The Federal Trade Commission ("FTC" or "Commission") hereby moves this Court for summary judgment against Defendants Inc21.com Corp., Jumpage Solutions, Inc., GST U.S.A., Inc., Roy Lin, and John Lin for violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and the Telemarketing Sales Rule, 16 C.F.R. Part 310. The Commission also moves for summary judgment against Relief Defendant Sheng Lin to disgorge the benefits he received from Defendants' unlawful practices, to which he had no legal or equitable title.

The uncontroverted evidence establishes the material facts, about which there is no genuine issue, to support a finding that Defendants are liable as a matter of law. In particular, an expert scientific survey of Defendants' so-called "customers" provides irrefutable evidence that virtually all of Defendants' billing was unauthorized. The FTC is entitled to summary judgment against all Defendants, including an award of monetary relief for injured consumers and a permanent injunction to prevent future violations of the law.

## I. STATEMENT OF MATERIAL FACTS

### A. The Defendants

Defendant Roy Lin incorporated Defendant Inc21.com Corporation ("Inc21") in 1999 to

Inc21.[6] Together, Roy and John Lin ("Individual Defendants") manage and have authority over all aspects of the business.[7]

Roy Lin incorporated Defendant GST U.S.A., Inc. ("GST USA") in California in 1995 to serve as a corporate entity for his parents' various endeavors.[8] He admitted to later using the company as part of his own ventures, including his LEC billing operations.[9] GST USA has a bank account that received funds associated with Defendants' business practices.[10]

Defendant Jumpage Solutions, Inc. ("Jumpage") is a California corporation. John Lin is the CEO, CFO, and director of Jumpage and owns its shares.[11] Jumpage has a bank account that received funds associated with Defendants' business practices.[12]

Relief Defendant Sheng Lin is Roy and John Lin's father. He speaks no English and had no involvement with Inc21 or its LEC billing business.[13] Roy Lin nonetheless named him President of GoFaxer, and Sheng Lin drew a salary and periodic bonuses from Inc21 of at least $434,000.[14]

B. Defendants' Business Operation

Defendants ran a classic cramming operation that fleeced thousands of unsuspecting businesses, public entities, non-profits, and individuals by placing unauthorized (and often unnoticed) charges on their phone bills. Beginning in 2004, Defendants sold Internet services such as website hosting, online directory listings, search engine advertising, and Internet-based

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[6] Id., Att. B (John Lin Depo. p.42:14-43:1).

[7] Id., Att. A (Roy Lin Depo. p.60:5-22; 63:14-64:6); Att. B (John Lin Depo. p.93:27-96:15); Att. C (Walch Depo. p.11:4-13:11); Att. E (Kubova Depo. p.10:25-12:8); Att. D (Tran Depo. p.12:8-25).

[8] Id., Att. A (Roy Lin Depo. p.37:1-42:16).

[9] Id., Att. A (Roy Lin Depo. p.42:23-45:15).

[10] Id., Att. A (Walch Depo. p.28:5-21); Sihota, ¶11.

[11] Id., Att. B (John Lin Depo. p.91:11-15).

[12] Id., Att. C (Walch Depo. p.28:17-18); Sihota, ¶12.

[13] Id., Att. B (John Lin Depo. p.108:18-111:8); Att. A (Roy Lin Depo. p.110:20-111:3).

[14] Id., Att. A (Roy Lin Depo. p.286:24-287:24); Att. K (Sheng Lin Depo. p.12:18-14:12); Att. C (Walch Depo. p.113:11-114:8; 115:8-11; 116:14-16; 118:24-120:5); Att. DD p.6.

faxing – packaged in various combinations and sold as five different "products." The[15] three

a. Telemarketing

Inc21 considered the recording of a "yes" to each question sufficient confirmation of the person's authorization.[25]

Defendants' contractors testify that the TPV recordings themselves were doctored. Indeed, Defendants hired various third parties to perform pass/fail reviews of the recordings.[26] Since 2007, Quality Calls, Inc ("QCI") conducted these reviews for Inc21 and provided daily reports of the results to Defendants. The review process involved little more than listening to recordings through headphones and making pass/fail determinations in accordance with pre-set criteria.[27] Inc21 gave QCI a specified list of reasons TPVs could fail: incomplete recording, interruption, disturbance, no TPV recording, not authorized,

> employed fraudulent techniques, including, but not limited to using digitized and recorded responses to the questions posed by the TPV. Inc21 learned that, in most instances, no customer was actually on the telephone line during the TPV process. Instead, the call center would connect to the TPV and simply play the digitized or recorded responses in such a way that the TPV review would classify the call as a valid sale.[32]

Notwithstanding the lawsuit, Defendants admitted that they continued to reap the benefits of LEC billing those who had been "signed up" by these call centers.[33] John Lin also admitted that, in late 2008, Inc21 was still blaming these call centers for its inability to meet Verizon's cramming thresholds,[34] and Inc21's customer service manager testified that her department continued to receive complaints associated with those call centers well into 2009.[35]

Because of the admission that recordings were doctored and because none of Inc21's employees listened to live telemarketing calls,[36] consumer testimony is the only evidence of Defendants' telemarketing and "verification" tactics. Victims – whom Defendants did not depose – describe how Defendants' telemarketers misled them into "authorizing" charges. Rather than explaining the services and the true terms of the sales offer, the telemarketers often lied to consumers about the purpose of the call and whether and how charges would be incurred.[37] Consumers who expressly turned down the "offer" often discovered later that they had been billed anyway.[38]

Far from ensuring the reliability of authorizations, the real purpose of the recorded "verifications" was to shield Defendants from later allegations of unauthorized billing. Defendants often used falsified TPV recordings as a basis for denying refund requests or fending

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[32] Inc21.com Corp., d/b/a Global YP.net v. Flo, Case No. C 08-02967 WHA (N.D. Cal.), DE 9 at ¶ 29.

[33] John Lin admitted that Inc21 did not refund all customers signed up by those call centers, waiting instead until customers complained. Wolfe, Att. B (John Lin Depo. p.174:25-177:6).

[34] Id., Att. B (John Lin Depo. p.204:11-205:12); Att. Z (FTC Exh 12, 13).

[35] Id., Att. D (Tran Depo. p.153:1-154:2).

[36] Id., Att. D (Tran Depo. p.25:16-18); Att. E (Yakubova Depo. p.60:4-10).

[37] See Cronk (DE 36-26), Fogel (36-28), Gerber (36-31), Gold (36-33), Groppe (36-34), Koval (36-39), Machen (36-41), Sommerfeld (36-47), Weber (36-51).

[38] See Bryan (DE 36-23), Cronk (36-26), Fogel (36-28), Rumphol (36-45), Winn (36-52), Pesoat (52-1).

off law enforcement investigations.[39] In fact, all the consumer declarants who listened to the TPVs relied upon by Defendants as proof of their authorization testify that the recordings did not accurately reflect their conversations and were likely falsified.[40] **Barbara Winn**, whose experience is typical, answered a call in April 2008 that she was led to believe related to the Yellow Pages.[41] She provided the caller her address and telephone number, but ended the call when she was asked to state her date of birth, a question she found suspicious.[42] The next month she discovered a charge for Jumpage Solutions on her phone bill and called to dispute the charge.

sales of GoFaxer per day,[47] and despite at least one Inc21 employee's vocal disbelief about the legitimacy of such sales, Defendants pressed forward and quickly racked up thousands of GoFaxer "customers."[48]

Defendants' Internet sales campaign for GoFaxer was no less deceptive than its telemarketing campaign, resulting in a raft of unauthorized billing and customer cancellations. In 2009, Inc21 filed a lawsuit admitting the fraud.[49] Specifically, Inc21 alleged that approximately 70% of the 78,071 GoFaxer "customers" had complained of unauthorized charges, and admitted that less than 1% of these "customers" actually used the GoFaxer service.[50]

**2. Unauthorized Billing**

The evidence establishes that Defendants charged virtually all their "customers" without authorization. An expert survey of these customers as well as direct testimony from numerous victims provide uncontroverted, conclusive evidence of Defendants' unauthorized billing scam.

**a. The Gateway: LEC Billing**

Defendants charged for their Internet services via LEC billing,[51] a mainstay of Inc21's business throughout its many years of operation.[52] In simple terms, LEC billing works as follows: in exchange for fees, LECs place charges on behalf of pre-approved third party vendors

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[47] Id., Att. H (Nelson Depo. p.66:3-19).

[48] Id., Att. H (Nelson Depo. p.66:20-67:22).

[49] Inc21.com v. Delicate Data, LLC, Case No. C 09-1824 WHA (N.D. Cal.); see also Wolfe, Att. B (John Lin Depo. p.199:1-200:22); Att. AA p.11 (FTC Exh 17).

[50] Id.; see also Wolfe, Att. J (Adams Depo. p.47:9-21).

[51] As a result of the AT&T break-up in the 1980's, telephone services fell to "local exchange carriers" or "LECs." See United States v. American Tel. & Telegraph Co., 552 F.Supp. 131, 227 (D.D.C. 1982); 47 C.F.R. § 702, et. seq. The FCC's detariffing of the LECs' billing and collection services gave rise to a peculiar form of commerce founded upon third party exploitation of this uncommon payment method for things other than phone usage. See In re: Matter of Detariffing Billing & Collection, 102 F.C.C.2d 1150 (1986).

[52] Tellingly, John Lin described Defendants as being part of the "LEC billing industry," not the Internet services industry. Wolfe, Att. B (John Lin Depo. p.65:22-66:7).

The survey results thus show that Defendants have few, if any, true "customers," but instead, tens of thousands of victims. Defendants have no evidence refuting the survey's conclusive results.

**c. Testimony of Defendants' "Customers" Corroborates Unauthorized Billing**

The survey evidence is corroborated by many of Defendants "customers" who testify that they neither agreed to purchase Defendants' services nor authorized charges for those services. The FTC filed 36 signed consumer declarations in support of its application for a preliminary injunction. Shortly thereafter, the FTC received an additional nine declarations consistent in tone and substance with those originally presented to the Court.[63] Defendants failed to depose any of these declarants, leaving unchallenged the testimony from all 45, who testify that they had been subject to Defendants' unauthorized billing. Many of the declarations expose the flagrancy of Defendants' scam, including their billing of entities with no use for Inc21's services[64] and their reliance on TPVs from individuals who were either non-existent or without authority to incur charges.[65]

For example, **Diane Haney**, who works for a *non-profit* organization, received a call in early 2008 asking her to "verify contact information." Not long after that call, Ms. Haney discovered that the phone bill included a $39.95 charge for Jumpage Solutions, Defendants'

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[63] Although not received in time for the preliminary injunction, these declarations were disclosed to defense counsel consistent with the date provided in the Case Management Order

website advertising product. Ms. Haney's non-profit group does not even have a website and never authorized the service or phone bill charges.[66]

Similarly, **Rhonda Cillian** called Defendants in August 2006 after receiving a mailing indicating that her business, Biopro, had supposedly signed up for Global YP. The Global YP representative informed her that the service had been authorized by someone at Biopro named "Onye Dea." Biopro has never employed anyone by that name and never authorized the service or charges from Global YP.[67]

**3. Hiding From Complaints and Denying Refund Requests**

"Customers" who discovered the fraud (and not all of them did) often attempted to lodge complaints, sometimes directly with Defendants and sometimes through state law enforcement authorities or the Better Business Bureau ("BBB"). Inc21's customer service manager estimated that the company fielded a weekly average of 90 consumer complaints alleging unauthorized billing.

The undisputed evidence thus reveals that no aspect of consumer interaction with Defendants was safe from crookedness and deceit. They lied to consumers during the solicitation, signed up "customers" without their knowledge, falsified TPVs, and then made it

Roy and John Lin unmoved by these concerns, they found it funny when this employee derisively described Inc21's business model as "gee, I hope we don't get caught."[74]

Additionally, Defendants deliberately set prices at levels that would go unnoticed on monthly phone bills. Roy Lin admitted that in 2004, as he was learning from those experienced in LEC billing, he had been given a document titled "Rules to LEC Billing Programs," which specifically states, "Never bill more than $29.95 per month. The average small business sees this as phone charges and does not review for 5 months."[75] Federal law enforcement found this document in his desk upon execution of search warrants at Defendants' premises last June [76]

**2. Roy and John Lin Put on Notice by LEC Billing Suspensions**

In addition to hearing directly from outraged consumers, the BBB, and various law enforcement authorities,[77] the Lins also received notice of cramming problems from the LECs and aggregators. At various times, Verizon, Quest, AT&T, and PaymentOne each warned or suspended Inc21 for exceeding their thresholds for unauthorized charges:

- July 2005: Verizon terminated MetroYP's LEC billing.[78]
- March 2007: AT&T required action plans for GlobalYP and NetOpus.[79]
- June 2008: Qwest terminated Jumpage's LEC billing.[80]
- November 2008: Verizon warned Jumpage about excessive unauthorized charges.[81]
- May 2009: Verizon terminated Jumpage's LEC billing.[82]

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[73] (...continued)
Att. D (Tran Depo. p.40:14-41:10; 55:23-56:12); Att. I (Kingery Depo. p.24:21-26:1).

[74] Wolfe, Att. H (Nelson Depo. p.59:22-60:22).

[75] Id., Att. A (Roy Lin Depo. p.166:23-171:23); Att. BB p.1 (FTC Exh 18).

[76] Id.

[77] Id., Att. E (Yakubova Depo. p.34:7-18)

[78] Id., Att. B (John Lin Depo. p.191:1 - 192:1).

[79] Id., Att. D (Tran Depo. p.125:4-127:11); Att. BB p.9 (FTC Exh 23).

[80] Id., Att. F (Lavino Depo. p.60:23-63:3); Att. GG p.9-10 (FTC Exhs 142, 143).

[81] Id., Att. B (John Lin Depo. p.185:20-189:22); Att. Z p.1-2 (FTC Exh 12).

[82] Id., Att. B (John Lin Depo. p.185:20-188:12); Att. Y p.2 (FTC Exh 11).

- May 2009: PaymentOne terminated GoFaxer LEC billing.[83]

3. Roy and John Lin Lied and Schemed to Maintain Access to LEC Billing

In order to protect their access to LEC billing, the Lins created a false picture of the relationship between themselves and Inc21's various d/b/a's and misled the LECs about their responsiveness to cramming complaints. Finally, they colluded with another vendor to charge consumers outside their LEC billing reach.

Individual Defendants controlled Inc21 and all the d/b/a's as one enterprise, but lied to LECs and state authorities to create the appearance that their entities were unrelated. For example, they used a false business address for NetOpus[84] and named their mother, Sherry Yu, as its President despite the fact that she had nothing to do with Defendants' business.[85] John Lin even admitted that their mother's signature had been forged on a state filing after she died.[86] Similarly, they named Sheng Lin as GoFaxer's President and used his name and signature on GoFaxer documents despite the fact that their father, like their mother, did nothing for the business and did not even speak English.[87] The Lins also admitted to making several false statements on sub-CIC applications to gain access to LEC billing for various products[88] and to lying to LECs about the steps they were taking to address cramming problems.[89]

Compounding their deceit, Roy Lin colluded with another vendor – Jeff Lavino – to bill customers in regions where Inc21's LEC billing privileges had been suspended or not yet

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[83]

approved.[90] Because Mr. Lavino had access to LEC billing in those regions, Roy Lin "sold" Inc21 customers to him in exchange for half the revenues realized from those customers.[91] Mr. Lavino simply LEC billed these customers through his own aggregators and wired half of the proceeds to a GST USA bank account.[92] Mr. Lavino testified at his deposition that he had no involvement with the telemarketing of Defendants' products or the provision of services to their customers and that his role was limited to billing Defendants' customers, collecting the revenue, and forwarding 50% of it to Roy Lin.[93]

D. Consumers Lost Millions to Defendants' Cramming Operation

Since 2004, Defendants' LEC billing scam has resulted in millions of dollars of consumer losses. Defendants' billing aggregators – PaymentOne, The Billing Resource, BSG, and ILD – produced documents showing total net billings of $43,824,970.35 from 2004 to January 2010.[94] Further, Roy Lin's "customer sharing" arrangement with Jeff Lavino produced at least an

## II. LAW AND ARGUMENT

### A. Summary Judgment Standard

Summary judgment "should be rendered if the pleadings, discovery and disclosure materials on file, and any affidavits, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). Material facts are "those which might affect the outcome of the suit," Rivera v. Philip Morris, Inc., 395 F.3d 1142, 1146 (9th Cir. 2005), and the Court views the evidence in the light most favorable to the non-moving party. Ting v. United States, 927 F.2d 1504, 1509 (9th Cir. 1991). The FTC routinely seeks and is granted summary judgment in its cases. See, e.g., FTC v. Stefanchik, 559 F.3d 924 (9th Cir. 2009); FTC v. Medlab, 615 F. Supp. 2d 1068 (N.D. Cal. 2009).

### B. FTC Entitled to Summary Judgment on All Counts

The FTC has alleged five counts of Defendants' violations of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, and the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, as wPart 64/StyleSpan <</2d 610 T*nr 12 0 0 12 72 721.98 Tm ihel9p] >>BDt

charges contained within. As this Court has noted, consumers often fail to detect third party charges for any number of reasons, including the lack of public awareness that such charges could be on phone bills as well as the difficulty of identifying specific line items on lengthy bills. See Preliminary Injunction, DE 57. Indeed, the inclusion of such charges on LEC bills also "capitalize[s] on the common and well-founded perception held by consumers that they must pay their telephone bills." FTC v. Verity Int'l., Ltd., 443 F.3d 48, 63 (2d Cir. 2006).

Finally, Defendants' LEC charges are material as a matter of law because false, express representations are presumed material. See FTC v. Cliffdale Assocs., 103 F.T.C. 110, 168 (1984). The representation that consumers owed payment for these charges is unquestionably false. Thus, the FTC is entitled to summary judgment on its Count I allegation that Defendants deceived consumers in violation of Section 5 of the FTC Act.

2. Unfair Billing Practices (Count II)

To prove unfairness, the FTC must show: (1) Defendants' billing practices cause, or are

There is no genuine issue regarding Defendants' failure to inform customers about the negative option feature of their offer during the telemarketing calls. Roger Gerber (DE 36-31), an individual consumer, and Diane Haney (filed herewith), who works for a non-profit, both testify that Defendants called them under the guise of updating contact information, making no mention of any offer or charges connected with the call. Shortly after receiving Defendants' call, both Mr. Gerber and Ms. Haney discovered unauthorized charges on their telephone bills, Mr. Gerber for NetOpus and Ms. Haney for Jumpage Solutions. Defendants thus failed to present consumers with any "offer" at all, much less the offers' "material terms." Consequently, Defendants violated the TSR, and the FTC is entitled to summary judgment on Count III of the Complaint.

b. Use of Preacquired Account Information to Charge Consumers Without Their Express Informed Consent

When a seller seeks to impose charges using "preacquired account information" after the expiration of a free trial period, the TSR requires that its telemarketers obtain the customer's express informed consent before billing. 16 C.F.R. § 310.4(a)(6)(i). For such transactions, the telemarketer must: (1) obtain from the customer at least the last four digits of the account number being charged; (2) obtain the customer's express agreement to be charged for the services and to be charged using that account; and (3) make and maintain an audio recording of the telemarketing transaction. 16 C.F.R. § 310.4(a)(6)(i) (emphasis added).

The TSR defines "preacquired account information" as "any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer." 16 C.F.R. § 310.2(w). Here, because Inc21 engages in LEC billing, the account at issue is nothing more than a person's telephone number, and is indisputably "preacquired" for every consumer on the receiving end of an Inc21 telephone call. Importantly, a telephone number only becomes "preacquired account

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[98] (...continued)
to take an affirmative step to cancel is interpreted by the seller as acceptance of the offer. 16 C.F.R. § 310.2(t). When combined with a free trial offer that converts to a paid subscription unless the consumer takes affirmative steps to stop the billing, the TSR describes the offer as a "free-to-pay conversion." 16 C.F.R. § 310.2(o).

information" when in the hands of vendors like Inc21 who have specific contractual arrangements with LECs and billing aggregators that allow them to place charges on telephone bills.[99]

By their own admission, Defendants failed to make and maintain audio recordings of the entirety of their telemarketing transactions. Defendants' list of telemarketed customers submitted to this Court in February, includes a batch labeled "No TPV Located,"[100] and among that group are two public schools and two churches. Therefore, Defendants have evidenced their own liability by admitting to telemarketing non-businesses without maintaining recordings of the transactions. Defendants have thus violated the TSR, and the FTC is entitled to judgment as a matter of law on Count IV of the Complaint.

c. Failure to Obtain Express Verifiable Authorization Before Charging Consumers' Telephone Bills

Finally, the TSR requires that telemarketers obtain "express verifiable authorization" if they intend to use payment methods other than a credit or debit card. To satisfy the express verifiable authorization requirement, an audio recording[101] of the transaction must evidence clearly the customer's authorization of payment for the services, as well as the customer's receipt of all the following information: (1) the number of charges (if more than one) to be submitted for payment; (2) the dates the charges will be submitted for payment; (3) the amount of the charges; (4) the customer's name; (5) the customer's billing information identified with sufficient specificity that the customer understands what account will be used to collect payment; (6) a telephone number

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[99] The TSR requires the telemarketer to obtain the billing information and document the transaction because consumers do not expect someone to charge an account they have not voluntarily given the caller during the course of a telemarketing call. See TSR Statement of Basis and Purpose, 68 Fed. Reg. 4580, 4616-23. "The record shows that the specific harm resulting from the use of preacquired account information is manifested in unauthorized charges. These may appear not only on consumers' credit card or checking accounts, but also on mortgage statements and other account sources not traditionally used to pay for purchases." Id. at 4620 (emphasis added).

[100] DE 47-3, at p.123-25. Of course, the TPV covers only the end of the call. See fn. 24, supra

[101] Telemarketers are generally free to document authorization either by audio recording or written confirmation. However, written authorizations are insufficient for offers involving free-to-pay conversion and preacquired account information, and therefore Defendants had no option but to obtain recorded oral authorization. See 16 C.F.R. § 310.3(a)(3)(iii). Defendants of course obtained neither.

monetary judgment for restitution. FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982); FTC v. Pantron I Corp., 33 F.3d 1088, 1102 (9th Cir. 1994).

The proper measure of such recovery is the full amount that consumers paid as a result of the unlawful conduct. Gill, 265 F.3d at 958. The Commission need not prove that every consumer actually relied upon the misrepresentations to prevail. Stefanchik, 559 F.3d at 929 fn.12 (quoting FTC v. Amy Travel Serv., Inc., 875 F.2d 564, 572 (7th Cir. 1989). "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)]." FTC v. Figgie Int'l, Inc., 994 F.2d 595, 605 (9th Cir. 1993) (citing FTC v. Kitco of Nev., Inc., 612 F. Supp. 1282, 1293 (D. Minn. 1985) and FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1316 (8th Cir. 1991)); FTC v. Wilcox, 926 F. Supp. 1091, 1105 (S.D. Fla. 1995). It is sufficient to show that misrepresentations were widely disseminated and caused actual consumer injury.[102] See Figgie, 994 F.2d at 605-606; Kitco, 612 F. Supp. at 1293-94. Once the Commission satisfies its burden on these elements, "[t]he Commission must show that its calculations reasonably approximated the amount of customers' net losses, and then the burden shifts to the defendants to show that those figures were inaccurate." FTC v. Febre, 128 F.3d 530, 535 (7th Cir. 1997). The uncontroverted evidence, including a definitive scientific survey of alleged "customers," establishes that virtually all of them were injured by the widespread unauthorized billing, entitling the FTC to a judgment in the amount of consumers' net losses. Defendants' net revenues – $44,474,682.65 – is the starting point for determining net consumer losses because this figure accounts for total billings minus refunds already paid. The net revenues are evidenced by billing records received directly from Defendants' aggregators – the entities responsible for recording billing and collections transactions on Defendants' behalf – as well as records of wire transfers from Mr. Lavinio to Defendants. For purposes of summary judgment, and taking every inference in Defendants' favor, the FTC deducts $134,366.40 from the net

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[102] To the extent Defendants introduce evidence that some of their customers are legitimate, this would not create a genuine issue of fact because "the existence of some satisfied customers does not constitute a defense under the FTCA." Stefanchik, 559 F.3d at 929 n.12.

revenues figure to account for the possibility that Defendants' have some legitimate customers.[103] Therefore, $44,340,316.25 is a "reasonable approximation" of net consumer losses that allows the Court to determine the amount of monetary relief as a matter of law.

The Defendants' conduct demonstrates that permanent injunctive relief is also necessary to prevent future harm to consumers. A permanent injunction restraining conduct is justified when there is "some cognizable danger of recurring violation." 711 F. Supp. 2d at 1047 (citing United States v. W.T. Grant, 345 U.S. 629, 633, 73 S. Ct. 894, 898 (1953)). Determining the likelihood of future violations "may involve the consideration of past unlawful conduct." Id. (citing CFTC v. Co Petro Mktg. Group, Inc., 502 F. Supp. 806, 818 (C.D. Cal. 1980)). Where the past violation "has been predicated upon systematic wrongdoing, rather than isolated occurrences, a court should be more willing to enjoin future conduct." Id. Finally, an order need not be "limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. . . . [Defendants] must expect some fencing in." FTC v. Colgate-Palmolive Co., 380 U.S. 374, 395, 85 S. Ct. 1035, 1048 (1965). It is proper to fence in Defendants' conduct by: (1) banning their participation in LEC billing related activities;[104] and (2) setting strict parameters on

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[103] Responses to the Court-ordered verification survey indicated that 36 customers authorized Defendants' billing. Wolfe, Att. II (this includes the 22 customers specifically identified by the Court in the Preliminary Injunction as well as an additional 14 that sent in notifications

any future telemarketing. Such provisions are necessary to protect consumers in the face of Defendants' flagrantly unscrupulous conduct with respect to both LEC billing and telemarketing.

Additionally, Individual Defendants Roy and John Lin should be found personally liable. An individual is liable for a corporation's violations of the FTC Act if the Court finds that the individual participated in the violative practices or had authority to control them and had "actual knowledge of material misrepresentations, was recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth." FTC v. Publ'g Clearing House, Inc., 104 F.3d 1168, 1170-71 (9th Cir. 1997). The Commission need not show intent to defraud. Id. at 1171. The extent of an individual's participation in the violative conduct alone is sufficient to establish the requisite knowledge for restitution. FTC v. Affordable Media, LLC, 179 F.3d 1228, 1235 (9th Cir. 1999). Together, Roy and John Lin orchestrated every element of Inc21's cramming operation. They also lied to LECs and state authorities about their business, and colluded with another vendor to bill consumers outside their LEC billing purview. See Section II.C. The FTC has thus more than met its burden in showing that no genuine issues of fact remain regarding Roy and John Lins' individual liability.

## III. CONCLUSION

For the foregoing reasons, the FTC requests that the Court grant summary judgment and enter the concurrently filed Proposed Order for Permanent Injunction and Final Judgment.

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[104] (...continued)
credit repair business); FTC v. Holiday Enter., Inc., Civ. No. 1:06-CV-2939 (N.D. Ga. Feb. 5, 2008) (ban on involvement in franchises, and business opportunities); FTC v. Neiswonger, 494 F. Supp. 2d 1067, 1084 (E.D. Mo. 2007) (ban on marketing of business opportunities); FTC v. Int'l Prod. Design, Inc., No. 1:97-CV-01114-AVB (E.D. Va. Jul 12, 2007) (ban on participating in invention promotion services); FTC v. Credit Enhancement Serv., CV-02-2134 (E.D.N.Y. Mar. 31, 2004) (ban on marketing or selling any credit-related goods or services); FTC v. Five Star Auto Club, 97 F. Supp. 2d 502, 536 (S.D.N.Y. 2000) (ban on multi-level marketing); FTC v. Int'l Computer Concepts, Inc., No. 5:94CV1678, 1995 WL 767810, at *7 (N.D. Ohio Oct. 24, 1995) (ban on involvement in business opportunities and franchises).

Respectfully submitted,

Date: June 17, 2010

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