

1 WILLIAM BLUMENTHAL
General Counsel

2 KENNETH H. ABBE, Cal. Bar No. 172416
3 ERIC D. EDMONDSON, DC Bar No. 225473
4 FEDERAL TRADE COMMISSION
901 Market St., Suite 570
5 San Francisco, CA 94103
Telephone: (415) 848-5182, -5179, -5100
6 Facsimile: (415) 848-5184
e-mail: kabbe@ftc.gov; eedmondson@ftc.gov

7 GREGORY A. BROWER
8 United States Attorney
District of Nevada
9 Blaine T. Welsh
Nevada Bar No. 4790
10 Assistant United States Attorney
333 Las Vegas Boulevard South, Suite 5000
11 Las Vegas, Nevada 89101
Phone: (702) 388-6336
12 Fax: (702) 388-6787
Blaine.Welsh@usdoj.gov

13 Attorneys for Plaintiff
14 FEDERAL TRADE COMMISSION

15 UNITED STATES DISTRICT COURT
16 DISTRICT OF NEVADA

17
18 FEDERAL TRADE COMMISSION,
19 Plaintiff,
20
21 v.
22 CITY WEST ADVANTAGE, INC., et
23 al.,
24 Defendants.

Case No. 2:08-CV-609-BES-GWF
**PLAINTIFF FTC'S OPPOSITION TO
DEFENDANT JAMES SLEMBOSKI AND
CITY WEST ADVANTAGE'S MOTION
TO DISMISS COMPLAINT OR IN THE
ALTERNATIVE FOR SUMMARY
JUDGMENT**

Table of Contents

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. The standard for a motion to dismiss 2

II. The FTC’s Complaint satisfies the notice pleading standard
and should not be dismissed 3

 A. Count 1 5

 B. Count 2 8

 C. Count 3 10

 D. Count 4 12

III. Individual Defendant James Slemboski is liable for violations
of the FTC Act and TSR and this Court has personal
jurisdiction over him 14

IV. Defendants’ alternative motion for summary judgment
should be denied because it is premature and there exist
genuine issues of triable fact here 17

V. Conclusion 21

Table of Authorities

Federal Cases

1

2

3 *Bautista v. Los Angeles County*, 216 F.3d 837 (9th Cir. 2000) 3, 17

4 *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007) 2, 3

5 *In re Cliffdale Associates, et al.*, 103 F.T.C. 110 (1984) 5

6 *Davis v. Metro Productions, Inc.*, 885 F.2d 515 (9th Cir. 1989) 15, 16

7 *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) 2

8 *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989) 14

9 *FTC v. Cyberspace.com*, 2002 U.S. Dist. LEXIS 25565

10 (W.D. Wash. 2002) 17

11 *FTC v. Gill*, 71 F. Supp. 2d 1030 (C.D. Cal. 1999) 7

12 *FTC v. J.K. Publications*, 99 F. Supp. 2d 1176 (C.D. Cal. 2000) 14

13 *FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. Cal. 1994) 5, 7, 19, 20

14 *FTC v. Publ’g Clearing House, Inc.*, 104 F.3d 1168 (9th Cir. 1997) 14

15 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,

16 475 U.S. 574, 106 S.Ct. 1348 (1986) 17, 18

17 *Newman v. County of Orange*, 457 F.3d 991 (9th Cir. 2006) 18

18 *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683 (1974) 3

19 *Smilecare Dental Group v. Delta Dental Plan of Cal., Inc.*,

20 88 F.3d 780 (9th Cir. 1996) 3

21 *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) 2, 3

Federal Statutes

22

23 28 U.S.C. § 1391(b) and (c) 14, 15

24 Fed. R. Civ. P. 8(a) 2, 3

25 Fed. R. Civ. P. 12(b)(6) 2, *passim*

26 Fed. R. Civ. P. 56(c) 2, 17

27

28

1 Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) 2, *passim*
2 Section 13(b) of the FTC Act, 15 U.S.C. § 53(b) and (c) 14, 15
3 Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310,
4 as amended by 68 Fed. Reg. 4580, 4669 (January 29, 2003) 2
5 Sections 310.2(z), (bb) (cc) of the TSR, 16 C.F.R. § 310.2(z), (bb) (cc) 8
6 Section 310.3(a)(2)(i) of the TSR, 16 C.F.R. § 310.3(a)(2)(i) 4, 10
7 Section 310.3(a)(2)(iv) of the TSR, 16 C.F.R. § 310.3(a)(2)(iv) 4, 8
8 Section 310.4(a)(6) of the TSR, 16 C.F.R. § 310.4(a)(6) 4, 12

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 On May 13, 2008, plaintiff Federal Trade Commission (“Commission” or
2 “FTC”) filed its Complaint against defendants City West Advantage, Inc. (also doing
3 business as Unified Services) and James S. Slemboski (“Defendants”) for violations
4 of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the FTC’s Telemarketing
5 Sales Rule (the “TSR”), 16 C.F.R. Part 310, as amended by 68 Fed. Reg. 4580, 4669
6 (January 29, 2003). On May 30, 2008, Defendants filed a motion to dismiss
7 pursuant to Fed. R. Civ. P. 12(b)(6) and, in the alternative, a motion for summary
8 judgment under Fed. R. Civ. P. 56(c) (docket no. 21) (“Motion”). Because the
9 Complaint complies with Fed. R. Civ. P. 8(a) by containing a “a short and plain
10 statement of the claim[s] showing that the pleader is entitled to relief,” and because
11 Defendants’ legal and factual arguments are either unfounded or inappropriately
12 made at this stage of the proceedings, the motion to dismiss should be denied.
13 Furthermore, the record shows that there are genuine issues of triable fact in this
14 matter, so the motion for summary judgment should likewise be denied.

15
16 **I. The standard for a motion to dismiss**

17 Under the notice pleading standard of Rule 8(a), a complaint must contain “a
18 short and plain statement of the claim showing that the pleader is entitled to relief.
19 Specific facts are not necessary; the statement need only give the defendant fair
20 notice of what the . . . claim is and the grounds upon which it rests.” *Erickson v.*
21 *Pardus*, 127 S. Ct. 2197, 2200 (2007). In its most recent pronouncement on the
22 requirements of Rule 8(a), the Supreme Court held that “we do not require
23 heightened fact pleading of specifics, but only enough facts to state a claim to relief
24 that is plausible on its face.” *Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1974 (2007).
25 The Court has previously relied on the literal language of Rule 8(a) to find, for
26 example, that an employment discrimination complaint need not contain specific
27 facts establishing a prima facie case of discrimination. *Swierkiewicz v. Sorema N.A.*,

1 534 U.S. 506, 510-13 (2002), (cited approvingly in *Twombly*, 127 S. Ct. at 1965,
2 1969). The *Swierkiewicz* Court emphasized the simplified nature of notice pleading.
3 *Id.* at 512-14. The FTC's Complaint satisfies Rule 8(a) and should not be dismissed.

4 The Ninth Circuit has noted that motions to dismiss for failure to state a claim
5 should be granted only in "extreme circumstances." *Bautista v. Los Angeles County*,
6 216 F.3d 837, 841 (9th Cir. 2000) (holding that a district court's "sudden death
7 response" to dismiss case with prejudice was abuse of court's discretion for failing to
8 consider less drastic alternatives). In evaluating a motion to dismiss, a court must
9 take all material facts in the complaint as true and liberally construe the complaint in
10 favor of the plaintiff. *Smilecare Dental Group v. Delta Dental Plan of Cal., Inc.*, 88
11 F.3d 780, 782-83 (9th Cir. 1996). At this stage, the appropriate question is "not
12 whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer
13 evidence to support the claims." *Twombly*, 127 S. Ct. at 1969 n.8, quoting *Scheuer v.*
14 *Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683 (1974). As the FTC has pled its
15 Complaint properly, discovery should now commence to allow the Commission to
16 prove up its claims.

17
18 **II. The FTC's Complaint satisfies the notice pleading standard and should**
19 **not be dismissed**

20 The FTC's Complaint against Defendants complies with the notice pleading
21 required by the Federal Rules of Civil Procedure, and is well within the parameters
22 courts deem acceptable. The Complaint carefully lays out: (1) who the Defendants
23 are and how they are involved in the challenged acts¹; (2) what statute (the FTC Act)
24 and trade regulation rule (the TSR) the FTC contends the Defendants violated,
25

26
27 ¹ Complaint for Permanent Injunction and Other Equitable Relief, filed
28 May 13, 2008 (docket no. 1) ("Complaint"), pp. 3-4, ¶¶ 5-10.

1 including relevant statutory definitions²; (3) why the Commission believes that the
2 Defendants violated the FTC Act and the TSR³; and (4) the individual claims the
3 Commission is bringing against the Defendants, including specific citations to
4 relevant sections of the FTC Act and the TSR.⁴

5 The Complaint alleges distinct violations of the FTC and the TSR. Count 1
6 alleges that Defendants violated Section 5(a) of the FTC Act by misrepresenting that
7 they would charge consumers only a nominal fee, such as \$1.95, and not any other
8 amount, and that the consumers would have a trial period in which the consumers
9 could avoid being charged more than this amount by cancelling their orders, both
10 deceptive practices.⁵ Counts 2 and 3 allege that Defendants misrepresented a
11 material aspect of their cancellation policy and the total cost to consumers of their
12 products and services, both deceptive practices under Sections 310.3(a)(2)(iv) and
13 310.3(a)(2)(i) of the TSR.⁶ Count 4 alleges that Defendants charged consumers for
14 products and services without first obtaining the consumers' express, informed
15 consent, an abusive act in violation of Section 310.4(a)(6) of the TSR.⁷ Counts 5
16 and 6 allege that Defendants repeatedly called consumers with the intent to annoy or

22 ² Complaint, pp. 1-2, ¶¶ 1-4.

23 ³ Complaint, pp. 4-7, ¶¶ 11-24.

24 ⁴ Complaint, pp. 7-11, ¶¶ 25-46.

25 ⁵ Complaint, pp. 7-8, ¶¶ 25-28.

26 ⁶ Complaint, pp. 8-10, ¶¶ 29-31, 35-39.

27 ⁷ Complaint, pp. 8-10, ¶¶ 29-30, 32, 35, 40-41.

1 harass and ignored consumers' requests to stop calling.⁸ The Complaint adequately
2 charges each of these violations, as set forth below.

3 **A. Count 1**

4 The first Count of the FTC's Complaint alleges that Defendants violated
5 Section 5(a) of the FTC Act by charging consumers around \$149 instead of the \$1.95
6 promised and denying consumers the opportunity to cancel their orders after
7 promising them a trial period.⁹ To prevail on Count 1 of the Complaint, the
8 Commission must show:

9 first, there is a representation, omission, or practice that,
10 second, is likely to mislead consumers acting reasonably
11 under the circumstances, and third, the representation,
12 omission, or practice is material.

13 *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. Cal. 1994) (quoting *In re*
14 *Cliffdale Associates, et al.*, 103 F.T.C. 110, 164-65 (1984)). The deceptive
15 representation must be in or affect commerce. *Id.* "Express product claims are
16 presumed to be material," *id.* at 1095-96, so the Commission may establish that a
17 deceptive representation was material by showing it was made.

18 The FTC's Complaint alleges that the Defendants engaged in commerce by
19 making telemarketing calls to consumers throughout the United States.¹⁰ The
20 Complaint then sets out, in detail, the manner by which Defendants made deceptive
21 representations that convinced consumers into providing their bank account
22 information. First, Defendants's telemarketers represent that the purpose of their call

24 ⁸ Complaint, pp. 8-9, 11, ¶¶ 29-30, 33-35, 42-45. Defendants have not
25 moved to dismiss Counts 5 or 6 of the Complaint at least as they relate to Defendant
26 City West Advantage, Inc. See Motion, p. 5.

27 ⁹ Complaint, ¶¶ 25-28, pp. 7-8.

28 ¹⁰ Complaint, pp. 3-4, ¶¶ 7-10.

1 is to send consumers a free gift,¹¹ when the purpose is actually to sell consumers
2 unrelated products and services.¹² This is an express misrepresentation. Then,
3 during the call, Defendants' telemarketers tell consumers that they must provide their
4 bank account numbers to pay only a small shipping and handling fee for the free gift,
5 typically \$1.95,¹³ when Defendants charge consumers much more for the unrelated
6 products and services, often \$149.¹⁴ This is also an express misrepresentation. Next,
7 consumers who agree to pay Defendants for the shipping and handling of the free
8 gift are put through a recorded "verification" process that confusingly purports to
9 disclose additional charges to consumers pertaining to the unrelated products and
10 services.¹⁵ Defendants' telemarketers contradict these disclosures and encourage
11 consumers to assent to the additional charges by representing to consumers that,
12 regardless of any other disclosures, they will not be charged more than \$1.95 and
13 that they can freely cancel their orders without charge during a trial period.¹⁶ As
14 Defendants do charge consumers more than \$1.95¹⁷ and do not allow consumers to
15 cancel their orders before being charged as promised,¹⁸ these, too, are express
16 misrepresentations.

19 11 Complaint, p. 4, ¶ 11.

20 12 Complaint, pp. 4-6, ¶¶ 15-17.

21 13 Complaint, p. 4, ¶¶ 11, 14.

22 14 Complaint, pp. 4-6, ¶¶ 15, 22.

23 15 Complaint, p. 5, ¶ 16.

24 16 Complaint, pp. 5-7, ¶ 17, 24.

25 17 Complaint, p. 6, ¶ 22.

26 18 Complaint, pp. 6-7, ¶¶ 23

1 Count 1 of the FTC's Complaint encapsulates these well-pled factual
2 allegations by charging that Defendants made express misrepresentations to
3 consumers regarding how much consumers would be charged and whether
4 consumers would be allowed to freely cancel, and that these misrepresentations were
5 misleading.¹⁹ Since, as a matter of law, Defendants' misleading and deceptive claims
6 are presumed to be material because they are express, all of the elements necessary to
7 prevail under Section 5 of the FTC Act have been met. *Pantron I*, 33 F.3d at
8 1095-96.

9 Defendants argue Count 1 should be dismissed solely on the basis that the
10 misrepresentations alleged therein are, in Defendants' words, "contradicted" by two
11 factual recitations in the Complaint: (1) that Defendants use deceptive techniques to
12 obtain consumers' consent during the recorded "verification" process,²⁰ and (2) that
13 Defendants include a cover letter in the materials they send to consumers – long after
14 the misrepresentations have been made – that gives supposed cancellation
15 instructions without clearly and conspicuously warning consumers of the high costs
16 of failing to do so.²¹ Defendants' argument appears to be based on a misreading of
17 the law. There is simply no authority for the proposition that the mere *existence* of a
18 disclosure made during a telemarketing call, regardless of the net impression of the
19 call, defeats a claim of deceptive misrepresentation as a matter of law. In fact, courts
20 presented with this argument have expressly rejected it. *See, e.g., FTC v. Gill*, 71 F.
21 Supp. 2d 1030, 1044 (C.D. Cal., 1999) ("a disclaimer does not automatically
22 exonerate deceptive activities.") Since, for the purposes of Defendants' motion to
23

24
25 ¹⁹ Complaint, pp. 7-8, ¶¶ 25-28. Defendants do not argue that the
26 challenged misrepresentations, as alleged, are not misleading.

27 ²⁰ Motion, ¶ 16, p. 5.

28 ²¹ Motion, ¶ 21, p. 6.

1 dismiss, the factual allegations in FTC's Complaint must be taken as true (*i.e.*,
2 Defendants made express, misleading representations), and since there is no
3 authority for Defendants' argument that their supposed disclosures cure the
4 misrepresentations they have made, Defendants' Motion should be denied as to
5 Count 1.

6 **B. Count 2**

7 The second Count of the FTC's Complaint alleges that Defendants violated
8 Section 310.3(a)(2)(iv) of the TSR, 16 C.F.R. § 310.3(a)(2)(iv) by misrepresenting
9 one or more material terms of their cancellation policy to consumers.²² This Count is
10 based on the same factual allegations as Count 1. To prevail on this Count, the FTC
11 must first show that the Defendants are "telemarketers" engaged in "telemarketing"
12 under the TSR, 16 C.F.R. § 310.2(z), (bb) (cc), as the Complaint properly pleads.²³
13 The FTC must then show that Defendants made express or implied
14 misrepresentations regarding their cancellation policy. On this point, the FTC
15 alleges that, while taking a consumer's order, Defendants' telemarketers
16 affirmatively misrepresented that consumers would not have to take any steps to
17 avoid being charged more than \$1.95 because the telemarketers would ensure that
18 consumers' "orders" for Defendants unrelated products and services would be
19 cancelled.²⁴ This is an affirmative misrepresentation of Defendants' cancellation
20 policy, as Defendants charged consumers who did not cancel their orders around
21 \$149.²⁵

22
23
24
25 ²² Complaint, p. 10, ¶¶ 36-37.

26 ²³ Complaint, p. 8, ¶ 30.

27 ²⁴ Complaint, pp. 5-6, ¶ 17.

28 ²⁵ Complaint, pp. 6-7, ¶¶ 21-23.

1 The FTC has also alleged that Defendants' telemarketers told consumers they
2 may easily cancel out of the negative-option orders for products delivered along with
3 the "free" gifts Defendants promised consumers,²⁶ that Defendants did not inform
4 consumers precisely when the cancellation period would end,²⁷ that Defendants
5 billed many consumers for products consumers did not want without the consumers'
6 knowledge,²⁸ and that Defendants told consumers they were billed because they did
7 not cancel in accordance with Defendants policies.²⁹ These allegations also properly
8 state a cause of action under Section 310.3(a)(2)(iv) of the TSR for express or
9 implied misrepresentations regarding a material term of Defendants' cancellation
10 policy, namely the duration of the cancellation period.

11 Defendants also argue that Count 2 should be dismissed on the grounds that it
12 somehow contradicts Count 1 and that Defendants do, in fact, have a cancellation
13 policy. In no way does Count 2 contradict Count 1 – they are parallel counts under
14 different statutes charging that Defendants made misrepresentations about their
15 cancellation policy. Defendants do not explain what they mean by this supposed
16 contradiction, but they may be referring to the FTC's allegations that Defendants
17 misrepresented whether many consumers would have to cancel *at all* to avoid being
18 charged by Defendants³⁰ *and* that Defendants also misrepresented the terms of their
19 cancellation policy to many consumers.³¹ There is no reason why Defendants could
20 not have made *both* kinds of misrepresentations as alleged in the Complaint,
21

22 ²⁶ Complaint, pp. 5-6, ¶ 17.

23 ²⁷ Complaint, p. 6, ¶ 21.

24 ²⁸ Complaint, p. 6, ¶ 22.

25 ²⁹ Complaint, pp. 6-7, ¶ 23.

26 ³⁰ See Complaint, p. 5, ¶ 17.

27 ³¹ See Complaint pp. 5-7, ¶¶ 17, 21-23.

1 however. By claiming that Defendants do provide a cancellation policy, Defendants
2 essentially argue that the FTC's Complaint is wrong, but on a motion to dismiss, the
3 complaint's allegations and all reasonable inferences must be accepted. Count 2 is
4 properly pled, and Defendants have raised no cognizable reason for it to be
5 dismissed. The Motion should be denied as to Count 2.

6 **C. Count 3**

7 The third Count of the FTC's Complaint alleges that Defendants
8 misrepresented the total cost to purchase, receive or use Defendants' products and
9 services in violation of Section 310.3(a)(2)(i) of the TSR, 16 C.F.R.

10 § 310.3(a)(2)(i).³² Count 3 is also based on the same factual allegations as Count 1.
11 To prevail on Count 3, the FTC need only show that Defendants, as telemarketers
12 engaged in telemarketing,³³ failed to disclose truthfully, in a clear and conspicuous
13 manner, the total costs of the unrelated products and services they were actually
14 charging consumers for.

15 The FTC's Complaint states that Defendants' telemarketers represented to
16 consumers that they would only have to pay \$1.95 to receive the free gifts offered at
17 the outset of the sales calls.³⁴ The Complaint then specifically alleges that the
18 telemarketers obtained consumers' bank account information without disclosing
19 clearly and conspicuously that Defendants will use that information to charge
20 consumers considerably more than \$1.95, usually \$149.³⁵ Finally, the Complaint
21 alleges that Defendants' telemarketers then use the "verification" process itself as an
22 instrument of deception. Any disclosures that Defendants actually do provide

23 _____
24 ³² Complaint, p. 10, ¶¶ 38-39.

25 ³³ As noted above in regards to Count Two, the FTC has properly pled this
26 element. *See* Complaint, p. 8, ¶ 30.

27 ³⁴ Complaint, p. 4, ¶ 11.

28 ³⁵ Complaint, pp. 4-5, ¶ 15.

1 regarding the amounts they will charge consumers for unrelated products and
 2 services are confusing and are not clear and conspicuous.³⁶ And Defendants'
 3 telemarketers affirmatively misrepresent to consumers that they should not be
 4 concerned about any charges disclosed during the verification process because those
 5 charges do not pertain to the consumer or that the consumer will only be charged
 6 \$1.95 regardless of what is disclosed in the verification.³⁷ The FTC has pled
 7 sufficient facts to state a plausible cause of relief under TSR Section 310.3(a)(2)(i).

8 Defendants argument to dismiss this Count 3 is a non sequitur. It refers only
 9 to unspecified contradictions in the Complaint and the FTC's allegations that
 10 Defendants misrepresented the terms of their cancellation policy, which relates to
 11 Count 2.³⁸ Defendants may be suggesting that, as above, because Defendants claim
 12 to have offered a trial period after which consumers would be billed,³⁹ then
 13 Defendants could not have misrepresented the total cost they charged consumers.
 14 This would not invalidate Count 3, however: The FTC has charged both that
 15 defendants both affirmatively misrepresented the total cost they would charge
 16 consumers⁴⁰ and that Defendants failed to clearly and conspicuously inform
 17 consumers of what the total charges would be.⁴¹ There is no contradiction between
 18 the allegations in Count 1 that Defendants misrepresented the total costs of their
 19 products and services in violation of Section 5 of the FTC Act and the allegations in

21 ³⁶ Complaint, p. 5, ¶ 16.

22 ³⁷ Complaint, pp. 5-6, ¶ 17.

23 ³⁸ See Motion, p. 4, lines 17-21.

24 ³⁹ See Complaint, pp. 5-6, ¶¶ 16-17. Of course, the FTC alleges that
 25 Defendants used misrepresentations about this very trial period as a means to induce
 26 consumers to agree to the flawed disclosures in the verification process. *Id.*

27 ⁴⁰ See Complaint, pp. 4-6, ¶¶ 11, 17.

28 ⁴¹ See Complaint, pp. 4-5, ¶¶ 15-16.

1 Count 3 that Defendants failed to properly disclose those costs in violation of Section
 2 310.3(a)(2)(i) of the TSR. Defendants thus appear to be simply denying Count 3, for
 3 they do not explain how the FTC has failed to provide the grounds upon which
 4 Count 3 rests. Denial of an allegation is not cause for dismissing a complaint. The
 5 Motion should therefore be denied as to this Count.

6 **D. Count 4**

7 The fourth Count of the FTC's Complaint alleges that Defendants billed
 8 consumers in telemarketing transactions without the consumers' express informed
 9 consent in violation of Section 310.4(a)(6) of the TSR, 16 C.F.R. § 310.4(a)(6).⁴²
 10 The FTC has properly pled the factual basis for this Count. The Complaint alleges
 11 that Defendants use telemarketing calls to solicit consumers' bank account
 12 information to pay the modest \$1.95 shipping and handling costs for a free gift.⁴³
 13 Defendants then use this information to bill consumers more than the \$1.95 shipping
 14 costs, usually \$149.⁴⁴ To obtain consumers' billing information, Defendants either
 15 affirmatively misrepresent that consumers will be billed no more than \$1.95⁴⁵ or
 16 provide a confusing disclosure of charges that is insufficiently clear and conspicuous
 17 to elicit express informed consent.⁴⁶ Consumers report that they had no idea they
 18 would be charged more than \$1.95,⁴⁷ and complained to Defendants that their
 19 telemarketers misrepresented that the consumers would have to pay no more than

20 _____
 21 ⁴² Complaint, p. 10, ¶¶ 40-41.

22 ⁴³ Complaint, p. 4, ¶¶ 11, 14. As with Counts 2 and 3, the FTC has
 23 properly alleged that Defendants are telemarketers engaged in telemarketing, a
 24 threshold requirement for the application of the TSR. *See* Complaint, p. 8, ¶ 30.

25 ⁴⁴ Complaint, pp. 4-5, ¶ 15.

26 ⁴⁵ Complaint, pp. 4-5, ¶¶ 11, 17.

27 ⁴⁶ Complaint, p. 5, ¶ 16.

28 ⁴⁷ Complaint, p. 6, ¶ 22.

1 \$1.95.⁴⁸ Count 4 thus properly pleads all of the elements for a violation of this
2 Section of the TSR.

3 Defendants move to dismiss on the grounds that paragraphs 14 and 16 of the
4 FTC's Complaint contradict Count 4.⁴⁹ They do not. Paragraph 14 supports Count 4
5 by alleging that Defendants solicited consumers' bank account information to pay for
6 shipping charges for the free item Defendants promised.⁵⁰ Paragraph 16 states that
7 Defendants mislead consumers to gain their agreement to be charged for products
8 and services unrelated to the promised free gift – charges which are only confusingly
9 described in disclosures that are not clear or conspicuous.⁵¹ Count 4 alleges
10 Defendants charged consumers without their express informed consent.
11 Paragraph 16 properly pleads that Defendants' confusing "disclosures" were
12 insufficient to provide informed consent. Moreover, Defendants ignore the FTC's
13 allegations that the Defendants affirmatively misrepresented the amounts they would
14 bill consumers, including that very allegation in Paragraph 16: Defendants'
15 telemarketers told consumers they would only be charged \$1.95 and no other
16 amount⁵² and that the consumers should ignore any disclosure to the contrary in the
17 verification process.⁵³ As there are no contradictions in the FTC's Complaint, and
18 Count 4 is properly pled, Defendants' Motion should be denied.

22 ⁴⁸ Complaint, p. 7, ¶ 24.

23 ⁴⁹ Motion, p. 4, lines 22-27.

24 ⁵⁰ Complaint, p. 4, ¶ 14.

25 ⁵¹ Complaint, p. 5, ¶ 16.

26 ⁵² Complaint, pp. 4-7, ¶¶ 11, 16-17, 24.

27 ⁵³ Complaint, pp. 5-6, ¶ 17.

1 **III. Individual Defendant James Slemboski is liable for violations of the FTC**
 2 **Act and TSR and this Court has personal jurisdiction over him.**

3 Having adequately alleged that corporate Defendant City West Advantage,
 4 Inc., engaged in deceptive acts or practices, the FTC must merely allege that
 5 individual Defendant James Slemboski “directly participated” in City West’s
 6 unlawful acts or practices or that he had “authority to control” such acts or practices,
 7 in order to state a claim against him for injunctive relief under the FTC Act. *See*
 8 *FTC v. Publ’g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *FTC v.*
 9 *Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989). Toward that end, the
 10 FTC’s Complaint alleges that Defendant Slemboski, in his capacity as President, a
 11 director, and an owner of City West, “formulated, directed, controlled or
 12 participated” in the unlawful acts or practices alleged in the Complaint.⁵⁴ As a matter
 13 of law, “[a]uthority to control the company can be evidenced by active involvement in
 14 business affairs and the making of corporate policy, *including assuming the duties of*
 15 *a corporate officer.*” *Amy Travel*, 875 F.2d at 573 (emphasis added); *accord Publ’g*
 16 *Clearing House*, 104 F.3d at 1170; *FTC v. J.K. Publications*, 99 F. Supp. 2d 1176,
 17 1203 (C.D. Cal. 2000). Therefore, the Complaint adequately pleads Defendant
 18 Slemboski’s authority to control and his participation in City West’s unlawful acts or
 19 practices.

20 The Complaint also adequately alleges personal jurisdiction over Defendant
 21 Slemboski, stating that he transacts business in the District of Nevada⁵⁵ and that
 22 venue is proper here under 28 U.S.C. § 1391(b) and (c), and 15 U.S.C. § 53(b) and
 23 (c).⁵⁶ Under 28 U.S.C. § 1391(c), a corporate defendant may be sued in any district
 24 where it is subject to personal jurisdiction. A civil action not based on diversity

25
 26 ⁵⁴ Complaint, p. 3, ¶ 6.

27 ⁵⁵ Complaint, p. 3, ¶ 6.

28 ⁵⁶ Complaint, p. 2, ¶ 3.

1 jurisdiction may be brought in a district where “a substantial part of the events or
2 omissions giving rise to the claim occurred.” 28 U.S.C. § 1391(b)(2). Venue is thus
3 appropriate in the District of Nevada because City West is incorporated here and
4 because the Commission has properly alleged that City West and Slemboski
5 transacted business here. Furthermore, under the FTC Act, the Court may determine
6 that the interests of justice require venue may be appropriate as to all defendants in a
7 district without regard to whether any defendant could otherwise be sued there. 15
8 U.S.C. 53(b). The interest of justice suggest here that venue is equally appropriate in
9 the District of Nevada for City West and for its President.

10 Curiously, Defendants cite *Davis v. Metro Productions, Inc.*, 885 F.2d 515
11 (9th Cir. 1989), for the proposition that “a person’s mere association with a
12 corporation that causes injury in the forum state is not sufficient in itself to permit
13 that forum to assert jurisdiction over the person.”⁵⁷ *Davis* is inapposite: it was a
14 diversity jurisdiction case, while this is a matter of federal question jurisdiction, the
15 enforcement of the FTC Act and the TSR. A careful reading of the *Davis* holding,
16 however, would support this Court’s personal jurisdiction over Defendant
17 Slemboski. *Davis* concerns diversity jurisdiction against a corporation and its two
18 shareholders/officers for violations of Arizona securities law and RICO. Personal
19 jurisdiction over the corporation was conceded, but the individual defendants, both
20 California residents, argued that there were insufficient contacts with Arizona to
21 permit personal jurisdiction. The trial court *found* personal jurisdiction, and the
22 Ninth Circuit affirmed, finding that the fact that the defendants “purposefully
23 directed their activities toward Arizona” provided sufficient contacts to satisfy both
24 the Arizona long-arm statute and “traditional notions of fair play and justice.” *Id.*,
25 885 F.2d at 522-23. The Ninth Circuit also noted the other considerations involved
26 in determining whether personal jurisdiction is reasonable, including “efficiency of
27

28 ⁵⁷ Motion, pp. 5-6, citing *Davis*, 885 F.2d at 520.

1 adjudication” and “extent of the defendants’ purposeful interjection into [the forum
2 state].” *Id.*, 885 F.2d at 523.

3 Here, the Court has admitted into evidence the corporate documents for City
4 West filed with the Nevada Secretary of State as Attachment 1 to Plaintiff’s Exhibit
5 9.⁵⁸ These documents show that Slemboski is no mere associate or employee of City
6 West, as Defendants suggest.⁵⁹ Slemboski incorporated City West in Nevada on
7 October 2, 2006; in the Articles of Incorporation, Slemboski gave his address as
8 Carson City, Nevada.⁶⁰ On January 30, 2007, Slemboski certified that his address as
9 City West’s Agent for Service of Process was in Las Vegas, Nevada.⁶¹ And on
10 September 7, 2007, Slemboski signed the Annual List of Officers, Directors and
11 Agents of City West, which identified him as its President and gave Slemboski’s
12 address as Las Vegas, Nevada. Whether or not Slemboski lives in Utah, as
13 Defendants assert,⁶² is immaterial – Slemboski clearly transacted business within the
14 District of Nevada, and this is sufficient to establish the requisite contacts with this
15 District as a forum state.⁶³ As the Complaint properly alleges personal jurisdiction
16

17 ⁵⁸ See Minute Order, June 12, 2008 (docket no. 31).

18 ⁵⁹ See Motion, pp. 5-6, lines 26-6. Defendants go so far as to suggest that
19 Slemboski is only the “alleged” President of City West. *Id.* at 6, lines 16-17. If
20 Defendants dispute the FTC’s well-supported allegation that Slemboski is City
21 West’s President, then this creates a genuine issue of triable fact that would preclude
22 Defendants’ motion for summary judgment. See Section IV, *infra*.

23 ⁶⁰ Plaintiff’s Exhibit 9, p. 6. Although the cities and state listed in this
24 exhibit are clearly legible, the business street addresses were mistakenly redacted;
the FTC apologizes for this error.

25 ⁶¹ Plaintiff’s Exhibit 9, p. 9.

26 ⁶² Motion, p. 6, lines 8-10.

27 ⁶³ Slemboski also signed letters to consumer protection agencies on behalf
28 of two of City West’s fictitious business names, Unified Services and Apex, that held
FTC’s Opposition to Motion to Dismiss 16

1 over Defendant Slemboski, and the Court has admitted evidence showing that he
2 transacted business in this District, Defendants' Motion to Dismiss based on Fed. R.
3 Civ. P. 12(b)(2) as to Slemboski should be denied.

4
5 **IV. Defendants' alternative motion for summary judgment should be denied**
6 **because it is premature and there exist genuine issues of triable fact here.**

7 Defendants have prematurely moved for summary judgment under Rule 56(c).
8 If the FTC's Complaint does not effectively allege all causes of action, then the
9 appropriate response should be to request a more definitive statement under Fed. R.
10 Civ. P. 12(e). At this early stage in the proceedings, before discovery has even
11 commenced, granting Defendants' motion for summary judgment would be
12 functionally the same as dismissing the FTC's Complaint with prejudice. As noted
13 above, the Ninth Circuit has held that less drastic alternatives should be considered
14 before dismissing a case with prejudice. *Bautista*, 216 F.3d at 841. In any event,
15 Defendants cannot meet the standard for summary judgment: Looking at the facts
16 here in the light most favorable to the non-moving party, there are clearly a host of
17 genuine issues for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*, 475 U.S.

18
19
20
21
22
23 out Las Vegas, Nevada, as his business address. See Declaration of Tonya Hetzler,
24 Attachment 1 (docket no. 4-26) and Declaration Sharon Jackson, Attachment 1
25 (docket no. 4-27), both attached to the Memorandum in support of the FTC's TRO
26 Application. These letters, properly authenticated by the consumer protection
27 agencies that received them, are admissible under the residual hearsay exception,
28 Fed. R. Ev. 807. *FTC v. Cyberspace.com*, 2002 U.S. Dist. LEXIS 25565 (W.D.
Wash. 2002), *aff'd on other grounds*, 453 F.3d 1196 (9th Cir. 2006), at *13 (letters
and emails from consumer complainants admitted for the truth of the matter pursuant
to the "residual exception" to the hearsay rules, Fed. R. Ev. 807).

1 574, 585-87, 106 S.Ct. 1348, 1355-56, (1986).⁶⁴ This should be evident from the
2 lengthy, contested evidentiary hearing held on the FTC's PI application on June 12.

3 Defendants' "motion for summary judgment" is an *in haec verba* repetition of
4 the arguments made in their Opposition to the FTC's TRO Application,⁶⁵ and
5 incorporates by reference the exhibits to that Opposition. In response, the
6 Commission respectfully requests that the Court accept the FTC's Supplemental
7 Brief in support of its PI application⁶⁶ and the evidentiary material cited therein as an
8 opposition to Defendants' motion for summary judgment. The Supplemental Brief
9 sets out the Commission's legal and factual case in detail and responds to the
10 arguments made in the Defendants' TRO Opposition and again here. In capsule
11 form, the FTC's responses to Defendants' arguments are as follows:

12 *Defendants' "verification" transcripts do not accurately reflect the entirety of*
13 *their deceptive telemarketing calls to consumers.* Defendants offer transcripts of
14

15 ⁶⁴ Defendants' citation to *Newman v. County of Orange*, 457 F.3d 991 (9th
16 Cir. 2006), *see* Motion, p. 6, is unavailing. *Newman* was an appeal of a summary
17 judgment against a plaintiff who had sued a police department for malicious
18 prosecution arising from the plaintiff's arrest. *Id.* at 992-93. The district court held
19 that the plaintiff could not rely merely on his own "conclusory allegations" to
20 overcome the presumption that the prosecutor exercised independent judgment in
21 charging the plaintiff criminally, and the Ninth Circuit agreed. *Id.* at 994-95. By
22 marked contrast, the FTC has produced copious consumer testimony and
23 documentary evidence to support the allegations in its Complaint here. This more
24 than satisfies the requirement in Rule 56(e) that the non-moving party must "set forth
25 specific facts showing there is a genuine issue for trial." *Matsushita*, 475 U.S. at
26 586-87, 106 S. Ct. at 1356. *Newman* is thus entirely inapposite.

27 ⁶⁵ *Compare* Motion, pp. 7-11, *with* Opposition to Application for
28 Temporary Restraining Order, Asset Freeze, Order to Show Cause, and Other
Equitable Relief (docket no. 14), pp. 5-11.

⁶⁶ Supplemental Brief in Support of FTC's Application for Preliminary
Injunction and Other Equitable Relief Filed June 6, 2008 (docket no. 27)
("Supplemental Brief").

1 unauthenticated recordings of the FTC's consumer declarants for the proposition that
2 these recordings evince informed consent for all consumers. Motion, pp. 7-9. At the
3 PI hearing and in support of its pleadings, the FTC has offered credible consumer
4 testimony showing that the recordings do not contain the critical initial portions of
5 Defendants' telemarketing calls that contain many misrepresentations. *See*
6 Supplemental Brief, pp. 9-11. Defendants admit as much: "These recordings
7 completely *contradict* the assertions made in the Affidavits provided by the FTC."
8 *Id.* at 9 (emphasis added). Furthermore, the FTC has shown that the Defendants
9 have not met their burden to show even that the tapes presented are accurate
10 representations of the portions of the telemarketing calls that were recorded. *See*
11 Supplemental Brief, pp. 16-18. There are genuine issues of material facts relating to
12 the deceptive nature of Defendants' telemarketing calls, and the "verification" tapes
13 only illustrate the factual dispute. As these tapes form the crux of Defendants'
14 motion for summary judgment, that motion should be denied.

15 *The FTC need not show that every consumer was deceived for Defendants to*
16 *be held liable for violating the FTC Act and the TSR.* Defendants argue that because
17 some 28, 260 consumers cancelled their orders with Defendants, no consumers could
18 have been deceived. Motion, pp. 10-11.⁶⁷ This statistic, even if accurate, cannot
19 overcome the testimony by consumers who report actual deception, *id.* at 9-10, 13-
20 14. It also tells us nothing about how many consumers were actually deceived. *See*
21 *Pantron I*, 33 F.3d at 1098 (a "low refund rate may not represent satisfaction").
22 Furthermore, if Defendants' telemarketing calls can be construed in a deceptive
23 manner by even a significant minority of consumers, then Defendants have violated

24
25 ⁶⁷ Defendants also seem to argue that because they use a mechanical
26 system for billing consumers, no deception could have occurred because consumers
27 had the opportunity to cancel. *See* Motion, p. 11, lines 8-16. There is irrelevant, as it
28 ignores the consumer testimony that Defendants' telemarketers misrepresented that
consumers would not have to cancel because they were receiving a free item with no
obligation. *See* Supplemental Brief, p. 10, note 30.

1 the FTC Act and the TSR. *Id.* at 12. The FTC has raised genuine issues of triable
2 fact relating to the nature and extent of Defendants' telemarketing
3 misrepresentations, so the motion for summary judgment should be denied on this
4 basis.

5 *Even if some consumers used Defendants' products and services or received*
6 *refunds, this does not mean that Defendants did not violate the FTC Act and the TSR.*

7 Defendants suggest that because some 266 consumers paid to redeem the "free"
8 vacation voucher sent to them and because a handful of consumers wrote favorable
9 letters about Defendants' diet pills, no genuine issue of triable fact exists here.

10 Motion, p. 11, lines 17-20. Deception can occur, however, even if some consumers
11 use the products deceptively sold. Supplemental Brief, pp. 8-9. In fact, low usage
12 rates like the tiny number of consumers who Defendants' claim took advantage of
13 their travel offer are *indicative* of deception. *Id.* Defendants' arguments that they
14 gave some consumers refunds and that they responded quickly to consumer phone
15 calls, Motion pp. 9-11, are similarly unavailing. The Ninth Circuit has held that
16 providing refunds to consumers is not a defense to FTC Act allegations. *Pantron I*,
17 33 F.3d at 1103. Thus, even if Defendants did so, offering refunds or proving
18 customer service cannot show there are no issues of triable fact here. Defendants
19 motion for summary judgment should be denied because the FTC has shown there
20 are triable issues as to Defendants' misrepresentations and other violations of the
21 FTC Act and the TSR.


1 **V. Conclusion**

2 For the foregoing reasons, the FTC respectfully requests that the Court deny
3 Defendants' motions to dismiss and, in the alternative, for summary judgment.
4

5 Respectfully submitted,

6 WILLIAM BLUMENTHAL
7 General Counsel

8
9 Dated: July 1, 2008



10 Kenneth H. Abbe
11 Eric D. Edmondson
12 Federal Trade Commission
13 901 Market Street, Suite 570
14 San Francisco, CA 94103
15 Telephone: (415) 848-5182, -5170
16 Facsimile: (415) 848-5184

17
18
19
20
21
22
23
24
25
26
27
28
Attorneys for Plaintiff FTC

CERTIFICATE OF SERVICE

I, Kenneth H. Abbe, hereby certify that on this 1st day of July, 2008, service of the foregoing **PLAINTIFF FTC'S OPPOSITION TO DEFENDANT JAMES SLEMBOSKI AND CITY WEST ADVANTAGE'S MOTION TO DISMISS COMPLAINT OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT** was made via the Case Management/Electronic Case Filing System of the United States District Court, District of Nevada.


Kenneth H. Abbe

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28