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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,)
)
) Plaintiffs)
)
 vs.)
)
 J.K. PUBLICATIONS, INC., et)
)
) al.)
)
) Defendants.)
)
)
)

CASE NO.: CV 99-0044 ABC (AJWx)
ORDER RE: (1) PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT
AND (2) DEFENDANT
MAURICE O'BANNON'S
MOTION FOR SUMMARY
JUDGMENT

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Plaintiff Federal Trade Commission's ("FTC") Motion for Summary Judgment (the "Motion") and Defendant Maurice O'Bannon's ("O'Bannon") Motion for Summary Judgment (the "O'Bannon Motion") came on regularly for hearing before this Court on April 3, 2000. After considering the materials submitted by the parties, argument of counsel, and the case file, it is hereby ORDERED that: (1) the FTC's Motion is GRANTED, in part, on the issue of liability as to defendants J.K. Publications, Inc. ("JKP"), Herbal Care, Inc. ("Herbal Care"), MJD Services Corp. ("MJD"), Kenneth H. Taves ("Ken Taves"), and Teresa Callei Taves ("Teresa Taves"); (2) the FTC's Motion is DENIED, in part, on the

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1 issue of damages with respect to JKP, Herbal Care, MJD, Ken Taves and
2 Teresa Taves; (3) the FTC's Motion against O'Bannon is DENIED; and (4)
3 the O'Bannon Motion is GRANTED.

4 I. Procedural Background

5 On January 6, 1999, the FTC filed a complaint for a permanent
6 injunction and other equitable relief, and an ex parte motion for a
7 temporary restraining order ("TRO") without prior notice to the
8 defendants. The complaint alleges that the defendants had committed
9 unfair and deceptive business practices in violation of section 5(a)
10 of the FTC Act, 15 U.S.C. § 45(a). The Court issued a TRO on the same
11 day against the following defendants: JKP; Ken Taves and Teresa
12 Taves, individually and as officers of JKP, also dba Netfill,
13 netfill.com, N-Bill, Webtel and Online Billing; Net Options, Inc.;
14 Gary Neal Mittman, individually and as an officer of Net Options,
15 Inc.; and MJD. The TRO froze the defendants' assets and required,
16 inter alia, that the defendants be temporarily enjoined from
17 conducting certain business practices and the defendants disclose all
18 assets held by them, for their benefit or under their direct or
19 indirect control. The Court also appointed a receiver, Robb Evans and
20 Robb Evans & Associates ("Receiver") to administer the defendants'
21 businesses.

22 On January 7, 1999, the FTC served the complaint and TRO on the
23 defendants. On January 20, 1999, the FTC filed an amended complaint
24 naming the following additional defendants: Herbal Care; TAL
25 Services, Inc. ("TAL"); Adult Banc, Inc. ("Adult Banc"); Discreet
26 Bill, Inc. ("Discreet Bill"); Dennis Rappaport ("Rappaport"),
27 individually and as an officer of TAL, Adult Banc, Inc. and Discreet
28 Bill; O'Bannon, individually and as an officer of TAL and MJD. The

1 amended complaint also added an allegation that the defendants engaged
2 in a common enterprise while violating the FTC Act.

3 On March 5, 1999, the Court issued a preliminary injunction order
4 against Gary Mittman and Adult Banc. On March 15, 1999, the Court
5 issued a preliminary injunction order against JKP, MJD, Ken Taves and
6 Teresa Taves. On May 4, 1999, the Court issued Findings of Fact and
7 Conclusions of Law holding Ken Taves in contempt of the Court's TRO by
8 failing to disclose the property located at 6837 Zumirez Drive in
9 Malibu, California ("Zumirez Property") and causing the transfer of
10 the Zumirez Property to an entity called Trans Global on or about
11 February 12, 1999. The Court ordered Ken Taves to pay \$2,050,000, the
12 estimated sale price of the property, into the receivership estate
13 within seven days to purge himself of the contempt. The Court also
14 ordered that Ken Taves shall be imprisoned until he complies with the
15 order if he fails to pay the \$2,050,000 within the prescribed time.
16 To this date, Ken Taves has not purged himself of this contempt. He
17 remains imprisoned at the Metropolitan Detention Center ("MDC") in Los
18 Angeles.

19 On May 5, 1999, the Court issued a separate Findings of Fact and
20 Conclusions of Law holding Ken and Teresa Taves in contempt of the
21 Court's preliminary injunction order by, inter alia, failing to
22 disclose an account at Euro Bank in the Cayman Islands with an
23 estimated \$6.2 million in assets and failing to prevent dissipation of
24 the Euro Bank account. Ken and Teresa Taves were ordered to take all
25 steps possible and necessary to ensure the repatriation of the \$6.2
26 million or else face imprisonment. Although the couple have signed

27 //

28 //

1 various documents to repatriate the monies, the Receiver has not
2 recovered the monies to this date.¹

3 On June 10, 1999, the Court entered a stipulated final judgment
4 and preliminary injunction order against Gary Mittman and Adult Banc.
5 On July 29, 1999, the Clerk entered a default against Discreet Bill
6 and TAL. On August 11, 1999, the Clerk entered a default against
7 Rappaport. On February 8, 2000, the Court entered default judgment
8 and permanent injunction against Rappaport.

9 On November 29, 1999, the FTC filed the motion for summary
10 judgment against JKP, MJD, Herbal Care, Ken Taves, Teresa Taves and
11 O'Bannon. On December 6, 1999, O'Bannon filed an opposition to the
12 Motion. On December 13, 1999, JKP, Herbal Care and Ken Taves filed
13 their opposition to the Motion. On the same day, Teresa Taves filed
14 her opposition to the Motion. On December 20, 1999, the FTC filed its
15 reply.²

16 On December 20, 1999, O'Bannon filed his own motion for summary
17 judgment.³ On December 22, 1999, the FTC filed its opposition to the

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21 ¹ On May 24, 1999, the Court ordered that Teresa Taves'
22 contempt shall be considered purged in the event that she files a
23 declaration under penalty of perjury detailing her efforts to locate
24 documents related to the Euro Bank account and she turns over any such
25 documents immediately upon discovery. On May 24, 1999, Teresa Taves
26 filed a declaration stating that she had found no Euro Bank records in
27 her home.

28 ² MJD is no longer represented by counsel and did not file an
opposition.

³ The motion cutoff date -- the last day for a motion to be
heard -- was December 20, 1999. Although the O'Bannon Motion was
untimely, the Court will consider the motion. The FTC has had a full
opportunity to brief its opposition to this motion.

1 O'Bannon Motion. On February 24, 2000, O'Bannon filed a reply.⁴

2 **II. Factual Background⁵**

3
4 ⁴ On January 21, 2000, due to the illness of the presiding
5 judge, the Court took the Motion and the O'Bannon Motion off calendar.
6 On March 23, 2000, the Court placed the motions back on calendar and
7 set them for hearing on April 3, 2000.

8 ⁵ These undisputed facts are derived largely from the FTC's
9 statement of uncontroverted facts ("FTC's Statement") and the Court's
10 review of all admissible evidence submitted by the FTC. On the issue
11 of liability, JKP, Herbal Care and Ken Taves did not submit any
12 evidence to oppose the Motion. Rather, in their joint statement of
13 genuine issues, these defendants responded to the FTC's "facts" in one
14 of three ways: (1) "Defendants . . . do not dispute this fact"; (2)
15 "Defendant Kenneth Taves cannot respond to this alleged fact at this
16 time based on his right against self-incrimination" and "[t]he
17 corporate defendants, [JKP and Herbal Care], are also unable to
18 respond at present because Mr. Taves is the witness with knowledge . .
19 ."; or (3) "Defendants . . . lack the information to know whether this
20 is a disputed fact." In short, on the issue of liability, JKP, Herbal
21 Care and Ken Taves have identified no facts and submitted no evidence
22 which controvert the facts included in FTC's Statement. With respect
23 to certain "facts" relevant to the calculation of damages, these
24 defendants did raise a challenge with the support of an expert
25 declaration. Therefore, the Court finds that all facts included in
26 the FTC's Statement to prove the liability of JKP, Herbal Care, Ken
27 Taves, and MJD (because it did not oppose the Motion), to the extent
28 supported by the evidence, exist without controversy. See Local Rule
7.14.4 ("In determining any motion for summary judgment, the Court
will assume that the material facts as claimed and adequately
supported by the moving party are admitted to exist without
controversy except to the extent that such material facts are (a)
included in the "Statement of Genuine Issues" and (b) controverted by
declaration or other written evidence filed in opposition to the
motion") (emphasis added).

Teresa Taves filed an improper and unhelpful statement of genuine
issues. She should have identified each fact from the FTC's Statement
that is purportedly in dispute and, in a side by side comparison,
pointed to facts and evidence that show a genuine issue exists.
Instead, she merely (1) incorporates by reference JKP, Herbal Care and
Ken Taves' statement of genuine issues and (2) lists purported genuine
issues (e.g., "[w]hether Defendant Teresa Taves had actual knowledge
of any illegal activity by any defendant . . .") without identifying
supporting facts. She has submitted a copy of a sworn declaration
filed in January 1999 and a copy of a portion of her deposition

(continued...)

1 Defendants⁶

2 JKP, MJD and TAL. JKP and MJD were Nevada corporations engaged
3 in operating 14 adult-content Internet web sites. JKP was
4 incorporated on September 14, 1995. From at least June 1997 through
5 October 1998, JKP conducted business under the names Netfill and N-
6 Bill. MJD was incorporated on May 5, 1998. At some point in 1998,
7 MJD supposedly purchased JKP's book of business. From May 1998
8 through December 1998, MJD conducted business under the name Webtel.
9 In 1998, JKP and/or MJD also conducted business under the names Online
10 Billing and Assist Online. On October 16, 1998, TAL was incorporated
11 in Nevada. A month or two later, MJD transferred its book of business
12 to TAL. JKP, MJD and TAL operated out of the same Malibu, California
13 offices.⁷ The same employees worked for these companies.

14 _____
15 ⁵(...continued)

16 testimony as exhibits in support of her opposition. These exhibits
17 concern her alleged lack of knowledge concerning the defendant
18 companies' activities. But the facts included in FTC's Statement to
19 prove the liability of Teresa Taves remain essentially undisputed.
20 Teresa Taves has consistently denied having knowledge of material
21 facts. The issue that the Court must determine boils down to whether,
22 despite her denial of knowledge, the FTC has sufficient evidence to
23 show Teresa Taves should be held liable as a matter of law.

24 O'Bannon's statement of genuine issues (in opposition to the
25 Motion) and statement of uncontroverted facts (in support of the
26 O'Bannon Motion) are similarly deficient in form and substance and,
27 therefore, unhelpful to the Court. As in Teresa Taves' case, the
28 issue boils down to whether the FTC has sufficient evidence to show
that O'Bannon should be held liable as a matter of law.

⁶ Unless necessary for background information, the Court only
discusses the defendants that remain in this action.

⁷ JKP operated out of an office located at 22917 Pacific Coast
Highway in Malibu, California, from at least April 1997 until January
1998. Thereafter, JKP operated out of offices located at 22761
Pacific Coast Highway in Malibu. The 22761 Pacific Coast Highway
offices were also used by MJD, TAL, and Discreet Bill at all relevant
(continued...)

1 Herbal Care & Discreet Bill. Herbal Care was a California
2 corporation co-founded in the mid-1980s by Ken and Teresa Taves.
3 During times relevant to this action, Herbal Care sold no products.
4 Instead, in 1997 and 1998, its sole "business" consisted of paying the
5 employees of JKP, purportedly after JKP provided the funds to Herbal
6 Care. Discreet Bill, a Nevada corporation, took over Herbal Care's
7 role of paying JKP employees in the fall of 1998.

8 Ken and Teresa Taves. Ken Taves and Teresa Taves, husband and
9 wife, are the owners, officers and directors of JKP and Herbal Care.
10 In 1998 alone, Ken and Theresa Taves were each paid a salary of at
11 least \$1.7 million for their services to JKP.⁸ Ken Taves was actively
12 involved in the daily operations of his companies. He also held
13 himself out to employees and third parties as the final decision maker
14 for all key matters.

15 With respect to MJD, Ken Taves is not identified as an officer or
16 director on corporate documents. Also, Ken Taves had informed a third
17 party that he was a mere "consultant" for the company. However, the
18 evidence shows that he had ownership in and/or control over MJD.⁹

19 _____
20 ⁷(...continued)
21 times.

22 ⁸ Even their son, who was 15 or 16 in 1998, was paid a salary
23 of over \$48,000 in 1998 for either "provid[ing] marketing concepts for
24 marketing" or "clean[ing] up" the offices. (K. Taves Depo. at 102 &
25 Depo. Ex. 5; T. Taves Depo. at 731-32.)

26 ⁹ The FTC attempts to introduce certain "evidence" against Ken
27 Taves purportedly elicited from Martin J. Dugan in regard to MJD, its
28 formation and its operation. See Motion at 20, note 92. During his
deposition, however, Martin Dugan invoked the Fifth Amendment
privilege against self-incrimination in response to all substantive
questions asked by counsel. The FTC argues that the Court can draw
adverse inferences from Dugan's assertion of the Fifth Amendment

(continued...)

1 According to his employees, Ken Taves held himself out as a final
2 decision maker for matters involving MJD. Additionally, Ken Taves was
3 the only person responsible for making payments to Automated
4 Transaction Services, Inc. ("ATS"), the company which processed the
5 defendant companies' credit and debit card transactions,¹⁰ on behalf
6 of both JKP and MJD. As discussed below, Ken Taves was also the only
7 person who submitted JKP and MJD's e-mail charge requests to ATS for
8 processing. Moreover, according to Randall Ball,¹¹ all of the
9 "entities" -- Netfill, N-Bill, Online Billing, Webtel, TAL and MJD --
10 were part and parcel of the same company over which Ken Taves had
11
12

13 ⁹(...continued)

14 against Ken Taves and the other defendants. Id. After reviewing the
15 cases cited by the FTC, which the Court finds distinguishable, the
16 Court declines to draw such adverse inference. See id. (citing
17 Libutti v. United States, 968 F. Supp. 71 (N.D.N.Y. 1997) (case
18 brought by the named-owner of a valuable racehorse against which the
19 IRS had issued a tax levy due to lack of assets in the name of named-
20 owner's father, the delinquent taxpayer; on issue of whether the
21 daughter or the father really owned the horse, the district court drew
22 adverse inferences from non-party father's invocation of the Fifth
23 Amendment privilege at trial after the court of appeals determined
24 that adverse inference was permissible under the circumstances of this
25 case), aff'd, LiButti v. U.S., 178 F.3d 114 (2d Cir. 1999)); and RAD
26 Servs., Inc. v. Aetna Casualty & Surety Co., 808 F.2d 271 (3rd Cir.
27 1986) (plaintiff company sued its insurer to recover costs incurred in
28 disposing of hazardous waste materials; court allowed jury to draw
adverse inferences against the company from the silences of two non-
party witnesses -- one a former officer and director of the company
and the other a former employee -- who were involved in the alleged
plan to unlawfully dump the hazardous waste materials). For this
ruling, the Court does not rely on any fact that is supported solely
by Martin Dugan's silence during his deposition.

26 ¹⁰ In June 1999, ATS was purchased by Quick Pages, Inc., a
27 Minnesota company.

28 ¹¹ Ms. Ball was Ken Taves' office administrative assistant from
January 1997 to January 1999.

1 "control." (Ball Depo. at 12-14.)¹² "The names [merely] changed
2 periodically." (Id.)¹³ Further, in December 1998, when one of MJD's
3 merchant accounts was terminated, Ken Taves contacted the agent who
4 assisted MJD in obtaining the account to inquire about the reason for
5 the termination. At the very least, the record shows that Ken Taves
6 was actively involved in MJD and the two companies -- JKP and MJD --
7 and their principals were cohorts in the same scheme.¹⁴

8 Teresa Taves has been married to Ken Taves since 1982. (T. Taves
9 Depo. at 800.)¹⁵ Before her marriage, in the 1970s, she worked for
10

11 ¹² Ms. Ball also testified that the same employees worked out
12 of the same suite of offices in Malibu and there was no distinction
13 between work done for JKP/Netfill as opposed to work done for MJD or
14 TAL. (Id. at 19-20.)

15 ¹³ When asked why the company's name changed, e.g., from
16 JKP/Netfill to MJD, Ken Taves and Rappaport told Ms. Ball that the
17 company was growing so different merchant accounts had to be set up
18 with different names because banks could only process a certain
19 volume/amount per merchant account. (Id. at 21-22.)

20 ¹⁴ Ken Taves attempted to but could not quite explain the
21 business relationship between MJD and JKP. He claims that pursuant to
22 a contract between MJD and JKP, MJD paid JKP for the credits and
23 chargebacks against JKP's merchant accounts (presumably after MJD took
24 over JKP's book of business). (K. Taves Depo. at 64-67.) But the
25 contract may or may not have been written (id. at 64, 67) and no
26 service was actually provided by MJD to JKP (id. at 66).

27 ¹⁵ The Court notes that some of the material facts concerning
28 Teresa Taves (and other defendants) discussed herein are not included
in the FTC's Statement. However, these facts are all supported by the
deposition transcripts, declarations or exhibits submitted by the FTC
in support of the Motion. Therefore, the Court may consider the facts
at this time. See Fed. R. Civ. P. 56(c) ("The judgment sought shall
be rendered forthwith if the pleadings, depositions, answers to
interrogatories, and admissions on file, together with the affidavits,
if any, show that there is no genuine issue as to any material fact").
For the parties' convenience, all facts not listed in the FTC's
Statement but referenced herein shall be accompanied by a citation to
the record.

1 five years at Security Pacific Bank. (Id. at 683.) She started as a
2 bank teller, advanced to the position of chief teller and later
3 transferred to the bank's loan department. (Id.) After leaving the
4 bank, she worked for six months for a real estate company and two
5 years in sales for a garment company. (Id. at 684.) Around 1985, a
6 few years into her marriage, Teresa Taves worked for Herbal Care, the
7 company she and her husband co-founded. She handled customer service
8 and the shipping of products for approximately three years. (Id. at
9 684-85.) Then, the company "kind of dissolved" because "it just
10 wasn't a strong company." (Id. at 686-87.) During the next five
11 years, with the exception of time-off for maternity leave, Teresa
12 Taves worked part-time at another company formed by Ken Taves,
13 handling shipping and answering calls. (Id. at 687.) The company
14 sold or distributed computer toner supplies. (Id.) Around 1994 or
15 1995, before JKP was formed, this computer toner supplies company
16 dissolved. (Id. at 688.)

17 Teresa Taves assisted her husband with JKP's operations. She
18 visited the Malibu offices occasionally, ran errands for the
19 companies, entertained customers and held parties for the employees.
20 (Id. at 690.) The record does not show that she was involved in the
21 daily operations of JKP's business. However, as an officer of JKP,
22 she signed checks, letters and corporate documents on behalf of JKP.
23 The documents include federal corporate tax returns, bank account
24 applications and signature cards, and statements concerning
25 JKP/Netfill's business history. During her deposition, Teresa Taves
26 repeatedly testified that she did not read the documents that she
27 signed or did not recall reading the documents, even when those
28 documents contain her initials next to statements such as "Merchant

1 Initial When Read." (See, e.g., *id.* at 748 ["I was just told to sign
2 them and I signed them. I didn't really read the fine print"], 750
3 ["I don't remember reading it"], 752 ["I didn't read these
4 documents"], 763 ["I didn't read [them], I just signed them"].)¹⁶ She
5 also denied having any knowledge of fraud by any of the defendants.
6 (See, e.g., *id.* at 752-53, 765-66, 769-71, 789-F-789-I.)¹⁷

7 But the evidence shows that she had a general understanding of
8 JKP's business operations. For example, she knew that JKP's business
9 operated adult-content web sites. (*Id.* at 711, 789-P.) She knew that
10 merchant bank accounts were necessary for JKP to charge and process
11 credit card payments.¹⁸ (*Id.* at 736-37.) She was aware that ATS
12 processed all of JKP's credit card transactions. (*Id.* at 782-83.)
13 She also knew that customer service employees at the Malibu offices
14 handled calls from disgruntled consumers seeking credits or
15 "chargebacks" from the companies. (*Id.* at 730, 771.)¹⁹ She talked to
16

17 ¹⁶ Included among the documents that she signed on behalf of
18 JKP/Netfill was a single page "Business to Business Affidavit" whereby
19 she made certain representations and warranties to a bank, e.g.,
20 JKP/Netfill will not process a credit card transaction for any sale in
21 which the merchandise or service has not been delivered. (*Id.* at
22 871.) When asked at her deposition whether each representation or
23 warranty on the affidavit was true, Teresa Taves' answer was generally
24 "I don't know," "I have no idea," or "I don't know if it was true or
25 not." (*Id.* at 779-781.)

26 ¹⁷ During her deposition, she also refused to answer many
27 questions on the ground that her answer might divulge confidential
28 communications between her husband and her.

¹⁸ A merchant account is a bank account that is used to accept
credit cards as payment for the sale of products or services.

¹⁹ When a card holder complains of unauthorized charges, the
card holder can receive a reimbursement by chargeback or credit. If
the issuing bank accepts the complaint from a customer who disputes a
(continued...)

1 employees, observed their activities and overheard telephone
2 conversations during her visits to the Malibu offices. (Id. at 789-S-
3 791.)

4 In addition, Teresa Taves played a key role -- she was
5 instrumental in JKP's ability to obtain merchant bank accounts. As
6 discussed below, Teresa Taves ultimately acted on behalf of JKP in its
7 efforts to obtain merchant accounts after Ken Taves' application was
8 rejected because of his bad credit record. Teresa Taves recalls
9 submitting merchant bank account applications on behalf of JKP. (Id.
10 at 737.) On at least one occasion, she went to the premises of
11 Charter Pacific Bank ("Charter Pacific"), met with bank personnel,
12 including Richard Cornejo, the Executive Vice President/Bank Card
13 Manager, and signed documents on site. (Id. at 746-749, 758-59.)²⁰
14 On another occasion, Teresa Taves, unaccompanied by her husband, met
15 with an agent to sign documents related to a merchant bank application
16 with Heartland Card Services (or Heartland Bank) ("Heartland"). (Id.
17 at 773-76 ["I know my husband wasn't there"].)

18 Finally, Teresa Taves was aware that JKP (and/or the Taveses'
19 other related businesses) made an extraordinary amount of money in
20

21 ¹⁹(...continued)

22 charge on his or her account statement, it will reverse or charge back
23 the transaction through the credit or debit card interchange. The
24 "chargeback" causes a debit to be placed on the merchant's account at
25 its bank and a credit on the customer's account at the issuing bank.
26 A fee against the merchant account is ordinarily assessed for each
27 chargeback. Alternatively, a credit can be given to the card holder
28 by the merchant directly (whereby the merchant agrees to reimburse the
card issuer), or it can be given by the card issuer (where the issuing
bank absorbs the cost of the unauthorized charge).

²⁰ Teresa Taves testified that she did not specifically recall
the conversations that took place at this meeting. (Id.)

1 1997 and 1998. As mentioned earlier, Teresa Taves and her husband
2 were each paid around \$1.7 million in 1998 by Herbal Care for their
3 work and involvement with JKP. She knew that her 15 or 16 year old
4 son was paid a salary, which amounted to approximately \$48,000, even
5 though he only "spen[t] a little time" in the offices and she did not
6 know what his duties were other than "cleaning up." (Id. at 731-
7 33.)²¹ She also testified that the family earned close to \$4 million
8 from JKP's operations in 1997. (Id. at 804.) Before 1997, she and
9 her husband had never made so much money from any of their business
10 endeavors. (Id.)²²

11 **Rappaport.** Dennis Rappaport has been a friend of the Taveses for
12 approximately twenty years. Discreet Bill was Rappaport's company.
13 In 1998, he worked full-time at the Malibu offices acting as Ken
14 Taves' office manager. In addition, Rappaport held himself out to
15 employees and third parties as a contact for both MJD and TAL.

16 **O'Bannon.** Maurice O'Bannon had an informal agreement with Nevada
17 Corporate Headquarters, Inc. ("Nevada Corp."), an incorporator, to act
18 as a nominee for their client-corporations and sign whatever documents
19 Nevada Corp. wanted him to sign. He visited the office once or twice

21 ²¹ She testified that she did not know the exact amount of
22 compensation. When presented with records showing that Herbal Care
23 paid her son approximately \$48,000 in 1998, she did not express any
surprise. (Id. at 733-35.)

24 ²² Some additional facts are worthy of mention. Ken Taves
25 faced a felony check alteration charge in 1997. (See 12/20/99 Speigel
26 Decl., Attachment "A" [T. Taves Depo. at 4-6].) Teresa Taves claims
27 that she did not learn about this charge until after the commencement
28 of this action. (Id.) However, Teresa Taves has known since at least
1995 that her husband had been in trouble with the law in the past:
(1) he faced a murder charge in 1988 involving a victim who was a
financial or business associate of Ken Taves; and (2) prior to their
marriage, he had some unspecified criminal problems. (Id. at 12-16.)

1 a week to sign documents. (O'Bannon Depo. at 283.) O'Bannon claims
2 that he has never received a salary from Nevada Corp. (Id. at 282.)
3 He has received "a few little benefits" in exchange of his work, such
4 as "a hand-me down . . . used computer or something on that order" and
5 the use of a Cadillac car. (Id. at 282-83.)

6 Corporate documents show that O'Bannon was an officer and
7 director of MJD, Discreet Bill and TAL in 1998.²³ A merchant bank
8 agreement between Charter Pacific and TAL indicates that O'Bannon
9 signed the agreement on behalf of TAL in December 1998, even though
10 the corporate documents show that he had tendered his resignation as
11 an officer and director of TAL on October 29, 1998. (See id. at 305
12 [Resolution of the Board of Directors of TAL]; 311-322 [merchant
13 agreement].) However, O'Bannon testified that he was not aware that
14 he had held those roles (prior to his telephone deposition), he was
15 not familiar with those companies, and he has never received any money
16 from those companies. (Id. at 285-286, 289, 291-92, 299-300.) He
17 either does not recall signing the documents or claims that the
18 signatures on the documents appear to be impressions from his
19 signature stamp (and placed on the documents by someone else).
20 (Id.)²⁴ O'Bannon acknowledged that he, on behalf of Discreet Bill,

21
22 ²³ According to the corporate documents: O'Bannon served as an
23 officer for (1) Discreet Bill from March 17, 1998 to April 25, 1999
24 (O'Bannon Depo. at 306; O'Bannon Motion, Ex. C); (2) MJD from May 7,
25 1998 to June 3, 1998 (O'Bannon Depo. at 304-304-A); and (3) TAL from
26 unknown date to October 29, 1998 (id. at 305).

27 ²⁴ With respect to the December 1998 merchant bank agreement
28 between TAL and Charter Pacific, O'Bannon testified that he "sees
[his] signature stamp" on the last page. (Id. at 299; see id. at
322.) The signature page of the agreement does not contain a date line
next to his name. (See id. at 322.) The handwritten "12-8-98" below
(continued...)

1 signed the fictitious business name certificates that indicate
2 Discreet Bill (and not JKP or MJD) did business as N-Bill, Webtel,
3 Online Billing and Assist Online. (Id. at 293-98; see id. at 307-
4 10.)²⁵ However, he has no specific recollection of signing these
5 statements. Apparently, it was his practice to go to Nevada Corp.'s
6 offices, sit at a table and sign whatever documents the company gave
7 him to sign without actually reviewing the documents. (See id. at 293
8 ["I signed things that they give me to sign, and I don't really know
9 too much about everything I sign"], 298 ["I just would, you know, sit
10 at a table and sign them"], 301-02 ["I possibly would [sign a lengthy
11 document without reading it first] because I don't look at it that
12 carefully when I sign those papers"].) He is "not sure" whether
13 anyone at Nevada Corp. had authority to sign his signature in 1998.
14 (Id. at 301.)²⁶

15
16 ²⁴(...continued)
17 O'Bannon's title and above the "Authorized Bank Signature" could have
18 been written by O'Bannon or the person who signed on behalf of the
19 bank. (A separate "12-22-98" notation on the lower left hand corner
20 is accompanied by initials of someone from the bank.) During
21 O'Bannon's deposition, the FTC did not ask O'Bannon whether the "12-8-
22 98" was written by him. The Court does not know whether the FTC
23 deposed the person who signed this agreement on behalf of the bank to
24 determine whether O'Bannon signed the agreement at the bank and/or
25 whether the bank personnel wrote the "12-8-98". (O'Bannon testified
26 that he was "pretty sure" that he was in Las Vegas on or about
27 December 8, 1998 (id. at 302).)

28 ²⁵ The notarized documents show that O'Bannon signed the
certificates concerning Discreet Bill's use of (1) "N BILL" on
September 15, 1998, (2) "ONLINE BILLING" on September 15, 1998, (3)
"WEBTEL" on December 10, 1998, and (4) "ASSIST ONLINE" on December 10,
1998. (See id. at 307-10.)

²⁶ The Court does not know whether the FTC deposed Nevada Corp.
or its employees to determine whether someone had authority to sign
O'Bannon's name and/or whether someone else used O'Bannon's signature
(continued...)

1 O'Bannon claims that he does not know any person named Ken Taves,
2 Teresa Taves, or Lee Sacks, former counsel for Ken Taves and his
3 companies. (Id. at 302.) He also does not know anyone associated
4 with MJD or Discreet Bill and does not have any knowledge about these
5 companies' businesses. (Id. at 303.)

6 JKP dba Netfill's High Volume

7 "Business" and Trouble with the Banks

8 To become a member and utilize the adult-content Internet web
9 sites, customers must submit a credit or debit card number.
10 Defendants' web sites charged a \$19.95 monthly fee. ATS processed
11 credit and debit card transactions for JKP, MJD and TAL.²⁷ ATS was
12 responsible for submitting these defendants' charge requests to the
13 authorizing networks and collecting the payments.

14 In late 1996 or early 1997, Ken Taves applied for a merchant
15 account with Charter Pacific. Charter Pacific turned down his
16 application because he had a terrible credit record. Unlike her
17 husband, Teresa Taves was creditworthy. Therefore, on or about June
18 2, 1997, Teresa Taves, acting as President of JKP dba Netfill, signed
19 a merchant account application with Charter Pacific. On or about June
20 4, 1997, Ken Taves, acting on behalf of JKP, forwarded to Charter
21 Pacific a copy of the notarized fictitious business name filing that
22 confirms JKP can do business as Netfill. (K. Taves Depo. at 94 &
23 Depo. Ex. 4.) JKP/Netfill's application was approved on or about June

24 _____
25 ²⁶(...continued)
stamp to sign documents.

26 ²⁷ ATS processed charges for (1) JKP from 1995 to 1998; (2) MJD
27 in 1998; and (3) TAL from late 1998 to January 1999. The only written
28 transaction agreement that exists between ATS and these companies is a
1995 contract signed by Ken Taves on behalf of Netfill.

1 5, 1997. Charter Pacific's files list Ken and Theresa Taves as
2 contacts for the JKP/Netfill merchant account.

3 In November 1997, on a form filled out by Ken Taves, Teresa Taves
4 signed (on behalf of JKP/Netfill) an agreement to purchase access to
5 various historical credit card number databases from Charter Pacific.
6 JKP/Netfill ordered, among others, "Positive Database File #2," which
7 contained the date of sale, card number and dollar amount of every
8 Visa and Mastercard transaction processed through any merchant of
9 Charter Pacific during the previous 11 months for which there had been
10 no chargebacks or credits issued ("Charter Pacific Positive
11 Database"). This database contained no information about the card
12 holder. JKP/Netfill could download the Charter Pacific databases
13 electronically.

14 Coinciding with JKP/Netfill's access to the Charter Pacific
15 historical databases, JKP/Netfill began transmitting thousands of
16 credit card charge requests to ATS by e-mail.²⁸ In late 1997 or early
17 1998, Ken Taves, on behalf of JKP, began submitting customer charge
18 information to ATS by e-mails with attached text files. The text
19 files, transmitted once or twice a month, contained up to thousands of
20 credit and debit card numbers.²⁹ At times these files omitted

21
22 ²⁸ Prior to that time, subscriptions to the adult web sites
23 were processed solely by HTML post. In other words, customers would
24 input the necessary data, e.g., their credit or debit card
25 information, on a form generated by their Internet browsers, hit the
26 submit button, and transmit the data directly to ATS's server for
27 authorization. According to Ms. Ball, this was the only method by
28 which the defendant companies processed subscriptions and obtained
cardholders' credit or debit card numbers. (Ball Depo. at 31-32.)

27 ²⁹ According to David Goldfarb, one of the owners of ATS, Ken
28 Taves informed him that one reason for the e-mail transmissions was
(continued...)

1 customer names, customer e-mail addresses and card expiration dates.
2 From those e-mail transmissions, it was impossible for ATS to
3 determine whether a cardholder had visited the defendants' web sites.
4 Nevertheless, ATS accepted the numbers and processed the charge
5 requests.³⁰ Ken Taves transmitted credit card charge requests by e-
6 mail to ATS on behalf of JKP, and subsequently on behalf of MJD,
7 through the end of 1998.³¹

8 Also near the time that Ken Taves began transmitting large
9 volumes of charge requests to ATS by e-mail, the JKP/Netfill merchant
10 account at Charter Pacific came to the attention of Visa USA's
11 chargeback monitoring program because its chargeback rate exceeded the

12 //

13 //

14 _____
15 ²⁹(...continued)

16 that JKP, and later MJD, were submitting charges on behalf of other
17 Internet merchants -- merchants who lost their merchant accounts --
18 through JKP and MJD's merchant accounts for a fee. The banks with
19 which JKP and MJD held merchant accounts were not aware that JKP
and/or MJD were submitting charge transactions for the web sites of
third parties.

20 ³⁰ In 1998 alone, ATS was paid approximately \$2.35 million in
21 fees -- \$1.25 million in checks and \$1.3 million in wire transfers --
22 from Ken Taves and/or his companies for the services ATS provided to
23 JKP and MJD. (Goldfarb Depo. at 503-05.) Interestingly, the checks
24 were made payable to ATS and deposited in Bank of America, where ATS
maintained a business banking account; however, the wire transfers
were sent to an Euro Bank account (in the Cayman Islands) held in the
individual names of David Goldfarb and Bill Parodi, the former co-
owners of ATS. (Id. at 511-12.)

25 ³¹ When asked if he knew whether ATS processed charge requests
26 after JKP/Netfill e-mailed a list of credit card numbers and
27 expiration dates, Richard Cornejo, the Executive Vice President/Bank
28 Card Manager of Charter Pacific, replied: "You're kidding?" (Cornejo
Depo. at 1513.) Cornejo then stated that "It better not have
occurred" because "[i]t's totally illegal." (Id. at 1514.)

1 maximum monthly norm permitted for merchants.³² At the time, the
2 chargeback rate which triggered Visa USA monitoring was an overall
3 rate of 2.50% or more per month or a consumer dispute chargeback rate
4 of 1% or more.³³ By January 1998, the JKP/Netfill account had a 5.54%
5 overall chargeback rate (2,556 chargebacks out of 46,127 transactions)
6 and by February 1998, the JKP/Netfill account had a 6.11% overall
7 chargeback rate (2,656 chargebacks out of 43,480 transactions). On
8 March 30, 1998, Visa USA notified Ken Taves and Charter Pacific that
9 the Netfill account had an excessive number of chargebacks four months
10 in a row -- November 1997, December 1997, January 1998 and February
11 //
12 //

14 ³² Through its Risk Management Division, Visa USA monitors
15 chargebacks suffered by merchants who accept Visa cards. The
16 chargeback rate is calculated with the numerator being the number of
17 transactions charged back to the merchant's bank and the denominator
18 being the total number of all transactions charged through the system
19 by the merchant. In the first three months of excessive chargebacks,
20 Visa USA contacts the merchant bank and asks them to fix the
21 problem(s) causing the excessive chargebacks. If a merchant has four
22 months of excessive chargebacks in any five month period, Visa USA
23 places the merchant on "active monitoring" status. Visa USA also
24 begins to assess fees against the merchant bank, which in turn
25 assesses fees against the merchant. The fees include a \$5,000
26 administrative fee and \$25 per chargeback. In addition, the merchant
27 is required to develop and follow a chargeback reduction plan.
28 Typically, among the approximately 3.5 to 4 million merchants in the
29 Visa card system, only 3 to 5 merchants reach four consecutive months
30 of excessive chargebacks.

31 ³³ A chargeback can also occur for a number of reasons that do
32 not involve a consumer dispute, e.g., a transaction for which an
33 authorization was never given by the issuing bank. (Elliott Decl. ¶¶
34 4-5.) A consumer dispute chargeback is a chargeback initiated by a
35 consumer complaint and determined by Visa USA to involve a merchant
36 practice that may adversely impact the consumer, e.g., credits not
37 posted or defective merchandise. (See id.; Cornejo Depo. at 1570 (Ex.
38 14 [Visa USA letter to Netfill]).)

1 1998.³⁴ (See Cornejo Depo. at 1570-71.) Therefore, JKP/Netfill was
2 required to submit a chargeback reduction plan within 15 days. (Id.)
3 In addition, Visa USA warned Netfill that failure to reduce the
4 chargeback ratios may result in the revocation of Netfill's Visa card
5 acceptance privileges. (Id.) On April 3, 1998, Charter Pacific
6 notified Netfill that a total of \$71,250 in fees would be assessed to
7 Netfill's account for the February 1998 chargebacks. (Id. at 1572.)

8 JKP/Netfill never submitted the requisite chargeback reduction
9 plan. Instead, presumably to avoid "active monitoring" by Visa USA,
10 JKP decided to switch merchant banks. On March 19, 1998, less than
11 two weeks before the arrival of the Visa USA warning letter concerning
12 the Charter Pacific account, Teresa Taves, as President of JKP dba
13 Netfill, signed an application for a merchant account with Heartland
14 Bank (via Heartland Card Services) ("Heartland"). Heartland approved
15 the account on or about April 17, 1998.³⁵ Instead of "Netfill," the
16

17 ³⁴ According to Visa USA's records, the Netfill account at
18 Charter Pacific had the following chargeback rates for March through
19 June 1998: March 1998: 5.20% (3,095 chargebacks out of 59,470
20 transactions), April 1998: 9.53% (3,693 chargebacks out of 38,739
21 transactions), May 1998: 23.75% (4,391 chargebacks out of 18,489
22 transactions), and June 1998: 63.9% (2,983 chargebacks out of 4,668
23 transactions).

24 ³⁵ Heartland's JKP/Netfill underwriting file contains a list of
25 adult web sites operated by JKP/Netfill. (See Carr Depo. at 960-61,
26 1150.) The web sites included the following: erosisland.com,
27 pinkbeaver.com, muffpie.com, pornhq.com, asianhq.com, cinemaxxx.com,
28 porntheatre.com, and pornreview.com. (Id. at 1150.) Gary Mittman,
the owner of Adult Banc, testified that in late 1998, Ken Taves
"basically handed" him 14 adult web sites that JKP had developed but
stopped operating. Those 14 web sites include the eight referenced
above and one called "pureskin.com," (Mittman Depo. at 54-55), which
is subsequently identified as a site owned and operated by MJD.

Based on Ken Taves' representation, Robert Carr, Heartland's
Chief Executive Officer, believed that JKP only processed charge/debit
(continued...)

1 billing descriptor for this account (as it would appear on the
2 cardholder's statements) was "N-Bill." On May 22, 1998, Netfill
3 informed Charter Pacific that it would cease processing payments with
4 Charter Pacific. Teresa Taves signed the letter on behalf of Netfill.
5 On May 31, 1998, Charter Pacific closed the Netfill account.

6 However, JKP/Netfill continued to pay for access (and had access)
7 to the Charter Pacific Positive Database until at least December 31,
8 1998. The Charter Pacific Positive Database files that JKP/Netfill
9 could have accessed from November 1997 through January 7, 1999 (the
10 date the Receiver took over) contained at least 3,622,418 valid
11 Visa/MasterCard credit card numbers. (See Card Alert Services ("CAS")
12 Report at 2163, 2165; see also discussion, *infra*, at 32 & note 54.)

13 The N-Bill account with Heartland was approved at an opportune
14 time. JKP/Netfill was able to avoid submitting a chargeback reduction
15 plan and continue processing its credit/debit card requests without
16 interruption. But almost immediately, in July 1998, the N-Bill
17 account was flagged by the Visa USA chargeback monitoring program
18 because of excessive chargebacks. In August 1998, according to
19 Heartland's records, cardholders charged back 21,431 transactions
20 worth \$427,129 that had been billed through the N-Bill account.³⁵

21 _____
22 ³⁵ (...continued)
23 card transactions for subscriptions to web sites that it owned and
24 operated. Heartland maintains no merchant account relationship with
25 merchants who processed charge/debit card transactions on behalf of
26 third parties who did not have their own merchant accounts.

27 ³⁶ Visa USA's records show that the N-Bill account had a 6.63%
28 chargeback rate for August 1998 (13,414 chargebacks out of 202,389
transactions). Apparently, the Heartland and Visa USA records contain
different figures because Visa USA only monitors Visa card charges,
whereas Heartland's records reflect chargebacks for all credit cards
(continued...)

1 Heartland assessed \$321,465 in fees against JKP for the August
2 chargebacks. (Carr Depo. at 975-76, 1347-49.) On or about September
3 16, 1998, Mr. Carr (Heartland) informed either Ken Taves or Mr.
4 Goldfarb (ATS) that chargebacks on the N-Bill account were "way out of
5 line." (Id. at 923-24.) Indeed, for September 1998, Visa USA
6 registered a 9.67% chargeback rate for the N-Bill account. Moreover,
7 September 1998 was the third consecutive month that N-Bill's
8 chargebacks exceeded Visa USA's guidelines.³⁷ Realizing that it would
9 soon go on Visa USA's "active monitoring" list, JKP/Netfill decided to
10 close the Heartland account.

11 On September 29, 1998, Netfill sent a letter to Heartland
12 requesting the closure of the N-Bill account effective October 1,
13 1998. Teresa Taves, as President of Netfill, signed the letter to
14 Heartland. On October 1, 1998, Heartland closed the N-Bill account.

15 Transfer of JKP/Netfill's Business to MJD
16 and the Opening of New Merchant Accounts

17 As mentioned earlier, MJD was incorporated on May 5, 1998. It
18 shared the same employees and the same suite of offices in Malibu used
19 by JKP/Netfill. In addition to Ken Taves, Rappaport held himself out
20 as a contact for MJD. Sometime after its formation, Ken Taves advised
21 ATS that JKP's customers would become MJD's customers because MJD
22 bought JKP's book of business. The evidence indicates that the
23

24 ³⁶(...continued)
25 processed through its merchant accounts.

26 ³⁷ In September 1998, Ken Taves and Mr. Carr exchanged a series
27 of e-mails concerning N-Bill account's overcharges. In his e-mails,
28 Ken Taves acknowledged that the N-Bill account has experienced
excessive charge-backs but suggested that JKP/Netfill was making every
effort to improve its record.

1 transfer of JKP's book of business to MJD, to the extent that it
2 occurred, was part of the scheme to avoid the detection of fraud.³⁸

3 In May 1998, around the time that JKP closed its Netfill account
4 at Charter Pacific, MJD applied for a merchant account with Charter
5 Pacific. The MJD account, underwritten for an account where the
6 merchant only processed charges for its own web site(s), was approved
7 in May or June 1998. Almost immediately, the MJD account had
8 excessive Visa card chargebacks. Visa USA records show that MJD had
9 the following chargeback rates from August through November 1998:
10 3.11% (August); 6.63% (September); 9.62% (October); and 5.86%
11 (November). (Elliott Decl. at 2154.) Thus, by the end of November
12 1998, the MJD account had exceeded Visa USA's acceptable chargeback
13 ratios for four months.

14 In October 1998, when its merchant account at Charter Pacific was
15 entering its third month of excessive chargebacks, MJD opened a
16 merchant account with Heartland using "Webtel" instead of MJD as the
17 merchant descriptor.³⁹ On its application, MJD identified

18 //

19 //

22 ³⁸ For example, by changing merchant banks or merchant names,
23 that merchant's chargeback record starts anew under the Visa USA
24 chargeback monitoring program. Thus, even if the merchant had
25 previously been flagged as a problem merchant by Visa USA, the next
26 time that the merchant has excessive chargebacks, the merchant (under
27 the new name or merchant account) will be listed as a first month
28 offender under Visa USA's monitoring program. This way, a merchant
can avoid "active monitoring" by Visa USA and avoid chargeback fees,
at least initially.

³⁹ The opening of the Heartland account coincided with
JKP/Netfill's closing of its N-Bill account with Heartland.

1 "www.pureskin.com" as its adult-content web site.⁴⁰ On December 3,
2 1998, following a four-day period in late November when the MJD/Webtel
3 account processed approximately \$4.7 million in Internet "sales,"
4 MasterCard contacted Heartland to report that it had received calls
5 from three issuing banks regarding possible fraud by Webtel. On
6 December 7, 1998, Heartland terminated the Webtel account.⁴¹

7 On January 5, 1999, Charter Pacific advised MJD that a total of
8 \$48,200 in fees will be assessed to MJD's account for the November
9 1998 chargebacks. (Cornejo Depo. at 1614.) In addition, Charter
10 Pacific required MJD to submit its chargeback reduction plan by
11 January 7, 1999. (Id.) On January 11, 1999, four days after the
12 Receiver took over the defendant companies, Charter Pacific closed the
13 MJD account.

14 Beginning Anew With TAL

15 In October 1998, as the MJD account was placed under the scrutiny
16 of Visa USA's monitoring program, a new entity appeared. Like JKP,
17 MJD and other defendant companies, TAL operated out of the offices at

18 ⁴⁰ As noted earlier in footnote 35, www.pureskin.com was also
19 supposed to be JKP/Netfill's web site in 1998.

20 ⁴¹ On December 8, 1998, Lee Sacks, former counsel for Ken Taves
21 and his companies, contacted Heartland on behalf of MJD. Mr. Sacks
22 requested the opportunity to discuss with Heartland "the events
23 leading to the termination of [MJD's] merchant account." (Carr Depo.
24 at 1090). Mr. Sacks went to Heartland's offices and requested, to no
25 avail, that the MJD account be reopened. Around the same time, Ken
26 Taves contacted Heather Bennett, the independent agent who submitted
27 MJD's application to Heartland, to find out why Heartland had
28 terminated the MJD/Webtel account.

On or about December 9, 1998, Ken Taves also learned that a
representative from GM MasterCard had called and accused Online
Billing, one of the fictitious business names used by JKP/Netfill or
MJD, of stealing people's credit card numbers over the Internet and
charging for services not rendered. Ken Taves was last seen at the
Malibu offices on December 8 or 9, 1998.

1 22761 Pacific Coast Highway offices and shared the same employees. In
2 December 1998, a merchant account for TAL was opened at Charter
3 Pacific.⁴² The merchant account agreement between TAL and Charter
4 Pacific indicates that O'Bannon signed the agreement on behalf of TAL.
5 (O'Bannon Depo. at 322.)

6 Rappaport held himself out as a contact for TAL. Around the
7 middle of December 1998, Rappaport told ATS that MJD's existing book
8 of business, the portion that was then processed through the Charter
9 Pacific merchant account, would be turned over to TAL. TAL was only
10 in operation for a few weeks when the FTC filed this action.

11 Problems With Consumers

12 In 1998 alone, over \$49.4 million in "income" were deposited into
13 JKP and MJD's merchant accounts at Charter Pacific and Heartland. Of
14 this total, over \$10.7 million were deposited at Charter Pacific
15 (\$6,145,431 in the JKP/Netfill account and \$4,562,914 in the MJD
16 account) and over \$38.7 million were deposited at Heartland
17 (\$26,284,514 in the JKP/N-Bill account and \$12,424,284 in the Webtel
18 account). From bank records of the total monthly deposits into JKP
19 and MJD's merchant accounts, the following monthly "sales" pattern for
20 1998 emerges:⁴³

21
22 ⁴² The FTC did not cite to a copy of the merchant account
23 application; and the Court did not find a copy of the application in
24 the volumes of exhibits. Therefore, the Court does not know which
individual actually applied for the account.

25 ⁴³ For the sake of convenience, the numbers in the chart have
26 been rounded to the nearest hundred. For the accurate figures, see
February 1999 Receiver's Report, FTC's Exhibit 28-A, at 1974.

27 FTC Fact No. 99, which identifies the amounts that JKP and MJD
28 deposited into their merchant bank accounts in 1998, relies on the
declaration of Brick Kane, a principal of Robb Evans & Associates, who
(continued...)

	January	February	March	April	May	June
JKP	\$830,400	962,200	1,870,400	3,119,500	2,224,700	4,991,600
MJD						185,300
Total \$	\$830,400	962,200	1,870,400	3,119,500	2,224,700	5,176,900

	July	August	September	October	November	December
JKP	\$5,510,500	5,865,500	6,060,200	991,500	3,600	80
MJD	\$ 757,800	664,900	887,400	3,563,300	10,129,200	799,300
Total	\$6,268,300	6,530,400	6,947,600	4,554,800	10,132,800	799,380

Such sales figures, if legitimate, are impressive indeed, given that the monthly web site membership fees were only \$19.95. But JKP and MJD did not legitimately obtain the spectacular "sales."

It is clear from the undisputed evidence that these defendants billed the credit and debit card accounts of individuals from all over the United States without authorization. Typically, the purported consumers had never heard of or seen the defendants' business names before receiving their bank or charge card statements. Many victims

⁴³(...continued)

in turn cites the February 1999 Receiver's Report and bank statements in support of these figures. In their statement of genuine issues, Ken Taves, JKP and Herbal Care dispute FTC Fact No. 99 on the erroneous ground that the FTC had relied upon the ATS Historical Database (see definition in text, *infra*, at 30) in reaching these calculations. (K. Taves, JKP and Herbal Care's Statement of Issues, No. 99.) Because the Receiver did not rely on the ATS Historical Database for these figures, the Court disregards these defendants' "dispute" and treats this fact as undisputed. The Court notes that FTC Fact No. 100 is similarly not in dispute, despite the defendants' contentions to the contrary, because the fact is based on the Receiver's review of bank statements and not the ATS Historical Database.

1 called the toll-free telephone numbers listed next to the descriptor
2 names on their statements to find out why they were charged \$19.95.⁴⁴
3 To add to the confusion, when calls were answered, JKP, MJD or TAL
4 customer service representatives used two additional fictitious names
5 to greet customers -- "Online Billing" or "Assist Online."

6 Unfortunately, many unhappy cardholders were unable to reach a
7 live customer service representative to respond to their inquiries.
8 Oftentimes the toll-free telephone lines were busy for long periods of
9 time or rang without an answer. Some calls were answered by an
10 automated voice mail system that did not identify the name of any
11 company. Instead, the voice mail recording would ask callers to input
12 their credit card numbers and press telephone keys to satisfy
13 inquiries. Understandably, many people refused to give their credit
14 card numbers to an anonymous or unknown entity. Other people were
15 unable to leave messages because the voice mail system indicated that
16 the voice mailbox was "full." Frustrated and fearful that their cards
17 may have been stolen, many cardholders contacted their issuing banks
18 and canceled their debit or charge cards.

19 JKP, MJD and TAL's customer service department⁴⁵ was overwhelmed
20 with complaints. In February 1998, the customer service department
21 had two employees. The complaints increased steadily during the year.
22 Around April 1998, in response to the increased number of calls, more
23 customer service representatives were hired. Towards the end of 1998,
24

25 ⁴⁴ Some cardholders were charged \$19.95 for several months in a
26 row.

27 ⁴⁵ The Court refers to a single customer service department
28 because the evidence shows that JKP, MJD and TAL shared a single
customer service department and used the same set of employees.

1 when the volume of complaint calls was at its highest, the customer
2 service department had 12 or 13 representatives. At that time,
3 thousands of calls were answered each day. Every customer service
4 agent received 200 to 300 calls per day.

5 According to employees' estimates, more than 50% of the calls
6 were from people who said they did not order the defendants' services
7 and had no idea why they were billed. In addition, an astonishing 40%
8 to 50% of the calls were from people who said they did not have a
9 computer and had not given their card numbers to anyone. Not
10 surprisingly in the scheme of things, the customer service agents'
11 computer screens generally did not display consumers' street or e-mail
12 addresses because such information was not available. Thus, the
13 customer service representatives were unable to verify whether the
14 complaining callers had actually signed up for any of the companies'
15 Internet web sites.

16 In the summer of 1998, Ken Taves and Rappaport established a bank
17 support department (and a separate telephone line) to respond to calls
18 from card issuing banks and credit unions. The goal was to get the
19 issuing banks to contact JKP, Netfill, N-Bill, MJD, Webtel or TAL
20 directly (instead of going through the charge authorization networks)
21 so that the defendants could issue credits. By issuing credits, these
22 defendants could avoid the penalties and fees associated with
23 chargebacks and reduce their exposure to the Visa USA chargeback
24 monitoring program.⁴⁶ Rudy Pena, the employee that Ken Taves and
25 Rappaport picked to head the bank support department, had no knowledge
26 //

27
28 ⁴⁶ The defendant companies never disputed a chargeback.

1 of the Truth in Lending Act, Electronic Fund Transfer Act or the
2 credit card processing rules for Visa, MasterCard or Discover.

3 By August 31, 1999, the Charter Pacific and Heartland merchant
4 accounts had processed over \$6.8 million worth of chargebacks and
5 credits⁴⁷ (or 13.8% of the \$49.4 million in "sales" proceeds deposited
6 into the accounts). Visa USA's records show that JKP and MJD's
7 merchant accounts' average chargeback rate for Visa cards in 1998,
8 taken as a whole, is approximately 7.3%. (Elliot Decl. ¶¶ 14-15.)
9 This rate is based on the following data: 120,425 chargebacks
10 (totaling in excess of \$2.6 million) processed out of 1,647,578 total
11 Visa card transactions. (Id.)⁴⁸ This is "exceedingly high" when
12 compared to the average Visa card chargeback rate of 0.80% for
13 electronic commerce merchants, those classified as primarily Internet-
14 based merchants. (Elliott Decl. ¶¶ 12-16.)

15 To date, there remain cardholders from all over the United States
16

17 ⁴⁷ \$5,157,898 in chargebacks and \$1,652,814 in credits. (Kane
18 Decl. ¶ 4.) During oral argument, the FTC's counsel updated the total
19 chargebacks and credits to the merchant accounts, providing the Court
20 with a total of \$7.3 million (\$7,330,968 instead of \$6,810,712)
21 through February 2000. Because the Court finds that a triable issue
22 of fact exists concerning the amount of damages and the damages
23 calculation presented in the briefs used the \$6.8 million figure, the
24 Court shall continue to refer to the former \$6.8 million figure in the
25 facts section rather than the updated \$7.3 million figure.

26 ⁴⁸ Martin Elliott, the Program Manager of Visa USA's Merchant
27 Chargeback Monitoring Program, opines that the 7.3% chargeback rate
28 stated above may understate the number of consumer complaints to
issuing banks because many issuers would have written off the charges
without charging them back to the merchant bank. (Elliot Decl. ¶ 14.)
As explained by Card Alert Services, the FTC's expert, processing a
chargeback through the interchange system typically costs card issuers
at least \$20. (CAS Report at 2161.) If the challenged charge is less
than the cost associated with processing the chargeback, issuing banks
may simply absorb the cost of the charge in question instead of
submitting it through the interchange system. (Id.)

1 who complain that they have never been credited for unauthorized
2 charges posted to their credit or debit card accounts by N-Bill, MJD
3 and Webtel.⁴⁹ Some cardholders discovered the unauthorized charges
4 too late; they were no longer able to obtain a credit through their
5 card issuing banks. Undoubtedly, there are also cardholders who do
6 not pay much attention to their statements and therefore never noticed
7 the unauthorized charges.

8 Amount of Damages

9 The FTC contends that the damages caused by the defendants'
10 unauthorized billing practices in 1998 amount to \$40.5 million.⁵⁰ The
11 FTC's calculation of damages relies in large part on information
12 derived from historical databases maintained and produced by ATS.
13 JKP, Herbal Care, Ken Taves and Teresa Taves challenge the
14 authenticity and reliability of information obtained from ATS.

15 ATS maintained a historical database that purportedly recorded
16 the transactions processed for JKP, MJD and TAL from January 1998 to
17 the date the Receiver took over the defendant businesses (the "ATS
18 Historical Database"). The database produced to the FTC contains the
19 following information: transaction number, card number, transaction
20 amount, transaction time and date, and associated merchant
21 identification. It does not identify the names or addresses of any
22 card holders whose accounts were being billed. Nor does the database

24 ⁴⁹ The FTC submitted 17 cardholder declarations in support of
25 this fact. See FTC Statement, Fact No. 93. During oral argument, the
26 FTC's counsel stated that these 17 cardholders are representatives of
27 a larger class of victims who have yet to obtain a credit for the
28 unauthorized charges.

⁵⁰ The FTC has not submitted evidence concerning damages that
may be attributed to the defendants' 1997 business activities.

1 identify the authorization numbers for any of the transactions.⁵¹ ATS
2 turned over this database to former defense counsel, Fried, Frank,
3 Harris, Shriver, and Jacobson ("Fried, Frank"), on February 19, 1999.
4 Four days later, the ATS Historical Database was turned over to the
5 Receiver.

6 Apart from the ATS Historical Database, ATS maintained a customer
7 database for TAL (the "TAL Customer Database"). This database
8 contains customers' names and addresses in addition to the information
9 contained in the ATS Historical Database. Until January 4, 1999,
10 three days before service of the complaint (and TRO) in this case, ATS
11 allegedly also maintained a customer database for JKP and MJD which
12 contained the names and addresses of the customers. During his
13 deposition, Mr. Goldfarb testified that ATS turned over this database
14 (on a CD-ROM) to former defense attorney Lee Sacks on January 4, 1999.
15 Mr. Sacks testified in his deposition that he returned the CD-ROM to
16 the defendants by leaving it on Ms. Ball's desk. However, Ms. Ball
17 did not receive the CD-ROM and never had a conversation with Mr. Sacks
18 concerning the delivery of the CD-ROM prior to this action. When the
19 Receiver entered the defendants' business premises on January 7, 1999,
20 it did not find the CD-ROM or any other documents/files that contain a
21 listing of the JKP and MJD customers. Therefore, based on what the
22 FTC was able to ascertain, the ATS Historical Database and the TAL
23 Customer Database are the only existing records of the defendant

24 //

26 ⁵¹ "The absence of authorization numbers raises an inference
27 that the transactions were not properly processed through the
28 [interchange] system, or that the ATS data as submitted is not
complete." (CAS Report at 2163.)

1 companies' charge transactions maintained by or on behalf of the
2 defendants.⁵²

3 The ATS Historical Database purportedly contains records of
4 2,584,919 transactions (not card numbers) for the January 1998 to
5 December 1998 period, totaling \$47,512,530.⁵³ (CAS Report at 2162-
6 63.) Card Alert Services, the FTC's expert, found 912,125 credit and
7 debit card numbers associated with the 2,584,919 transactions. (Id.
8 at 2163.) Comparing the card numbers in the ATS Historical Database
9 with the card numbers in the Charter Pacific Positive Database
10 processed from August 1997 through June 1998,⁵⁴ Card Alert Services

11
12 ⁵² The absence of any other record of the defendants' business
13 transactions -- e.g., customer names, addresses or authorization
14 numbers for approved transactions -- is incredible insofar as the
15 defendants would have the Court believe that they operated legitimate
16 businesses. As FTC's expert states, "[i]n our experience with
17 businesses involved in high volume credit and debit card activity,
18 such information is routinely kept by the businesses." (CAS Report at
19 2166-67.) Also, one would expect a legitimate Internet-based merchant
20 to maintain a record of its customers' e-mail addresses and
21 corresponding credit/debit card numbers. (See id.) However, neither
22 the defendants nor their agents have such records, whether stored in
23 computer files or on hard copies.

19 ⁵³ This number is \$1,906,693 less than the total 1998 deposits
20 to the Charter Pacific and Heartland merchant accounts -- \$49,417,143
21 -- derived from a review of bank statements. Due to the lack of
22 sufficient business records maintained by the defendant companies, the
23 FTC claims it is unable to account for this difference.

23 ⁵⁴ As previously stated, JKP/Netfill obtained access to the
24 Charter Pacific Positive Database in November 1997. The database
25 contains valid credit card numbers processed in the prior 11 months.
26 Therefore, JKP/Netfill should have had access to valid credit card
27 numbers processed prior to August 1997. However, Charter Pacific
28 apparently did not produce any database files that contain records of
credit cards processed prior to August 1997. Of the two groups of
Charter Pacific Positive Database files received by Card Alert
Services, one covers cards processed from August 1997 through June
1998 and the other covers cards processed from July 1998 through
(continued...)

1 found that 752,602 cards that appear in the Charter Pacific Positive
2 Database were used in ATS processed transactions after the card
3 numbers first appeared in the Charter Pacific Positive Database. (Id.
4 at 2165.) Based on this data, Card Alert Services concludes that
5 82.5% of the ATS processed cards (752,602 out of 912,125) matched
6 cards processed previously from a Charter Pacific merchant other than
7 the defendant businesses. (Id.) When Card Alert Services compared
8 the card numbers in the ATS Historical Database with the card numbers
9 in the Charter Pacific Positive Database processed from August 1997
10 through October 1998, it found that 86% of the ATS processed cards
11 (783,947 out of 912,125) matched.⁵⁵ (Id. at 2165-66.) Again, this
12 figure involves cards that were first processed in the Charter Pacific
13 Positive Database and then processed in the ATS Database.

14 Card Alert Services opines that it is extremely unlikely that
15 783,947 cards out of 912,125 cards would coincidentally match a single
16 database of 3.6 million cards processed through one merchant bank.
17 (Id. at 2166.) The FTC's statistical expert, Dr. Martin Lee, agrees.
18 Dr. Lee opines that the probability of this occurring is "roughly
19 equivalent to winning the grand prize in the California lottery every
20 week for about 109,000 consecutive years." (Lee Report at 2194.)

22 ⁵⁴ (...continued)
23 October 1998. (Id. at 2164.)

24 ⁵⁵ The Court notes that the CAS report neglects to emphasize at
25 this point that the 912,125 cards processed through the ATS Historical
26 Database supposedly include both credit and debit cards. (Compare CAS
27 Report at 2163 with id. at 2166). Thus, to the extent this evidence
28 is reliable, the number of credit cards ATS processed for the
defendants should be less than 912,125. Accordingly, the correlation
should be larger than 86% (because the numerator remains 783,947 but
the denominator would be an amount less than 912,125).

1 Such matches, along with other improbable correlations discussed in
2 its report, led Card Alert Services to conclude that:

3 [V]irtually all credit card numbers that the defendants
4 billed as [their] own sales were, in fact, credit card
5 numbers that [first] appeared in the [Charter Pacific]
6 [P]ositive [D]atabase and which defendants appropriated for
7 their own use. Rather than obtaining authorization for
8 billing credit card numbers from cardholders who provided
9 their card number[s] and authorized such charges, it appears
10 that defendants accessed another source for valid credit
11 card numbers, the [Charter Pacific] [P]ositive [D]atabase,
12 and simply billed these credit card numbers without regard
13 to authorization.

14 (CAS Report at 2166.)

15 Using the \$47.5 million "sales" figure from the ATS Historical
16 Database, the FTC concludes that a total of \$3,357,552 can be linked
17 to merchant identification numbers ("merchant IDs") associated with
18 the defendant companies' web sites and \$1,026,407 can be linked to
19 merchant IDs associated with web sites that these defendants shared
20 with third parties. Thus, \$4,383,849 (or 9.2% of the \$47,512,530
21 processed through ATS) possibly represent legitimate sales; and
22 \$43,128,681 (\$47,512,530 - 4,383,849) represent illegitimate gains.
23 Using Charter Pacific and Heartland Bank records as well as sample
24 issuing bank data, Card Alert Services concludes that approximately
25 \$2.3 million of the \$4,383,849 in "legitimate" sales resulted in
26 chargebacks and credits to customers. (*Id.* at 2172.) The FTC
27 contends that the most reasonable calculation of damages caused by the
28

1 defendants' unlawful business practices is \$40.5 million.⁵⁶

2
3 ⁵⁶ The FTC obtained this figure by the following calculation:
4 approximately \$43.1 million in illegitimate gains (from the ATS
5 Historical Database) + \$2.3 million estimated chargebacks and credits
6 (per Card Alert Services) + \$1.9 million (the extra amount deposited
7 into the merchant accounts but not reflected in the ATS Historical
8 Database) - \$6.8 million (total chargebacks and credits to date (based
9 on the merchant bank statements). Motion at 34-35. The Court
10 questions the accuracy of this calculation. Card Alert Services
11 reached the \$2.3 million chargebacks and credits figure after
12 reviewing Charter Pacific and Heartland's records and sample issuing
13 bank data. (CAS Report at 2172.) The \$6.8 million chargebacks and
14 credits figure is obtained from the Receiver's review of the merchant
15 bank statements. (Kane Decl. ¶¶ 4-5.) It therefore appears that the
16 \$2.3 million figure should be subsumed in the \$6.8 million figure. In
17 fact, the Court is puzzled as to why the FTC added the \$2.3 million in
18 its calculation in the first place since this figure is supposed to
19 represent the amount that has already been returned to cardholders via
20 credits and chargebacks.

21 During oral argument, the FTC's counsel explained that the \$2.3
22 million chargebacks and credits are presumed to be illegitimate;
23 therefore, the figure must be added to the damages calculation. The
24 following is the Court's attempt to illustrate the FTC's calculation
25 of damages:

<u>ATS Historical Database</u>	<u>Merchant Accounts</u>
\$47.5 mil. total processed <u>< 4.4 mil. ></u> legit. sales 43.1 mil.	\$49.4 mil. total deposited <u>< 4.4 mil. ></u> legit. sales 45.0 mil.
43.1 mil. illegit. sales + 2.3 mil. presumed add'l illegit. sales (aka chargebacks & credits from the \$4.4 mil. legit. sales)	45.0 mil. illegit. sales <u>+ 2.3 mil.</u> presumed add'l illegit. sales (aka chargebacks & credits from the \$4.4 mil. legit. sales)
<u>+ 1.9 mil.</u> add'l bank deposits 47.3 mil. total illegit. sales <u>< 6.8 mil. ></u> total chargebacks & credits (refunded to consumers)	47.3 mil. total illegit. sales <u>< 6.8 mil. ></u> total chargebacks & credits (refunded to consumers)
<u>\$40.5 mil.</u> total damages	<u>\$40.5 mil.</u> total damages

27 However, there is a problem with the presumption that the \$2.3
28 million represents additional illegitimate "sales." Since the FTC

(continued...)

1 Defendants' Assets & Transfers of Assets

2 The details of the defendants' assets and transfers of assets
3 (both prior to the commencement of this case and after the TRO was
4 issued) are well documented in the FTC's Statement, Fact Nos. 104 to
5 127. Because these facts are not controverted by the defendants and
6 are supported by the evidence,⁵⁷ the Court incorporates them by
7 reference as though stated herein. A brief summary of the transfers,
8 however, is warranted.

9 The defendants transferred much of the ill-gotten gains from
10 their activities to off-shore accounts. Between July 24, 1997 and
11 November 11, 1998, a total of \$25.3 million was transferred from the
12

13 ⁵⁶(...continued)

14 linked \$4.4 million processed through the ATS Historical Database to
15 presumably legitimate sales, the initial presumption concerning the
16 \$2.3 million in chargebacks and credits should not be a presumption of
17 illegitimacy, i.e., a presumption that they reflect fraudulent
18 billing. Rather, unless there is evidence to the contrary, one should
19 initially presume that the \$2.3 million simply reflects the ordinary
20 refunds that customers obtain, e.g., they (1) changed their minds
21 about subscribing to the defendants' web sites or (2) discovered that
22 their children had used their credit/debit cards to subscribe to the
23 web sites. See, e.g., Ball Depo. at 35 ("We would get general
24 cancellation calls. . . . [Some people] had subscribed for a free
25 month and did not realize that they were going to be charged from that
26 point on"); 38 (some calls to customer service were from people who
27 simply complained that the "wrong amount" had been charged); Pena
28 Depo. at 340 (some people called to say "'my kid made this[;] I'm not
going to pay it'"). The FTC has offered no evidence to support its
claim that the \$2.3 million must be additional illegitimate "sales"
merely because they resulted in chargebacks and credits. Accordingly,
the Court remains dubious about the accuracy of the FTC's calculation.

25 ⁵⁷ The only exception is Fact No. 125, which appears to contain
26 an erroneous statement concerning the state of two properties -- the
27 Zumirez Property and a property located at Rum Point, Georgetown in
28 the Cayman Islands. Fact No. 125 states that these two properties are
currently frozen. However, both the Motion and the evidence cited in
Fact No. 125 indicate that these two properties have not yet been
frozen. See Motion at 39; Kane Decl. at 1952.

1 defendants through accounts held in the names of JKP, Discreet Bill
2 and MJD to two entities -- Media Buying Service ("MBS") and Phaeton
3 Corporation ("Phaeton") -- over which Ken Taves had control. Both MBS
4 and Phaeton held accounts at Euro Bank in the Cayman Islands that were
5 directly or indirectly controlled by Ken Taves. The transfers to MBS
6 and Phaeton occurred either directly from the defendants to these
7 accounts or through an intermediary known as MultiMedia West. Since
8 January 7, 1999, the date the FTC served the defendants with the
9 complaint and TRO, the defendants have transferred or caused to be
10 transferred at least \$21.6 million from accounts in their names or
11 under their control to (1) other accounts in their name or in the name
12 of third parties which are affiliated with the defendants or under
13 their control; or (2) their former lawyers -- Sacks & Zweig and Fried,
14 Frank.⁵⁸

15 Currently, the total known assets of the defendants covered by
16 the TRO and preliminary injunction order are worth approximately \$23.8
17 million. Of this total, around \$17.4 million is located in overseas
18 accounts which are currently frozen pursuant to legal actions taken by
19 the Receiver. In addition, around \$1.71 million is in frozen domestic
20 accounts and assets, which include a Cessna aircraft worth \$140,000.
21 The Receiver has also identified over \$4.5 million in assets that
22 appear to be covered by the TRO and Preliminary Injunction but have
23 not yet been frozen. These assets include the Zumirez Drive property
24 that was the subject of the May 1999 contempt hearings, a Cayman

25
26 ⁵⁸ Fried, Frank has since returned the \$225,000 that it
27 received from the defendants' off-shore accounts. Sacks & Zweig,
28 however, has not returned the \$60,000 that it received. A motion for
an order to show cause why Lee Sacks should not be held in contempt is
currently pending before another judge in this district.

1 Island property, and \$1.25 million in overseas accounts held in the
2 names of third parties.

3 **III. Discussion**

4 **A. Stay or Continuance of this Proceeding**

5 **1. Fifth Amendment Right Against Self-Incrimination**

6 Ken Taves asks the Court to stay these proceedings until his
7 "pending criminal case" has been resolved or until "threat of any
8 potential criminal prosecution no longer exists." Opp. at 8, 12. Ken
9 Taves claims that he has asserted his Fifth Amendment right against
10 self-incrimination because he is the "target of an active criminal
11 prosecution arising from the same series of events that are at issue"
12 in this case. *Id.* at 12. He argues that he cannot or should not be
13 compelled to respond to the FTC's Statement because doing so would
14 deprive him of his privilege against self-incrimination. At the same
15 time, the corporate defendants contend that Ken Taves' inability to
16 respond prevents them from opposing the Motion on the merits because
17 Ken Taves is the only person with information that can assist their
18 defense. Similarly, Teresa Taves argues that her husband's refusal to
19 testify prevents her from properly opposing the Motion because he is
20 her most important witness.

21 In general, the Constitution does not require a stay of civil
22 proceedings pending the outcome of criminal proceedings. *Keating v.*
23 *Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995). "In
24 the absence of substantial prejudice to the rights to the rights of
25 the parties involved, [simultaneous] parallel [civil and criminal]
26 proceedings are unobjectionable under our jurisprudence.'" *Id.*
27 (quoting *Securities & Exchange Comm'n v. Dresser Indus.* ("Dresser"),
28 628 F.2d 1368, 1374 (D.C. Cir. 1980)) (original brackets). The

1 decision whether to stay civil proceedings while a parallel criminal
2 case is pending "is left to the sound discretion of the district
3 court." IBM Corp. v. Brown, 857 F. Supp. 1384, 1487 (C.D. Cal. 1994)
4 (citing Dresser, 628 F.2d at 1375). The court's determination turns
5 upon the "'particular circumstances and competing interests involved
6 in the case.'" Keating, 45 F.2d at 324 (quoting Federal Sav. & Loan
7 Ins. Corp. v. Molinaro, 889 F.2d 899, 902 (9th Cir. 1989)).

8 Specifically, the court should consider the following factors: 1) the
9 interest of the plaintiff in proceeding expeditiously with this
10 litigation and the potential prejudice to the plaintiff caused by a
11 delay; 2) the burden which any particular aspect of the proceedings
12 may impose on the defendant; 3) the convenience of the court in the
13 management of its cases and the efficient use of judicial resources;
14 4) the interests of persons or entities not parties to the civil
15 litigation; and 5) the interest of the public in the pending civil and
16 criminal litigation. Id. (citing Molinaro, 889 F.2d at 903).

17 First, the Court considers the FTC's interest in proceeding
18 expeditiously with this litigation, along with the interests of third
19 parties whose activities or lives would be affected by the outcome of
20 this litigation. As the record in this case shows, Ken Taves has a
21 history of hiding and attempting to dispose of his assets. See, e.g.,
22 5/4/99 & 5/5/99 Orders Re Contempt. Indeed, since the date the
23 defendants were served with the complaint and TRO, Ken and Teresa
24 Taves have transferred at least \$21 million from accounts in their
25 names or under their control to other accounts in their names or in
26 the names of third parties who are affiliated with them or under their
27 control. (FTC Statement, Fact No. 115.) Therefore, the FTC would be
28 prejudiced by further delay. See Molinaro, 889 F.2d at 902. In

1 addition, the cardholder-victims' interests in recovering the money
2 defrauded by the defendants weigh against a stay. See id. This is
3 particularly true when the case has been pending for over a year.
4 Moreover, third-party card-issuing banks, merchant banks, and card
5 associations are also prejudiced by the delay to the extent that they
6 have had to make payments to cardholders on the defendants' behalf and
7 yet cannot pursue claims against the defendants during the pendency of
8 the receivership.

9 Second, the Court considers its interest in clearing its docket
10 and the efficient use of resources. This case is now over fifteen
11 months old. Moreover, as another court observed, "[a] stay would
12 disrupt the court's calendar by indefinitely postponing trial" as the
13 parties and the Court wait for the outcome of the government's case
14 against Ken Taves. IBM Corp., 857 F. Supp. at 1392. The Court finds
15 that these factors weigh against a stay.

16 Finally, the Court considers the burden on Ken Taves. In May
17 1999, five months after the commencement of this action, the United
18 States Attorney's Office issued a criminal complaint against Ken
19 Taves.⁵⁹ However, the Court learned from the FTC's Reply that the
20 government never indicted Ken Taves. Reply at 5. At the January 7,
21 2000 hearing on former defense counsel's motion to withdraw, defense
22 counsel advised the Court that Ken Taves has been incarcerated at the
23 MDC, since June or July 1999, solely on the Court's civil contempt
24 orders. Because the Court did not hear otherwise from the parties, it
25 proceeded to resolve this Motion with the understanding and belief
26

27 ⁵⁹ The complaint was filed against Ken Taves on May 4, 1999.
28 He was arrested the same day.

1 that to date, there has been no operative criminal complaint,
2 information or indictment filed against Ken Taves.⁶⁰

3 The Court was dismayed, to put it mildly, when its court staff
4 discovered well after the close of business on March 31, 2000, the
5 Friday before the hearing on the Motion, that the criminal dockets
6 reveal: (1) an indictment was filed against Ken Taves on February 29,
7 2000, charging Ken Taves with one count of criminal contempt under 18
8 U.S.C. § 401, and one count of false statement under 18 U.S.C. § 1001;
9 and (2) Ken Taves entered a plea of not guilty on both counts on March
10 6, 2000. See Criminal Docket for United States v. Kenneth H. Taves,
11 Case No. CR 00-187.⁶¹ Nevertheless, the Court concludes that this
12 factor -- the burden on Ken Taves -- does not require the Court to
13 stay this civil action.

14 As stated by the district court in IBM Corp. v. Brown:

15 [T]he contention that being forced to choose between the
16 compulsion to testify in a civil suit in order to avoid an
17 adverse result on the merits undermines the right to remain
18 silent in a criminal matter, while having surface appeal,
19 will not stand analysis. While the choice between

20
21 ⁶⁰ The Court advised the parties of this understanding in the
22 February 8, 2000 minute order. See 2/8/00 Minute Order ("The Court is
23 aware that Defendant Taves is currently incarcerated solely for
24 contempt of court. . . . Under the circumstances, the Court intends
25 to consider these motions as soon as possible and plans to give them
26 priority over other civil motions on the calendar"). The Court also
27 indicated that it might resolve the motions on the papers without oral
28 argument. See *id.* ("If the Court decides that oral argument would
assist the Court, the Court will notify the parties . . .").

27 ⁶¹ Although none of the parties advised the Court of these
28 facts, the Court hereby takes judicial notice of the information
contained in the criminal dockets of the Central District of
California. See Fed. R. Evid. 201.

1 testifying or invoking the Fifth Amendment may be difficult,
2 . . . it does not create the basis for a stay.
3 857 F. Supp. at 1389 (quotations omitted). Here, the fact that Ken
4 Taves has invoked his Fifth Amendment privilege does not, by itself,
5 create a basis for stay. The Ninth Circuit recognizes that "[a]
6 defendant has no absolute right not to be forced to choose between
7 testifying in a civil matter and asserting his Fifth Amendment
8 privilege." Keating, 45 F.3d at 326. Indeed, "[n]ot only is it
9 permissible to conduct a civil proceeding at the same time as a
10 related criminal proceeding, even if that necessitates invocation of
11 the Fifth Amendment privilege, but it is even permissible for the
12 trier of fact to draw adverse inferences from the invocation of the
13 Fifth Amendment in a civil proceeding." Id. (citing Baxter v.
14 Palmigiano, 425 U.S. 308, 318 (1976)).

15 In addition, the burden on Ken Taves' Fifth Amendment privilege
16 is minimal here. The criminal charges relate to acts that occurred
17 after the commencement of this civil case. Count One of the
18 indictment alleges that "[o]n or about April 26, 1999," Ken Taves
19 "knowingly and willfully" violated the Court's TRO and preliminary
20 injunction order "by maintaining with Euro Bank Corporation, George
21 Town, Grand Cayman, accounts in his own name, and accounts which he
22 controlled in the names of [others], and failing to transfer the funds
23 on deposit in such accounts to an account in the United States . .
24 . ." Indictment, United States v. Kenneth H. Taves, at ¶ 4.⁶² Count
25

26 ⁶² During oral argument, the Court asked counsel for a copy of
27 the indictment. After the hearing, the FTC submitted a copy of the
28 indictment to the Court pursuant to the Court's request. The Court
hereby takes judicial notice of the indictment. See Fed. R. Evid. 201.

1 Two alleges that "[o]n or about January 9, 1999," Ken Taves "knowingly
2 and willfully" made a false representation to the FTC by submitting "a
3 financial statement under penalty of perjury that was materially
4 false, in that it failed to disclose that [Ken Taves] held or
5 controlled accounts at Euro Bank Corporation . . . which had on
6 deposit approximately \$25.3 million." *Id.* at ¶ 6. The central issues
7 in the criminal case (e.g., whether Ken Taves violated the Court's
8 orders or made a false statement to the FTC after this action was
9 filed) appear unrelated to the central issues in the underlying civil
10 case (e.g., whether Ken Taves and the other defendants' actions prior
11 to the commencement of this case constitute unfair and deceptive
12 business practices). Therefore, there is little, if any, need for Ken
13 Taves to invoke his Fifth Amendment privilege with respect to
14 questions concerning his actions prior to January 6, 1999.

15 Even if there remains some overlap between the present criminal
16 and civil proceedings (i.e., the government decides to bring
17 additional criminal charges against Ken Taves that arise from the
18 activities at issue here), the Court stills finds that the burden on
19 Ken Taves' Fifth Amendment privilege, if forced to testify in this
20 case, is minimal. As the record shows, Ken Taves has testified at a
21 deposition and submitted sworn statements in prior proceedings in this
22 case. Where a defendant already has provided deposition testimony on
23 substantive issues of the civil case, any burden on that defendant's
24 Fifth Amendment privilege is "negligible." *Molinaro*, 889 F.2d at 903;
25 see IBM Corp., 857 F. Supp. at 1390. Moreover, nothing prevents Ken
26 Taves (and the other defendants purportedly dependant on him) from
27 responding with information that does not tend to incriminate him,
28 e.g., business records that show his companies were legitimate

1 operations. Further, Ken Taves and the other defendants "have made no
2 effort to demonstrate to the court how truthful testimony [possibly]
3 subject to [Ken Taves' Fifth Amendment] privilege in this case could
4 be helpful to [them] in their defense on the merits." IBM Corp., 857
5 F. Supp. at 1390. Under the circumstances, any difficulty that Ken
6 Taves may encounter from testifying and any difficulty that the other
7 defendants may encounter from Ken Taves' decision to remain silent do
8 not outweigh the other interests favoring denial of the stay
9 request.⁶³ After considering all the factors, the Court denies the
10 defendants' request for a stay.

11 **B. Continuance Pursuant to Rule 56(f).**

12 Ken Taves and the corporate defendants also request, in the
13 alternative, that the Court continue or deny the Motion (presumably
14 without prejudice) pursuant to Federal Rule of Civil Procedure 56(f).
15 The defendants' request is without merit.

16 Rule 56(f) provides that:

17 Should it appear from the affidavits of a party opposing the
18 motion that the party cannot for reasons stated present by
19 affidavit facts essential to justify the party's opposition,
20 the court may refuse the application for judgment or may
21 order a continuance to permit affidavits to be obtained or

22 //

24 ⁶³ Ken Taves' reliance on the Court's July 20, 1999 order
25 staying discovery against him is misplaced. At the time, the case was
26 only seven months old. See 7/20/99 Minute Order at 4 ("At this point,
27 the Court's docket is not really a factor in terms of the effects of a
28 delay"). Simply put, the circumstances have changed in the ensuing
eight months. See Molinaro, 889 F.2d at 903 (A district court must
consider the "circumstances presented to [it] when the motion [to
stay] was made").

1 depositions to be taken or discovery to be had or may make
2 such other order as is just.
3 Fed. R. Civ. P. 56(f). The party seeking additional time for
4 discovery under Rule 56(f) must, among other things, articulate a
5 plausible basis for believing that specific discoverable facts exist
6 which, if adduced, will give rise to genuine issues of material fact.
7 See, e.g., C.B. Trucking, Inc. v. Waste Management, Inc., 137 F.3d 31,
8 44 (1st Cir. 1998); Committee for the First Amendment v. Campbell, 962
9 F.2d 1517, 1522 (10th Cir. 1992); International Shortstop, Inc. v.
10 Rally's, Inc., 939 F.2d 1257, 1266-67 (5th Cir. 1991); Airs Int'l
11 Inc. v. Perfect Scents Distributions, Ltd., 902 F. Supp. 1141, 1145
12 (N.D. Cal. 1995). Ken Taves and the corporate defendants do not even
13 attempt to make such showing. See Opp. at 12-13. They simply contend
14 that they need a continuance until Ken Taves' pending criminal
15 investigation is resolved so that he "may then be able to respond on
16 his own behalf and on behalf of the corporate defendants." Id. In
17 other words, this Rule 56(f) request is based solely on Ken Taves'
18 continued assertion of the Fifth Amendment privilege. This is
19 improper. Moreover, as stated by another court in a similar
20 situation: "There is no reason to grant a continuance to a litigant
21 who has personal and intimate knowledge of the underlying facts for
22 the purported purpose of conducting discovery to ascertain those
23 identical facts.'" United States v. Private Sanitation Indus. Ass'n
24 of Nassau/Suffolk, Inc., 899 F. Supp. 974, 984 (E.D.N.Y. 1994) (civil
25 RICO action involving a defendant who invoked the Fifth Amendment
26 //
27 //
28

1 privilege with respect to the underlying facts).⁶⁴ The Court denies
2 the request for a Rule 56(f) continuance.

3 **B. Summary Judgment Standard**

4 The party who moves for summary judgment has the burden of
5 establishing that there is "no genuine issue of material fact, and
6 that the moving party is entitled to judgment as a matter of law."
7 Fed. R. Civ. P. 56(c); British Airways Bd. v. Boeing Co., 585 F.2d
8 946, 951 (9th Cir. 1978). If the moving party has the burden of proof
9 at trial -- the plaintiff on a claim for relief, or the defendant on
10 an affirmative defense -- the moving party must make a showing
11 sufficient for the court to hold that no reasonable trier of fact
12 could find other than for the moving party. Calderone v. United
13 States, 799 F.2d 254, 259 (6th Cir. 1986) (citing W. Schwarzer,
14 Summary Judgment Under the Federal Rules: Defining Genuine Issues of
15 Material Fact, 99 F.R.D. 465, 487-88 (1984)). This means that if the
16 moving party has the burden of proof at trial, that party "must
17 establish beyond peradventure all of the essential elements of the
18 claim or defense to warrant judgment in [that party's] favor."
19 Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986) (original
20 emphasis). Furthermore, the court must view the evidence presented to
21 establish these elements "through the prism of the substantive
22 evidentiary burden." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
23 252 (1986).

25 ⁶⁴ The Court notes that its July 20, 1999 order only stayed
26 discovery -- interrogatories and depositions -- against Ken Taves.
27 See 7/20/99 Minute Order at 5. Nothing prevented Ken Taves and the
28 other defendants from conducting discovery, to the extent anything
beyond their knowledge or control may be necessary to adequately
defend this case.

1 If the opponent has the burden of proof at trial, then the moving
2 party has no burden to negate the opponent's claim. Celotex Corp. v.
3 Catrett, 477 U.S. 317, 323 (1986). In other words, the moving party
4 does not have the burden to produce any evidence showing the absence
5 of a genuine issue of material fact. Id. at 325. "Instead, . . . the
6 burden on the moving party may be discharged by 'showing' -- that is,
7 pointing out to the district court -- that there is an absence of
8 evidence to support the nonmoving party's case." Id.

9 Once the moving party satisfies this initial burden, "an adverse
10 party may not rest upon the mere allegations or denials of the adverse
11 party's pleadings . . . [T]he adverse party's response . . . must set
12 forth specific facts showing that there is a genuine issue for trial."
13 Fed. R. Civ. P. 56(e) (emphasis added). A "genuine issue" of material
14 fact exists only when the nonmoving party makes a sufficient showing
15 to establish an essential element to that party's case, and on which
16 that party would bear the burden of proof at trial. Celotex, 477 U.S.
17 at 322-23. "The mere existence of a scintilla of evidence in support
18 of the plaintiff's position will be insufficient; there must be
19 evidence on which a reasonable jury could reasonably find for
20 plaintiff." Anderson, 477 U.S. at 252. The evidence of the nonmovant
21 is to be believed, and all justifiable inferences are to be drawn in
22 his favor. Id. at 248; Griffeth v. Utah Power & Light Co., 226 F.2d
23 661, 669 (9th Cir. 1955).

24 C. Unfair Practices

25 Section 13(b) of the FTC Act provides that the FTC may obtain a
26 permanent injunction against practices that violate the FTC Act. FTC
27 v. Pantroln I Corp., 33 F.3d 1088, 1102 (9th Cir. 1994). In addition,
28 section 13(b) gives the courts the "authority to grant any ancillary

1 relief necessary to accomplish complete justice.'" Id. Such
2 ancillary relief includes an order for restitution. Id.

3 **1. Liability for Unfair Practices**

4 Section 5 of the FTC Act prohibits "unfair or deceptive practices
5 in or affecting commerce[.]" 15 U.S.C. § 45(a). An act or practice
6 is unfair if it "causes or is likely to cause substantial injury to
7 consumers which is not reasonably avoidable by consumers themselves
8 and not outweighed by countervailing benefits to consumers or to
9 competition." 15 U.S.C. § 45(n); accord Orkin Exterminating Co., Inc.
10 v. FTC, 849 F.2d 1354, 1363-66 (11th Cir. 1988); FTC v. Windward
11 Marketing, Ltd., 1997 U.S. Dist. LEXIS 17114, *29-30 (N.D. Ga. Sept.
12 30, 1997). Thus, to find unfairness, the injury must satisfy three
13 tests: (1) it must be substantial; (2) it must not be outweighed by
14 countervailing benefits to consumers or competition; and (3) it must be
15 one that consumers themselves could not reasonably have avoided.
16 Orkin Exterminating Co., 849 F.2d at 1364 (citing FTC's 1980 Policy
17 Statement); Windward Marketing, 1997 U.S. Dist. LEXIS 17114, *30-31.
18 One district court has found that debiting consumers' bank accounts
19 without the consumers' authorization constitutes an unfair practice
20 under the FTC Act. Windward Marketing, 1997 U.S. Dist. LEXIS 17114,
21 *37-38.

22 The substantial injury prong can be satisfied if the FTC
23 establishes that consumers were injured by a practice for which they
24 did not bargain. Id. at *31; cf. Orkin Exterminating Co., 849 F.2d at
25 1364-65. Injury may be sufficiently substantial if it causes a small
26 harm to a large class of people. Windward Marketing, 1997 U.S. Dist.
27 LEXIS 17114, *31-32 (citing American Fin. Servs. v. FTC, 767 F.2d 957,
28 972 (D.C. Cir. 1985)). The second prong of the test is easily

1 satisfied "when a practice produces clear adverse consequences for
2 consumers that are not accompanied by an increase in services or
3 benefits to consumers or by benefits to competition." Id. at *32; cf.
4 Orkin Exterminating Co., 849 F.2d at 1365. With regard to the third
5 prong of the test, the focus is on "whether consumers had a free and
6 informed choice that would have enabled them to avoid the unfair
7 practice." Windward Marketing, 1997 U.S. Dist. LEXIS 17114, *32
8 (citing American Fin. Services, 767 F.2d at 976); accord Orkin
9 Exterminating Co., 849 F.2d at 1365. "Consumers may act to avoid
10 injury before it occurs if they have reason to anticipate the
11 impending harm and the means to avoid it, or they may seek to mitigate
12 the damage afterward if they are aware of potential avenues toward
13 that end.'" Orkin Exterminating Co., 849 F.2d at 1365 (quoting FTC v.
14 Orkin Exterminating Co., 108 F.T.C. 341, 366 (1986)).

15 a. Corporate Defendants JKP, Herbal Care and MJD

16 (1) Common Enterprise

17 Preliminarily, the Court addresses whether the corporate
18 defendants operated a common enterprise. In the arguments portion of
19 the Motion, the FTC does not make a distinction between Herbal Care,
20 on the one hand, and JKP and MJD, on the other.⁶⁵ The FTC contends
21 that the defendants should be held liable as a common enterprise
22 because no distinction exists among these entities. Motion at 47;
23 see, e.g., Delaware Watch Co. v. FTC, 332 F.2d 745, 746 (2d Cir. 1964)
24 (where "the same individuals were transacting an integrated business
25 through a maze of interrelated companies[,] . . . 'the pattern and
26

27 ⁶⁵ As noted in the facts section, Herbal Care's only "business"
28 in 1997 and 1998 consisted of paying the salaries of JKP employees,
purportedly after JKP transferred money to Herbal Care.

1 frame-work of the whole enterprise must be taken into consideration'"
2 and the companies may be held liable as a joint enterprise); FTC v.
3 Wolf, 1996 WL 812940, *8, 1997-1 Trade Cases ¶ 71,713 (S.D. Fla. Jan.
4 31, 1996) (a common enterprise exists where "the thirty corporate
5 defendants are commonly controlled, share office space and officers,
6 conduct their business through a maze of interrelated companies,
7 commingle corporate funds, and [n]othing in the evidence shows
8 a real distinction between the corporate defendants"). Defendants
9 found to be a common enterprise are held "jointly and severally liable
10 for the injury caused by their violations of the FTC Act"
11 Wolf, 1996 WL 812940, *8.

12 The Court agrees that Herbal Care, JKP and MJD were part of a
13 common enterprise. The uncontroverted facts show that the corporate
14 defendants were under the common control of Ken Taves, shared office
15 space, employees, and officers, and conducted their businesses through
16 "a maze of interrelated companies" purportedly operating the same web
17 sites. In sum, the evidence shows there was no real distinction among
18 the companies. Therefore, to the extent that JKP and MJD are found to
19 have violated the FTC Act, Herbal Care will be held jointly and
20 severally liable.

21 (2) The Unfair Practices

22 In this case, the corporate defendants essentially concede that
23 they engaged in unfair business practices in violation of the FCT Act.
24 MJD filed no opposition to the Motion. Herbal Care and JKP did not
25 even attempt to argue that the uncontroverted facts do not show that
26 the defendants' activities constitute unfair practices. Nevertheless,
27 for the sake of establishing a complete record, the Court will briefly
28 discuss the corporate defendants' liability for unfair practices.

1 Even without relying on the ATS Historical Database, the
2 uncontroverted evidence overwhelmingly demonstrates that the
3 defendants participated in a billing scheme by submitting unauthorized
4 charges for processing. Some of the key facts are highlighted below:

- 5 • The corporate defendants are interrelated entities that
6 shared a common enterprise.
- 7 • In a single year, the corporate defendants utilized at
8 least five different merchant accounts and four
9 fictitious business names to process over \$40 million
10 in credit and debit card transactions.
- 11 • The timing of each new merchant account application
12 coincides with the impending threat of being placed on
13 Visa USA's "active monitoring" list for excessive
14 chargebacks.
- 15 • Ken Taves began transmitting thousands of supposedly
16 authorized debit/credit card numbers to ATS for
17 processing around the same time JKP/Netfill obtained
18 access to the Charter Pacific Positive Database.
- 19 • From November 1997 through December 1998, the
20 defendants had access to more than 3 million valid Visa
21 and Mastercard credit card numbers from the Charter
22 Pacific Positive Database.
- 23 • By submitting the charges and debits for processing,
24 the defendants represented to the issuing/merchant
25 banks that they obtained authorization from the
26 cardholders for the charges and debits.

27 //

28 //

- 1 • An untold number of consumers could not reach a live
2 customer service representative from the defendant
3 companies to relay their complaints.
- 4 • At one point, the defendants' customer service
5 department received thousands of consumer complaint
6 calls a day.
- 7 • More than 50% of the calls received by the customer
8 service department were from people who said they did
9 not order anything from the defendants and had no idea
10 why they were billed.
- 11 • A shocking 40% to 50% of the calls received by the
12 defendants were from people who said they did not have
13 a computer and had not given their card numbers to
14 anyone.
- 15 • Approximately 7.3% of the Visa card transactions
16 submitted by the corporate defendants in 1998 resulted
17 in chargebacks. This figure reflects over 120,000 Visa
18 card chargebacks totaling over \$2.6 million.
- 19 • The defendants' merchant bank statements show
20 approximately \$6.8 million in chargebacks and credits
21 have been processed. This amount represents 13.8% of
22 all "sales" proceeds deposited into the defendants'
23 merchant accounts.

24 As the Program Manager of Visa USA's Merchant Chargeback
25 Monitoring Program aptly puts it:

26 The combination of very high chargeback rates, merchant name
27 changes, unanswered telephone calls to customer service, the
28 pattern of chargebacks among the Taves-affiliated entities

1 over time, and customer complaints of unauthorized charges
2 by a series of Taves-affiliated merchants [leads one to
3 conclude that the defendant businesses were committing fraud
4 against innocent cardholders.]

5 (Elliott Decl. ¶ 19.) Moreover, the only reasonable inference the
6 Court can draw from the corporate defendants' access to the Charter
7 Pacific Positive Database and the timing of the defendants' fraudulent
8 billing practices is that the defendants stole and processed Visa and
9 MasterCard numbers from the database. Further, the Court finds that
10 the complete absence of the ordinary indicia of a legitimate business,
11 much less a high volume credit/debit card-dependent Internet business,
12 for companies that supposedly processed over \$49 million in sales in a
13 single year, is further evidence that the defendant companies did not
14 run legitimate operations.⁶⁶ In the absence of any evidence offered
15 by the defendants to controvert these facts, the Court concludes as a
16 matter of law that (1) defendants JKP, Herbal Care and MJD engaged in
17 the unfair practice of operating a fraudulent scheme by which they
18 debited and charged card numbers without the cardholders'
19 authorization; (2) such practice resulted in substantial injury; and
20 (3) the practice was not outweighed by any benefits to consumers or
21 competition.

22 **b. Individual Defendants**

23 Individual defendants may be held liable for injunctive relief
24 for the corporate defendants' violations of the FTC Act if the FTC
25

26 ⁶⁶ Such records include, for example: customer lists; customer
27 e-mail or street addresses; and transaction records showing
28 credit/debit card numbers linked with customer names, authorization
codes, and web sites used.

1 demonstrates that the individual defendants participated directly in
2 the wrongful acts or practices or had authority to control the
3 corporations. FTC v. Publishing Clearing House, Inc., 104 F.3d 1168,
4 1170 (9th Cir. 1997) (citing FTC v. American Standard Credit Sys.,
5 Inc., 874 F. Supp. 1080, 1087 (C.D. Cal. 1994)). "Authority to
6 control the company can be evidenced by active involvement in business
7 affairs and the making of corporate policy." American Standard Credit
8 Sys., 874 F. Supp. at 1089 (citing FTC v. Amy Travel Service, Inc.,
9 875 F.2d 564, 573-74 (7th Cir. 1989)). An individual's status as a
10 corporate officer and authority to sign documents on behalf of the
11 corporate defendant can be sufficient to demonstrate the requisite
12 control. Publishing Clearing House, 104 F.3d at 1170.

13 To be held liable for restitution, the FTC must show, in addition
14 to the above, that the individual defendants had knowledge that the
15 corporation or one of its agents engaged in the wrongful acts or
16 practices. Id. at 1171. To satisfy the knowledge requirement, the
17 FTC must establish that the individual defendant either: (1) had
18 actual knowledge of the wrongful acts or practices; (2) was recklessly
19 indifferent to whether or not the corporate acts or practices were
20 fraudulent; or (3) had an awareness of a high probability that the
21 corporation was engaged in fraudulent practices along with an
22 intentional avoidance of the truth. See id. (citing American Standard
23 Credit Sys., 874 F. Supp. at 1089) (individual liability for
24 misrepresentations or deceptive practices under the FTC Act); Windward
25 Marketing, 1997 U.S. LEXIS 17114, *39 (individual liability for unfair
26 practices under the FTC Act). The FTC does not need to show that an
27 individual defendant intended to defraud consumers in order to hold

28 //

1 that individual personally liable. Publishing Clearing House, 104
2 F.3d at 1171.

3 (1) **Ken Taves**

4 The undisputed facts set forth above show without a doubt that
5 Ken Taves actively participated in the unlawful practices, controlled
6 the day-to-day operations of the corporate defendants, and had actual
7 knowledge of the unlawful practices. Indeed, the record shows that he
8 is the key player in the billing scheme -- the common denominator that
9 ties all the pieces of the puzzle together. The Court finds that the
10 FTC has established that (1) Ken Taves is individually and jointly
11 liable for the corporate defendants' unfair practices;⁶⁷ and (2) the
12 FTC may obtain injunctive relief against and restitution from Ken
13 Taves.

14 (2) **Teresa Taves**

15 Teresa Taves' opposition argues that genuine issues of material
16 fact issues exist as to whether Teresa Taves has the sufficient degree
17 of involvement and/or knowledge of the alleged unlawful practices.
18 The Opposition identifies portions from the deposition testimony of
19 Randall Ball, David Goldfarb, Robert Carr, Michael Kenner and, of
20 _____

21 ⁶⁷ Although the FTC does not expressly make this argument in
22 the Motion, the Court finds that Ken Taves is directly liable for his
23 own unfair practices. See Windward Marketing, 1997 U.S. Dist. LEXIS
24 17114, *38 ("individual defendants are directly liable for their own
25 violations"); 15 U.S.C. § 45(a)(2) ("The [FTC] is . . . empowered and
26 directed to prevent persons, partnerships, or corporations . . . from
27 using unfair or deceptive acts or practices in or affecting commerce")
28 (emphasis added); Amended Complaint (Ken Taves is sued individually
and as an officer of the defendant companies). The undisputed facts
establish that (1) Ken Taves engaged in the unfair practice of
operating a fraudulent scheme by which he debited and charged card
numbers without the cardholders' authorization; (2) such practice
resulted in substantial injury; and (3) the practice was not
outweighed by any benefits to consumers or competition.

1 course, Teresa Taves, to show that Teresa Taves had little involvement
2 with the daily operations of JKP and little or no knowledge of the
3 contents of the documents that she signed. As the Court noted in the
4 summary of facts section, these facts are really not in dispute.
5 After thoroughly evaluating the evidence, the Court finds that the FTC
6 is entitled to summary judgment against Teresa Taves.

7 The FTC relies on Publishing Clearing House, 104 F.3d 1168, in
8 support of its argument that Theresa Taves should be held liable for
9 the misconduct of the corporate defendants. Motion at 50-51. In
10 Publishing Clearing House, the FTC sued Publishing Clearing House
11 ("PCH"), a telemarketing business operated by an individual named
12 Robbin McLaurin, for violating section 5 of the FTC Act. Working from
13 a script, PCH's telephone solicitors told people that they had won one
14 of several prizes. 104 F.3d at 1169. The solicitors then told the
15 potential consumers that they could claim the prizes by making a tax-
16 deductible donation to one of two charities, one of which was H.O.P.E.
17 Id. The PCH solicitors made numerous misrepresentations to consumers
18 upon which the consumers relied to their detriment.

19 Defendant Lorin Martin became the president of PCH at the
20 direction of McLaurin. Id. As president of PCH, Martin applied for
21 PCH's business licence. Id. Acting on behalf of PCH, she also signed
22 an agreement with H.O.P.E. Id. at 1171. In addition, H.O.P.E.'s
23 application to conduct charitable solicitation listed Martin as the
24 individual "in direct charge of conducting the solicitation." Id.
25 She worked at PCH's offices for only one week, answering telephone
26 calls and handling routine office duties. Id.

27 On the FTC's summary judgment motion, the district court held
28 that Martin, as president of PCH, was individually and jointly liable

1 with PCH for the over \$360,000 that consumers had donated. Id. at
2 1170. The district court ordered restitution of that amount and
3 permanently enjoined PCH and Martin. Id. Martin appealed. Id. The
4 Ninth Circuit rejected Martin's argument and affirmed the district
5 court's order granting summary judgment.

6 First, the Ninth Court found that "Martin's assumption of the
7 role of president of PCH and her authority to sign documents on behalf
8 of the corporation demonstrate that she had the requisite control over
9 the corporation." Id. at 1171. The court reached this ruling because
10 Martin had offered no evidence to controvert the FTC's showing of
11 control. Id.⁶⁸

12 Second, in determining whether Martin had the requisite
13 knowledge, the Ninth Circuit specifically noted that Martin had
14 previously worked for McLaurin as a telephone solicitor at the
15 National Clearing House ("NCH"), another telemarketing operation
16 formerly operated by McLaurin. Id. at 1170, 1171. NCH had ceased
17 operations due to criminal fraud investigations. Id. at 1170. PCH
18

19 ⁶⁸ Specifically, Martin argued that she filed PCH's business
20 application as the president of PCH "only because McLaurin had
21 convinced her that he could not legally open a telemarketing business
22 in his name due to pending criminal charges." Id. She also argued
23 that she only answered telephones for a week at PCH, which should
24 negate the evidence on control. Id.

25 The court noted that:

26 However, other than statements in the appellate brief,
27 Martin has never offered any evidence to support these
28 factual assertions. Her affidavit filed in opposition to
summary judgment made no mention of these facts. . . .
[C]onclusory, self-serving statements in appellate briefs .
. . . are insufficient to create a genuine issue of material
fact.

29 Id.

1 telephone solicitors used a script that was practically identical to
2 the script used by NCH. Id. Thus, the record showed that Martin
3 acted on behalf of PCH at the direction of someone she knew was facing
4 criminal charges concerning similar telemarketing activities. Based
5 on this background, the court found that Martin was "at least
6 recklessly indifferent with regard to the truth or falsity of the
7 misrepresentations made by PCH employees." Id.

8 Here, the Court finds that the case against Teresa Taves is more
9 compelling than the case against Martin in Publishing Clearing House,
10 but not on the same grounds reached in that case. On the issue of
11 authority to control, a genuine issue of material fact may exist.
12 Unlike Publishing Clearing House, here, Teresa Taves does offer some
13 evidence in the form of deposition testimony concerning her alleged
14 lack of control over JKP's operations. However, whether such evidence
15 creates a genuine issue of fact for trial need not be answered by the
16 Court. As stated in the legal section, supra, the FTC need not show
17 authority to control to prevail on this element. Alternatively, if
18 the undisputed facts show that Teresa Taves participated directly in
19 the wrongful acts or practices, she can be held individually liable
20 for JKP's unfair practices.

21 Like Martin in Publishing Clearing House, Teresa Taves was an
22 officer of a defendant corporation who signed documents on behalf of
23 the corporation. But Teresa Taves' involvement as an officer of JKP
24 was not as limited as Martin's involvement as an officer in PCH.
25 Teresa Taves was not an officer in name only; JKP was the Taveses'
26 company. From the time of their marriage to the end of 1998, Teresa
27 Taves had worked in companies owned by her husband or the two of them.
28 While she was not active in the day-to-day operations of the

1 companies, she did draw a salary. Indeed, in 1998 alone, she was paid
2 around \$1.7 million by Herbal Care for her role as an owner and
3 officer of JKP. The fact that she claims she did not know how this
4 sum was calculated is irrelevant.

5 In addition, Teresa Taves actively participated in certain acts
6 crucial to the success of JKP/Netfill's billing scheme, namely, using
7 her credit to obtain merchant bank accounts at Charter Pacific and
8 Heartland and signing the agreement to purchase the Charter Pacific
9 Positive Database. The record shows that Charter Pacific had
10 previously rejected Ken Taves' application for a merchant bank account
11 because of his bad credit record. In approving the merchant bank
12 applications, the banks relied on Teresa Taves' credit history and the
13 representations made in the numerous accompanying documents that she
14 signed.⁶⁹ These merchant account applications enabled the company
15 that she owned with her husband to perpetrate the fraud against
16 innocent cardholders. Also, Charter Pacific's acceptance of JKP's
17 application enabled JKP to purchase Charter Pacific's credit card
18 database. Absent evidence to the contrary, the corporate defendants'
19 access to the 3 million valid Visa/MasterCard credit card numbers in
20 this database was a necessary part of the billing scheme. In sum,
21 Teresa Taves played an integral role in the commitment of unfair
22 practices by the corporate defendants.

23 The heart of her argument is that she had no knowledge of the
24 nature of her participation and the illegal activities of the other
25 defendants. She attempts to hide behind the shield erected by her
26

27
28 ⁶⁹ The Court does not rely on the two documents that Teresa
Taves claims may not contain her signature. See T. Taves Opp. at 7.

1 claims that she did not read the documents that she signed. For
2 purposes of the summary judgment motion, the Court accepts as true
3 that she did not read most of the documents that she signed.⁷⁰
4 Nevertheless, as the Court detailed in the factual background section,
5 supra, the evidence does show she was aware of the nature of JKP's
6 businesses, the necessity of merchant bank accounts, and the nature of
7 her participation.

8 Moreover, similar to Martin in Publishing Clearing House, Teresa
9 Taves "acted at the direction of someone she knew" had previously run
10 into trouble with the law. Teresa Taves admitted that she knew,
11 before 1995, that her husband had faced a murder charge in 1988
12 involving a victim who was a financial or business associate. She
13 also admitted that she knew, before 1995, that her husband had some
14 unspecified criminal problems before they were married. Additionally,
15 she signed numerous contracts, bank documents and letters making
16 various warranties and representations on behalf of JKP without
17 reading the contents of the documents. Having worked in a bank for
18 five years, working first as a teller, then a chief teller and later
19 in the loan department, Teresa Taves must have been aware of the legal
20 significance of her actions. She certainly had ample opportunity to
21 review the details of all the documents that she signed. Indeed, by
22 simply reading the May 22, 1998 letter to Charter Pacific that she
23 signed, she would have learned that JKP/Netfill was closing the
24 account because it needed to "implement better fraud control systems
25

26 ⁷⁰ Given that she was aware that she submitted merchant bank
27 applications on behalf of JPK, she must have "read" some of the
28 relevant documents, even if just to glance at the headings, to reach
that conclusion. See text, supra, at 11-12.

1 and procedures." (T. Taves Depo. at 768-69 [authenticating
2 signature], 868 [letter].) The fact that she had just applied for the
3 Heartland merchant account shortly before sending this letter
4 certainly should have raised a red flag as to JKP's activities. She
5 had ample opportunity to take action and discover the fraud. But she
6 intentionally avoided learning the truth, comfortable with the huge \$4
7 million income that her family suddenly "earned" after years of failed
8 business ventures. Based on the undisputed facts, the Court finds as
9 a matter of law that Teresa Taves was, at a minimum, recklessly
10 indifferent with regard to whether or not the corporate acts or
11 practices were fraudulent. Therefore, she is individually liable for
12 the corporate defendants' unlawful practices and is subject to
13 injunctive relief and any order of restitution.

14 (3) Maurice O'Bannon

15 The FTC Motion⁷¹ Preliminarily, the Court notes that O'Bannon's
16 opposition concedes that he once served as an officer of MJD, Discreet
17 Bill and TAL, and in that capacity, he signed and filed start-up
18 documents on behalf of MJD, Discreet Bill and TAL. Opp. at 2;
19 O'Bannon Motion at 1-2. Thus, whether or not some of these corporate
20 documents were signed by O'Bannon personally or by someone else (at
21 Nevada Corp.) who used his signature stamp is irrelevant. (See text,
22 supra, at 14-15.) In addition, O'Bannon has admitted that he signed
23 the fictitious business name statements concerning N-Bill, Online
24

25 ⁷¹ The Court rejects O'Bannon's suggestion that he cannot
26 adequately oppose the Motion because the FTC's Motion cites to
27 exhibits submitted in support of its application for a temporary
28 restraining order and motion for a preliminary injunction, which were
filed in early 1999, but never served on O'Bannon. None of those
exhibits supports the FTC's case against O'Bannon.

1 Billing, Webtel and Assist Online. (See id.) Therefore, the only
2 possible authentication issue that may arise concerns whether or not
3 he signed the December 1998 merchant bank agreement on behalf of TAL.
4 (See id. at 14, note 24.)

5 The FTC's Motion against O'Bannon is premised on its contention
6 that O'Bannon's role, however temporary, as an officer and director of
7 MJD, Discreet Bill and Tal, and his act of signing documents on behalf
8 of these companies, without more, is sufficient to support a finding
9 that O'Bannon had the requisite control under Publishing Clearing
10 House. Reply at 20-21. As discussed above, the ruling in that case
11 turned on the fact that defendant Martin did not point to any evidence
12 to contradict the FTC's evidence of control over the corporation. See
13 Publishing Clearing House, 104 F.3d at 1170. Here, however, O'Bannon
14 does point to some evidence that raises an issue of fact as to whether
15 he had the requisite control over the companies, e.g., he denies
16 knowing Ken Taves and others, he denies knowing anything about the
17 corporate defendants and he claims he was only an officer and director
18 on paper.⁷² The FTC has not established that it is entitled to
19 judgment against O'Bannon as a matter of law.

20 The O'Bannon Motion. O'Bannon argues that there is an absence of
21 evidence to support the FTC's case. O'Bannon contends that the FTC's
22 evidence shows he only temporarily acted as an officer for MJD,
23 Discreet Bill and TAL, he had no actual authority over these
24 companies, he resigned shortly after each corporation was formed, he

25
26 ⁷² The Court notes that the FTC did not argue that O'Bannon
27 should be liable for the corporate defendants' unlawful practices
28 because he participated directly in the unlawful acts. Reply at 20.
Id. Instead, the FTC only argued that O'Bannon had the requisite control.

1 did not know the other individual defendants and did not receive any
2 compensation from the companies. O'Bannon Motion at 2. Notably,
3 O'Bannon does not mention the Charter Pacific merchant account
4 agreement that indicates O'Bannon signed a legal contract on behalf of
5 TAL in or about December 1998.

6 First, contrary to O'Bannon's contention, the evidence shows that
7 he was not always a "temporary" officer for the companies. In fact,
8 the corporate documents indicate that he was an officer and director
9 of Discreet Bill, at least on paper, for 13 months -- from March 1998
10 (O'Bannon Depo. at 306) to April 1999 (O'Bannon Motion, Ex. C
11 [Resolution of the Board of Directors of Discreet Bill]). During the
12 interim, O'Bannon, on behalf of Discreet Bill, signed the four
13 fictitious business name certificates. (O'Bannon Depo. at 307 [N-Bill
14 in 9/98]; 308 [Online Billing in 9/98]; 309 [Webtel in 12/98]; 310
15 [Assist Online in 12/98].) Second, it appears that O'Bannon signed
16 the Charter Pacific merchant account agreement on behalf of TAL and he
17 may have done so in or about December 1998, after he purportedly
18 resigned from the company. That merchant account agreement enabled
19 TAL to continue the fraudulent scheme, albeit only for about a month
20 before the Receiver took over the company.

21 Nevertheless, the Court finds that O'Bannon is entitled to
22 judgment in his favor. The FTC's case against O'Bannon is based
23 solely on O'Bannon's role as an officer of the defendant companies.
24 Therefore, to hold O'Bannon liable for injunctive relief, the FTC must
25 establish that O'Bannon either participated directly in the wrongful
26 practices at issue or had authority to control the corporation.

27 The FTC contends that O'Bannon's role as an officer or director
28 on paper, without more, sufficiently shows authority to control or, at

1 the very least, sufficiently shows that O'Bannon's Motion should be
2 denied. The Court disagrees. At this stage, to successfully oppose
3 this motion, the FTC must have enough evidence "on which a reasonable
4 jury could reasonably find for [the FTC]." Anderson, 477 U.S. at 252.
5 But the record submitted by the FTC is devoid of evidence that shows
6 O'Bannon even knew any of the other defendants (or their agents) or
7 communicated in any way with any of other defendants (or their
8 agents). Without some other evidence linking O'Bannon to the other
9 defendants, the evidence simply shows that an unwise man signed
10 certain documents from afar on behalf of companies unknown to him
11 without knowledge about (1) who actually owned or operated those
12 companies or (2) the business activities of those companies.

13 The Court is very troubled by the nature of O'Bannon's
14 activities, lending his name and signature to faceless and unknown
15 corporations and signing documents without care for their content or
16 legal effect. The record shows that O'Bannon did not merely act as an
17 officer and director for strange companies for the limited purpose of
18 signing incorporation documents. The Court is also skeptical about
19 O'Bannon's claim that he received little or no benefit from Nevada
20 Corp. in exchanges for his "services." However, the FTC did not
21 prosecute O'Bannon independently for unlawful practices unrelated to
22 the defendants' billing scheme. In this case, there is simply
23 insufficient evidence for a reasonable jury to find that O'Bannon
24 actually had authority to control the defendant corporations.⁷³

25
26 ⁷³ The FTC has not alleged that O'Bannon participated directly
27 in the wrongful billing scheme perpetrated by the other defendants.
28 Even if it did, the Court finds that there is insufficient evidence on
which a reasonable jury could find for the FTC. The FTC's strongest
(continued...)

1 Accordingly, the Court concludes that O'Bannon is entitled to judgment
2 as a matter of law on the FTC's claims against him.⁷⁴

3 **2. Scope of the Injunction**

4 **a. Ken Taves**

5 Ken Taves objects to the scope of the requested injunction.
6 Specifically, he contends that the proposed injunction would
7 "permanently enjoin [him] from operating any business" that accepts
8 credit or debit cards, which "effectively prohibits [him] from ever
9 engaging in a position of ownership, management or control." Opp. at
10 16. He also contends that he would not be able to lawfully support
11 himself (and presumably his family) or pay any restitution, if the
12 requested relief is granted. Id. at 17.⁷⁵

13
14 ⁷³(...continued)

15 evidence in this regard is the TAL/Charter Pacific merchant account
16 agreement. However, O'Bannon claims that the document contains his
17 signature stamp, i.e., someone signed his signature to the document.
18 The FTC has submitted no evidence to the contrary. Even viewing this
19 document combined with the fictitious business name filings, the Court
cannot conclude that a triable issue of fact exists as to whether
O'Bannon participated directly in the corporate defendants' unlawful
practices.

20 ⁷⁴ The Court need not distinguish between the FTC's unfair
21 practice claim and the deceptive practice claim. As stated above,
22 O'Bannon's liability for the unlawful acts is premised on his role as
23 an officer or director of MJD, Discreet Bill and TAL. Because the
Court finds that the FTC has insufficient evidence to proceed to trial
on the issues of control and direct participation, O'Bannon is
entitled to judgment on both claims.

24 ⁷⁵ None of the defendants, including Ken Taves, object to the
25 other provisions of the proposed injunction -- Sections I to V. Those
26 provisions would permanently enjoin Ken Taves, Teresa Taves, JKP,
27 Herbal Care and MJD from engaging in the particular unlawful practices
28 at issue in this case and requiring them to take certain actions in
connection with the "advertising, promotion, offering for sale, or
sale of goods or services by any means whatsoever" to ensure that

(continued...)

1 The relevant portions of the FTC's proposed order, submitted on
2 November 29, 1999, states:

3 IT IS FURTHER ORDERED that for a period of ten years from
4 the date of this order, Ken Taves, whether directly, in
5 concert with others, or through any business, entity,
6 corporation, subsidiary, division or other device, is
7 enjoined from owning or controlling, whether directly or
8 directly, holding a managerial post, consulting for, or
9 serving as an officer in any business that handles
10 consumers' credit card or debit card accounts, or the
11 information therefrom[.]

12 Proposed Order at 7 (Section VI). Two paragraphs later, the proposed
13 order provides that:

14 [N]othing in this part shall prohibit Ken Taves from being
15 an employee of a business that handles consumers' credit
16 card or debit card accounts, or the information received
17 therefrom, provided that Ken Taves has no contact or access,
18 directly or indirectly, with or to these credit card or
19 debit card accounts or any information derived from them.

20 Id.

21 The Court recognizes that "those caught violating the FTC Act can
22 expect some 'fencing in'" Windward Marketing, 1997 U.S. Dist. LEXIS
23 17114, *43 (quoting ETC v. National Lead Co., 352 U.S. 419, 431
24 (1957)). "'The[] 'fencing in' provisions are needed to prevent
25 similar and related violations from occurring in the future.'" Id.

26 _____
27 ⁷⁵(...continued)
28 debits or charges to cardholder accounts occur only with express
authorization from the cardholders. See Proposed Order at 3-7.

1 (quoting Trans World Accounts, Inc. v. FTC, 594 F.2d 212, 215 (9th
2 Cir. 1979). With this in mind, the Court finds that Ken Taves'
3 unscrupulous and unlawful practices, which he successfully carried out
4 for over a year largely because of his position of control over his
5 companies and other individuals, warrant the ten year prohibition
6 against owning, controlling, holding a managerial position, consulting
7 for, or serving as an officer in "any business that handles consumers'
8 credit card or debit card accounts, or the information therefrom[.]"
9 Proposed Order at 7 (Section VI at ¶ 1).

10 However, the provision that limits Ken Tave's employment as a
11 non-mangerial employee is unwarranted.⁷⁶ Although the requested
12 relief does not on its face prohibit Ken Taves from working at all,⁷⁷
13 it does effectively prohibit him from working in the overwhelming
14 majority of businesses. There are few businesses nowadays that accept
15 only cash or checks and few, if any, positions in businesses that do
16 handle credit or debit cards where the (non-managerial) employee can
17 avoid having contact with or even access to customers' card account
18 information.⁷⁸ Instead, the Court will adopt the first two paragraphs

19
20 ⁷⁶ None of the cases cited by the FTC supports this proposed
21 ban. See Motion at 54 & Reply at 15 (cases all ban defendants from
22 engaging in the particular unlawful activities at issue, e.g.,
engaging in future telemarketing businesses or selling investments
that include an interest in government licenses).

23 ⁷⁷ For example, Ken Taves can work as an employee in a business
24 that (1) accepts only cash or checks or (2) accepts credit and debit
25 cards as long as he has "no contact or access, directly or indirectly,
with or to these credit card or debit card accounts or any information
derived from them."

26 ⁷⁸ Outside of "businesses," there are professions that might
27 not handle credit or debit card account information (e.g., lawyers,
28 teachers, and engineers), but those positions require certain

(continued...)

1 of the proposed ban (see Proposed Order at 7) but substitute the third
2 paragraph for the following language:

3 Provided, further, that nothing in this part shall prohibit
4 Ken Taves from being an employee of a business that handles
5 consumers' credit or debit card accounts, or the information
6 received therefrom, as long as Ken Taves does not use any of
7 those credit or debit card accounts, or any information
8 derived therefrom, for any purpose other than the lawful and
9 legitimate processing of a credit or debit card transaction
10 that is expressly authorized by the cardholder for goods
11 sold or services provided by Ken Taves' employer.

12 **b. Teresa Taves**

13 Teresa Taves did not object to the scope of the injunction
14 against her. Although she did "join" in all other defendants'
15 arguments, no one else addressed the specific ban against her, namely,
16 she must obtain a surety bond in the amount of \$4,000,000 before she
17 can engage in any of the activities proscribed by sections I to V of
18 the proposed order (which allow lawful "advertising, promotion,
19 offering for sale, or sale of goods or services by any means
20 whatsoever" as long as she takes certain steps to ensure that debits
21 or charges are expressly authorized). See Proposed Order at 8
22 (Section VII). The Court finds a \$4,000,000 bond is unwarranted.
23 Instead, the Court will require a \$500,000 bond.

24 //

25 //

26 _____
27 ⁷⁸(...continued)

28 educational training and/or professional background which Ken Taves
likely does not have and cannot easily obtain.

1 3. **Damages on the Unfair Practices Claim**

2 JKP, Herbal Care, Ken Taves and Teresa Taves contend that the
3 FTC's calculations on damages -- total of \$40.5 million -- are based
4 on unreliable evidence. The defendants' expert, Jon Karraker, CPA,
5 questions the reliability of the ATS Historical Database, upon which
6 much of the calculations are based, because, *inter alia*, (1) Mr.
7 Goldfarb apparently turned over the database records to the FTC in
8 three batches over a seven month period from January through July
9 1999⁷⁹; (2) the FTC has not independently verified the accuracy of the
10 ATS data (by reviewing other merchant databases maintained by ATS);
11 (3) Mr. Goldfarb's credibility is in doubt because he is an interested
12 party and the evidence suggests or shows that Mr. Goldfarb knew of or
13 participated in the unlawful practices; and (4) there is the \$1.9
14 million discrepancy between the \$47.5 million "sales" figure from the
15 ATS Historical Database and the \$49.4 million "sales" deposits in the
16 merchant bank accounts (and the FTC includes this \$1.9 million in the
17 damages calculation). (Opp., Ex. A [Karraker Report] at 1-5]. After
18 reviewing the deposition testimony of David Goldfarb, the evidence in
19 support of the FTC damages calculations, and Mr. Karraker's report,
20 the Court had questions about the reliability of the FTC's evidence on
21 damages. See Fed. R. Civ. P. 56(e) (evidence in support of a summary
22 judgment motion must be admissible).

23 Therefore, on March 23, 2000, the Court issued a minute order to
24 the parties, asking that counsel address the following points during
25 oral argument:

26 //

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28

⁷⁹ The FTC does not dispute this fact. See Reply at 9-13.

- 1 (1) Is the FTC's evidence on damages dependent on Mr.
2 Goldfarb's credibility as a witness?
- 3 (2) Did the FTC agree to not prosecute Mr. Goldfarb and/or ATS
4 or make any other promises to Mr. Goldfarb in exchange for
5 Mr. Goldfarb's cooperation?
- 6 (3) Do the defendants have any evidence of collusion or
7 wrongdoing by Mr. Goldfarb (i.e., that Mr. Goldfarb tampered
8 with the databases he turned over to the FTC) other than
9 mere speculation?
- 10 (4) If the Court finds that it has concerns about Mr. Goldfarb's
11 credibility as a witness, does that necessarily cast some
12 doubt as to the reliability of the ATS databases such that
13 the issue of damages cannot be determined on summary
14 judgment?
- 15 (5) As to the \$1.9 million discrepancy between the \$47.5 million
16 total "sales" figure from the ATS Historical Database and
17 the \$49.4 million total "sales" deposits in the corporate
18 defendants' merchant bank accounts -- what evidence in the
19 record shows the \$1.9 million is illegitimate?
- 20 (6) Is the FTC's calculation overstated by at least \$2.3
21 million? See discussion, infra, note 56.

22 During oral argument, counsel addressed these points at length.
23 For the first time, the FTC proposed an alternative method of
24 calculating damages not previously raised in its moving or reply
25 papers. The FTC proposed that the Court disregard the ATS Historical
26 Database and simply use the \$49.4 million total deposits in the
27 defendants' merchant accounts. The FTC asserts that \$49.4 million
28 equals the total amount of unauthorized charges because the defendants

1 have no evidence that indicates these were authorized transactions.
2 After subtracting the total chargebacks and credits to date (\$7.3
3 million as of February 2000), the total amount of damages should be
4 \$42.1 million. The FTC argues that two cases, FTC v. Gem
5 Merchandising Corp., 87 F.3d 466 (11th Cir. 1996) and FTC v. Febre,
6 128 F.3d 530 (7th Cir. 1997), support this alternative method of
7 calculation. After considering counsel's oral argument, the record in
8 this case and the two cases cited by the FTC, the Court finds that
9 under either of the FTC's proposed methods of calculation, a triable
10 issue of fact exists as to the amount of damages. Accordingly, the
11 Court concludes that the FTC is not entitled to judgment as a matter
12 of law on the damages issue.

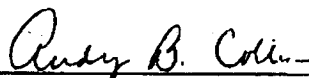
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1 III. Conclusion⁸⁰

2 For all of the foregoing reasons, the Court hereby ORDERS that
3 (1) the FTC's Motion is GRANTED, in part, on the issue of liability as
4 to JKP, Herbal Care, MJD, Ken Taves and Teresa Taves; (2) the FTC's
5 Motion is DENIED, in part, on the issue of damages with respect to
6 JKP, Herbal Care, MJD, Ken Taves and Teresa Taves; (3) the FTC's
7 Motion against O'Bannon is DENIED; and (4) the O'Bannon Motion is
8 GRANTED.

9 SO ORDERED.

10 DATED: April 7, 2000

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12 

13 AUDREY B. COLLINS
14 UNITED STATES DISTRICT JUDGE
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25 ⁸⁰ The FTC also argues that the defendants violated section 5
26 of the FTC ACT by committing "deceptive practices." Motion at 44-46.
27 The Court finds that even if the FTC establishes liability on this
28 claim, the forthcoming injunction and restitution order for the unfair
practices would not be broader in scope. Therefore, the Court
concludes that it need not address this argument.