH (N.D. Ga. May 22, 1996); FTC v.  
13 Nationwide Connections, Case No. CV 9:06-80180-KLR (S.D. Fla. June 22, 2007); FTC v.  
14 Washington Data Resources, Inc., Case No. CV 8:09-2309-T-23TBM (M.D. Fla. Jan.15, 2010)  
15 (orders attached hereto). Here, the FTC has proven through the testimony of Defendant Roy Lin  
16 and Inc21’s accountant that Defendants paid Sheng Lin at least \$434,000 for doing nothing.  
17 These facts are undisputed. The FTC should therefore prevail on its claim against Sheng Lin as  
18 a matter of law.

19           **III. DEFENDANTS’ OPPOSITION HAS CREATED NO GENUINE ISSUES OF**  
20           **MATERIAL FACT ON THE PROPER REMEDY FOR THEIR VIOLATIONS**

21           The FTC seeks both monetary and injunctive relief to remedy Defendants’ violations and  
22 fence-in their future conduct. Section 13(b) of the FTC Act provides that “in proper cases the  
23 Commission may seek and after proof, the court may issue, a permanent injunction.” 15 U.S.C.  
24 § 53(b). This grant of permanent injunctive power gives the Court broad equitable authority “to  
25 grant any ancillary relief necessary to accomplish complete justice,” which extends to ordering  
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27           <sup>11</sup> Defendants do not say Sheng Lin should prevail on Count VI, but rather argue, without  
28 evidence, that his frozen funds are not traceable to the wrongdoing. See Opp. at 22.

1 monetary judgment for restitution and rescission. H.N. Singer, 668 F.2d at 1113; FTC v.  
2 Pantron I Corp., 33 F.3d 1088, 1102 (9th Cir. 1994).

3 **A. Net Consumer Loss is the Proper Measure of Monetary Relief**

4 Remediating Defendants' violations requires compensating consumers for the full amount  
5 of their losses, but Defendants argue that the law requires any judgment to be limited to their net  
6 receipts. Opp. at 23. In support of this argument, Defendants cite to the Second Circuit's  
7 exposition of equitable restitution in Verity, 443 F.3d at 68, which has been expressly rejected  
8 by the Ninth Circuit. See Stefanchik, 559 F.3d at 931 ("because the FTC Act is designed to  
9 protect consumers from economic injuries, courts have often awarded the full amount lost by  
10 consumers rather than limiting damages to a defendant's profits") (citing FTC v. Febre, 128 F.3d  
11 530, 536 (7th Cir. 1997)); Medlab, 615 F. Supp. 2d 1068, 1083 fn.5 (N.D. Cal. 2009)  
12 (recognizing Stefanchik as Ninth Circuit precedent). Thus, Stefanchik, not Verity, provides the  
13 legal basis for determining monetary recovery here, and Defendants' invitation to deviate from  
14 Ninth Circuit precedent should be rejected.

15 **1. Calculation of Net Consumer Loss**

16 Although Defendants' Opposition makes no mention of it, the law creates a burden-  
17 shifting framework on the question of calculating net consumer losses. Specifically, "[t]he  
18 Commission must show that its calculations reasonably approximated the amount of customers'  
19 net losses, and then the burden shifts to the defendants to show that those figures were  
20 inaccurate." Febre, 128 F.3d at 535. The FTC has shown its entitlement to total consumer  
21 losses because the expert survey establishes that virtually no customers authorized the services,  
22 and consequently, the FTC provided the Court with a reasonable approximation of that figure.  
23 Therefore, to the extent Defendants assert that the FTC's calculations are inaccurate, they had an  
24 obligation to put forward evidence supporting a different calculation. See Stefanchik, 559 F.3d  
25 at 931. Instead, claiming that "it is not Defendants' place to speculate as to the manner in which  
26 the FTC calculated the purported damages," Defendants gave the Court nothing. As such, the  
27 FTC's evidence is the only evidence in the record on the question of consumer losses.

1 Since filing its summary judgment papers, the FTC has discovered four mathematical  
2 errors in its initial calculation of net consumer losses, due in no small part to a complex, post-  
3 bankruptcy relationship between two of Defendants' billing aggregators. The correct figure for  
4 billing that Defendants placed through aggregators is \$37,442,602.89, not \$43,824,970.35 as the  
5 FTC had originally calculated. Importantly, the evidence underlying the FTC's calculations  
6 remains the same – the records obtained directly from the aggregators who were responsible for  
7 tracking the revenues from, and refunds to, Defendants' customers. See DE 123-14, 123-15,  
8 123-17, 136-2. The math errors are fully explained in the Reply Declaration of FTC Attorney  
9 Douglas Wolfe, and a summary attached thereto shows the complete revised calculations based  
10 on the aggregators' billing records. See Wolfe Reply Dec., Att. A. Adding the reasonable  
11 approximation of losses attributable to billing by Jeff Lavino on Defendants' behalf –  
12 \$649,712.30<sup>12</sup> – the proper baseline figure for a monetary judgment based on net consumer  
13 losses is \$38,092,315.19. Defendants have provided the Court with no evidence supporting an  
14 alternative calculation.

## 15 2. Defendants Provide No Basis for Deductions From Net Loss Calculation

16 Defendants suggest, again without legal basis, that the FTC is not entitled to the full  
17 amount of consumer losses because that “would wrongly assume that all customers were entitled  
18 to refund.” Opp at 23. Defendants appear to argue that the FTC has to provide evidence of each  
19 customer's harm in order to recover on his/her behalf, but this argument is directly contrary to  
20 the law. In fact, the Commission need not prove that every consumer actually relied upon the  
21 misrepresentations to prevail. Stefanchik, 559 F.3d at 929 fn.12 (quoting FTC v. Amy Travel  
22 Serv., Inc., 875 F.2d 564, 572 (7th Cir. 1989)). “Requiring proof of subjective reliance by each  
23 individual consumer would thwart effective prosecutions of large consumer redress actions and  
24 frustrate the statutory goals of [Section 13(b)].” FTC v. Figgie Int'l, Inc., 994 F.2d 595, 605 (9th  
25 Cir. 1993) (citing FTC v. Kitco of Nev., Inc., 612 F. Supp. 1282, 1293 (D. Minn. 1985) and FTC

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26  
27 <sup>12</sup> The portion of the original calculation attributable to Defendants' LEC billing through Jeff  
28 Lavino remains unchanged. See SJ Motion, Section I.D., DE 123 at 16.

1 v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1316 (8th Cir. 1991)); FTC v. Wilcox,  
 2 926 F. Supp. 1091, 1105 (S.D. Fla. 1995). It is sufficient to show that the misrepresentations  
 3 were widely disseminated and caused actual consumer injury. See Figgie, 994 F.2d at 605-606;  
 4 Kitco, 612 F. Supp. at 1293-94.

5 Once the FTC establishes that Defendants' violations were widespread, the FTC is entitled  
 6 to redress all consumers for their losses. It was *Defendants' burden*, consistent with Stefanchik  
 7 and Febre, to produce evidence that specific consumers' losses should not be included in the  
 8 calculation.<sup>13</sup> Here, the uncontroverted evidence, including a definitive scientific survey of  
 9 alleged "customers," establishes that virtually all of them were injured by the widespread  
 10 unauthorized billing. Nonetheless, as discussed in the SJ Motion, the FTC's calculation has  
 11 given Defendants the "maximum credit" the evidence allows – \$134,366.40. See DE 123 at 24  
 12 fn.103. Therefore, the evidence taken in the light most favorable to Defendants still entitles the  
 13 FTC to a judgment in the amount of \$37,957,948.79.<sup>14</sup>

14  
 15  
 16 <sup>13</sup> In paragraph 4 of his declaration, DE 143-6, John Lin tries to attack the amounts owed by  
 17 stating that he reviewed the billing and credit history for each of the consumers whose  
 18 declarations the FTC filed with the Motion for Summary Judgment. He goes on to state how  
 19 much each declarant was billed and supposedly received in credits. Yet, in the Supplemental  
 20 Responses to the Government's Interrogatories in the related Asset Forfeiture case, Lin stated  
 21 "Inc21 did not maintain records of the dates the customer was billed [ ], the total amount the  
 22 customer was billed [ ], or the reason the billing was terminated. The billing companies  
 23 maintained this information." Claimants' Second Supplemental Response to Interrogatory 7.  
 24 Wolfe Reply Dec. at ¶ 5 and Att B. No one from the billing companies authenticated any  
 25 records from which he purportedly created his spreadsheet. He laid no foundation regarding the  
 26 analysis he allegedly performed, and the attached spreadsheet constitutes nothing but hearsay.  
 27 See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002) (only admissible evidence may  
 28 be considered on summary judgment). John Lin has therefore created the quintessential  
 inadmissible self-serving declaration in an effort to avoid summary judgment. See FTC v.  
Publ'g Clearing House, 104 F.3d at 1171 (conclusory affidavit lacking detailed facts is  
 insufficient to create a genuine issue to avoid summary judgment). Moreover, even if the  
 spreadsheet were admissible, it shows that each declarant *did not receive a refund*.

<sup>14</sup> Formula: (Billing through Defendants' aggregators) + (Billing through Jeff Lavino's  
 aggregators) - (Credit for Consumers Who May Have Authorized Billing) = Net Consumer  
 Losses.

Math: \$37,442,602.89 + \$649,712.30 - \$134,366.40 = \$37,957,948.79.

### 3. Three-Year Limitations Period of Section 19 Not Triggered Here

Defendants wrongly argue that FTC Act Section 19 limits all monetary relief in this case to violations in the three years prior to the FTC's January 2010 complaint filing. The deception and unfairness counts in this case are brought only under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). Complaint, DE 1 at ¶ 56. Section 13(b) invokes federal court jurisdiction for violations of Section 5, 15 U.S.C. § 45, and Section 19 in no way limits the courts' equitable powers invoked under 13(b). H.N. Singer, 668 F.2d at 1113 (quoting Section 19, 15 U.S.C. § 57b(e): "Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.") Thus, Section 19 provides no limitation period for actions brought under Section 13(b), and therefore is inapplicable to Counts I and II.

The TSR Counts (III-V) are brought under both Sections 13(b) and 19. See Complaint, DE 1 at ¶ 57. The three-year limitation period is applicable only to the Section 19 aspect of these counts. 15 U.S.C. § 57b(d) ("No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) of this section relates"). By its own plain text, Section 19 does not limit the Court's equitable power under 13(b) to redress the Section 5 violations inherent in the TSR violations, meaning that the limitations period is immaterial here.<sup>15</sup> Moreover, even if it provided a time limitation for these counts, Defendants' monetary liability in this case would remain unchanged because the TSR violations affect only a *subset* (telemarketed non-businesses) of the victims of deception and unfairness established in Counts I and II.

### 4. Unrefunded Amounts May be Disgorged to Treasury

Finally, Defendants argue that the FTC should return any funds not distributed to victims because disgorging such excess to the United States Treasury would be "punitive." Opp. at 24.

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<sup>15</sup> A violation of the TSR is also an unfair or deceptive act or practice in violation of section 5 of the FTC Act, 16 C.F.R. § 310.3(a); 15 U.S.C. § 57a(d)(3) (a violation of a rule "shall constitute an unfair or deceptive act or practice in violation of section 45(a)(1) of this title, unless the Commission otherwise expressly provides in such rule"), and is therefore also actionable under Section 13(b) of the Act. See, e.g., FTC v. Wolf, No. 94-8119-CIV, 1996 WL 812940, at \*8 fn.4 (S.D. Fla. 1996); FTC v. Nat'l Bus. Consultants, 781 F. Supp. 1136, 1141 (E.D. La. 1991).



1 Over a decade ago in this very court, Judge Armstrong disposed of this same argument based on  
2 Ninth Circuit precedent. FTC v. Silueta Distributions, No. 93-CV-4141 SBA, 1995 WL 215313, at  
3 \*6 (N.D. Cal. Feb. 25, 1995). In Silueta, the defendants “oppose[d] disgorgement of all  
4 unclaimed monies to the United States Treasury,” relying, as Defendants do here, on Figgie, a  
5 case in which the FTC had alleged violations only of Section 19 FTC Act. Id. Because the FTC  
6 was seeking relief against the Silueta defendants under Section 13(b), the Court ruled that “to  
7 allow defendants to recover any portion of the restitution amount awarded against them would,  
8 in essence, allow them to profit from their misdeeds.” Silueta, at \*8 (citing Pantron, 33 F.3d at  
9 1102). It is thus proper that any amounts recovered from Defendants, but not refunded to  
10 consumers, be disgorged to the Treasury rather than returned to Defendants.<sup>16</sup>

11 **B. The Proposed Injunctive Provisions are Proper Fencing-in Relief**

12 Defendants object to the FTC’s Proposed Order, DE 123-49, arguing that the telemarketing  
13 provisions improperly bring Defendants “within the purview of the TSR,” and that the proposed  
14 ban on future LEC billing is overly broad. Opp. at 23. As already discussed herein and in the  
15 Opposition to Defendants’ Motion for Summary Judgment, Defendants are not “outside the  
16 purview of the TSR.” See Section II.C, supra; DE 132 at 2-4. Additionally, whether Defendants  
17 are currently subject to the TSR is immaterial to the question of whether their conduct  
18 demonstrates a need to set parameters on their future telemarketing activity. The evidence  
19 irrefutably establishes that need.

20 As to Defendants’ argument that a LEC billing ban is too broad, the Supreme Court has  
21 expressly held that fencing-in relief is lawful and sometimes necessary. FTC v. Colgate-  
22 Palmolive Co., 380 U.S. 374, 395 (1965) (An order need not be need not be “limited to  
23 prohibiting the illegal practice in the precise form in which it is found to have existed in the  
24 past”). Moreover, numerous courts have imposed bans enjoining defendants from future  
25 participation in a particular line of business in FTC cases. See SJ Motion, fn.104, DE 123 at 24-  
26 25. (citing cases).

27 \_\_\_\_\_  
28 <sup>16</sup> As in Silueta, 1995 WL 215313, at \*8 fn.9, the FTC has possession of a copy of Defendants’  
customer list. See DE 123-38. Thus, it is unlikely funds would be disgorged to Treasury.

1           **C. Defendants Create No Genuine Dispute Regarding the Personal Liability of**  
 2           **Roy and John Lin**

3           Defendants attempt to create a factual dispute about the individual liability of Roy and  
 4 John Lin by discussing a list of steps they allegedly took to “ensure valid sales,” but the attempt  
 5 is in vain because: (1) Defendants failed to produce evidence that these steps resulted in legal  
 6 sales; and (2) were they to have produced such evidence, it would fail to create a genuine issue  
 7 of fact because their intent is irrelevant. First, Defendants’ laundry list of alleged good deeds is  
 8 not supported by so much as a single citation to admissible evidence. See Opp. at 21-22.  
 9 Without evidence, Defendants cannot create any genuine issue of fact for trial. See Orr, 285  
 10 F.3d at 773. Not surprisingly, the record contains not a single sworn declaration from any  
 11 customer that allegedly authorized Defendants’ services and charges.

12           Second, were such evidence available, it would not be “sufficiently probative” as required  
 13 by Anderson. Defendants’ intent is not a material issue. Publ’g Clearing House, 104 F.3d at  
 14 1171 (citing Amy Travel, 875 F.2d at 574). The FTC has set forth extensive evidence showing  
 15 that Roy and John Lin orchestrated every element of Inc21’s cramming operation. They also  
 16 lied to LECs and state authorities about their business, and colluded with another vendor to bill  
 17 consumers outside their LEC billing purview. See SJ Motion, Section II.C, DE 123 at 13-16.  
 18 Defendants pretend this evidence does not exist and make no attempt to refute it.

19           **IV. CONCLUSION**

20           Defendants’ Opposition has raised no genuine issue of material fact, dedicating itself  
 21 instead to spinning a tale of “overzealous prosecution” that smears the government in order to  
 22 deflect attention from the overwhelming evidence of their illegal conduct.<sup>17</sup> Because evidence,  
 23 not fiction, carries the day, the FTC is entitled to summary judgment and requests that the Court  
 24 enter the previously filed Proposed Order for Permanent Injunction and Final Judgment.<sup>18</sup>

25 \_\_\_\_\_  
 26 <sup>17</sup> Acknowledging more than once that the FTC’s Motion for Summary Judgment makes no  
 27 reference to Inspector Wong’s search warrant affidavit, Defendants nonetheless resurrect this  
 28 paper tiger and suggest, with zero proof, that his conduct has “influenced” the testimony of  
 Inc21 employees and others. Opp. at 7, 8.

<sup>18</sup> The amount of monetary relief in Section IV should now be \$37,957,948.79. DE 123-49.

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Respectfully submitted,

Date: July 22, 2010

/s Sandhya P. Brown  
Douglas V. Wolfe  
Sandhya P. Brown  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Mailstop NJ-2122  
Washington, DC 20580  
Telephone: (202) 326-3113, -2040  
Fax: (202) 326-2558 (fax)  
Email: dwolfe@ftc.gov, sbrown5@ftc.gov

Local Counsel  
Kerry O'Brien (CSBN 149264)  
901 Market Street, Suite 570  
San Francisco, CA 94103  
Telephone: (415) 848-5189  
Fax: (415) 848-5184  
Email: kobrien@ftc.gov

Attorneys for Plaintiff  
Federal Trade Commission

**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 July 22, 2010, I caused to be served FTC’S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT and supporting documents as indicated on:

Wayne R. Gross CM/ECF  
Greenberg Traurig, LLP  
3161 Michelson Drive  
Suite 1000  
Irvine, CA 92612  
grossw@gtlaw.com

Joel R. Dichter CM/ECF  
Dichter Law, LLC  
488 Madison Avenue  
10<sup>th</sup> Floor  
New York, NY 10022  
dichter@dichterlaw.com

Michael A. Piazza CM/ECF  
Greenberg Traurig, LLP  
3161 Michelson Drive  
Suite 1000  
Irvine, CA 92612  
piazza@gtlaw.com

Donald P. Bunnin CM/ECF  
Greenberg Traurig, LLP  
3161 Michelson Drive  
Suite 1000  
Irvine, CA 92612  
bunnind@gtlaw.com

Jui Sheng Lin via First Class Mail  
2400 W. El Camino Real #917  
Mountain View, CA 94040

Ed Swanson via Email  
Swanson McNamara & Haller, LLP  
300 Montgomery Street, Suite 1100  
San Francisco, CA 94104  
eswanson@smhlegal.com

/s Sandhya P. Brown

1 Douglas V. Wolfe  
Sandhya P. Brown  
2 600 Pennsylvania Avenue, NW  
Mailstop M-8102B  
3 Washington, DC 20580  
Telephone: (202) 326-3113, -2040  
4 Fax: (202) 326-2558  
Email: dwolfe@ftc.gov, sbrown5@ftc.gov

5 Local Counsel  
6 Kerry O'Brien (CSBN 149264)  
901 Market Street, Suite 570  
7 San Francisco, CA 94103  
Telephone: (415) 848-5189  
8 Fax: (415) 848-5184  
Email: kobrien@ftc.gov

9 Attorneys for Plaintiff  
10 Federal Trade Commission

11 **UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**  
**San Francisco Division**

13 FEDERAL TRADE COMMISSION,  
14 Plaintiff,  
15 v.  
16 INC21.com CORPORATION, et. al.,  
17 Defendants.

Case No. CV 10-00022 WHA

**DECLARATION OF  
DOUGLAS V. WOLFE FOR  
REPLY IN SUPPORT OF  
MOTION FOR SUMMARY  
JUDGMENT**

18  
19  
20 The undersigned, Douglas V. Wolfe, submits this Declaration, pursuant to Civil L.R. 7-  
21 5(a), in support of the Federal Trade Commission's ("FTC" or "Commission") Reply in Support  
22 of the Commission's Motion for Summary Judgment. If called upon to testify, I could and  
23 would testify to the following:

- 24 1. I am over 18 years of age, and I am employed by the FTC as an attorney. My business  
25 address is 600 Pennsylvania Ave., NW, Mailstop M-8102B, Washington, DC 20580. I am  
26 currently assigned to the FTC's Bureau of Consumer Protection, Division of Enforcement.  
27 2. I am assigned to work on the captioned case.

28 CASE NO. CV 10-00022 WHA  
DECLARATION OF DOUGLAS V. WOLFE FOR REPLY IN SUPPORT OF MOTION FOR SUMMARY  
JUDGMENT

1 3. Pursuant to Civil L.R. 7-5(a), I am attaching as Wolfe Reply Attachment A, a summary of  
2 the amounts shown as net losses (or actual billing minus refunds and credits) in the  
3 following discovery materials filed in support of the FTC’s Motion for Summary  
4 Judgment:

5 (A) Wolfe Declaration Attachment M. [DE 123-14] An excerpt from discovery  
6 produced and authenticated by billing aggregator PaymentOne;

7 (B) Wolfe Declaration Attachment N. [DE 123-15] An excerpt from discovery  
8 produced and authenticated by billing aggregator The Billing Resource, LLC;

9 (C) Wolfe Supplemental Declaration Attachment O. [DE 136-2] An excerpt from  
10 discovery produced and authenticated by billing aggregator BSG Clearing Solutions;

11 (D) Wolfe Declaration Attachment P. [DE123-17] An excerpt from discovery  
12 produced and authenticated by billing aggregator ILD;

13 4. The difference between \$44,474,682.65, the amount of consumers’ estimated net losses set  
14 forth in the FTC’s Motion for Summary Judgment [DE 123 p.23] (of which the FTC  
15 reported \$43,824,970.35 as coming from the billing aggregators’ records, id., p.16) and  
16 \$38,092,315.19, the amount of consumers’ estimated net losses set forth in the Reply (of  
17 which \$37,442,602.89 comes from the billing aggregators’ records) is a result of four  
18 revised calculations involving the records from those billing aggregators:

19 (1) After filing the Motion for Summary Judgment, I noticed that the respective  
20 records of PaymentOne and the Billing Resource, LLC (Wolfe Declaration Attachment M  
21 p.12 and Attachment N p.1) showed identical dollar amounts in the “new billing” column  
22 for the months October 2008 through January 2009.<sup>1</sup> I became concerned that, given the  
23 relationship of PaymentOne and the Billing Resource, LLC as reflected in bankruptcy  
24 filings, the FTC might have double-counted some net consumer losses in the Motion for  
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26 <sup>1</sup> Roy Lin testified to the meaning of the columns reflected in these documents. See  
27 Wolfe Attachment A, Roy Lin Depo. [DE 123-2] pp.306-317; Wolfe Attachment AA [DE 123-  
28 28] pp.6-10.

1 Summary Judgment.<sup>2</sup> Therefore, I spoke with attorneys for both PaymentOne and the  
 2 Billing Resource, LLC. The attorney for PaymentOne, Richard Gordin, informed me that  
 3 during the week of July 12, 2010, he spoke with Brad Singer, the records custodian from  
 4 PaymentOne, who confirmed facts regarding the relationship and overlapping billing  
 5 records of PaymentOne and The Billing Resource, LLC.<sup>3</sup> As a result of the discussions  
 6 with Mr Gordin, he drafted and I am submitting with the FTC's Reply, as Wolfe Reply  
 7 Attachment A-1, a declaration for Mr. Singer's signature indicating that, as a result of the  
 8 relationship between PaymentOne and The Billing Resource, LLC, the amounts set forth  
 9 on Wolfe Declaration Attachment N [DE 123-15] pp.2-6 (records produced by The Billing  
 10 Resource, LLC) were a subset of the amounts set forth on Wolfe Declaration Attachment  
 11 M [DE 123-14] pp.3-6, 12 (records produced by PaymentOne) for the same months  
 12 indicated on those documents.<sup>4</sup> Wolfe Reply Attachment A thus reflects a \$2,729,902.73  
 13

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14 <sup>2</sup> The bankruptcy proceeding is styled: In re: Old T.B.R., Incorporated f/k/a The Billing  
 15 Resource d/b/a Integretel, Case No. 07-52890 ASW (Bankr. N.D. Cal filed Sept. 16, 2007).

16 <sup>3</sup> Filings in the bankruptcy case show the following: PaymentOne was a subsidiary of  
 17 the debtor. See In re: Old T.B.R., Incorporated, Disclosure Statement to Second Amended Joint  
 18 Chapter 11 Plan for Reorganization, Case No. 07-52890 [DE 1005] pp.10-12. In 2008, The  
 19 Billing Resource, LLC (or "New TBR") bought the operating assets of the debtor. See id.,  
 20 pp.18-19; see also Exhibits to Order Approving Asset Sale [DE 828] pp.31, 33-34 (sale included  
 21 the billing and accounting servers and Carrier Identification Codes), and p.32 (sale also included  
 22 debtor's agreement with PaymentOne for data processing services to be amended by a Support  
 23 Services Agreement). In October 2008, PaymentOne and New TBR signed the Support Services  
 24 Agreement, which provided that New TBR would give PaymentOne "access to the CIC 402 bill  
 25 page." Attachment D to the Declaration of Brad Singer in Support of PaymentOne's Opposition  
 26 to The Billing Resource, LLC's Motion for Temporary Restraining Order, [DE 23-6] in The  
 27 Billing Resource, LLC v. Old T.B.R., Incorporated, et.al., Adversary Proceeding 09-05077.  
 28 Thus, there are overlapping records for both billing aggregators starting in October 2008.

24 <sup>4</sup> Mr. Gordin stated to me on July 22, 2010 that Mr. Singer is on vacation and difficult to  
 25 reach, but Mr. Singer will sign a declaration at the earliest possible time. The FTC is also filing  
 26 herewith the Declaration of Brent Neitzel, the records custodian of The Billing Resource, LLC,  
 27 confirming that the data reflected in the records produced by PaymentOne resides on the billing  
 28 and settlement database that The Billing Resource, LLC purchased from the debtor in  
 bankruptcy.

1 credit to Defendants from the net consumer loss amount originally set forth in the FTC  
2 Motion for Summary Judgment.

3 (2) The FTC's Motion for Summary Judgment included the 2003 consumer loss  
4 totals reflected on Wolfe Declaration Attachment M [DE 123-14] pp.9-10, but Roy Lin's  
5 testimony (Wolfe Attachment A [DE 123-2] pp.82-83) indicated that Inc21 switched from  
6 re-selling long distance to selling the services at issue in this case at the end of 2003.  
7 Wolfe Reply Attachment A thus subtracts the 2003 net receipts and reflects a \$321,587.64  
8 credit to Defendants from the net consumer loss amount originally set forth in the FTC  
9 Motion for Summary Judgment.

10 (3) In the FTC's Motion for Summary Judgment, I mistakenly counted the net  
11 consumer loss in Wolfe Declaration Attachment M [DE 123-14] p.12 twice. Wolfe Reply  
12 Attachment A thus reflects a \$3,339,652.81 credit to Defendants from the net consumer  
13 loss amount originally set forth in the FTC Motion for Summary Judgment.

14 (4) In calculating the net consumer loss in the Motion for Summary Judgment, I  
15 made additional scrivener's errors, resulting in a credit of \$8,772.75 to Defendants' benefit  
16 from net revenues. Wolfe Reply Attachment A thus reflects an addition of \$8,772.75 to  
17 the net consumer loss amount originally set forth in the FTC Motion for Summary  
18 Judgment.

- 19 5. On June 16, 2010, I received an e-mail from Grayce Lee, legal secretary at the firm of  
20 defense counsel Greenberg Traurig, attaching discovery responses from United States of  
21 America v. Approximately \$2,822,224.75 in Funds Seized from Eight Bank Accounts, et.  
22 al., Case No. CV-09-3119-WHA, including Second Supplemental Response of Claimants  
23 Inc21.com Corporation, GST U.S.A., Inc. and Jumpage Solutions to Plaintiff's First Set of  
24 Interrogatories ("Second Supplemental Interrogatory Response"). A true and correct copy  
25 of the Second Supplemental Interrogatory Response is attached hereto. (Wolfe Reply  
26 Attachment B).

27 //

28 CASE NO. CV 10-00022 WHA  
DECLARATION OF DOUGLAS V. WOLFE FOR REPLY IN SUPPORT OF MOTION FOR SUMMARY  
JUDGMENT



1 6. Pursuant to Civil L.R. 7-5(a), I am attaching true and correct copies of another portion of  
2 the sworn deposition transcript from the January 29, 2010 deposition of Defendant Roy  
3 Lin, (Wolfe Reply Attachment C).

4

5 I declare under penalty of perjury that the foregoing is true and correct.

6

7 Executed at Washington, DC.

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9

10 /s Douglas V. Wolfe  
Douglas V. Wolfe

Date: July 22, 2010

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**NET LOSS CALCULATION SUMMARY FROM BILLING AGGREGATOR RECORDS**

<u>Source</u>	<u>Wolfe Att</u>	<u>Revised Net Consumer Loss</u>	<u>Acct #</u>	<u>Product</u>	<u>Months</u>	<u>Notes re Revised Calculation</u>
PAY1_INC21 001 Net Receipts	M p.3	805439.38	728	GlobalYP	4/08-6/09	
PAY1_INC21 002 Net Receipts	M p.4	2221924.19	746	GoFaxer	5/08-5/09	
PAY1_INC21 003 Net Receipts	M p.5	7492388.96	757	NetOpus	3/06-6/09	
PAY1_INC21 004 Net Receipt calc	M p.6	1299117.3	759	Jumpage	10/07-6/09	
PAY1_INC21 005-6 Net Receipt calc	M pp.7-8	12623060.06	328	GlobalYP	4/04-7/07	
PAY1_INC21 007 Net Receipt calc	M p.9	10211.32	456	Inc21	1/04-7/04	2004 only (2003 total backed out from Motion total)
PAY1_INC21 008 Net receipt calc	M p.10	153706.87	457	GlobalYP	1/04-7/04	2004 only (2003 total backed out from Motion total)
PAY1_INC21 009 Net Receipts	M p.11	4973519.81	328	GlobalYP	9/07-5/08	
PAY1_INC21 0010 Net Receipts	M p.12	1659926.32	328	GlobalYP	6/08-9/08	backed out 1679726.49 from the total 3339652.81 because(Oct 2008-Feb 2009) also on N p.2
FTC_TBR A Net Receipts	N p.2	4823011.86	328	GlobalYP	10/08-1/10	
FTC_TBR B 1 Net Receipts	N p.3	0	728	GlobalYP	10/08-6/09	no longer credited b/c subset of M p.3
FTC_TBR B 2 Net Receipts	N p.4	0	746	GoFaxer	10/08-5/09	backed out in total b/c subset of M p.4
FTC_TBR B 3 Net Receipts	N p.5	0	757	NetOpus	10/08-6/09	backed out in total b/c subset of M p.5
FTC_TBR B 4 Net Receipts	N p.6	0	759	Jumpage	10/08-6/09	backed out in total b/c subset of M p.6
FTC_BSG	Supp O p.4	1251461		Metro YP		
FTC_ILD 10-11, 20	P pp.2-4	128835.82		GoFaxer	8/09-1/10	
		<b>\$ 37442602.89</b>	<b>TOTAL</b>			

## DECLARATION

I, Brad Singer, Executive Vice-President of PaymentOne Corporation ("PaymentOne"), hereby declare that I am a duly authorized custodian of records of PaymentOne, and that, with respect to the documents produced to the FTC by PaymentOne on or about January 22, 2010 in connection with *FTC v. INC21.com Corp*:

(1) The Monthly Performance Status Reports labeled PAY1\_INC21 00001 to PAY1\_INC21 00004 reflect new billings (and related adjustments) processed on behalf of the indicated service providers during the specified time period using PaymentOne CIC 874 and The Billing Resource/New TBR (as these entities are defined in the January 22, 2010 production cover letter) CIC 402. The FTC has supplied to PaymentOne documents with Bates labels FTC\_TBR Exhibit B 1 through FTC\_TBR Exhibit B 4. To the best of my knowledge, information and belief, the Telco billings reflected in these four documents provided by the FTC processed using CIC 402, are a subset of the overall new billings reflected in the Monthly Status Reports referenced in the first sentence in this paragraph.

(2) The Monthly Performance Status report labeled PAY1\_INC21 00010<sup>1</sup> reflects new billings (and related adjustments) processed on behalf of the indicated service provider during the specified time period using The Billing Resource/New TBR CIC 402. The FTC has supplied to PaymentOne a document with Bates label FTC\_TBR Exhibit A. To the best of my knowledge, information and belief, the new billings stated for the months October 2008 through January 2009 in PAY1\_INC21 00010 are the same new billings for the same months stated in PAY1\_INC21 00010. To the best of my knowledge, information and belief, the new billings for February 2009 stated in PAY1\_INC21 00010 are included in the new billings stated in FTC\_TBR Exhibit A.

(3) PaymentOne is a former subsidiary of a company formerly known as The Billing Resource, formerly known as Integretel Incorporated, a California corporation ("Old TBR"). While they were affiliated, PaymentOne and Old TBR performed services for one another. On or about September 16, 2007, Old TBR filed a Chapter 11 bankruptcy petition in the Northern District of California, San Jose Division, In re Old T.B.R., Incorporated, f/k/a The Billing Resource, dba Integretel (07-52890 ASW). In October 2008, the bankruptcy court approved the sale of the operating assets of Old TBR to The Billing Resource, LLC, an unrelated Delaware limited liability company ("New TBR"). For a time thereafter, New TBR and PaymentOne performed services for one another. This relationship has ceased. PaymentOne has no corporate

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<sup>1</sup> As noted in the January 22, 2010 production cover letter, the file PAY1\_INC21 00010 was inadvertently produced without its TBR suffix. If needed, a replacement file with its correct title, PAY1\_INC21 00010 TBR, can be produced separately.

relationship or common ownership with either Old TBR or New TBR. To the best of my knowledge, Old TBR is no longer an operating entity.

(4) A copy of the January 22, 2010 production letter that I reference in paragraph (1) and paragraph (2) and a copy of the "Certification of Records of Regularly Conducted Activity" for the January 22, 2010 production are attached to this declaration.

I declare under penalty of perjury that the foregoing is true and correct.

\_\_\_\_\_  
Brad Singer

Date: \_\_\_\_\_

BUTZEL LONG  
TIGHE PATTON PLLC  
ATTORNEYS AND COUNSELORS

1747 Pennsylvania Avenue N.W. Suite 300  
Washington, D.C. 20006  
Tel: 202 454 2800  
Fax: 202 454 2805  
butzeltp.com

Richard H. Gordin  
202 454 2881  
rgordin@butzeltp.com

January 22, 2010

**VIA MESSENGER**

Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Suite NJ-2122  
Washington, DC 20580  
ATTN: Douglas V. Wolfe, Esq.

Re: FTC v. Inc21.com Corp.

Dear Mr. Wolfe:

This letter and the accompanying documents are submitted on behalf of PaymentOne Corporation ("PaymentOne" or the "Company"), in response to the January 19, 2010 subpoena ("Subpoena") issued in connection with the above-referenced proceeding.

The Subpoena is directed to the Company and certain related entities, including any parent entity. PaymentOne is a former subsidiary of the company formerly known as The Billing Resource, formerly known as Integretel Incorporated, a California corporation (The Billing Resource and Integretel together, "The Billing Resource"). While they were affiliated, the Company and The Billing Resource performed services for one another.

On September 16, 2007, The Billing Resource filed a Chapter 11 bankruptcy petition in the Northern District of California, San Jose Division, In re Old T.B.R., Incorporated, f/k/a The Billing Resource, dba Integretel (07-52890 ASW). In October 2008, the bankruptcy court approved the sale of the operating assets of The Billing Resource to The Billing Resource, LLC, an unrelated Delaware limited liability company ("New TBR").

The Billing Resource is no longer an operating entity. The Company has no corporate relationship or common ownership with either The Billing Resource or New TBR

Douglas V. Wolfe, Esq.  
January 22, 2010  
Page 2

The Company performed aggregation functions for NetOpus, Jumpage Solutions, GoFaxer and GlobalYP (account code 728 only). Because of the prior relationship of The Billing Resource and the Company, the Company also has in its possession responsive documents that are business records of The Billing Resource and relate to GlobalYP's accounts with The Billing Resource. As explained below, GlobalYP was at various times a customer of the Company and a customer of The Billing Resource, under different account codes. The Company no longer has ready access to The Billing Resource's online records of its GlobalYP accounts. We cannot certify on the form you provided business records of The Billing Resource that concern that company's own customer accounts.

The Company has in its possession certain documents that were produced in response to previous subpoenas that were directed to The Billing Resource and PaymentOne jointly. For reference purposes, the following account codes have been assigned to the subject entities: GLOBALYP f/k/a INC21 (728, 328, 456 and 457<sup>1</sup>), NetOpus (757), Jumpage Solutions (759), and GoFaxer (746). Documents bearing a "PAY1\_INC21 \_\_\_\_\_" bates label were obtained or produced from Company hard copy or electronic files and/or produced under the direction of the Company. A "PAY1\_INC21 \_\_\_\_\_ TBR" bates label reflects documents in the Company's possession, but originally obtained or produced from the hard copy or electronic files of The Billing Resource and/or produced under the direction of The Billing Resource.

The Company stopped processing new transaction records for the subject entities in May/June 2009.

As stated above, while they were affiliated, the Company and The Billing Resource performed services for one another. One of these services was that employees of The Billing Resource addressed written and regulatory complaints and inquiry for certain of the Company's customers, including some of the defendants in the above-referenced lawsuit. We are producing in response to Request 2 of the Subpoena documents maintained by The Billing Resource that fall into two categories: written and regulatory complaints concerning the Company's customers and written and regulatory complaints concerning The Billing Resource's GlobalYP accounts. We will only be able to certify those documents that concern the Company's customers.

We have interpreted Request 1 to call for all documents sufficient to show the requested information. We understand the responsive documents that we have produced are a source for the totality of the information stated in the request.

Accordingly, please find enclosed a CD which contains the following documents:

1. PAY1\_INC21 00001 to 00004, consists of Excel files containing reports by client account code showing deposit month, new billing, unbill amount, net billing, client refunds, call center refunds, LEC chargebacks, LEC writeoffs, and net receipts. With the exception of the report for GlobalYP, the reports cover the period from when transaction record processing services pursuant to the Company's contract with the subject entity first commenced until

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<sup>1</sup> 728 is the Company's account code for GlobalYP. 328, 456 and 457 are The Billing Resource account codes for GlobalYP.

Douglas V. Wolfe, Esq.

January 22, 2010

Page 3

transaction record processing services were terminated in or about May/June 2009, along with subsequent adjustments through mid-January 2010. The report for GlobalYP reflects transaction records processed under the 728 account code pursuant to the Company's contract with GlobalYP during the time period commencing on or about May 2008 until payment processing services were terminated in or about May/June 2009, along with subsequent adjustments through mid-January 2010.

2. Transaction records for GlobalYP were also processed under The Billing Resource account codes 328, 456 and 457. PAY1\_INC21 00005 TBR to PAY1\_INC21 00009 TBR and PAY1\_INC21 00010<sup>2</sup> consist of Excel and PDF files in the Company's possession containing reports by these accounts codes for the referenced time period showing deposit month, new billing, unbill amount, net billing, client refunds, call center refunds, LEC chargebacks, LEC writeoffs, and net receipts. As noted previously, the Company no longer has ready access to online data related to transaction records pertaining to these The Billing Resource account codes for GlobalYP.

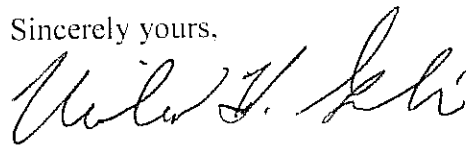
3. PAY1\_INC21 00011 to 00020 and PAY1\_INC21 00021 TBR to PAY1\_INC21 03109 TBR consist of both Excel and PDF files containing a log of inquiry comment entries made by customer service representatives.

4. PAY1\_INC21 031110 to 03112 and PAY1\_INC21 03113 TBR to PAY1\_INC21 03121 TBR consist of Excel and PDF files of the summary listing of written consumer and regulatory complaints received during the specified time period.

5. PAY1\_INC21 03122 TBR to PAY1\_INC21 07608 TBR consists of images of documents from hard-copy and electronic files relating to consumer and regulatory complaints through [date] concerning those of the subject entities for which the Company has records. The Company is in the process of assembling complaint/response materials for the period June 2008 to January 18, 2010. We expect to produce these documents on or before Tuesday, January 26.

If you have any questions regarding this production, please contact me at 202-454-2881 or Steven Lancellotta at 202-454-2886.

Sincerely yours,



Richard H. Gordin

Enclosure: CD (1)

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<sup>2</sup> The file PAY1\_INC21 00010 was inadvertently produced without its TBR suffix. If needed, a replacement file with its correct title, PAY1\_INC21 00010 TBR, can be produced separately.

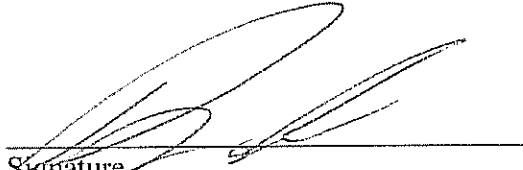
**CERTIFICATION OF RECORDS OF REGULARLY CONDUCTED ACTIVITY**  
**Pursuant to 28 U.S.C. § 1746**

1. I, Brad Singer, am Executive Vice President of PaymentOne Corporation (“PaymentOne”), and in such capacity have personal knowledge of the facts set forth below and am competent to testify as follows:
2. In my capacity as an officer of PaymentOne, I have authority to certify the authenticity and accuracy of certain of the records produced by PaymentOne and attached hereto.
3. Except as stated in paragraph 4 below, the documents labeled “PAY1\_INC21 \_\_\_\_\_,” and the documents labeled “PAY1\_INC21 \_\_\_\_\_TBR,” produced and attached hereto by PaymentOne, are originals or true copies or formulations of records of regularly conducted activity that:
  - a) Were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
  - b) Were kept by or on behalf of PaymentOne in the course of the regularly conducted activity of PaymentOne; and
  - c) Were made by the regularly conducted activity as a regular practice of PaymentOne.
4. The certification in paragraph 3 above does not apply to documents pertaining to GlobalYP account codes 328, 456 and 457, which were accounts of PaymentOne’s former parent company, The Billing Resource, formerly known as Integretel, Inc., a California Corporation.

I certify under penalty of perjury that the foregoing is true and correct.



Executed on 1/22, 2010 at Sudbury, Massachusetts.

  
Signature

1 Wayne R. Gross, Esq. (SBN 138828)  
grossw@gtlaw.com  
2 Michael A. Piazza, Esq. (SBN 235881)  
piazza@gtlaw.com  
3 Donald P. Bunnin, Esq. (SBN 223363)  
bunnind@gtlaw.com

4 GREENBERG TRAUIG, LLP  
3161 Michelson Drive, Suite 1000  
5 Irvine, California 92612  
Telephone: (949) 732-6500  
6 Facsimile: (949) 732-6501

7 Attorneys for Claimants  
8 Inc21.com Corporation, GST U.S.A., Inc.,  
John Lin, and Jumpage Solutions Incorporated

9  
10 **UNITED STATE DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12 **SAN FRANCISCO DIVISION**

13  
14 UNITED STATES OF AMERICA,  
15 Plaintiff,

16 vs.

17 APPROXIMATELY \$2,822,224.75 IN FUNDS  
SEIZED FROM EIGHT BANK ACCOUNTS;

18 ONE 2007 PORSCHE C4 CABRIOLET (VIN  
19 WP0CB29927S777234; ONE 2005 PORSCHE  
CAYENNE S (VIN: WP1AB29P35LA66041);

20 AND SEVEN PARCELS OF REAL  
21 PROPERTY AND IMPROVEMENTS,

22 Defendants.

CASE NO. CV-09-3119 (WHA)

**SECOND SUPPLEMENTAL  
RESPONSE OF CLAIMANTS  
INC21.COM CORPORATION, GST  
U.S.A., INC. AND JUMPAGE  
SOLUTIONS INCORPORATED TO  
PLAINTIFF'S FIRST SET OF  
INTERROGATORIES**

Assigned to Hon. William H. Alsup  
Courtroom 9, 19<sup>th</sup> Floor

23 PROPOUNDING PARTY: Plaintiff United States of America  
24 RESPONDING PARTY: Claimants Inc21.com Corporation, GST U.S.A., Inc., and  
25 Jumpage Solutions Incorporated  
26 SET NUMBER: One

1 Claimants Inc21.com Corporation, GST U.S.A., Inc., and Jumpage Solutions  
 2 Incorporated ("Inc21") hereby provide further responses to Plaintiff United States of America's  
 3 ("Plaintiff") First Set of Special Interrogatories ("Interrogatories") as follows:

4 **RESPONSES TO SPECIAL INTERROGATORIES**

5 **INTERROGATORY NO. 4:**

6 If you contend that any customer of INC21 was billed after service was knowingly  
 7 accepted by an authorized person, identify: (a) the name, contact person, address and telephone  
 8 number of such customer; and (b) all facts that support that contention.

9 **RESPONSE TO INTERROGATORY NO. 4:**

10 Inc21 responds to Interrogatory No. 4, sub-section (a) as follows: Inc21 hereby produces  
 11 lists of company names (where applicable), contact names/persons, addresses and telephone  
 12 numbers for each customer of products - Go Faxer [attached hereto in a digital format (via CD)  
 13 as Exhibit 'A'], MetroYP [attached hereto in a digital format (via CD) as Exhibit 'B'], NetOpus  
 14 [attached hereto in a digital format (via CD) as Exhibit 'C'], JumPage [attached hereto in a  
 15 digital format (via CD) as Exhibit 'D'], and GlobalYP [attached hereto in a digital format (via  
 16 CD) as Exhibit 'E'].

17 Inc21 responds to Interrogatory No. 4, sub-section (b) as follows: Inc21 contends that  
 18 those names listed in Exhibits 'A' through 'E' are customers due to the many checks and  
 19 balances Inc21 had in place to obtain valid sales, including (1) broker agreements that contracted  
 20 to pay brokers a commission only for each "approved valid sale", (2) marketing agreements with  
 21 call centers that provided that Inc21 had exclusive control and approval of all marketing  
 22 materials, customer lists, customer profiles, telephone communication scripts, sales methods,  
 23 sales styles, and customer relation policies, (3) training and training manuals provided to call  
 24 centers, (4) Inc21's requirement that call centers comply with a specific outbound sales script,  
 25 (5) TPV scripts that required prospective customers to verify all of the same information  
 26 contained in the call script, (6) Inc21's welcome letter, which was sent by first-class mail to  
 27 customers who had confirmed that they wanted the service during the TPV, providing each

1 customer again with the information referenced in the above referenced scripts, and (7) Inc21's  
2 postcards sent to new customers providing another form of notification.

3 **INTERROGATORY NO. 7:**

4 For each telephone number billed by INC21 during the period January 1, 2004 to the  
5 present, identify the: (a) customer name, (b) name of the person who authorized the charges,  
6 (c) INC21 product for which the customer was billed, (d) dates the customer was billed, (e) total  
7 amount the customer was billed, (f) call center who solicited the customer, (g) the reason the  
8 billing was terminated, and (h) the total amount refunded to the customer, if any.

9 **RESPONSE TO INTERROGATORY NO. 7:**

10 Inc21 responds to Interrogatory No. 7 as follows: Inc21 hereby produces lists (a chart) of  
11 customer names (company and contact names)[responsive to (a) of Interrogatory No. 7] for each  
12 product for which the customer was or may have been billed [responsive to (c) of Interrogatory  
13 No. 7], the respective call center who solicited the customer [responsive to (f) of Interrogatory  
14 No. 7] and the total amount refunded to the customer, if any<sup>1</sup> [responsive to (h) of Interrogatory  
15 No. 7]. These lists are organized in charts by product name, as follows: Go Faxer [attached  
16 hereto in a digital format (via CD) as Exhibit 'F'], MetroYP [attached hereto in a digital format  
17 (via CD) as Exhibit 'G'], NetOpus [attached hereto in a digital format (via CD) as Exhibit 'H'],  
18 Jumpage [attached hereto in a digital format (via CD) as Exhibit 'I'], and GlobalYP [attached  
19 hereto in a digital format (via CD) as Exhibit 'J']. Each chart contains the customer names  
20 (company and contact), requisite call center who solicited the customer (with the exception of  
21 the GoFaxer product of which customers were not solicited via call centers or telemarketing),  
22 and the total amount refunded to the customer.

23 Inc21 did not maintain records of the dates the customer was billed [responsive to (d) of  
24 Interrogatory No. 7], the total amount the customer was billed [responsive to (e) of Interrogatory  
25

26 \_\_\_\_\_  
27 <sup>1</sup> The list of refunds may not be complete as the billing companies and local exchange carriers  
28 maintained much of this information, while Inc21 only received notice of some of the customers  
and some of the amounts that were refunded.

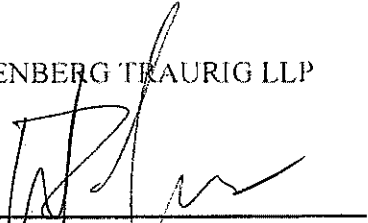
1 No. 7], or the reason the billing was terminated [responsive to (g) of Interrogatory No. 7]. The  
2 billing companies maintained this information.

3 Finally, the only record Inc21 has of the persons who authorized the charges [responsive  
4 to (b) of Interrogatory No. 7] are the tens of thousands of TPVs. The only way to extract  
5 information from these TPVs is to listen to each recording (most of which run several minutes)  
6 in real-time. Pursuant to the Preliminary Injunction in the related FTC action, the Claimants  
7 have had no more than two persons available to prepare these discovery responses, including the  
8 review these TPV recordings. The Claimants are reviewing these TPVs and will provide the  
9 results of the review as the become available.

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DATED: June 16, 2010

GREENBERG TRAURIG LLP

By:   
Wayne R. Gross  
Michael A. Piazza  
Donald P. Bunnin  
Attorneys for Claimants  
INC21.com Corporation,  
GST U.S.A., Inc., John Lin and Jumpage Solutions  
Incorporated

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VERIFICATION

I, John Lin, declare as follows:

I am a claimant in the above-entitled action and am an authorized representative of claimants Inc21.com Corporation, GST U.S.A., Inc., and Jumpage Solutions Incorporated, also parties to this action. I am authorized to make this verification for and on behalf of these responding parties, and I make this verification for that reason. I have read the foregoing document entitled Second Supplemental Response of Claimants Inc21.com Corporation, GST U.S.A., Inc. and Jumpage Solutions Incorporated to Plaintiff's First Set of Interrogatories and know the contents thereof. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed at San Francisco, California on June 16, 2010.

  
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JOHN LIN

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**CERTIFICATE OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF ORANGE**

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is 3161 Michelson Drive, Suite 1000, Irvine, California 92612.

On June 16, 2010, I served the **SECOND SUPPLEMENTAL RESPONSE OF CLAIMANTS INC21.COM CORPORATION, GST U.S.A., INC. AND JUMPAGE SOLUTIONS INCORPORATED TO PLAINTIFF'S FIRST SET OF INTERROGATORIES** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**(BY ELECTRONIC SERVICE VIA CM/ECF SYSTEM)**

In accordance with the electronic filing procedures of this Court, service has been effected on the aforesaid party(s) above, whose counsel of record is a registered participant of CM/ECF, via electronic service through the CM/ECF system.

**(BY ELECTRONIC MAIL)**

On the below date prior to 5:00 p.m. PST, I transmitted the foregoing document(s) by electronic mail, and the transmission was reported as complete and without error. A true and correct copy of the electronic transmission is attached to this declaration. This method of service was made pursuant to the agreement of counsel.

**(BY U.S. MAIL)**

I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings, and notices for mailing with United States Postal Service. The foregoing sealed envelope was placed for collection and mailing this date consistent with the ordinary business practice of my place of employment, so that it will be picked up this date with postage thereon fully prepaid at Irvine, California, in the ordinary course of such business.

**(BY FEDERAL EXPRESS)**

I am readily familiar with the business practice of my place of employment in respect to the collection and processing of correspondence, pleadings and notices for delivery by Federal Express. Under the practice it would be deposited with Federal Express on that same day with postage thereon fully prepared at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if delivery by Federal Express is more than one day after date of deposit with Federal Express. Executed on the below date, at Irvine, California.

**(FEDERAL)**

I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Executed on June 16, 2010.

  
\_\_\_\_\_  
Grayce Lee

**SERVICE LIST**

*United States of America v. Approximately \$2,822,224.75 In Funds Seized From Eight Bank Accounts, et al.*

USDC Case No. CV-09-3119 (WHA)

<p>David Countryman, Esq. Assistant U.S. Attorney U.S. Attorney's Office, NDCA 450 Golden Gate Avenue, 11th Floor San Francisco, CA 94102</p>	<p><b><u>Counsel for Plaintiff</u></b> <b><u>United States of America</u></b></p> <p>Tel: 415.436.7303 Fax: 415.436.7234 E-mail: David.Countryman@usdoj.gov</p> <p>SERVED VIA E-MAIL</p>
<p>Steven J. Saltiel, Esq. U.S. Attorney's Office 450 Golden Gate Ave. San Francisco, CA 94102</p>	<p><b><u>Counsel for Plaintiff</u></b> <b><u>United States of America</u></b></p> <p>Tel: 415.436.6996 Fax: 415.436.6748 E-mail: steven.saltiel@usdoj.gov</p> <p>SERVED VIA E-MAIL</p>
<p>Douglas V. Wolfe DWolfe@ftc.gov Sandhya P. Brown, Esq. sbrown5@ftc.gov FTC Bureau of Consumer Protection Division of Enforcement 600 Pennsylvania Ave., NW Mailstop M-8102 B Washington, DC 20580</p>	<p><b><u>Counsel for Federal Trade Commission</u></b> <b><u>Case No. CV 10-00022 WHA</u></b></p> <p>Tel: 202.326.3113 Fax: 202.326.2558</p> <p>SERVED VIA E-MAIL</p>
<p>Kerry O'Brien KO'Brien@ftc.gov 901 Market Street, Suite 570 San Francisco, CA 94103</p>	<p><b><u>Counsel for Federal Trade Commission</u></b> <b><u>Case No. CV 10-00022 WHA</u></b></p> <p>Tel: 415.848.5189 Fax: 415.848.5184</p> <p>SERVED VIA E-MAIL</p>



<p>1 2 3 4 5 6 7</p> <p>Joel Dichter, Esq. Dichter Law LLC 488 Madison Avenue, 10th Floor New York, NY 10022</p>	<p><b><u>Counsel for Inc21.com Corporation, Jumpage Solutions, Inc. GST U.S.A., Inc. Roy Yu Lin and John Yu Lin (Admitted Pro Hac Vice) Case No. CV 10-00022 WHA</u></b></p> <p>Tel: 212.593.4202 Fax: 212.994.5394 E-mail: dichter@dichterlaw.com</p> <p>SERVED VIA E-MAIL</p>
<p>8 9 10 11 12</p> <p>Kent Morrison Rider, Esq. Terrace II, Suite 400 2700 Via Fortuna Austin, TX 78746 Email: kentr@publicans.com</p>	<p><b><u>Counsel for Cypress-Fairbanks Independent School District, Katy Independent School District and Harris County Texas</u></b></p> <p>Tel: 512.447.6675 Fax: 512.443.3494 E-mail: kentr@publicans.com</p> <p>SERVED VIA U.S. MAIL</p>
<p>13 14 15 16 17</p> <p>Michael Adam Sweet McNutt Law Group LLP 188 The Embarcadero, Suite 800 San Francisco, CA 94105</p>	<p><b><u>Counsel for Claimant Harris County, Texas</u></b></p> <p>Tel: 415.999.8475 Fax: 415.995.8487 Email: msweet@ml-sf.com</p> <p>SERVED VIA U.S. MAIL</p>
<p>18 19 20 21 22 23 24 25 26 27 28</p> <p>Elana Moeder, Esq. Michael James Fox, Esq. Pite Duncan LLP 1820 E First Street, Suite 420 Santa Ana, CA 92705</p>	<p><b><u>Counsel for Claimant Bank of America, N.A.</u></b></p> <p>Tel: 714.285.2635 E-mail: emoeder@piteduncan.com Tel: 714.285.2637 Fax: 619.285.2668 Email: mfox@piteduncan.com</p> <p>SERVED VIA U.S. MAIL</p>

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

CERTIFIED COPY

FEDERAL TRADE COMMISSION,

PLAINTIFF,

V.

INC21.COM CORPORATION, ET

AL.,

DEFENDANTS.

) CASE NO.

) CV 10-00022 WHA

)

)

DEPOSITION OF ROY LIN  
FRIDAY, JANUARY 29, 2010

BEHMKE REPORTING & VIDEO SERVICES

BY: CYNTHIA F. DAMMANN, CSR NO. 10610

160 SPEAR STREET, SUITE 300

SAN FRANCISCO, CALIFORNIA 94105

(415) 597-5600

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Deposition of ROY LIN, taken on behalf  
of PLAINTIFF, at 450 Golden Gate Avenue, 9th Floor,  
San Francisco, California, commencing at 9:05 a.m.,  
FRIDAY, JANUARY 29, 2010, before Cynthia F. Dammann,  
Certified Shorthand Reporter No. 10610, pursuant to  
Notice.

1 APPEARANCES OF COUNSEL

2 FOR THE FEDERAL TRADE COMMISSION:

3 FEDERAL TRADE COMMISSION

4 BY: DOUGLAS V. WOLFE, ATTORNEY AT LAW

5 SANDHYA P. BROWN, ATTORNEY AT LAW

6 600 Pennsylvania Avenue, NW

7 Washington, D.C. 20580

8 Telephone: (202) 326-3113

9 E-mail: dwolfe@ftc.gov

10 sbrown5@ftc.gov

11

12 FOR THE UNITED STATES OF AMERICA:

13 U.S. DEPARTMENT OF JUSTICE, UNITED STATES

14 ATTORNEY'S OFFICE

15 BY: DAVID B. COUNTRYMAN, ASSISTANT U.S. ATTORNEY

16 STEVEN J. SALTIEL, ASSISTANT U.S. ATTORNEY

17 450 Golden Gate Avenue

18 Box 36055

19 San Francisco, California 94102

20 Telephone: (415) 436-7303

21 E-mail: david.countryman@usdoj.gov

22

23

24

25

1 APPEARANCES OF COUNSEL - CONTINUED

2 FOR DEFENDANTS:

3 GREENBERG TRAURIG, LLP

4 BY: WAYNE GROSS, ATTORNEY AT LAW

5 3161 Michelson Drive

6 Suite 1000

7 Irvine, California 92612

8 Telephone: (949) 732-6500

9 E-mail: grossw@gtlaw.com

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1 ROY LIN,  
2 having been first duly sworn, testified as follows:

3

4 EXAMINATION

5 BY MS. BROWN:

6 Q. Good morning, Mr. Lin.

7 A. Good morning.

8 Q. Could you please state your full name for  
9 the record.

09:05:59 10 A. Roy Yu-Chou Lin.

11 Q. Could you please spell that.

12 A. Roy, R-O-Y, Yu-Chou, Y-U C-H-O-U, L-I-N.

13 Q. And are Yu and Chou two different names?

14 A. Yu-Chou is my Chinese name.

09:06:18 15 Q. Is it hyphenated?

16 A. Yeah. It's hyphenated.

17 MR. GROSS: Just wait for her to finish her  
18 questions.

19 THE WITNESS: Okay. Sure.

09:06:23 20 BY MS. BROWN:

21 Q. And are you a defendant in the matter of FTC  
22 versus Inc21, et al.?

23 A. Yes.

24 Q. And you were here yesterday for your  
09:06:33 25 brother's deposition, right?

1 talked about product development.

2 What other areas of responsibility were in  
3 the company?

4 A. They also are quality control and, you  
11:03:24 5 know -- but mostly John involves in the IT --  
6 quality control and IT mostly John is involved. But  
7 once in a while I'll -- you know, if he's  
8 stressed -- once in a while they get me involved, if  
9 John is busy or -- yeah.

11:03:40 10 Q. Okay. Who was part of the quality control  
11 team?

12 A. Leader?

13 Q. Did you say -- was there a leader?

14 A. Yes.

11:03:49 15 Q. Who was the leader?

16 A. Selena Tran.

17 Q. Okay. And who else was part of the team?

18 A. Ariel Adams.

19 Q. Okay. Anyone else?

11:04:03 20 A. And talking about prior the June 9th, right?

21 Q. Yes.

22 A. Okay. Betty Wong.

23 Q. Betty Fong?

24 A. Yeah.

11:04:14 25 Q. F-O-N-G?

1 A. I'm sorry. W-O-N-G.

2 Then we've got -- that's a full-time people,  
3 yeah. We've got a few part-time also, yeah.

11:04:29

4 Q. Okay. And with respect to the IT team, was  
5 there a leader?

6 A. Yeah. Billy Kimble was the leader.

7 B-I-L-L-Y.

8 Q. Billy Kimble.

9 A. Yeah.

11:04:38

10 Q. Spell the last name.

11 A. Kimble, K-I-M --

12 Q. B-A-L-L?

13 A. K-I-M-B-L-E.

14 Q. Okay. And who else was part of that team?

11:04:48

15 A. Andrew Waage and Joseph Gutierrez.

16 Q. Okay.

17 A. Yeah.

18 Q. Anyone else?

19 A. And Nat. Again it's a long last name, so I

11:05:10

20 don't know how to spell it.

21 Q. Okay. Do you know what the name begins  
22 with, the last name?

23 A. It's probably "H." Don't count me on that.

24 Q. Okay.

11:05:19

25 A. Yeah. It's a very long last name. Yeah.



1 We also have a Colette on the leads, Colette Cheng.

2 Q. And was she not -- was she part of one of  
3 the teams we discussed?

4 A. No.

11:05:35 5 Q. Something else?

6 A. Yeah. Something else.

7 Q. Okay. So tell me what --

8 A. She's more of a department of her own. Like  
9 leads department.

11:05:42 10 Q. So leads were handled by Colette Cheng?

11 A. Yeah.

12 Q. Were there other people who weren't  
13 necessarily part of a team but they had different  
14 responsibilities than what we've discussed?

11:05:53 15 A. Yeah. There's a sys admin, like Michael  
16 Nelson, yeah.

17 Q. Does that cover all the major areas of work  
18 and responsibility in the company?

19 A. Yes.

11:06:12 20 Q. Okay. Now, describe for me your role  
21 further and perhaps in relation to those teams.

22 A. Sure, sure. Well, I work -- I'm sorry.  
23 There's also legal department.

24 Q. Okay. There's a legal department?

11:06:27 25 A. It's run by Ariel himself.

1 Q. Okay.

2 A. Yeah.

3 Q. Was he the only one in it, or were there  
4 other people?

11:06:33 5 A. Yeah. Obviously, we -- he gets assistants  
6 on and off.

7 Q. With -- from whom?

8 A. Helping him -- helping Ariel taking care of  
9 his stuff, but I don't remember the name.

11:06:47 10 Q. Okay. So would that have been an employee  
11 of Inc21?

12 A. It was, yeah.

13 Q. Okay.

14 A. It was. Usually they don't stay very long.

11:06:56 15 Q. Okay. So you don't remember anyone in  
16 particular?

17 A. Yeah. But I remember there were a couple of  
18 assistant working with Ariel.

19 Q. Okay. If you remember more, you can let me  
11:07:11 20 know?

21 A. Sure, sure.

22 Q. Okay. So continue describing for me your  
23 roles in the company.

24 A. So I manage on daily basis mostly -- I'm  
11:07:21 25 sorry. I forgot.

1 A. Yeah. Not me.

2 Q. E-mail the company?

3 A. The company, yeah.

4 Q. Okay. And do customers also e-mail the  
11:41:23 5 company having problems with the service?

6 A. Of course.

7 Q. Who -- it doesn't sound like they're  
8 e-mailing you directly. Is that right?

9 A. Because I'm not in charge of customer  
11:41:34 10 service department.

11 Q. Who would they be e-mailing in the company?

12 A. To Salena's department.

13 Q. Selena.

14 Is there any way for someone at Inc21 to  
11:41:46 15 determine if a customer is interacting with their  
16 service, that they are doing anything to show that  
17 they are engaged with the service?

18 Do you understand what I'm saying?

19 A. Yeah, yeah, sure. So Michael Nelson has  
11:42:04 20 more in-depth knowledge of that.

21 Q. I'm asking generally is there a way to tell?

22 You said --

23 A. Yeah.

24 Q. -- these services don't require customer  
11:42:13 25 interaction, right?

1 A. On GlobalYP.

2 Q. Right. I'm talking about GlobalYP, NetOpus,  
3 and MetroYP.

4 A. Sure.

11:42:21 5 Q. So there's no customer interaction required  
6 for those services to be in existence?

7 A. (Witness nods head.)

8 Q. So is there any way for anyone at Inc21 to  
9 determine if the customer is looking at the website  
11:42:36 10 that's being built or sees their listing or accesses  
11 the service in any way?

12 A. Can you repeat?

13 MR. GROSS: Do you understand the question?

14 THE WITNESS: I think the question is kind  
11:42:54 15 of long. That's why I need it repeated, yeah.

16 MR. GROSS: Can he have the question read  
17 back?

18 MS. BROWN: Please.

19 (Record read: So is there any way for  
11:42:29 20 anyone at Inc21 to determine if the customer  
21 is looking at the website that's being built  
22 or sees their listing or accesses the  
23 service in any way?)

24 MR. GROSS: It's a compound question, but  
11:43:19 25 you may answer it if you understand it.

1 THE WITNESS: Yeah.

2 BY MS. BROWN:

3 Q. You can answer it.

4 A. Yeah. There's a --

11:43:28 5 Q. There's a way to determine? Yes?

6 A. They determine by the customer feedbacks  
7 from the customer service center.

8 Q. Is there a way to determine -- without the  
9 customer having to contact the company, is there a  
11:43:42 10 way to determine if there's any interaction on the  
11 part of the customer with the service?

12 A. Without the customer contacting the company?

13 Q. Correct.

14 A. To measure -- okay. Without -- there might  
11:44:10 15 be a way. I think John and Michael is better --

16 Q. You don't know of it, right?

17 A. Yeah. I don't know. I'm not that  
18 technical.

19 Q. Okay.

11:44:19 20 A. I shouldn't say I'm not that technical,  
21 yeah.

22 Q. Okay. What about the SiteBuilder service,  
23 does that require customer interaction?

24 A. Actually, we sign up customer. When the  
11:44:33 25 customer authorize, we actually upload their basic

1 account to SiteBuilder, but when customer look at  
2 it, some customer do require some changes on  
3 SiteBuilder itself that can be changed on some of  
4 the pages of template. So some customer call to  
5 request for a change.

11:44:48

6 Q. So it can be interacted with, SiteBuilder  
7 service, but it doesn't have to be?

8 A. It doesn't have to be, but it can be.  
9 That's right.

11:44:59

10 Q. Can you tell when a customer interacts with  
11 that SiteBuilder service? Can you or anyone at  
12 Inc21?

13 A. Yeah.

14 Q. And who would know?

11:45:09

15 A. Michael Nelson would know.

16 Q. Michael Nelson?

17 A. Yeah.

18 Q. I'm going to ask you similar questions with  
19 respect to JumPage Solutions.

11:45:20

20 A. Sure, sure.

21 Q. Does JumPage Solutions require any  
22 interaction from customers in order for the service  
23 to exist?

11:45:34

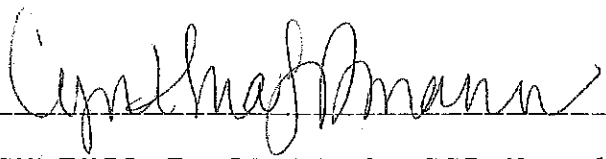
24 A. Does JumPage Solution require interaction,  
25 no. But we -- the reason is when they sign up with

1 STATE OF CALIFORNIA )  
2 COUNTY OF SAN FRANCISCO )

3  
4 I hereby certify that the witness in the  
5 foregoing deposition was by me duly sworn to testify  
6 to the truth, the whole truth and nothing but the  
7 truth, in the within-entitled cause; that said  
8 deposition was taken at the time and place herein  
9 named; that the deposition is a true record of the  
10 witness' testimony as reported by me, a duly  
11 certified shorthand reporter and a disinterested  
12 person, and was thereafter transcribed into  
13 typewriting by computer.

14 I further certify that I am not interested  
15 in the outcome of the said action, nor connected  
16 with, nor related to any of the parties in said  
17 action, nor to their respective counsel.

18 IN WITNESS WHEREOF, I have hereunto set my  
19 hand this 2nd day of February, 2010.

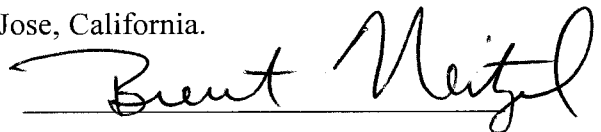
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22 \_\_\_\_\_  
23 CYNTHIA F. DAMMANN, CSR No. 10610  
24 STATE OF CALIFORNIA  
25

**CERTIFICATION OF RECORDS OF REGULARLY CONDUCTED ACTIVITY**  
**Pursuant to 28 U.S.C. § 1746**

- I. I, BRENT NEITZEL, have personal knowledge of the facts set forth below and am competent to testify as follows:
- II. I have authority to certify the authenticity and accuracy of records maintained by The Billing Resource, LLC, a Delaware limited liability company ("TBR").
- III. TBR purchased certain assets of Old T.B.R., Incorporated, f/k/a The Billing Resource d/b/a Integretel ("Old TBR") in a bankruptcy, pending in the United States Bankruptcy Court for the Northern District of California. Among the assets purchased was the billing and settlement database (the "Database") that included the settlement statement history of certain clients of Old TBR ("Old TBR Clients").
- IV. The documents attached hereto are copies of Monthly Status Reports for the following Old TBR Clients: 328 GlobalYP, 456 Inc21.com, and 457 GlobalYP (the "Monthly Status Reports").
- V. While I cannot attest to the completeness, accuracy or method of recording the data indicated on the attached documents, the data contained on the attached documents is consistent with the data contained in the Database.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on 6/17/2010, 2010 at San Jose, California.



Signature



## Monthly Performance Status

As Of: 08/22/2007

Client: 328 - GLOBALYP

From Deposit Month: Jan 2002 To Jul 2007

Deposit Month	New		Unbill		Client		Call Center		LEC		LEC	
	Billing	Amount	%	Refunds	%	Refunds	%	Chargebacks	%	Write-Offs	%	
Apr 2004	40,246.58	(3,088.97)	7.68	0.00	0.00	(2,219.26)	5.51	(10,875.89)	27.02	(317.84)	0.79	
May 2004	62,530.18	(3,313.96)	5.30	0.00	0.00	(3,478.92)	5.56	(21,229.60)	33.95	(652.03)	1.04	
Jun 2004	124,419.24	(9,557.32)	7.68	0.00	0.00	(12,008.61)	9.65	(35,259.29)	28.34	(1,126.70)	0.91	
Jul 2004	192,902.95	(19,025.85)	9.86	(334.90)	0.17	(21,337.94)	11.06	(37,824.03)	19.61	(1,271.07)	0.66	
Aug 2004	153,197.22	(14,666.51)	9.57	0.00	0.00	(28,462.70)	18.58	(30,987.60)	20.23	(1,848.57)	1.21	
Sep 2004	162,860.31	(17,662.86)	10.85	(139.96)	0.09	(37,231.64)	22.86	(23,705.83)	14.56	(1,701.54)	1.04	
Oct 2004	265,486.47	(26,667.69)	10.04	(69.98)	0.03	(55,424.78)	20.88	(30,663.29)	11.55	(3,205.79)	1.21	
Nov 2004	282,704.17	(25,380.22)	8.98	0.00	0.00	(61,185.65)	21.64	(31,076.99)	10.99	(2,558.32)	0.90	
Dec 2004	564,455.58	(55,326.22)	9.80	(69.98)	0.01	(117,086.32)	20.74	(58,903.07)	10.44	(5,653.87)	1.00	
<b>Total 2004</b>	<b>1,848,802.70</b>	<b>(174,689.60)</b>	<b>9.45</b>	<b>(614.82)</b>	<b>0.03</b>	<b>(338,435.82)</b>	<b>18.31</b>	<b>(280,525.59)</b>	<b>15.17</b>	<b>(18,335.73)</b>	<b>0.99</b>	
Jan 2005	588,760.26	(45,561.49)	7.74	(104.97)	0.02	(120,375.11)	20.45	(71,966.10)	12.22	(7,244.51)	1.23	
Feb 2005	623,271.64	(65,101.38)	10.45	0.00	0.00	(118,920.58)	19.08	(60,166.86)	9.65	(8,036.73)	1.29	
Mar 2005	427,862.51	(24,612.96)	5.75	0.00	0.00	(124,511.55)	29.10	(40,239.65)	9.40	(4,829.85)	1.13	
Apr 2005	334,202.32	(12,081.54)	3.62	0.00	0.00	(47,692.65)	14.27	(29,100.29)	8.71	(5,115.39)	1.53	
May 2005	203,656.71	(9,742.21)	4.78	0.00	0.00	(21,776.18)	10.69	(15,703.61)	7.71	(3,677.61)	1.81	
Jun 2005	186,461.63	(8,347.61)	4.48	0.00	0.00	(19,519.36)	10.47	(11,933.13)	6.40	(2,874.38)	1.54	
Jul 2005	257,317.52	(13,204.34)	5.13	0.00	0.00	(26,813.74)	10.42	(16,051.43)	6.24	(4,119.65)	1.60	
Aug 2005	168,551.75	(14,740.78)	8.75	0.00	0.00	(23,405.70)	13.89	(6,779.88)	4.02	(2,290.80)	1.36	
Sep 2005	223,372.12	(18,504.71)	8.28	0.00	0.00	(34,660.46)	15.52	(9,118.94)	4.08	(2,651.22)	1.19	
Oct 2005	249,218.75	(14,670.80)	5.89	0.00	0.00	(38,268.98)	15.36	(10,249.11)	4.11	(3,104.01)	1.25	
Nov 2005	252,420.87	(13,953.03)	5.53	0.00	0.00	(40,755.77)	16.15	(9,869.80)	3.91	(2,490.95)	0.99	
Dec 2005	476,864.01	(30,669.34)	6.43	0.00	0.00	(90,069.78)	18.89	(20,048.36)	4.20	(5,229.70)	1.10	
<b>Total 2005</b>	<b>3,991,960.09</b>	<b>(271,190.19)</b>	<b>6.79</b>	<b>(104.97)</b>	<b>0.00</b>	<b>(706,769.86)</b>	<b>17.70</b>	<b>(301,227.16)</b>	<b>7.55</b>	<b>(51,664.80)</b>	<b>1.29</b>	
Jan 2006	358,435.72	(13,861.18)	3.87	0.00	0.00	(71,324.53)	19.90	(17,765.59)	4.96	(4,190.87)	1.17	
Feb 2006	371,740.72	(9,132.39)	2.46	0.00	0.00	(72,576.59)	19.52	(17,619.18)	4.74	(4,778.26)	1.29	
Mar 2006	473,743.59	(9,821.24)	2.07	0.00	0.00	(100,774.52)	21.27	(23,691.00)	5.00	(5,241.76)	1.11	
Apr 2006	667,468.19	(16,790.20)	2.52	0.00	0.00	(115,692.39)	17.33	(37,846.04)	5.67	(6,332.58)	0.95	
May 2006	552,922.94	(18,940.62)	3.43	0.00	0.00	(84,557.53)	15.29	(30,563.37)	5.53	(6,586.45)	1.19	
Jun 2006	641,574.77	(19,550.45)	3.05	0.00	0.00	(90,821.59)	14.16	(32,103.26)	5.00	(6,738.38)	1.05	
Jul 2006	706,548.00	(16,160.38)	2.29	0.00	0.00	(87,004.73)	12.31	(36,028.63)	5.10	(6,692.74)	0.95	
Aug 2006	632,089.39	(19,103.55)	3.02	0.00	0.00	(84,151.34)	13.31	(29,766.19)	4.71	(5,967.66)	0.94	
Sep 2006	872,610.82	(18,984.07)	2.18	0.00	0.00	(149,807.26)	17.17	(40,861.69)	4.68	(8,342.00)	0.96	
Oct 2006	675,157.10	(12,716.47)	1.88	0.00	0.00	(102,642.96)	15.20	(33,800.71)	5.01	(7,646.76)	1.13	
Nov 2006	572,910.83	(9,127.50)	1.59	0.00	0.00	(69,196.68)	12.08	(29,023.90)	5.07	(6,438.14)	1.12	
Dec 2006	678,423.74	(11,417.02)	1.68	0.00	0.00	(59,780.79)	8.81	(26,788.37)	3.95	(8,005.09)	1.18	
<b>Total 2006</b>	<b>7,203,625.81</b>	<b>(175,605.07)</b>	<b>2.44</b>	<b>0.00</b>	<b>0.00</b>	<b>(1,088,330.91)</b>	<b>15.11</b>	<b>(355,857.93)</b>	<b>4.94</b>	<b>(76,960.69)</b>	<b>1.07</b>	

## Monthly Performance Status

As Of: 08/22/2007

Client: 328 - GLOBALYP

From Deposit Month: Jan 2002 To Jul 2007

<u>Deposit Month</u>	<u>New Billing</u>	<u>Unbill</u>		<u>Client</u>		<u>Call Center</u>		<u>LEC</u>		<u>LEC</u>	
		<u>Amount</u>	<u>%</u>	<u>Refunds</u>	<u>%</u>	<u>Refunds</u>	<u>%</u>	<u>Chargebacks</u>	<u>%</u>	<u>Write-Offs</u>	<u>%</u>
Jan 2007	501,687.21	(6,605.14)	1.32	0.00	0.00	(37,073.63)	7.39	(15,807.17)	3.15	(5,643.44)	1.12
Feb 2007	414,189.32	(6,379.27)	1.54	0.00	0.00	(26,434.04)	6.38	(10,377.39)	2.51	(3,886.55)	0.94
Mar 2007	725,811.99	(13,352.26)	1.84	0.00	0.00	(48,594.36)	6.70	(15,222.71)	2.10	(5,026.31)	0.69
Apr 2007	483,315.94	(15,011.77)	3.11	0.00	0.00	(46,158.02)	9.55	(10,191.90)	2.11	(1,597.22)	0.33
May 2007	524,018.34	(9,925.21)	1.89	0.00	0.00	(39,733.60)	7.58	(9,104.48)	1.74	(1,248.90)	0.24
Jun 2007	646,505.41	(12,847.40)	1.99	0.00	0.00	(38,721.60)	5.99	(7,301.08)	1.13	(735.19)	0.11
Jul 2007	538,562.18	(9,698.24)	1.80	0.00	0.00	(15,414.06)	2.86	(2,809.11)	0.52	(205.74)	0.04
<b>Total 2007</b>	<b>3,834,090.39</b>	<b>(73,819.29)</b>	<b>1.93</b>	<b>0.00</b>	<b>0.00</b>	<b>(252,129.31)</b>	<b>6.58</b>	<b>(70,813.84)</b>	<b>1.85</b>	<b>(18,343.35)</b>	<b>0.48</b>
<b>Grand Total</b>	<b>16,878,478.99</b>	<b>(695,304.15)</b>	<b>4.12</b>	<b>(719.79)</b>	<b>0.00</b>	<b>(2,385,665.90)</b>	<b>14.13</b>	<b>(1,008,424.52)</b>	<b>5.97</b>	<b>(165,304.57)</b>	<b>0.98</b>

## Monthly Performance Status

As Of: 08/22/2007

Client: 456 - INC21.COM, CORPORATION  
From Deposit Month: Jan 2002 To Jul 2007

<u>Deposit Month</u>	<u>New Billing</u>	<u>Unbill</u>		<u>Client Refunds</u>		<u>Call Center Refunds</u>		<u>LEC Chargebacks</u>		<u>LEC Write-Offs</u>	
		<u>Amount</u>	<u>%</u>	<u></u>	<u>%</u>	<u></u>	<u>%</u>	<u></u>	<u>%</u>	<u></u>	<u>%</u>
Aug 2003	14,112.34	(2,349.40)	16.65	0.00	0.00	(1,686.19)	11.95	(3,048.33)	21.60	(1,311.75)	9.30
Sep 2003	12,419.13	(682.71)	5.50	0.00	0.00	(370.71)	2.98	(3,692.11)	29.73	(1,081.16)	8.71
Oct 2003	5,761.92	(821.99)	14.27	0.00	0.00	(59.46)	1.03	(533.57)	9.26	(189.20)	3.28
Nov 2003	7,192.06	(235.34)	3.27	0.00	0.00	(40.48)	0.56	(1,731.91)	24.08	(318.30)	4.43
Dec 2003	4,260.24	(882.97)	20.73	0.00	0.00	(5.50)	0.13	(268.66)	6.31	(45.84)	1.08
<b>Total 2003</b>	<b>43,745.69</b>	<b>(4,972.41)</b>	<b>11.37</b>	<b>0.00</b>	<b>0.00</b>	<b>(2,162.34)</b>	<b>4.94</b>	<b>(9,274.58)</b>	<b>21.20</b>	<b>(2,946.25)</b>	<b>6.73</b>
Jan 2004	17,870.81	(13,549.06)	75.82	0.00	0.00	(0.15)	0.00	(369.80)	2.07	(632.79)	3.54
Feb 2004	2,841.28	(592.06)	20.84	0.00	0.00	(35.70)	1.26	(251.04)	8.84	(26.00)	0.92
Mar 2004	2,045.93	(335.90)	16.42	0.00	0.00	(3.80)	0.19	(15.90)	0.78	(83.00)	4.06
Apr 2004	3,017.59	(279.11)	9.25	0.00	0.00	0.00	0.00	(5.80)	0.19	(408.83)	13.55
May 2004	1,200.25	(115.53)	9.63	0.00	0.00	0.00	0.00	(1.40)	0.12	(105.48)	8.79
Jul 2004	47.06	(0.20)	0.42	0.00	0.00	0.00	0.00	(0.05)	0.11	0.00	0.00
<b>Total 2004</b>	<b>27,022.92</b>	<b>(14,871.86)</b>	<b>55.03</b>	<b>0.00</b>	<b>0.00</b>	<b>(39.65)</b>	<b>0.15</b>	<b>(643.99)</b>	<b>2.38</b>	<b>(1,256.10)</b>	<b>4.65</b>
<b>Grand Total</b>	<b>70,768.61</b>	<b>(19,844.27)</b>	<b>28.04</b>	<b>0.00</b>	<b>0.00</b>	<b>(2,201.99)</b>	<b>3.11</b>	<b>(9,918.57)</b>	<b>14.02</b>	<b>(4,202.35)</b>	<b>5.94</b>

## Monthly Performance Status

As Of: 08/22/2007

Client: 457 - GLOBALYP

From Deposit Month: Jan 2002 To July 2007

Deposit Month	New Billing	Unbill Amount	%	Client Refunds	%	Call Center Refunds	%	LEC Chargebacks	%	LEC Write-Offs	%
	Feb 2003	21,316.99	(22,502.48)	105.56	0.00	0.00	(11,719.48)	54.98	(1,994.60)	9.36	(1,220.78)
Mar 2003	38,826.27	(2,165.66)	5.58	0.00	0.00	(9,316.09)	23.99	(3,429.64)	8.83	(879.18)	2.26
Apr 2003	29,748.62	(3,970.62)	13.35	0.00	0.00	(14,472.44)	48.65	(4,428.69)	14.89	(938.89)	3.16
May 2003	31,755.62	(7,196.48)	22.66	0.00	0.00	(9,819.63)	30.92	(3,122.34)	9.83	(1,249.34)	3.93
Jun 2003	53,547.74	(13,936.93)	26.03	(27.33)	0.05	(10,855.67)	20.27	(5,533.82)	10.33	(3,572.37)	6.67
Jul 2003	30,102.86	(6,434.08)	21.37	0.00	0.00	(4,518.19)	15.01	(3,803.02)	12.63	(2,807.31)	9.33
Aug 2003	134,087.57	(25,442.76)	18.97	0.00	0.00	(26,417.46)	19.70	(15,547.89)	11.60	(10,689.33)	7.97
Sep 2003	76,970.11	(13,806.99)	17.94	0.00	0.00	(11,290.62)	14.67	(8,992.65)	11.68	(5,407.48)	7.03
Oct 2003	93,896.34	(19,656.29)	20.93	(29.99)	0.03	(6,286.45)	6.70	(10,861.81)	11.57	(6,002.34)	6.39
Nov 2003	90,452.88	(13,546.80)	14.98	(719.46)	0.80	(4,083.04)	4.51	(13,545.34)	14.98	(5,203.79)	5.75
Dec 2003	91,629.16	(25,741.36)	28.09	(914.09)	1.00	(3,949.09)	4.31	(11,788.18)	12.87	(5,298.36)	5.78
<b>Total 2003</b>	<b>692,334.16</b>	<b>(154,400.45)</b>	<b>22.30</b>	<b>(1,690.87)</b>	<b>0.24</b>	<b>(112,728.16)</b>	<b>16.28</b>	<b>(83,047.98)</b>	<b>12.00</b>	<b>(43,269.17)</b>	<b>6.25</b>
Jan 2004	70,549.44	(17,442.22)	24.72	(29.99)	0.04	(2,175.64)	3.08	(7,861.36)	11.14	(5,685.99)	8.06
Feb 2004	75,356.95	(25,532.69)	33.88	0.00	0.00	(2,568.27)	3.41	(7,285.77)	9.67	(6,193.23)	8.22
Mar 2004	94,108.54	(30,970.58)	32.91	(32.39)	0.03	(3,563.97)	3.79	(12,428.07)	13.21	(7,860.35)	8.35
Apr 2004	55,120.53	(23,626.73)	42.86	0.00	0.00	(959.68)	1.74	(3,489.69)	6.33	(7,369.35)	13.37
May 2004	37,215.78	(12,944.77)	34.78	0.00	0.00	(809.72)	2.18	(2,818.73)	7.57	(4,346.80)	11.68
Jul 2004	17,224.36	(5,448.17)	31.63	0.00	0.00	(509.82)	2.96	(1,397.48)	8.11	(2,517.27)	14.61
<b>Total 2004</b>	<b>349,575.60</b>	<b>(115,965.16)</b>	<b>33.17</b>	<b>(62.38)</b>	<b>0.02</b>	<b>(10,587.10)</b>	<b>3.03</b>	<b>(35,281.10)</b>	<b>10.09</b>	<b>(33,972.99)</b>	<b>9.72</b>
<b>Grand Total</b>	<b>1,041,909.76</b>	<b>(270,365.61)</b>	<b>25.95</b>	<b>(1,753.25)</b>	<b>0.17</b>	<b>(123,315.26)</b>	<b>11.84</b>	<b>(118,329.08)</b>	<b>11.36</b>	<b>(77,242.16)</b>	<b>7.41</b>

### Monthly Performance Status

As Of: 02/06/2009

Client: 328 - GLOBALYP

From Deposit Month: Jun 2008 To Feb 2009

Deposit Month	New		Unbill Amount	%	Net Billing	Client		Call Center		LEC		LEC		Net	
	Billing	Amount				Refunds	%	Refunds	%	Chargebacks	%	Write-Offs	%	Receipts	%
Jun 2008	444,392.70	(7,633.78)	1.72	436,758.92	0.00	0.00	(34,973.85)	8.01	(11,790.27)	2.70	(2,927.51)	0.67	387,067.29	88.62	
Jul 2008	478,909.61	(14,069.92)	2.94	464,839.69	0.00	0.00	(35,716.34)	7.68	(11,733.89)	2.52	(2,525.74)	0.54	414,863.72	89.25	
Aug 2008	545,728.01	(7,263.98)	1.33	538,464.03	0.00	0.00	(36,734.80)	6.82	(12,710.00)	2.36	(3,015.93)	0.56	486,003.30	90.26	
Sep 2008	416,643.93	(6,426.18)	1.54	410,217.75	0.00	0.00	(27,550.99)	6.72	(8,858.82)	2.16	(1,815.93)	0.44	371,992.01	90.68	
Oct 2008	470,314.63	(6,937.03)	1.47	463,377.60	0.00	0.00	(26,497.30)	5.72	(7,646.74)	1.65	(1,754.48)	0.38	427,479.08	92.25	
Nov 2008	391,095.29	(5,098.57)	1.30	385,996.72	0.00	0.00	(17,537.43)	4.54	(4,424.74)	1.15	(641.61)	0.17	363,392.94	94.14	
Dec 2008	376,626.33	(4,828.62)	1.28	371,797.71	0.00	0.00	(12,805.30)	3.44	(2,946.17)	0.79	(175.66)	0.05	355,870.58	95.72	
Jan 2009	477,390.55	(4,317.78)	0.90	473,072.77	0.00	0.00	(6,508.12)	1.38	(1,574.55)	0.33	(237.73)	0.05	464,752.37	98.24	
Feb 2009	68,231.52	0.00	0.00	68,231.52	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	68,231.52	100.00	
<b>Total</b>	<b>3,669,332.57</b>	<b>(56,575.86)</b>	<b>1.54</b>	<b>3,612,756.71</b>	<b>0.00</b>	<b>0.00</b>	<b>(198,324.13)</b>	<b>5.49</b>	<b>(61,685.18)</b>	<b>1.71</b>	<b>(13,094.59)</b>	<b>0.36</b>	<b>3,339,652.81</b>	<b>92.44</b>	

### Monthly Performance Status

As Of: 05/31/2008

Client: 328 - GLOBALYP

From Deposit Month: Sept 2007 To May 2008

Deposit Month	New		%	Net Billing	Client		Call Center		LEC		LEC		Net	
	Billing	Unbill Amount			Refunds	%	Refunds	%	Chargebacks	%	Write-Offs	%	Receipts	%
Sep 2007	725,915.08	(23,254.44)	3.20	702,660.64	0.00	0.00	(113,409.94)	16.14	(31,131.65)	4.43	(4,603.32)	0.66	553,515.73	78.77
Oct 2007	648,023.48	(14,928.84)	2.30	633,094.64	0.00	0.00	(79,377.76)	12.54	(28,911.11)	4.57	(3,842.33)	0.61	520,963.44	82.29
Nov 2007	793,222.57	(12,475.52)	1.57	780,747.05	0.00	0.00	(68,369.72)	8.76	(25,435.39)	3.26	(4,672.12)	0.60	682,269.82	87.39
Dec 2007	569,675.69	(9,920.15)	1.74	559,755.54	0.00	0.00	(43,246.74)	7.73	(15,810.42)	2.82	(3,087.08)	0.55	497,611.30	88.90
Jan 2008	536,739.92	(9,426.30)	1.76	527,313.62	0.00	0.00	(35,816.79)	6.79	(12,784.63)	2.42	(1,986.39)	0.38	476,725.81	90.41
Feb 2008	683,713.28	(12,761.33)	1.87	670,951.95	0.00	0.00	(38,862.83)	5.79	(13,173.35)	1.96	(1,415.21)	0.21	617,500.56	92.03
Mar 2008	553,374.28	(8,938.41)	1.62	544,435.87	0.00	0.00	(26,019.99)	4.78	(7,159.93)	1.32	(493.33)	0.09	510,762.62	93.82
Apr 2008	479,696.40	(6,122.26)	1.28	473,574.14	0.00	0.00	(15,456.15)	3.26	(3,091.14)	0.65	(92.57)	0.02	454,934.28	96.06
May 2008	671,260.11	(5,862.26)	0.87	665,397.85	0.00	0.00	(5,566.77)	0.84	(559.84)	0.08	(34.99)	0.01	659,236.25	99.07
<b>Total</b>	<b>5,661,620.81</b>	<b>(103,689.51)</b>	<b>1.83</b>	<b>5,557,931.30</b>	<b>0.00</b>	<b>0.00</b>	<b>(426,126.69)</b>	<b>7.67</b>	<b>(138,057.46)</b>	<b>2.48</b>	<b>(20,227.34)</b>	<b>0.36</b>	<b>4,973,519.81</b>	<b>89.49</b>

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

FILED IN CLERK'S OFFICE  
U.S.D.C. Atlanta

MAY 22 1996

LUTHER D. THOMAS, Clerk  
By: *[Signature]* Deputy Clerk

FEDERAL TRADE COMMISSION

Plaintiff

v.

WINDWARD MARKETING, LTD.,  
et al.,

Defendants

CIVIL ACTION NO.  
1:96-CV-615-FMH

**ORDER**

**I. COURT REAFFIRMS APRIL 18, 1996 ORDER**

On April 18, 1996, this Court granted Plaintiff FTC's Motion for a Preliminary Injunction which Order enjoined certain telemarketing activities of the Defendants and froze certain assets of the Defendants. This matter is before the Court on various motions and briefs by several Defendants requesting that the Court reconsider the freezing of certain assets, especially those assets not traceable directly to the Defendants' recent telemarketing activities. After review of the motions and briefs filed by several Defendants, the Court reaffirms its April 18, 1996 Order and continues the freeze on Defendants' non-traceable assets for several reasons.

Plaintiff brings this action for violations of the FTC Act and seeks relief under both §13(b) of the FTC Act, 15 U.S.C. § 13(b), and §19 of the FTC Act, 15 U.S.C. § 57b. As is evident from the record and more fully explained at the April 30, 1996 hearing, however, the bulk of Plaintiff's Complaint, and the relief sought therein, focuses on §13(b). Because the Court finds that §13(b) supports the asset freeze previously granted without any consideration of the relief available under §19, the Court analyzes the question of traceability solely under §13(b).

Section 13(b) authorizes the Court to issue only injunctive relief for a violation of the FTC Act, reading in pertinent part as follows:

Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order of injunction shall be dissolved by the court and be of no further force and effect: Provided, further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.

15 U.S.C. §53(b). The Court's statutory authority to issue a permanent injunction under the FTC Act invokes the Court's "inherent equitable powers" and includes the ancillary power to order restitution and rescission of contracts. F.T.C. v. U.S. Oil and Gas Corp., 748 F.2d 1431, 1434 (11th Cir. 1984). Indeed, because "the public interest is involved in [the government's enforcement of the FTC Act], those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." Id. at 1434. Moreover, the Court may order "preliminary relief, including an asset freeze, in order to assure the availability of permanent relief," when exercising its inherent equitable powers. Levis Strauss & Co. v. Sunrise Int'l Trading, Inc., 51 F.3d 982, 987 (11th Cir. 1995) (citing U.S. Oil and Gas, 748 F.2d at 1433-34)). Thus, if the Court may order a particular kind of equitable relief as part of any permanent injunction, then the Court may issue preliminary injunctive relief to ensure the availability of that permanent relief.

In its April 18, 1996 Order, the Court froze Defendants' assets based upon two theories of equitable recovery. The first was disgorgement. In finding that disgorgement was an appropriate



final equitable remedy under §13(b), however, the Court held that disgorgement is limited to those assets that are traceable to the illegal telemarketing scheme. Largely because the Court limited the April 30, 1996 hearing to the question of whether tracing is a prerequisite to any relief available under §13(b) and because disgorgement requires such tracing, Defendants do not challenge the Court's asset freeze based upon the availability of disgorgement as part of any final relief. Instead, Defendants challenge the portion of the Court's order regarding the availability of consumer redress as part of a final remedy and whether tracing is a prerequisite to the issuance of a final order of consumer redress. The Court thus focuses solely upon whether the Court must trace an asset's origin to the alleged violation of the FTC Act before the Court may order the distribution of that asset as the part of a final equitable remedy of consumer redress.

As detailed above, §13(b) authorizes the issuance of a permanent injunction. The power to issue a permanent injunction under the FTC Act includes the ability to order ancillary relief, such as the distribution of a defendant's assets. E.g., F.T.C. v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1434 (11th Cir. 1984); F.T.C. v. Atlantex Assocs., No. 87-0045, 1987 WL 20384, slip op. at \*13-14 (S.D. Fla. Nov. 25, 1987), aff'd 872 F.2d 966 (11th Cir. 1989); accord F.T.C. v. Silueta Dist., Inc., No. 93-4141, 1995 WL 215313, slip op. at \*6-8 (N.D. Cal. Feb. 24, 1995); F.T.C. v. US Sales Corp., 785 F. Supp. 737, 752-53 (N.D. Ill. 1992).

Defendants' principal argument in opposition to the Court's asset freeze is that court-ordered restitution involving non-traceable assets is legal and not equitable in nature. Because §13(b) authorizes only equitable relief, Defendants' theory, in essence, is that the Court is without authority to order consumer redress under §13(b).

While the text of §13(b) does not expressly mention consumer redress as an available remedy, the courts routinely have found consumer redress to be an available remedy in §13(b) actions. See, e.g., F.T.C. v. Atlantex Assoc., No. 87-0045, 1987 WL 20384, slip op. \*14 (S.D. Fla. Nov. 25, 1987) (consumer redress remedies monetary injury to consumers; \$12,175,250 ordered in consumer redress under §13(b)), aff'd 872 F.2d 966, 969 n.1 (11th Cir. 1989) (affirming consumer restitution in amount of \$12,175,250 under §13(b)); see also F.T.C. v. Silueta Dist., Inc., No. 93-4141, 1995 WL 215313, slip op. at \*6 (N.D. Cal. Feb. 24, 1995) (\$169,339,35 in consumer redress because 3,853 consumers paid \$43.95 each); F.T.C. v. US Sales Corp., 785 F. Supp. 737, 752 (N.D. Ill. 1992) (§13(b) authorizes the repayment of money for consumer redress as restitution or redress; in excess of \$9 million ordered); accord F.T.C. v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1031 (7th Cir. 1988) (consumer restitution proper in §13(b) action); cf. F.T.C. v. Jordan Ashley, No. 93-2557-civ, 1994 WL 200775, slip op. at \*6-8 (S.D. Fla. April 5, 1994) (consumer redress of \$9,165,567 ordered in action under §13(b) and §19). Consistent with the authority from this Circuit as well as other circuits, the Court finds that consumer redress is within the scope of its equitable powers as authorized by §13(b).

To calculate a remedy of consumer redress, the Court totals the amount paid by each consumer less any amount returned to the consumer. F.T.C. v. Atlantex Assoc., No. 87-0045, 1987 WL 20384, slip op. \*14 (S.D. Fla. Nov. 25, 1987), aff'd 872 F.2d 966 (11th Cir. 1989); accord F.T.C. v. Figgie Int'l, Inc., 994 F.2d 595, 606-07 (9th Cir. 1993) (proper measure of consumer restitution may be to restore the status quo); Silueta, slip op. at \*6 (measure of consumer redress is amount paid by each consumer multiplied by number of injured consumers); US Sales, 785 F. Supp. at 753 (consumer restitution is purchase price of relevant product or

business opportunity less any refunds). Thus, the Court may order the refund of any monies paid by consumers because of Defendants' illegal telemarketing scheme.

Furthermore, the assets used to satisfy an equitable order for consumer refund are not limited to those traceable to the illegal conduct of Defendants. Each Defendant is jointly and severally liable, and any individual may be liable for the full amount of consumer redress regardless of his or her retention of the ill-gotten gains. (See April 18, 1996 order, at pp.66-67). It is the joint and several liability imposed by the FTC Act that leads the Court to decide that traceability is not required in executing an order for consumer refunds. Unlike disgorgement which focuses upon removing the ill-gotten gains from the defendant—an exercise that by its very nature requires tracing—consumer redress looks to place the consumer back in the position he or she held prior to the illegal conduct. Because of joint and several liability, a defendant may be called upon to redress the harm to consumers in an amount far exceeding the value of assets currently held by that defendant and that are traceable to the illegal enterprise. Indeed, a defendant who is jointly and severally liable may be required to redress the entire consumer injury. Because each defendant is jointly and severally liable,<sup>1</sup> the Court finds that tracing an asset to the

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<sup>1</sup>Defendant Mizell argues that he should not be held liable for any conduct that occurred prior to his entry into the telemarketing enterprise. The Court need not decide the merits of Mizell's argument because the evidence in the record shows that over \$5,597,000 passed through Defendant Crestwood's accounts while Mizell controlled Crestwood and that over \$3,379,000 was collected from consumers accounts. The record also shows that total consumer injury is in excess of \$13 million. Regardless of whether the Court uses \$13 million or the more conservative \$3.3 million as the measure of Mizell's assets, Mizell's assets that are frozen do not exceed either figure and, thus, a remedy that involves all of Mizell's assets does not relieve Mizell of his liability.

illegal activities of the defendant is not a prerequisite to distributing that asset as part of an order of consumer redress under §13(b).<sup>2</sup>

In sum, the Court concludes that consumer redress is an appropriate equitable remedy under §13(b) and that consumer redress in a §13(b) action is measured by the loss to the consumers minus any money returned to the consumers. The Court further finds that tracing an asset to the illegal conduct is not a prerequisite to using that asset to satisfy an equitable remedy of consumer redress. Because consumer redress is an appropriate final equitable remedy, the Court may exercise its preliminary injunctive powers and freeze any assets that can form a part of this final equitable remedy.

Having further explained the basis for the Court's preliminary injunction as it relates to the freeze on non-traceable assets for eventual consumer refund, Defendants' objections to the contrary are misplaced. To begin with, the Eleventh Circuit in Waldrop v. Southern Co. Services, Inc., 24 F.3d 152 (11th Cir. 1994), relied upon by Defendants, did not adopt Professor Douglas Laycock's article, The Scope and Significance of Restitution, 67 Tex.L.Rev. 1277 (1979), as the law on restitution in this Circuit. The references to Laycock's article in the Waldrop were passing citations to general principles of equity, and this Court does not read Waldrop as a wholesale departure from this Circuit's precedent on restitution in general or from restitution's traditional characterization as equitable. See Waldrop, 24 F.3d at 157-59. Rather, Waldrop represents the Eleventh Circuit's considered opinion on the now existing law on back pay in employment

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<sup>2</sup>The Court's conclusion that traceability if unnecessary is further bolstered by the lack of any restrictive language in the text of §13(b), the recognition that the public interest is involved with its accompanying interest in deterring deceptive and unfair trade practices, and the Court's broad and flexible equitable powers in ensuring consumer redress.

discrimination cases. The Court finds the use of Waldrop to challenge this Court's ability under §13(b) to order consumer redress to be an unwarranted extension of the Eleventh Circuit's reasoning.

As the Court explained in its April 18, 1996 order, Waldrop recognized that back wages are most appropriately viewed as compensation for the loss of the plaintiff's job. (April 18, 1996 order, at p. 66, note 12). In contrast to Waldrop, the consumers here receive exactly what they lost: the amount they paid due to the allegedly false representations by Defendants. Consumer refunds do not include various additional injuries suffered by the consumers, such as overdraft fees and stop payment fees.

Perhaps most importantly, however, Waldrop is inapposite because the statutory provision that Plaintiff relies upon, §13(b), permits only equitable relief. As the Court explained above, consumer refunds are within the range of equitable remedies available to the Court under §13(b). As recognized in the Court's April 18, 1996 Order, the Eleventh Circuit's decision in Waldrop is not inconsistent with the Court's freeze on Defendants' assets.<sup>3</sup> (April 18, 1996 Order, p. 66, note 12).

The Court finally addresses Defendants' argument that restitution is so analogous to disgorgement that restitution should require tracing just as disgorgement requires tracing. Rather than debate the different interpretations of the word "restitution," the Court distinguishes between the two equitable remedies discussed in its April 18, 1996 Order. The first is disgorgement,

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<sup>3</sup>This action is brought by a government agency that is charged with the enforcement of the FTC Act for the good of the public. As the Eleventh Circuit explains, "since the public interest is involved in a proceeding of this nature, [the Court's] equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." F.T.C. v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1434 (11th Cir. 1984).

which focuses upon removing the unlawful gain from the Defendant. The second equitable remedy discussed in the April 18, 1996 Order is consumer refund, which looks to return the consumer to his or status before being victimized by Defendants. The two are separate equitable remedies available under § 13(b), and, as explained above, assets used to satisfy an order for consumer refund need not be traced to the underlying illegality.

Because the Court can order consumer redress as part of an eventual permanent injunction without regard to the origins of those assets, the Court exercises its preliminary injunctive power and freezes Defendants' assets, regardless of their relation to the alleged telemarketing scheme. The Court does not change its April 18, 1996 preliminary injunction and asset freeze based upon the legal arguments presented by Defendants' regarding whether tracing is a prerequisite to a freeze of assets.

## **II. DEFENDANTS' INDIVIDUAL REQUESTS FOR RELEASE OF LIMITED FUNDS FROM NON-TRACEABLE ASSETS**

Even assuming the Court has frozen correctly certain non-traceable assets of the Defendants, several Defendants contend that at a minimum equity dictates that some monies from non-traceable assets should be released to pay attorneys fees. The Court will discuss the Defendants' requests individually.

The Court DENIES Defendant Philip E. Dill's Motion for Release of Assets [73-1] because Defendant Dill has presented no evidence to support Defendant Dill's Motion or any of the allegations in Defendant Dill's Motion or any financial information in Defendant Dill's Motion for Release. Instead, Defendant Dill has objected consistently to providing any financial information. Thus, at the April 30, 1996 hearing, the Court could not determine whether

Defendant Dill does or does not have any financial resources for living expenses or attorneys fees. Subsequent to that hearing, Defendant Dill filed a second Motion for Release [95-1] on May 15, 1996. The Court will rule on Defendant Dill's second Motion after the Plaintiff responds.

While Defendant Mega's President, Randolph Rodriques, did submit some information in two pleadings entitled "Non-Traceable Assets" [76-1] and "Contracts Found in Records of Mega Magazines" [77-1], the Court finds that these submissions are not verified, and, in any event, nothing in these submissions by Mega Magazines causes the Court to revise its earlier Order as to Mega Magazines' assets.

Defendant Sarfraz Tariq's counsel submitted certain documents with a letter motion [80-1] requesting that the Court release \$3,418.46 in Tariq's bank account at the United Jersey Bank, account 048302550. Defendant Tariq has several businesses which he contends are unrelated to his telemarketing activities. The Court has not frozen any income received by Defendant Tariq after March 13, 1996. Also, by Consent Order, dated April 29, 1996, the Court released funds in three bank accounts of Standard Acceptance Corporation and Wilson Title Agency, upon which Sarfraz Tariq was a signatory. Based on the record to date, the Court finds that Defendant Tariq has not shown that he is unable to pay current living expenses or attorneys fees from his ongoing income which the Court has not frozen. Also, Defendant Tariq has been able to retain counsel to represent him to date. Thus, the Court DENIES Defendant Tariq's letter motion [80-1] for release of this additional bank account. See, e.g., Commodity Futures Trading Commission v. Noble Metals Int'l, 67 F.2d 766, 775 (9th Cir. 1995) (where frozen assets fall below amount needed to compensate consumers, it is within court's discretion to deny request to release funds

for attorneys' fees); cf. S.E.C. v. Coates, No. 94-5361, 1994 WL 45558, slip op. at \*3 (S.D.N.Y. Aug. 23, 1994).

The Court also DENIES as moot Defendant Mizell's Motion to Compel [35-1] more specific discovery responses, as Defendant Mizell has announced that he has resolved this matter with the Plaintiff FTC.

Defendants Dill and Pepper also filed a Motion for a Protective Order [11-1], wherein Defendants request that the Court recognize the Defendants' right to protect themselves from self-incrimination and order that the Defendants do not have to perform any acts that would jeopardize their rights to protect themselves from self-incrimination. The Court agrees that the Defendants have the right to assert their Fifth Amendment privileges and that the Defendants have not waived those rights; however, it is up to the Defendants to determine when, where and how to assert those rights, and not up to the Court to enter some kind of Protective Order regarding Defendants' Fifth Amendment rights. Thus, the Court GRANTS in part and DENIES in part Defendants Dill and Pepper's Motion for a Protective Order [11-1], in that the Court finds that the Defendants Dill and Pepper have not waived their Fifth Amendment rights, but it is up to them as to when, where and how to assert their Fifth Amendment rights.

### III. CONCLUSION

In conclusion, the Court reaffirms its April 18, 1996 Order as amended on May 15, 1996. The Court DENIES in part and GRANTS in part Defendants Dill and Pepper's Motion for Protective Order [11-1] to the extent outlined above. The Court DENIES Defendant Tariq's letter motion [80-1] requesting release of an additional bank account. The Court DENIES Defendant Mizell's Motion to Compel [35-1] as moot.



IT IS HEREBY ORDERED, this <sup>nd</sup>22 day of May, 1996.

Frank M. Hull  
FRANK M. HULL  
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Case and No. 06-80180-CIV-RYSKAMP/VITUNAC

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

NATIONWIDE CONNECTIONS, INC., ET AL.,

Defendants.

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**ORDER DENYING MOTION FOR EMERGENCY RELIEF**

THIS CAUSE comes before the Court pursuant to the motion of Yaret Garcia (“Garcia”) for emergency relief in the form of the release of approximately \$50,000 in personal assets so that she may retain an expert and pay her counsel. Garcia filed this motion on May 25, 2007 [DE 504]. Garcia also requests an emergency hearing on her motion [DE 503]. The FTC responded on May 30, 2007 [DE 510]. This motion is ripe for adjudication.

Garcia and her companion, Qaadir Kaid (“Kaid”), filed a nearly identical motion shortly after the initial preliminary injunction hearing, which the Court referred to Magistrate Judge Vitunac, who conducted a hearing on the motion on June 1, 2006. The resulting Report and Recommendation recommended the denial of the motion, noting that both failed to present evidence that would justify modification of the asset freeze and that their counsel “assume[d] the risk of nonpayment” by taking on the case without requiring an upfront retainer. On August 8, 2006, the Court adopted the Report and Recommendation in its entirety.

Garcia asserts in her instant motion that such is the first time she has requested litigation expenses or prospective attorneys fees. As such is plainly not the case, the Court will treat the

motion as one for reconsideration.

Reconsideration of a prior ruling is appropriate only if there has been an intervening change in the controlling law, if new evidence has only recently become available, or if there is the need to correct clear error or prevent manifest injustice. See Bautista v. Cruise Ships Catering and Service Intn'l, N/V, 350 F. Supp. 2d 97, 992 (S.D. Fla. 2004); In re Garcia, 2002 US Dist. Lexis 23962, at\*1-2 (S.D. Fla. Nov. 2, 2002). Garcia wholly fails to explain why her motion should be granted under this standard, and her motion is denied on this ground alone. See In re Mack, No. 06-1782, 2007 WL 1222575 at \*4 (S.D. Fla. Apr. 24, 2007) (holding that argument not raised in initial brief is waived); Donahay v. Palm Beach Tours & Transp., Inc., No. 06-61279, 2007 WL1119206 at \*2 (S.D. Fla. Apr. 16, 2007) (“failure to press the point (even if it is mentioned) to support improper argument and authority forfeits it.”). Furthermore, Garcia has provided no detailed, competent evidence that she is unable to pay her litigation expenses.

Additionally, in this case, consumer injury exceeds \$33 million, unless the \$5 million that has been frozen can be used for consumer redress. Although the Court has expressed numerous times its view that individual consumers’ recovery will be negligible, the paucity of recovered monies is sufficient reason to deny Garcia’s request for the release of funds to pay an expert. See CFTC v. Noble Metals Int’l, Inc., 67 F.3d 766, 775 (9th Cir. 1995). Garcia’ request is all the more meritless, though, when one considers the substance of the testimony of her proposed expert, which essentially consists of the principle that fraudsters conceal their fraud from others. This elementary notion does not require input from an expert witness. See United States v. Ojeikere, No. 03-581, 2005 WL 425492, at \*5 (S.D.N.Y. Feb. 18, 2005) (“[E]xpert testimony is

properly excludable where persons of common understanding or capable of comprehending the primary facts and of drawing correct conclusions from them.”) (quotation marks and modifications omitted).

Garcia devotes the bulk of her brief to telling of her and Kaid’s efforts in real estate speculation. She apparently does so to show that the money she and Kaid earned in real estate is somehow “untraceable” to the fraud at issue here. Such is not the case, however. Except for the Lake Worth house purchase in 2001, all of the other properties were paid for from 2003 onwards, after Garcia became involved with Nationwide. Furthermore, the Eleventh Circuit has held that freezing a defendant’s total assets when such assets fell short of the defendant’s potential liability was not an abuse of discretion, irrespective of the source of the assets. See SEC v. ETS Payphones, 408 F.3d 727, 735-36 (11th Cir. 2005). Second, Garcia attempts to demonstrate that the FTC has “squandered” her assets. To the contrary, the FTC has attempted to maximize the total assets available for potential redress to consumer victims and to realize the value of assets that would have otherwise dissipated. For example, the FTC has worked with Garcia with regard to the Lowell Homes investment, attempting to secure deposit that Garcia paid for that property in 2005. The FTC also advocated for a public, arm’s-length foreclosure sale of the Loxahatchee property in which the Court ordered the lender to use reasonable efforts to maximize the sale price of the property. Finally, as for the Ridgewood Circle property, the FTC cannot be blamed for the downturn in the South Florida real estate market.

Finally, the Court does not feel that Garcia’s motion is a true emergency. The amended scheduling order requires disclosure of expert witnesses by May 25, 2007, and, on May 18, 2007, the Court extended until June 18, 2007 the deadline for defendants to identify any expert

witnesses. Counsel for Garcia had the better part of half a year to seek the relief he now demands. Accordingly, it is hereby

ORDERED AND ADJUDGED of the Motion for Release of Funds and Motion for Emergency Hearing, filed May 25, 2007 [DE 503, 504] are DENIED.

DONE AND ORDERED at Chambers in West Palm Beach, Florida this 21<sup>st</sup> day of June, 2007.

Kenneth L. Ryskamp  
KENNETH L. RYSKAMP  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

Case No. 8:09-cv-2309-T-23TBM

WASHINGTON DATA RESOURCES,  
INC., et al.,

Defendants.

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**ORDER**

THIS MATTER is before the court on **Defendant Richard A. Bishop's Emergency Motion to Modify or Dissolve the Asset Freeze Imposed Pursuant to the Temporary Restraining Order** (Doc. 59), the Federal Trade Commission's response (Doc. 63), and Defendant's reply (Doc. 78), and **Defendant Brent McDaniel's Motion to Modify Asset Freeze** (Doc. 57) and the Federal Trade Commission's response (Doc. 71).<sup>1</sup> An evidentiary hearing on these matters was conducted on January 7, 2010.

By his motion, Bishop urges that the asset freeze entered by the court pursuant to the TRO (Doc. 19) should be dissolved in its entirety because the court lacks authority to impose such a freeze given the FTC's failure to assert a cognizable equitable claim against specific assets of Defendants. In the alternative, Bishop urges the court to modify the asset freeze so that any disgorgement/restitution calculation is limited to, or measured by, the alleged "ill-

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<sup>1</sup>Counsel for Defendants has also filed a **Post-Hearing Memorandum on Asset Freeze Modification** (Doc. 88) and the Declaration of John Brent McDaniel (Doc. 89).

gotten gains” of the Defendants. Should that fail, Bishop urges the court to allow him a “reasonably generous living allowance.”<sup>2</sup> (Doc. 59).

The FTC counters that it is well-settled that the district court has authority to enter an asset freeze and assets can be frozen to preserve the status quo in this case regardless of whether Bishop’s assets can be traced to § 13(b) violations. The FTC also urges that the court, in its discretion, should deny Bishop’s request for living expenses. It notes that its best estimate thus far of the consumer injury in this case is over \$3.8 million, while its estimate of Bishop’s assets is \$980,000.00. To the extent the court is inclined to grant some living allowance, the FTC requests that it be limited in duration to three months and that it not exceed \$9,800.00. (Doc. 63).

In reply and by his post-hearing memorandum, Bishop urges that the amount of his assets frozen far exceeds his liability in this cause, which he measures by the net receipts of his company, Nationwide, from its work on behalf of this loan modification endeavor. Further, he urges that many of the assets frozen by the injunction are joint assets owned with his wife. At arguments, his counsel urged that all but the monies presently held in his trust account should be released as that sum is more than adequate to cover any restitution he may be held liable for. (Docs. 78, 88).

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<sup>2</sup>According to the monthly expense sheet attached to his motion, Bishop asserts that his monthly expenses total \$17,940.27. (Doc. 59-2). This includes the following: mortgage payment-\$5,838.76; car payments-\$486.51; food expenses-\$2,250.00; clothing-\$280.00; utilities-\$1,174.00; medical expenses, including insurance-\$900.00; other insurance premiums-\$560.00; other transportation expenses-\$700.00; other household expenses-\$650.00; tuition-\$2,987.00; tutoring-\$344.00; dental-\$400.00; and cc-\$1,7940.27. (Doc. 59-2).

By his motion, McDaniel seeks an Order modifying the asset freeze to permit living expenses in the amount of \$12,100.00 per month until he can find new employment.<sup>3</sup> (Doc. 57).

The FTC urges the court to deny the motion. As grounds, the FTC urges that McDaniel's bank statements suggest income from an unidentified, perhaps unfrozen, source.<sup>4</sup> It also urges that the living expenses sought are unreasonable, for luxuries rather than necessities, and the funds requested would deplete his assets. Given the discretionary nature of an award for living expenses, it urges the court to deny McDaniel's request. (Doc. 71).

With respect to Bishop's request to dissolve the asset freeze in its entirety on the basis that the FTC has not asserted a cognizable equitable claim against specific assets of the Defendants, the motion is denied. Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), authorizes a district court to grant preliminary relief, including an asset freeze, if necessary to ensure the possibility of effective final relief. *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984). In doing so, a district court may exercise its full equitable powers under section 13(b). *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469-70 (11th Cir. 1996). This includes the power to grant restitution and disgorgement. *Id.* The FTC seeks those remedies among others in this action. (Doc. 1 at 2). In entering the preliminary injunction in this case (which had not been entered at the time Bishop filed his instant motion), the district

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<sup>3</sup>McDaniel asserts the following monthly expenses: rent-\$2,490.00; tuition-\$883.00; car payment-\$710.00; groceries and dining out-\$1,600.00; medical expenses-\$2,300.00; life insurance-\$1,022.00; auto insurance-\$200.00; son's insurance-\$240.00; gas, oil, and auto repairs-\$400.00; utilities-\$1,210.00; and other household expenses including credit cards, cleaning, haircuts, etc.-\$900.00. (Doc. 57).

<sup>4</sup>The bank records show cash deposits in addition to salary deposits during a period of time from July to October 2009. At the hearing, McDaniel claimed that the source of these cash deposits was revenue generated from the loan modification business.



court has previously considered the appropriateness of ordering an asset freeze on the corporate and individual Defendants, including Bishop. Here, Bishop has failed to demonstrate why the court should modify its prior ruling and dissolve the freeze in its entirety as to the his individual assets.

At present, and for similar reasons, Bishop's alternative request, i.e., to modify the asset freeze to release those assets that are not reflective of the purported ill-gotten-gains, is denied. Rule 65 of the Federal Rules of Civil Procedure does not address modifying or vacating an injunction. However, a party may seek to modify or vacate an existing injunction under Rule 65. *See* Fed. R. Civ. P. 65(e). A district court has continuing jurisdiction over a preliminary injunction and may modify the injunction to meet changes in the law or facts, or for any other good reasons.<sup>5</sup> *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 578 (11th Cir. 1974). On a motion to modify a preliminary injunction, the moving party bears the burden of proof. *See United States v. Harrison County, Miss.*, 463 F.2d 1328, 1330 (5th Cir. 1972); *SEC v. Prater*, 296 F. Supp. 2d 210, 216 (D. Conn. 2003) (quoting *N.Y. State Ass'n for Retarded Children v. Carey*, 706 F.2d 956, 967 (2d Cir. 1983)). While Bishop's contention that restitution and/or disgorgement under § 13(b) are limited to specific assets directly traceable to the alleged violations is not without some support, this court has concluded otherwise. *See FTC v. Home Assure, LLC, et al.*, No. 8:09-cv-547-T-23TBM, 2009 WL 1043956, \*3 (M.D. Fla. Apr. 16, 2009). Thus, "[i]n a section 13(b) action of this kind, 'the proper amount of restitution

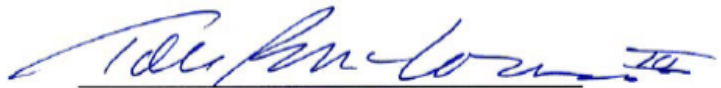
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<sup>5</sup>“Though the exact standard the movant must meet has not been precisely defined, *see* 11A Wright, Miller & Kane, Federal Practice & Procedure § 2961, at 395 (1995), it is clear that the movant must make a showing regarding two elements: that ‘the danger which the decree was meant to foreclose must almost have disappeared,’ *and* that the movant faces ‘extreme and unexpected’ hardship.” *S.E.C. v. Prater*, 296 F. Supp. 2d 210, 216 (D. Conn. 2003) (citing *Humble Oil & Ref. Co. v. Am. Oil Co.*, 405 F.2d 803, 813 (8th Cir. 1969)).

has been held to be the purchase price of the relevant product or business opportunity, less any refunds.” *Id. at* \*2 (quoting *FTC v. Nat’l Urological Group*, No. 1:04-cv-3294-CAP, 2008 WL 2414317, \*33 (N.D. Ga. June 4, 2008)). Consequently, the modification argument raised by Bishop is foreclosed.

Lastly, with regard to the request for living expenses made by Bishop, the motion is granted in part. As a corollary to the rules of law permitting a district court to grant a preliminary asset freeze, a district court may release or lower the amount of assets frozen. *FTC v. RCA Credit Servs., LLC*, No. 8:08-cv-2062-T-27MAP, 2008 WL 5428039, \*4 (M.D. Fla. Dec. 31, 2008) (citing *SEC v. Duclaud Gonzalez de Castilla*, 170 F. Supp. 2d 427, 429 (S.D. N.Y. 2001)). Thus, a court may exercise its discretion to prohibit or limit payment of living expenses out of frozen assets. *Id.* (citing *CFTC v. Noble Metals Int’l, Inc.*, 67 F.3d 766, 775 (9th Cir. 1995)). For his and his family’s necessary living expenses, Bishop is hereby authorized to receive the sum of \$9,500.00 per month, drawn from his and his wife’s funds on deposit in the Lewis & White, P.L.C. trust account, for January, February and March 2010. Likewise, McDaniel’s motion is granted in part. For his and his family’s necessary living expenses, McDaniel is hereby authorized to receive the sum of \$5,000.00 per month for January, February and March 2010, drawn from his Scottrade account.

**Done and Ordered** in Tampa, Florida, this 15th day of January 2010.



THOMAS B. McCOUN III  
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:  
Counsel of Record