IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Federal Trade Commission,

Plaintiff,

v.

First Consumers, LLC, *et al*.

Defendants.

Civ. Action No. 2:14-cv-01608-GAM

FILED ELECTRONICALLY

MEMORANDUM IN SUPPORT OF PLAINTIFF FTC'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT ARI TIETOLMAN

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INTRODUCTION

Until this Court stopped him in March 2014, Ari Tietolman operated a telemarketing scheme designed to drain money from the bank accounts of vulnerable, elderly consumers. Tietolman's telemarketers tricked consumers into providing their account numbers in various ways. Sometimes, they purported to sell services that would help consumers obtain free prescription drugs or—ironically—protect their bank accounts and identities. In other instances, they claimed affiliations with trusted entities, like the U.S. government. Tietolman employed each of these false statements for one purpose: to obtain consumers' bank account information. He then used a network of front companies to debit money from consumers' accounts without their authorization. In total, Tietolman stole nearly $11 million from consumers' accounts.

Tietolman's actions violated both Section 5 of the FTC Act, 15 U.S.C. § 45, and the Telemarketing Sales Rule ("TSR"), 16 C.F.R. § 310. Furthermore, his control over, and knowledge of, the fraud make him personally liable for both injunctive and monetary relief. Because the undisputed facts establish that Tietolman is personally liable for violations of the FTC Act and the Telemarketing Sales Rule, the FTC requests that the Court enter summary judgment, a permanent injunction, and a monetary judgment.

STATEMENT OF UNDISPUTED FACTS

I. Defendant Ari Tietolman[1]

1. Defendant Ari Tietolman is a Canadian national who resides in Quebec. PX15 ¶ 6.

2. Tietolman is the owner and director of two Canadian corporations, Landshark

[1] The FTC reached proposed settlements with defendants Marc Ferry and Robert Barczai (DE 57), and the Court stayed the dispositive motion deadline as to them while it considers the proposed settlements (DE 59).

Holdings and Madicom, which are also defendants in this action.[2] PX79; PX80; *see also* PX95 ¶¶ 3-4, *infra* ¶ 10 (Tietolman failed to respond to the FTC's Requests for Admission); DE 1.

3. Tietolman hired U.S. residents Marc Ferry, Robert Barczai, and Charles Borie (collectively, "U.S. Defendants") to create U.S. business entities and open accounts at U.S. banks. PX16 ¶¶ 2, 4-7; PX17 ¶¶ 2, 4-5; PX90; PX91. These front companies included First Consumers LLC (PX17 ¶ 4; PX81); PowerPlay Industries LLC (PX16 ¶ 4; PX88); and Standard American Marketing, Inc. (PX90; PX91) (collectively, "U.S. Front Companies").

4. The U.S. Front Companies registered a variety of fictitious business names, including Trust One, Patient Assistance Plus, Fraud Watch, and Legal Eye. PX16 ¶ 4; PX17 ¶ 4; PX82; PX83; PX84; PX89.

5. As described below in Section IV, Tietolman directed every aspect of his U.S. Front Companies' operations and acted on their behalf with third parties.

6. The United States Attorney's Office for the Eastern District of Pennsylvania has indicted Tietolman for wire fraud and money laundering based on his role in the scheme described in this motion. Indictment, *United States v. Tietolman*, Case No. 2:14-cr-00465-GAM-1 (E.D. Pa. Aug. 28, 2014). The Royal Canadian Mounted Police is also investigating him. PX15 ¶ 3.

II. Procedural History

7. The FTC filed its Complaint in this matter against Ari Tietolman and other defendants on March 18, 2014. DE 1.

8. At the FTC's request, the Court entered a Temporary Restraining Order and then

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[2] None of the corporate defendants in this action, including Tietolman's two corporations, have answered the FTC's Complaint. The Clerk of Court entered default against them on December 4, 2014, and the FTC is filing a Motion for Default Judgment against the corporations concurrently with this motion.

Preliminary Injunctions against the defendants, including Tietolman. DE 6; DE 13.

9. Tietolman answered the FTC's Complaint and, through counsel, promised to obey the Court's Preliminary Injunction in this matter. DE 20 (Tietolman's Answer); DE 23 (Tietolman's Motion for Extension of Time to Comply with Preliminary Injunction).

10. Contrary to that promise, Tietolman failed to comply with the Preliminary Injunction (DE 27; DE 39), failed to appear for a noticed deposition (PX93; PX94), and failed to respond to Requests for Admission (PX95).

11. On July 17, 2014, upon the FTC's motion, this Court held Tietolman in contempt and entered coercive monetary sanctions for his violations of the Preliminary Injunction. DE 39. When Tietolman still did not comply despite the entry of monetary sanctions, the Court entered a bench warrant for his arrest as a coercive sanction. DE 41. Tietolman still has not complied with the Preliminary Injunction.

III. Tietolman's Business Practices

12. Since at least 2010, Tietolman ran an international operation that siphoned money from American consumers' bank accounts. *See* PX17 ¶¶ 2, 4; PX59; PX61; PX68; PX76; PX81-82; PX84.

13. Tietolman's scheme was simple: his telemarketers told a variety of lies that led victims to divulge their bank account numbers, and then, through the U.S. Front Companies, used that information to debit consumers' accounts without authorization. *See* ¶¶ 15-83 *infra*.

14. Since 2010, Tietolman's scheme netted almost $11 million from its victims. *See* ¶¶ 84-86 *infra*.

A. Tietolman's Telemarketers Lied to Consumers to Obtain Consumers' Bank Account Information.

15. Tietolman's operation placed unsolicited telephone calls to American consumers.

See, e.g., PX1 ¶ 2; PX2 ¶ 2; PX8 ¶ 2; PX10 ¶ 3; PX12 ¶ 2; PX13 ¶ 2.

i. Tietolman Targeted Elderly Consumers.

16. Of the 172 complaints the FTC and Better Business Bureaus (BBBs) received about Tietolman's scheme, 70 listed the age of the victimized consumers. PX14 ¶ 9. Of these 70 complaints, 47 described the experiences of consumers over age 70, and 34 described the experiences of consumers over age 80. PX14 ¶ 9. Many of these complaints came from elderly consumers' caregivers. PX14 ¶ 9.

17. Many of the consumers who testified about their experiences with Tietolman's operation, and consumers about whom caregivers testified, are over age 80. PX1 ¶ 1; PX4 ¶ 1; PX5 ¶ 3a; PX6 ¶ 2; PX7 ¶ 2; PX9 ¶ 2.

18. For example, one declarant explained that his 87-year-old mother's memory problems are readily apparent in a telephone conversation. PX7 ¶ 2. Despite, or perhaps because of, that limitation, Tietolman's operation targeted her on numerous occasions. PX7 ¶ 6.

19. Indeed, several elderly victims had no recall of any conversation with Tietolman's telemarketers, despite documentation that the U.S. Front Companies debited their accounts. PX4 ¶ 15; PX6 ¶ 4; PX9 ¶ 7.

ii. Tietolman Used Telemarketing Scripts to Direct His Telemarketers.

20. The Royal Canadian Mounted Police ("RCMP") in Quebec seized telemarketing scripts from boiler rooms at 181 boul. Hymus, where the RCMP arrested Tietolman in his office, and at 823 boul. Decarie, where telemarketers confirmed to the RCMP that they worked for and reported to Tietolman. PX15 ¶¶ 7A, 7B, 11A, 11B.

21. RCMP agents observed the seized scripts sitting on desks and pinned to cubicle walls at call stations in these boiler rooms. PX15 ¶¶ 7A, 7B.

22. Many of the seized scripts are battered from use or display telemarketers' handwritten notes. PX15 Atts. A, B, D, E, H, I, K, QQQ-YYY.

23. Consumers' testimony about the telemarketing pitches they heard closely track the representations in the scripts (*see* ¶¶ 33, 35, 41, 42 *infra*), further confirming that Tietolman's telemarketers used the scripts the RCMP seized.

24. Tietolman's schemes remained the same, even as his operation changed names and front companies. On some printed scripts, telemarketers simply crossed out an old name ("MedExpress" or "Fraud Watch") and wrote in "Trust One," the scheme's latest iteration. PX15 Atts. SSS, WWW, XXX.

25. Tietolman's telemarketers employed a variety of deceptive tactics, including claims that they offered services for sale, or that they were affiliated with trusted groups like the government or consumers' banks or electrical companies.

iii. Telemarketers Claimed to Offer Prescription Drug and Fraud Monitoring Services.

26. Telemarketers touting Tietolman's prescription drug services promised consumers they were "pre-qualified" for assistance in paying for their medication, before asking any questions to ascertain consumers' qualifications. PX15 Atts. C, L.

27. Telemarketers then promised consumers they would pay "absolutely nothing" for their medications, and that Tietolman's prescription drug programs would "work directly with the drug manufacturers" to get consumers "free medication." PX15 Atts. C, L; PX95 ¶ 56, *supra* ¶ 10.

28. Tietolman's telemarketers quoted consumers prices ranging from $99 to $369 for their prescription services, plus additional monthly fees. PX15 Atts. A, C, J, L, OOO.

29. Telemarketers sometimes promised to provide the services for free. PX8 ¶¶ 3-4;

PX13 ¶¶ 2-4. In at least one instance, a telemarketer promised a reduced fee to a skeptical consumer, but then charged the consumer the full price. PX2 ¶¶ 2-5.

30. Tietolman's "fraud monitoring" scripts offered services to protect consumers from the very types of unauthorized debits his operation caused. These scripts opened with scare tactics, referring to "the recent and alarming increase in fraud nationwide" (PX15 Att. SSS) and stating, "If someone were to take large sums of money out of your account without your authorization I'm sure that would put you in a bad predicament, and we wouldn't want that to happen." PX15 Atts. QQQ, SSS.

31. Telemarketers for the monitoring services then promised consumers to "safeguard you against identity theft, and assist you in the fraud recovery process." PX15 Atts. H, I. Telemarketers quoted prices of up to $396 dollars for this service. PX15 Atts. H, I, PPP, RRR.

32. The telemarketers asked for consumers' bank account information to "protect" these accounts; as one notice to telemarketers directed, "Ask clients how many bank accounts need protection . . . Never settle for one bank of [sic] they have more." PX15 Att. F.

33. Several consumers received phone calls offering medical insurance or bank account protection under the names "Fraud Watch," "Legal Eye," and "Trust One." PX1 ¶ 2; PX2 ¶ 2; PX3 ¶ 16; PX10 ¶ 3; PX12 ¶ 2; PX13 ¶ 2. Consumers' descriptions of these calls track the scripts seized from Tietolman's offices, as described *supra* in Paragraphs 26-32. *Id.*

iv. Telemarketers Sometimes Sought Consumers' Bank Information Without Offering Services for Sale.

34. Tietolman's telemarketers sometimes claimed consumers merely needed to renew an existing service. PX15 Atts. K, RRR, TTT, WWW, YYY. These "renewal" scripts repeatedly claimed the consumer had the program in place for, specifically, the past "year" or "two years," regardless of when or whether any individual consumer actually became a

customer. PX15 Atts. RRR, TTT, WWW, YYY.

35. Tietolman's telemarketers sometimes claimed affiliations with the victim's bank or with the U.S. government. PX1 ¶ 2 (telemarketer claimed affiliation with consumer's bank); PX2 ¶ 2 (same); PX5 ¶ 3 (same); PX12 ¶ 2 (telemarketer claimed he needed account information in connection with new Social Security and Medicare product related to "ObamaCare").

36. Indeed, one script for the "American Institute for Energy Savings" begins, "Did you know that you are entitled to receive your energy saving home device due to the ongoing efforts of the United States Senate and your electrical company to reduce the costs of energy bills for all Americans and to prevent frequent power outages?" PX15 Att. D.

v. Tietolman's Sole Goal Was to Obtain Consumers' Bank Account Information.

37. Each of Tietolman's representations primed consumers for his real objective: obtaining consumers' bank account information.

38. If the telemarketers claimed to sell a service, they requested consumers' bank account information to take payment for the service. *See, e.g.*, PX15 Atts. C, H, I.

39. If the telemarketers claimed affiliation with a trusted party or claimed they simply wished to "renew" a prior service, telemarketers followed up with requests to "verify" the consumer's account information. For instance, the script for the "American Institute for Energy Savings" followed its allusion to the "ongoing efforts of the United States Senate" to reduce electricity bills by saying, "So I'm showing there that you are making monthly payments to your bills through your checking account right? Great, please go get your checkbook/bank statement so we can verify some billing information . . . . Now on the bottom left hand side, please read the number that starts with a zero, a one, two, or three. And the numbers that follow?" PX15 Att. E.

40. A similar script walked through a series of tactics to convince consumers to

"verify" account information the company purportedly already had:

> You can say the wrong bank; "And it shows here you are still with the bank of America … (must be a clerical error, good thing I asked you) now which bank are you with then? … Of course I don't have your bank info in front of me, our company does that to protect you/your account against any potential fraud … So please go ahead, in order for [sic] **verification purposes** please repeat all the numbers at the bottom of [y]our check from left to right beginning with the 0, 1, 2, or 3.

PX15 Att. VVV (emphasis added); *see also* PX15 Att. G ("Now I want you to write some information down somewhere safe. Go grab your check book so you can write it there . . . . Now if you look on the bottom left hand side you will notice a string of numbers, go ahead and read me those numbers. And the numbers that follow . . . .")

41. Several consumers testified that they gave Tietolman's telemarketers their account numbers because they believed they were speaking with representatives from their banks or the government. PX1 ¶ 3; PX2 ¶ 3; PX12 ¶ 2.

42. Other consumers testified they gave Tietolman's telemarketers their account numbers because they believed they would not be charged, either because the telemarketers claimed they were only "verifying" the information or because the telemarketers claimed their services were free. PX8 ¶ 3; PX13 ¶ 2.

vi. The Representations Telemarketers Used to Obtain Consumers' Bank Information Were False.

43. As noted above, Tietolman's telemarketers promised that his prescription drug programs would "work directly with the drug manufacturers" to get consumers "free" medications. PX15 Atts. C, L; *see also* PX95 ¶ 53, *supra* ¶ 10. In fact, major drug companies Pfizer, Novartis, Merck, AstraZeneca, and AbbVie – makers of commonly used drugs including Celebrex, Lyrica, Viagra, Nasonex, and more – have no record of Tietolman's companies or the names under which he operated. PX44 ¶ 12; PX45 ¶ 11; PX46 ¶ 9, Att. C; PX48 ¶¶ 5, 8; PX49 ¶

9; PX92 ¶ 9, Att. B. Indeed, none of the drug companies the Federal Trade Commission contacted had any affiliation with Tietolman's operation. *Id.*

44. Furthermore, these drug companies' patient assistance programs provide medication only to consumers who qualify based on income, household size, and insurance status, and even then not all of their medications are free. PX44 ¶¶ 5-8, Atts. D-G; PX45 ¶¶ 4-7, Att. A; PX46 ¶¶ 4-5, Att. A; PX47 ¶¶ 17-19; PX49 ¶¶ 4-6; PX92 ¶¶ 4-5, Att. A.

45. Additionally, as described in Section III.B below, Tietolman's operation made unauthorized debits to the very bank accounts his "fraud monitoring" programs (*e.g.*, PX15 Atts. H, I) were supposed to protect.

46. Tietolman's own scripts demonstrate that his telemarketers were not calling to "renew" previously purchased programs; telemarketers made the same "year" or "two year" representations about how long a consumer had purportedly been in a program regardless of who picked up the phone. PX15 Atts. RRR, TTT, YYY, WWW.

47. Contrary to their representations, Tietolman's telemarketers did not work for consumers' banks or electrical companies, the Social Security Administration, or the U.S. Senate; they worked for, and reported to, Ari Tietolman, who had no such affiliations. PX15 ¶¶ 7A, 7B.

vii. Tietolman's Own "Verification" Scripts Demonstrated that His Representations Were False.

48. After obtaining consumers' bank account information, telemarketers led consumers through a "verification" script and recorded the consumer's responses. *See, e.g.*, PX15 Atts. A, J, PPP.

49. These scripts contradicted many of the representations telemarketers made to obtain account information, by stating that that the telemarketers were not affiliated with banks

or government agencies and by stating that Tietolman's operation would charge consumers. *Id.*

50. These scripts did not clarify consumers' impressions, however; instead, they only created false "authorization" records Tietolman could use against complaining consumers. *See* PX2 ¶ 4; PX12 ¶¶ 7-8.

51. Before reading the "verification" scripts, telemarketers discouraged consumers from asking questions and coached them to "keep all your answers to a clear yes and we will be done in no time." PX15 Att. K; *see also* PX15 Att. B.

52. Some scripts even directed telemarketers to practice with consumers before recording their responses. PX15 Att. B.

53. In one instance, a Tietolman telemarketer restarted a recording three times because the consumer repeatedly questioned the contradictions between the telemarketer's original representations and the verification script. PX2 ¶ 4. In another, Tietolman's telemarketers tried to use a "verification" recording to deny a consumer a refund even though the tape included the consumer's voice saying, "No, what is this? … Do not charge my account." PX12 ¶¶ 7-8.

54. Tietolman's operation often cited the existence of "verification" recordings when responding to complaints forwarded by the BBB or state Attorneys General, claiming the recordings proved that consumers had authorized the debits. PX15 Atts. P, X, Y, CC, FF, KK, NN, OO, UU, WW, DDD, GGG. Tietolman and his employees also cited the recordings as proof of authorization in response to banks' inquiries about consumer complaints and returns. PX51 Att. C; PX52 at 4.

B. Tietolman's Operation Debited Millions from Consumers' Accounts Without Authorization.

55. After obtaining a consumer's bank account information, Tietolman used it to

generate a Remotely Created Check ("RCC") made out to one of the U.S. Front Companies or their fictitious trade names in amounts up to $396. PX16 ¶¶ 8-10; PX17 ¶ 6; *see also* PX2 Att. B; PX3 Att. B; PX5 Att. B; PX6 Att. A; PX9 Atts. A, B; PX10 Att. B; PX11 Att. A; PX12 Att. A; PX95 ¶ 77, *supra* ¶ 10.

56. In some instances, consumers' accounts were debited multiple times, increasing their total losses. PX3 ¶¶ 5-7, 10-12; PX5 ¶ 3c, Atts. B and C; PX7 ¶ 6; PX9 ¶¶ 3, 6; PX10 ¶¶ 5, 7.

57. RCCs are paper checks that do not bear the payor's signature. PX50 ¶ 11; *see, e.g.,* PX2 Att. B (image of RCC payable to Legal Eye). RCCs are often used in fraudulent transactions because all a person needs to create an RCC is the bank account and routing numbers that appear at the bottom of a check (PX50 ¶ 15) – precisely the information Tietolman's telemarketers sought from consumers (Section III.A, *supra*).

i. Tietolman Used Front Companies to Debit Consumers' Accounts.

58. Because Canada's payment-clearing system bans the use of RCCs (PX50 ¶ 19), Tietolman could not deposit consumers' funds directly into Canadian accounts. He therefore enlisted the U.S. Defendants to establish the U.S. Front Companies and open dozens of bank accounts in their names at more than 20 banks across the United States. PX16 ¶¶ 8-10; PX17 ¶¶ 5-6; PX77.

59. Tietolman told the U.S. Defendants which banks to approach for new accounts. PX17 ¶¶ 5-6, 14; PX41. While only the U.S. Defendants were signatories to the accounts, (PX52 – PX74), they granted Tietolman authority over the accounts or access to online banking. PX17 ¶ 5; PX57 at 5-7; PX58 at 3.

60. At Tietolman's direction, the U.S. Defendants deposited the RCCs Tietolman

generated into their stateside accounts, thus debiting consumers' accounts. PX16 ¶ 9; PX17 ¶ 6; PX75; *see also* PX95 ¶¶ 80, 83, 86, *supra* ¶ 10.

61. Consumers had no opportunity to prevent the debits, and could only protest if they later noticed the withdrawals on their bank statements. PX1 ¶ 4; PX4 ¶¶ 13-14; P6 ¶¶ 5-6; PX7 ¶ 9; PX8 ¶ 5; PX10 ¶ 5; PX11 ¶¶ 5-6; PX12 ¶¶ 4-6; PX13 ¶¶ 5-7.

ii. Tietolman's Front Companies Incurred Massive Return Rates.

62. "Returns" occur when a payor's (consumer's) bank either refuses to pay a check or demands that the payee's (Tietolman's) bank re-credit the funds. PX50 ¶¶ 13-14. Returns can occur automatically (for instance, because the payor's account has insufficient funds) or because a payor asserts that the check was unauthorized. *Id.*

63. Both Tietolman's overall return rates and return rates for checks disputed as unauthorized were astronomically high. PX75; PX50 ¶ 3.

64. For instance, at Tietolman's operation's highest-volume bank – Susquehanna Bank, which accepted more than $12 million of his deposits – 45.09% of deposits by value were returned, including the 16.09% of deposits by value that were returned as unauthorized. PX75.

65. Vist Bank and Customers Bank collectively accepted more than $4 million in Tietolman's deposits; the U.S. Front Companies' overall return rates there were, respectively, 44.34% by value and 46.23% by value. PX75.

66. The story was similar at all banks Tietolman's operation used, as their overall return rates by value ranged from 7.79 % to 46.23%. PX75.

67. In total, more than 43% of Tietolman's deposits by value were returned. PX75.

iii. Tietolman's Return Rates Greatly Exceeded Industry Norms.

68. Professor Amelia Boss compared Tietolman's operation's overall and

unauthorized return rates to several benchmarks.

69. Professor Boss is an expert in banking and payment systems. PX50 ¶¶ 5-9. She is currently the Trustee Professor of Law at Drexel University's law school, and she has taught about banking and payment systems for 25 years. PX50 ¶ 6.

70. Professor Boss served on the Members Consultative Committee of the American Law Review Institute on the most recent changes to the Uniform Commercial Code (UCC) Articles 3 and 4, which set out uniform rules regarding checks and check processing. PX50 ¶ 6. Professor Boss is a member of the Permanent Editorial Board of the UCC, which works closely with the Federal Reserve Banks in matters regarding check and electronic funds payment systems. PX50 ¶ 6.

71. Professor Boss consults with attorneys for businesses and financial institutions on payment practices. PX50 ¶ 9.

72. Professor Boss testified about fraudulent payment processing before the Honorable Timothy Rice of the Eastern District of Pennsylvania in *United States v. Payment Processing Center LLC*, F. Supp. 2d 319, 321-22 (E.D. Pa. 2006), where her opinion was adopted by the Court. PX50 ¶ 9.

73. Professor Boss referenced several benchmarks to draw conclusions in this case, including national averages and cutoffs for ACH transactions, checks, and credit cards. PX50 ¶¶ 30-54.

74. Tietolman's return rates consistently exceeded each applicable benchmark by many orders of magnitude. PX50 ¶¶ 34-35 (unauthorized ACH returns), 38-39 (total ACH returns), 42-43 (total check returns), 46-49 (unauthorized check returns), 51-52 (credit card chargebacks).

75. For example, only 0.3% of checks were returned unpaid nationwide in 2012. PX50 ¶ 41. Tietolman's by-value return rates ranged from 29 times greater than this national average to 154 times greater than the national average. PX50 ¶¶ 42-43.

76. Furthermore, in 2012, only $0.39 of each $10,000 spent by check was returned as unauthorized, for a national by-value unauthorized return rate of 0.0039%. PX50 ¶ 45. Tietolman's unauthorized return rates by value were up to 4,333 times greater than the national average. PX50 ¶¶ 46-47.

77. Finally, the Federal Reserve Bank considers overall return rates above 10% to be a *prima facie* indicator of fraud. PX50 ¶¶ 29, 53. At 43.07%, Tietolman's total return rate by value far outstripped the Federal Reserve Bank's benchmark. PX50 ¶ 53.

iv. Tietolman's Return Rates, Banking History, and Consumer Testimony Demonstrate that His Operation Debited Consumers Without Authorization.

78. Tietolman's operation's return rates greatly exceeded all industry norms and benchmarks. PX50 ¶ 54. Tietolman's return rates also remained consistently high. PX50 ¶ 54, app'x A, app'x C. Professor Boss concluded that the "only plausible reason [for the return rates] is the existence of fraudulent behavior in the creation of these remotely created checks." PX50 ¶ 54.

79. Tietolman's astronomical return rates also alarmed his U.S. Front Companies' banks. In several instances, banks terminated the U.S. Front Companies' deposit privileges after expressing concerns about excessive returns.[3] PX51 ¶¶ 12, 16-17, Att. E; PX52 at 9-13, 16;

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[3] Additional banks terminated Tietolman's operation's accounts without documenting the reason. PX55 at 12; PX57 at 13; PX61 at 5. Tietolman also ceased making deposits at the remainder of his operation's banks, often within months and after accruing excessive returns, but not all banks provided documentation of the terminations or closures of Tietolman's operation's accounts. PX76.

PX66 at 6; PX67 at 9.

80. Tietolman sought, often unsuccessfully, to convince worried banks to continue accepting his deposits despite the returns.[4] PX16 ¶¶ 13-14; PX17 ¶¶ 12-13; PX51 ¶¶ 8, 12-17; PX58 at 4-11.

81. Tietolman directed the U.S. Defendants to open accounts at new banks to keep deposits flowing. PX16 ¶ 4; PX17 ¶ 14; *see also* PX76. Specifically, Tietolman told U.S. Defendant Barczai to look for banks that did not ask too many questions, and to prioritize "those that seem more casual and less strict." PX41.

82. Multiple consumers testified that they did not authorize Tietolman's operation to debit their accounts. PX1 ¶ 4; PX2 ¶ 6; PX4 ¶¶ 5, 12, 14; PX8 ¶ 4; PX10 ¶ 5; PX11 ¶ 2; PX12 ¶ 4; PX13 ¶ 4. Additionally, 172 consumers complained to the FTC and BBBs about Tietolman's operation, almost invariably stating that the U.S. Front Companies debited their accounts without authorization. PX14 ¶¶ 9-10.

83. Taken together, Tietolman's sustained excessive returns, consumers' testimony, and Tietolman's history of moving from bank to bank demonstrate that his operation systematically debited consumers' accounts without authorization. *See* PX50 ¶ 60.

C. Tietolman's Unauthorized Debits Caused Nearly $11 Million in Consumer Harm.

84. From 2010 through March of 2014, when the Court entered a Temporary Restraining Order and then Preliminary Injunctions to halt Tietolman's scheme (DEs 6, 13-16), the U.S. Front Companies deposited a total of $18,856,360.56 in RCCs. PX75; PX76.

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[4] In one instance, Tietolman apparently communicated with a bank while impersonating U.S. Defendant Charles Borie, as one email to the bank originated from Borie's email account but bore Tietolman's electronic signature at the bottom. PX57 at 17-18.

85. As described above, these RCCs were returned at astonishing rates, for a total of $8,122,104.75 in returns. PX76.

86. Tietolman's scheme therefore netted $10,734,255.81 in unauthorized debits from consumers' bank accounts.

IV. Tietolman's Role

A. Tietolman Directed and Controlled the Deceptive Scheme.

87. Tietolman was the mastermind and operational head of the scheme. PX15 ¶ 7A-B; PX16 ¶¶ 4-7; PX17 ¶¶ 2-10; PX36; PX40 at 1 (Msgs. 87, 90).

88. Tietolman is the owner and director of corporate defendants Landshark and Madicom. PX79, PX80; PX95 ¶¶ 3-4, *supra* ¶ 10.

89. Using corporate defendants Landshark and Madicom, Tietolman directed his operation's telemarketing activity from his Canadian offices. Tietolman's main boiler room, where he kept an office and where the RCMP arrested him, was located at Landshark and Madicom's corporate address at 181 boul. Hymus in Pointe-Claire, Quebec. PX15 ¶¶ 6, 7A; PX79; PX80. Telemarketers at both of Tietolman's Canadian boiler rooms confirmed that they reported to Tietolman. PX15 ¶¶ 7A, 7B. Tietolman wrote a letter confirming that Adam Harper, his assistant in the Canadian operation, worked for Landshark and reported to Tietolman. PX15 Att. ZZZ.

90. Tietolman recruited the U.S. Defendants[5] to establish the U.S. Front Companies and bank accounts so that he could process payments through U.S. banks. PX17 ¶ 2; PX16 ¶ 2;

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[5] Given that the FTC obtained testimony from Defendants Ferry and Barczai but not from Defendant Borie, this memo references Ferry's and Barczai's roles in greater detail. However, the evidence demonstrates that Borie's role was substantially similar to Ferry's and Barczai's.

PX95 ¶¶ 79, 82, 85, *supra* ¶ 10.

91. According to Defendants Ferry and Barczai, Tietolman directed their daily activity. PX16 ¶¶ 4-12[6]; PX17 ¶¶ 2-10. He instructed them about where they should deposit consumers' checks, when to open new bank accounts, and when to wire funds. PX16 ¶¶ 4-12; PX17 ¶¶ 4-7; *see also* PX21-25; PX40 at 6 (Msg. 8331); PX95 ¶¶ 22-24, 79-87, *supra* ¶ 10.

92. By Tietolman's own admission, he set the pricing for the scheme and determined how much to pay employees. PX40 at 1 (Msg. 87).

93. Tietolman also sought to establish accounts with new payment processors himself. *See* PX31; PX36. In communications with prospective processors, he referred to the operation as "my group" and identified some of the "products and services" as Patient Assistance Plus, Trust One Services, and Consumers First. PX36. In another email, he referred to First Consumers as "mine and my cousin[']s company." PX31.

94. Tietolman coached Ferry and Barczai on how to approach banks to open new accounts. PX19, PX34, PX41. For example, he told Barczai to start with banks "that seem more casual and less strict" and warned him to "[t]ake note if any [banks] start asking crazy questions." PX41. He also instructed him to avoid going into details about what the specific products and services would be. PX41.

95. He similarly advised Ferry to "play ignorant" about taxes when talking to a new payment processor, and told Ferry not to call the bank when there was an issue with deposits to avoid causing more problems. PX19; PX34.

96. He also told the U.S. Defendants when to operate under a different U.S. Front

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[6] Tietolman gave directions to Barczai through a Canadian associate and Barczai relative, Adam Harper. PX16 ¶¶ 2-12.

Company or fictitious name. For example, in a September 2012 email, he wrote "I would like to have SAS DBA replace Legal Eye at Susquehanna, but not if it means it will bring unwanted attention to our accounts." PX21.

97. Tietolman authorized payments and transfers from the U.S. bank accounts. PX40 at 5 (Msg. 7903), 7 (Msg. 9338), 8 (Msg. 9686). On one occasion, he wrote Ferry, "Always verify the deposit amount with me before making it." PX40 at 2 (Msg. 107).

98. He frequently directed the U.S. Defendants to transfer funds from the U.S. bank accounts to his Canadian companies, Landshark Holdings and Madicom. PX16 ¶¶ 9, 11; PX17 ¶ 7; PX23-25; PX27; *see also* PX78. Each time he gave explicit instructions, including how much to wire, and to which account. PX16 ¶¶ 9, 11; PX17 ¶ 7; PX23-25; PX40 at 2 (Msg. 291), 4 (Msgs. 594, 702, 711), 5 (Mgs. 753, 7903), 6 (Msg. 8471), 7 (Msgs. 9195, 9338), 8 (Msgs. 9515, 9632, 9686).

99. In an April 2013 text, he wrote to Ferry, "the citiwire must be sent to Fraudwatch, not [F]irst[C]onsumers . . . I don't want him to think we already have new accounts and/or are attempting [t]o funnel out all our funds or something like that . . . if he tries contacting you, same rule, get in touch with me ASAP. " PX40 at 5 (Msg. 1012).

B. Tietolman Actively Participated in the Deceptive Scheme.

100. Tietolman closely tracked activity in the U.S. bank accounts. He noticed missing or incorrect deposits, asked for frequent updates about deposits, and accessed many accounts himself. PX17 ¶ 6; PX18-19; PX40 at 6 (Msgs. 8250, 8331); PX57 at 5, 11; PX58 at 3-13.

101. For instance, he wrote Ferry that "I know for a fact that close to 10k is missing on FRW [Fraud Watch] from Friday, and . . . there should be another 10k approx for PAP [Patient Assistance Plus] from [the] past 24-48 hours." PX18.

102. He corresponded directly with the U.S. banks about the accounts, often to persuade them to keep an account open or grant a longer grace period to compensate for high returns. PX28-29; PX33; PX51 Atts. B-D; PX58 at 4-13.

103. Tietolman also preferred to respond directly to banks that raised questions about high return rates or unauthorized transactions. PX26; PX32; PX58 at 6. On one occasion, Tietolman chastised Ferry for responding to the bank himself, telling Ferry "[y]ou should let me write these replies." PX32.

104. When banks emailed one of the U.S. Defendants directly to inquire about unauthorized returns or problems with an account, Tietolman often responded on their behalf. PX51 at 9-10; PX57 at 17.

105. Tietolman transferred more than $4 million from the U.S. Front Companies to his Canadian companies, Landshark and Madicom. PX78.[7]

C. Tietolman Knew that His Scheme Generated High Returns.

106. Tietolman received reports from banks showing the number of returns his attempted charges generated. PX38-39; PX58 at 6. These reports often contained affidavits consumers filed with their banks, alleging that the debits from their bank accounts were unauthorized. PX38 at 3-4; PX39 at 5-6, 11-12, 14-15, 20, 26-27.

107. Tietolman also carefully monitored returns in the U.S. bank accounts. PX22; PX35; PX40 at 8 (Msg. 9622). For example, in an October 30, 2012 email to Ferry, Tietolman wrote "I'm noticing that returns for [the last two days] are way higher than they should be." PX35.

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[7] This figure likely understates the total amount transferred from U.S. Front Companies, as it summarizes records from only 8 U.S. banks. PX78. Tietolman's Front Companies maintained accounts at more than 20 banks. PX77.

108. Tietolman's excuses for the high returns varied: he blamed increases in return on a new direct mail campaign (PX58 at 10-11), faulty check verification software (PX51 Att. B), a third-party marketing group (PX51 Att. C), or a recently launched campaign with an unexpectedly "high attrition rate." (PX33).

109. Despite his scheme's history of high returns and terminated accounts by previous banks, Tietolman told banks that they were "really at no risk." PX28 at 2.

110. However, in preparing materials for a payment processing application, Tietolman acknowledged the scheme's unauthorized return rate was at least 3 to 5 percent and directed Ferry to tell banks that the return rate was between 15 and 25 percent. PX34.

D. Tietolman Knew Consumers Complained that His Scheme's Charges Were Not Authorized and that His Telemarking Pitches Were Deceptive.

111. Tietolman personally received complaints forwarded from state attorneys general and BBBs. Ferry routinely forwarded Tietolman the consumer complaints he received at the First Consumers Pennsylvania addresses. PX17 ¶ 9.

112. Ferry also forwarded him complaints that consumers filed with their banks. PX38-39.

113. In addition, banks alerted Tietolman that consumers had complained his charges were unauthorized. *E.g.*, PX26; PX58 at 6.

114. In a March 2014 text to Ferry, Tietolman acknowledged that a bank had alerted him that "they are getting a large volume of affidavits and law enforcement." PX40 at 5 (Msg. 1022).

115. Tietolman demanded that he receive complaints from Attorneys General and the BBBs. PX37. When he learned that he had not seen all such complaints, he wrote that "all AG & BBB are to pass by me f[ir]st. . . . I need to see them." PX37.

116. At least fifty such complaints—forwarded from state attorneys general, BBBs, local law enforcement, and banks in the United States—were recovered from Tietolman's Canadian telemarketing offices. PX15 ¶ 11; PX15 Atts. M-NNN.

117. Many included express statements by consumers that they did not authorize Tietolman's U.S. Front Companies to take money from their accounts. PX15 Atts. AAA, HHH-JJJ. Others complained that, despite multiple attempts, they had not received a refund. PX15 Atts. AA, CC, JJ, KK, OO, RR.

118. Many of the complaints recovered from Tietolman's boiler rooms stated that his telemarketers misrepresented the nature of their services, claimed they were calling to "verify" account information, claimed affiliations with the consumers' banks or the U.S. government, or took advantage of vulnerable elderly consumers. PX15 Atts. P, U, V, X, Y, AA-DD, FF-GG, JJ, KK, QQ, RR, TT, VV, XX, AAA, EEE, FFF, HHH, NNN.

119. At least one state Attorney General and one BBB office wrote the U.S. Front Companies warning that they had received multiple consumer complaints; both letters were forwarded to Tietolman's Canadian office. PX15 ¶ 11; PX15 Atts. KKK-LLL. The BBB letter noted that the complaints "reveal a pattern of taking funds from consumers['] bank account without their authorization." PX15 Att. KKK.

120. In addition, Patient Assistance Plus paid a $2,500 fine to the Utah Division of Consumer Protection for violating its telemarketing fraud statute. PX15 Att. MMM.

ARGUMENT

The Court may grant summary judgment when evidence in the record shows "there is no genuine issue as to any material fact … and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Gammino v. Cellco P'ship*, 527 F. Supp. 2d 395, 397 (E.D. Pa. 2007). To defeat summary

judgment, the non-moving party must provide, or point to, evidence demonstrating a genuine issue of material fact. *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 238 (3d Cir. 2007). As described above, the FTC has presented voluminous uncontroverted evidence, including the testimony of Tietolman's employees and his own statements, proving all aspects of Tietolman's scheme and his role in it.

Furthermore, Tietolman's conduct during the discovery period precludes him from providing any evidence demonstrating a genuine issue of material fact. Courts may exclude evidence offered in response to summary judgment as a discovery sanction if the circumstances are especially egregious. *See Steele v. Aramark Corp.*, 535 F. App'x 137, 143 (3d Cir. July 18, 2013); *SuperMedia LLC v. Morley*, No. 13-cv-176, 2014 WL 5023386, at *11-12 (E.D. Pa. Oct. 8, 2014).

Here, Tietolman's behavior warrants such a sanction. First, Tietolman is in contempt of the Preliminary Injunction for, among other things, failing to provide required documents and information. DE 27; DE 39. Second, while Tietolman was still represented, the FTC served a deposition notice on Tietolman through his counsel. PX93. The deposition did not occur because Tietolman's counsel informed the FTC that he would not attend. PX94. Finally, on August 28, 2014, the FTC served Requests for Admission ("RFAs") upon Tietolman by email and Federal Express, including RFAs covering all aspects of his scheme. PX95. The FTC obtained confirmation that Federal Express delivered the RFAs to Tietolman on September 2, 2014. PX95 Att. A. Mr. Tietolman never responded to the FTC's RFAs. Thus, each of the points raised in the RFAs is deemed admitted. Fed. R. Civ. P. 36(a)(3). Because Tietolman has already admitted all relevant facts by failing to answer the FTC's RFAs, and because his egregious refusal to engage in discovery permits the Court to strike any response he may file,

Tietolman cannot dispute any of the facts described in this motion.

As explained above, the undisputed facts establish that Tietolman's operation made misrepresentations to consumers to obtain their bank account information, then used the information to debit their accounts. These actions, for which Tietolman is personally liable, violated Section 5 of the FTC Act and the TSR. Monetary and injunctive relief against Tietolman are therefore appropriate.

I. As Alleged in Counts I and II of the FTC's Complaint, Tietolman's Operation Violated Section 5 of the FTC Act by Deceiving Consumers to Obtain Their Account Information.

An act or practice is "deceptive" under Section 5 if it involves a material representation or omission that is likely to mislead consumers acting reasonably under the circumstances. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *FTC v. NHS Sys., Inc.*, 936 F. Supp. 2d 520, 531 (E.D. Pa. 2013).

A. Tietolman Made Misrepresentations Through His Telemarketers.

Tietolman, through his telemarketing operation, lied to consumers in three ways.

First, Tietolman's telemarketers misrepresented the "services" his operation provided. For example, it is undisputed that telemarketers told consumers that Tietolman's prescription drug programs would "work directly" with drug companies to get the consumers "absolutely free" medication. SUF ¶ 27.[8] In fact, none of the major drug companies the FTC contacted had any relationship with the defendants. SUF ¶ 43. Furthermore, it is undisputed that telemarketers told consumers they were already qualified for the drug programs. SUF ¶ 26. In fact, the telemarketers cold-called consumers without asking even basic questions about their eligibility. SUF ¶ 26. Because consumers must meet certain requirements to qualify for the drug

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[8] Citations to SUF refer to the Statement of Undisputed Facts contained in this Memorandum.

companies' prescription assistance programs, many of the consumers Tietolman's telemarketers pitched likely were not even eligible for the promised services. SUF ¶ 44. Plus, even for eligible consumers, not all medications are included in the drug companies' assistance programs, and included medications are not always free. SUF ¶ 44. It is also undisputed that Tietolman's telemarketers promised their fraud monitoring programs would protect consumers' bank accounts from unauthorized debits. SUF ¶¶ 30-31. In fact, Tietolman's operation made unauthorized debits to the very accounts his telemarketers had promised to protect. SUF ¶¶ 55-83.

Second, Tietolman's telemarketers misrepresented that his operation would not debit consumers' accounts. They made these representations expressly to some consumers. SUF ¶ 29. In other instances, they told consumers they needed account information for "verification" purposes, leading consumers to reasonably believe their accounts would not be debited. SUF ¶¶ 34, 39-40, 42. Tietolman's telemarketers sometimes reinforced this impression by claiming they were renewing a previously-purchased service and that they already had consumers' account information. SUF ¶¶ 39-40. In fact, Tietolman's own telemarketing scripts and instructions show that his operation did not already possess consumers' account information and called consumers only to obtain it. SUF ¶¶ 39-40, 46. Furthermore, contrary to his telemarketers' representations, it is undisputed that Tietolman used consumers' bank information to create RCCs and remove money from their accounts. SUF ¶ 55.

Finally, Tietolman's telemarketers falsely claimed they were affiliated with consumers' banks, electrical companies, and government entities. SUF ¶¶ 35-36, 39. In fact, it is undisputed that Tietolman's telemarketers worked for and reported to him, and he had no such affiliation. SUF ¶ 47.

B. Tietolman's Misrepresentations Were Material.

The three types of misrepresentations Tietolman's telemarketers made were material. "'Explicit claims or deliberately-made implicit claims . . . are presumed to be material.'" *NHS Sys.*, 936 F. Supp. 2d at 531 (citing *In re Nat'l Credit Mgmt. Grp.*, 21 F. Supp. 2d 424, 441 (D.N.J. 1998)). It is undisputed that most of the claims Tietolman's telemarketers made, including claims about the services, claims about their affiliations, and promises not to debit consumers' accounts, were express. SUF ¶¶ 26-33, 35. These claims are therefore presumed material.

Furthermore, any claim—whether express or implied—is material if a reasonable consumer would consider the claim important in choosing a course of action. *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992); *see also FTC v. Davison Assocs.*, 431 F. Supp. 2d 548, 559 (W.D. Pa. 2006). All of Tietolman's claims were important to reasonable consumers in choosing a course of action and were thus material. Tietolman's false claims that his operation would "work directly" with drug companies to obtain "free" medication, or that his programs would protect consumers' accounts from fraud, were about the central characteristics of these programs. Claims about such characteristics "strike at the heart of a consumer's purchasing decision" and are therefore material. *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005); *see also In re Thompson Medical Co.*, 104 F.T.C. 648 (1984). The telemarketers' representations that they were affiliated with the government or consumers' banks or electrical companies led reasonable consumers to trust the telemarketers and, therefore, divulge bank account information. Indeed, in uncontested testimony, several consumers said they disclosed their account information because they believed they were speaking with a trusted entity. SUF ¶ 41. Similarly, the telemarketers' representations that they needed account information for "verification" created the impression that consumers' accounts would not be debited. This

representation was material because, as consumers' uncontested testimony shows, some victims disclosed their bank account information because they believed they would not be charged. SUF ¶ 42.

C. Tietolman's "Verification" Scripts Did Not Cure His Deception.

Tietolman could not cure his deception through the use of recorded "verification" scripts, which he used as cover with banks, law enforcement, and complaining consumers. To determine whether marketing is deceptive, the Third Circuit considers the communication as a whole, "without emphasizing isolated words or phrases apart from their context." *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976); *see also Nat'l Credit Mgmt. Grp.*, 21 F. Supp. 2d at 441; *Davison*, 431 F. Supp. 2d at 559-60.

As described above, Tietolman's own scripts show that his telemarketers opened their calls with deceptive pitches designed to convince consumers to divulge bank information. SUF ¶¶ 26-40. After the telemarketers obtained consumers' account numbers, they led the consumer through a recorded "verification" call. SUF ¶¶ 48-53. Tietolman's "verification" scripts contradicted many of the representations in telemarketers' initial pitches, by disclaiming affiliations with consumers' banks and by stating that consumers would be charged for services. SUF ¶ 49. Before the verification call, however, telemarketers coached consumers not to ask questions and told consumers to answer only "yes" to all questions. SUF ¶¶ 51-52. Telemarketers restarted the recordings if consumers balked at the questions, or ignored consumers' apparent confusion. SUF ¶ 53. The few disclosures buried in these "verification" scripts did not cure the initial misrepresentations, especially because telemarketers only read the scripts after they obtained consumers' account information. *See Beneficial Corp.,* 542 F.2d at 617. This is particularly true because Tietolman targeted elderly and vulnerable consumers, SUF ¶¶ 16-19, who were even less likely to understand a confusing disclosure given after a

misleading pitch. *See FTC Policy Statement on Deception*, appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984) ("When representations or sales practices are targeted to a specific audience, such as children, the elderly, or the terminally ill, the Commission determines the effect of the practice on a reasonable member of that group.").

In fact, the real reason Tietolman made the recordings was not to clarify his early misrepresentations, but to stymie complaining consumers and avoid giving refunds. Consumers gave uncontroverted testimony that Tietolman's companies played back "verification" recordings when they called to seek refunds.[9] SUF ¶ 53. Furthermore, Tietolman's own employees often mentioned the recordings in responses to consumer complaints from banks, BBBs, or state Attorneys General, claiming the recordings demonstrated consumers' authorization to debit their accounts. SUF ¶ 54.

II. As Alleged in Count III of the FTC's Complaint, Tietolman's Operation Violated Section 5 of the FTC Act By Unfairly Debiting Consumers' Accounts without Authorization.

Tietolman's unauthorized debits constituted an unfair practice in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(n). An act or practice is "unfair" under Section 5 if it: (1) causes or is likely to cause substantial injury to consumers; (2) that is not reasonably avoidable; and (3) that is not outweighed by countervailing benefits to consumers or competition. 15 U.S.C. § 45(n); *see also Int'l Harvester Co.*, 104 F.T.C. 949, 1064 (1984); *NHS Sys.*, 936 F. Supp. 2d at 531.

As described above, uncontroverted bank records of Tietolman's massive return rates and evasive behavior, a banking expert's uncontested analysis, and uncontroverted consumer

[9] In some instances, Tietolman's companies claimed the recordings were proof of authorization even though the consumers in the recordings demonstrated confusion or explicitly declined the charges. SUF ¶ 53.

testimony establish that Tietolman systematically debited consumers' accounts without authorization. SUF ¶¶ 55-83. Courts have repeatedly held that unauthorized charges or debits—like those at issue here—violate Section 5. *See NHS Sys.*, 936 F. Supp. 2d at 531; *FTC v. Wells*, 385 F. App'x 712, 713 (9th Cir. 2010); *FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1004 (N.D. Cal. 2010); *FTC v. Kennedy*, 574 F. Supp. 2d 714, 721 (S.D. Tex. 2008); *FTC v. Windward Mktg., Inc.*, No. 96-615F, 1997 WL 33642380, at *13 (N.D. Ga. Sept. 30, 1997). Indeed, Tietolman's scheme meets all three prongs of the unfairness standard.

First, Tietolman's practices caused substantial injury. It is undisputed that Tietolman debited each consumer between $99 and $396, and sometimes followed up with repeated withdrawals, meaning many consumers lost hundreds of dollars. SUF ¶¶ 28, 31, 55-56. Even considered on a consumer-by-consumer basis, such injury is "substantial." Furthermore, courts consider whether injury is "substantial" in the aggregate, so even a small individual injury would be substantial if inflicted on many consumers. *See FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985) (quoting *FTC Policy Statement on Deception*); *see also NHS Sys.*, 936 F. Supp. 2d at 531. The U.S. Front Companies' own bank records show that, in the aggregate, Tietolman took nearly $11 million from consumers' bank accounts. SUF ¶¶ 84-86.

Second, this injury was not reasonably avoidable. As courts have observed, when analyzing unauthorized billing under the unfairness standard, the burden does not fall "on defrauded customers to avoid charges that were never authorized to begin with." *Inc21.com*, 745 F. Supp. 2d at 1004; *see also FTC v. Crescent Publ'g Grp.*, 129 F. Supp. 2d 311, 322 (S.D.N.Y. 2001). Tietolman obtained consumers' account information through deception, often targeting elderly and vulnerable consumers who were least able to protect themselves. *Cf.* FTC Policy

Statement on Deception, 103 F.T.C. at 174 (FTC analyzes deception based on effect on targeted audience, such as the elderly). Tietolman's victims often did not even know that his operation would debit their accounts until the debits appeared on their bank statements. SUF ¶ 61. These consumers therefore could not reasonably avoid Tietolman's unauthorized debits. *See NHS Sys.*, 936 F. Supp. 2d at 531 (finding unfairness and concluding "consumers could not reasonably avoid the limitless financial consequences of providing their account information for a supposed discount healthcare program"). Nor did consumers' ability to request reversal of the charges make injury avoidable, as even consumers who successfully reversed charges had to expend "time, trouble, aggravation, and money" to do so. *FTC v. Neovi, Inc.*, No. 06- 1952, 2009 WL 56139, at *4 (S.D. Cal. Jan. 7, 2009).

Finally, the massive harm caused to victimized consumers was not outweighed by countervailing benefits. Tietolman provided no benefit to consumers or competition when he effectively stole consumers' money, whether under the guise of sales transactions, by pretending to "verify" existing services, or when his telemarketers masqueraded as bank and government officials. *See Inc21.com*, 745 F. Supp. 2d. at 1004 ("it cannot be said that defendants' 'customers' benefitted at all from services that they never agreed to purchase, didn't know were being provided to them, and never wanted in the first place"); *see also Kennedy*, 574 F. Supp. 2d at 721; *Crescent Publ'g Grp.*, 129 F. Supp. 2d at 322.

III. As Alleged in Counts IV through VIII of the FTC's Complaint, Tietolman's Operation Violated Several Provisions of the Telemarketing Sales Rule.

Tietolman's scam also violated the Telemarking Sales Rule (TSR), 16 C.F.R. § 310, by failing to disclose material facts, misrepresenting total cost, misrepresenting telemarketers' affiliation, and failing to obtain express verifiable authorization and informed consent before debiting consumers' accounts. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. §

6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the TSR also constitutes a violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

The TSR prohibits sellers and telemarketers from making misrepresentations or omissions, and from engaging in certain billing practices.

First, the TSR prohibits failing to disclose clearly and conspicuously all material restrictions, limitations, or conditions on the goods or services offered before a consumers pays. 16 C.F.R. § 310.3(a)(1)(ii). Tietolman violated this provision by withdrawing money from consumers' bank accounts without clearly disclosing that he would do so, or that he would not provide the prescription drug services or fraud protection as promised. SUF ¶¶ 29, 34, 39-40, 42-45, 55. Second, the TSR prohibits telemarketers from misrepresenting the total costs to purchase goods or services, or their affiliation with any person or government entity. 16 C.F.R. § 310.3(a)(2)(i), (vii). Tietolman's telemarketers misrepresented, expressly and by implication, that they would not charge consumers anything and that they were affiliated with the government or with consumers' banks or electrical companies. SUF ¶¶ 29, 34-36, 39-42, 47-48. Third, the TSR prohibits telemarketers from billing or debiting consumers' accounts without their express informed consent. 16 C.F.R. § 310.4(a)(7). Tietolman debited consumers' accounts without their knowledge, let alone their express informed consent. SUF ¶¶ 55-83. Finally, the TSR requires telemarketers to obtain "express verifiable authorization" to debit consumers, and, if the authorization is oral, to make an audio recording of the authorization and telemarketers' communication of specified information. 16 C.F.R. § 310.3(a)(3)(ii). Tietolman debited consumers' accounts without obtaining "express verifiable authorization," by coaching consumers through confusing verification recordings even though consumers had not actually authorized any debits. SUF ¶¶ 48-52.

IV. The Proposed Injunctive Relief is Appropriate.

The injunctive relief the FTC seeks is necessary to protect consumers and prevent Tietolman from engaging in similar deceptive practices in the future. Under Section 13(b) of the FTC Act, courts may issue permanent injunctive relief for violations of the FTC Act. 15 U.S.C. § 53(b). Because Tietolman controlled and actively participated in the fraud, he is liable for such relief. Where, as here, a defendant has engaged in egregious conduct that indicates a likelihood of recurrent violations, strong permanent injunctive relief is warranted.

A. Tietolman is Individually Liable for Injunctive Relief.

Individuals are liable for injunctive relief based on a company's deceptive acts or practices if they "participated directly in the deceptive acts or had the authority to control them." *NHS Sys.*, 936 F. Supp. 2d at 533-34 (citing *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009)); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 574 (7th Cir. 1989). Active involvement in business affairs, assuming the duties of a corporate officer, or controlling, directing or formulating the violative policies and practices demonstrate authority to control. *NHS Sys.*, 936 F. Supp. 2d at 533-34 (holding individuals liable who supervised operations, directed payments, and managed customer service representatives) (citing *FTC v. Chinery*, No. 05-3460, 2007 WL 1959270, at *6 (D.N.J. July 5, 2007)); *see also* Opinion, *FTC v. Magazine Solutions, LLC*, No. 7-692, at 20 (W.D. Pa. Dec. 1, 2008) *aff'd*, 432 F. App'x 155 (3d Cir. 2011) (holding individual liable who formulated, directed, controlled acts and practices of corporate defendants).

There is no dispute that Tietolman directly controlled the scheme and actively participated in its day-to-day operations. SUF ¶¶ 87-93. He was the owner and director of Canadian corporations Landshark and Madicom, SUF ¶ 88, and recruited individuals to carry out his scheme in the U.S. SUF ¶ 90. He exerted control over their every move, from establishing the U.S. Front Companies to wiring funds back to his Canadian companies. SUF ¶¶ 91, 94-99.

In addition, he actively participated in carrying out the fraud, including maintaining relationships with U.S. banks that were instrumental to furthering the scheme, and he sought to persuade banks to keep accounts open or overlook his astronomical return rates. SUF ¶¶ 102-104. He also sought to evade detection by banks and law enforcement by directing the U.S. Defendants to open new bank accounts and use various Front Companies and fictitious trade names. SUF ¶¶ 94-96. Further, he oversaw the employees who carried out the deceptive sales calls, monitored responses to consumer complaints, and directed the division of the scheme's profits. SUF ¶¶ 89, 97-98, 115. Tietolman tightly controlled and directed nearly every aspect of the operation. As such, he is liable for his operation's violations of the FTC Act.

B. Permanent Injunctive Relief is Necessary to Protect Consumers.

Strong injunctive relief is necessary to protect consumers from future harm. Permanent injunctive relief is appropriate where there is a "cognizable danger of recurrent violation." *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953). To determine the danger of recurrence, courts may consider the deliberateness and seriousness of the violation, the violator's record with respect to unfair practices, and the adaptability or transferability of the unfair practice to other products. *Sears, Roebuck and Co. v. FTC*, 676 F.2d 385, 392 (9th Cir. 1982) (citing *FTC v. Colgate-Palmolive* Co., 380 U.S. 374, 395 (1965)); *see also Davison*, 431 F. Supp. 2d at 560 (citing *W.T. Grant*, 345 U.S. at 633). The likelihood of future violations may be inferred from the totality of the circumstances and "even presumed, from past unlawful conduct, and the absence of proof to the contrary." *CFTC v. Am. Metals Exch. Corp.*, 693 F. Supp. 168, 172 (D.N.J. 1988); *see also SEC v. Bonastia*, 614 F.2d 908, 912 (3d Cir. 1980). Courts presented with evidence of systematic wrongdoing, as opposed to an isolated occurrence, are "more willing" to enjoin future misconduct. *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979) (citing *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972)); *see also FTC v. Gill*,

71 F. Supp. 2d 1030, 1047 (C.D. Cal. 1999) *aff'd*, 265 F.3d 944 (9th Cir. 2001) (imposing ban where defendants engaged in systematic pattern of misrepresentations).

The undisputed evidence demonstrates that, absent strong injunctive relief, Tietolman is likely to engage in harmful conduct in the future. For at least four years, he systematically targeted elderly consumers and used deceptive telemarketing practices to trick them into divulging their bank account information. SUF ¶¶ 12-19, 25, 37-38, 41-42. Once he did so, he used that information to steal their money for his personal benefit. SUF ¶¶ 55, 61, 82, 84-86, 105. Moreover, mounting warnings from banks and law enforcement that his practices violated the law did not deter him. SUF ¶¶ 106-120. Indeed, despite these warnings, he continuously switched bank accounts, created front companies, and masked the connections between business entities, demonstrating his determination to continue perpetrating his scheme. SUF ¶¶ 3-4, 24, 58-59, 93-96. His actions show that, absent injunctive relief, he is likely to continue harming consumers in the future.

Specifically, Tietolman should be banned from telemarketing and from the use of remotely created checks. Injunctive relief should be "broa[d] enough to prevent [defendants] from engaging in similarly illegal practices." *Colgate-Palmolive*, 380 U.S. at 395; *see also NLRB v. Express Publ'g Co.*, 312 U.S. 426, 435 (1941) (courts have "broad power" to restrict activity that "may fairly be anticipated from the defendant's conduct in the past"). Therefore, particularly where defendants demonstrate a propensity for engaging in illegal activity, courts impose bans enjoining similar conduct. *See, e.g.*, *FTC v. John Beck Amazing Profits, LLC*, 888 F. Supp. 2d 1006, 1013 (C.D. Cal. 2012) (telemarketing ban); *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1233 (D. Nev. 2011) (ban on marketing business opportunities); *FTC v. Neiswonger*, 494 F. Supp. 2d 1067, 1084 (E.D. Mo. 2007) (same); Order for Permanent

Injunction (DE 114), *FTC v. Bay Area Bus. Council, Inc.,* No. 02-5762 (N.D. Ill. Apr. 15, 2004) (telemarketing ban), *aff'd*, 423 F.3d 627 (7th Cir. 2005); *FTC v. Ivy Capital, Inc.*, No. 11-283 JCM GWF, 2013 WL 1224613, at *16 (D. Nev. Mar. 26, 2013) (extending ban to telemarketing because scam was highly adaptable to other areas).

Tietolman has already demonstrated his tactics' transferability, purportedly offering different "services" but employing the same abusive telemarketing and using RCCs to steal consumers' money.[10] SUF ¶¶ 24, 26-33, 37-39, 55. Thus, Tietolman has demonstrated that he can easily adapt these tactics if he is not banned from the use of telemarketing and RCCs. Furthermore, RCCs are often abused by fraudsters, as Tietolman did in this case. *See* Notice of Proposed Rulemaking, Telemarketing Sales Rule, 16 CFR Part 310, 78 Fed. Reg. 41200, 41202-41203 (July 9, 2013). Banning Tietolman from using RCCs would keep this dangerous instrument out of the hands of an individual who has already shown a propensity to abuse it.

In addition, the proposed injunctive relief would require Tietolman to disclose material payment terms to consumers before charging a financial account. It would also prohibit him from misrepresenting any material facts about any product or service he sells. Such restrictions will further ensure that Tietolman cannot transfer his propensity for deceptive practices to other products or services. Finally, the proposed relief includes ancillary provisions to assist the FTC in monitoring and enforcing compliance with the order, including recordkeeping and reporting requirements. Such provisions are necessary to enforce compliance with the order and the FTC Act, and courts routinely grant them. *See, e.g., NHS Sys*., 936 F. Supp. 2d at 537; *FTC v. U.S.*

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[10] In fact, there is evidence that Tietolman engaged in additional campaigns beyond those described in this motion. For example, complaints and communications found at his telemarketing offices name additional campaigns, and Tietolman himself refers to other services that his operation runs. *E.g.*, PX15 Att. DD; PX31.

Sales Corp., 785 F. Supp. 737, 753 (N.D. Ill. 1992); *FTC v. Hope for Car Owners, LLC*, 2:12-cv-778-GEB-EFB, 2013 WL 322895, at *5 (E.D. Cal. Jan. 24, 2013).

V. The Proposed Monetary Relief is Appropriate.

The FTC's proposed monetary relief is needed to redress the economic harm Tietolman's unfair practices caused consumers. Courts may issue "any ancillary relief necessary to accomplish complete justice" under Section 13(b) of the FTC Act. *Pantron I*, 33 F.3d at 1102; *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997). This includes equitable monetary relief, including restitution to consumers injured by defendants' conduct. *Pantron I*, 33 F.3d at 1102 (*citing Amy Travel*, 875 F.2d at 571); *FTC v. Magazine Solutions, LLC*, 432 F. App'x 155, 158 n.2 (3d Cir. 2011). Because Tietolman not only controlled and participated in the scheme, but knew that his practices were deceptive, he is liable for the amount of restitution to consumers. The appropriate measure of that relief is the full amount that consumers lost because of Tietolman's unfair practices: $10.7 million.

A. Tietolman is Liable for the Harm He Caused Consumers.

Tietolman is individually liable for monetary relief because he knew that his practices deceived consumers. Defendants are liable for monetary relief if they had knowledge of a company's violative practices. *Amy Travel*, 875 F.2d at 574. Knowledge may be established by showing an individual had "actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth." *Id.*; *see also NHS Sys*., 936 F. Supp. 2d at 533-34 (citing *Stefanchik*, 559 F.3d at 93); *see also Freecom*, 401 F.3d at 1203 (individuals liable if they "knew or should have known" of the violative conduct). The degree to which an individual participated in business affairs is also probative of knowledge. *Amy Travel*, 875 F.2d at 574 (affirming liability for individuals who knew that scripts contained

misrepresentations and were aware of high volume of customer complaints and chargebacks); *NHS Sys*., 936 F. Supp. 2d at 533-34 (finding individuals knew or should have known practices were deceptive because they received complaints alleging consumers had been misled).

The undisputed facts overwhelmingly demonstrate that Tietolman knew his scheme deceived vulnerable consumers and debited their accounts without authorization. SUF ¶¶ 106-120. He received a continuous stream of consumer complaints and notices from banks and state attorneys general that consumers reported his attempted charges as unauthorized. SUF ¶¶ 106, 111-113. He monitored the responses to complaints and instructed employees to send complaints directly to him. SUF ¶ 115. He carefully monitored return rates at U.S. banks and instructed his U.S. employees on how to avoid raising red flags with banks. SUF ¶¶ 107, 94-95. Nor did Tietolman try to distance himself from his appalling return rates returns; instead, he personally defended those rates with banks and actively sought to convince them to continue doing business with his front companies. SUF ¶¶ 102-104, 108. The evidence establishes that Tietolman was fully aware of the extent to which his scheme misled and harmed consumers. As such, he is personally liable for the full amount of consumer harm.

B. The Appropriate Monetary Relief is the Full Amount of Harm to Consumers.

The proper amount of monetary relief is the full amount paid by consumers—less refunds—even if that amount exceeds the amount of Defendants' unjust enrichment. *Febre*, 128 F.3d at 535-36; *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996); *Pantron I*, 33 F.3d at 1103. In determining the appropriate amount, "[t]he Commission must show that its calculations reasonably approximated the amount of customers' net losses, and then the burden shifts to the defendants to show that those figures were inaccurate." *NHS Sys*., 936 F. Supp. 2d at 537 (quoting *Febre*, 128 F.3d at 535). Further, the FTC need not prove that each individual consumer relied upon Defendants' false claims to obtain consumer redress. *Amy Travel*, 875

F.2d at 573; *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993) (citations omitted). Requiring individual reliance by each consumer as a prerequisite for compensation "would be virtually impossible" and "thwart and frustrate the public purposes of FTC action." *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000) (citing *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991)); *see also FTC v. BlueHippo Funding, LLC*, 762 F.3d 238, 244 (2d Cir. 2014). Instead, where the fraud was widespread, the FTC is entitled to a presumption that each consumer subject to the conduct was injured. *See, e.g.*, *FTC v. Kuykendall*, 371 F.3d 745, 764-67 (10th Cir. 2004); *McGregor*, 206 F.3d at 1387-88; *see also Security Rare Coin*, 931 F.2d at 1316.

The FTC's proposed judgment of $10,734,255.81 is the correct amount of restitution because it reflects the amount of harm that Tietolman's deceptive practices caused consumers. Because the FTC's evidence demonstrates that fraud permeated Tietolman's scheme, it is presumed all of consumers' money was obtained through deception. *See, e.g.*, *Kuykendall*, 371 at 764-67; *McGregor*, 206 F.3d at 1387-88. Tietolman, through his scheme, debited a total of $18,856,360.56 from consumers. Accounting for $8,122,104.75 in returns, the net loss consumers suffered, and thus appropriate monetary relief, is $10,734,255.81

CONCLUSION

For the reasons given above, the FTC respectfully requests that the Court find Ari Tietolman liable for violations of Section 5 of the FTC Act and the TSR, enter the attached proposed Permanent Injunction, and enter judgment against Tietolman in the amount of $10,734,255.81.

Respectfully submitted,

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