UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION, Plaintiff, vs. JOHN BECK AMAZING PROFITS, LLC, a California limited liability company, et al., Defendants.	2:09-cv-4719-FMC-FFMx ORDER GRANTING IN PART THE FEDERAL TRADE COMMISSION'S MOTION FOR PRELIMINARY INJUNCTION WITH ASSET FREEZE AND OTHER EQUITABLE RELIEF

This matter is before the Court on Plaintiff Federal Trade Commission's ("FTC") Motion for Preliminary Injunction with Asset Freeze and Other Equitable Relief (docket no. 2), filed on July 6, 2009. The Court has read and considered the moving, opposition, reply, and surreply documents submitted in connection with this motion. Additionally, the Court heard oral argument in response to its tentative order. Following oral argument, the matter was taken under submission. For the reasons and in the manner set forth herein, the Court GRANTS IN PART Plaintiff's Motion for Preliminary Injunction.

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I. EVIDENTIARY OBJECTIONS

A. Defendants' Objections

1. Consumer declarations

Defendants object to each consumer declaration filed by the FTC – Exhibit Nos. 3-10, 11-21, 22-29, 30-40, 41-65, and 86-87. Defendants object to almost every paragraph contained in these declarations. Defendants object on the grounds of hearsay, best evidence, and improper opinion testimony. The Court hereby **OVERRULES** Defendants' objections.

Most statements objected to are not offered for the truth of the matter asserted, or can be considered party opponent admissions of Defendants and their representatives. Any remaining hearsay statements are admissible under the residual hearsay exception, Fed. R. Evid. 807, or in the context of a preliminary injunction. *Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) ("The urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial.").

Defendants' best evidence objection is without merit because the consumer declarations do not seek to establish the contents of the infomercials or program materials. Instead, the declarations are directed at the customer's understanding of the statements made in the infomercials and materials. The consumer declarations do not offer improper opinion testimony. Fed. R. Evid. 701.

2. Third party declarations

Defendants object to each third party declaration filed by the FTC – Exhibit Nos. 66-76. These declarations were made by former endorsers of the John Beck and Jeff Paul systems appearing in the infomercials, former employees of the corporate Defendants, and various employees from government agencies that have previously investigated Defendants' enterprise. Defendants object to each paragraph

of these declarations on the grounds of hearsay, best evidence, and improper opinion testimony. For the same reasons provided above, the Court hereby **OVERRULES** Defendants' objections.

3. FTC's employees

Defendants object to each declaration filed by FTC employees and investigators – Exhibit Nos. 77-81. Defendants object to each paragraph of these declarations on the grounds of hearsay, best evidence, improper opinion testimony, improper legal conclusion, and improper summary evidence. The Court finds the summary evidence provided by these declarations to be in compliance with Fed. R. Evid. 1006. The originals or duplicates have been produced to Defendants, or are available upon request. (FTC Response to Evid. Obj. at 5 n.7.) Any legal conclusions contained in these declarations will not be considered by the Court. For these reasons and the reasons set forth above, the Court hereby **OVERRULES** Defendants' objections.

4. FTC attorneys

Defendants object to the two declarations filed by the FTC's attorneys, Jennifer Brennan, and John D. Jacobs – Exhibit Nos. 82-83. Defendants object to each paragraph of these declarations on the grounds of hearsay, best evidence, improper opinion testimony, improper legal conclusion, and lacking foundation. The Court finds that a proper foundation has been laid for the evidence attached to these declarations. For this reason and the reasons set forth above, the Court hereby **OVERRULES** Defendants' objections.

B. The FTC's Objections

1. Individual Defendants and employees

The FTC objects to the declarations filed by the Individual Defendants and two employees, Michael O'Connell and James Heninger – Exhibit Nos. 1-7. The FTC objects to these declarations on the grounds of lack of personal knowledge, lack of foundation, vague and ambiguous, hearsay, lack of authentication, and best

evidence rule. The Court finds the evidence attached to these declarations to have been properly authenticated. For this reason and the reasons set forth above, the Court hereby **OVERRULES** Defendants' objections.

2. Consumer declarations

The FTC objects to each consumer declaration filed by Defendants – Exhibit Nos. 8-24, and 25-39. The FTC objects on the grounds of lack of personal knowledge, lack of foundation, vague and ambiguous, hearsay, and best evidence rule. For the reasons set forth above, the Court hereby **OVERRULES** Defendants' objections.

Furthermore, to the extent the parties have filed objections to any inadmissible evidence, the Court will not consider such inadmissible evidence.

II. FACTUAL AND PROCEDURAL BACKGROUND

This case arises in part out of Defendants' advertising and marketing of two wealth creation systems, the John Beck Free & Clear Real Estate system and the Jeff Paul Shortcut to Internet Millions system. Individual Defendants Gary Hewitt and Douglas Gravink are the sole owners of Defendant Family Products, LLC. Family Products, LLC owns as its subsidiaries, John Beck Amazing Profits, LLC, Jeff Paul, LLC also d/b/a Shortcuts to Millions, LLC, and Mentoring of America, LLC. These four corporate entities shall be referred to as "corporate Defendants." Individual Defendants John Beck and Jeff Paul developed their respective wealth creation systems, and serve as spokespersons for their respective products. The John Beck system is based upon buying government tax-foreclosed properties for "pennies on the dollar." The Jeff Paul system is based upon creating internet websites to market and sell one's products.

Defendants advertise their wealth creation systems through extended commercials aired on television, i.e., the John Beck infomercials, and the Jeff Paul infomercials. When a customer orders either system from Defendants, the customer is enrolled in a continuity service, either the John Beck "Property Vault" or the Jeff

Paul "Big League " or "Millionaire's Club." The continuity services offer a monthly newsletter and a customer service hotline, and are free for the first 30 days. After the 30-day free trial period, consumers are charged $39.95 per month unless they affirmatively take action to cancel the service. The FTC refers to this type of payment scheme as a "negative option." In addition to the basic materials provided with each wealth creation system, Defendants offer personal coaching services to further assist customers with their wealth creation efforts. Defendants' personal coaching services are sold through Defendants' telemarketers, and range in price from approximately $4,000 to $12,000.

The FTC alleges Defendants have violated the Federal Trade Commission Act (15 U.S.C. §§ 41 et seq.) and the Telemarketing Sales Rule (16 C.F.R. Part 310, as amended by 68 Fed. Reg. 4580, 4669 (January 29, 2003)) in their advertising and sale of both wealth creation systems, the continuity charges, and the personal coaching services. The FTC filed its Complaint on June 30, 2009, and moved for a preliminary injunction on July 6, 2009. The Court held a hearing following the issuance of a tentative order.

III. LEGAL STANDARD

A. Preliminary Injunction, Generally

1. Standard for Entry

In order to obtain a preliminary injunction, the moving party must demonstrate "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. NRDC*, 129 S. Ct. 365, 374 (2008); *Lands Council v. Martin*, 479 F.3d 636, 639 (9th Cir. 2007) (citing *Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)).

2. Discretion and Terms

A district court has great discretion in determining whether to grant or to deny

a TRO or preliminary injunction. *See Wildwest Institute v. Bull*, 472 F.3d 587, 589-90 (9th Cir. 2006). Additionally, "[a] district court has considerable discretion in fashioning suitable relief and defining the terms of an injunction." *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991); *see also Coca-Cola Co. v. Overland, Inc.*, 692 F.2d 1250, 1256 n.16 (9th Cir.1982) ("The district court has substantial discretion in defining the terms of an injunction....) (citing *Lemon v. Kurtzman*, 411 U.S. 192, 200, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973); *Nissan Motor Co., Ltd. V. Nissan Computer Corp.*, 89 F.Supp.2d 1154, 1165 (C.D. Cal. 2000) (modifying and crafting the terms of an injunction where defendant failed to directly address the terms of the requested injunction).

"Injunctive relief, ..., must be tailored to remedy the specific harm alleged." *Lamb-Weston, Inc.*, 941 F.2d at 974 (citing *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 108 (D.C.Cir.1976); *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) ("[I]njunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs")). "An overb[road] injunction is an abuse of discretion." *Id.* (citing *United States v. BNS, Inc.*, 858 F.2d 456, 460 (9th Cir.1988)); *see also Natural Resources Defense Council, Inc. v. Winter*, 508 F.3d 885, 886 (9th Cir. 2007) ("Injunctive relief must be tailored to remedy the specific harm alleged, and an overbroad preliminary injunction is an abuse of discretion.") (citing *Lamb-Weston, Inc.*, 941 F.2d at 974); *Stormans, Inc. V. Selecky*, 571 F.3d 960, 968 (9th Cir. 2009) (citing *Lamb-Weston, Inc.*, 941 F.2d at 974) (*U.S. v. Spectro Foods Corp*., 544 F.2d 1175, 1180 (3d Cir. 1976).

"This is particularly true when, as here, a preliminary injunction is involved. A preliminary injunction can only be employed for the 'limited purpose' of maintaining the status quo." *Zepeda v. U.S. Immigration & Naturalization Service*, 753 F.2d 719, 728 n.1 (9th Cir. 1984) (citing *University of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981); *King v. Saddleback Junior*

College District, 425 F.2d 426, 427 (9th Cir.1970), cert. denied, 404 U.S. 979, 92 S.Ct. 342, 30 L.Ed.2d 294 (1971)). "Therefore, an injunction must be narrowly tailored ...to remedy only the specific harms shown by the plaintiffs, rather than 'to enjoin all possible breaches of the law.'" *Price v. City of Stockton*, 390 F.3d 1105, 1117 (9th Cir. 2004) (quoting *Zepada*, 753 F.2d at 728 n. 1) (citation omitted).

B. Preliminary Injunctions, FTC Act Context

1. Standard for Entry

It is well-established that a district court is authorized by 15 U.S.C. § 53(b) to grant preliminary injunctions to enjoin violations of the FTC Act. *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982). In the context of the FTC Act, courts are permitted to grant the FTC's motion for a preliminary injunction "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b). Section 13(b) of the FTC Act, therefore, "places a lighter burden on the Commission than that imposed on private litigants by the traditional equity standard; the Commission need not show irreparable harm to obtain a preliminary injunction." *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1159 (9th Cir. 1984). Under this more lenient standard, "a court must 1) determine the likelihood that the Commission will ultimately succeed on the merits and 2) balance the equities." *Id.* at 1160.[1]

[1] With respect to the presumption of irreparable harm, the FTC has filed a Notice of New Case (docket no. 199), and Defendants have filed an Objection and Motion to Strike the FTC's Notice of New Case (docket no. 202). The FTC's Notice of New Case is concerned with the recent Ninth Circuit decision, *Johnson v. Couturier*, 572 F.3d 1067, 1078 (9th Cir. 2009), which discusses the appropriate legal

2. Discretion and Terms

Moreover, in a Section 13(b) action the district court may exercise the full measure of its equitable authority, because Congress "did not limit that traditional equitable power" when it passed the FTC Act. *Singer, Inc.*, 668 F.2d at 1113. The Court may grant "any ancillary relief necessary to accomplish complete justice." *Id.*

As a more general matter, a "district court is inherently invested with broad equitable powers and has the authority to mold its decree to the necessities of the particular case." *Handler v. S.E.C.*, 610 F.2d 656, 659 (9th Cir. 1979) (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944)). Under "settled law," "'when [trial] courts are properly acting as courts in equity, they have discretion unless a statute clearly provides otherwise' [and] such 'discretion is displaced only by a clear and valid legislative command.'" *In re Munoz*, 287 B.R. 546, 552 (9th Cir. BAP 2002) (quoting *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001) (internal

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standard for a preliminary injunction in light of *Winter v. Natural Res. Defense Council, Inc.*, --- U.S. ---, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). The Court has read and considered *Couturier*, and does not find that it alters or overrules the presumption of irreparable harm established in *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1159 (9th Cir. 1984). *Couturier* merely emphasizes that in most cases, plaintiffs must demonstrate both a likelihood of success and a likelihood of irreparable harm. The Court does not find the FTC's argument in its Notice of New Case to be necessary, and does not rely upon it. The parties have notified the Court that they have reached an agreement concerning Defendants' Motion to Strike (docket no. 202), and the Court need not rule on it.

quotation omitted).

IV. DISCUSSION

The FTC moves to enjoin the following marketing activities and practices alleged to be in violation of section 5(a) of the FTC Act and/or the Telemarketing Sales Rule: (1) the John Beck infomercial, (2) the Jeff Paul infomercial, (3) the continuity charges, and (4) the telemarketing of personal coaching services.

A. John Beck Infomercial

The FTC claims that using the John Beck infomercials to advertise the John Beck system violates section 5(a) of the FTC Act.[2] An act or practice is considered deceptive if "first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material." *F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994) (citing *In the Matter of Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984)).[3] In assessing whether a representation or practice is likely

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[2] Section 5(a) provides, "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a).

[3] The parties dispute whether the FTC's citation to *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1202 n.5 (10th Cir. 2005) in its Reply brief is supported by Ninth Circuit authority. The Court finds that it need not rely upon the *Freecom* court's discussion of the "reasonable consumer" and whether this label encompasses "the ignorant, the unthinking, and the credulous." There is ample Ninth Circuit authority holding that an act or practice is considered deceptive if it would likely mislead consumers "acting reasonably under the circumstances."

to mislead consumers, a court may consider the overall net impression conveyed by the activity in question. *F.T.C. v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) ("A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures."). Furthermore, "[t]he failure to disclose material information may cause an advertisement to be deceptive, even if it does not state false facts," *Sterling Drug, Inc. v. F.T.C.*, 741 F.2d 1146, 1154 (9th Cir. 1984), and material information that is only disclosed in small print may be inadequate to cure the deception. *F.T.C. v. Cyberspace.Com LLC*, 453 f.3d 1196, 1200 (9th Cir. 2006) ("In *Floersheim v. FTC*, 411 F.2d 874 (9th Cir. 1969), we found that substantial evidence supported the FTC's determination that the appearance and prominent repetition of the words "Washington D.C." on debt-collecting forms from a private collections company created the deceptive impression that the forms were a demand from the government even though the forms contained a small print disclaimer informing recipients that such was not the case.").

Here, the John Beck infomercial dated September 14, 2007 begins with an introduction declaring that the average home in the U.S. costs more than $219,000, but the viewer can now learn how to purchase homes similar to those depicted in the program "for just a few hundred dollars, and own them free and clear with no additional monthly payments." (Pl.'s Ex. 1.; *see also* Pl.'s Ex. 1, 12/20/05 John Beck Infomercial at 5:14.) The infomercial goes on to state that the homes shown in the program were all purchased with the John Beck system for "literally pennies on the dollar," a slogan that is repeated throughout the program. (*Id*.) This is also true of the earlier John Beck infomercial. (*See, e.g.*, 12/20/05 John Beck Infomercial at 1:10; 11:57; 27:25.) John Beck explains that his system takes advantage of government tax foreclosure sales, which permit a buyer to purchase properties free and clear, simply by paying the delinquent back taxes owed on the property. This allows the viewer to purchase properties for pennies on the dollar, and in any state;

there are over 2.2 million tax foreclosure properties available throughout the U.S. and Canada. Mr. Beck states that it is "actually pretty easy to do, once you have all the right information." (Pl.'s Ex. 1, 9/14/07 John Beck Infomercial at 3:35; *see also*, *e.g.*, 12/20/2005 John Beck Infomercial at 1:25; 1:39; 7:40.)

A large portion of the infomercials are spent showing pictures of homes in good condition, and telling the viewer they were purchased for between a few hundred dollars and a few thousand dollars. Many of these homes are described as having been resold for market values in excess of $100,000. Former consumers of the John Beck system also provide testimonials informing the viewer that they easily and quickly purchased numerous properties and sold them for significant profits. For example, one customer claims he has only used the John Beck system "for a little over 3 months, and I'm sitting on a profit of over $180,000.[4] (9/14/07 John Beck Infomercial at 10:45.; *see also*, *e.g.*, 12/20/05 John Beck Infomercial at 22:16 ("I've purchased two properties and profited over fifty thousand dollars."; 12/20/05 John Beck Infomercial at 24:18 "Just in the past five months using the John Beck system we have made $31,000.") The infomercials also promise fast results. "Just pop in John's Quick Start DVD, and you'll be on your way to buying amazing government tax foreclosure properties like these faster than you ever imagined possible." (9/14/07 John Beck Infomercial at 10:45; *see also* 12/20/05 John Beck Infomercial at 25:44.)

Based upon the statements and visual representations made in the infomercials, the Court finds the overall net impression communicates to the viewer

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[4] During these testimonials, very small print appears underneath the photo of the home purchased, stating, "Unique experience. Results vary." The Court finds that this very small print fails to cure the misleading net impression generated by the infomercial.

that a typical consumer can easily purchase high-valued properties for pennies on the dollar and therefore quickly earn tens of thousands of dollars, if not hundreds of thousands of dollars. The Court considers the statements conveyed by the infomercial's overall net impression to be material. *See F.T.C. v. Cyberspace.com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006) ("A misleading impression created by a solicitation is material if it 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.'"). A consumer acting reasonably under the circumstances would therefore be confronted with a material misrepresentation if this message can properly be considered deceptive or misleading.

The FTC can show that a claim is likely to mislead consumers if the message conveyed is in fact false, or if the advertiser lacked a reasonable basis for asserting that the message was true. *F.T.C. v. US Sales Corp.*, 785 F. Supp. 737, 748 (N.D. Ill. 1992) ("Apart from challenging the truthfulness of an advertiser's representations, the FTC may challenge the representation as unsubstantiated if the advertiser lacked a reasonable basis for its claims.") (citing *Thompson Medical Co., Inc. v. F.T.C.*, 791 F.2d 189, 193 (D.C. Cir. 1986)). Furthermore, although proof of actual deception is not necessary to establish a violation of section 5(a), "such proof is highly probative to show that a practice is likely to mislead consumers acting reasonably under the circumstances." *F.T.C. v. Cyberspace.com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006).

Here, the John Beck infomercials fail to disclose that in most states, a government tax foreclosure sale transfers a tax lien instead of a tax deed. A tax lien permits the purchaser to collect the delinquent taxes owed on the property, but does not transfer title to the property. In the remaining states where tax deeds are sold, an auctioning process makes it very difficult to purchase high-value properties for "pennies on the dollar." (*See* PX 81 ¶¶ 34-41.) Consumers who purchase the John Beck coaching services are therefore advised to focus their efforts on empty lots,

instead of the well-built homes depicted in the infomercials. (*See, e.g.*, PX 5 ¶ 18; PX 7 ¶¶ 14, 18.) It is no secret that empty land, depending upon its location, can be purchased for a few hundred or a few thousand dollars. However, it is very difficult, if not impossible, to resell these empty properties for hundreds of thousands of dollars.

To further support their allegation that a reasonable consumer would find the John Beck infomercials misleading, the FTC has submitted numerous declarations from consumers of the John Beck system. These consumer declarations offer evidence of actual deception. For example, after viewing the infomercial, consumers believed the John Beck system would show them how to purchase the "nice houses" shown in the infomercial for "pennies on the dollar." (*See, e.g.*, PX 3 ¶ 3; PX 4 ¶¶ 2-3.) However, after purchasing the John Beck system and in many cases the personal coaching program, consumers were still unable to buy homes for a few hundred dollars, or to quickly and easily earn the amounts of money touted in the infomercial, despite using their best efforts. (*See, e.g.*, PX 3 ¶¶ 19-30; PX 4 ¶¶ 22, 27, 30-44; PX 5 ¶¶ 15-28, 38-41; PX 19 ¶ 12; PX 21 ¶ 4.) Furthermore, while Defendants do not keep track of their customers' actual success rates, they offer customers who have purchased coaching services a tuition refund if they successfully complete the coaching program, purchase a certain number of properties, and provide a testimonial of their success. Out of the 30,000 customers who have purchased coaching services, only 58 individuals – approximately 0.2% – have qualified and applied for a tuition refund. (PX 82 ¶¶ 28-32, att. 6 at 1511-16.) It is therefore highly unlikely that a typical consumer of the John Beck system could easily and quickly purchase homes for pennies on the dollar.

Defendants' evidence also fails to rebut the FTC's evidence. At best, Defendants' evidence shows that a limited number of individuals can make a profit purchasing properties at government tax foreclosure sales. These individuals include the 17 consumers who have submitted declarations in support of Defendants'

Opposition (DX 8-24), and the individuals appearing in the infomercial, who have signed affidavits declaring their success prior to appearing in the infomercial. (DX 4, Exs. M-O.) There is no evidence that a majority of consumers, or even a significant percentage of consumers who purchase the John Beck system are similarly successful and satisfied with their purchase. Out of the 600,000 sales of the John Beck system, Defendants cannot rely upon the existence of a very small number of satisfied customers. *F.T.C. v. Amy Travel Service, Inc.*, 875 F.2d 564, 572 (7th Cir. 1989) ("Contrary to defendants' claims, the FTC need not prove that every consumer was injured. The existence of some satisfied customers does not constitute a defense under the FTCA."). Moreover, even if the results claimed by the 17 consumers submitting declarations on behalf of Defendants were typical of what an average consumer would achieve, these results do not live up to the claims touted in the John Beck infomercials. Of the consumers who have revealed their profits to date, the bulk of these satisfied customers earned between $3,000 and $5,000, or less. (*See, e.g.*, DX 8, 9, 10, 11.) Only two individuals have earned significant profits of approximately $35,000 and $50,000. (DX 17, 18.) As the FTC admits, it is possible for a limited number of individuals to profit from government tax foreclosure sales. However, it is not easy, fast, or typical of the average John Beck consumer. Instead, many homes must be purchased for thousands of dollars, and may require significant effort and additional expense to repair them prior to reselling them. (*See, e.g.*, PX 20 ¶¶ 10-11; PX 82 at 1482, 1508; PX 82 ¶ 22, att. 5.)

The Court therefore finds that the infomercials' net impression – a typical consumer of the John Beck system can easily and quickly purchase high-value homes for pennies on the dollar – is false. Defendants also lack a reasonable basis to assert that such a claim is true. The FTC has therefore satisfied its burden of demonstrating that the John Beck infomercials contain material misrepresentations likely to deceive or mislead consumers acting reasonably under the circumstances, in violation of section 5(a) of the FTC Act.

Defendants also argue that an injunction need not be entered against the John Beck infomercial, because the current version will be "retired" by the hearing date of this Motion, and a new version has been produced to cure any violations of the FTC Act. The new version of the infomercial includes the following changes and additional disclosures: (1) prominent disclaimers at the beginning and end of the program, (2) disclaimers underneath each testimonial and property used as an example, and (3) an additional segment from John Beck discussing the purchase of undeveloped land as his favorite type of investment because it is easier, cheaper, and more plentiful. (DX 4, Hewitt Decl. ¶¶ 37-41.) Defendants contend these changes to the infomercial no longer subject it to injunctive relief. *See F.T.C. v. Evans Products Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985) ("As a general rule, '[p]ast wrongs are not enough for the grant of an injunction'; an injunction will issue only if the wrongs are ongoing or likely to recur."). Nonetheless, even after taking into consideration the additional disclosures,[5] the net impression conveyed by the infomercial remains substantially the same – a typical consumer can easily and quickly purchase high-value properties for pennies on the dollar.[6] Based upon the transcript of the new infomercial, the Court finds it similarly contains material

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[5] Defendants have not yet provided the Court with a copy of the new infomercial, as it would be aired on television. Defendants have only attached a complete transcript of the new infomercial's script. (DX 4, Hewitt Decl, Ex. H.)

[6] For example, the new infomercial contains the following passages:

John has perfected a system that can literally turn pennies into dollars, by cashing in on special tax foreclosure programs...run by the government...that most people don't even know exist.

misrepresentations that are likely to mislead a reasonable consumer. It is clear from the evidence currently before the Court that the FTC has demonstrated a likelihood of success in their claim that Defendants are in violation of the FTC Act. The FTC is therefore entitled to preliminary injunctive relief.

B. Jeff Paul Infomercial

The FTC claims the Jeff Paul infomercial used to advertise the Jeff Paul system similarly violates section 5(a) of the FTC Act. The Jeff Paul system is a wealth creation system based upon establishing internet websites to market and sell one's products. The infomercial introduces the system with the following statement:

> Even though it's an internet system, you don't need to know anything about computers, or the internet, to make money. Because Jeff's Shortcuts do all the work for you, and immediately turn any computer into your own money machine. It's fast. It's easy, and it works.

(PX 1, 10/27/08 Jeff Paul Infomercial at 0:50; *see also* PX 1, 11/1/07 Jeff Paul Infomercial at 0:48; 1:04) Former consumers of the Jeff Paul system also provide testimonials informing the viewer that they easily and quickly made money using the Jeff Paul system. For example, one customer claims to have made money within 4 days, and made $7,500 within a few weeks. (10/27/08 Jeff Paul Infomercial at 7:45; *see also, e.g.*, 11/1/07 Jeff Paul Infomercial at 0:51 (hostess claiming she made $1,800 in her first week); 11/1/07 Jeff Paul Infomercial at 9:21; 11/1/07 Jeff Paul Infomercial at 24:15 ("We work less, and earn more."). Other customers claim to have made up to $7,000-$8,000 per week. The Court finds that the infomercials' overall net impression communicates to the viewer that a typical consumer can easily and quickly earn thousands of dollars per week simply by purchasing and using Jeff Paul's system.

The FTC admits that it is possible for a consumer to create and use the free websites described in both versions of the Jeff Paul infomercial. However, the websites provided by the program are basic, unattractive, and contain boilerplate

text. (PX 78 ¶ 28.) They are simple, one-page "sites" that link to other websites selling products such as dog training lessons or awakening the zen pool-playing master within. (PX 78 ¶¶ 26 – 28, atts. 15-16.) The websites are also simply individual pages on a broader site containing many such pages. (PX 78 ¶ 26.) For example, when an FTC investigator created a website related to dog training, his web address was "http://bigleagueplayersclub.com/3clicks/published/122640/595316/index.htm" and when he created a website related to zen pool, his web address was "http://bigleagueplayersclub.com/3clicks/published/122640/595317/index.htm." (PX 78 ¶ 26.) Contrary to the claims expressed in the infomercials, consumers without prior experience in website design find it very difficult to modify or enhance the appearance and content of the websites. (*See, e.g.*, PX 22 ¶¶ 2, 11, 14; PX 27 ¶ 5.) Although the Jeff Paul system provides customers with general marketing advice and strategies, it does not offer a tangible product that customers can actually sell. (*See, e.g.*, PX 81 ¶¶ 45, 47-48.) If a customer does not have a product to sell, the Jeff Paul materials suggest marketing internet ads. The infomercials fail to disclose that the system does not provide customers with any product to market on their internet websites. Consumers have declared that despite their efforts, they have not been successful at making similar amounts of money that are claimed in the infomercials. (*See, e.g.*, PX 22 ¶¶ 2-24; PX 3 ¶¶ 2, 15-21; PX 24 ¶¶ 2-13.)

Defendants' consumer declarations stating they experienced success with the Jeff Paul system are not representative of the typical customer who purchased the program through the infomercials. For the most part, these successful individuals owned or operated an existing business prior to purchasing the Jeff Paul system. The Jeff Paul system was used to assist in the marketing of their existing business. (*See, e.g.*, DX 25, 26, 27.) Other successful users did not purchase the Jeff Paul system through the infomercial; instead, they attended a Jeff Paul seminar, which is not at issue in this case. (*See, e.g.*, DX 28, 29.) Moreover, there is no evidence that a single purchaser of the Jeff Paul coaching service has ever successfully qualified for

a tuition refund. (PX 82 ¶ 29, att. 6.)

The Court therefore finds that the infomercials' net impression – a typical consumer can easily and quickly earn thousands of dollars per week simply by purchasing and using the Jeff Paul system – is false. Defendants also lack a reasonable basis to assert that such a claim is true. The FTC has satisfied its burden of demonstrating that the Jeff Paul infomercials contains material misrepresentations likely to deceive or mislead consumers acting reasonably under the circumstances, in violation of section 5(a) of the FTC Act.

C. Continuity Charges

The FTC alleges the continuity charges imposed in both the John Beck and Jeff Paul systems violate section 5(a) of the FTC Act, section 310.3(a)(1)(vii) of the Telemarketing Sales Rule, and section 310.4(a)(6) of the Telemarketing Sales Rule.[7]

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[7] Section 310.3(a)(1)(vii) provides:

> It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:
>
> (1) Before a customer pays for goods or services offered, failing to disclose truthfully, in a clear and conspicuous manner, the following material information:
>
> (vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment,

The continuity charges are monthly recurring charges that are imposed for a customer's subscription to the John Beck "Property Vault" service or the Jeff Paul "Big League" service. These continuity services provide consumers with a monthly newsletter and access to a customer service hotline for questions. In most cases,

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and the specific steps the customer must take to avoid the charge(s).

16 C.F.R. § 310.3(a)(1)(vii).

Section 310.4(a)(6) provides:

It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

> Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements in paragraphs (a)(6)(i) through (ii) of this section must be met to evidence express informed consent.

16 C.F.R. § 310.4(a)(6).

Defendants automatically subscribe consumers to a 30-day free trial of these services. If consumers do not affirmatively cancel these services after the 30-day trial period, and another 30-day grace period, consumers are automatically charged the $39.95 monthly continuity charge. The FTC refers to this type of charge as a "negative option." The FTC claims Defendants fail to properly disclose that consumers have been automatically subscribed to the continuity service, and will be charged for it if they do not affirmatively cancel the service.

The John Beck and Jeff Paul infomercials only state that the first 250 customers who purchase the system will receive a free 30-day trial to the continuity service. (PX 1.) When consumers call to order either product, the pre-recorded automated greeting informs the caller that the continuity services are included free with their purchase. There is no up front disclosure that customers will be automatically charged after the 30-day trial period. When consumers begin the ordering process, the automated system takes their payment information. After a customer's payment information is obtained, the automated system offers prepaid subscriptions to the continuity services. (PX 81 ¶¶ 21-24.) Even if a customer declines these prepaid subscriptions, they are still enrolled in the continuity services, and will be charged $39.95 per month after the 30-day trial period. (*See*, *e.g.*, PX 33 ¶¶ 3-4; PX 37 ¶¶ 3, 6.) Defendants contend that consumers are reminded by automated phone calls and in writing that they need to call to cancel their subscription after the 30-day trial period; however, Defendants do not cite to any evidence of these reminders. (Opp'n at 33.) The FTC's consumer declarations indicate that many of them were not aware that they would be charged $39.95 per month for the continuity services until they saw the charge on their credit card statements. (*See*, *e.g.*, PX 30 ¶¶ 3, 5, 10; PX 33 ¶¶ 3, 6-8; PX 35 ¶¶ 3-7.)

The Court finds these practices to be in violation of the Telemarketing Sales Rule. Defendants enroll consumers in their continuity service programs and obtain consumers' payment information without having disclosed all material terms and

features of the negative option. Defendants' post-enrollment disclosures, if any, are not adequate. Pursuant to section 310.4(a)(6) of the TSR, express informed consent must be obtained before billing information is submitted by the customer for payment.

Defendants assert a preliminary injunction is no longer necessary because a new automated system has been installed that specifically asks the customer whether he or she wants to continue receiving the continuity service after the 30-day free trial. If the customer answers no, the customer receives the 30-day free trial without any further charges. (Hewitt Decl. ¶ 33.) However, the actual text of the automated system may not be as clear as Defendants assert. The actual text reads:

> Your membership to John's "Property Vault Club" is 100% FREE for the first 30 days. So you can easily locate your first few properties right away! Once the club benefits have proven their value in 30 days you will continue to profit from the club for only $39.95 a month, charged to the same credit card that you are using today unless you call to cancel. As an added club benefit you'll also receive unlimited access to John's Toll Free advisory hotline that you can call for assistance as often as you'd like! The "Property Vault Club" is absolutely FREE to try for 30 days and can be cancelled at any time by calling us at 1-888-461-9029 if you are not 100% pleased with the amount of money it helps you make!
>
> May I include this FREE trial membership with your order?

(Hewitt Decl., Ex. U.) Furthermore, the preliminary injunction proposed by the FTC seeks to conform Defendants' practices to the requirements of the TSR. If Defendants disclose all material terms of the negative option in a clear and conspicuous manner, as required by the TSR, it would also be in compliance with the relevant terms of the preliminary injunction proposed by the FTC, as adapted by the Court.

D. Personal Coaching Services

The FTC alleges that in connection with the telemarketing of personal coaching services, Defendants: (1) make misleading and deceptive statements while marketing the coaching services, (2) provide confusing and inadequate compliance verifications of each sale, and (3) violate the TSR's do-not-call provisions.

1. Misleading and deceptive statements

The FTC alleges Defendants' telemarketers make misleading and deceptive statements indicating their investment in personal coaching services is "risk-free" because: (1) the personal coaches will walk each customer "step-by-step" through the John Beck or Jeff Paul system, in order to ensure their success, (2) customers can and should borrow "other people's money" to finance the coaching, since the loan will be easily repaid from the income generated by the system; and (3) specific earnings claims are made. Though the telemarketing of coaching services is not a recorded portion of the phone call, the FTC has submitted multiple declarations from consumers in support of the FTC's contention that misleading and deceptive statements were made.

The consumer declarations include approximately 12 examples wherein Defendants' telemarketers stated the personal coaching services are "risk free." *See, e.g.*, Beverly Decl. ¶ 11 (declarant was promised a money back guarantee if the program did not work for him); Doss Decl. ¶ 6 (same); Grant Decl. ¶ 7 (telemarketer represented to declarants that they would only have to make two monthly credit card payments of $260-280 toward the $12,500 in coaching services; thereafter, Defendants would reimburse declarants for the remaining balance upon completion of the coaching classes.); Loken, J. Decl. ¶¶ 9 (telemarketer claimed declarant's investment is "risk free" due to the "tuition reimbursement" program).

The FTC's consumer declarations contain approximately 6 examples wherein Defendants' telemarketers assured consumers that the coaches would ensure success by walking consumers through real estate transactions step-by-step. *See, e.g.*, Bandora Decl. ¶ 6 (sales representative stated a coach would walk declarant through

his first real estate transaction and that declarant would be successful if declarant followed the coach's intructions.); Gainsburg Decl. ¶ 5 (sales representatives promised declarant would receive "hand-held" training by a coach who would ensure declarant's success.); and Peak Decl. ¶ 8 (Telemarketer told declarant "the coaching sessions would be like 'having someone guide you step-by-step through the money making process to success.'"). Approximately 14 consumers felt Defendants failed to live up to their promises of success. *See*, *e.g.*, Bernard Decl. ¶37 (coaching sessions did not help declarant locate and purchase houses at a discount rate.); Beverly Decl ¶ 21 (same); and Paredes Decl. ¶ 12 (same).

Approximately 9 consumers declared Defendants' telemarketers made earnings claims that declarants would make a specific amount of money in a specific amount of time. *See, e.g.*, Badora Decl. ¶¶ 7 (telemarketer assured declarant that he could make $100,000 or more in one year; declarant would also make the cost of coaching back in 60 to 90 days.); Beverly Decl. ¶ 11 ("even if [declarant] was a 'couch potato,' within six months [he] would get [his] money back".); Loken, S. Decl. ¶¶ 10, 14 (declarant would make $20,000-$30,000 in income within three months.). Based upon these consumer experiences, the Court concludes that deceptive and misleading statements were made in the process of telemarketing Defendants' personal coaching services.

2. Compliance verifications of sale

The FTC alleges Defendants' compliance monitors are not adequate in preventing deceptive practices, because compliance monitors are difficult to understand, and telemarketers instruct customers not to disclose that earnings claims were made. Approximately 4 consumers declared Defendants' telemarketers had asked consumers not to reveal their earnings claims and promises to compliance monitors. *See, e.g.*, Bernard Decl. ¶ 24 (telemarketer asked declarant to say "no" to the compliance monitor if asked whether the salesman had made any "outrageous claims"); Loken, J.Decl. ¶¶ 11-12 (telemarketer asked declarants to say "no" if asked

by his "secretary" whether or not he had made any guarantees of success; the telemarketer explained he "could not guarantee [declarant's] success 100 percent because he could not guarantee [declarant's] participation."); Gainsburg Decl. ¶ 7; Peak Decl. ¶ 8. At least one consumer stated the compliance monitor read the compliance verification script very quickly, and was difficult to understand. (PX 12 ¶ 9; *see also* PX 2.) Based upon these consumer experiences, the Court finds the compliance verifications of each sale to be inadequate to prevent Defendants' deceptive practices.

3. Do not call violations

The FTC alleges Defendants' telemarketers are in violation of section 310.4(b)(1)(iii)(A) of the TSR, which prohibits calling consumers who have previously stated they do not wish to receive sales calls.[8] Multiple consumers have indicated that they have placed their phone numbers on the National "Do-Not-Call" Registry and have specifically asked Defendants not to contact them. Nonetheless,

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[8] Section 310.4(b)(1)(iii)(A) provides:

> It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:
>
> (iii) Initiating any outbound telephone call to a person when:
>
> (A) that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited.

they continue to receive calls from Defendants' telemarketers. (*See, e.g.*, Allen Decl. ¶¶ 2, 7, 9; Church Decl. ¶¶ 7-10; Leahy Decl. ¶ 3.) Based upon these consumer experiences, the Court finds Defendants to be in violation of section 310.4(b)(1)(iii)(A) of the TSR.

E. Common Enterprise

The FTC contends each of the corporate Defendants operates as a common enterprise, which permits each Defendant to be held liable for the deceptive acts and practices of the other. *F.T.C. v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1011 (N.D. Ind. 2000) (citing *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir.1973); *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746-47 (2d Cir.1964)). Defendants do not appear to dispute that each corporate Defendant operates as a common enterprise of the other. Family Products, LLC oversees the marketing and selling of the John Beck and Jeff Paul systems. Mentoring of America, LLC employs the telemarketers who sell the personal coaching services. Each corporate Defendant reports the same Van Nuys address as its principal place of business. (PX 81 ¶¶ 8, 10, 14.) The Court therefore finds the corporate Defendants to be operating as a common enterprise.

F. Liability of Individual Defendants

The FTC claims the individual Defendants, Gary Hewitt, Douglas Gravink, John Beck, and Jeff Paul are personally liable for the deceptive acts and practices of the corporate Defendants. "An individual will be liable for corporate violations of the FTC Act if (1) he participated directly in the deceptive acts or had the authority to control them and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *F.T.C. v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009). "Also, the degree of participation in business affairs is probative of knowledge." *F.T.C. v. Amy Travel Service, Inc.*, 875 F.2d 564, 574 (7th Cir. 1989). "The Commission, however, 'is not required to show

that a defendant intended to defraud consumers in order to hold that individual personally liable.'" *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1236 (9th Cir. 1999) (citing *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997)).

Additionally, at the hearing the FTC cited *Publishing Clearing House, Inc.*, 104 F.3d at 1170 for the proposition that the test for individual liability simply requires direct participation in the improper acts or practices, or authority to control them. This case, which had already been cited in the tentative order, states that:

> As an ***officer***, Martin 'may be held liable for ***injunctive relief*** under the [Federal Trade Commission Act] for corporate practices if the FTC can prove (1) that the corporation committed misrepresentations or omissions of a kind usually relied on by a reasonably prudent person, resulting in consumer injury, and (2) that [Martin] participated directly in the acts or practices or had authority to control them.'

Id. (quoting *FTC v. American Standard Credit Systems, Inc.*, 874 F.Supp. 1080, 1087 (C.D.Cal.1994) (emphasis added).

Defendants Hewitt and Gravink are the sole owners of the corporate Defendants and have ultimate control of their operations. (PX 81 ¶ 8, att. 1 at 37-40, 82-84, 122-23.). Accordingly, they are individually liable for injunctive relief for corporate practices, and they satisfy the first element of the test for personal liability.

With respect to knowledge, the second element of that test, Defendants do not dispute that Mr. Hewitt and Mr. Gravink were aware of the statements made in the John Beck and Jeff Paul infomercials. Instead, Defendants argue that their mere knowledge of these statements is not equivalent to a knowledge of their falsity. Defendants contend that because Mr. Hewitt and Mr. Gravink obtained releases from each person appearing in the infomercials, and implemented compliance programs to prevent deceptive practices, there was no intent to defraud or knowledge of falsity in their marketing practices. (Opp'n at 35-36.) Nonetheless, Defendants Hewitt and Gravink must have known that success rates for the John Beck and Jeff Paul programs were very low, which renders the message conveyed by the infomercials

inaccurate. The Court finds Defendants Hewitt and Gravink were likely recklessly indifferent to the truth or falsity of the representations conveyed by the John Beck and Jeff Paul infomercials. Defendants Hewitt and Gravink may therefore also be held personally liable for restitution for the deceptive practices of the corporate Defendants.

Individual Defendants John Beck and Jeff Paul participated directly in the deceptive acts by making many of the statements deemed to be misleading when taken as a whole. However, the FTC does not argue that Mr. Beck and Mr. Paul are officers of the corporate Defendants. Consequently, as applied to Mr. Beck and Mr. Paul, the *Publishing Clearing House, Inc.* test for whether an individual may be subjected to individual liability for injunctive relief is without import. Additionally, applying the test for personal liability, it is not clear whether Mr. Beck and Mr. Paul were necessarily aware of the falsity of their statements. Though they were hired to speak in the infomercials, there is no evidence that they maintained significant control over the corporate Defendants or otherwise became aware of or recklessly indifferent to the low success rates for their programs. To the contrary, Mr. Beck and Mr. Paul declare that they believe their presentations are true, present their strategies at teaching seminars, and have personally made money using their strategies. (Beck Decl., DX 1 ¶¶ 25-26.) The Court therefore concludes there is insufficient evidence to hold Defendants Beck and Paul personally liable for the deceptive practices of the corporate Defendants.

G. Asset Freeze & Monitor

The FTC seeks an asset freeze directed against both the corporate Defendants and the individual Defendants. The FTC contends an asset freeze is necessary to prevent dissipation of the individual Defendants' assets, which may be needed to satisfy a potential judgment of $300 million. Alternatively, with respect to the corporate Defendants, the FTC proposes that the corporate Defendants be permitted to retain control of their business, but be placed under the review and scrutiny of a

monitor.

"A party seeking an asset freeze must show a likelihood of dissipation of the claimed assets, or other inability to recover monetary damages, if relief is not granted." *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009) (concluding a *likelihood* of dissipation is necessary post-*Winter* to support an asset freeze instead of the lower standard, a *possibility* of dissipation). Here, there is no evidence that Defendants have ever previously attempted to intentionally dissipate, hide or otherwise shelter corporate or personal assets from an effort to collect a debt or judgment against Defendants. The FTC argues that because Defendants have committed fraudulent acts, Defendants will likely dissipate their assets to thwart potential collection activity. In addition, the FTC contends every available dollar should be preserved in order to satisfy Defendants' potential liability of $300 million.

The Court finds the FTC has failed to satisfy its burden of demonstrating that an asset freeze is warranted. Courts have previously considered fraudulent activity as a factor in support of a likelihood of dissipation. *See SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1106 (2d. Cir. 1972) ("Because of the fraudulent nature of appellants' violations, the court could not be assured that appellants would not waste their assets prior to refunding public investors' money.") However, in *Manor Nursing*, additional factors were present that supported an asset freeze. *Id.* (uncertainty existed over the total amount of defendants' proceeds, where the proceeds were located, and defendants' failure to furnish information to remove the uncertainty). In this case, the only evidence in support of an asset freeze is Defendants' misleading marketing practices. If this were sufficient to support an asset freeze, one would issue in every deceptive advertising case. Given the more stringent standard of a likelihood of dissipation, the Court concludes an asset freeze

is not supported by the FTC's evidence.[9]

On the other hand, the Court agrees with the FTC's alternative proposal to appoint a monitor over the corporate Defendants.[10] "Federal courts repeatedly have

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[9] At the hearing, the FTC pointed to the case of *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) for the proposition that it is significant that a claim for restitution might exceed extant assets. While the existence of any significant restitution claim certainly makes it seem *possible* that Defendants may dissipate assets, the Court simply does not find that the FTC has met its burden of showing a *likelihood* of dissipation under the *Johnson*, 572 F.3d at 1085 standard. *See also id.* (finding likelihood of dissipation where defendant had convinced "his fellow directors and trustees to consent to diverting nearly $35 million ... into his personal bank account. Such an individual is presumably more than capable of placing assets in his personal possession beyond the reach of a judgment.") (citing *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999) (concluding that the district court did not clearly err in finding a likelihood of dissipation "[g]iven the [defendants'] history of spiriting their commissions away to a Cook Islands trust....")); *see also World Wide Factors, Ltd.*, 882 F.2d at 347 (stating party had been convicted for criminally fraudulent activities alleged in the FTC's complaint).

[10] At the hearing, counsel for Defendants actually agreed to monitoring. The only remaining dispute was as to the form of the monitoring and as to the identity of the monitor. Defendants suggested retired federal Judge Dickran M. Tevrizian as a

approved the use of special masters to monitor compliance with court orders and consent decrees." *Stone v. City and County of San Francisco*, 968 F.2d 850, 859 n.18 (citations omitted); *see also Commodity Futures Trading Com'n v. Chase Commodities Corp.*, No. CV04-6463, 2006 WL 321965, at *6 (C.D.Cal., 2006). "[R]ule 53 does not terminate or modify the district court's inherent equitable power to appoint a person, whatever be his title, to assist it in administering a remedy. The power of a federal court to appoint an agent to supervise the implementation of its decrees has long been established. Such court-appointed agents have been identified by "a confusing plethora of titles: 'receiver,' 'Master,' 'Special Master,' 'master hearing officer,' 'monitor,' 'human rights committee,' 'Ombudsman,' " and others. The function is clear, whatever the title." *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir. 1982) (footnotes omitted); *see also National Organization for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 544 (9th Cir. 1987); *Keith v. Volpe*, 833 F.2d 850, 857-58 (9th Cir. 1987); *Toussaint v. Rushen*, 553 F.Supp. 1365, 1387 (C.D. Cal., 1983).

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potential monitor. While the Court is quite confident that Judge Tevrizian would do a commendable job, the Court adopts instead the FTC's suggestion, also made at the hearing, of Rob Evans & Associates, LLC. If Rob Evans & Associates, LLC is for any reason unable or unwilling to serve as a monitor in this case, the FTC will inform the Court within one week of when it or its employees or agents obtains knowledge of that fact, and a different monitor will be appointed. The Court intends at this time to appoint a monitor, as requested, not a receiver. *See FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 348 (9th Cir. 1989) (finding a special master was transformed into a receiver for certain purposes pursuant to the terms of the district court's order).

As detailed further in the preliminary injunction order, the appointed monitor would be charged with observing Defendants' business practices to ensure that the corporate Defendants are complying with the preliminary injunction. The monitor can also observe whether the corporate Defendants' assets are properly spent on ordinary and necessary business expenses. The monitor would not have direct control over Defendants' business operations or assets, but if a violation of the preliminary injunction were observed, the FTC would be authorized to seek an appropriate remedy from the Court.

H. Balance of Equities

In weighing the public interest versus the private interest against a preliminary injunction, the public interest is accorded greater weight. *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1236 (9th Cir. 1999) ("Under this Circuit's precedents, 'when a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight.'") (citing *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir.1989)). Here, the public interest in preventing further misleading and deceptive practices is great, as Defendants have sold their products to hundreds of thousands of consumers, and continue to advertise their products in a deceptive manner. The Court finds the public interest in preventing further consumer deception outweighs Defendants' private interest in continuing to advertise and market its products and services in the same manner.

Though Defendants' argue that a preliminary injunction will shut down Defendants' business and put more than 550 employees out of work, the injunction does not expressly shut down Defendants' business. The injunction seeks only to prevent further violations of the FTC Act and the TSR. If Defendants can operate in compliance with these statutory and regulatory provisions, their business operations need not end.

I. Form of Injunction

Nonetheless, this injunction, issued herewith, will not be issued exactly as

proposed by the FTC.[11] "A district court has considerable discretion in fashioning suitable relief and defining the terms of an injunction." *Lamb-Weston, Inc.*, 941 F.2d at 974. A preliminary injunction must do no more nor less than maintain the status quo and "must be narrowly tailored ...to remedy only the specific harms shown by the plaintiffs, rather than 'to enjoin all possible breaches of the law.'" *Price*, 390 F.3d at 1117 (9th Cir. 2004).

Prior to the hearing, the Court noted in its tentative order that it was not clear what the extent of the injunctive relief should be, or whether the FTC's proposed preliminary injunction was completely necessary to ensure that Defendants were in compliance with the relevant statutes and regulations. The Court requested that the parties discuss at the hearing whether alternative measures could serve as an adequate remedy for Defendants' violations while permitting Defendants to continue advertising their wealth creation systems. Prior to the hearing, Defendants lodged a Proposed Alternative Order Re: Plaintiff's Motion for Preliminary Injunction and Related Relief. Defendants indicated in the Notice of Lodgment that this had been shared with the FTC, but no agreement was reached. The FTC indicated at the hearing it saw no need to make any additional suggestions. Additionally, at the hearing the FTC cited *Resort Car Rental System, Inc. v. FTC*, 518 F.2d 962 (9th Cir. 1975) for the proposition that no disclosures can possibly cure the net impression of the infomercials. However, that case is distinguishable, as it was not a case where the court found a commercial had a false net impression. Rather, in *Resort Car Rental System, Inc.*, the Ninth Circuit approved an order excising the trade name "Dollar-A-Day" where "'(t)he trade name, 'dollar-a-day' by its nature has a decisive connotation for which any qualifying language would result in a contradiction in terms.'" *Id.* at 964 (quoting the original order). The Court does however find

[11] For example, Counsel for the FTC stated at the hearing that the FTC wants the informercials to come off the air now.

instructive the fact that in that case, the Ninth Circuit wrote that "[t]he Federal Trade Act is violated if it induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract." *Id.* (citing *Exposition Press, Inc. v. Federal Trade Commission*, 295 F.2d 869 (2d Cir. 1961), cert. denied, 370 U.S. 917, 82 S.Ct. 1554, 8 L.Ed.2d 497; *Carter Products, Inc. v. Federal Trade Commission*, 186 F.2d 821 (7th Cir. 1951)); *see also* FTC v. Connelly, 2006 WL 6267337, *10 (C.D. Cal., Dec. 20, 2006) (citing *Resort Car Rental System, Inc.*, 518 F.2d at 964). Accordingly, the Court has exercised its discretion in crafting the terms of the preliminary injunction.

V. CONCLUSION

For the reasons and in the manner set forth above, the Court **GRANTS IN PART** the FTC's Motion for Preliminary Injunction (docket no. 2), the terms of which are set forth in a separate Preliminary Injunction, against the corporate Defendants and against individual Defendants Gary Hewitt and Douglas Gravink. Furthermore, the Court **APPOINTS** a monitor over the corporate Defendants, but **DENIES** the FTC's Motion for an Asset Freeze.

IT IS SO ORDERED.

Dated: November 17, 2009

FLORENCE-MARIE COOPER, JUDGE
UNITED STATES DISTRICT COURT