

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ABILI-STAFF, LTD., ET AL.,

Defendants.

Civil Action No. SA10CA0088 OG

PLAINTIFF FEDERAL TRADE COMMISSION'S
MOTION FOR SUMMARY JUDGMENT

FEDERAL TRADE COMMISSION
Southwest Region
1999 Bryan Street, Suite 2150
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ATTORNEYS FOR PLAINTIFF
FEDERAL TRADE COMMISSION

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MOTION FOR SUMMARY JUDGMENT

Plaintiff Federal Trade Commission moves for summary judgment, under Federal Rule of Civil Procedure 56, against Defendants Abili-Staff, Ltd., Equitron, LLC, and Pamela Jean Barthuly, and Jorg Wilhelm Becker, in their individual capacities and as principals of Abili-Staff and Equitron. All material facts necessary for the Court to grant summary judgment are undisputed. As more fully discussed in the supporting memorandum below, the FTC is entitled to summary judgment as a matter of law on all counts of its Complaint, and it is entitled to monetary and injunctive relief.

I. INTRODUCTION.

Since at least September 2000 and up to the entry of the Temporary Restraining Order issued in this case, through at least three separate Web sites, Defendants marketed work-at-home job listings that they offered through a password-protected Web site (“job listings”) to consumers throughout the United States for an up-front membership fee ranging from \$29 to \$89. Defendants falsely represented that consumers who paid Defendants for access to their job listings would receive unlimited access to more than 1000 work-at-home job listings for the duration of their membership term. Defendants also falsely represented that they provided a money-back guarantee to purchasers.

Despite numerous and repeated promises made on Defendants’ Web sites, Defendants did not deliver. Consumers who purchased access to Defendants’ job listings discovered the listings did not provide unlimited access to 1000 work-at-home job listings, and, in numerous instances, consumers were locked out of Defendants’ Web sites long before their membership expired. When consumers attempted to get refunds, they were often unsuccessful. Refunds were frequently denied and usually provided only after consumers complained to the Better

Business Bureau of Coastal, Central, & Southwest Texas (“BBB”), if at all.

Defendants’ actions caused substantial consumer injury across the country. Defendants advertised, marketed, promoted, offered for sale, and sold their job listings to consumers in Texas and throughout the United States. Defendants’ actions are especially troubling because the victims are often those who can least afford to lose their money. The pervasiveness of Defendants’ deceptive practices is proven by the substantial evidence already filed of record, as well as additional evidence submitted with this motion for summary judgment.

II. PROCEDURAL HISTORY.

Plaintiff FTC commenced this action on February 2, 2010, and alleges that Defendants violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). In its Complaint, the FTC alleges that Defendants engaged in deceptive acts or practices in connection with the advertising, marketing, promotion, offering for sale, and selling of access to job listings provided through Web site memberships. The Complaint includes two counts. Count I alleges that Defendants misrepresented that purchasers of their job listings would receive unlimited access to more than 1000 work-at-home job listings for the duration of the membership term. Count II alleges that Defendants misrepresented that they would give full refunds to consumers who are not getting paid to work at home 60 days after purchasing Defendants’ job listings. The Complaint seeks temporary, preliminary, and permanent injunctive relief, and equitable relief as necessary to redress consumer injury resulting from Defendants’ violations of the FTC Act, including, but not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies by Defendants.

Simultaneously, Plaintiff applied for an *ex parte* Temporary Restraining Order with Asset Freeze, Order Permitting Expedited Discovery, and Order to Show Cause Why a

Preliminary Injunction Should Not Issue, which was granted on February 2, 2010 (Rec. Docs. 4, 13). The Court set a show-cause hearing (Rec. Doc. 13).

On February 16 and 17, 2010, the parties appeared before the Court for the show-cause hearing on the FTC's request for a preliminary injunction. The Court extended its TRO until March 2, 2010 (Rec. Doc. 36). On March 2, 2010, the Court entered its Preliminary Injunction with Asset Freeze and Other Equitable Relief against Defendants (Rec. Doc. 52).

Plaintiff FTC now seeks an order granting summary judgment under Federal Rule of Civil Procedure 56(c) because there are no genuine issues of material fact, and the FTC is entitled to judgment as a matter of law. Summary judgment is particularly appropriate in this case. First, the voluminous, uncontroverted evidence establishes that there are no genuine issues as to any material fact concerning the allegations in the Complaint. This uncontroverted evidence includes, but is not limited to, excerpts of Defendants' three Web sites, Defendants' business records, testimony, declarations and complaints from consumers nationwide, and declarations from three FTC investigators posing as consumers. Second, individual Defendants, three consumer witnesses, an FTC investigator, and an investigator for the U.S. Postal Inspection Service testified at the preliminary injunction hearing on February 16 and 17, 2010. Therefore, the Court had an opportunity to judge the credibility of the individual Defendants and Plaintiff's witnesses. Accordingly, the FTC is entitled to summary judgment against Defendants under Federal Rule of Civil Procedure 56(c) on both counts.

For its relief, Plaintiff FTC seeks permanent injunctions banning Defendants from marketing or selling work-at-home opportunities and enjoining Defendants from further violations of Section 5 of the FTC Act.¹ The FTC also seeks an equitable monetary judgment against Defendants for \$3,025,185, which represents a reasonable estimate of consumer injury caused by Defendants' deceptive activities.²

STATEMENT OF FACTS³

III. THE PARTIES.

A. Plaintiff.

The FTC is an independent agency of the United States government created by the FTC Act, 15 U.S.C. § 41 *et seq.* The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC, through its own attorneys, to initiate federal district court proceedings to enjoin violations of the FTC Act and secure appropriate equitable relief, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies.

¹ The relief the FTC seeks includes restrictions on Defendants' future conduct, as well as compliance monitoring and reporting, record-keeping, and distribution obligations.

² The FTC bases its minimum estimate of consumer injury on the results of review of Defendants' server database, where accounting and consumer data was stored, as corroborated by tax returns.

³ Many of the factual citations supporting Plaintiff's Statement of Facts reference documentary evidence already filed in the record in support of Plaintiff's Ex Parte Motion for Temporary Restraining Order (Rec. Doc. 4). Volumes 1-4 of Plaintiff's Appendix of Documentary Evidence are filed in the Court's record at Rec. Doc. 4-3, 4-4, 4-5, and 4-6, respectively. In its Motion for Summary Judgment, Plaintiff cites to the Rec. Doc. where the specific volume is filed and then cites to the specific Appendix page within the volume (e.g., Rec. Doc. 4-5 App 772 ¶11). Plaintiff is not re-filing the voluminous evidence already admitted in the record.

Only documentary evidence not previously filed in Rec. Doc. 4-3, 4-4, 4-5, and 4-6 is filed concurrently with Plaintiff's Motion for Summary Judgment. To avoid confusion, this evidence is designated by Exhibit letters, not Appendix numbers. Exhibits not previously filed of record will be cited by letter designation, short description, page number, and where applicable, line or paragraph number (e.g., Ex. A-PI Hr'g Tr. 79:24-80:1; Ex. B-Barthuly Dep. 49:15-23; Ex. G-McPeck Sixth Dec. 3 ¶10.)

B. Defendants.

Until this suit was filed, Defendants operated their job listings scheme nationwide. Defendants operated as a common enterprise and were actively engaged in an elaborate multi-state effort to hide their location and personal identities from consumers, regulatory officials, and law enforcement.

1. Abili-Staff, Ltd.

Defendant Abili-Staff, Ltd. (“Abili-Staff”) is a Texas limited partnership with its principal place of business at 2810 Thousand Oaks Drive #400, San Antonio, Texas 78232.⁴ Through the Texas Secretary of State, Abili-Staff has registered the following additional assumed names: CCS Group Advertising, Topjobs.net, Netfit, Netfit USA, and 123-Add-Masters.com.⁵ Abili-Staff transacts or has transacted business in this district and throughout the United States.⁶ Abili-Staff engaged in nationwide marketing of work-at-home job listings through its three Web sites, jobsformoms.com, moneyfromhome.com, and moneyfromhome.net.⁷ Abili-Staff’s general partner is defendant Equitron, LLC.⁸

2. Equitron, LLC.

Defendant Equitron, LLC (“Equitron”) is a Texas limited liability company with its mailing address at 2810 Thousand Oaks Drive #400, San Antonio, Texas 78232, and its principal

⁴ Rec. Doc. 1 ¶6 (Complaint); Rec. Doc. 63 ¶6 (Amended Answer).

⁵ Rec. Doc. 1 ¶6 (Complaint); Rec. Doc. 63 ¶6 (Amended Answer).

⁶ Rec. Doc. 1 ¶6 (Complaint); Rec. Doc. 63 ¶6 (Amended Answer).

⁷ Rec. Doc. 1 ¶¶6, 12 (Complaint); Rec. Doc. 63 ¶¶6, 12 (Amended Answer).

⁸ Rec. Doc. 1 ¶7 (Complaint); Rec. Doc. 63 ¶7 (Amended Answer).

place of business at 13423 Blanco Road #215, San Antonio, Texas 78216.⁹ Equitron is a one-percent owner and the general partner of Abili-Staff and serves as Abili-Staff's registered agent.¹⁰ Equitron transacts or has transacted business in this district.¹¹ In conjunction with Abili-Staff, Equitron advertised, marketed, distributed, or sold job listings to consumers throughout the United States.¹² Abili-Staff relies on Equitron, as the general partner, to act on Abili-Staff's behalf.¹³ As discussed below, Abili-Staff and Equitron act as a common enterprise to perpetrate their fraud.¹⁴

3. Pamela Jean Barthuly.

Defendant Pamela Jean Barthuly ("Barthuly") is a member and president of Equitron and owns a 49 percent interest in Abili-Staff.¹⁵ She signed official corporate documents on behalf of Abili-Staff as "Equitron, LLC, General Partner, P. Barthuly, President."¹⁶ She was a signatory on Abili-Staff's and Equitron's bank accounts and Abili-Staff's merchant account with

⁹ Rec. Doc. 1 ¶7 (Complaint); Rec. Doc. 63 ¶7 (Amended Answer).

¹⁰ Rec. Doc. 1 ¶7 (Complaint); Rec. Doc. 63 ¶7 (Amended Answer).

¹¹ Rec. Doc. 1 ¶7 (Complaint); Rec. Doc. 63 ¶7 (Amended Answer).

¹² See discussion *infra*, Section III.B.5.

¹³ For instance, as the general partner, Equitron, through its president Barthuly, is the signatory on Abili-Staff's credit card merchant account with payment processor Moneris Solutions, Inc. Rec. Doc. 4-5 App. 996 ¶8; Rec. Doc. 4-6 App. 1123, 1125, 1127 (Barthuly is signatory on Abili-Staff's merchant application with Humboldt); Ex. B-Barthuly Dep. 49:15-23 (Barthuly signs documents as president of Equitron, Abili-Staff's general partner).

¹⁴ See discussion *infra*, Section III.B.5.

¹⁵ Rec. Doc. 1 ¶8 (Complaint); Rec. Doc. 63 ¶8 (Amended Answer).

¹⁶ Rec. Doc. 4-5 App. 833-40 (Abili-Staff's Assumed Name Certificates, were signed by Barthuly as president of Equitron, Abili-Staff's general partner); Ex. B-Barthuly Dep. 49:15-23 (Barthuly signed documents as president of Equitron, Abili-Staff's general partner).

Moneris.¹⁷ She was involved in the day-to-day operations of Abili-Staff and Equitron.¹⁸ She drafted all the content for Abili-Staff's three Web sites.¹⁹ She handled customer service for Abili-Staff, including drafting content for emails to consumers and sending security emails to consumers.²⁰ She received and responded to consumer complaints and consumer refund requests.²¹ The Defendants' job-listing enterprise was operated from one or more of Defendants' residences.²² Defendant Barthuly formulated, directed, controlled, had the authority to control, or participated in the acts and practices of Equitron and Abili-Staff, including the acts and practices alleged in Plaintiff's Complaint.²³

¹⁷ Ex. A-PI Hr'g Tr. 77:17-19 (Barthuly is a signatory on Abili-Staff bank accounts); Ex. B-Barthuly Dep. 63:19-22 (Barthuly is a signatory on Abili-Staff bank accounts), 66:22-24 (Barthuly is a signatory on Equitron bank accounts); Rec. Doc. 4-6 App. 1123, 1125, 1127 (Barthuly is a signatory on Abili-Staff's merchant application with Humboldt); Rec. Doc. 4-6 App. 1194-95 (Barthuly is a signatory on Abili-Staff's IBC depositor agreements).

¹⁸ Ex. A-PI Hr'g Tr. 77:11-16 (Barthuly personally operated Abili-Staff), 78:16-19 (Barthuly and Becker are the two individuals who operated Abili-Staff and Equitron), 83:2-5 (Barthuly or her husband performed all the acts); Ex. B-Barthuly Dep. 50:12-23 (Barthuly operated Abili-Staff and Equitron), 61:5-9 (Barthuly operated Abili-Staff for almost 10 years), 64:10-22 (Barthuly and her husband controlled Abili-Staff), 69:10-12 (Barthuly and her husband controlled Equitron); *see infra* text accompanying notes 19-21.

¹⁹ Ex. B-Barthuly Dep. 58:19-20 (Barthuly drafted everything for the company), 91:4-12 (Barthuly drafted content of Web sites); Ex. D-Becker (6/11/10) Dep. 29:10-25 (Barthuly drafted content of JobsForMoms.com Web site).

²⁰ Ex. A-PI Hr'g Tr. 130:18-21 (Barthuly answered emails); Ex. B-Barthuly Dep. 57:10-58:5,19-20 (Barthuly drafted emails for the company), 70:20-24 (Barthuly sent security emails to consumers); Ex. A-PI Hr'g Tr. 96:24-97:11 (Barthuly sent emails about security concerns to consumers).

²¹ Ex. B-Barthuly Dep. 71:7-25 (Barthuly reviewed and responded to consumer complaints and refund requests); Ex. A-PI Hr'g Tr. 90:1-3 (Barthuly received BBB complaints about the company), 91:15-16 (Barthuly responded to BBB complaints).

²² There is no physical business location other than the individual Defendants' personal residences located at 550 Heimer Road #1022, San Antonio, Texas 78232, and W4204 Kiekhaefer Parkway, Fond du Lac, Wisconsin. Ex. A-PI Hr'g Tr. 69:16-22 (Abili-Staff and Equitron had no office and operate out of Defendants' home), 72:19-21 (business operated out of home in Wisconsin), 83:6-9 (Barthuly and Becker had a work-at-home business); Ex. B-Barthuly Dep. 53:12-18 (Abili-Staff and Equitron had no office and operated out of Defendants' home), 72:1-4 (both Equitron and Abili-Staff were operated out of house in Wisconsin and apartment in San Antonio).

²³ *See supra* text accompanying notes 16-22.

4. Jorg Wilhelm Becker.

Defendant Jorg Wilhelm Becker (“Becker”) is a member of Equitron²⁴ and is a 49 percent partner of Abili-Staff, Ltd.²⁵ Becker is married to Defendant Barthuly.²⁶ He is a signatory on Abili-Staff’s and Equitron’s bank accounts.²⁷ He was involved in the day-to-day operations of Abili-Staff and Equitron.²⁸ He registered and managed the domain names used for Abili-Staff’s Web sites.²⁹ He was in charge of maintaining Abili-Staff’s computer system, including maintaining Abili-Staff’s Web sites and consumer databases.³⁰ He provided customer service for

²⁴ Rec. Doc. 1 ¶9 (Complaint); Rec. Doc. 63 ¶9 (Amended Answer).

²⁵ Ex. A–PI Hr’g Tr. 69:11-15 (Barthuly and her husband are owners or limited partners in Abili-Staff), 127:23 (Becker is a partner of Abili-Staff); Ex. B–Barthuly Dep. 34:8-17 (Becker is a limited partner of Abili-Staff with 49% interest), 36:19–37:11 (Becker has a 49% interest in Abili-Staff); Ex. C–Becker (6/10/10) Dep. 21:15-19 (Becker is a partner of Abili-Staff); Ex.D–Becker (6/11/10) Dep. 5:1-3 (Becker is a partner in Abili-Staff).

²⁶ Ex. B–Barthuly Dep. 7:8-13 (Barthuly’s husband is Becker); Ex. C–Becker (6/10/10) Dep. 6:11-14 (Becker’s wife is Barthuly); Rec. Doc. 4-5 App. 824-25 (marriage certificate).

²⁷ Ex. A–PI Hr’g Tr. 77:20-22 (Becker is a signatory on Abili-Staff bank accounts); Ex. B–Barthuly Dep. 63:19-22 (Becker is signatory on Abili-Staff bank accounts); Ex. C–Becker (6/10/10) Dep. 22:10-15 (Becker is signatory on Equitron and Abili-Staff bank accounts).

²⁸ Ex. A–PI Hr’g Tr. 78:16-19 (Barthuly and Becker are the two individuals who operated Abili-Staff and Equitron), 83:2-5 (Barthuly or her husband perform all the acts), 129:18-20 (Becker operated and actively participated in Abili-Staff); 64:10-22 (Barthuly and her husband controlled Abili-Staff), 69:10-12 (Barthuly and her husband controlled Equitron), 90:10–91:3 (Becker created [Jobsformoms.com](#) Web site, and either Barthuly or Becker created the [moneyfromhome.com](#) Web site); Ex. C–Becker (6/10/10) Dep. 12:6-14 (prior to February 2010, Becker only worked for Abili-Staff, Equitron, and Eagle Fusion), 21:25–22:15 (Becker programmed the Web sites, made sure the service was running, did customer service and issued refunds for Abili-Staff, and was a signatory on bank accounts for Abili-Staff and Equitron); *see infra* text accompanying notes 29-31.

²⁹ Ex. B–Barthuly Dep. 41:11–42:2 (Becker registered and managed the domain names on behalf of Equitron and Abili-Staff); Ex. C–Becker (6/10/10) Dep. 22:16–23:15 (Becker was in charge of registering domain names for Abili-Staff); Ex. D–Becker (6/11/10) Dep. 9:8-11 (Becker registered domain names for the business), 18:10–19:2 (Becker registered domain names for Abili-Staff).

³⁰ Ex. A–PI Hr’g Tr. 127:24–128:2, 128:11-19 (Becker is in charge of Abili-Staff technology for computers, servers, and Web sites), 129:21-23 (Becker is the administrator for the Web sites); Ex. B–Barthuly 56:6–23 (Becker was responsible for technical work for Abili-Staff, was in charge of the computer system and Web sites); Ex. C–Becker (6/10/10) Dep. 21:25–22:5 (Web site programming and made sure service was running), 26:8–27:1 (Becker created and maintained Abili-Staff customer databases), 27:24–28:8 (same); Ex. D–Becker (6/11/10) Dep. 9:8-11 (registration of domain names), 15:22–24 (he automated Abili-Staff’s computer system); 16:18– 17:5 (he managed the technical features and automated the security, customer service and credit card processing), 29:10–31:1 (Becker created the three Web sites, but not the content).

Abili-Staff's customers, was in charge of processing refunds, and was aware of consumer complaints.³¹ Becker formulated, directed, controlled, had the authority to control, or participated in the acts and practices of Equitron and Abili-Staff, including the acts and practices set forth in Plaintiff's Complaint.³²

5. A common enterprise operated the job listings scheme.

Abili-Staff and Equitron operated the job listings scheme through jobsformom.com, moneyfromhome.com and moneyfromhome.net, as a common enterprise. First, the job listings scheme was operated by a common control group, where no real distinction exists between Abili-Staff and Equitron.³³ Abili-Staff is controlled by Equitron: Equitron is Abili-Staff's general partner and owns a one percent interest of Abili-Staff.³⁴ Abili-Staff, which owns and operated jobsformom.com, moneyfromhome.com, and moneyfromhome.net³⁵ relied on Equitron, as the general partner, to act on Abili-Staff's behalf.³⁶ For instance, Equitron, through its president Barthuly, is the signatory on Abili-Staff's credit card merchant account with

³¹ Ex. A–PI Hr'g Tr. 132:14-16 (uses alias George Murphy when he speaks with customers); Ex. B–Barthuly 56:24–57:4 (in charge of processing refunds and involved in customer service); 59:3–60:1 (in charge of refund processing and automated refund responses and had knowledge of refund practices); Ex. C–Becker (6/10/10) Dep. 21:25–22:5 (did customer service and refunds); Ex. D–Becker (6/11/2010) Dep. 7:15-18 (processed refunds), 12:13-21 (customer service and responded to refunds requests), 13:19–14:19 (received refund requests and consumer complaints); Ex. A–PI Hr'g Tr. 134:7-18 (aware of complaints).

³² See *supra* text accompanying notes 24-31.

³³ Barthuly testified that she and her husband “had one business enterprise” comprised of Abili-Staff, Eagle Fusion, and Equitron, that published employment information on the Internet and sold subscriptions to their job listings to consumers. Ex. B–Barthuly Dep. 19:14–20:14; see Ex. B–Barthuly Dep. 74:19-25.

³⁴ See *supra* text accompanying notes 10, 13.

³⁵ See *supra* text accompanying note 7.

³⁶ See *supra* text accompanying notes 10, 13.

payment processor Moneris and on Abili-Staff's commercial mailbox application at 2810 Thousand Oaks Drive #400, San Antonio, Texas.³⁷

Second, Abili-Staff and Equitron have common owners. Barthuly and Becker each hold at least a 49 percent interest of Abili-Staff, and Barthuly and Becker are the members of Equitron.³⁸ Barthuly, as president of Equitron, often signed contracts on behalf of Abili-Staff.³⁹ The signatories of the business checking accounts for Equitron and Abili-Staff are the same: Barthuly and Becker.⁴⁰ Other than Barthuly and Becker, no other individuals or employees were associated with, or received profits from, Equitron or Abili-Staff.⁴¹

Third, Abili-Staff and Equitron share the same address.⁴² In reality, neither entity had a physical office address; rather, both entities operated out of the individual Defendants' residence(s).⁴³ Defendants Abili-Staff and Equitron maintain records in the same location and utilize the same accountants and attorneys.⁴⁴

³⁷ See *supra* note 16; Rec. Doc. 4-6 App. 1168 ¶6, 1172 (commercial mailbox application for Abili-Staff).

³⁸ See *supra* text accompanying notes 15, 24-25.

³⁹ See *supra* text accompanying notes 16-17.

⁴⁰ See *supra* text accompanying notes 17 and 27; Rec. Doc. 4-6 App. 1194-95 (IBC depositor agreements for Abili-Staff).

⁴¹ Ex. A—PI Hr'g Tr. 77:23–78:19, 84:10-12; Ex. B—Barthuly Dep. 60:13-15, 63:23–64:22, 67:7-12.

⁴² See *supra* text accompanying notes 4 and 9; Rec. Doc. 4-6 App. 1168 ¶6, 1172-73 (commercial mailbox applications for Abili-Staff and Equitron). See also Rec. Doc. 4-5 App. 772 ¶11, App. 831, 842 (Certificate of Limited Partnership filed in 2000 and Periodic Report filed in 2005); Rec. Doc. 4-5 App. 772-73 ¶12, 844–46 (Articles of Organization filed in 2000). Abili-Staff and Equitron failed to provide a street address for their principal places of business registered with the Texas Secretary of State, as required by law. Tex. Bus. Orgs. Code Ann. §§153.302, 153.551; Tex. Tax Code Ann. § 171.203.

⁴³ See *supra* text accompanying note 22.

⁴⁴ Ex. B—Barthuly Dep. 72:19-24, 74:6-18.

Defendants Abili-Staff and Equitron form a common enterprise: they jointly operate the jobsformoms.com, moneyfromhome.com, and moneyfromhome.net job listings scheme.⁴⁵ The common enterprise is controlled by Defendants Barthuly and Becker.⁴⁶

IV. DEFENDANTS' DECEPTIVE BUSINESS PRACTICES.

Since at least September 2000, and continuing thereafter, Defendants advertised, marketed, promoted, offered for sale, and sold work-at-home job listings that they provide solely through their password-protected Web sites to consumers throughout the United States.⁴⁷

Defendants offered their job listings through three Web sites, www.jobsformoms.com, www.moneyfromhome.com, and www.moneyfromhome.net.⁴⁸

Defendants' Web sites contained both public areas and membership-only areas.⁴⁹ Public areas were freely accessible and contained Defendants' solicitations and representations to

⁴⁵ See *supra* note 33.

⁴⁶ Ex. B–Barthuly Dep. 64:17-22, 69:10-12; Ex. A–PI Hr'g Tr. 78:8-23; See also discussion, *supra* sections III.B.3 and III.B. 4.

⁴⁷ Ex. B–Barthuly Dep. 34:2-4, 45:10-12 (created Abili-Staff and Equitron in 2000), 61:5-9 (Barthuly operated Abili-Staff since 2000), 90:3-9 (Barthuly sold job listings through moneyfromhome.com and jobsformoms.com since 2000); Ex. C–Becker (6/10/10) Dep. 21:15-22 (Becker and Barthuly formed Abili-Staff and Equitron in 2000); Ex. D–Becker (6/11/10) Dep. 29:1-8 (Becker started selling job listings to consumers through the Internet in late 1990s), 29:9–30:9 (Becker set up and made the moneyfromhome.com and jobsformoms.com Web sites accessible to the public in 1998 and 1999, respectively). Texas Secretary of State records indicate Abili-Staff was organized in September 2000. Rec. Doc. 4-5 App. 772 ¶11, 831 (Certificate of Limited Partnership). The domain names jobsformoms.com and moneyfromhome.net were initially registered in September 1998. Rec. Doc. 4-4 App. 382-83 ¶7, 764, 768. The domain name moneyfromhome.com was registered in July 1997. Rec. Doc. 4-4 App. 382-83 ¶7, 766. Consumers throughout the United States purchased Defendants' job listings. Rec. Doc. 4-3 App. 274 ¶1 (Orr resides in Texas), 296 ¶1 (Cotton resides in Texas), 321 ¶1 (Prough resides in Florida), 340 ¶1 (Hayes resides in Washington), 355 ¶1 (Fortier resides in Louisiana), 364 ¶1 (Baltzell resides in Oregon), 269 ¶1 (Rogers resides in Texas).

⁴⁸ Ex. A–PI Hr'g Tr. 79:24–80:1 (Barthuly and her husband marketed job listings on the Web sites); see *supra* text accompanying note 7 (Abili-Staff owns and operates Web sites).

⁴⁹ Ex. A–PI Hr'g Tr. 19:23–20:14, 25:11–26:3; Rec. Doc. 1 ¶¶14-16 (Complaint); Rec. Doc. 63 ¶14-16 (Amended Answer); Rec. Doc. 4-4 App. 385, 388, 536, 540, 611, 613, 671-72 (Web site home pages and member login pages).

induce consumers to purchase access to the job listings.⁵⁰ Access to Defendants' job listings was only available to consumers who purchased a Web site membership and obtained a password.⁵¹

Defendants offered consumers three levels of membership that purportedly provided different features.⁵² The core product offered for all memberships was the unlimited access to Defendants' job listings for the duration of the membership.⁵³ The prices of Defendants' Web site memberships ranged from \$29.98 up to \$89.99, depending on the type of membership purchased.⁵⁴ Defendants also represented to consumers that the purchase of a membership came with a money-back guarantee.⁵⁵

Defendants, however, did not deliver on their promises. In essence, Defendants took consumers' money, did not provide unlimited access to job listings, and often refused to provide refunds.

⁵⁰ Rec. Doc. 4-4 App. 385, 536, 611, 671; *see also* Rec. Doc. 4-5 App. 897 ¶34.

⁵¹ Ex. A-PI Hr'g Tr. 23:2-4, 25:17-26:3; Rec. Doc. 1 ¶16 (Complaint); Rec. Doc. 63 ¶16 (Amended Answer); Rec. Doc. 4-4 App. 391 ("If you decide to become a member (because our job listings are only available to the exclusive group of members of our website, but don't worry, our small fee is EXTREMELY affordable and we GUARANTEE you will become a real work at home mom in 60 days or less or you'll get your money back!"), 563 ("Once you receive your User ID and password you'll have IMMEDIATE 24 hour access to our website to use at your convenience."), 633 ("Almost immediately after you join, you'll get a User ID and password to use our site."), 692 ("If you decide to become a member (because our job listings are only available to the exclusive group of members . . ."); *see* Rec. Doc. 4-4 App. 388, 540, 613, 672 (Web sites member login pages).

⁵² Rec. Doc. 4-4 App. 524-25, 538-39, 632, 751; Ex. A-PI Hr'g Tr. 21:25-23:1, 87:18-20.

⁵³ Ex. A-PI Hr'g Tr. 22:8-13, 80:13-16, 107:2-6; Rec. Doc. 4-4 App. 398 ("enjoy personal, unlimited use . . . of our Site 24 hours a day"), 534 ("You'll have UNLIMITED ACCESS to ALL of our work at home opportunities, . . . for a whole year!" (Emphasis in original.)), 538 ("instant and unlimited personal access" to job listings), 632 ("[o]ne whole year of unlimited personal access"); *see* Rec. Doc. 4-4 App. 704 (whole year of 24 hour access).

⁵⁴ Ex. A-PI Hr'g Tr. 21:25-23:1, 87:18-88:5; Rec. Doc. 1 ¶24 (Complaint); Rec. Doc. 63 ¶24 (Amended Answer); Rec. Doc. 4-4 App. 524-25, 538-39, 632, 751.

⁵⁵ Defendants' jobsformoms.com and moneyfromhome.com Web sites offered a money-back guarantee. Rec. Doc. 4-4 App. 452, 594, 617. The moneyfromhome.net Web site, however, stated that its membership fees were not refundable except in limited circumstances. Rec. Doc. 4-4 App. 717; *cf.* Rec. Doc. 4-4 App. 731 (stating that in the event a consumer presents "a legitimate reason" for a refund, staff "will evaluate [the] request as fairly as possible and if a . . . refund is fair, will be happy to assist you.").

A. Defendants Misrepresented That Consumers Would Have Unlimited Access to Job Listings.

1. Defendants promised unlimited access to job listings.

Defendants represented that, upon purchasing Defendants' job listings membership, consumers would have unlimited use of and access to Defendants' job listings for the duration of the membership term.⁵⁶ For instance, on the jobsformoms.com Web site, for \$39.95, Defendants offered consumers a basic membership that purportedly provided "Instant and unlimited personal access to 1000+ Scam-Free Job Listings, including updates for a WHOLE YEAR for just one low price!"⁵⁷ In addition to the basic membership, Defendants offered two upgraded memberships that provided unlimited access to Defendants' job listings, as well as access to Defendants' "auction suite" and Defendants' "home business suite," that purportedly provided consumers information and ideas about how to start home-based businesses.⁵⁸

2. Defendants did not provide unlimited access to job listings.

Defendants, however, did not provide unlimited access to the job listings to consumers who purchased a membership. In numerous instances, consumers were locked out of the job listings long before their memberships expired, contrary to Defendants' express representations that consumers will have unlimited access for the duration of their memberships.⁵⁹

⁵⁶ See *supra* note 53.

⁵⁷ Rec. Doc. 4-4 App. 525.1 (emphasis in original); see also Rec. Doc. 4-4 App. 609.1 (moneyfromhome.com offered one year of unlimited access for \$39.99).

⁵⁸ The upgraded memberships cost either \$69.99 for one year or \$89.99 for two years of unlimited access to Defendants' job listings and home business and auction suites. Rec. Doc. 4-4 App. 525.1; see also Rec. Doc. 4-4 App. 609.1 (moneyfromhome.com). The information provided in these additional member areas includes articles, links to other Web sites, and downloadable information. Rec. Doc. 4-5 App. 894 ¶25.

⁵⁹ Rec. Doc. 4-3 App. 275-76 ¶¶8-9 (Orr); Rec. Doc. 4-3 App. 322-4 ¶¶8-10, 13 (Prough); Rec. Doc. 4-3 App. 370 ¶ 8 (Rogers); Rec. Doc. 4-3 App. 356-57 ¶¶7, 9 (Fortier); Rec. Doc. 4-3 App. 109 (BBB complaint); see Rec. Doc. 4-3 App. 78 (BBB complaint).

Despite the express Web site representations that consumers would receive unlimited access, Defendants admitted that they locked consumers out of the job listings once a consumer had clicked on or accessed 95 jobs.⁶⁰ In fact, Defendants' computer system automatically blocked consumers from accessing the job listings after they had accessed approximately 95 job listings.⁶¹

Defendants also testified that they suspected any consumer who accessed in excess of 90 job listings to be stealing.⁶² Defendants routinely blocked these consumers' access to the job listings, claiming a security concern.⁶³ After consumers accessed over 90 job listings, Defendants sent a "security email" to consumers.⁶⁴ Defendants' "security email" demanded consumers respond to a series of technical questions and demanded consumers provide a copy of

⁶⁰ Ex. A–PI Hr'g Tr. 95:21–96:21 (consumers are blocked, and computer system designed to block use, after 95 clicks); Ex. E–Abili-Staff 30(b)(6) (Barthuly) Dep. 25:23–26:9 (sent security email and blocked consumers from Web sites after accessed 95 job listings).

⁶¹ Ex. A–PI Hr'g Tr. 96:14-21 (computer system designed to block consumers after accessing 95 job listings); Ex. B–Barthuly Dep. 96:14-19 (computer security functions were automated); Ex. D–Becker (6/11/10) Dep. 15:1-14 (automated security feature triggered once consumer accessed certain number of jobs accessed by consumers), 15:25–16:5 (Barthuly set the number of job listings accessible by consumers before the automated security feature was triggered).

⁶² Ex. E–Abili-Staff 30(b)(6) (Barthuly) Dep. 30:16-19 (suspected consumers of stealing).

⁶³ Ex. A–PI Hr'g Tr. 99:15-18 (consumers routinely blocked for security concerns after accessing 90 links); 95:21–96:7 (website inaccessible after 95 job listings), 100:11-13 (Barthuly decided and defined a security risk as any time a consumer clicks 90 times). *See* Ex. A–PI Hr'g Tr. 28:6–31:3 (investigator's access blocked); Rec. Doc. 4-5 App. 894-96, ¶¶26-31 (McPeek), Rec. Doc. 4-6 App. 1134-35 ¶¶9-10 (Brannon-Quale), Rec. Doc. 4-6 App. 1200-02 ¶¶11-13 (Krause). In correspondence with the BBB, Defendants routinely accuse consumers of engaging in "suspicious conduct," unauthorized use, raising "security concerns," or being a "security issue" or "security risk" as an excuse for locking consumers out of their memberships. Rec. Doc. 4-3 App. 26 ("suspicious conduct"), 27 ("security concerns" and use in "unauthorized manner"), 32 (use in an "unauthorized way"), 35 ("security risk"), 223 ("security issue") (BBB complaints); *see also* Rec. Doc. 4-3 App. 275 ¶15, 294 (Orr); Rec. Doc. 4-3 App. 371-72 ¶12, 379 (Rogers).

⁶⁴ Ex. A–PI Hr'g Tr. 96:24–97:11 (after 90 jobs accessed, Defendants routinely send emails blocking membership based on security concerns). All three FTC investigators' memberships were blocked after accessing between 95 and 100 job listings. Ex. A–PI Hr'g Tr. 28:6–31:3 (investigator McPeek's membership blocked after 95 job listings accessed); Rec. Doc. 4-5 App. 894-96, ¶¶26-31 (McPeek); Rec. Doc. 4-6 App. 1134-35 ¶¶9-10 (Brannon-Quale blocked after accessing 100 job listings), Rec. Doc. 4-6 App. 1200-02 ¶¶11-13 (Krause blocked after accessing approximately 100 job listings).

their resume.⁶⁵ Consumers rarely discovered what prompted the “security concern” and rarely were able to respond satisfactorily to Defendants’ security questions.⁶⁶ Consumers uniformly denied that they engaged in suspicious activity and generally attempted to respond to Defendants’ security questions.⁶⁷ No matter how thoroughly they responded, consumers were unable to answer Defendants’ email questions to the satisfaction of Defendants.⁶⁸ Even after timely responding to the lengthy and in-depth questions, consumers were still unable to regain access to Defendants’ job listings.⁶⁹ Therefore, Defendants used the purported “security concern” as a pretense to automatically suspend memberships after consumers had accessed approximately 90 job listings.⁷⁰

Defendants attempted to disclaim the Web site representations that consumers would receive unlimited access through provisions buried in their membership agreements.⁷¹

⁶⁵ Rec. Doc. 4-3 App. 370 ¶¶8, 374-74 (Rogers); Rec. Doc. 4-3 App. 275-76 ¶9, 282 (Orr); Rec. Doc. 4-3 App. 17, 48, 109, 131, 155-57, 160, 206, 223, 242 (BBB complaints); Rec. Doc. 4-5 App. 896 ¶31, 981-82 (McPeck); Rec. Doc. 4-6 App. 1135 ¶10, 1166 (Brannon-Quale).

⁶⁶ See Rec. Doc. 4-3 App. 276-77 ¶¶10-15 (Orr), 370-71 ¶¶8, 12 (Rogers); see also Rec. Doc. 4-3 App. 17-19, 49, 24-25, 131, 155-56, 206, 223, 242 (BBB complaints).

⁶⁷ See Rec. Doc. 4-3 App. 276-77 ¶¶10-15 (Orr); 370-71 ¶¶8, 10-12 (Rogers); Rec. Doc. 4-3 App. 131, 155-56, 206 (BBB complaints); see also Rec. Doc. 4-3 App. 17-19, 24-25, 49, 109, 223, 242 (BBB complaints).

⁶⁸ Rec. Doc. 4-3 App. 276-77 ¶¶10-14 (Orr); Rec. Doc. 4-3 App. 370-71 ¶¶8, 10-11 (Rogers); Rec. Doc. 4-3 App. 17-19, 25, 131 (BBB complaints).

⁶⁹ Rec. Doc. 4-3 App. 371 ¶11 (Rogers); Rec. Doc. 4-3 App. 277 ¶14 (Orr); Rec. Doc. 4-3 App. 17-18, 25 (BBB complaints).

⁷⁰ Ex. E–Abili-Staff 30(b)(6) (Barthuly) Dep. 25:23–26:9 (sent security email and blocked consumers from Web sites after accessed 95 job listings). See *supra* text accompanying notes 60-64.

⁷¹ Defendants’ membership agreement contained language limiting the number of job listings consumers could access. The [jobsformoms.com](#) and [moneyfromhome.com](#) membership agreements contained the following limitation on use: “Full value of membership shall be considered at such time as ninety (90) specific employer contacts has [sic] been delivered, regardless of the length of time membership was used.” Rec. Doc. 4-4 App. 528, 603, 646. The [moneyfromhome.net](#) Membership Agreement does not contain this language. See Rec. Doc. 4-4 App. 756 (“Proper Use of Site”). Defendant Barthuly testified that this statement in the membership agreement means that consumers who purchased a membership could only use their membership to view 90 potential employers, regardless of the length of the membership they purchased. Ex. E–Abili-Staff 30(b)(6)

Additionally, the membership agreements for all three Web sites contained a discussion about security practices and suspensions of memberships.⁷² Defendants' security practices limiting consumers' use of their memberships directly contradicted the Web sites' multiple express representations that membership provides "unlimited" access to the job listing services. At the Preliminary Injunction hearing, Defendants acknowledged that their limitation on use was not adequately disclosed to consumers.⁷³

As argued in Section V.C.1., *infra*, these contradictory terms in the membership agreements were not clearly and conspicuously disclosed to consumers and are legally insufficient to overcome the consumers' initial net impressions based on the express Web site representations.

B. Defendants Did Not Honor Their Money-Back Guarantee.

1. Defendants promised a money-back guarantee.

Defendants' Web sites jobsformom.com and moneyfromhome.com represented that the purchase of a membership came with a money-back guarantee.⁷⁴ Defendants represented that

(Barthuly) Dep. 24:19–25:3, 25:12–26:9; *see also* Ex. A–PI Hr'g Tr. 95:21–96:21, 99:15–18, 107:15–108:2.

⁷² Rec. Doc. 4-4 App. 529, 603-04, 646-47, 756-57 (Proper Use of Site & Disputes/Security Concerns). Here, consumers purportedly authorized Defendants "[i]n the event of a dispute and/or security concern . . . to place the membership in suspense and/or interrupt Member's access to the Site while the dispute or concern is being resolved." Rec. Doc. 4-4 App. 529, 603, 646, 756. However, neither the Web sites nor the Membership Agreements define what constitutes a "security concern." Ex. A–PI Hr'g Tr. 101:24–102:4 (Barthuly admits security dispute not defined on the Web site or in the membership agreement); *see also* Ex. A–PI Hr'g Tr. 63:2-64:14 (information on security disputes only in agreements, not on Web sites, and security emails do not explain what the security concern is only that there were questions about membership usage). At her deposition, Barthuly unconvincingly insisted that there was a "common sense" limitation on consumers' use of their memberships, which was not disclosed anywhere on Web sites or membership agreements. Ex. E–Abili-Staff 30(b)(6) (Barthuly) Dep. 12:4–14:21 (common sense limitation).

⁷³ Ex. A–PI Hr'g Tr. 94:24–95:19 (Barthuly testified "we address security in our agreement. Now, I understand that it may need to be more clear and we're willing to make it more clear. I see that that's become an issue.").

⁷⁴ *See supra* note 55.

consumers would be able to use Defendants' job listings to find a paying job, and if consumers are "not getting paid to work at home" after 60 days, Defendants will "CHEERFULLY give you your money back, no questions asked!"⁷⁵ Consumers who had doubts, or wondered if they could get their money back if not satisfied, were assured by the express guarantee that they could obtain a refund.⁷⁶ The consumers' net impression was that they would receive a full refund if they did not get a job after paying for access to the job listings.⁷⁷

2. Defendants failed to honor their money-back guarantee.

Despite the explicit promise that refunds would be "cheerfully" granted with "no questions asked,"⁷⁸ Defendants often denied refunds to consumers who were not getting paid to work at home.⁷⁹ In practice, Defendants denied refund requests where consumers failed to comply with precise timing and forms requirements for submitting refund requests.⁸⁰ In

⁷⁵ If after 60 days consumers had not found a job, Defendants gave consumers 30 days to apply for a refund. Rec. Doc. 1 ¶23 (Complaint); Rec. Doc. 63 ¶23 (Amended Answer); Rec. Doc. 4-4 App. 452 (jobsformoms.com Web site guarantee); see Rec. Doc. 4-4 App. 594 (moneyfromhome.com Web site guarantee); see also Rec. Doc. 4-4 App. 611, 617 (moneyfromhome.com Web site guarantee).

⁷⁶ Rec. Doc. 4-3 App. 297 ¶4 (Cotton); see Rec. Doc. 4-3 App. 7, 11, 14 (BBB complaints); Rec. Doc. 4-3 App. 340 ¶2 (Hayes); see also Ex. E–Abili-Staff 30(b)(6) (Barthuly) Dep. 29:13-17 (Barthuly testified that consumers' purchase of job listings was risk free).

⁷⁷ Rec. Doc. 4-3 App. 340 ¶2 (Hayes); Rec. Doc. 4-3 App. 36, 242 (BBB complaints); see Rec. Doc. 4-3 App. 297 ¶4 (Cotton); Rec. Doc. 4-3 App. 138, 141-42 (BBB complaints).

⁷⁸ See *supra* text accompanying notes 75 and 55.

⁷⁹ Rec. Doc. 4-3 App. 356-57 ¶¶6, 9 (Fortier); Rec. Doc. 4-3 App. 342 ¶7 (Hayes); Rec. Doc. 4-3 App. 322 ¶7, 324 ¶14 (Prough); Rec. Doc. 4-3 App. 372 ¶14 (Rogers); see Rec. Doc. 4-3 App. 36, 141 (BBB complaints); Rec. Doc. 4-3 App. 297-299 ¶¶5, 7-8 (Cotton).

⁸⁰ Ex. A–PI Hr'g Tr. 104:20-24 (automatically denied refunds requested before 60 days), 105:4-6, 106:5-8 (often denied refunds to consumers who did not fill out refund request form), 106:17-21 (denied refunds claiming consumers failed to meet prerequisites for refund); see Rec. Doc. 1 ¶32 (Complaint); Rec. Doc. 63 ¶32 (Amended Answer) (must submit refund request through Web site).

Defendants at times denied refunds because the consumer had refused to sign a non-dispute form in which the consumer agreed the fee was non-refundable. Rec. Doc. 4-3 App. 36-37, 97-98, 113-14 (non-dispute forms required) (BBB complaints). Defendants denied refunds claiming consumers failed to identify legitimate reason to warrant one. See Rec. Doc. 4-3 App. 122 (consumer's refund request denied "unless [she] stated specific examples of why [she] found the advertisements to be untrue"), 173 (consumer's refund request denied without a "legitimate

numerous instances, consumers found it difficult, if not impossible, to comply with the technical requirements and procedures that Defendants forced them to use to request a refund.⁸¹

Testimony from FTC investigator Brent McPeek demonstrates how Defendants routinely denied consumer refund requests, even when the original request is made during the refund period. Mr. McPeek was blocked from accessing Defendants' job listings approximately two months after purchasing a membership from Defendants.⁸² Mr. McPeek testified that he first requested a refund after 60 days, but was required to fill out another refund request form.⁸³ After resubmitting his refund request at Defendants' direction, Defendants denied his refund, claiming the refund period had expired.⁸⁴ Mr. McPeek's experience is similar to the experience of other consumers who complained to the BBB.⁸⁵

Similarly, Defendants denied Ms. Hayes' refund request because she had not used her membership for 60 days and was directed to use a special refund request form.⁸⁶ Ms. Hayes

excuse" for refund) (BBB complaints); Rec. Doc. 4-3 App. 171 (Defendants deny refund because consumer had no "legitimate basis that he may be entitled to a refund").

⁸¹ Rec. Doc. 4-3 App. 342 ¶7 (Hayes); Rec. Doc. 4-3 App. 124 (BBB complaint). In other instances, Defendants claim consumers refused to cooperate with security procedures and denied the refund on that basis. Rec. Doc. 4-3 App. 21, 51, 133, 158-59, 162, 245 (Defendants' BBB response letters citing consumers' refusals to cooperate).

⁸² Ex. A-PI Hr'g Tr. 28:6-22.

⁸³ Ex. A-PI Hr'g Tr. 31:4-33:15; *see* Rec. Doc. 4-5 App. 895-96 ¶¶29-30 (McPeek), 968 (Attachment Q, email refund request), 971 (Attachment R, Defendants' email response with link to request form).

⁸⁴ Ex. A-PI Hr'g Tr. 33:4-15; *see* Rec. Doc. 4-5 App. 896 ¶32 (McPeek) 984-85 (Attachment U, money back request form), 988 (Attachment V, error message money back guarantee expired).

⁸⁵ *See supra* text accompanying notes 80; *see infra* text accompanying notes 86-88. Another Federal Trade Investigator, however, received a full refund after completing the detailed request procedure within the 90-day time frame. Rec. Doc. 4-6 App. 1202-03 ¶¶14-17 (Krause).

⁸⁶ Rec. Doc. 4-3 App. 342 ¶7.

could not locate the request form on Defendants' Web site.⁸⁷ Ms. Hayes emailed Defendants three more times requesting a refund each time before the 90-day refund period expired.⁸⁸

Defendants also denied refunds to consumers based on security disputes.⁸⁹ In numerous instances, consumers requested refunds after their access to Defendants' job listings had been arbitrarily blocked by Defendants based on Defendant's security policy.⁹⁰ Defendants testified that consumers who were unable to satisfactorily answer the series of technical questions in Defendants' "security email" were denied refunds.⁹¹ As discussed above, Defendants' security policy was not clearly and conspicuously disclosed on the Web sites nor was it explained in the Membership Agreements.⁹² Defendants, however, routinely used their "security" policy as a basis to deny refunds, despite their "no questions asked" money-back guarantee.⁹³

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Ex. E–Abili-Staff 30(b)(6) (Barthuly) Dep. 23:13-15.

⁹⁰ *See* Rec. Doc. 4-3 App. 17-19, 24-27, 31-32, 48- 49, 78-80, 109, 131,153, 155-56, 205-06, 223, 242 (BBB complaints); Rec. Doc. 4-3 App. 275-77 ¶¶8-13, 15 (Orr); Rec. Doc. 4-3 App. 370-72 ¶¶8, 10-12 (Rogers). *See also* Ex. A–PI Hr'g Tr. 28:6-33:15; Rec. Doc. 4-5 App. 894-96, ¶¶26-31 (McPeek), Rec. Doc. 4-6 App. 1134-35 ¶¶9-10 (Brannon-Quale), Rec. Doc. 4-6 App. 1200-02 ¶¶11-13 (Krause).

⁹¹ Ex. A–PI Hr'g Tr. 99:15–100:10; Ex. E–Abili-Staff 30(b)(6) (Barthuly) Dep. 31:18-21.

⁹² *See supra* text accompanying notes 71-73.

⁹³ *See* Rec. Doc. 4-5 App. 894-96 ¶¶27-32 (McPeek); Ex. A-PI Hr'g Tr. 28:6–33:17. *See supra* text accompanying note 75 (no questions asked refund policy); *see supra* text accompanying note 91.

Defendants often arbitrarily denied consumers refunds.⁹⁴ In some instances, consumers received a refund after they complained to the BBB.⁹⁵ In numerous other instances, Defendants denied refunds even after consumers complained to the BBB.⁹⁶

Despite the clear money-back guarantee on the Web sites, through provisions in the membership agreements, Defendants imposed numerous technicalities and procedures to request a refund.⁹⁷ As argued in Section V.C.2., *infra*, these procedural intricacies for requesting a refund were not clearly and conspicuously disclosed on the Web sites and are legally insufficient to overcome the consumers' initial net impressions based on the Web site representations.⁹⁸

⁹⁴ See *supra* notes 79-81. Defendants also accused consumers of not trying hard enough to find a job using their job listings and refused to issue refunds. See Rec. Doc. 4-3 App. 146 (BBB complaint) (did not conduct serious job search); Rec. Doc. 4-3 App. 299 ¶8 (Cotton) (did not work hard enough, although later received a partial refund after BBB complaint).

⁹⁵ At times, Defendants issued refunds prior to the consumer filing a complaint with the BBB. Rec. Doc. 4-3 App. 113-15 (partial refund before and full refund after complaint to BBB); Rec. Doc. 4-3 App. 365-66 ¶¶8-9 (Baltzell) (partial refund before and full refund after complaint to BBB); see also Rec. Doc. 4-6 App. 1202-03 ¶¶14-17 (full refund) (Krause). At other times, Defendants issued refunds after the consumer filed a BBB complaint. Rec. Doc. 4-3 App. 88-89 (refund after BBB complaint), 122 (partial refund after complaint) (BBB complaints); Rec. Doc. 4-3 App. 299 ¶10 (Cotton) (partial refund after complaint). According to PayPal's account records for Abili-Staff, approximately 57 refunds were given through PayPal from September 2007 through November 2009. Rec. Doc. 4-5 App. 997 ¶9 (Cotton). During the same period, approximately 2550 consumers purchased memberships through PayPal. Rec. Doc. 4-5 App. 997-98 ¶9 (McPeck). Thus, the PayPal refund rate is approximately 2%. Rec. Doc. 4-5 App. 998 ¶9 (McPeck).

⁹⁶ Rec. Doc. 4-3 App. 342 ¶8 (Hayes); Rec. Doc. 4-3 App. 324 ¶¶12-14 (Prough); Rec. Doc. 4-3 App. 371-72 ¶¶12, 14 (Rogers); Rec. Doc. 4-3 App. 356-57 ¶¶8-9 (Fortier).

⁹⁷ The technicalities included the timing of the requests and the forms used for refund requests. Rec. Doc. 4-4 App. 526-27, 645 (Money Back Guarantee section of Membership Agreements for jobsformoms.com and moneyfromhome.com).

⁹⁸ The Web sites failed to conspicuously disclose the purported limitations on the promised refund, and the technical procedures for requesting a refund. See Rec. Doc. 4-4 App. 526-27, 601-02, 645.

C. Defendants' Deceptive Practices Injured Consumers.

Consumers paid between \$29.98 and \$89.99 to access Defendants' job listings and obtain a work-at-home job.⁹⁹ In numerous instances, consumers who purchased Defendants' job listings memberships never obtained a paying work-at-home job using Defendants' job listings.¹⁰⁰ Approximately 65 consumers filed complaints with the BBB between July 2006 and February 2010,¹⁰¹ and the BBB gave Abili-Staff an "F" rating in its reliability report.¹⁰²

Abili-Staff maintained customer data electronically.¹⁰³ Defendants created and maintained databases containing the customer data for Abili-Staff.¹⁰⁴ Abili-Staff's abilinewmember database contains information about the number of consumers and the amount

⁹⁹ Rec. Doc. 1 ¶24 (Complaint); Rec. Doc. 63 ¶24 (Amended Answer); *see* Ex. A-PI Hr'g Tr. 87:18-88:5.

¹⁰⁰ Rec. Doc. 4-3 App. 342 ¶6 (Hayes); Rec. Doc. 4-3 App. 357 ¶9 (Fortier); Rec. Doc. 4-3 App. 372 ¶13 (Rogers); Rec. Doc. 4-3 App. 36, 66, 76, 208, 216, 243 (BBB complaints); *see* Rec. Doc. 4-3 App. 299 ¶8 (Cotton). *See also* Ex. B-*Barthuly* Dep. 100:14-18 and Ex. E-*Abili-Staff* 30(b)(6) (*Barthuly*) Dep. 28:13-16 (*Abili-Staff* did not keep records of consumers who found jobs).

¹⁰¹ App. 999-1000 ¶12 (64 complaints filed with BBB in 41 months prior to January 4, 2010); App. 271 (58 complaints filed with BBB in 36 months prior to January 4, 2010); *see* App. 3 - 269 (64 BBB complaint files); Ex. F-*Comstock* Second Declaration, 1 ¶2, 3-7 (attaching two BBB complaints filed between January 4 and February 2, 2010).

¹⁰² Rec. Doc. 4-3 App. 270. In spite of the BBB's report, the moneyfromhome.net Web site continued to claim that the company typically has a "satisfactory" rating with the BBB. Rec. Doc. 4-4 App. 738. *But see* Rec. Doc. 4-4 App. 478 (jobsformoms.com Web site acknowledges "F" rating).

¹⁰³ Ex. B-*Barthuly* Dep. 92:18-93:24 (customer data kept on computers and server), 96:1-4 (hard copy customer data would be duplicative of electronically stored customer data); Ex. C-*Becker* (6/10/10) Dep. 24:24-25:6 (customer data stored on server, computers and USB drives); *see* Ex. O-*Excerpt of Abili-Staff, Ltd.*'s Responses to Plaintiff's First Set of Discovery, Answer to Interrogatory No. 12 and Exhibit D, at O-2, O-5.

¹⁰⁴ Ex. B-*Barthuly* 92:23-93:1 (server contained most of *Abili-Staff*'s customer data); Ex. C-*Becker* (6/10/10) Dep. 27:6-22 (abilinewmember database contains *Abili-Staff*'s customer data since automation of computer system late 2005 or 2006), 29:18-30:4 (member table and autinfo table probably contains data prior to automation), 31:18-23 (does not know whether *Abili-Staff* data kept anywhere other than databases); Ex. D-*Becker* (6/11/10) Dep. 33:3-7 (*Becker* created *Abili-Staff*'s database in 2004 or 2005), 33:23-34:17 (databases maintained on server in Boston contained *Abili-Staff*'s customer data); 35:7-18 (*Abili-Staff* customer data contained in the abilinewmember and abilog databases); *see* Ex. O-*Excerpt of Abili-Staff, Ltd.*'s Responses to Plaintiff's First Set fo Discovery, Answer to Interrogatory No. 12 and Exhibit D, at O-2, O-5.

paid by consumers who purchased Defendants' job listings.¹⁰⁵ Abili-Staff's abilinewmember database also contains customer refund information.¹⁰⁶

Under the Temporary Restraining Order, the FTC obtained a copy of Defendants' electronically stored information, including data stored on the server.¹⁰⁷ Defendant's electronically stored information contains, *inter alia*, Abili-Staff's abilinewmember database.¹⁰⁸ Defendants' database contains information from November 2000 to February 2010.¹⁰⁹ Based on these database records containing information representing almost a 10-year period, Defendants received approximately \$3,052,434 in confirmed payments from 75,189 consumers as a result of Defendants' deceptive business practices.¹¹⁰

The dollar value of total payments Defendants received from consumers, as determined from Defendants' database, is corroborated by Defendants' tax returns and financial statement

¹⁰⁵ Ex. D–Becker (6/11/10) Dep. 31:7-18, 33:20-22, 34:13-17 (the abilinewmember database contained number of consumers who purchased a membership), 37:13-15, 37:25–38:3 (abilinewmember database contains purchase price paid by consumers). Defendants testified that gross income and refund information probably could be determined from the data contained on Abili-Staff's databases. Ex. C–Becker (6/10/10) Dep. 30:2-4 (database probably contains data prior to automation); Ex. D–Becker (6/11/10) Dep. 42:18-25 (gross income can be determined from data in abilinewmember database since database created), 43:1-6, 44:4-7 (does not know if total amount of refunds in database); 44:8-10 (does not know if total gross income in database). Barthuly testified that gross income for Abili-Staff would be contained on Defendants' computers and in their tax returns. Ex. B–Barthuly Dep. 104:4-12.

¹⁰⁶ Ex. D–Becker (6/11/10) Dep. 35:7-10 (the abilinewmember database contained refund information), 38:11-20 (refund information contained in abilinewmember database, autinfo table).

¹⁰⁷ Ex. H–Hayes Dec. 1-2 ¶¶4-7; Ex. I–Pisano Dec. 2-3 ¶¶10-15; Ex. J–Brubaker Dec. 1-2 ¶¶3-8; Ex. K–Sweeney Dec. 1 ¶¶3-5; Ex. L–Compton Dec. 1 ¶¶3-5; Ex. M–Huettnner Dec. 2-3 ¶¶9-13; Ex. N–Dale Dec. 1 ¶¶2-4.

¹⁰⁸ Ex. N–Dale Dec. 1 ¶¶2-4; Ex. G–McPeek Sixth Dec. 3 ¶¶8-9; *see supra* notes 103–106.

¹⁰⁹ Ex. G–McPeek Sixth Dec. 3 ¶10.

¹¹⁰ Ex. G–McPeek Sixth Dec. 3-4 ¶10. The FTC bases its minimum estimate of consumer injury on the results of review of Defendants' server databases, where accounting and consumer data was stored. Ex. G–McPeek Sixth Dec. 3 ¶8. The \$3,052,434 figure is a conservative estimate of Defendants' gross receipts from November 2000 to February 2010 that is based on the "Members" table data including only confirmed payments. Ex. G–McPeek Sixth Dec. 3-4 ¶10. For about a five year period, from May 2005 to February 2010, Defendants' "Autinfo" table shows consumer payments in the amount of \$2,004,141. Ex. G–McPeek Sixth Dec. 4 ¶¶11-12.

submitted to the FTC. Abili-Staff's tax returns for the years 2002 through 2008 indicate Defendants earned \$2,845,108 during that period.¹¹¹ Additionally, Barthuly's sworn financial statement indicated that Defendants earned at least \$140,000 during 2009.¹¹² The IRS returns for a seven year period plus Defendant's sworn financial statement for 2009 adds up to \$2,985,108. The tax records and Defendants' testimony account for only eight years of Defendants' almost 10-year period of operation.¹¹³ Defendants' database information, containing payment data from November 2000 to February 2010, presents a more complete picture and is the best evidence of Defendants' gross receipts.

Defendants' database records also indicate, that during the time period May 2005 to February 2010, the total amount of refunds given to consumers was only \$27,248.87.¹¹⁴

Defendants' database indicates that during the same time period, May 2005 to February 2010,

¹¹¹ Ex. G–McPeek Sixth Dec. 1-2 ¶¶4-5, and G-6.

¹¹² Ex. G–McPeek Sixth Dec. 2 ¶6.

¹¹³ In discovery, Defendants produced Abili-Staff's tax returns for 2002 to 2008 and executed the IRS Form 4506, authorizing the FTC to obtain copies of Abili-Staff's tax returns for 2000 and 2001. On information and belief, the IRS has destroyed Abili-Staff's 2000 and 2001 tax returns.

¹¹⁴ Ex. G–McPeek Sixth Dec. 4 ¶¶11, 13. Abili-Staff did not offer a money-back guarantee prior to 2007. Ex. E–Abili-Staff 30(b)(6) (Barthuly) Dep. 33:21-22. When asked in discovery, Defendants failed to produce any dollar amount of refunds paid and failed to controvert the FTC's calculation of refunds. Ex. B–Ex. B–Barthuly Dep. 105:3-8 (Barthuly does not know amount of refunds given by Abili-Staff); Ex. D–Becker (6/11/10) Dep. 43:1-6, 44:4-7 (Becker does not know if database contained all refund records); Ex. O–Excerpt of Abili-Staff, Ltd.'s Responses to Plaintiff's First Set of Discovery, Answer to Interrogatory Nos. 12 and 17, at O-2 to O-4 (database contains refunds since automation; total refunds not known yet). Barthuly testified that Defendants had provided almost 800 refunds in the last three years and estimated there were approximately 36,000 customers during the same time period. Ex. A–PI Hr'g 80:6-12, 108:11-14; *see* Rec. Doc. 44, 2 ¶3, 11 ¶30. Although Barthuly estimated a greater number of refunds for a shorter time (three years), Defendants have not provided concrete evidence showing a greater total value of refunds than the \$27,248.87 contained in the database.

only 774 consumers received refunds.¹¹⁵ Based on Defendants' testimony and written response to discovery, Defendants' database information is the best evidence of their refunds.¹¹⁶

Thus, based on Defendants' own records, a reasonable estimate of consumer injury (total consumer payments minus refunds) generated by Defendants' deceptive business practices is \$3,025,185 (\$3,052,434 - \$27,248.87).

LEGAL ARGUMENT

V. SUMMARY JUDGMENT IS APPROPRIATE IN THIS CASE.

Summary judgment is appropriate when the moving party shows that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is proper when a rational trier of fact would not be able to find for the nonmoving party on the claims at issue. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Harvill v. Westward Commc'ns, L.L.C.*, 433 F.3d 428, 433 (5th Cir. 2005). Only disputes over facts that might affect the outcome of this litigation will properly preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus, any opposition to this motion must set forth evidence that is significantly probative, and not merely colorable, of any fact that is claimed to be disputed. *Hawking v. Ford Motor Credit Co.*, 210 F.3d 540, 545 (5th Cir. 2000). Because Defendants cannot come forward with such evidence, Plaintiff FTC is entitled to summary judgment against Defendants.

¹¹⁵ Ex. G–McPeek Sixth Dec. 4 ¶13; *see supra* note 114.

¹¹⁶ *See supra* notes 104-106. Abili-Staff did not offer a money-back guarantee prior to 2007. Ex. E–Abili-Staff 30(b)(6) (Barthuly) Dep. 33:21-23. When asked in discovery, Defendants failed to produce any dollar amount of refunds paid and failed to controvert the FTC's calculation of refunds.

A. Jurisdiction, Venue, and Commerce Requirements Are Met.

The FTC brought this action under Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), to halt Defendants’ fraudulent business practices. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. §§ 45(a) and 53(b), and 28 U.S.C. §§ 1331, 1337(a), and 1345. Venue is proper in this case because all Defendants reside or resided in and transact or have transacted business in the Western District of Texas. 15 U.S.C. § 53(b); 28 U.S.C. § 1391(b) and (c).

Defendants operated their deceptive business on a nationwide level, thereby affecting the passage of property or messages from one state to another and using instrumentalities of interstate commerce.¹¹⁷ Thus, at all times material to the FTC’s Complaint, Defendants maintained a substantial course of trade in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. *See Finger Furniture Co., Inc. v. Mattress Firm, Inc.*, No. H-05-0299, 2005 U.S. Dist. LEXIS 18648, at *14 (S.D. Tex. July 1, 2005) (“Transfer of products and advertisements through the internet is considered interstate commerce.”); *Hillis v. Equifax Consumer Servs., Inc.*, 237 F.R.D. 491, 511 (N.D. Ga. 2006) (use of Internet establishes use of instrumentalities of interstate commerce element required under CROA, 15 U.S.C. § 1679); *see also FTC v. Shaffner*, 626 F.2d 32, 37 (7th Cir. 1980) (use of telephone subjects business to federal regulation).

B. Defendants Violated Section 5 of the FTC Act.

Section 5 of the FTC Act, 15 U.S.C. § 45, prohibits deceptive acts and practices. An act or practice is deceptive if a defendant makes a material misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances. *Kraft, Inc. v. FTC*, 970

¹¹⁷ *See supra* notes 47-48 and accompanying text at Section IV.

F.2d 311, 314 (7th Cir. 1992); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988).

To establish liability for deceptive practices under Section 5 of the FTC Act, the FTC must establish that (1) there was a representation, (2) the representation was likely to mislead consumers acting reasonable under the circumstances, and (3) the representation was material. *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003). When express claims are at issue, it is appropriate to infer that reasonable consumers interpret them to mean what they say. *FTC v. USA Beverages, Inc.*, No. 05-61682-CIV, 2005 U.S. Dist. LEXIS 39075, at *16-17 (S.D. Fla. Dec. 5, 2005). Thus, a claim is “likely to mislead” if it is false. *In re Thompson Med. Co.*, 104 F.T.C. 648, 818-19 (1984), *petition for review denied*, 791 F.2d 189, 197 (D.C. Cir. 1986).

A misrepresentation or omission is material if it is likely to affect the consumer’s decision to buy the product or service. *FTC v. Atlantex Assocs.*, No. 87-0045-CIV-NESBITT, 1987 U.S. Dist. LEXIS 10911, at *28-29 (S.D. Fla. Nov. 25, 1987), *aff’d on other grounds*, 872 F.2d 966 (11th Cir. 1989); *FTC v. Jordan Ashley, Inc.*, No. 93-2257-CIV-NESBITT, 1994 U.S. Dist. LEXIS 7494, at *9-10 (S.D. Fla. Apr. 5, 1994). “Reasonable consumers are not required to doubt the veracity of express representations, and the Court may presume express claims to be material.” *FTC v. Stefanchik*, No. C04-1852RSM, 2007 U.S. Dist. LEXIS 25173, at *14 (W.D. Wash. Apr. 3, 2007), *aff’d*, 559 F.3d 924 (9th Cir. 2009); *accord FTC v. Wilcox*, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995) (“Express claims or deliberately-made implied claims used to induce the purchase of a particular good or service are presumed material.”).¹¹⁸

¹¹⁸ See also *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) (“Consumer reliance on express claims is presumptively reasonable. It is reasonable to interpret express statements as intending to say exactly what they say.”), quoting *FTC v. Int’l Computer Concepts, Inc.*, No. 5:94CV1678, 1994 WL 730144, at *12 (N.D. Ohio Oct. 24, 1994), quoted with approval in *FTC v. Garvey*, No. CV 00-9358 (GAF) (CWx), 2001 U.S. Dist. LEXIS 25060, at *20 (C.D. Cal. Nov. 8, 2001).

The FTC can prove its claims through a representative sample of injured consumers and is not required to demonstrate that each individual consumer relied on defendants' misrepresentations or omissions. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993) (“[P]roof of individual reliance by each purchasing customer is not needed.”); *FTC v. Int'l Diamond Corp.*, No. C-82-0878 WAI (JSB), 1983 U.S. Dist. LEXIS 11862, at *17-19 (N.D. Cal. Nov. 8, 1983) (“representative sample” of consumers); see *FTC v. Kitco of Nev., Inc.*, 612 F. Supp. 1282, 1294 (D.C. Minn. 1985) (eight consumer witnesses). A presumption of actual reliance arises once the FTC has proven that defendants made material misrepresentations, that the misrepresentations were widely disseminated, and that consumers purchased defendants' product. *Figgie*, 994 F.2d at 605-06. “Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of [Section 13(b)].” *Id.* at 605 (citing *Kitco.*, 612 F. Supp. at 1293).¹¹⁹ From a representative sample of consumers, a court can infer a pattern or practice of deceptive behavior. *FTC v. Nat'l Bus. Consultants, Inc.*, 781 F. Supp. 1136, 1141-42 (E.D. La. 1991) (citations omitted); see *Int'l Diamond Corp.*, 1983 U.S. Dist. LEXIS 11862, at *17-19 (“representative sample” of consumers, even as few as one); *Kitco*, 612 F. Supp. at 1294 (eight consumer witnesses).

Defendants' pattern or practice of deception may be proven by consumer declarations and complaints, which are admissible under Federal Rule of Evidence 807. See *Figgie*, 994 F.2d at 608-09 (affirming district court's ruling that consumer complaint letters were admissible

¹¹⁹ See also *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991) (citing *Kitco*, 612 F. Supp. at 1293) (“[The FTC does not file] a private fraud action, but a government action brought to deter unfair and deceptive trade practices and obtain restitution on behalf of a large class of defrauded investors. It would be inconsistent with the statutory purpose for the court to require proof of subjective reliance by each individual consumer.”).

under Rule 807's predecessor, Rule 803(24), to prove the price paid by consumers and total injury).¹²⁰ In determining the number of testifying consumers necessary to prove a Section 5 violation, the *International Diamond* court quotes *Vasquez v. Superior Court*, 484 P.2d 964, 968 (Cal. 1971): "Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice to one consumer would provide proof for all." *Int'l Diamond*, 1983 U.S. Dist. LEXIS 11862, at *17-18. Thus, the Court can infer a widespread pattern of deceptive practices based on the testimony of relatively few consumers.

C. Complaint Counts.

1. Count One of the Complaint.

Defendants violated Section 5 of the FTC Act by falsely representing that they would allow purchasers of their job listings to receive unlimited access to more than 1000 work-at-home job listings for the duration of the membership term.¹²¹ Contrary to Defendants' multiple Web site representations that membership will provide "unlimited" access to the job listing services, the evidence shows that Defendants did not provide unlimited access to consumers who purchased their work-at-home job listing memberships.¹²² The evidence further shows that Defendants failed to conspicuously disclose to consumers that membership access would be

¹²⁰ See also *FTC v. Kuykendall*, 312 F.3d 1329, 1343 (10th Cir. 2002) (affirming district court's admission of consumer declarations and complaints as evidence of violative behavior); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 576 (7th Cir. 1989) (affirming district court's admission of consumer declarations to show actual harm to consumers had resulted from the defendants' activities); *FTC v. Magazine Solutions, LLC*, No. 7-692, 2009 U.S. Dist. LEXIS 20629, at *3-8 n.1 (W.D. Pa. Mar. 16, 2009) (admitting consumer complaints as evidence of material facts and to show notice); *Kitco*, 612 F. Supp. at 1294 (admitting affidavits as proof of purchase, injury to consumers, and entitlement to restitution); *FTC v. Cyberspace.com, LLC*, No. C00-1806L, 2002 U.S. Dist. LEXIS 25565, at *13 n.5 (W.D. Wash. July 10, 2002) (admitting emails and letters of complaint to show both the truth of the matters asserted and notice).

¹²¹ See *supra* section IV.A.

¹²² See *supra* section IV.A.

limited and that their access would be blocked before the expiration of the membership term.¹²³ This contradictory language in the membership agreements is legally insufficient to cure the prior misrepresentations.¹²⁴

Ultimately, Defendants reaped the profits of promising unlimited access while simultaneously taking action to block consumers' access to the job listings.¹²⁵

Defendants did not grant unlimited access but nevertheless chose to misrepresent their service and even acknowledged in open court that the Web sites were not clear.¹²⁶ The FTC's uncontroverted evidence, including Defendants' admissions, Defendants' own documents, consumer declarations, and consumer complaints to the BBB establishes that Defendants' made these representations and that these representations constitute a deceptive act or practice in violation of Section 5 of the FTC Act.

2. Count Two of the Complaint.

Defendants also violated Section 5 of the FTC Act by falsely representing, in express claims on their Web sites, that they will give full refunds to consumers who are not getting paid

¹²³ See *supra* section IV.A.2.

¹²⁴ While the Membership Agreement contradicted the promise of unlimited access, and made specific exclusions to the refund policy, this does not cure Defendants' misrepresentations. The limitations in the Membership Agreements are not clearly and conspicuously displayed, and do not cure the prior deception. *FTC v. Gill*, 71 F. Supp.2d 1030, 1044 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944 (9th Cir. 2001) (rejecting argument that representations were not deceptive because contract disclaimed any guarantee); see also *FTC v. Connelly*, No. SACV 06-701 DOC (RNBx), 2006 U.S. Dist. LEXIS 98263, at *33 (C.D. Cal. Dec. 20, 2006) (“[D]isclaimers are particularly inadequate when they appear in a different context than the claims they purport to repudiate.”). Similarly, Defendants' promises of unlimited access were not cured by providing refunds to some consumers who did complain when their access was blocked.

¹²⁵ See *supra* section IV.A.

¹²⁶ See *supra* text accompanying notes 60-61.

to work at home 60 days after purchasing their job listings memberships. In fact, in numerous instances, Defendants denied refunds to consumers.¹²⁷

The evidence establishes that Defendants routinely denied consumer refund requests, even when the original request was made during the refund period.¹²⁸ Often the refund requests were denied because consumers did not use the correct form to submit the refund requests.¹²⁹

Additionally, the evidence shows that Defendants routinely used their arbitrary and undefined security policy as a basis to deny consumer refunds, despite their “no questions asked” money-back guarantee.¹³⁰ The evidence further demonstrates that Defendants refused to issue refunds even after consumers complained to the BBB.¹³¹

In the Membership Agreements for jobsformom.com and moneyfromhome.com, Defendants also attempt to limit their money-back guarantee representations.¹³² In the agreements, Defendants impose numerous technicalities and procedures to request a refund, such as the timing and forms used for refund requests.¹³³ Nevertheless, even if a consumer understood its terms, the Membership Agreement directly contradicts the Web sites’ money-back guarantee representations. Thus, this contradictory language is legally insufficient to cure the prior misrepresentations.¹³⁴

¹²⁷ See *supra* section IV. B.2.

¹²⁸ See *supra* text accompanying notes 80, 83-84, 88.

¹²⁹ See *supra* note 80; see *supra* text accompanying notes 83-84, 86-88.

¹³⁰ See *supra* text accompanying notes 89-93.

¹³¹ See *supra* text accompanying note 96.

¹³² See *supra* note 97.

¹³³ *Id.*

¹³⁴ See *supra* note 124.

Defendants' express promise that consumers will receive full refunds, plus evidence of Defendants' pattern and practice of denying refunds, establishes Defendants' violation of Section 5 of the FTC Act. Based on the representations, it was reasonable for consumers to believe that, if they did not find a work-at-home job after 60 days, they would received the promised refund. *See Five-Star Auto Club*, 97 F. Supp. 2d at 528-31. Defendants reaped the benefits of representing to consumers that purchasing Defendants' job listings was risk free.¹³⁵ The uncontroverted evidence establishes Defendants violated Section 5 of the FTC Act by denying refunds contrary to their express representations.

Moreover, the fact that Defendants provided some refunds does not cure the deception. The uncontroverted facts show that Defendants failed to provide the promised refunds for other consumers, which does not negate Defendants' liability. *See Basic Books, Inc. v. FTC*, 276 F.2d 718, 721 (7th Cir. 1960) ("That a person or corporation, through its agents, may have made correct statements in one instance has no bearing on the fact that they made misrepresentations in other instances."). Some consumers were denied refunds contrary to the Web sites' representations. Therefore, the number of refunds granted is irrelevant.

Additionally, no issue of material fact is created by the existence of consumers who were satisfied. Settled law holds that "[t]he existence of some satisfied consumers does not constitute a defense under the FTC [Act]." *Amy Travel*, 875 F.2d at 572, *quoted with approval in FTC v. Stefanichik*, 559 F.3d 924, 929 n.12 (9th Cir. 2009) (affirming summary judgment in favor of

¹³⁵ It is well settled that providing refunds does not sanitize misrepresentations. *FTC v. Think Achievement*, 312 F.3d 259, 261 (7th Cir. 2002) (argument that misrepresentations are cured by refunds has been "repeatedly rejected"); *FTC v. SlimAmerica*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999) ("The existence of a money-back guarantee . . . is neither a cure for deception nor a remedy for consumer injury.").

FTC).¹³⁶ Similarly, a small number of complaints filed with the BBB or another agency is not a defense and does not indicate Defendants have complied with the FTC Act.¹³⁷ *FTC v.*

Vocational Guides, Inc., No. 3:01-0170, 2006 WL 3254517, at *14 (M.D. Tenn. Nov. 9, 2006).

There are a number of reasons dissatisfied consumers may not request a refund:

[Defendant's] low refund rate may not represent satisfaction. . . .
[E]ven dissatisfied consumers may fail to exercise their right to a refund, because they think it not worth the trouble, because they feel guilty for having been deceived, because they credit the product's ineffectiveness to their own failure to follow instructions, or for any one of a number of other reasons.

FTC v. Pantron I Corp., 33 F.3d 1088, 1098 (9th Cir. 1994).

Some consumers may have never realized their job listing access was limited, realized it only after the refund period expired, or may never have realized that Defendants' refund policy was not as promised. Nevertheless, it is Defendants' misrepresentation that "tainted the customers' purchasing decisions" that gives rise to a Section 5 violation. *See Figgie*, 994 F.2d at 606 ("The fraud in the selling . . . is what entitles consumers" to restitution). Thus, the fact that some consumers did not complain or did not seek refunds or is irrelevant where the deception occurred at the time of the consumers' purchase and does not create a material issue of fact.

¹³⁶ *See also Gill*, 71 F. Supp. 2d at 1049 n.21 ("Even assuming that defendants do have thousands of satisfied consumers, it does not excuse their violation of the law."); *FTC v. Silueta Distribs., Inc.*, No. C93-4141 SBA, 1995 U.S. Dist. LEXIS 22254, at *16 n.6 (N.D. Cal. Feb. 24, 1995) ("[T]he existence of some satisfied consumers is not a defense to liability.").

¹³⁷ Defendants have argued that out of approximately 36,000 consumers who purchased Defendants' job listings, relatively few (64) filed complaints with the BBB. Rec. Doc. 44, 2 ¶3, 11 ¶30.

VI. THE CORPORATE AND INDIVIDUAL DEFENDANTS ARE SUBJECT TO JOINT AND SEVERAL LIABILITY.

A. The Corporate Defendants Are Subject to Joint and Several Liability as a Common Enterprise.

Corporate defendants may be held jointly and severally liable if they operate as a common enterprise. *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000) (citation omitted).¹³⁸ To determine whether a common enterprise exists, “the pattern and framework of the whole enterprise must be taken into consideration.” *Del. Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964) (quotations omitted), *quoted in J.K. Publ'ns*, 99 F. Supp. 2d at 1202. A host of factors may demonstrate the existence of a common enterprise, including: common control, shared officers, shared office space, commingling of funds, unified advertising, a maze of interrelated companies, use of the joint operation to perpetrate a fraud, whether unjust loss or injury would result from separate treatment, and “any other evidence revealing that no real distinction existed between the corporate defendants.” *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1116 (S.D. Cal. 2008) (citing, *inter alia*, *Del. Watch Co.*, 332 F.2d at 746; *J.K. Publ'ns*, 99 F. Supp. 2d at 1201-02); *FTC v. Inv. Devs., Inc.*, No. 89-642, 1989 U.S. Dist. LEXIS 6502, at *30 (E.D. La. June 9, 1989) (citation omitted); *see FTC v. Data Med. Capital, Inc.*, No. SA CV 99-1266 AHS (EEx), 2010 U.S. Dist. LEXIS 3344, at *62 (C.D. Cal. Jan 15, 2010) (citations omitted).¹³⁹

¹³⁸ *See Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973); *FTC v. SkyBiz.com, Inc.*, 2001 WL 1673649, at *5 (N.D. Okla. Aug. 2, 2001); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1011 (N.D. Ind. 2000); *see also FTC v. Para-Link Int'l, Inc.*, No. 8:00-CV-2114-T-17E, 2000 WL 33988084, at *2-4 (M.D. Fla. Nov. 21, 2000) (holding multiple corporate entities liable as participants in a common enterprise).

¹³⁹ *See also FTC v. U.S. Oil & Gas Corp.*, No. 83-1702-CIV-WMH, 1987 U.S. Dist. LEXIS 16137, at *60 (S.D. Fla. July 10, 1987) (“The fact . . . that the companies’ records permit the segregation of each company’s sales, refunds, and assets, does not outweigh the other factors” used to determine common enterprise.).

Many of those factors are present here, demonstrating that the two corporate Defendants operated as a common enterprise. First, no real distinction exists between Abili-Staff and Equitron in the operation and management of the job-listing scheme.¹⁴⁰ Second, Equitron and Abili-Staff have common ownership, management, and employees.¹⁴¹ Third, Abili-Staff and Equitron share an address and share accountants and attorneys.¹⁴² These facts demonstrate that there is no real distinction between the individual Defendants and their companies. In the words of Defendant Barthuly, the work-at-home job listing operation was “one business enterprise” run by herself, Becker, and the two corporate defendants.¹⁴³

Finally, the common enterprise is used to perpetuate a fraud, and unjust loss and injury would result from treating the corporate Defendants separately because both companies are involved actively in the deception. To treat the corporate Defendants separately would serve only to frustrate the consumer protection purpose of the FTC Act.¹⁴⁴

B. Barthuly and Becker Can and Should Be Held Individually Liable for the Acts and Practices of the Corporate Defendants.

Individuals can be held liable for corporate violations of Section 5 of the FTC Act. *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006); *FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080, 1087 (C.D. Cal. 1994). Individual liability for injunctive relief is appropriate where the individual defendant directly participated in or had the authority to control

¹⁴⁰ See *supra* text accompanying notes 33-37.

¹⁴¹ See *supra* text accompanying notes 38-41.

¹⁴² See *supra* text accompanying notes 42-44.

¹⁴³ See *supra* note 33.

¹⁴⁴ See *U.S. Oil & Gas*, 1987 U.S. Dist. LEXIS 16137, at *61-63 (citing, *inter alia*, *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 267 (6th Cir. 1970)).

corporate deceptive acts and practices. *Am. Standard*, 874 F. Supp. at 1087 (citations omitted). Authority to control can arise from assuming the duties of a corporate officer. *Amy Travel*, 875 F.2d at 573-74, *followed in Am. Standard*, 874 F. Supp. at 1089. This is especially true when the corporate defendants, as those in this case, are small, closely held corporations. *See Standard Educators, Inc. v. FTC*, 475 F.2d 401, 403 (D.C. Cir. 1973) (“A heavy burden of exculpation rests on the chief executive and primary shareholder of a closely held corporation whose stock-in-trade is overreaching and deception.”), *followed in FTC v. Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1205 (10th Cir. 2005). Individual defendants are further subject to monetary liability if they had knowledge of the practices at issue. *Am. Standard*, 874 F. Supp. at 1089 (citations omitted).¹⁴⁵ “[T]he degree of participation in business affairs is probative of knowledge.” *Amy Travel*, 875 F.2d at 574 (citation omitted), *followed in FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1235 (9th Cir. 1999). An individual defendant’s awareness of a high volume of consumer complaints can further demonstrate knowledge of deceptive practices. *Amy Travel*, 875 F.2d at 574.

Here, both of the individual Defendants are liable for injunctive and monetary relief. Defendants Barthuly and Becker are the only individuals who own and operate Abili-Staff and Equitron and receive all profits.¹⁴⁶ Both individual Defendants actively participate and control

¹⁴⁵ However, an individual need not have had subjective intent to deceive or actual knowledge of the deception; reckless indifference to the truth or falsity of a misrepresentation or an awareness of a high probability of fraud coupled with intentional avoidance of the truth will suffice. *Amy Travel*, 875 F.2d at 574; *see Cyberspace.com*, 453 F.3d at 1202; *Am. Standard*, 874 F. Supp. at 1089; *J.K. Publ’ns*, 99 F. Supp. 2d at 1204.

¹⁴⁶ *See supra* text accompanying note 41.

Abili-Staff and Equitron.¹⁴⁷ Both individual Defendants admitted to knowledge of consumer complaints about their business practices.¹⁴⁸

The individual Defendants' positions with and actions in furtherance of the business demonstrate their ability to control the common enterprise, subjecting each to injunctive liability. Additionally, the individual Defendants have the requisite knowledge of Abili-Staff's deceptive acts and practices to be subject to monetary liability. Based on the overwhelming, uncontroverted evidence, both individual Defendants participated in, had authority to control, and had knowledge of the corporate Defendants' deceptive acts and practices, and they can and should be held liable for both injunctive and monetary relief.

VII. THE REQUESTED RELIEF.

To remedy Defendants' blatant violations of the FTC Act, the FTC seeks injunctive, monetary, and ancillary relief against Defendants, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). The Second Proviso of Section 13(b) provides that "in proper cases the [FTC] may seek, and, after proper proof, the court may issue, a permanent injunction." *Id.*¹⁴⁹ The FTC may seek a permanent injunction against violations of "any provision of law enforced" by the FTC. *Id.*; *see also FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1086-87 (9th Cir. 1985). A deception case, such as this one, involving misrepresentations of material facts in violation of Section 5 of the FTC Act, is a "proper case." *H.N. Singer*, 668 F.2d at 1111.

¹⁴⁷ See *supra* text accompanying notes 15-23 (Barthuly) and 24-32 (Becker).

¹⁴⁸ See *supra* text accompanying note 21 (Barthuly) and note 31 (Becker).

¹⁴⁹ Because the FTC seeks preliminary and permanent injunctive relief under the Second Proviso of Section 13(b), its Complaint is not subject to the procedural conditions set forth in the First Proviso of Section 13(b) for the issuance of preliminary injunctions in aid of administrative proceedings. *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982).

Once the equitable power of a federal court has been invoked, the full breadth of the court's authority is available, including such ancillary final relief as rescission of contracts and restitution. *Id.* at 1113. Section 13(b) empowers courts to exercise the full breadth of their equitable authority:

Congress, when it gave the district court authority to grant a permanent injunction against violations of any provisions of law enforced by the Commission, also gave the district court authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference.

Id.; see also *FTC v. Elders Grain Inc.*, 868 F.2d 901, 907 (7th Cir. 1989); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984); *FTC v. Sw. Sunsites, Inc.*, 665 F.2d 711, 718-19 (5th Cir. 1982).

Because the public interest is implicated, this Court's equitable powers "assume an even broader and more flexible character." *H.N. Singer*, 668 F.2d at 1112 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (also quoting *Porter*); see also *Sw. Sunsites*, 665 F.2d at 718 (also quoting *Porter*).

A. Injunctive Relief.

1. The Court has the authority to issue broad injunctive relief.

Section 13(b) of the FTC Act expressly authorizes the issuance of a permanent injunction to prevent further violations of the FTC Act. 15 U.S.C. § 53(b); *Pantron I*, 33 F.3d at 1102. Such an injunction is necessary when there is "some cognizable danger of recurrent violation," *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953),¹⁵⁰ or "some reasonable likelihood of future violations," *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1017 (N.D. Ind. 2000), *aff'd in part, rev'd in part on other grounds*, 312 F.3d 259 (7th Cir. 2002); *CFTC v. Hunt*,

¹⁵⁰ See also *Gill*, 71 F. Supp. 2d at 1047 (following *W.T. Grant*).

591 F.2d 1211, 1220 (7th Cir. 1979). The commission of past illegal conduct is highly suggestive of the likelihood of future violations. *CFTC v. CoPetro Mktg. Group, Inc.*, 502 F. Supp. 806, 818 (C.D. Cal. 1980) (quoting *Hunt*, 591 F.2d at 1220), *aff'd*, 680 F.2d 573 (9th Cir. 1982); *see also Five-Star Auto Club*, 97 F. Supp. 2d at 536 (citing *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975)); *Think Achievement*, 144 F. Supp. 2d at 1017 (quoting *Hunt*, 591 F.2d at 1220). A court should be more willing to find a possibility of recurrence “[w]hen the violation has been founded on systematic wrongdoing, rather than an isolated occurrence.” *Hunt*, 591 F.2d at 1220; *see Gill*, 71 F. Supp. 2d at 1047 (quoting *CoPetro Mktg.*, 502 F. Supp. at 818). Without an injunction, “[t]he defendant is free to return to his old ways.” *W.T. Grant*, 345 U.S. at 632.

a. The Court has the authority to issue “fencing-in” relief.

In addition to enjoining the specific conduct at issue in the Complaint, the Court has broad authority to enjoin unlawful acts that may be anticipated from Defendants’ past conduct, and to model injunctive orders to fit the exigencies of the case. *Five-Star Auto Club*, 97 F. Supp. 2d at 536 (citing *Kitco*, 612 F. Supp. at 1296). As the court noted in *FTC v. Wolf*, “Broad injunctive provisions are often necessary to prevent transgressors from violating the law in a new guise.” No. 94-8119-CIV-FERGUSON, 1996 U.S. Dist. LEXIS 1760, at *26 (S.D. Fla. Jan. 30, 1996) (citing *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)). The Supreme Court has recognized the necessity of “fencing-in relief” in FTC orders:

The Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. Having been caught violating the Act, respondents must expect some fencing in.

FTC v. Colgate-Palmolive Co., 380 U.S. 374, 395 (1965) (citations omitted); *see J.K. Publ’ns*, 99 F. Supp. 2d at 1209. “These ‘fencing in’ provisions are needed to prevent similar and related

violations from occurring in the future.” *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 215 (9th Cir. 1979) (citing *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959)).

b. The Court may impose occupational bans.

The fencing-in relief the Court is authorized to impose includes ordering occupational bans. Courts have previously approved and explained the need for this type of relief:

In drafting the [FTC] Act, Congress recognized that “there is no limit to human inventiveness in [the advertising] field.” Accordingly, it authorized the Commission to draft orders encompassing all of an advertiser’s products or all products in a broad product category in order to “fence in” known violators of the Act. “Fencing-in provisions serve to ‘close all roads to the prohibited goal, so that [the FTC’s] order may not be by-passed with impunity.’”

Sterling Drug, Inc. v. FTC, 741 F.2d 1146, 1154 (9th Cir. 1984) (citations omitted; second and third alteration in original); *see also Kraft, Inc.*, 970 F.2d at 326 (“The FTC has discretion to issue multi-product orders, so-called ‘fencing-in’ orders, that extend beyond violations of the Act to prevent violators from engaging in similar deceptive practices in the future.”). To keep defendants from engaging in deceptive activity in the future, numerous courts have granted FTC requests for permanent injunctions that ban defendants’ participation in broad categories of activity.¹⁵¹

¹⁵¹ *FTC v. Gill*, 265 F.3d 944, 957-58 (9th Cir. 2001) (ban on participation in credit-repair business); *FTC v. Global Mktg. Group, Inc.*, No. 8:06-cv-2272-T-33TGW, slip op. at 7 (M.D. Fla. Dec. 24, 2008) (bans on telemarketing and payment processing); *FTC v. Universal Premium Servs., Inc.*, No. CV06-0849 SJO (OPx), slip op. at 6-7 (C.D. Cal. Feb. 26, 2007), *aff’d sub nom. FTC v. MacGregor*, No. 08-55838, 2009 U.S. App. LEXIS 28661 (9th Cir. Dec. 30, 2009) (ban on telemarketing and on the sale or marketing of program memberships); *FTC v. Tashman*, No. 98-07058-CIV-Ryskamp, slip op. at 19 (S.D. Fla. July 11, 2006) (ban on marketing of franchises and business opportunities); *FTC v. Check Investors, Inc.*, No. 03-2115 (JWB), 2005 U.S. Dist. LEXIS 37199, at *8 (D. N.J. July 18, 2005), *aff’d*, 502 F.3d 159 (3d Cir. 2007) (ban on engaging in debt collection); *FTC v. World Media Brokers Inc.*, No. 02-C-6985, slip op. at 6-7 (N.D. Ill. June 22, 2004), *aff’d*, 415 F. 3d 758 (7th Cir. 2005) (bans on telemarketing and selling lottery tickets); *FTC v. Bay Area Bus. Council, Inc.*, No. 02-C-5762, slip op. at 6 (N.D. Ill. Apr. 14, 2004), *aff’d*, 423 F.3d 627 (7th Cir. 2005) (ban on all telemarketing in U.S. and ban on sale of credit-related products); *FTC v. Capital Choice Consumer Credit, Inc.*, No. 02-21050 CIV, 2004 WL 5149998, at *48 (S.D. Fla. Feb. 20, 2004) (ban on marketing credit cards); *FTC v. Consumer Alliance, Inc.*, No. 02-C-2429, slip op. at 5-6 (N.D. Ill. Oct. 17, 2003) (bans on telemarketing, selling credit card protection services, and selling credit-related products); *FTC v. Medicor, LLC*, No. CV 01-1896 CBM (Ex), 2002 U.S. Dist. LEXIS 16220, at *3-4 (C.D. Cal. July 18, 2002) (ban on telemarketing and on marketing of work-at-home medical billing opportunities); *Think Achievement*, 144 F. Supp. 2d at 1018, 1024 (ban on telemarketing and on marketing career-advisory goods and

2. The requested relief is appropriate.

a. Ban on Work-at-Home Opportunities.

Section I of the FTC's proposed Final Order bans Defendants from engaging in, or assisting others engaged in, the advertising, marketing, promoting, offering for sale, and sale of any "Work-at-Home Opportunity," as that term is defined in the Definitions section of the Final Order. This ban prohibits Defendants from engaging in the very activity at issue in this case. Without this ban, Defendants may attempt to return to their old ways of systematically deceiving job seekers into paying for job-listing membership with false promises of quality and quantity of the job listing services. Section I of the proposed Final Order makes it clear that Defendants may no longer participate in this Work-at-Home Opportunity industry.

b. Injunctions preventing Defendants from violating the law in a new guise.

Section II of the FTC's proposed Final Order enjoins all Defendants from making misrepresentations of material fact relating to the marketing or sale of any good, service, plan, or program. A non-exhaustive list of material facts is included as guidance. However, Section II serves to broadly enjoin Defendants from deceptive activities that would violate, at a minimum, Section 5 of the FTC Act, 15 U.S.C. § 45.

services); *Five-Star Auto Club*, 97 F. Supp. 2d at 536 (ban on all multi-level marketing); *FTC v. Micom Corp.*, Civ. No. 96-0472 (SS), 1997 U.S. Dist. LEXIS 3404, at *10-11 (S.D.N.Y. Mar. 12, 1997) (ban on offering application-preparation services for licenses or permits issued by U.S. government and investment opportunities involving such licenses or permits); *Wilcox*, 926 F. Supp. at 1095 (affirming magistrate's recommended ban on marketing by direct mail); *FTC v. NCH, Inc.*, No. CV-94-138-LDG, 1995 U.S. Dist. LEXIS 21096, at *8-9 (D. Nev. Aug. 31, 1995), *aff'd*, 106 F.3d 407, 1997 U.S. App. LEXIS 25928 (9th Cir. 1997) (ban on prize-promotion telemarketing); *Jordan Ashley*, 1994 U.S. Dist. LEXIS 7494, at *17-18 (ban on marketing of franchises or business opportunities).

B. Monetary Relief.**1. Measure of monetary relief.**

For the FTC to recover monetary damages in a summary judgment, it “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.” *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997) (citing *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 1996); *HUD v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 927 (4th Cir. 1995)). Even when the defendants’ record-keeping prevents distinguishing unlawful gains from the lawful, the risk falls on the wrongdoer whose conduct created the uncertainty. *Febre*, 128 F.3d at 535 (citing *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989)). In *Febre*, the Seventh Circuit affirmed the district court’s calculation of the appropriate amount of monetary relief by starting with total consumer sales and subtracting refunds. *Id.* at 535-36 & n.6.

In *FTC v. Medicor, LLC*, the court followed the Seventh Circuit’s reasoning and held that the “full amount lost by consumers is an appropriate measure of damages,” and that “[t]he FTC must show that its calculations reasonably approximate the amount of customers’ net losses.” 217 F. Supp. 2d 1048, 1057-58 (C.D. Cal. 2002) (citing *Febre*, 128 F.3d at 535-36). Then, the burden shifts to defendants to prove that the FTC’s approximation is inaccurate. *Id.* In support of its motion for summary judgment in *Medicor*, the FTC presented the declaration of an accountant who determined that defendants’ net sales were \$16,562,364.51, after deducting refunds, charge backs, and returns. *Id.* at 1057. The defendants objected that salaries, cost of product, rent, the cost of the receiver, and other business expenses had not been deducted. *Id.* The court overruled this objection: “Section 13(b) of the FTC Act permits the Court to order disgorgement regardless of the amount of defendant’s profits.” *Id.* (citing *Febre*, 128 F.3d at

537). The accountant's calculation of defendants' net sales was found to reasonably approximate consumers' net losses. *Id.* at 1057-58. The court held the defendants jointly and severally liable for the full amount of net sales. *Id.* at 1058.

Additionally, Section 13(b) of the FTC Act "permits a district court to order a defendant to disgorge illegally obtained funds." *Gem Merchandising*, 87 F.3d at 470; *see also Pantron I*, 33 F.3d at 1103 n.34 (district court may order disgorgement of unjust enrichment when it is not possible to reimburse all of the injured consumers). Otherwise, a defendant could retain the ill-gotten gains "simply by keeping poor records," thus undermining the deterrence function of Section 13(b). *Gem Merchandising*, 87 F.3d at 470; *see also Febre*, 128 F.3d at 535 (when the defendants' record-keeping prevents distinguishing lawful gains from the unlawful, the risk falls on the wrongdoer whose conduct created the uncertainty). Likewise, monetary relief should not be reduced to account for those few consumers who successfully used Defendants job-listings because Defendants' misrepresentations "tainted the customers' purchasing decisions." *Figgie*, 994 F.2d at 606 ("The fraud in the selling, not the value of the thing sold," is what entitles consumers to restitution.).

2. Amount of monetary relief.

Defendants deceived thousands of job seekers throughout the United States. Based on Defendants' own database records, including member payment and refund records, Defendants received at least \$3,052,434 in confirmed payments from 75,189 consumers from November 2000 to February 2010.¹⁵² Defendants' records also show 774 refunds in the amount of \$27,248.87 from May 2005 to February 2010.¹⁵³ Thus, the amount of revenue generated by

¹⁵² *See supra* text accompanying notes 109-110.

¹⁵³ *See supra* text accompanying notes 114-115.

Defendants' illegal scheme, net of refunds, totaled at least \$3,025,185. Defendants have not controverted these numbers derived from their own database. Therefore, the Court should enter a monetary judgment against Defendants for this amount as a reasonable approximation of consumer injury, as set forth in Section III of the FTC's proposed Final Order.

C. Ancillary Equitable Relief Required to Protect Consumers and Monitor Compliance.

1. Section IV provides necessary protections for Defendants' consumer victims.

Sections IV of the FTC's proposed Final Order protects Defendants' consumer victims from being further victimized. Section IV prohibits Defendants from disclosing, using, or otherwise benefitting from consumers' information and requires Defendants to properly dispose of consumers' information. These provisions will prevent Defendants' victims from finding themselves on "sucker lists" sold to other scam artists, and from being forced to contend with debt collectors trying to collect fraudulently obtained debt. The Court should include these important consumer safeguards in its Final Order in this case.

2. Monitoring, compliance reporting, and record keeping provisions are necessary to ensure compliance.

The Court should include monitoring, compliance reporting, and record keeping provisions in the Final Order in this case. Section VII of the proposed Order allows the FTC to monitor Defendants' compliance with the permanent injunctions. Section VIII requires Defendants to inform the FTC of changes in their employment status, residence, or financial status. Section IX of the proposed Order requires Defendants to maintain business records for inspection, while Section X requires Defendants to provide copies of the Order to their employees, agents, representatives, principals, and managers.

These provisions are necessary to ensure Defendants' compliance with the permanent injunction, and have been imposed by other courts in Section 13(b) actions. *See Think Achievement*, 144 F. Supp. 2d at 1018 ("Courts may order record-keeping and monitoring to ensure compliance with a permanent injunction.") (citation omitted); *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 212 (D. Mass. 2009) ("A permanent injunction serves twin goals: avoiding repeat violations of and monitoring compliance with the law and with the terms of injunction itself.") (citation omitted); *see, e.g., FTC v. Universal Premium Servs., Inc.*, No. CV06-0849 SJO (OPx), slip op. at 15-20 (C.D. Cal. Feb. 26, 2007) (ancillary relief granted in the form of order distribution, disclosures, FTC monitoring, and record keeping); *Medicor*, 2002 U.S. Dist. LEXIS 16220, at *6-13 (same).

CONCLUSION

For the foregoing reasons, as set forth in this motion, memorandum, the uncontroverted facts, and the overwhelming evidence supporting them, Plaintiff Federal Trade Commission requests that the Court grant summary judgment against Defendants on each and every Count pled and enter the requested permanent injunction and order for monetary relief.

Respectfully submitted, this 9th day of July, 2010.

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/s/ Ann D. LeJeune

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CERTIFICATE OF SERVICE

I certify that Plaintiff, Federal Trade Commission has provided a true and correct copy of the foregoing document to counsel of record through the Court's Notice of Electronic Filing system, according to Local Rule CV-5(b).

Dated: July 9, 2010
Dallas, Texas

/s/ Ann D. LeJeune
Ann D. LeJeune, Attorney for Plaintiff