The undisputed facts in this action present a well-documented account of a classic bait and switch scheme—aided by rigged internet searches, deceptive sales scripts, and predatory practices. Though consumers believed they were purchasing comprehensive insurance coverage, Defendants sold them practically worthless limited indemnity or discount plans. Defendants

often referred to a "Obamacare." ACA-qualified plans (1) must provide ten essential health benefits[1]; (2) must guarantee coverage for preexisting conditions; (3) must have an out-of-pocket

afford healthcare coverage. During this point in the call, telemarketers were to warn consumers

the products which were quickly read aloud by one of Defendants' employees. *Id.* ¶ 14(b). The electronic verifications displayed pages of densely worded, barely legible fine print disclosures. *Id.* ¶ 14(c). Defendants' telemarketers urged consumers to quickly click through the disclosures and affix an electronic signature. *Id.*

Defendants also used a "verification rebuttal" script that instructed employees to provide different and conflicting answers to consumers' common questions depending on whether the verification was recorded or not. *Id*. ¶ 14(d). One "on recording" rebuttal stated that Defendants' products "are not [h]ealth [i]nsurance," and the corresponding "off recording" rebuttal stated "[t]his is health insurance." *Id.* Another "on recording" rebuttal about ACA qualification and the tax penalty stated a consumer is "susceptible" to the tax penalty, while the "off recording" rebuttal is multiple convoluted sentences and does not state that consumers will be subject to the tax penalty with Defendants' plans. *Id.*

6. Use of Scripts

The record reflects that Defendants' telemarketers routinely followed the scripts. Defendants' recorded sales calls nearly all contain the misrepresentations detailed above. *Id*. ¶ 10. A statistical analysis of 13,816 of Defendants' own recordings confirms that in more than 90% of Defendants' sales calls, telemarketers misrepresented the availability of specific benefits such as coverage for surgical treatment, prescription drugs, and diagnostic testing, and falsely called the products being sold as PPOs. *Id.* ¶ 10(a). At least 83% of the time, Defendants told consumers that there were "no limits" on the product's usage. *Id.*

C. Consumer Complaints and Cancellations

Defendants' scheme resulted in high cancellation rates and thousands of complaints to Defendants and third parties, including the Better Business Bureau ("BBB") and state departments

of insurance. *Id.* ¶ 30(a)-(j). Consumers consistently reported believing that Defendants had enrolled them in a plan that provided comprehensive benefits as promised by Defendants' telemarketers. *Id.* ¶ 30(b), (d), (e), (g), (h), (k).

1. Complaints During Cancellation

the commissions resulting from HBO's sales.[16] *Id.* ¶¶ 2i, 2n. HBO transferred millions of dollars to the other Corporate Defendants, none of which had significant sources of revenue. *Id.* ¶ 2p.[17]

B. Dorfman's Control, Participation, and Knowledge

Dorfman controlled nearly all aspects of the Simple Heal (s)-1 99ƀDC /TT0 l, and Kana (he)4 (-46,3 Td[(
015 -25.96[(4 (t)-o()-2 (S)-4 (r)3 (ol)-2 d3 (l) by1 (y a)H)-8e (he)4 ((y a)H)-8ee Oo-2 (d¶)4p10 15 -23 7.4

"burner" phones and suggested they use those phones to create false positive reviews of Simple Health to submit to the BBB. *Id.* ¶ 55.

V. Consumer Harm

me (de)l(de)l(de) (de)ntefovel(de) (-5 (u8.(pos)-1 (i)2.1an2c]1k.0 (de)ns)-1 (me)4 (nos)-1 (i)22 (h37

Complaint, which added Girouard as a defendant and Section 19 of the FTC Act, 15 U.S.C. § 57b, as an additional basis for relief. [ECF No. 289].

On January 15, 2021, the FTC and Dorfman filed their cross motions for summary judgment. In the FTC's Motion, it argues that the undisputed material facts establish as a matter of law that (1) Dorfman violated the FTC Act and the TSR; (2) the Defendants operated as a common enterprise; (3) Dorfman is individually liable for violations of the FTC Act and the TSR; and (4) the Court should issue injunctive and monetary relief. In Dorfman's Motion, he argues that (1) the McCarran-Ferguson Act divests the Court of subject matter jurisdiction over this proceeding; (2) Defendants did not make any material misrepresentations that consumers relied on; (3) Defendants cannot be liable for violating the Telemarketing Sales Rule because Defendants did not initiate any contacts with consumers; and (4) the FTC is not authorized to seek, and the Court is not authorized to grant, the forms of monetary relief requested.[19]

LEGAL STANDARD

Summary judgment, pursuant to Federal Rule of Civil Procedure 56(a), "is appropriate only if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (per curiam) (quoting Fed. R. Civ. P. 56(a)) (internal quotation marks omitted). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no ***genuine*** issue of ***material*** fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)

19

(emphasis in original). An issue is "genuine" when a reasonable trier of fact, viewing all of the record evidence, could rationally find in favor of the nonmoving party in light of his burden of proof. *Harrison v. Culliver*, 746 F.3d 1288, 1298 (11th Cir. 2014). And a fact is "material" if,

FTC v. Tashman, 318 F.3d 1273, 1277 (11th Cir. 2003). In determining whether a representation is likely to mi

- Their products were comprehensive health insurance plans that provided significant benefits, including for hospitalization, emergency care, doctor's appointments, and prescriptions;
- They offered ACA-qualified plans or had the expertise to do so; and
- They were affiliated with AARP, Blue Cross Blue Shield, and other prominent health-

Defendants' representations are also material. First, Defendants' express, deliberate representations are presumptively material. *Transnet Wireless Corp.*, 506 F. Supp. 2d at 1267. Second, Defendants' representations about what their plans would cover go to "the heart of a consumer's decision to purchase" a product or service and are presumptively material. *FTC v. USA Beverages, Inc.*, No. 05-61682, 2005 WL 5654219, at *6 (S.D. Fla. Dec. 6, 2006), *report and recommendation adopted*, No. 05-61682, 2005 WL 5643834 (S.D. Fla. Dec. 9, 2005). Finally, Defendants' representations led to substantial consumer injury and, therefore, are demonstrably material. *See* FTC Policy Statement on Deception, Appended to *Matter of Cliffdale Assocs., Inc.*, 103 F.T.C. 174, 183 (1984) ("Injury exists if consumers would have chosen differently but for the deception. If different choices are likely, the claim is material, and injury is likely as well. Thus, injury and materiality are different names for the same concept."). Indeed, in addition to consumers losing over $400 million on fees for subpar plans, Defendants' scheme forced many consumers to incur uncovered medical expenses and/or to delay or forgo medical treatment or medications. And, as demonstrated by the drop off reports and other evidence, many consumers cancelled their enrollments because Defendants' plans provided insufficient benefits or were not ACA-qualified.

canceled their plans, demonstrates consumers purchased the subpar plans in reliance on Defendants' false representations about coverage and ACA-qualification.

As the undisputed material facts establish the elements of a deception claim under Section 5 of the FTC Act, summary judgment shall be entered in favor of the FTC as to Count I.[20]

II. Count II—Defendants Violated the TSR

The TSR prohibits deceptive and abusive telemarketing practices, including misrepresenting any material aspect of the nature or central characteristics of goods or services, 16 C.F.R. § 310.3(a)(2)(iii), making a false or misleading statement to induce any person to pay for goods or services, 16 C.F.R. § 310.3(a)(4), and misrepresenting an affiliation with any person or government entity, 16 C.F.R. § 310.3(a)(2)(vii).[21] The undisputed material facts establish that Defendants violated each of these provisions. First, Defendants misrepresented material aspects of the products they sold, including that the plans were comprehensive health insurance and/or ACA-qualified. *See* 16 C.F.R. § 310.3(a)(2)(iii). Second, Defendants made material misrepresentations about their plans to induce consumers to buy them. *See* 16 C.F.R. § 310.3(a)(4). Finally, Defendants misrepresented their own affiliation with the government and multiple private entities,

[20] Defendants' Post-Close script/verification process, completed after consumers paid their premiums, does not shield them from liability. First, "*caveat emptor* is not a valid defense to liability arising from misrepresentations." *FTC v. B*

including the ACA, Blue Cross, and AARP. *See*