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15  
 16 **UNITED STATES DISTRICT COURT**  
 17 **DISTRICT OF NEVADA**

<p>18 <b>FEDERAL TRADE COMMISSION,</b></p> <p>19 Plaintiff,</p> <p>20 v.</p> <p>21 <b>OMICS GROUP INC., et al.,</b></p> <p>22 Defendants.</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>
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**Case No. 2:16-cv-02022-GMN-VCF**

**FTC’S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF**

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2 **I. INTRODUCTION**

3 The Federal Trade Commission (“FTC”) filed its complaint (ECF No. 1) on August 25,  
4 2016, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to halt the deceptive practices  
5 carried out by a network of interconnected companies. Defendants claim to operate hundreds of  
6 online academic journals on a wide variety of topics, including medicine, chemistry, engineering,  
7 and genetics, among others. In order to persuade consumers to submit articles to their journals  
8 for publication, Defendants make numerous misrepresentations regarding the nature and  
9 reputation of their journals. Defendants also fail to disclose the significant fees associated with  
10 their publishing services. Finally, Defendants make additional misrepresentations in connection  
11 with the marketing of their scientific conferences. The FTC alleged that these practices violate  
12 Section 5 of the FTC Act, 15 U.S.C. § 45. On September 29, 2017, on motion by the FTC, the  
13 Court entered a preliminary injunction against Defendants (ECF No. 46) temporarily enjoining  
14 their deceptive practices.  
15

16  
17 The FTC hereby moves the Court, pursuant to Federal Rule of Civil Procedure 56 and Local  
18 Rule 56-1, for summary judgment against Defendants. As discussed below, summary judgment  
19 is appropriate in this case because the FTC has presented overwhelming and uncontroverted  
20 evidence that Defendants violated Section 5 of the Federal Trade Commission Act (“FTC Act”),  
21 15 U.S.C. § 45, in connection with the marketing of their academic publishing and conference  
22 services, and because there are no genuine issues of material fact requiring a trial. *Adickes v.*  
23 *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). A proposed order has been filed with this motion.  
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1  
2 **II. STATEMENT OF MATERIAL FACTS**

3 **A. The Parties**

4 **1. Federal Trade Commission**

5  
6 (1) The FTC is an independent agency of the United States Government created by the FTC Act.  
7 15 U.S.C. §§ 41-58. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a),  
8 which prohibits unfair or deceptive acts or practices in or affecting commerce. Section 13(b)  
9 of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC, through its own attorneys, to initiate  
10 federal district court proceedings to enjoin violations of the FTC Act and to secure such  
11 equitable relief as may be appropriate in each case, including rescission or reformation of  
12 contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies.  
13 *See, e.g., FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982).

14  
15 **2. Defendants**

16 (2) Defendants admit that Defendant Srinibabu Gedela is an Indian national and is the sole  
17 owner and founding director and CEO of the three co-defendant companies. (SJX02 at 3 ¶ 9;  
18 SJX03 at 6 (response 2); SJX04 at 6 (response 2); SJX05 at 6 (response 2); SJX06 at 6  
19 (response 1), 10-12 (response 12); SJX10 at 4 (admission 1); SJX16 at 3 ¶ 5; *see also* PX12  
20 Att. B at 13, Att. J at 266, Att. D at 110, 114, Att. L at 937, Att. N at 986, Att. R at 1037, Att.  
21 S at 1039; ECF No. 84 at 35.).<sup>1</sup> Defendant Gedela began offering publishing services in  
22 India in 2008. (SJX16 at 3 ¶¶ 5, 12; SJX23 at 13 (lines 18:3-18:20), 14 (lines 19:5-13).) In  
23 2009, while studying in the United States, he registered “OMICS Publishing Group” as his  
24 fictitious business name and established a US bank account for his business. (SJX23 at 10-  
25 11 (lines 15:20-16:4), 18 (lines 23:1-23:18), 20-22 (lines 25:24-27:13), 25-26 (lines 30:18-  
26 27

27  
--  
<sup>1</sup> The label “PX” refers to the FTC’s exhibits filed in support of its motion for preliminary injunction, and are located at ECF Nos. 9-4 – 9-33, 12-1 – 12-4, and 34-1 – 34-6. The exhibits filed with this motion for summary judgment are labeled “SJX.”

1  
2 31:21), 42-43 (lines 58:8-59:9); SJX02 at 3 ¶ 9 (acknowledging Gedela owns this business  
3 name 10); PX12 Att. N at 964). Until at least 2015, Defendant Gedela processed payments  
4 and advertised conferences and publications using the name of OMICS Publishing Group.  
5 (SJX23 at 22-24 (lines 27:1-29:5), 24-25 (lines 29:13-30:5), 28-29 (lines 37:4-38:24).)

6  
7 (3) Defendants admit that Defendant Gedela founded and is the sole owner of Defendant OMICS  
8 Group Inc., a Nevada corporation, with a principal place of business located in Hyderabad,  
9 India. (SJX02 at 3 ¶ 6; SJX03 at 6 (response 1); SJX16 at 3 ¶ 6; *see also* PX12 Att. B at 13-  
10 14; PX11 Att. C at 9, Att. D at 11.)

11 (4) Defendants admit that Defendant Gedela founded and is the sole owner of iMedPub LLC, a  
12 Delaware limited liability company, with its principal place of business at the same  
13 Hyderabad, India address as OMICS Group. (SJX02 at 3 ¶ 7; SJX04 at 6 (response 1); *see*  
14 *also* PX12 Att. A at 10-11, Att. D at 144.)

15  
16 (5) Defendants admit that Defendant Gedela founded and is the sole owner of Conference Series  
17 LLC, a Delaware limited liability company, with its principal place of business at the same  
18 Hyderabad, India address as OMICS Group. (SJX02 at 3 ¶ 8; SJX05 at 6 (response 1); *see*  
19 *also* PX12 Att. C at 16, Att. D at 111.)<sup>2</sup>

20  
21 (6) Defendant Gedela is also the owner of several entities chartered in India: OMICS  
22 International Pvt. Limited, Srinu Sci Technol Biosoft Pvt. Limited, OMICS Entertainment

23  
24 <sup>2</sup> Gedela filed dissolution papers OMICS Group, Inc., and papers to cancel his Delaware limited  
25 liability corporations in June and July, 2017. (SJX17 Att. B at 7-8 (certificate of dissolution for  
26 OMICS Group filed on or about June 23, 2017), 9 (certificate of cancellation for iMedPub filed  
27 on or about July 18, 2017), 10 (certificate of cancellation for Conference Series filed on or about  
28 June 20, 2017)). Apart from these filings, no other action has been taken to dissolve these  
29 entities. (SJX23 at 70-72 (lines 159:20-161:3). These entities continue to be used in Defendants'  
30 publishing and conference business. (*See, e.g.*, SJX26 Att. J at 302-04, Att. K at 309, Att. L at  
31 328, Att. M at 338, Att. R at 1022-27, 1032-41, 1046-47, 1050-53, 1056-57, 1066-67; SJX14 at  
32 112.) In any event, the purported dissolution does not alter these entities' amenability to suit or  
33 liability. *See Nev. Rev. Stat. § 78.585.*

1  
2 Pvt. Limited. (SJX06 at 10-12 (response 12); SJX23 at 16-17 (lines 21:10-22:7); 83-84 (lines  
3 174:25-175:15); SJX26 Att. H at 244.) In the past two years, he has also chartered entities in  
4 the United Kingdom and Singapore, some of which have names similar to his co-defendants,  
5 including iMed Publications Limited, Conference Series LLC Limited, Meetings  
6 International, Ltd., Allied Academics Limited, Euroscion Limited, Pulsus Group Limited,  
7 (SJX06 at 10-12 (response 12); SJX23 at 78-79 (lines 169:6-170:3), 80-82 (lines 171:18-  
8 172:1, 172:7-173:4), 83 (lines 174:10-20); SJX26 Att. C at 192-201, Att. D at 203-09, Att. E  
9 at 211-20, Att. F at 222-31, Att. G at 233-42.)

10  
11 (7) Defendants admit that Defendant Gedela has signatory authority over OMICS Group's and  
12 iMedPub's financial accounts. (SJX02 at 3 ¶ 9; SJX10 at 9 (admission 22); *see also* PX12  
13 Att. N at 954-55, 959, 979, 986, Att. Q at 1201, Att. O at 997.) Defendant Gedela is the main  
14 point-of-contact for Defendants' servicers, including their payment processor. (*Id.* Att. P at  
15 1007, Att. O at 997, 999, Att. D at 109.)

16  
17 (8) Defendant Gedela is the registrant for many of Defendants' websites, often paying the  
18 registration fees with his personal credit card. (SJX02 at 5 ¶ 21; SJX10 at 5 (admissions 2, 3,  
19 4); PX12 ¶ 12, Att. F at 134, 216-229, Att. G at 233, 235, Att. H at 245; SJX23 at 34 (lines  
20 44:17-23); SJX26 Att. R at 1010-21, 1030-31, 1042-45, 1048-49, 1054-55, 1058-65 (current  
21 registrant for omicsonline.org, omicsgroup.com, omicsgroup.biz, omicsgroup.info,  
22 conferenceseries.com, alliedconferences.org, euroscicon.com, esciencecentral.org,  
23 globalmediajournal.com, imagejournals.org, pulsusmeetings.org, rroj.com,  
24 scholarscentral.org, and scitechnol.com).)

25  
26 (9) Defendant Gedela has participated in, and has had the authority to control, Defendants'  
27 publishing and conference acts and practices. (SJX10 at 4-5 (admissions 1, 2, 3, 4), 9  
-- (admission 22); SJX16 at 3 ¶¶ 5, 12 (Gedela states that he developed Defendants' "Open

1  
2 Access” model); PX12 Att. L at 937-38 (Defendants’ website omicsonline.org touting  
3 Gedela as “CEO and Managing Director”); SJX26 Att. M at 367 (personal credit card used in  
4 conference registration), Att. P at 419-21, 423 (emails from Gedela to consumers), 440-48  
5 (contract with Aries Systems Corp. for editorial manager services lists Gedela as contact,  
6 Editor-in-Chief and CEO).) Gedela initiated key processes of Defendants’ publishing  
7 business, such as determining the membership of editorial boards and selecting a company to  
8 provide editorial management software. (SJX23 at 44 (lines 63:1-63:24), 89-90 (lines  
9 188:18-189:9), 90-91 (lines 189:19-190:15), 92 (lines 194:4-7).) He has held the titles  
10 Founding Director, Managing Director, and CEO, and has always been the top official on the  
11 organization charts of the business. (*Id.* at 92-93 (lines 194:8-195:3), 51-52 (lines 113:17-  
12 114:1), 53 (lines 115:11-115:22), 54-55 (lines 117:11-118:8), 12 (lines 17:2-13), 107 (Dep.  
13 Ex 8); SJX26 Att. P at 449.) Currently, three vice presidents report to Defendant Gedela  
14 regarding journal operations, and ten officers (who are designated as vice presidents or senior  
15 managers) report to him regarding conferences. (*Id.* at 47-48 (lines 79:3-80:9), 54-55 (lines  
16 117:16-118:9), 56-57 (lines 121:14-122:6, 122:9-122:15), 58 (lines 130:5-130:7).) After this  
17 court entered a preliminary injunction, Defendant Gedela personally instructed the vice  
18 presidents and senior managers on how to respond. (*Id.* at 73-75 (lines 162:16-164:1, 164:7-  
19 21).)

20  
21  
22  
23 (10) Defendant Gedela has had knowledge of Defendants’ publishing and conference acts and  
24 practices. (SJX10 at 4-5 (admissions 1, 2, 3, 4), 7-9 (admissions 18, 19, 20 (admits to  
25 responding to complaints regarding Defendants’ operations), 22; SJX23 at 62 (lines 136:1-  
26 136:17), 65 (lines 141:9-141:18 (aware of use of addresses and CEO statements in  
27 promotions)).) As managing director/CEO, he receives weekly updates and reports from vice  
-- presidents and senior managers. (SJX23 at 59 (lines 132:1-21); SJX26 Att. P at 402, 404,



1  
2 563-65.) Defendant Gedela has been directly involved in responding to complaints that  
3 Defendants' journals falsely advertise that they are affiliated with prominent academic  
4 indices. (SJX26 Att. P at 422 (communication from Gedela acknowledging issues with  
5 NIH), 438-39 (letter from Gedela to NIH referencing NIH's cease and desist letter to  
6 Defendants); ECF No. 36-4 at 2-3.) In addition to BBB complaints, Defendants receive  
7 numerous complaints about their publishing and conference practices. (SJX26 Att. P at 424-  
8 34, 481-560.)  
9

10 (11) Defendants OMICS Group, iMedPub, and Conference Series have common ownership  
11 (see SJX03 at 6 (response 2); SJX04 at 6 (response 2); SJX05 at 6 (response 2); SJX06 at 6  
12 (response 1), 10-12 (response 12)), officers, managers, business functions, employees, and  
13 office locations (SJX03 at 6 (response 1); SJX04 at 6 (response 1); SJX05 at 6 (response 1)).  
14 OMICS Group and iMedPub both advertise some of the same journals, and some of the  
15 journals listed on OMICS Group's website are actually hosted on the iMedPub website. (*See*  
16 PX22 at 4 ¶ 13, Att. E at 132-40, Att. F at 142, Att. G at 144, Att. H at 146, Att. I at 148).  
17 OMICS' website advertises conferences organized by Conference Series. (PX22 at 3 ¶ 11,  
18 Att. C at 17-122; SJX26 Att. Q at 831-915.) And both OMICS Group and Conference  
19 Series' names appear on contracts setting up conferences. (*See* SJX26 Att. J at 302.)  
20  
21

22 (12) Defendants describe OMICS Group, iMedPub, and Conference Series, as well as Allied  
23 Academies, Pulsus, Trade Sci, SciTechnol, and EuroSciCon, as subsidiaries of OMICS  
24 International. (PX22 Att. C at 17; SJX26 Att. I at 247 (email setting up conference in name  
25 of OMICS group has symbols for OMICS International, conferenceseries.com, Pulsus, and  
26 Allied Academies), Att. K at 306 (same), Att. I at 250, 253, 263, 272 (Defendants' contact  
27 for conference hosted in the name of Conference Series has @omicsgroup.org email  
-- address), Att. K at 309, 316 (same), Att. P at 410 (Organizational duties refers to "company

1  
2 wise journals including OMICS, Pulsus, Allied Academies, Trade Sci, iMedPub, SciTechnol,  
3 EuroSciCon), Att. Q at 585, Att. R at 1008-67 (at least 29 websites registered to either  
4 Gedela or iMedPub); ECF No. 84 at 35 (CEO Stm. In OMICS-ConferenceSeries promotional  
5 publication).)

6  
7 (13) Defendants OMICS, iMedPub, and Conference Series “do not operate individually, but  
8 rather as a group under Omics Group Inc.” (SJX19 at 4 (responses 3-5)). They do not  
9 maintain separate records of income, assets, or revenue. (*Id.*) These companies’ payments  
10 to Defendant Gedela are also commingled. (SEX06 at 7-8, responses 10, 11).

11 (14) Defendants OMICS, iMedPub, and Conference Series have used common addresses for  
12 their United States locations and business registrations. OMICS Group has used mailing  
13 addresses in Henderson, Nevada, Westlake Village, California, and Foster City, California  
14 (SJX02 at 3 ¶ 6; ECF No. 84 at 10, 17, 96), which addresses have been used in Defendants’  
15 business transactions and consumer-facing advertising, email solicitations, and websites.  
16 (PX12 Att. L at 667, Att. M at 945; PX10 Att. B at 9, Att. G at 43; SJX26 Att. J at 284, 290,  
17 296, 299, Att. K at 323, Att. L at 328, Att. M at 338; ECF No. 84 at 10, 17, 96.) Defendant  
18 iMedPub has used mailing addresses in Wilmington, Delaware (SJX02 at 3 ¶ 7), which  
19 addresses have been used by Defendants in consumer-facing communications and in  
20 corporate registration documents. (PX12 Att. D at 116, Att. K at 367.) Defendants also  
21 admit that Conference Series has used mailing addresses in Wilmington, Delaware (SJX02 at  
22 3 ¶ 8; SJX14 at 98-99, 112 (admission 105)), and it has used addresses in Henderson, Nevada  
23 and West Lake, California in Defendants’ business transactions and consumer-facing  
24 communications. (PX12 Att. I at 257; SJX26 Att. J at 302, Att. K at 309, 316, Att. L at 328;  
25 SJX14 at 98, 101, 107-08 (admission 104).)  
26  
27  
--

1  
2 (15) Defendants have done business with consumers located throughout the United States and  
3 the world. (*See, e.g.*, PX01 (Maryland); PX02 (Pennsylvania); PX03 (North Carolina); PX04  
4 (California); PX05 (Tennessee); PX09 (Missouri); PX16 (India); PX18 (New York); PX19  
5 (New Zealand); PX20 (Massachusetts); SJX01 (Canada); SJX26 Att. A at 18-149 (consumer  
6 complaints from various locations), Att. B at 151-90 (same).)

7  
8 **B. Background On Academic Publishing**

9 (16) An academic or scholarly journal is a peer-reviewed publication in which scholarship  
10 relating to a particular academic or scientific discipline is published. (SJX18 at 4 ¶ 5.)  
11 Content typically takes the form of articles presenting original research, review articles,  
12 commentaries, or clinical case studies. (*Id.*) Generally, an author may not publish the same  
13 article in more than one journal. (*Id.* at 6 ¶ 11.)

14  
15 (17) Peer-review is the process of subjecting an author's scholarly work, research, or ideas to  
16 the scrutiny of experts in the same field (who are qualified and available to perform impartial  
17 review), before the work is published in a journal or as a book. (*Id.* ¶ 12.) A peer-reviewed  
18 journal is assumed to have a certain level of quality and reliability. (*Id.*) The peer-review  
19 process typically takes several months, during which authors are expected to respond to peer  
20 reviewer comments and implement any recommendations (or, alternatively, justify the  
21 rejection of any proposed revisions). (*Id.* at 6-7 ¶¶ 12-14.) At some point in the publishing  
22 process, the author typically signs a publication agreement giving the journal the right to  
23 publish the article; with many journals, this happens when the manuscript is accepted for  
24 publication following the completion of the peer-review process; with others, it may be done  
25 when the author submits the manuscript to the journal. (*Id.* at 7 ¶ 14.)

26  
27 (18) An academic journal's prestige is established over time, and can reflect many factors,  
-- some of which may be expressed in objective, quantifiable terms. (*Id.* at 8 ¶ 15.) In the

1  
2 scientific publishing industry, the “impact factor” is often used as one such measure of the  
3 prestige or relative importance of a journal in its field. (*Id.*) It measures the average number  
4 of citations in scholarly literature to the articles published by that journal. (*Id.* ¶ 16.) A  
5 higher impact factor would indicate a more important or credible journal. (*Id.* ¶ 15.) The  
6 term “impact factor” specifically is understood in the academic publishing industry to mean  
7 the proprietary citation measure calculated and published by Thomson Reuters in its Journal  
8 Citation Reports<sup>®</sup>, and in particular, the “two-year” impact factor. (*Id.* ¶ 16.) A journal must  
9 be indexed by Thomson Reuters in either its Science Citation Index Expanded or its Social  
10 Sciences Citation Index in order to receive an impact factor. (*Id.*) Authors often look to a  
11 journal’s impact factor when deciding where to publish, as do tenure committees when  
12 evaluating a candidate’s published research. (SJX20 at 9 (lines 4-10).) Thomson Reuters has  
13 been succeeded by Clarivate Analytics. (SJX11 at 6 (admissions 36).)

14  
15  
16 (19) Indexing can be another indicator of a journal’s credibility and prestige. (SJX18 at 8 ¶  
17 17.) The United States National Library of Medicine (“NLM”), an institute within the  
18 National Institutes of Health (“NIH”), produces and manages three freely accessible  
19 bibliographical resources: PubMed,<sup>3</sup> Medline,<sup>4</sup> and PubMed Central.<sup>5</sup> (*Id.* at 9 ¶ 18; SJX11  
20 at 7 admissions 42, 43) Journals must apply for inclusion in Medline and PubMed Central  
21 and be reviewed by an NIH-chartered advisory committee. (SJX18 at 9 ¶¶ 20, 22.) Only a  
22

---

23  
24 <sup>3</sup> PubMed is a bibliographic database containing over 26 million citations and abstracts,  
25 primarily for journal articles in biomedicine and the life sciences. PubMed includes citations  
26 and, if they exist, abstracts for all the journal articles contained in PubMed Central. (*Id.* at 9 ¶  
27 19.)

28 <sup>4</sup> Medline is a very large subset of PubMed (about 90%). The citations to articles in Medline are  
29 enhanced with subject headings from NLM’s controlled thesaurus and with other value-added  
30 features. Most users view PubMed as being synonymous with Medline. (*Id.* ¶¶ 20-21.)

31 <sup>5</sup> PubMed Central contains the full text of over 3.9 million journal articles in biomedicine and the  
32 life sciences. (*Id.* ¶ 22.)

1  
2 small percentage of the journals that apply meet NLM’s quality standards and are accepted  
3 into Medline and/or PubMed Central. (*Id.* ¶¶ 20, 22.) Because of their selectivity, inclusion  
4 in Medline or PubMed Central is considered by many to be a mark of a journal’s high  
5 quality. (*Id.* ¶¶ 21-22.)

6  
7 (20) Under the traditional or standard academic journal publishing model, publishers charge  
8 user subscription fees to libraries or individuals for access to the published material. (*Id.*) In  
9 recent years, another model of academic journal publishing has developed that is sometimes  
10 referred to as “open access” journal publishing. (*Id.* ¶ 7.) Under this newer model, journals  
11 make their content publicly available at no cost, subsidizing their operations primarily  
12 through author-funded publication fees, and sometimes also through funding by large  
13 organizations or universities. (*Id.*)

### 14 **C. Defendants’ Deceptive Publishing Practices**

15  
16 (21) Since at least 2009, Defendants have owned and operated several websites, including  
17 omicsonline.org, omicsgroup.net, imedpub.com, and archivesofmedicine.com, on which they  
18 claim to publish hundreds of academic journals on “science, health, and technology” and  
19 invite consumers to submit articles for publication. (*See generally* PX12 Att. I at 248-60,  
20 Att. K at 336-629, Att. L at 631-942; SJX02 at 4 ¶ 20; SJX16 at 3 ¶¶ 5, 8; SJX26 Att. R at  
21 1008-67 (list of 29 websites registered to Defendants).<sup>6</sup> Defendants also use frequent and  
22 repeated email solicitations to invite consumers to submit articles and research for  
23

24  
25 <sup>6</sup> Defendant Gedela claims that his businesses publish more than 1,000 journals. (SJX23 at 69  
26 (lines 149:21-23).) The journal count appearing in Defendants’ advertising varies and has grown  
27 rapidly. (*See, e.g.*, PX12 Att. L at 632 (over 500 journals in 2015), 937 (more than 700 journals  
in 2016); SJX16 at 3 ¶ 14 (more than 700 in 2018), 5 ¶ 37 (over 700 journals, with more than  
50,000 editorial board members in 2018); SJX26 Att. Q at 585, 588 (same), 608-24 (list of  
journals); ECF No. 84 at 52, 80-88.) Defendants admit to using over 950 journal names to  
solicit manuscripts for publication. (SJX14 at 45 (admission 100); SJX15 at 5 (admission 175).)

1  
2 publication in their online journals. (SJX01 at 6; SJX02 at 4-5 ¶¶ 12, 22, 23; SJX09 at 7  
3 (admission 16); SJX16 at 4 ¶ 18; SJX26 Att. A at 20, 26, 84; SJX27 Att. A at 3-7.)

4  
5 **1. Defendants Make Numerous Material Misrepresentations To Induce Consumers  
To Submit Articles To Their Journals**

6  
7 **a. Defendants Misrepresent That They Follow Standard Peer-Review  
Practices**

8 (22) Defendants admit that on their websites, they frequently and repeatedly state that they  
9 uphold standard peer-review practices that are widely accepted in the academic journal  
10 publishing industry and that all of their articles are subject to peer review. (SJX02 at 5 ¶ 23;  
11 SJX11 at 12 (admission 60), 13 (admissions 65, 66); SJX12 at 7 (admissions 61, 63, 64);  
12 SJX13 at 6 (admission 75.1), 8 (admissions 77.1, 78.1), 9-11 (admissions 79.1, 80.1, 81.1,  
13 82.1), 13-16 (admissions 83.1, 85.1, 86.1, 87.1, 89.1); SJX15 at 4-8, 11-14 (admissions 175,  
14 182, 183, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195)<sup>7</sup>; *see also* SJX16 at 4 ¶ 23.)  
15 Peer review claims also appear in emails to consumers soliciting articles. (SJX01 at 8;  
16 SJX26 Att. P at 412, Att. Q at 576, 585, 588, 630, 682-97 (“Peer Review Journal List”  
17 webpage), 698-705 (“OMICS Peer Review Process” webpage), 949 (webpage title reads  
18 “iMedPub LTD Peer Reviewed Open Access Journals & Articles Publishing Company”);  
19 SJX27 Att. A at 5.)

20  
21  
22 (23) The following statements are illustrative of these claims:

- 23 • OMICS Group Journals encourages original and well researched articles for publication.  
24 With the help of a strong 25,000 experts as editorial board members and reviewers,  
25 OMICS Group journals uphold the standard review process. All the articles submitted for  
publication are subjected to a blind peer review. (SJX15 at 11 (admission 182 -

26 <sup>7</sup> The FTC served its Fifth Request for Admissions on February 14, 2018. Defendants did not  
27 respond within thirty days to this request. Accordingly, each admission is deemed admitted  
-- pursuant to Federal Rule of Civil Procedure 36(a)(3) and summary judgment may be granted  
based on matters deemed admitted. *See, e.g., Conlon v. United States*, 474 F.3d 616, 621 (9th  
Cir. 2007); *Elitzam v. City of Las Vegas*, 2017 U.S. Dist. LEXIS 194093, at \*3 (D. Nev. Nov. 22,  
2017).

1  
2 Defendants admit webpages made claims in 2014); *see also id.* (admission 183)  
3 (Defendants admit webpages made the same claim in 2015, but represented the number  
4 of experts exceeded 30,000).<sup>8</sup>

- 5 • With the help of a strong 30,000 experts as editorial board members and reviewers,  
6 OMICS Group journals uphold the standard review process. All articles submitted for  
7 publication are subjected to a blind peer review. (PX12 Att. L at 657.)
- 8 • OMICS Scholarly Journals strictly adhere to standard review process. All the articles are  
9 subjected to peer-reviewing prior to publication. (*Id.* at 657.)
- 10 • OMICS Group International peer-review policies are highly appreciated, accepted and  
11 adaptable to the criteria that have been prescribed by the international agencies such as  
12 NIH, PubMed etc. (*Id.* at 773.)
- 13 • The peer-review process subjects scientific research papers to independent scrutiny by  
14 other qualified scientific experts (peers) before they are made public . . . . The goal of  
15 peer-review is to assess the quality of articles submitted for publication . . . . Articles  
16 published by these Academic Journals are peer-reviewed and edited by the experts in the  
17 related areas . . . . (*Id.* at 748.)

18 (24) Even after entry of the preliminary injunction, Defendants continued to publish web  
19 pages that included representations that their journals are peer reviewed and operated by  
20 “50,000+ Editorial Board Members and esteemed reviewers.” (SJX15 at 12 (admission 187);  
21 SJX26 Att. Q at 576, 588.) The following statements illustrate these recent claims:

- 22 • OMICS International . . . subjects all the submitted manuscripts for peer reviewing to  
23 maintain quality and the standards of publication. 50,000 eminent scholars and  
24 researchers are providing staunch editorial support to OMICS online science journals  
25 striving to promote scientific research across the globe. (SJX15 at 13 (admission 191),  
26 18, 69 (admission 222 and accompanying document FTCRFA0074).)
- 27 • All the articles submitted for publication are subjected to strict blind peer review process.  
The peer review is carried out by reviewers who are randomly selected from the pool of  
50,000 subject matter experts that serve as editorial board members and reviewers or the  
OMICS International journals. (*Id.* at 12 (admission 189), 18, 60 (admission 221 and  
accompany document FTCRFA0065).)
- Make the best use of Scientific Research and information from our 700+ leading-edge  
peer reviewed, Open Access Journals that operates with the help of 50,000+ Editorial

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<sup>8</sup> Defendants’ representations that their journals are peer-reviewed date back to at least 2009.  
(SJX23 at 14-15 (lines 19:23-20:6); ECF No. 84 at 6 (2011 web page), 13, 19 (2012 web page).)



1  
2 Board Members and esteemed reviewers and 1000+ Scientific associations in Medical,  
3 Clinical, Pharmaceutical, Engineering, Technology and Management Fields. (SJX26 Att.  
4 Q at 576, 585.)

5 (25) In reality, in numerous instances, Defendants' peer-review practices are a sham. For  
6 example, several consumers who submitted articles to Defendants for publication were  
7 surprised when their manuscripts were approved for publication within several days of  
8 submission. (PX07 at 1 ¶ 4; PX10 at 2 ¶ 10; SJX26 Att. A at 20, 53, 69, 84, 86, 114.)  
9 Consumers were also concerned that they received no comments or proposed revisions from  
10 peer-reviewers. (PX04 at 1 ¶ 4; PX07 at 1 ¶ 4; PX06 at 1-2 ¶¶ 5-6; SJX26 Att. A at 37, 53,  
11 73, 93, 114, 124, Att. B at 151). Even those consumers who did receive feedback from the  
12 Defendants noted it was not substantive. (PX09 at 1 ¶ 4; PX10 at 1-2 ¶¶ 6, 10; SJX26 Att. A  
13 at 53.)  
14

15 (26) In 2012, John Bohannon, a scientist and writer for *Science* magazine conducted an  
16 experiment where he submitted papers with obvious and egregious scientific flaws to several  
17 journals, including two journals published by Defendants. (PX14 at 1 ¶ 3.) Both journals  
18 accepted his flawed papers without any substantive comments. (*Id.* at 2-3 ¶¶ 5, 7.)  
19 According to the FTC's expert, the articles contained both "editorial and scientific flaws,"  
20 and she opined that "these papers were not subject to peer review." (SJX18 at 11-12 ¶ 29;  
21 *see also* PX14 at 1 ¶ 3 (Mr. Bohannon states that "any qualified peer reviewer would [have]  
22 rejected them after even a brief perusal.")) Defendants admit that they published the papers  
23 without doing any peer review. (SJX12 at 8 (admission 68); SJX13 at 5 (admissions 70,  
24 71).)  
25

26 (27) Similarly, in 2016, a journalist for the Ottawa Citizen/Ottawa Sun submitted a flawed  
27 article to one of Defendants' journals. (SJX01 at 2 ¶ 2.) The manuscript, which combined  
-- text taken from Aristotle, unrelated modern words, and invented words, was "unintelligible;



1  
2 some sentences in the manuscript did not have verbs and others did not make sense because  
3 words from the original text had been changed to produce gibberish.” (*Id.*) Defendants’  
4 journal published the manuscript without any changes. (*Id.* ¶ 3.) The journalist was never  
5 contacted by a reviewer or editor prior to publication. (*Id.*) The FTC’s expert likewise  
6 opined that “any qualified peer reviewer would reject the article after even a brief perusal  
7 because of the nonsense sentences it contains.” (SJX18 at 12 ¶ 31.) She opined that “this  
8 paper was not subjected to peer review, as that term is understood in the academic publishing  
9 industry.” (*Id.*)  
10

11 (28) This contrasts with standard industry practice, where the peer-review process often takes  
12 at least several weeks and involves multiple rounds of substantive feedback from experts in  
13 the author’s particular field of expertise. (*See id.* at 6-7 ¶¶ 12-14.)  
14

15 (29) FTC interviews of Defendants’ purported journal “editors” also show that in many  
16 instances, the peer review claims are phony. Several academics and professionals who  
17 agreed to serve on the editorial boards of Defendants’ journals stated that they never received  
18 any manuscripts to review. (*See* PX03 at 1 ¶¶ 3-4; PX01 at 1-2 ¶¶ 3-4, 9.) One professor  
19 stated that when she accessed Defendants’ online system to make a final decision on several  
20 articles assigned to her, she noticed that those articles had already been approved by someone  
21 else. (PX11 at 2 ¶ 7.) In addition, when the FTC contacted several listed “editors” on  
22 Defendants’ website, many indicated that they had never agreed to be affiliated with OMICS  
23 and had not reviewed any manuscripts for Defendants’ journals. (PX02 at 1 ¶¶ 4-7; PX08 at  
24 2 ¶ 7; PX11 at 2 ¶ 11.)  
25

26 (30) Defendants are not able to substantiate their representations that all submitted  
27 manuscripts are peer-reviewed. In discovery, Defendants identified a list of articles  
28 published by their journals, and records of manuscript reviews. (SJX03 at 7 (response 4);

1  
2 SJX21 at 5; SJX22 at 5-7.) For numerous journals, Defendants have no evidence that  
3 manuscripts submitted to those journals have been reviewed in any manner. The manuscript  
4 review records that Defendants produced do not have a single entry in the names of 166  
5 journals that Defendants have advertised as peer-reviewed publications. (*Compare* SJX24 at  
6 8 ¶ 16 and *id.* at 12-16 (“Table of Journal Names Not in Review Data Files”) with PX12 at  
7 634-641 (online list); SJX14 (admission 100)). Further, Defendants’ list identifies almost  
8 69,000 published articles. But Defendants had a record of some form of review for only 49%  
9 of the published articles. (SJX24 at 5 ¶ 10.) For more than half of the articles, Defendants  
10 had no record showing that the manuscript had been reviewed. (*Id.*) Even among the articles  
11 for which Defendants were able to point to a record of some form of pre-publication review,  
12 these records reported that many of the articles had, in fact, been rejected.<sup>9</sup>  
13  
14

15 **b. Defendants Misrepresent That Their Publications Are Reviewed And**  
16 **Edited By Subject Matter Experts**

17 (31) Defendants also claim that their online publications are reviewed and edited by various  
18 scientists, researchers, and academics, including by as many as 50,000 experts. (*See, e.g.*,  
19 PX12 Att. L at 669-82, 734-37, 808-815; SJX15 at 11-13 (admission 180 - 20,000 editors in  
20 2012 and 2013, admission 181 - 30,000 editors in 2014, admission 182 - in 2014, 25,000  
21 experts as editorial board members and reviewers, admissions 183, 185 - 30,000 in 2015,  
22

---

23 <sup>9</sup> While Defendants produced *some* record of review for certain journals and the 49% of  
24 published articles, their records did not demonstrate that these reviews were the rigorous peer  
25 review by qualified experts that Defendants’ advertise. (*See* SJX26 Att. Q at 698-700 (describing  
26 single blind peer review followed by editor decision).) The spreadsheet files that Defendants  
27 produced often provide nothing more than minimal notation that a given manuscript was  
- - editors. For the summary above, any notation that a manuscript was accepted was treated as  
sufficient to establish that the manuscript was reviewed in some manner before publication. (*Id.*  
at 6 ¶¶ 11.b, 12.)

1  
2 admission 186 - 50,000+ editors in 2015-2017, admissions 188, 190, 192 - peer review  
3 conducted from pool of 50,000 subject matter experts that serve as editorial board members  
4 and reviewers); SJX16 at 5 ¶37; SJX26 Att. Q at 585, 588 (2018 website lists 50,000+  
5 editors), 973 (“Only top scholars are appointed to Boards of Editors”); ECF No. 84 at 52.)  
6 Indeed, Defendants’ websites include hundreds of names, pictures, and biographies of  
7 reputable scientists and researchers who allegedly serve on the editorial boards of their  
8 publications. (PX12 Att. L at 669-82, 734-37, 808-815.)

9  
10 (32) Many individuals that Defendants claim are journal editors have not, in fact, agreed to  
11 serve in that role. For example, Anthony Grace refused to serve as an editor of the Journal of  
12 Psychiatry after this Journal was acquired by OMICS. (PX02 at 1 ¶ 4; SJX13 at 5  
13 (admission 73)). Nonetheless, Defendants continued to use his name and image in  
14 advertising for the journal, and included him among the 14,598 editors in their discovery  
15 response. (SJX26 at 6 ¶ 16 (Grace listed in Defendants’ Annexure 3); SJX14 at 98-99, 104,  
16 110, 113, 118 (admissions 104-107); ECF No. 84 at 26.) Other individuals whose names  
17 Defendants have advertised as editors similarly report that they never agreed to serve on  
18 Defendants’ editorial boards. (PX08 at 1-2 ¶¶ 4-7; PX11 at 2 ¶ 11; SJX26 Att. A at 35, 63.)  
19 Others initially agreed to serve as editors, but later asked to be removed, with no success.  
20 (PX06 at 3 ¶ 11, Att. E at 28; PX07 at 2 ¶ 6, Att. C at 13.) Yet others indicated they had  
21 agreed to serve on the editorial board of Defendants’ journals, but that Defendants then listed  
22 them as editors-in-chief of the journals without their authorization. (PX01 at 1-2 ¶¶ 3, 5-8.)  
23

24  
25 (33) Defendants have also been unable to support their representations with any  
26 documentation showing tens of thousands have agreed to serve as editors. In discovery in  
27 this action, Defendants were asked to identify the purported editors, and to produce  
28 confirmation that these individuals had, in fact, agreed to serve as editors. (SJX03 at 7-8

1  
2 (interrog. 6); SJX19 at 13(response 29), 9 (request 18 (requesting documents reflecting  
3 agreements to serve)).) The lists of purported editors and reviewers that Defendants  
4 assembled in response do not contain 50,000 names; they name only 14,598 unique  
5 individuals. (SJX24 at 3 ¶ 3.) Further, after being compelled by this Court to provide a  
6 complete response to discovery requests for all documents reflecting agreement to serve as  
7 an editorial board member or to be affiliated with a journal, Defendants’ response identified  
8 only 380 individuals who had agreed to serve as an editor on one of only 130 of Defendants’  
9 journals. (SJX19 at 9, request 18; SJX26 at 5 ¶ 15.)<sup>10</sup>

### 11 **c. Defendants Misrepresent The Impact Factors Of Their Publications**

12 (34) Defendants also represent that their online publications have high impact factors, and  
13 their solicitation emails and journal websites often prominently display what purports to be  
14 an “impact factor.” (*Id.* Att. L at 657, 691, 762, 766, 768-69, 881-935; SJX15 at 14  
15 (admissions 196, 197 (statements continued to be made after entry of preliminary  
16 injunction)); SJX26 Att. P at 450-67, 475, 477, Att. Q at 589, 741-68 (“Scientific Journals

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17  
18  
19 <sup>10</sup> In their initial response to the FTC’s motion for a preliminary injunction, Defendants  
20 submitted letters from purported editors or editorial board members recommending that  
21 Defendants’ journals be indexed in PubMed Central. (ECF No. 10, Ex. 5.) But when the FTC  
22 contacted the individuals in question, several indicated that while they had been affiliated with  
23 Defendants in the past, they ended their affiliation upon discovering Defendants’ problematic  
24 publishing practices. (PX15 at 2 ¶ 6.) For example, one indicated she was never affiliated with  
25 Defendants and never sent a letter on their behalf to PubMed Central. (*Id.* at 3 ¶ 8.) Some others  
26 explained that they only sent the letters because they usually try to support new, up-and-coming  
27 journals. (*Id.* at 2 ¶ 6-7.) Another individual further reported that although she initially agreed to  
28 send the letter on the Defendants’ behalf, after discovering the journals’ problematic publishing  
29 practices, she asked to be removed from their websites, and Defendants refused. (*Id.* ¶ 6; PX18 at  
30 2-3 ¶¶ 6-7.) In their subsequent response to the FTC’s motion for preliminary injunction,  
31 Defendants submitted a list of purported editors who allegedly support the indexing of  
32 Defendants’ journals in major journal indexing services (ECF Nos. 33-4 – 33-16): When the  
33 FTC contacted 57 U.S.-based academics listed in that exhibit, 12 of the 23 who responded  
34 indicated that they regretted their affiliation and endorsement of OMICS, or that they would not  
35 recommend OMICS’ journals for indexing at this time. (*See* PX22 at 2-3 ¶¶ 4-7; *see also* PX20  
36 at 2 ¶ 4 (research director at Harvard Medical School declined to publish in Defendants’ journal  
37 because OMICS is not “a legitimate publisher of scientific journals”).

1  
2 Impact Factor” webpage listing purported impact factor for all journals); SJX27 Att. A at 3;  
3 ECF No. 84 at 92-93.)

4 (35) Defendants admit to making the following statements on their websites since at least  
5 2015:

- 6
- 7 • What is Impact Factor? How is it calculated? The Impact Factor, often abbreviated IF, is  
8 a measure defining the quantity of articles cited published by a Journal, therefore,  
9 reflecting the average number of citations of the articles published in science and social  
10 science journals. IF is calculated by dividing the number of citations in the Journal  
11 Citation Reports that particular year by the total number of articles published in the two  
12 previous years. (SJX12 at 5 (admission 30).)
  - 13 • The Impact Factor, often abbreviated IF, is a measure reflecting the average number of  
14 citations to recent articles published in science and social science journals. IF is  
15 calculated by dividing the number of citations in the Journal Citation Reports year by the  
16 total number of articles published in the two previous years. High impact factor for a  
17 particular journal implies good number of citations and quality of work. (SJX11 at 5  
18 (admission 31).)
  - 19 • Journal impact factors are published each year in the Journal Citation Reports - produced  
20 by ISI. (SJX12 at 5 (admission 32).)
  - 21 • OMICS International hosts many high impact factor journals. (SXJ26 Att. Q at 589.)
  - 22 • OMICS International journals are among the top high impact factor academic journals  
23 which are publishing scholarly articles constantly. (SJX26 Att. Q at 820.)

24 (36) Defendants began makings specific representations regarding their journals’ impact  
25 factors in 2011. (SJX23 at 46 (lines 75:15-24), 109 (Dep. Ex. 12 at FTCRFA0043 (list of  
26 impact factors)).) And continue to make such representations. (SJX26 Att. Q at 741-68;  
27 ECF No. 84 at 92-93.)

28 (37) Defendants’ admit that, in fact, none of their journals have a Thomson Reuters impact  
29 factor. (SJX04 at 8 (response 8); SJX07 at 7 (admission 15); SJX08 at 7 (admission 15);  
30 SJX09 at 7 (admission 15); SJX10 at 8 (admission 19).) Instead, the numbers that  
31 Defendants describe as “impact factors” are ratios that Defendants themselves calculate

1  
2 based on the number of citations found via “a search of Google Scholar Citation.”<sup>11</sup> (SJX14  
3 at 47 (admission (103); PX12 Att. L at 770; SJX26 Att. P at 467, Att. Q at 763.)

4 (38) Defendants’ websites contain inconsistent descriptions of how their “impact factor” is  
5 calculated. In some places, the impact factor is described as the Thomson Reuters impact  
6 factor based on Journal Citation Reports. (SJX15 at 14-17 (admissions 198-211).) In other  
7 places, it is described as an “unofficial impact factor” based on Google Scholar Citations.  
8 (E.g., SJX14 (admission 103); ECF No. 84 at 93.) But this alternative definition appears  
9 nowhere near Defendants’ marketing claims for their journals. (PX12 Att. L at 881-931  
10 (asterisk appears at the top of “impact factor” column, disclosure does not appear until page  
11 931); SJX26 Att. P at 450-467 (same), 475, 477-78, 479-80 (disclosure appears near bottom  
12 of journal homepage while impact factor representation near the top), Att. Q at 744-63  
13 (asterisk appears at the top of the “impact factor” column, but disclosure does not appear  
14 until last page); ECF No. 84 at 92-93 (disclosure appears at bottom of list).) In other  
15 instances, Defendants make the general, unqualified claim that their journals have “high  
16 impact factors.” (See, e.g., PX12 Att. L at 657, 762; SJX26 Att. Q at 820.) Meanwhile, their  
17 solicitation emails contain no qualifiers to alert consumers that the impact factor is not the  
18 metric calculated by Thomson Reuters. (SJX27 Att. A at 3.)  
19  
20  
21

22 **d. Defendants Misrepresent That Their Publications Are Included In NIH’s**  
23 **Indexing Databases**

24 (39) Finally, Defendants represent that their publications are indexed in well-known, reputable  
25 indexing services, going so far as to use the logos for such indices without permission. For  
26 example, they claim that “[m]ost of these journals” are “indexed in MEDLINE, PUBMED.”  
27 (PX12 Att. L at 643, 657, 694; see also *id.* at 760, 785 (using PubMed and Medline logos in  
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<sup>11</sup> Moreover, Defendants admit that their “impact factor” is not even a metric published by Google Scholar Metrics. (SJX14 at 6 (admission (95).)

1  
2 connection with specific journals); PX10 Att. D at 16 (email solicitation claiming “a good  
3 number” of OMICS journals are published in PubMed); SJX26 Att. Q at 588 (“OMICS’s  
4 open access journals are listed in dozens of highly acclaimed indexing databases”), 589  
5 (claims of indexing in Medline and PubMed Central), 820 (claims of indexing in Medline),  
6 916 (Medline and PubMed Central), 923.) Defendants’ use of the PubMed Central logo to  
7 advertise their journals goes back to at least 2011. (ECF No. 84 at 8, 11, 14, 17, 20, 24.)

8  
9 (40) Defendants admit that none of their journals are indexed in PubMed Central or  
10 MEDLINE. (SJX07 at 7 (admissions 13, 14); SJX08 at 7 (admissions 13, 14); SJX09 at 7  
11 (admissions 13, 14); SJX10 at 7 (admission 18).)

12  
13 (41) Indeed, NLM has refused to index Defendants’ publications in its databases due to  
14 questionable publishing practices.<sup>12</sup> (SJX18 at 13-14 ¶¶ 32-34, Att. B at 25, Att. C at 28.)  
15 And on multiple occasions, NLM has informed Defendants of this fact and requested that  
16 Defendants cease making deceptive statements regarding their purported affiliation with  
17 NIH, its Institutes, and PubMed Central. (*Id.* at 14 ¶¶ 35-36, Att. D at 31, Att. E at 33-34.)  
18 Defendants admit to receiving multiple notices from NIH that PubMed Central would not  
19 accept any journals from Defendants and that Defendants needed to stop making reference to  
20 PubMed Central on the journals and websites. (SJX11 at 10 (admission 54); SJX14 at 6-7  
21

22  
23 <sup>12</sup> In some instances, Defendants acquired journals that were included in PubMed Central or  
24 Medline. (SJX18 at 15-16 ¶¶ 37-38.) But as soon as NLM learned that Defendants had taken  
25 over editorial control of such journals, NLM ceased including new issues of those journals in  
26 PubMed Central and/or Medline. (*Id.* 15-16 ¶¶ 37-38.) In addition, a few articles published in  
27 Defendants’ journals have appeared in PubMed Central because NLM is required by law to make  
NIH-funded research available on PubMed Central, regardless of whether it was published in a  
journal indexed in PubMed Central. (*See* SJX18 at 10 ¶¶ 24-26.) This does not mean, however,  
that the journal in question has been approved for inclusion in PubMed Central. (*Id.* at 11 ¶ 27.)  
NIH has previously warned Defendants to cease claiming that their journals are included in  
PubMed Central simply because specific federally-funded articles appearing in their publications  
are indexed in PubMed Central. (*Id.* Att. E at 33-34.)



1  
2 (admissions 96, 97, 98, 99); ECF No. 36-4 at 2-3 (letter from Defendant Gedela to NIH.)  
3 NIH has not reversed that position. (*Id.* at 11 (admission 58).) Despite warnings, Defendants  
4 have continued to tout their inclusion in PubMed and to claim that their journal publishing  
5 practices comport with the standards set by NIH. (PX10 Att. D at 16 (article submission  
6 request email sent almost a year after NIH cease and desist letter states “A good number of  
7 Academic Journals of OMICS Publishing Group are indexed in famous indexing services  
8 like PubMed”); PX12 Att. L at 760, 773; SJX26 Att. Q at 589 (2018 website claims OMICS  
9 journals are indexed in Medline and PubMed Central), 820, 916, 923.)  
10

## 11 **2. Defendants Fail To Disclose Adequately Their Publishing Fees**

12 (42) As discussed above, Defendants send out frequent emails to individuals employed in  
13 research or academia soliciting the submission of articles for their online publications. In  
14 numerous instances, however, Defendants’ email solicitations contain no mention of any fees  
15 associated with the advertised publication service. (*See* PX04 Att. A at 6; PX09 Att. A at 4;  
16 PX10 Att. D at 16, Att. G at 37, 41; PX11 Att. D at 11; SJX26 Att. A at 69, 84, 90, 105, 124,  
17 Att. B at 156, 159, 169, 171; SJX15 at 20-25, 195-217 (admissions 235-278 and associated  
18 solicitations FTCRFA0200-221); SJX26 Att. P at 411-15.) Even after entry of the  
19 preliminary injunction that requires Defendants to disclose fees clearly and conspicuously,  
20 Defendants sent email solicitations for manuscripts that contain no mention of fees or other  
21 costs. (SJX01 at 6; SJX26 Att. A at 65; SJX27 Att. A at 3-7.)  
22

23  
24 (43) Defendants’ email solicitations invite consumers to submit articles for publication simply  
25 by responding to the email, meaning that consumers may never reach Defendants’ websites  
26 at all. (SJX01 at 6, 8; PX04 Att. A at 6; PX10 Att. G at 37, 41; PX11 Att. D at 11; SJX26  
27 Att. O at 386, Att. P at 411-15; SJX27 Att. A at 3-7.)  
--



1  
2 (44) Defendants’ solicitations also urge consumers to submit papers to online portals that  
3 invite authors to upload manuscripts for editorial review. (*See* SJX15 at 25-26, 218-22  
4 (admissions 279-282 and associated records FTCRFA0222-FTCRFA0226), 17, 23, 29, 207  
5 (admissions 215-216, 258 and associated records FTCRFA0034 (“Submission and Review  
6 Tracking System”) and FTCRFA0212 (inviting submission to Editorial Manager)); PX12  
7 Att. L at 700 (Editorial Manager welcome screen); SJX27 Att. A at 3-7.) The instructions  
8 and other content of these online portals have not disclosed fees. (*See* SJX15 at 17, 23, 25-  
9 26, 29, 207, 218-22 (admissions 215-216, 258, 279-282 and associated records  
10 FTCRFA0034, FTCRFA0212, FTCRFA0222-FTCRFA0226); PX12 Att. L at 700; SJX26  
11 Att. Q at 631-40 (no mention of fees on 2018 version of “Instructions for Authors”  
12 webpage), 957 (no mention of fees on “Online Submission” page), 982-1006 (no disclosure  
13 on editorial manager journal home pages); SJX14 at 99, 124-33 (admission 108)  
14 (“Instructions for Authors”).)

15  
16  
17 (45) The home pages of many of Defendants’ journals also do not clearly or conspicuously  
18 disclose that authors need to pay to publish their articles. (*See, e.g.*, PX12 Att. L at 734-38,  
19 762-67, 859-67; SJX26 at 11-12 ¶ 29, Att. P at 475, 477, 479, Att. Q at 982-1006.) Neither  
20 do the “Instructions for authors” or “Submit Manuscript” pages for many journals. (*See, e.g.*,  
21 PX12 Att. L at 652-54, 757-59; FTCRFA0024; SJX26 Att. Q at 631-40.) In some instances,  
22 Defendants bury their fee disclosures on secondary webpages that consumers would not  
23 otherwise need to visit. (*See, e.g.*, PX12 Att. K at 375-81 (generic reference to fees, although  
24 with no specific amounts, appears at very end of hyperlinked “Guidelines For Authors”  
25 webpage); Att. L at 632 (“Article Processing Charges” link appears towards the bottom of  
26 Defendants’ landing page), 752-55 (“Article Processing Charges” listed at the bottom of  
27 journal webpage); SJX26 Att. P at 475, 477, 479 (small print hyperlink on side of page to  
--

1  
2 “Article Processing Charges”), Att. Q at 577 (hyperlink to “Article Processing Charges” at  
3 bottom of page), 966-71 (disclosure at bottom of webpage.) Consumers going to a journal’s  
4 homepage can navigate directly to the manuscript submission page without seeing any  
5 disclosure. (*See, e.g.*, PX12 Att. K at 340-41 (no mention of fees on online submission page  
6 for iMedPub journals), Att. L at 698-733 (no mention of fees on OMICS Publishing Group  
7 Online Submission System).)

8  
9 (46) Many consumers learn of Defendants’ fees only after Defendants have accepted their  
10 articles for publication. (PX04 at 1 ¶ 5; PX06 at 1 ¶ 5; PX07 at 1 ¶ 5; PX09 at 1 ¶ 4; PX10 at  
11 1-3 ¶¶ 6, 11; SJX26 Att. A at 20, 26, 33, 45, 59, 69, 73, 78, 84, 90, 105, 110, 120, 124, Att. B  
12 at 156, 159, 169, 171, 182, Att. P at 488, 501.) At that time, consumers typically receive  
13 invoices from Defendants requiring them to pay hundreds or thousands of dollars in  
14 publication fees. (SJX01 at 17; PX04 at 1 ¶ 5; PX06 at 1 ¶ 5; PX07 at 1 ¶ 5; PX09 at 1 ¶ 4;  
15 PX10 at 1-3 ¶¶ 6, 11; SJX26 Att. A at 33, 45, 59, 73, 78, 84, 90, 105, 110, 120 124, Att. B at  
16 156, 159, 169, 171, 182, Att. P at 488.)

17  
18 (47) When consumers contest Defendants’ undisclosed publication fees and ask that their  
19 articles be withdrawn from publication, Defendants often ignore those requests or require  
20 consumers to pay a withdrawal fee (also undisclosed prior to submission). (PX04 at 1-2 ¶¶  
21 6-8; PX06 at 2 ¶¶ 6, 8; PX07 at 1-2 ¶¶ 5, 8; PX09 at 1-2 ¶¶ 5-9; PX10 at 2 ¶ 9; SJX26 12-13  
22 ¶¶ 32-38, Att. A at 37, 53, 69, 84, 86, 120, 124, Att. B at 156, 159, 169, 171, Att. O at 394,  
23 Att. P at 427, 481-560.) Consumers report receiving multiple requests for payment from  
24 Defendants, even after they have asked Defendants not to publish their articles. (PX04 at 2 ¶  
25 7; PX07 at 1-2 ¶¶ 5, 8, Att. B at 11, Att. E at 19; SJX26 Att. A at 84, 120 ,126, Att. B at 156-  
26 58, 169.) One consumer received so many payment requests from Defendants over the  
27  
--

1  
2 course of several years that he feared Defendants would report the unpaid fees to credit  
3 bureaus and harm his credit score. (PX04 at 2 ¶ 7.)

4 (48) When Defendants do remove consumers' articles from their website and stop sending  
5 payment requests, it is often because the consumers have sent multiple emails and threatened  
6 legal action. (*See, e.g.*, PX07 at 2 ¶¶ 9-10 (Defendants agreeing to remove article only after  
7 threat of legal action by university attorney); PX06 at 2 ¶¶ 7, 9 (article withdrawn only after  
8 two cease and desist letters from university attorney).) In addition to the harm from paying  
9 undisclosed fees or spending time and resources to convince Defendants to withdraw their  
10 articles, consumers face additional harms. If Defendants do not withdraw an article from  
11 publication, ethical standards in the journal publishing industry generally prohibit the author  
12 from submitting the same work to another journal. (SJX18 at 6 ¶ 11; PX06 at 2 ¶ 8; SJX26  
13 Att. A at 53.) The inability to publish their work elsewhere could have the further negative  
14 consequence of diminishing consumers' prospects for obtaining employment, tenure, grants,  
15 or other benefits from universities or other organizations that consider candidates' published  
16 work as a factor in their decision-making, and would negatively view someone associated  
17 with a disreputable journal.  
18  
19  
20

#### 21 **D. Defendants' Deceptive Conference Practices**

22 (49) In addition to their online publishing services, Defendants also organize conferences on  
23 various scientific topics, for which registration fees can range over \$1,000. (SJX16 at 3 ¶¶ 6,  
24 8; SJX26 Att. B at 170, 185, 188; SJX02 at 4, 6 ¶ 14, 37; SJX14 at 98-99, 101-12  
25 (admissions 104-105); ECF No. 84 at 58-61, 64-78.) Defendants market these conferences  
26 on their websites, including omiconline.org and conferenceseries.com, and via email  
27 solicitations to individuals involved in academia and research, and invite consumers to  
-- register for such conferences. (SJX02 at 6 ¶ 37; PX12 Att. I at 248-60, Att. M at 944-45;

1  
2 SJX26 Att. A at 43, 50, 56, 67, 71, 108, 122, Att. Q at 831-915 (listing of upcoming  
3 conferences), 932-37 (same); PX05 at 1-2 ¶¶ 3, 9, Att. B at 8-9; SJX14 at 98-99, 101-12  
4 (admissions 104-105); SJX26 Att. R at 1008-67 (list of websites registered to Defendants  
5 many of which promote Defendants' conferences.) Many of these conferences occur in the  
6 United States. (SJX26 at 4-5 ¶¶ 10-14 (conferences in Atlanta, San Francisco, Las Vegas,  
7 Dallas, Philadelphia), Att. Q at 831-913 (conferences in New York, Dallas, Boston, Florida,  
8 San Diego, Chicago, Las Vegas, Los Angeles, Atlanta, Birmingham, San Francisco, San  
9 Antonio), 932-37 (New York, Dallas, Boston); ECF No. 84 at 36-43 (Phoenix, Las Vegas,  
10 Atlanta, San Francisco), 64- (San Antonio, Orlando, Chicago, Houston, Baltimore).)

11  
12 (50) In order to induce consumers to register for these conferences and pay the registration  
13 fees, Defendants often tout the attendance of, and participation by, prominent academics and  
14 researchers. (PX05 1-2 ¶¶ 3, 5; SJX26 Att. A at 22, 56.)

15  
16 (51) In reality, however, in numerous instances, scientists listed on Defendants' websites as  
17 conference panelists or event organizers never agreed to appear at these conferences. (PX05  
18 at 1-2 ¶ 5 (two purported conference organizers never agreed to be affiliated with  
19 Defendants' conferences; one of them repeatedly asked Defendants to remove his name, with  
20 no success); PX03 at 1-3 ¶¶ 6-12; SJX26 Att. A at 24, 47, 116, Att. B at 170, Att. N at 369,  
21 370, 372, 374, 376, 378 ("OMICS! Those bastards. I had nothing to do with them on this  
22 conference in Valencia"), 380, 381, 383.) In reviewing Defendants' marketing materials for  
23 a Philadelphia, PA conference, a consumer noticed that a number of reputable scientists were  
24 listed as conference organizers. (PX 16 at 2 ¶ 12.) Because he personally knew three of  
25 them, he contacted these individuals to find out if they were indeed affiliated with  
26 Defendants' conferences. (*Id.*) None of them were, and some did not know that their names  
27 were being used by the Defendants in their marketing materials. (*Id.*) Had consumers  
--

1  
2 known Defendants listed conference organizers or participants without their permission, they  
3 may never have agreed to attend or be affiliated with Defendants' conferences. (*See, e.g.*,  
4 PX05 at 2 ¶ 6.)

5  
6 (52) Further, Defendants often have refused consumers' requests to remove their names from  
7 their conference advertising materials. (PX03 at 1-3 ¶¶ 6-12; SJX26 Att. N at 370.) When  
8 Defendants have agreed to remove consumers' names, it is often because consumers have  
9 threatened legal action. (PX05 at 2 ¶ 7.)

10 (53) Based on a random sample of Defendants' conferences, the FTC determined that  
11 approximately 60% of Defendants' conferences advertised organizers or participants who  
12 had, in fact, not agreed to serve in such capacities. (SJX25 at 4 ¶ 7.)

13  
14 (54) Further, during discovery the FTC requested that Defendants produce documents  
15 substantiating their claim that various academics had agreed to participate or otherwise be  
16 associated with Defendants' conferences. (SJX19 at 10 (Request No. 19).) Defendants  
17 produced no documents in response. (*Id.* (Response No. 19).)

18 **E. Consumer Injury**

19 (55) Between August 25, 2011 and July 31, 2017, Defendants have taken in gross revenues, in  
20 the form of publication and conference registration fees from consumers, of at least  
21 approximately \$50,740,100.05, and have paid out \$609,289.13 in chargebacks and refunds.  
22 (SJX26 at 9 -11 ¶¶ 21-25.) Accordingly, the net consumer injury caused by Defendants'  
23 unlawful publication and conference practices is at least \$50,130,810.92. (*Id.* at 11 ¶ 25.)  
24  
25  
26  
27  
28

1  
2 **III. THE COURT SHOULD ENTER SUMMARY JUDGMENT AGAINST**  
3 **DEFENDANTS**

4 **A. Summary Judgment Standard**

5 Summary judgment is appropriate where, as here, the movant shows “that there is no genuine  
6 dispute as to any material fact and that the moving party is entitled to judgment as a matter of  
7 law.” Fed. R. Civ. P. 56(a). As the moving party, the FTC bears the initial burden of  
8 demonstrating the absence of any genuine issues concerning any material facts. *See FTC v. AMG*  
9 *Servs.*, 2017 U.S. Dist. LEXIS 66689, at \*8-9 (D. Nev. May 1, 2017); *FTC v. Ivy Capital, Inc.*,  
10 2013 U.S. Dist. LEXIS 42369, at \*18 (D. Nev. Mar. 26, 2013). A fact is material if it may affect  
11 the outcome of the case, and a dispute is genuine if there is sufficient evidence for the trier of  
12 fact to return a verdict for the non-moving party. *AMG Servs.*, 2017 U.S. Dist. LEXIS 66689, at  
13 \*8 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Once the FTC has met its  
14 burden, “the burden shifts to [Defendants] to set forth, by affidavit or as otherwise provided in  
15 Rule 56, specific facts showing that there is a genuine issue...” *FTC v. Stefanchik*, 559 F.3d 924,  
16 928 (9th Cir. 2009) (quotation omitted); *AMG Servs.*, 2017 U.S. Dist. LEXIS 66689, at \*9.

17  
18  
19 Here, there are no material facts in dispute that (1) Defendants violated Section 5 of the FTC  
20 Act, (2) the corporate Defendants operated as a common enterprise and are, therefore, jointly  
21 liable, and (3) individual Defendant Gedela had the necessary level of involvement and  
22 knowledge to be individually liable.

23 **B. This Court Has Jurisdiction And Venue Is Proper**

24  
25 This Court has jurisdiction over cases brought under the FTC Act. 15 U.S.C. §§ 45, 53(b). In  
26 addition, the Court has subject matter jurisdiction because this is a civil action arising under an  
27 Act of Congress regulating commerce, 28 U.S.C. § 1337(a), and an agency of the United States  
is plaintiff, 28 U.S.C. § 1345. As discussed above, Defendants solicit academics nationwide

1  
2 (indeed, worldwide) for their publishing and conference services. (SMF 15, 21, 49.)<sup>13</sup> Such  
3 transactions are “in or affecting commerce,” as required by the FTC Act. *Ford Motor Co. v.*  
4 *FTC*, 120 F.2d 175, 183 (6th Cir.), *cert. denied*, 314 U.S. 668 (1941). Additionally, Section  
5 5(a)(4) of the FTC Act, 15 U.S.C. §45(a)(4), specifically provides that unfair or deceptive acts  
6 includes “such acts or practices involving foreign commerce that (i) cause or are likely to cause  
7 reasonably foreseeable injury within the United States; or (ii) involve material conduct occurring  
8 within the United States.” As discussed above, Defendants’ practices have caused or are likely  
9 to cause reasonably foreseeable injury within the United States, as numerous consumers within  
10 the United States were harmed by Defendants’ conduct. (SMF 55.) And, as further discussed  
11 above, Defendants’ practices involved material conduct occurring within the United States.  
12 (SMF 14, 15, 49.) Venue is proper under 28 U.S.C. § 1391(b)-(c) because, as discussed above,  
13 Defendant OMICS Group is incorporated in Nevada, Defendants use a Nevada-based company  
14 to serve as registered agent and to receive and forward mail, and Defendants routinely direct  
15 consumers to contact Defendants at phone numbers and addresses located in Nevada, California  
16 and Delaware. (SMF 14.)

### 17 18 19 **C. Defendants Violated Section 5 Of The FTC Act**

20  
21 Section 5 of the FTC Act prohibits “unfair or deceptive practices in or affecting  
22 commerce.” 15 U.S.C. § 45. An act or practice is deceptive under Section 5 if it involves a  
23 material representation or omission that is likely to mislead consumers acting reasonably under  
24 the circumstances. *Stefanchik*, 559 F.3d at 928. A misrepresentation is material if it involves  
25 facts that a reasonable person would consider important in choosing a course of action. *See FTC*  
26 *v. Cyberspace.com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006). Express claims are presumed  
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<sup>13</sup> The label “SMF” refers to the individually numbered Statements of Material Fact set forth in Section II above.

1  
2 material, so consumers, to be deemed reasonable, are not required to question the veracity of  
3 such claims. *See FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095-96 (9th Cir. 1994). In addition,  
4 consumer action based on express statements is presumptively reasonable. *Ivy Capital*, 2013  
5 U.S. Dist. LEXIS 42369, at \*23; *FTC v. Data Med. Capital, Inc.*, 2010 U.S. Dist. LEXIS 3344,  
6 at \*76-77 (C.D. Cal. Jan. 15, 2010); *FTC v. Stefanichik*, 2007 U.S. Dist. LEXIS 25173, at \*14  
7 (W.D. Wash. Apr. 3, 2007) (“Reasonable consumers are not required to doubt the veracity of  
8 express representations...”).  
9

10 The FTC need not prove reliance by each consumer misled by Defendants. *FTC v.*  
11 *OMICS Grp. Inc.*, 2017 U.S. Dist. LEXIS 161910, at \*5 (D. Nev. Sep. 29, 2018); *FTC v.*  
12 *SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1275 (S.D. Fla. 1999). “Requiring proof of subjective  
13 reliance by each individual consumer would thwart effective prosecutions of large consumer  
14 redress actions and frustrate the statutory goals of [Section 13(b)].” *FTC v. Figgie Int’l, Inc.*,  
15 994 F.2d 595, 605 (9th Cir. 1993) (quoting *FTC v. Kitco of Nev., Inc.*, 612 F. Supp. 1282, 1293  
16 (D. Minn. 1985)); *AMG Servs.*, 2017 U.S. Dist. LEXIS 66689, at \*38.  
17

18 In considering whether a claim is deceptive, the Court must consider the “net impression”  
19 created by the representation, even when the solicitation contains some truthful disclosures.  
20 *Cyberspace.com*, 453 F.3d at 1200; *FTC v. AMG Servs.*, 29 F. Supp. 3d 1338, 1365 (D. Nev.  
21 2014) (“Deception may be found based on the ‘net impression’ created by a representation. This  
22 means that the court employs its ‘common sense,’ and that a section 5 violation is not determined  
23 by fine print, technicalities, and legalese”); *FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 528  
24 (S.D.N.Y. 2000) (“[T]he Court must consider the misrepresentations at issue, by viewing them as  
25 a whole without emphasizing isolated words or phrases apart from their context.” (brackets and  
26 internal quotation marks omitted)). “A solicitation may be likely to mislead by virtue of the net  
27 impression it creates even though the solicitation also contains truthful disclosures.”  
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1  
2 *Cyberspace.com*, 453 F.3d at 1200; *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1214 (D.  
3 Nev. 2011); *see also Ivy Capital*, 2013 U.S. Dist. LEXIS 42369, at \*23; *FTC v. Publishers Bus.*  
4 *Servs.*, 821 F. Supp. 2d 1205, 1223 (D. Nev. 2010) (same). And because the FTC Act is a  
5 consumer protection statute, any disputed representation should be construed in favor of the  
6 consumer. *Resort Car Rental Sys. v. FTC*, 518 F.2d 962, 964 (9th Cir.1975)

7  
8 The FTC need not prove that Defendants' misrepresentations were made with an intent to  
9 defraud or deceive or in bad faith. *See, e.g., Removatron Int'l Corp. v. FTC*, 884 F.2d 1489,  
10 1495 (1st Cir. 1989); *FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1029 (7th Cir.  
11 1988); *OMICS Grp.*, 2017 U.S. Dist. LEXIS 161910, at \*5; *AMG Servs.*, 2017 U.S. Dist. LEXIS  
12 66689, at \*17. Indeed, good faith is not a defense to liability for violating Section 5 of the FTC  
13 Act, as asserted by Defendants in their third affirmative defense; thus, the Court should reject  
14 this defense.<sup>14</sup> *See, e.g., Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762, 779 (8th Cir. 2010)  
15 (noting consensus that "a defendant's good faith is immaterial to whether a 'deceptive act' has  
16 occurred under § 5 of the Federal Trade Commission Act because that statute does not require an  
17 intent to deceive"); *Cyberspace.com*, 453 F.3d at 1202; *FTC v. Bay Area Bus. Council, Inc.*, 423  
18 F.3d 627, 635 (7th Cir. 2005); *Removatron Int'l*, 884 F.2d at 1495; *World Travel Vacation*  
19 *Brokers*, 861 F.2d at 1029; *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 (D.C. Cir. 1977); *AMG*  
20 *Servs.*, 2017 U.S. Dist. LEXIS 66689, at \*17; *FTC v. Hope Now Modifications*, 2009 U.S. Dist.  
21 LEXIS 102596, at \*3 (D.N.J. Nov. 4, 2009); *FTC v. CEO Grp., Inc.*, 2007 U.S. Dist. LEXIS  
22 10619, at \*4 (S.D. Fla. Feb. 15, 2007). Neither is intent to deceive necessary to demonstrate a  
23 violation of Section 5 of the FTC Act, as asserted by Defendants in their sixth affirmative  
24 defense; thus, the Court should reject this defense. *See, e.g., FTC v. Publ'g Clearing House*, 104  
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14 Where appropriate, the FTC will address Defendants' affirmative defenses in context. The remaining defenses are discussed in Section V below.

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2 F.3d 1168, 1171 (9th Cir. 1997); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 574 (7th Cir.  
3 1989); *World Travel Vacation Brokers*, 861 F.2d at 1029; *Beneficial Corp. v. FTC*, 542 F.2d 611,  
4 617 (3d Cir. 1976); *AMG Servs.*, 2017 U.S. Dist. LEXIS 66689, at \*18; *FTC v. Patriot Alcohol*  
5 *Testers*, 798 F. Supp. 851, 855 (D. Mass. 1992).

6  
7 A representation is also deceptive if the maker of the representation lacks a reasonable  
8 basis for the claim. *See FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 8 (1st Cir. 2010);  
9 *OMICS Grp.*, 2017 U.S. Dist. LEXIS 161910, at \*5. Where the maker lacks adequate  
10 substantiation evidence, they necessarily lack any reasonable basis for their claims. *Direct Mktg.*  
11 *Concepts*, 624 F.3d at 8; *Removatron Int'l*, 884 F.2d at 1498; *OMICS Grp.*, 2017 U.S. Dist.  
12 LEXIS 161910, at \*5.

13  
14 Any disclaimers must be prominent and unambiguous to change the apparent meaning  
15 and leave an accurate impression. *Kraft, Inc. v. FTC*, 970 F.2d 311, 325 (7th Cir. 1992);  
16 *Removatron Int'l*, 884 F.2d at 1497; *OMICS Grp.*, 2017 U.S. Dist. LEXIS 161910, at \*5-6. A  
17 qualification must be likely to come to the attention of the person who sees the basic claim, and a  
18 qualification in small print or its equivalent is unlikely to be effective. *See Grant Connect*, 827  
19 F. Supp. 2d at 1214. Statements used to qualify otherwise deceptive statements must be  
20 sufficiently clear and conspicuous. *See, e.g., In re Thompson Med. Co.*, 104 F.T.C. 648, 789 n.9  
21 (1984).

22  
23 Finally, it is well established that “[t]he Federal Trade Act is violated if [a seller] induces  
24 the first contact through deception, even if the buyer later becomes fully informed before  
25 entering the contract.” *Resort Car Rental Sys.*, 518 F.2d at 964 (citing *Exposition Press, Inc. v.*  
26 *FTC*, 295 F.2d 869, 873 (2d Cir. 1961); *OMICS Grp.*, 2017 U.S. Dist. LEXIS 161910, at \*6;  
27 *FTC v. City W. Advantage, Inc.*, 2008 U.S. Dist. LEXIS 71608, at \*7 (D. Nev. Jul. 22, 2008).

1  
2 Here, Defendants engage in deceptive practices in violation of Section 5 by: (1)  
3 misrepresenting the nature of their academic journals; (2) misrepresenting their scientific  
4 conferences; and (3) failing to disclose or disclose adequately that consumers must pay  
5 publishing fees.  
6

7 **1. Defendants Misrepresent Their Academic Journal Publishing Activities As**  
8 **Alleged In Count I**

9 As discussed above, there is no genuine dispute that that, in connection with providing  
10 publishing activities, Defendants represent that: (a) their journals follow peer review processes  
11 standard in the academic journal industry (SMF 22, 23, 24); (b) specific individuals are editors  
12 of, members of an editorial board for, or otherwise associated with, their journals (SMF 31); (c)  
13 their publications have high impact factors listed in Thomson Reuters' Journal Citation Reports  
14 (SMF 34, 35, 36); and (d) their publications are included in well-known, reputable scholarly  
15 journal indexing services, such as Medline and PubMed Central. (SMF39.) And the evidence  
16 also shows there is no genuine dispute that in numerous instances these representations were  
17 either false or misleading or were not substantiated at the time they were made.<sup>15</sup> (SMF 25, 26,  
18 27, 28, 29, 30, 32, 33, 37, 38, 40, 41.) With respect to the impact factor claim, Defendants'  
19 inconspicuous or ambiguous disclosures (SMF 38) do not change the apparent meaning of  
20 Defendants' misrepresentation that their so-called impact factor is the Thomson Reuters' impact  
21 factor, and does not leave an accurate impression that their impact factor is of their own creation.  
22 *See Kraft*, 970 F.2d at 325.

23  
24 <sup>15</sup> Even if Defendants could identify some scientists who peer-reviewed articles or some  
25 consumers whose articles received standard peer review, their claims are still deceptive.  
26 Defendants have represented essentially without qualification that *all* articles will be subject to  
27 standard peer review practices, not just a fraction of them. (SMF 22, 23, 24.) Courts have held  
28 that an unqualified performance claim implies that consumers generally will receive the claimed  
29 performance and that the benefit is a significant one. *Five-Star Auto Club*, 97 F. Supp. 2d at 528  
30 (“[A]t the very least, it would have been reasonable for consumers to have assumed that the  
31 promised rewards were achieved by the typical Five Star participant.”). And “[t]he existence of  
32 some satisfied customers does not constitute a defense under the FTC [Act].” *Amy Travel Serv.*,  
33 875 F.2d at 572.

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2  
3 Further, because these claims are express they are presumed material. *OMICS Grp.*,  
4 2017 U.S. Dist. LEXIS 161910, at \*5. Even without that presumption, claims regarding a  
5 journal's peer review practices, the identities of its editors, its impact factor, and its acceptance in  
6 PubMed Central or Medline are material because they "involve information that is important to  
7 consumers," *Cyberspace*, 453 F.3d at 1201, especially when consumers are deciding where to  
8 publish their research.<sup>16</sup> And for similar reasons, consumers' reliance on Defendants' express  
9 claims were reasonable. Accordingly, there is no genuine dispute that Defendants' publishing  
10 activity claims are deceptive and violate Section 5 of the FTC Act as alleged in Count I of the  
11 Complaint.

12 **2. Defendants Misrepresent Their Scientific Conference Activities As Alleged In**  
13 **Count II**

14 As discussed above, there is no genuine dispute that that, in connection with providing  
15 conference activities, Defendants represent that specific individuals have agreed to participate in  
16 Defendants' scientific conferences as organizers or speakers. (SMF49, 50.) And the evidence  
17 shows there is no genuine dispute that in numerous instances these representations were either  
18 false or misleading or were not substantiated at the time it was made. (SMF 51, 52, 53, 54.)  
19 Like their publishing claims, these representations are material both because they are express and  
20 the identities of conference organizers and participants "involves information that is important to  
21 consumers" when deciding what scientific conferences to attend. Similarly, consumers are  
22 presumed to have relied reasonably upon Defendants' express claims regarding their  
23 conferences. Accordingly, there is no genuine dispute that Defendants' conference activity  
24

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25 <sup>16</sup> For example, as discussed above, a journal's impact factor reflects the number of times that  
26 journal has been cited in other reputable journals and is often used as a proxy for the relative  
27 importance of that journal in its field. (SMF 18.) Authors often look to a journal's impact factor  
when deciding where to publish, as do tenure committees. (SMF 18.) In addition, as also  
discussed above, NLM has strict scientific standards for any journals indexed in the PubMed  
Central and MEDLINE databases; as a result, the fact that a journal is indexed in PubMed  
Central or MEDLINE would serve as an indicator of that journal's quality and credibility. (SMF  
19.)

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2  
3 claims are deceptive and violate Section 5 of the FTC Act as alleged in Count II of the  
4 Complaint

5 **3. Defendants Fail To Disclose Adequately Their Publishing Fees As Alleged In**  
6 **Count III**

7 Finally, as discussed above, there is no genuine dispute that that, in connection with  
8 providing publishing activities, Defendants represent that consumers can submit articles for  
9 publication in Defendants' various journals. (SMF 42, 43.) And the evidence also shows there  
10 is no genuine dispute that in numerous instances Defendants fail to disclose or disclose  
11 adequately that consumers must pay a publishing fee ranging from several hundred to several  
12 thousand dollars. (SMF44, 45, 46, 47, 48.) As discussed above, the standard and most common  
13 journal publishing model charges subscription fees for access to its publications rather than  
14 charging authors to publish. (SMF 20.) And when legitimate journals do charge publication  
15 fees, they are well-disclosed before authors submit their articles. As a result, most consumers  
16 reasonably assume that they will not be charged a fee for publishing in Defendants' journals.  
17 Indeed, as discussed above, many consumers only learned of Defendants' steep fees after their  
18 manuscripts had been accepted and they received an invoice from Defendants.  
19

20 Failure to disclose these terms is material to consumers' decisions whether to submit an  
21 article for publication. *See Figgie Int'l, Inc.*, 994 F.2d at 608 (representations regarding cost  
22 presumed material). Even if consumers were later informed of the existence of publication fees,  
23 the first contact between Defendants and consumers is induced through the deceptive failure to  
24 disclose, thus violating the FTC Act. *See Resort Car Rental Sys.*, 518 F.2d at 964 (finding that  
25 rental agency's advertising slogan improperly induced contact with consumer through  
26 deception). In addition, any fee disclosures buried in Defendants' websites were not  
27 conspicuous and did not correct the inaccurate impression. *See Kraft*, 970 F.2d at 325.  
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1  
2 Accordingly, there is no genuine dispute that Defendants' failure to disclose adequately their  
3 publishing fees is deceptive and violates Section 5 of the FTC Act as alleged in Count III of the  
4 Complaint.

5  
6 **D. Defendants Are A Common Enterprise And Jointly And Severally Liable For  
Violating The FTC Act**

7  
8 Where corporate entities operate together and act as a common enterprise, each may be  
9 held liable for the deceptive acts and practices of the others.<sup>17</sup> *Network Servs.*, 617 F.3d at 1143;  
10 *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1105 (9th Cir. 2014); *OMICS Grp.*, 2017 U.S. Dist.  
11 LEXIS 161910, at \*11; *AMG Servs.*, 2017 U.S. Dist. LEXIS 66689, at \*26; *John Beck Amazing*  
12 *Profits*, 865 F. Supp. 2d at 1082; *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1202 (C.D. Cal.  
13 2000); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1011 (N.D. Ind. 2000), *aff'd* 312  
14 F.3d 259 (7th Cir. 2002). When determining whether a common enterprise exists, courts  
15 consider "common control; the sharing of office space and officers; whether business is  
16 transacted through a maze of interrelated companies; the commingling of corporate funds and  
17 failure to maintain separation of companies; unified advertising; and evidence that reveals that  
18 no real distinction exists between the corporate defendants." *Grant Connect*, 827 F. Supp. 2d at  
19 1216; *AMG Servs.*, 2017 U.S. Dist. LEXIS 66689, at \*26; *J.K. Publ'ns.*, 99 F. Supp. 2d at 1202.  
20 Where the same individuals transact business through a "maze of interrelated companies," the  
21 whole enterprise may be held liable as a joint enterprise. *John Beck Amazing Profits*, 865 F.  
22 Supp. 2d at 1082 (quoting *Think Achievement*, 144 F. Supp. 2d at 1011).

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24  
25 Here, Defendants operate as a common enterprise to market academic journal publishing  
26 services and scientific conferences. As discussed above, the uncontroverted evidence

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<sup>17</sup> Courts routinely grant summary judgment on the issue of common enterprise. *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1142-43 (9th Cir. 2010); *AMG Servs.*, 2017 U.S. Dist. LEXIS 66689, at \*26-28; *Ivy Capital*, 2013 U.S. Dist. LEXIS 42369, at \*41; *FTC v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1082 (C.D. Cal. 2012).

1  
2 demonstrates the entities' intertwinement. (SMF 11, 12, 13, 14.) Among other things, the  
3 various business entities share common ownership and management and operate from the same  
4 principal place of business in India. (SMF 2, 3, 4, 5, 6, 11, 14.) The websites belonging to the  
5 three corporations use similar language and often link to one another. (SMF 11, 12.) Defendant  
6 Gedela is the authorized signatory on the financial accounts of the Corporate Defendants, as well  
7 as the registrant for their websites. (SMF 7, 8.) Defendant Gedela also registered the Corporate  
8 Defendants in Nevada and Delaware. (SMF 3, 4, 5, 6.) The common enterprise is used to  
9 perpetuate the deceptive practices, and unjust loss or injury would result from treating the  
10 corporate Defendants separately, because each company is a beneficiary of, and participant, in  
11 the shared business scheme.  
12

#### 13 **E. Individual Defendant Gedela Is Liable For Injunctive And Monetary Relief**

14  
15 Once corporate liability for an FTC Act violation is established, individuals may be held  
16 liable for injunctive relief based on those violations if they participated directly in the violations  
17 or had authority to control the entities.<sup>18</sup> *Grant Connect, LLC*, 763 F.3d at 1101-02; *Publ'g*  
18 *Clearing House*, 104 F.3d at 1170-71; *FTC v. Publishers Bus. Servs.*, 540 F. App'x 555, 558  
19 (9th Cir. 2013) (district court abused its discretion in failing to find liability and restitution as to  
20 individual who "had *some degree* of either control or direct participation in the  
21 misrepresentations") (emphasis added); *AMG Servs.*, 2017 U.S. Dist. LEXIS 66689, at \*17.  
22 Monetary injunctive relief against individuals is also appropriate if the individual acted with  
23 knowledge of the unlawful conduct. *Grant Connect*, 763 F.3d at 1101 (quoting *Publ'g Clearing*  
24  
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26 <sup>18</sup> It is appropriate to enter summary judgment on the issue of individual liability. *Grant Connect*,  
27 763 F.3d at 1102-04; *Network Servs.*, 617 F.3d at 1138-41; *FTC v. MacGregor*, 360 F. App'x  
891, 894 (9th Cir. 2009); *Stefanchik*, 559 F.3d at 931; *Cyberspace.com*, 453 F.3d at 1202; *AMG*  
28 *Servs.*, 2017 U.S. Dist. LEXIS 66689, at \*17-18; *Ivy Capital*, 2013 U.S. Dist. LEXIS 42369, at  
\*41-50; *FTC v. Wellness Support Network, Inc.*, 2014 U.S. Dist. LEXIS 21449, at \*56 (N.D. Cal.  
Feb. 19, 2014); *John Beck Amazing Profits*, 865 F. Supp. 2d at 1081-82.



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2 *House*, 104 F.3d at 1171); *Network Servs.*, 617 F.3d at 1138 (same); *AMG Servs.*, 2017 U.S.  
3 Dist. LEXIS 66689, at \*17. The knowledge requirement is satisfied by actual knowledge,  
4 reckless indifference, or an awareness of a high probability of fraud with an intentional  
5 avoidance of the truth. *Grant Connect*, 763 F.3d at 1101-02; *Network Servs.*, 617 F.3d at 1138-  
6 39. Intent is not a necessary element for individual liability. *Grant Connect*, 763 F.3d at 1102;  
7 *Network Servs.*, 617 F.3d at 1139; *AMG Servs.*, 2017 U.S. Dist. LEXIS 66689, at \*17 (“Proof  
8 that the defendant intended to deceive consumers or acted in bad faith is unnecessary to establish  
9 a § 5(a) violation”).

11 “Authority to control may be evidenced by ‘active involvement in business affairs and  
12 making of corporate policy, including assuming the duties of a corporate officer.’” *AMG Servs.*,  
13 2017 U.S. Dist. LEXIS 66689, at \*18 (citing *Amy Travel*, 875 F.2d at 573). An individual's  
14 position as a corporate officer or authority to sign documents on behalf of the corporate  
15 defendant is sufficient to show requisite control. *AMG Servs.*, 2017 U.S. Dist. LEXIS 66689, at  
16 \*18.

18 “The extent of an individual’s involvement in a fraudulent scheme alone is sufficient to  
19 establish the requisite knowledge for personal restitutionary liability.” *FTC v. Affordable Media*,  
20 179 F.3d 1228, 1235 (9th Cir. 1999) (quoted in *Grant Connect*, 763 F.3d at 1102). “When an  
21 individual defendant acts as a corporate officer of a small, closely held company, courts presume  
22 that officer had control over its operations.” *Publ’g Clearing House*, 104 F.3d at 1170-71); *see*  
23 *also Ivy Capital*, 2013 U.S. Dist. LEXIS 42369, at \*42. Culpable knowledge is present for  
24 individual defendants active in handling consumer complaints and related litigation.  
25 *MacGregor*, 360 F. App’x at 894-95 (individual liability where defendant knew of numerous  
26 customer complaints and state attorney general proceedings); *FTC v. NCH, Inc.*, 1995 U.S. Dist.  
27 LEXIS 21096, at \*7 (D. Nev. Sep. 5, 1995), *aff’d* 106 F.3d 407 (9th Cir. 1997); *FTC v. Neovi*,



1  
2 *Inc.*, 598 F. Supp. 2d 1104, 1117 (S.D. Cal. 2008); *Think Achievement*, 144 F. Supp. 2d at 1011.

3 As discussed above, the undisputed evidence shows that Defendant Gedela has authority  
4 to control, and direct knowledge of, Defendants' wrongful acts. (SMF 2, 3, 4, 5, 6, 7, 8, 9, 10.)  
5 He is the principal officer of the Corporate Defendants and he registered the companies in  
6 Nevada and Delaware. (SMF 2, 3, 4, 5, 6.) He has signatory authority over the Corporate  
7 Defendants' financial accounts, and is the point of contact for Defendants' service providers.  
8 (SMF 7, 8.) Defendant Gedela founded the business, and himself put in place many of the  
9 procedures governing both the publishing and conference operations, and he continues to direct  
10 and oversee those operations. Indeed, on its website, OMICS openly touts Gedela's control over  
11 the journal publishing operation. (SMF 2, 9, 10.) Accordingly, he may be enjoined from  
12 violating the FTC Act and held liable for consumer redress or other monetary relief in  
13 connection with Defendants' activities.  
14  
15

16 **IV. THE SCOPE OF THE PROPOSED ORDER IS APPROPRIATE IN LIGHT OF**  
17 **DEFENDANTS' CONDUCT**

18 The scope of the proposed injunctive provisions and monetary relief provided in the  
19 proposed final order is appropriate in light of Defendants' past conduct and the likelihood of  
20 recurrence absent such relief.

21 **A. The Proposed Injunctive Provisions Are Appropriate**

22 **1. Conduct Relief**

23 Section 13(b) of the FTC Act expressly authorizes courts to grant a permanent injunction  
24 against violations of any provisions of law enforced by the FTC. 15 U.S.C. § 53(b); *H.N. Singer*,  
25 668 F.2d at 1113; *AMG Servs.*, 2017 U.S. Dist. LEXIS 66689, at \*31. "This provision gives the  
26 federal courts broad authority to fashion appropriate remedies for violations of the Act," *Pantron*  
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1  
2 *I Corp.*, 33 F3d. at 1102, including “any ancillary relief necessary to accomplish complete  
3 justice.” *H.N. Singer*, 668 F.2d at 1113.

4 A permanent injunction is justified when there is a “cognizable danger of recurrent  
5 violation, or some reasonable likelihood of future violations.” *United States v. W.T. Grant Co.*,  
6 345 U.S. 629, 633 (1953). To determine whether violations are likely to recur, courts look to two  
7 factors: (1) the deliberateness and seriousness of the present violation, and (2) the violator’s past  
8 record with respect to unfair advertising practices. *Sears, Roebuck and Co. v. FTC*, 676 F.2d  
9 385, 392 (9th Cir. 1982). Prior illegal conduct is highly suggestive of the likelihood of future  
10 violations. *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980); *see also SEC v. Am. Bd. of Trade*,  
11 751 F.2d 529, 537-38 (2d Cir. 1984); *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir.  
12 1975).

13  
14  
15 Although good faith on the part of a defendant could be relevant to the first factor, *FTC v.*  
16 *Hang-Up Art. Enter.*, 1995 U.S. Dist. LEXIS 21444, at \*10-11 (C.D. Cal. Sep. 27, 1995), the  
17 record shows that Defendants did not act in good faith. Defendants have long been aware of  
18 their problematic practices yet did nothing to change. (SMF 10.) For example, Defendants  
19 continued to make claims that their journals were indexed in PubMed Central even after  
20 receiving cease and desist letter from NIH. (SMF 41.) Accordingly, a permanent injunction is  
21 warranted here.

22  
23 Sections I and II of the proposed order would prohibit Defendants from making the types  
24 of misrepresentations alleged in the Complaint, including that a journal engages in peer-review;  
25 that a person is an editor of journal or an organizer of, or participant in, an academic or scientific  
26 conference; the Impact Factor of a journal; or that a journal is indexed in PubMed Central.

27  
-- Section III would require Defendants to disclose clearly and conspicuously all costs to the  
consumer associated with the submission or publication of a manuscript in a journal; whether a

1  
2 journal engages in peer-review; and whether consumers are allowed to withdraw their  
3 manuscripts after submission. Section IV would require Defendants, if they represent that a  
4 journal has an impact factor, to disclose clearly and conspicuously whether that impact factor is  
5 calculated by Thomson Reuters and if not, how it is calculated. Section V would require  
6 Defendants to obtain the express written consent from any person serving as an editor of a  
7 journal or an organizer of or participant in an academic or scientific conference. And Section VI  
8 would require Defendants to have substantiation for any claims regarding the benefits,  
9 performance, or efficacy of any product or service.  
10

11         These injunctive provisions bear a reasonable relation to Defendants' unlawful practices,  
12 yet are framed broadly enough to prevent Defendants from engaging in the same or similar  
13 illegal practices in the future. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965)  
14 ("The Commission is not limited to prohibiting the illegal practice in the precise form in which it  
15 is found to have existed in the past. Having been caught violating the [FTC] Act, respondents  
16 must expect some reasonable fencing in."); *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370 (9th  
17 Cir. 1982) (reasonable fencing-in provisions serve to "close all roads to the prohibited goal, so  
18 that [the FTC's] order may not be by-passed with impunity").  
19  
20

## 21         **2. Monitoring Provisions**

22         The proposed order also contains various provisions courts have imposed in orders  
23 obtained in other FTC actions designed to ensure enforceability: a provision requiring  
24 destruction of consumer information (Section VII); a provision requiring maintenance of records  
25 (Section XI); and an order distribution requirement (Section IX); a provision requiring  
26 Defendants to notify the FTC of any changes in their employment or residence status (Section  
27 X); record-keeping provisions (Section XI); and a provision permitting the FTC to monitor  
28 Defendants' compliance with the order through access to their business premises to inspect

1  
2 records and interview employees, or by posing as consumers to monitor representations, or  
3 through procedures prescribed by the Federal Rules of Civil Procedure (Section XI).

4  
5 It is well settled that these types of monitoring provisions are proper to ensure  
6 compliance with the permanent injunctive provisions discussed above. *See, e.g., FTC v. Ideal*  
7 *Fin. Solutions, Inc.*, 2016 U.S. Dist. LEXIS 23102, at \*19 (D. Nev. Feb. 23, 2016) (requiring the  
8 defendants to respond to written requests, submit compliance reports, create and maintain certain  
9 records, and distribute this court's final order to future employees); (*John Beck Amazing Profits*,  
10 888 F. Supp. 2d at 1016 (requiring destruction of customer information; imposing twenty-year  
11 order acknowledgment, compliance reporting, and recordkeeping requirements); *FTC v. Ivy*  
12 *Capital, Inc.*, 2013 U.S. Dist. LEXIS 90566, at \*10 (Jun. 26, 2013) (imposing twenty-year  
13 compliance reporting requirements); *Wellness Support Network*, 2014 U.S. Dist. LEXIS 21449,  
14 at \*71 (imposing twenty-year compliance reporting requirement); *FTC v. Direct Mktg. Concepts,*  
15 *Inc.*, 648 F. Supp. 2d 202 , 213 (D. Mass. 2009) (“Courts have also included monitoring  
16 provisions in final orders in FTC cases to ensure compliance with permanent injunctions”); *FTC*  
17 *v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1026-27 (N.D. Ind. 2000), *aff’d* 312 F.3d 259  
18 (7th Cir. 2002 (“Courts may order record-keeping and monitoring to ensure compliance with a  
19 permanent injunction”)); *SlimAmerica*, 77 F. Supp. 2d at 1276 (holding that record-keeping and  
20 monitoring provisions were appropriate to permit the FTC to police the defendants’ compliance  
21 with the order); *FTC v. US Sales Corp.*, 785 F. Supp. 737, 753-54 (N.D. Ill. 1992) (indicating  
22 that monitoring by the FTC may be necessary to ensure adequate compliance); *see also FTC v.*  
23 *Dinamica Financiera, LLC*, 2010 U.S. Dist. LEXIS 88000, at \*65-73 (C.D. Cal. Aug. 19, 2010)  
24 (order containing similar monitoring provisions).<sup>19</sup>  
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<sup>19</sup> *Accord FTC v. Pecon Software Ltd.*, 2014 U.S. Dist. LEXIS 108950, at \*12, 16-22 (S.D.N.Y. July 10, 2014) (requiring destruction of customer information; imposing order acknowledgment,

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3           **3. The Proposed Order Does Not Impinge On Defendants’ First Amendment Rights**

4           Contrary to Defendants’ assertions in their ninth affirmative defense, the proposed  
5 conduct relief does not violate Defendants’ First Amendment rights. The FTC, in filing this  
6 case, did not challenge the *content* of Defendants’ publications or conferences. And nothing in  
7 the proposed injunction is directed at content. Rather, the FTC challenged, and the proposed  
8 order addresses, Defendants’ *commercial* solicitations – the manner in which Defendants’  
9 promoted their publications and encouraged consumers to submit papers for publication or to  
10 attend their conferences.  
11

12           The law is well-settled that the government may prevent the dissemination of false or  
13 misleading commercial speech. *See United States v. Schiff*, 379 F.3d 621, 629-30 (9th Cir. 2004);  
14 *United States v. Raymond*, 228 F.3d 804, 815-16 (7th Cir. 2000). Commercial speech receives  
15 protection under the First Amendment only if it concerns lawful activity and is not misleading.<sup>20</sup>  
16 Thus, Defendants’ deceptive marketing practices are not privileged or protected by the First  
17 Amendment. *See, e.g., Bristol- Myers Co. v. FTC*, 738 F.2d 554, 562 (2d Cir. 1984)  
18 (“[D]eceptive advertising enjoys no constitutional protection and it may be regulated.... Even in  
19

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21 compliance monitoring, and twenty-year compliance reporting and recordkeeping requirements);  
22 *FTC v. Navestad*, 2012 U.S. Dist. LEXIS 40197, at \*24-25, 29-36 (W.D.N.Y. Mar. 23, 2012)  
23 (requiring destruction of customer information; imposing ten-year order acknowledgment  
24 requirement, twenty-year compliance reporting and recordkeeping requirements, and compliance  
25 monitoring requirements).

26 <sup>20</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of New York*, 447 U.S. 557, 563-64  
27 (1980) (“The government may ban forms of communication more likely to deceive the public  
28 than to inform it, or commercial speech related to illegal activity.”) (citation omitted); *see*  
29 *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (“For commercial speech to come  
30 [under the protection of the First Amendment], it at least must concern lawful activity and not be  
31 misleading.”); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985) (“The  
32 States and the Federal Government are free to prevent the dissemination of commercial speech  
33 that is false, deceptive, or misleading.”) (citation omitted); *see also Novartis Corp. v. FTC*, 223  
34 F.3d 783, 789 (D.C. Cir. 2000) (finding no First Amendment impediment to the FTC’s cease and  
35 desist order).

1  
2 the absence of a finding of actual deception, agencies may properly regulate speech that is  
3 merely potentially deceptive”); *FTC v. Stefanchik*, 2004 U.S. Dist. LEXIS 30710, at \*4-5 (W.D.  
4 Wash. Nov. 12, 2004) (“The law is well settled that, once speech is deemed to be false,  
5 misleading, and commercial, it is not constitutionally protected.”). The First Amendment does  
6 not prohibit the government from “insuring that the stream of commercial information flow  
7 cleanly as well as freely.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer*  
8 *Council, Inc.*, 425 U.S. 748, 772 (1976).

9  
10       Appropriate time, place, and manner restrictions may be imposed on commercial speech,  
11 and false or misleading advertisements may be forbidden, as long as the restrictions are justified  
12 and leave open ample alternative channels for communicating the information.<sup>21</sup> Commercial  
13 speech has a “hardiness” and durability that makes it unlikely to be “chilled by proper  
14 regulation.” *Virginia*, 425 U.S. at 772, n.24. Here, the proposed order does nothing to chill  
15 Defendants’ First Amendment right to publish whatever content they choose; instead, as  
16 discussed, it merely requires that the manner in which Defendants solicit authors be non-  
17 deceptive. The First Amendment defense does not shield Defendants’ alleged misconduct, and  
18 the Court should reject Defendants’ ninth affirmative defense and enter the proposed order.<sup>22</sup>  
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23 <sup>21</sup> See *United States v. Reader’s Digest Ass’n, Inc.*, 464 F. Supp. 1037, 1049 (D. Del. 1978)  
24 (“Appropriate time, place, and manner restrictions may be imposed on commercial speech, and  
25 false or misleading advertisements may be forbidden.”), *aff’d*, 662 F.2d 955 (3d Cir. 1981);  
26 *Virginia*, 425 U.S. at 771 (“We have often approved restrictions [on advertising] provided ... they  
27 leave open ample alternative channels for communication of the information.”); *Bates v. State*  
28 *Bar of Arizona*, 433 U.S. 350, 384 (1977) (“[T]here may be reasonable restrictions on the time,  
29 place, and manner of advertising.”).

30 <sup>22</sup> Numerous courts have stricken this defense in cases brought under Section 13(b) of the FTC  
31 Act. See, e.g., *FTC v. N. Am. Mktg. & Assocs.*, 2012 U.S. Dist. LEXIS 150102, at \*6-7 (D. Ariz.  
32 Oct. 17, 2012); *Stefanchik*, 2004 U.S. Dist. LEXIS 30710, at \*4-5; see also *In re Metagenics,*  
33 *Inc.*, 1995 FTC LEXIS 2, at \*2-3 (1995).

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2           **B. The Proposed Equitable Monetary Relief Is Appropriate**

3                   **1. The Amount Of Equitable Monetary Relief Is Appropriate**

4           The Court in its final order may include equitable monetary relief against corporate  
5 entities and individuals.<sup>23</sup> *Stefanchik*, 559 F.3d at 931-32 (district court is empowered to order  
6 restitution against corporate defendants and individual defendants); *Pantron I Corp.*, 33 F.3d at  
7 1102-04 (same); *AMG Servs.*, 2017 U.S. Dist. LEXIS 66689, at \*33-34. Under Ninth Circuit  
8 precedent, courts in FTC matters calculate redress based on consumers' losses, rather than  
9 defendants' gains. *See Stefanchik*, 559 F.3d at 931 ("because the FTC Act is designed to protect  
10 consumers from economic injuries, courts have often awarded the full amount lost by consumers  
11 rather than limiting damages to a defendant's profits"); *see also Publishers Bus. Servs.*, 540 F.  
12 App'x at 556; *FTC v. Wells*, 385 F. App'x 712, 713 (9th Cir. 2010); *AMG Servs.*, 2017 U.S. Dist.  
13 LEXIS 66689, at \*34. Thus, a monetary award in the amount of consumers' losses may exceed  
14 defendants' gain. *See Figgie Int'l.*, 994 F.2d at 606; *FTC v. Inc21.com*, 745 F. Supp. 2d 975,  
15 1011 (N.D. Cal. 2010), *aff'd*, 475 F. App'x 106 (9th Cir. 2012).

16           The FTC must show a "reasonable approximation" of consumers' losses, and the burden  
17 shifts to Defendants to demonstrate the inaccuracy of the FTC's figures. *Inc21.com Corp.*, 745 F.  
18 Supp. 2d at 1011 (citing *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997)), *aff'd*, 475 F. App'x  
19 106, 110 (9th Cir. 2012) (FTC advanced a "reasonable approximation of consumer losses" that  
20 defendants failed to rebut); *Neovi*, 604 F.3d at 1159 n.8; *FTC v. Commerce Planet*, 878 F. Supp.  
21 2d 1048, 1089 (C.D. Cal. 2012); *AMG Servs.*, 2017 U.S. Dist. LEXIS 66689, at \*35; *FTC v.*  
22

23           <sup>23</sup> It is appropriate and common for courts to grant monetary redress awards at the summary  
24 judgment stage. *FTC v. Inc21.com Corp.*, 475 F. App'x 106, 108-09 (9th Cir. 2012); *FTC v.*  
25 *Neovi, Inc.*, 604 F.3d 1150, 1159-60 (9th Cir. 2010); *MacGregor*, 360 F. App'x at 895;  
26 *Stefanchik*, 559 F.3d at 931-32; *AMG Servs.*, 2017 U.S. Dist. LEXIS 66689, at \*34; *Ivy Capital*,  
27 2013 U.S. Dist. LEXIS 42369, at \*47-50; *Wellness Support Network*, 2014 U.S. Dist. LEXIS  
28 21449, at \*69.



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2 *EDebitPay, LLC*, 2011 U.S. Dist. LEXIS 15750, at \*41 (C.D. Cal. Feb. 3, 2011). A reasonable  
3 estimate, rather than an exact amount, is proper because that may be the only information  
4 available, as when defendants do not maintain data necessary to calculate the precise amount.

5 *AMG Servs.*, 2017 U.S. Dist. LEXIS 66689, at \*35.

6  
7 And contrary to Defendants' assertion in their twelfth affirmative defense, Defendants  
8 may not reduce those restitution amounts by referencing their costs. Accordingly, the Court  
9 should disregard any attempted deductions by Defendants for overhead, salary, lead generation,  
10 or uncollectible debt. *See Neovi*, 604 F.3d at 1160 (affirming district court's determination not to  
11 reduce award by defendant's costs); *EDebitPay*, 2011 U.S. Dist. LEXIS 15750, at \*40 (rejecting  
12 defendants' attempt to reduce award by reference to consumer fees shared with nonparty);  
13 *accord FTC v. Bronson Partners, LLC*, 654 F.3d 359, 375 & n.11 (2d Cir. 2011) ("Bronson  
14 seeks to deduct from its revenue not the (negligible) costs of the products that it fraudulently  
15 sold, but the (substantial) costs of placing its fraudulent advertisements. This argument,  
16 equivalent to an armed robber's seeking to deduct the cost of his gun from an award of  
17 restitution, could stand with the classic patricide who claims mercy as an orphan as an  
18 illustration of the concept of chutzpah."). Neither can Defendants subtract any "benefit received  
19 by consumers" also asserted in their twelfth affirmative defense. Courts are clear that the fraud  
20 is "in the selling, not the value of the thing sold," and thus consumer injury is measured by the  
21 full amount of consumer loss. *Figgie Int'l*, 994 F.2d at 606; *FTC v. Ewing*, 2017 U.S. Dist.  
22 LEXIS 176209, at \*35 (D. Nev. Oct. 24, 2017) ("a product's value should not reduce or preclude  
23 equitable monetary relief").  
24  
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26 Here, the undisputed evidence shows that from August 25, 2011 through July 31, 2017,  
27 Defendants had gross revenues of \$50,740,100 and paid out only \$609,289 in refunds. (SMF  
-- 55.) Thus, the net consumer injury caused by their deceptive marketing practices amounts to



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2 \$50,130,811.<sup>24</sup> (SMF 55.) Accordingly, it is appropriate for the Court to enter judgment against  
3 each Defendant, jointly and severally, in that amount.

## 4                   2. Defendants' Statute Of Limitations Defense Is Without Merit

5                   Defendants assert as the fourteenth affirmative defense that the FTC's claims are barred  
6 by the statute of limitations (although they the statute of limitations on which they rely). (ECF  
7 No. 48 at 6.) This defense fails as a matter of law.

8                   The FTC brought this action pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b),  
9 and Section 13(b) has no statute of limitations. *See AMG Servs.*, 2017 U.S. Dist. LEXIS 66689,  
10 at \*15; *FTC v. Ivy Capital, Inc.*, 2011 U.S. Dist. LEXIS 65835, at \*8 (D. Nev. Jun. 20, 2011)  
11 (striking statute of limitations affirmative defense and finding that "Section 13(b) of the Federal  
12 Trade Commission Act specifies no statute of limitations period."). In fact, the express language  
13 of Section 13(b) provides that the FTC may bring suit "whenever" it has reason to believe a  
14 violation has occurred. 15 U.S.C. § 53(b); *see also Ivy Capital, Inc.*, 2011 U.S. Dist. LEXIS  
15 65835, at \*8. The Ninth Circuit has held that there is no statute of limitations defense against the  
16 United States government unless the statute in question contains an express limitations period.  
17 *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1489 (9th Cir. 1993) ("In the absence of a  
18 federal statute expressly imposing or adopting one, the United States is not bound by any  
19 limitations period."). Section 13(b) does not have any express limitation periods for government  
20 enforcement actions, so the limitations defenses may be summarily rejected.

21                   To the extent that Defendants are attempting to recast this Section 13(b) action as an  
22 action under Section 19(d) of the FTC Act, 15 U.S.C. § 57b(d), and apply the three year statute  
23 of limitations of the latter, this also fails. Courts have "universally rejected" such attempts to  
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<sup>24</sup> As noted above, the FTC's redress calculation incorporates the refunds and chargebacks that  
Defendants' documents show they have paid out, rendering moot that portion of Defendants'  
twelfth affirmative defense.

1  
2 recast Section 13(b) claims as Section 19(d) claims. *See FTC v. Instant Response Sys., LLC*,  
3 2014 U.S. Dist. LEXIS 17148, at \*7-8 (E.D.N.Y. Feb. 11, 2014) (citing *Ivy Capital* and striking  
4 statute of limitations defenses); *FTC v. Dalbey*, 2012 U.S. Dist. LEXIS 67393, at \*7 (D. Colo.  
5 May 15, 2012) (“arguments that section 19(d)’s period of limitations limits claims for consumer  
6 redress brought under section 13(b) have been consistently rejected”); *Inc21.com*, 745 F. Supp.  
7 2d at 1012 (“Since the claims asserted by the FTC against defendants in the instant case were  
8 expressly brought under Section 13(b) of the Act (and *not* Section 19), the three-year limitations  
9 period does not apply to these claims.”) (emphasis in original).  
10

11 Defendants may also be relying upon the Supreme Court’s recent decision in *Kokesh v.*  
12 *SEC*, 137 S. Ct. 1635 (2017). In *Kokesh*, the Supreme Court held that SEC claims for  
13 disgorgement are forfeitures and therefore subject to the five-year statute of limitations under 28  
14 U.S.C. § 2462. *Kokesh*, 137 S. Ct. at 1639. Here, the Court does not need to decide whether  
15 *Kokesh* also applies to redress actions under the FTC Act, as the FTC has voluntarily limited its  
16 monetary redress calculation to five years from the date it commenced this action. Accordingly,  
17 the Court may reject Defendants’ fourteenth affirmative defense and enter the proposed equitable  
18 monetary relief.  
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21 **V. THERE IS NO GENUINE DISPUTE OF MATERIAL FACT AS TO ANY OF**  
22 **DEFENDANTS’ REMAINING AFFIRMATIVE DEFENSES**

23 In their Answer, Defendants advanced twenty affirmative defenses (ECF No. 48 at 6-7),  
24 and the Court has already struck nine of those. (ECF No. 62.) There is no genuine dispute of  
25 material fact on the remaining affirmative defenses, which can be rejected on purely legal  
26 determinations. The FTC has already addressed above Defendants’ third, sixth, ninth, twelfth,  
27 and fourteenth affirmative defenses.  
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3 **A. Because The Court Has Already Ruled That The FTC’s Complaint States A Claim, Defendants’ First Affirmative Defense Can Be Rejected**

4 Defendants’ first affirmative defense asserts that the FTC “failed to state a claim against  
5 Defendants upon which relief can be granted.” (ECF No. 48 at 6.) Defendants, however,  
6 previously moved to dismiss the FTC’s complaint for failure to state a claim (ECF No. 31), and  
7 the Court denied that motion. (ECF No. 46.) In denying Defendants’ motion to dismiss, the  
8 Court expressly found that the FTC’s Complaint “provides Defendants sufficient detail to  
9 prepare an adequate answer to the allegations and complies with the pleading requirements” and  
10 that “the allegations in the Complaint clearly establish the requisite elements for the FTC’s  
11 claims under Section 5(a).” *OMICS Grp.*, 2017 U.S. Dist. LEXIS 161910, at \*20.

12  
13 Defendants had their bite at the apple and lost, they should not get another. Accordingly,  
14 their first defense (failure to state a claim) should be stricken. *United States v. Hempfling*, 2007  
15 U.S. Dist. LEXIS 35597, at \*14 (E.D. Cal. May 1, 2007); *Imperial Constr. Management Corp. v.*  
16 *Laborers’ Int’l Union, Local 96*, 818 F. Supp. 1179, 1186 (N.D. Ill. 1993).<sup>25</sup> Accordingly, the  
17 Court may reject Defendants’ first affirmative defense.

18  
19 **B. Entry Of The Proposed Order Is In The Public Interest**

20 The FTC brings this action pursuant to the second proviso of Section 13(b) of the FTC  
21 Act, 15 U.S.C. § 53(b), which expressly states that “in proper cases the Commission may seek,  
22 and after proper proof, the court may issue, a permanent injunction.” Further, when there is a  
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24 <sup>25</sup> Further, the defense of failure to state a claim is a negative defense, not an affirmative defense,  
25 and should be rejected on that ground as well. *See, e.g., N. Am. Mktg. & Assocs.*, 2012 U.S. Dist.  
26 LEXIS 150102, at \*6 (striking defense of failure to state a claim); *Barnes v. AT&T Pension*  
27 *Benefit Plan*, 718 F. Supp. 2d 1167, 1175 (N.D. Cal. 2010); *Lemery v. Duroso*, 2009 U.S. Dist.  
LEXIS 50771, at \*8 (E.D. Mo. June 16, 2009) (“failure to state a claim is not a proper  
affirmative defense”); *Boldstar Tech., LLC v. Home Depot, Inc.*, 517 F. Supp. 2d 1283, 1291  
(S.D. Fla. 2007) (“Failure to state a claim is a defect in the plaintiff’s claim; it is not an  
additional set of facts that bars recovery notwithstanding the plaintiff’s valid prima facie case.  
Therefore, it is not properly asserted as an affirmative defense.”); *In re Rawson Food Svc., Inc.*,  
846 F.2d 1343, 1349 n.9 (11th Cir. 1988) (failure to state a claim is not an affirmative defense).

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2 “cognizable danger of recurrent violation, or some reasonable likelihood of future violations,” a  
3 permanent injunction is justified and in the public interest. *See W.T. Grant*, 345 U.S. at 633.  
4 Accordingly, the Court may reject Defendants’ second affirmative defense.

5  
6 **C. Defendants Remaining Affirmative Defenses Are Not Affirmative Defenses And  
Can Be Rejected**

7 An affirmative defense absolves a defendant of liability “even where the plaintiff has  
8 stated a prima facie case for recovery.” *Vogel v. Huntington Oaks Delaware Partners, LLC*, 291  
9 F.R.D. 438, 442 (C.D. Cal. 2013). An attack on a plaintiff’s case-in-chief, however, is not an  
10 affirmative defense. *Id.* Instead, a defense which tends to disprove one or all of the elements of a  
11 complaint is a negative defense. *See FTC v. Think All Publishing, LLC*, 564 F. Supp. 2d 663,  
12 665 (E.D. Tex. 2008). Negative defenses are merely restatements of denials of allegations made  
13 elsewhere in the defendants’ answers. *Id.*

14  
15 Here, Defendants’ fourth, fifth, eighth, and eleventh affirmative defenses (“at no time did  
16 Defendants attempt to mislead or deceive anyone,” “Defendants actions are lawful,” “Defendants  
17 properly disclose any requisite material facts,” and “the Complaint fails to allege any plausible  
18 harm to any consumers”) are nothing more than “restatements of denials” and should be rejected  
19 on that basis alone. Further, the FTC has set forth above undisputed facts that Defendants, in  
20 fact, deceived consumers, failed to disclose adequately material facts, caused harm to consumers,  
21 and, accordingly, violated Section 5 of the FTC Act. Therefore, the Court may reject these  
22 affirmative defenses.  
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25 **VI. CONCLUSION**

26 For all the foregoing reasons, the FTC respectfully requests that this Court grant its  
27 motion for preliminary injunction and other equitable relief.  
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Respectfully submitted,

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Acting General Counsel

Dated: May 1, 2018

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on May 1, 2018, true and correct copies of (1) **FTC’S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF**, (2) **EXHIBITS IN SUPPORT OF FTC’S MOTION FOR SUMMARY JUDGMENT**, and (3) **[proposed] ORDER FOR PERMANENT INJUNCTION AND MONETARY JUDGMENT** were filed electronically with the United States District Court for the District of Nevada using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF system.

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