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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	Case No. CV 12-09631 DDP (MANx)
	)	
Plaintiff,	)	
	)	
v.	)	
	)	<b>ORDER GRANTING PLAINTIFF'S MOTION</b>
THE ZAKEN CORP., a	)	<b>FOR SUMMARY JUDGMENT</b>
California corporation also	)	
d/b/a The Zaken Corproation,	)	
QuickSell and QuickSell and	)	
TIRAN ZAKEN, individually	)	
and as an officer of The	)	[Dkt. No. 52]
Zaken Corp.,	)	
	)	
Defendants.	)	
	)	
_____	)	

Presently before the court is Plaintiff's Motion for Summary Judgment. Having considered the submissions of the parties, the court is inclined to grant the motion and adopt the following order.

**I. Background**

Defendants (collectively, "Zaken") offer a "Wealth Building Home Business Plan" to consumers.<sup>1</sup> (Declaration of Dani Stagg, Ex. D at 44.) For \$148.00, plus shipping, purchasers become Associates

<sup>1</sup> This order uses the term "consumer" and "purchaser" interchangeably.

1 of QuikSell Liquidations and receive a "kit" including instructions  
2 on how to locate excess inventories, "'[i]nsider' secret  
3 techniques," "powerful and proven strategies," "a simple seven-word  
4 phrase that instantly pays [purchasers] cash profits," and other  
5 information. (Id. at 57-58, 97.) Zaken also offers purchasers  
6 additional "tools" for an additional charge. (Stagg Dec., Ex. E.  
7 at 85-86.)

8 Under Zaken's plan, consumers identify businesses seeking to  
9 liquidate excess inventory. Consumers then notify Zaken, which may  
10 proceed to negotiate an acquisition of the excess merchandise. If  
11 Zaken is successful in 1) buying the products identified by the  
12 consumer and 2) reselling the products at a profit, then Zaken pays  
13 purchasers fifty percent of the net proceeds. (Id. at 52-53.)  
14 Zaken advertises a "realistic ballpark figure" estimate that "2 to  
15 4 hours a week working this business will earn [participants] an  
16 average of \$3,000 to \$6,0000." (Stagg Dec. Ex. D. at 61.)

17 Effective March 1, 2012, the Federal Trade Commission  
18 broadened the scope of its "Business Opportunity Rule," 16 CFR §  
19 437.0 et seq., the earliest form of which was first promulgated in  
20 1978. 76 FR 76816. Prior versions of the rule regulated and  
21 imposed certain disclosure requirements upon the sale of business  
22 opportunities, but only those costing over \$500. 76 FR 76818. The  
23 2012 revision eliminated this monetary threshold. 76 FR 76821.  
24 The 2012 changes also seek "to address the sale of deceptive work-  
25 at home schemes, where unfair and deceptive practices have been  
26 both prevalent and persistent." 76 FR 76826. The FTC elaborated  
27 that "[s]ellers of fraudulent work-at-home opportunities deceive  
28 their victims with promises of an ongoing relationship in which the

1 seller will buy the output that business opportunity purchasers  
2 produce, often misrepresenting to purchasers that there is a market  
3 for the purchasers' goods and services," and that these schemes  
4 "frequently dupe consumers with false earnings claims." Id. Ignmmaryng Se

5 On November 9, 2012, Plaintiff filed a complaint against  
6 Defendants for violations of the FTC's Business Opportunity ~~seif~~  
7 and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §  
8 45(a).

9 **II. Legal Standard**

10 Summary judgment is appropriate where the pleadings,  
11 depositions, answers to interrogatories, and admissions on file,  
12 together with the affidavits, if any, show "that there is no  
13 genuine dispute as to any material fact and the movant is entitled  
14 to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party  
15 seeking summary judgment bearsto an92 0 0 \* (seekiCtkatories, and a -3

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1 Anderson, 477 U.S. at 256. Summary judgment is warranted if a  
2 party "fails to make a showing sufficient to establish the  
3 existence of an element essential to that party's case, and on  
4 which that party will bear the burden of proof at trial." Celotex,  
5 477 U.S. at 322. A genuine issue exists if "the evidence is such  
6 that a reasonable jury could return a verdict for the nonmoving  
7 party," and material facts are those "that might affect the outcome  
8 of the suit under the governing law." Anderson

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1 material. F.T.C. v. Stefanchik, 559 F.3d 924, 928 (9th Cir. 2009).  
2 Courts look to the overall impression conveyed by a representation,  
3 and not merely to literal truth. F.T.C. v. Cyberspace.Com LLC, 453  
4 F.3d 1196, 1200 (9th Cir. 2006).

5 While Zaken disputes that it violated Section 5(a) of the FTC  
6 Act, it provides no argument, authority, or evidence to support  
7 that position. Plaintiff, in contrast, cites to numerous instances  
8 in which Zaken directly or indirectly represented that purchasers  
9 of Defendants' business opportunity would earn substantial income.  
10 Defendants, for example, explicitly guaranteed that the "entire  
11 good-faith deposit of \$148 will be sent right back" if consumers  
12 "haven't made at least \$4,000" and they "return the kit" in the  
13 first thirty days of purchase. (Pl.'s Ex. 11, Attach. F.)  
14 Defendants suggested that such an outcome was unlikely,  
15 representing, for example, that "the average commission check  
16 [associates] get . . . will be approximately \$4,280!" and  
17 presenting a "realistic ballpark figure" estimate that "2 to 4  
participants] an

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20 of Defendants' business2.46) of the FTC  
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1 QuikSell. (Id.) In 2012, Zaken paid commissions to only five  
2 QuikSell purchasers, and those commissions were a fraction of the  
3 amounts Zaken claimed consumers would earn. (Pl.'s Ex. 29, Attach.  
4 A.)

5 Consumers spent an additional \$10,130,433 total on other  
6 QuikSell "upsell" tools. (Pl.'s Ex. 30, Attach. A.) Some consumers  
7 were encouraged to "spend [an additional] \$2,300" to purchase one  
8 such tool if they were "serious about this business and . . .  
9 really want[ed] to make the kind of money others have made." (Yee  
10 Dep., Pl.'s Ex. 14 at 105:21-23) . This particular tool, however,  
11 consisted of largely outdated telephone numbers of companies who  
12 were out of business. (Yee Dep., Pl.'s Ex. 14 at 108:15-21.)

13 It was reasonable for consumers to rely on Zaken's  
14 representations. The Government need not prove that each individual  
15 consumer relied on the deceptive acts or practices. FTC v.  
16 Commerce Planet, Inc., 878 F.Supp.2d 1048, 1072 (C.D. Cal. 2012).  
17 Here, reliance is shown by the undisputed fact that more than  
18 110,000 consumers bought Zaken's products. FTC v. Figgie Int'l,  
19 Inc., 994 F.2d 595, 605-6 (9th Cir. 1993). Further, it was  
20 reasonable for consumers to believe that Defendants' statements of  
21 earnings potential represented typical or average earnings. FTC v.  
22 Medicor LLC, 217 F. Supp. 2d 1048, 1053-54 (C.D. Cal. 2002); FTC v. 0 0 .

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1 promises of an ongoing relationship in which the seller will buy  
2 the output that business opportunity purchasers produce, often  
3 misrepresenting to purchasers that there is a market for the  
4 purchasers' goods and services," and that these schemes "frequently  
5 dupe consumers with false earnings claims." Id.

6 The Rule defines a business opportunity as a commercial  
7 arrangement in which:

- 8
- 9 (1) A seller solicits a prospective purchaser to enter into  
10 a new business; and
- 11 (2) The prospective purchaser makes a required payment; and
- 12 (3) The seller, expressly or by implication, orally or in  
13 writing, represents that the seller or one or more  
14 designated persons will:
- 15 (i) Provide locations for the use or operation of  
16 equipment, displays, vending machines, or similar devices,  
17 owned, leased, controlled, or paid for by the purchaser; or
- 18 (ii) Provide outlets, accounts, or customers, including,  
19 but not limited to, Internet outlets, accounts, or  
20 customers, for the purchaser's goods or services; or
- 21 (iii) Buy back any or all of the goods or services that the  
22 purchaser makes, produces, fabricates, grows, breeds,  
23 modifies, or provides, including but not limited to  
24 providing payment for such services as, for example,  
25 stuffing envelopes from the purchaser's home.

26 16 C.F.R. § 437.1(c).

27 The first two elements of the Rule's inquiry are clearly met  
28 here.

As to third prong, Plaintiff contends that sub-prongs (ii) and  
(iii), the "outlet" and "buy back" provisions, apply to Zaken's



1 outlets, accounts, or customers . . . or otherwise assisting the  
2 prospective purchaser in obtaining his or her own locations,  
3 outlets, accountsse assisting the

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1 QuikSell. (Id. at 52, 53, 56.) He approved the advertising of  
2 QuikSell and reviewed all of the Zaken Corp.'s marketing materials  
3 prior to their disbursement. (Zaken Dep., Pl.'s Ex. 12 at 54-55.)  
4 Though it is somewhat unclear from the record when Zaken's  
5 misrepresentations began, Plaintiff has submitted a plethora of  
6 examples of misrepresentations made in direct mailings,  
7 advertisements, and product materials. Over a ten year span, Zaken  
8 sold the QuikSell program to over 110,000 consumers. Of those, the  
9 evidence submitted indicates that over 99.8% never earned any  
10 commissions whatsoever. Fewer than 9,000 consumers received  
11 refunds of the \$148 purchase price. Furthermore, many consumers  
12 were taken in by Zaken's exhortations to "invest" additional money,  
13 sometimes thousands of dollars, in additional QuikSell "tools."  
14 (E.g., Ex. 14 at 105:21-23.)

15 Nor does Zaken appear contrite about his decade of deceptive  
16 conduct. To the contrary, Zaken firmly stands behind the marketing  
17 tactics of his "legitimate" business opportunity, and has insisted  
18 that at no time did he ever believe consumers were misled by  
19 QuikSell's advertisements. (Zaken Dep., Pl.'s Ex. 12 at 65:21-22.)  
20 The risk of future misconduct is high. Though Zaken claims that he  
21 "is out of the distressed merchandise business for good," (Zaken  
22 Decl. 2 ¶¶ 2, 4), he appears to intend to, if permitted, continue  
23 marketing work-at-home business opportunities. Here, his  
24 misrepresentations had less to do with "the distressed merchandise  
25 business" than with the illusory benefits of a work-at-home  
26 business "opportunity" of precisely the type Zaken intends to keep  
27 marketing. Zaken's proposed alternative injunction, which would  
28 replace the lifetime ban with essentially a "follow the law"

1 injunction forbidding him from violating the Business Opportunity  
2 Rule, would be wholly inadequate to protect consumers in the  
3 future.<sup>3</sup>

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1 QuikSell. Second, Zaken's own personal experience making \$100,000  
2 to \$200,000 in the distressed merchandise industry has little  
3 bearing on the experiences of over 110,000 consumers, whose paltry  
4 earnings figures were readily available to Zaken. Lastly, Zaken's  
5 supposed reliance on testimonials from "high earners" appears to be  
6 based on one of his own advertisements, which includes 14 short  
7 quotes from supposed QuikSell associates. (Ex 11 at 42.) While  
8 the quotes are attributed to named individuals, all are unsworn,  
9 and some are as short as four words. Even crediting each of these  
10 14 testimonials as true, Zaken's reliance on them, in the face of  
11 dozens of consumer complaints and the fact that the overwhelming  
12 majority of QuikSell associates never saw a dime from the program,  
13 constitutes intentional avoidance of the truth, at best.

14           iii. Amount of Restitution

15           "Consumer loss is calculated by 'the amount of money paid by  
16 the consumers, less any refunds made.'" Commerce Planet, 878  
17 F.Supp.2d. at 1088. The FTC bears the burden of providing a  
18 reasonable estimate of the appropriate monetary relief. Id. The  
19 burden then shifts to Defendant to show that the FTC's calculations  
20 are inaccurate. Id.

21           The FTC calculates consumer losses of \$25,666,437. Zaken sold  
22 Quiksell to 113,596 consumers at \$148 per kit, and issued 8,623  
23 refunds, for a net total of \$15,536,004. Zaken sold another  
24 \$10,130,433 of upsell tools, for a grand total of \$25,666,437.

25           Zaken first argues that the FTC's figure is not a reasonable  
26 approximation because it is based on all of Zaken's sales between  
27 2003 and 2013, even though the record only contains evidence of  
28 misrepresentations from 2010-2013. The FTC replies that Zaken



1 judgment and injunction in accordance with this Order within ten  
2 days of the issuance of this Order.

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5 IT IS SO ORDERED.

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8 Dated: September 18, 2014

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United States District Judge

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