**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

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| **FEDERAL TRADE COMMISSION,** | ) | **1:17-cv-03094-WMR** |
| **v.** | ) | |
| **HORNBEAM SPECIAL SITUATIONS, LLC, *et al.*** | ) | |

**PLAINTIFF FEDERAL TRADE COMMISSION'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON LIABILITY AGAINST DEFENDANT JAMES McCARTER**

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Pursuant to Fed. R. Civ. P. 56, Plaintiff Federal Trade Commission ("FTC") asks the Court to enter summary judgment on liability against Defendant James McCarter ("Jim McCarter").

## I. THE DISCOUNT CLUB SCHEME

### A. The Hornbeam Defendants Pursued the Discount Club Business.

Defendants Hornbeam Special Situations, LLC, Cardinal Points Holdings, LLC, Cardinal Points Management, LLC, and Gyroscope Management Holdings, LLC (collectively, the "Hornbeam Entities" or the "Company") [1], purchased and ran a lead generation and online coupon club scheme ("Discount Club") started by EDP.[2] [PX 43 at 1-22; PX 1238 at 10; PX 1239 at 1]. The Company's members and Management Committee (the "Board") controlled operations. [PX 515 at ¶ 6.2]. Board membership included three of the Company's largest shareholders: Jim McCarter, Defendant Earl G.

[1] Hornbeam Special Situations, LLC ("Hornbeam"), owns 100% of Cardinal Points Holdings, LLC, which owns 100% of Cardinal Points Management, LLC (d/b/a Clear Compass Digital Group) ("Clear Compass"), and Gyroscope Management Holdings, LLC ("Gyroscope"). Hornbeam's principal place of business was in Georgia, while Clear Compass' and Gyroscope's principal places of business were in California. [PX 43 at 5; PX 1238 at 10].

[2] The EDP Defendants include EDebitPay, LLC, clickXchange Media, LLC, and Platinum Online Group (collectively, "EDP"), and individuals Defendants William R. Wilson and Dale Paul Cleveland.

Robinson, and Jerry L. Robinson.[3] [PX 515 at ¶ 6.2]. The Company's President, first Defendant Keith Merrill[4] then, from January 2016, Defendant Mark Ward, also sat on the Board.[5] [PX 515 at ¶ 6.2].

As established in the FTC's concurrently filed EDP summary judgment briefing, EDP started and ran a costly Discount Club[6] that charged consumers for a product they did not purchase. In mid-2013, Jerry Robinson and Earl Robinson, among others, began courting EDP, seeking to acquire and continue running the Discount Club scheme. [*See, e.g.,* PX 61; PX 62; PX 504]. By the time the purchase closed in early October 2013, and after months of flyspecking the business and EDP's books, it was clear what the Hornbeam Defendants were buying: a Discount Club scheme that generated steady revenues by billing consumers without authorization, which unsurprisingly has had a history of legal actions, extraordinary bank return rates, and ongoing consumer complaints. [PX 87 at 1; PX 449-450; PX 453; PX 510-511; PX 587-588; PX 590-594;

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[3] The Court substituted the Robinson Estate for Jerry Robinson after his death. [Dkt. 132].

[4] Defendant Keith Merrill settled the claims against him through a Stipulated Order entered in January 2018. *See* Stipulated Order. [Dkt. 105].

[5] The Hornbeam Entities, Jerry L. Robinson, and Defendants Jim McCarter, Earl Robinson, and Mark Ward, are collectively referred to as the Hornbeam Defendants.

[6] The Discount Club itself was a membership program to obtain online coupons for restaurants, travel, and retail offers, supplied by Access VG, LLC ("Access VG") [PX 43 at 6-7; PX 909-911].

PX 595 ("75% charge backs in one of their product lines is alarming and signals additional risk or exposure"); PX 693; PX 1240-1241; E. Robinson Dep. 108:7-9].[7]

**B. The Scheme Continued Unchanged.**

In October 2013, the Hornbeam Defendants took over every critical component of the Discount Club scheme, including: the directory of consumers "enrolled" in the Discount Club, along with the sensitive financial information that the Company could use to continue debiting them; the employees who ran the business; the business premises from which the scheme was operated; and the websites, telemarketing scripts, call centers, coupon fulfillment company, payment processor (Defendant iStream Financial Services, Inc. ("iStream")), and processing bank used to effectuate the scheme. [PX 19; PX 43 at 5-6, 28-33, 51-62; PX 111; PX 134; PX 173; PX 455 at 13; PX 606 at 2-3; PX 685 at 1; PX 686; PX 712-714; PX 715 at ¶ 7-10; PX 909-911; PX 967; PX 1100 at 1, 3, and 8]. Picking up where EDP left off, the Company continued operating dozens of websites peddling various loan offers, such as www.boomcashnow.com and www.cash-in-onehour.com. [PX 111; PX 134; PX 715 at ¶ 7-10; PX 712-714; PX 967]. Tens of thousands of consumers – scattered across the United States – submitted *loan*

[7] Anticipating government action to contain the Discount Club scheme, the Hornbeam Entities' owners attempted to design the Company's structure to shield themselves from liability. [PX 453; PX 589-590; PX 599; PX 1243 at 16-18; E. Robinson 31:15-35:13; 87:1-90:24; 119:21-120:10].

applications through the sites, turning over sensitive information to the Company, including their bank account numbers. [PX 715 at ¶ 11-12; PX 1099].[8]

Despite its promises, the Company did not issue loans, relying instead on a "ping tree" to hawk loan leads to third parties.[9] [PX 715 at ¶ 15; PX 961; PX 967 at 2]. The bulk of the Company's revenues came from leads that fell to the bottom of this ping tree – leads that third-party lenders found too worthless to purchase. [PX 132-133; PX 164 at 1 ("We market (and our marketers usually market) to subprime consumers, because that is the data we have from cash advance campaign and flows."); PX 529 at 1; PX 485 at 1 (Discount Club equals "75% of our revenue . . . ."); PX 555; PX 710 at 17 (Saving Makes Money "currently offered to leads not meeting bottom tier loans."); PX 961 at 1-2; PX 967; J. McCarter Dep. 134:17-19]. Using the sensitive consumer data it collected from the undesirable leads, the Company redirected those consumers to Discount Club application websites, often pre-filling some, or all, of the data fields, and charging consumers for memberships without authorization. [PX 321 at 2; PX 963; PX 1245; PX 1246 at 1 ("We take subprime data and redirect it to a coupon program where we charge $87 up front and $19.99 monthly recurring."); PX 1247; PX 1248 at 1 (Leads sent to

[8] The Company also bought "leads" containing this information. [PX 715 at ¶ 9].
[9] A "ping tree" is a lead generation technique that sends loan applications to lenders for bids. The bottom of the "ping tree" represents low or no-bids. [M. Baker Dep. 36:8-40:11].

Discount Club are "'poor credit' leads . . . [that should have] as many fields pre-popped as possible."); PX 1249 at 1-2; M. Baker Dep. 94:21-97:11]. Confused consumers thought they were still applying for loans, but were signed up for the Discount Club instead. [PX 609 ("[T]he scam is due to consumer confusion . . . ."); PX 661; PX 710 at 19 (Discount Club is "misleading . . . . high rate of chargebacks and refunds"); E. Robinson Dep. 220:2-20; *see also* Section C.1., below]. The Company employed similar practices as it continued outbound telemarketing of the Discount Club until July 2015, using the same foreign call center as EDP to enroll unsuspecting consumers. [PX 176; PX 685 at 1 (Telemarketing call center is "a very aggressive shop that probably just skirts around being compliant . . . ."); PX 686; PX 702; K. Merrill Dep. at 113:4-19].

In short, when they bought the scheme from EDP, the Hornbeam Defendants did not "intend to make any significant changes to the business," and continued funneling unsold leads to the Discount Club, registering consumers without their permission. [PX 606 at 2; PX 188 at 2 ("New name SAME product & company")]. Despite encouragement from the Company's first President, Keith Merrill, "to wind down the discount club program and 'get out' of the payday loan lead generation business," the Company continued the scheme uninterrupted. [PX 715 at ¶ 64; PX 606 at 2-3]. As a result, from October 2013 through May 2016, over 90,420 consumers fell victim to the Hornbeam Defendants, losing at least $16,220,921. [PX 1098 at ¶ 19; PX 1186 at ¶ 11].

### C. The Company Continued Unauthorized Debits of Consumer Accounts.

The Company did little to nothing to address the voluminous complaints from incensed consumers, perpetually massive numbers of returns from banks, and non-existent usage of the Discount Club, known as "Saving Makes Money."[10] Instead, they ran the scheme as long as possible to extract every dollar they could from consumers. Whether the Company enrolled consumers in the Discount Club using information harvested from the loan-finding websites or through telemarketing, the result was the same: the Company continued charging consumers' bank accounts without authorization.

#### 1. Ever Mounting Complaints About the Discount Club.

Thousands of consumers complained to the Company about unauthorized debits to their bank accounts, reporting that they had no idea how or why they were enrolled in the Discount Club. [*See, e.g.,* PX 1192; PX 1225 at ¶ 17]. Amazingly, over 75% of customer service calls to the Company came from consumers demanding cancellations or refunds due to unauthorized charges.[11] [PX 202 at 1]. To handle the deluge of angry consumers, the Company designed meticulously crafted call script responses.[12] [*See, e.g.,* PX 185; PX 188]. The Company's customer service representatives' ("CSRs") training materials

[10] "Saving Makes Money," or "SMM," debuted after the Company took over. [PX 43].
[11] The Company declined most refund requests. [*See, e.g.,* PX 202].
[12] These "rebuttal" scripts focused on disputing consumers' complaints of lack of authorization. [*See, e.g.,* PX 185 at 31; PX 188 at 34-35; V. Murillo Dep. 129:18-21].

openly recognized that consumer calls typically proceeded in "ONE OF TWO DIRECTIONS for support . . . WANT MY MONEY BACK or DID NOT DO IT . . . ." [PX 194 at 14]. The Company trained CSRs to listen for three common words when consumers complained about the latter: "FRAUD, SCAM, [and] ILLEGAL." [*Id*.].

These "two directions" correlate with an examination of tens of thousands of recorded calls produced by the Company, and reveal just how angry and frustrated consumers were after they discovered their unauthorized enrollment in the Discount Club. The Company's CSRs received approximately 57,571 calls discussing the Discount Clubs. [PX 1225 at ¶ 17; *see also* PX 1189]. Approximately 81% of those involved complaints about unauthorized charges. [PX 1225 at ¶ 5(b)]. Many of these recordings contained expressions of consumer frustration and anger. [PX 1189].

Complaints also flowed into the Company through other channels, including the Company's own website, the coupon vendor (Access VG), the Better Business Bureau ("BBB"), and State Attorneys General. [*See, e.g.,* PX 198-199; PX 206; PX 209; PX 212; PX 220; PX 222; PX 225; PX 237; PX 241; PX 246-248; PX 609; PX 611; PX 614-659; PX 925-928; PX 1192]. The Company's management was aware of the complaints. [PX 715 at ¶ 57; E. Robinson Dep. 128:5-22; 167:19-168:1; 185:22-187:11; M. Ward Dep. 84:2-85:8]. Tellingly, consumers rarely, if ever, called about problems using the coupons, their quality, or any concerns about, or interest in, actually using the Discount Club. [PX

1250 at 1; PX 1251 at 1]. Indeed, the Company's own product testing of versions of the program – not married to payday loan applications – revealed that consumers saw no value in the offer and did not want the club when the offer was not based on trickery. [PX 562 at 1; PX 566 at 1-2; PX 688 at 1 (Discount Club was "not sexy for payday customers if they know it's something they have to pay for."); PX 715 at ¶ 63; K. Merrill Dep. 94:20-96:25; M. Ward Dep. 135:6-140:18, 158:5-162:22].

The Company also enrolled consumers through telemarketing, although it did not control the telemarketing calls themselves, or even know the contents of the majority of such calls, other than that the "front end" involved "trying to close a loan lead." [PX 667]. In fact, the Company did not even obtain recordings of all of the "back ends" of the telemarketing calls, only random samples of the recordings. [PX 667; E. Robinson Dep. 240:8-242:11]. Nonetheless, the Company knew the telemarketing calls resulted in "a very high percentage of" consumers complaining that "they didn't know what they were ordering, thought they were receiving a payday loan, [etc.]," raising serious concerns about what was happening to "clos[e] SMM sales" on the calls. [PX 667; *see also* PX 613 at 1 ("Should we discontinue marketing the product to consumers that are turned down for payday loans?"); E. Robinson Dep. 240:8-241:20 (recordings were "spliced" and "things . . . were missing.")].

**2. The Discount Club's Exorbitant Bank Return Rates.**

The significance of the Discount Club's abysmally high return rates was glaringly apparent to the Company. [*See, e.g.,* PX 129 at 1-3; PX 141 at 1; PX 164 at 1 ("We need to reduce returns, which appear inherent in the online offer and flow. . . .")]. Indeed, in September 2013, before the Company's purchase from EDP was complete, EDP controller Martha Leon noted, "[o]ur direct sales membership is a high-return business, something that banks usually have a big problem with, because they believe it implies fraud . . . . Our FTC and Class Action history does not help this impression." [PX 87 at 1]. Earl Robinson had similar "concerns re the significant (ie 36,000) number of annual refund requests" related to the scheme, 3,000 of which poured into the company every month. [PX 612 at 1]. He conceded that "[t]he large number of refund requests (vs the actual number of new and recurring SMM clients) gives the BBB, Attorneys General and our friends who shut down the previous owners lots of data points re one of the 'gaps' in our strategy." [*Id.*; *see also* PX 613 at 1 ("Does 36,000 annual customer inquiries signal that something is fundamentally wrong with the product or being overly aggressively marketed by Ennovate?")]. As Jim McCarter observed in late 2014, the Company's return rates were "unheard of," dismissing return rates of "55-60%" as still too high. [PX 531; J. McCarter Dep. 216:6-221:19; *see also* PX 129 at 1].

From October 2013 through May 2016, the Company attempted to debit 424,314 consumer accounts for initial Discount Club fees, but 324,439 of those attempts – *more than 76%* – were returned by consumers' banks. [PX 18]. During that 32-month period, the monthly return rate was never less than 74% for any initial transaction "location" – shorthand used for the Discount Club.[13] [PX 18]. By comparison, return rates for legitimate businesses typically do not exceed 1%. [PX 1097 at ¶ 68-72].

These excessive return rates remained a concern to the Company, particularly because, from the outset, it was apparent the returns jeopardized the Company's relationship with the processing bank for the Discount Club, Westside Bank, and hampered the Company's ability to find a replacement bank. [PX 67; PX 71-75; PX 87; PX 113; PX 129; PX 151; PX 164; PX 168; PX 479 at 2 ("High returns jeopardize the banks [sic] position."); PX 715 at ¶ 58]. For example, in early 2014, Jerry Robinson and Jim McCarter traveled to Hiram, Georgia to assuage Westside Bank's concerns about the Discount Club business and its return rates. [PX 64; PX 112]. On behalf of the other owners, Jerry Robinson and Jim McCarter told the bank that they were "aware of the high return rates" but exaggerated the "stringent filtering and account verification" the

[13] Telemarketing transactions had even higher return rates than the unauthorized online enrollments. [*See, e.g.,* PX 1252 at 1; PX 702 ("[H]igh return rates for the phone campaign . . . .")]

Company was purportedly implementing. [PX 112 at 7].

### 3. Consumers Did Not Use the Discount Club.

Further proving they never agreed to Discount Club enrollment, consumers essentially never used the coupons. [*See, e.g.,* PX 670 (Discount Club usage "quite low")]. From October 2013 through May 2016, the Company enrolled approximately 90,420 consumers in the Discount Club. [PX 1098 at ¶ 19]. According to the coupon vendor, Access VG, during the same period, Discount Club members accessed fewer than 500 coupons: 31 from October through December 2013; 76 in 2014; 246 in 2015; and 102 from January through May 2016, meaning 99.95% of supposed members never used the Discount Club. [PX 894-895; PX 1098 at ¶ 19; Access Dep., Peterson at 62:5-68:13; 70:15-71:1].

While usage data was available to the Company upon request, it only requested the information once, in mid-2014. [PX 226-228; PX 230; PX 486; PX 489; PX 909-911; PX 914; Access Dep., Bentley 72:21-76:19]. Just once was enough, however, with Access VG reporting that from January through June 2014, members visited the Discount Club portal a paltry 3,946 times, resulting in just 49 coupon downloads during the same period. [PX 230; PX 904-906; Access Dep., Peterson 97:7-110:17]. Matt McCarter, an Analyst for the Company, fittingly described that usage as "shockingly low." [PX 490 at 1]. He explained, "the majority of people buy it, login once, and forget about it for on average

3.5 months before canceling." [*Id*.; *see also* PX 139 at 17; PX 229 at 10; PX 491 at 4]. His father, Jim McCarter, was more outspoken, noting to his Hornbeam colleagues that the Company was "[n]ot really selling anything," and that the Discount Club scheme was nothing more than "a shitty coupon product" that consumers did not use. [PX 529 at 1; J. McCarter Dep., 199:25-203:18]. Although the Company never asked for another update, consumers' non-existent usage of the Discount Club persisted. [*See* PX 894-895].

**4. The Hornbeam Defendants' Business Was Illegitimate.**

The Hornbeam Defendants did little to address the flood of consumer complaints, the Discount Club's "unheard of" return rates, and consumers' disturbingly low usage of the program. What little action they did take revealed that the Discount Club scheme was nothing more than a common scam. [PX 164 at 1 ("We have not been able, so far, to think of a recurring membership that would afford the marketing fees our industry expects, at the same time as having low return rates")].

Rather than reducing actual return rates by stopping unauthorized debits, the Company implemented the "Loyalty Leads" program under which it paid itself through thousands of micro RCC transactions artificially to lower its return rate. [PX 24; PX 44; PX 68; PX 124-126; PX 137; PX 142]. The number of actual returns was so high, however, that even when the Company "blended" the "Loyalty Leads" transactions into its Discount Club transactions, return rates remained exorbitant. [PX 104; PX 113-115;

PX 121; PX 129-130; PX 137; PX 171]. Despite this ruse, and faced with unyieldingly high return rates, the Company was forced to pony up an additional $150,000 – which Jim McCarter personally loaned to the Company – to keep Westside Bank processing the Discount Club transactions. [*See, e.g.,* PX 166; PX 494; PX 498; PX 532].

The Company actually obtained a legal review of the Discount Club website, and then promptly ignored that advice when it realized that implementing it would "affect conversions," in other words, revenues. [PX 215; PX 219; PX 696; PX 697 at 1 (Proposed changes "will **drastically** [affect] revenue. . . .")]. Specifically, in mid-2014, outside counsel strongly recommended separating the loan offer from the Discount Club enrollment, recognizing the confusion created by comingling the two offers on a single webpage. [PX 217 at 5 ("Given that the primary purpose of the website is the sale of coupon benefits, the site should be redesigned with that offer as the focus . . . . [the] loan brokering offer" should come after consumer agrees to Discount Club)]. Instead, counsel advised that the loan offer should appear only after the consumer had agreed to enroll in the Discount Club. [*Id.*]. Despite rejecting counsel's advice, the Company actually did develop marketing that did not include the loan offer – which they called the "green" version – but, as expected, that approach failed. [PX 325; K. Merrill Dep. 94:20-96:25]. The Company knew that the Discount Club was "geared for decline traffic [from a loan offer] as a pre-fill." [PX 321 at 3]. Otherwise, "the offer honestly tanks!" [*Id.*].

### D. Jim McCarter Was Not A "Silent Partner."

From the outset, Jim McCarter did not want to be a "silent partner" in the Discount Club scheme – nor was he. [PX 518]. After the EDP purchase was complete, McCarter visited the Company's California offices to learn more about how the scheme operated. [PX 516 ("I now understand what we do, and how we do it . . . ."); M. Leon Dep. 174:5-175:7; V. Murillo Dep. 220:18-24, 249:21-250:15]. From his perch on the Board, McCarter received constant updates on the Company's business and flexed his influence to weigh in on staffing decisions and Company operations. [*See, e.g.,* PX 101; PX 109; PX 140; PX 310; PX 449; PX 467; PX 484; PX 491; PX 505; PX 520; PX 523; PX 525-526; PX 528; PX 536; PX 541; PX 543; PX 580-581; PX 704; PX 1255; PX 1267-1271; M. Leon Dep. 222:6-223:2; J. McCarter Dep. 192:18-194:1]. McCarter also routinely received reports on the Company's finances, including breakdowns of transactions and returns. [*See, e.g.,* PX 101; PX 109; PX 129; PX 140; PX 161; PX 467; PX 492; PX 520; PX 522-525; PX 531; PX 580-581; PX 1256; M. Leon Dep. 202:11-203:2].

Likewise, the Company kept Jim McCarter informed about significant complaints about the business. [*See* PX 248; PX 530]. He also realized that the Discount Club's essentially non-existent usage made it a "shitty coupon product." [PX 529 at 1]. As Matt McCarter bluntly told his father: "[w]e need to realize that the coupon program is unquestionably a product nobody uses. The data is overwhelming. * * * It's 75% of our

revenue so we can't abandon it." [PX 491 at 4; *see also* PX 528 at 5; PX 529 at 1; J. McCarter Dep. 18:7-19:4, 132:21-133:16, 196:22-199:15, 202:25-203:18].

Despite knowing the Discount Club was nothing more than a grift on desperate, "subprime" consumers, McCarter persisted, actively participating in prolonging the scheme and aiding the Company's search for a replacement for Westside Bank when it sought to dump the business. [PX 160; PX 161; PX 167; PX 169; PX 497; PX 533-534; PX 535; PX 536; PX 853; PX 1246 at 1; PX 1257-1258]. Even more directly, he provided $150,000 for the express purpose of keeping the Discount Club scheme going. [*See* PX 532]. As McCarter bragged, "if I did not put that money in, we could not continue all of our day to day business." [PX 499 at 1].

## II. ARGUMENT

The "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To avoid summary judgment, the nonmoving party must make "enough of a showing that the jury could reasonably find for that party." *Gilliard v. Dep't. of Corrections*, 500 Fed. Appx. 860, 863 (11th Cir. 2012) (citation omitted).

### A. The Hornbeam Entities Violated the FTC Act Through Their Respective Operation of the Discount Club.

The undisputed facts in this case – the numerous complaints about unauthorized charges, the extraordinarily high return rates, the non-existent usage rates, among other

facts – demonstrate that the Discount Club scheme debited consumers' bank accounts without authorization. *See FTC v. Cyberspace.Com LLC,* 453 F.3d 1196, 1201 (9th Cir. 2006) (finding "reasonable to infer" lack of consumer authorization from less than one percent use of defendants' service); *FTC v. Direct Benefits Grp., LLC*, No. 6:11-CV-1186-ORL-28, 2013 WL 3771322, at *8-*11, *14 (M.D. Fla. July 18, 2013) (citing return rates of 54.96% to 79.86%, consumer complaints, and lack of usage in finding defendants charged loan-seeking consumers for discount program without authorization); *FTC v. Crescent Pub. Grp., Inc.,* 129 F. Supp. 2d 311, 314–15 (S.D.N.Y. 2001) (finding FTC likely to establish use of misleading user flow constituted unauthorized debiting); *FTC v. Windward Mktg., Inc.*, No. CIV. A. 1:96-CV-615F, 1997 WL 33642380, at *12 (N.D. Ga. Sept. 30, 1997) (citing 40% return rate, consumer complaints, and bank complaints in finding defendants engaged in unauthorized debiting). Here, the undisputed facts show the Hornbeam Entities ran the Discount Club scheme as a common enterprise: they shared office space, employees, owners, profits, and goals, namely sending undesirable loan leads to the Discount Club. *See Direct Benefits Grp.*, 2013 WL 3771322, at *19 (finding common enterprise between company that enrolled loan-seeking consumers into discount program and company generating those leads). Accordingly, the Hornbeam

Entities are liable on Counts I, II, and IV to VI for the violations caused by the Discount Club scheme during that time period.[14] *See FTC v. Lanier Law, LLC*, 715 F. App'x 970, 979 (11th Cir. 2017) ("[A] corporate entity can be held liable for the conduct of other entities where the structure, organization, and pattern of a business venture reveal a common enterprise or a maze of integrated business entities."). They are thus jointly and severally liable for the violations below.

**1. The Discount Club Scheme Constituted an Unfair Act or Practice in Violation of Section 5 (Count I).**

Section 5 of the FTC Act prohibits "unfair" acts or practices in commerce. 15 U.S.C. § 45(a)(1). An act or practice is unfair if it (1) causes or is likely to cause substantial injury, (2) that consumers could not reasonably avoid, (3) the injury is not outweighed by countervailing benefits to consumers or competition, and (4) the unfairness of the act or practice is "grounded in well-established legal policy." *LabMD, Inc. v. FTC,* 894 F.3d 1221, 1229 (11th Cir. 2018) (citing 15 U.S.C. § 45(n)). The Discount Club scheme's unauthorized debiting easily meets all four elements.

[14] Default has been entered against each of the Hornbeam Entities. The FTC intends to move for default judgment against them following the Court's decision on the merits. *See Drill S., Inc. v. Int'l Fid. Ins. Co.*, 234 F.3d 1232, 1237 n.8 (11th Cir. 2000) ("incongruous" to enter default judgment prior to decision on merits if there is "risk of inconsistent adjudications").

First, the Discount Club scheme caused "substantial injury" by debiting $16,220,921 from more than 90,420 consumers without their authorization. *See FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010) ("An act or practice can cause 'substantial injury' by doing a 'small harm to a large number of people…'") (citation omitted).

Second, consumers could not reasonably avoid the Discount Club charges because they "never agreed to purchase defendants' products in the first place" and therefore "had no reason to scrutinize" their bank account for the fraudulent charges. *See FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1004 (N.D. Cal. 2010), *aff'd*, 475 F. App'x 106 (9th Cir. 2012). Nor does the ability to seek a bank return, or even a refund, make the unauthorized charges reasonably avoidable. *Neovi, Inc.,* 604 F.3d at 1158 ("Regardless of whether a bank eventually restored consumers' money, the consumer suffered unavoidable injuries," including loss of time, effort, and access to funds while waiting for refund); *see also Inc21.com Corp.*, 745 F. Supp. 2d at 1004-05 (refusing to "blame unsuspecting consumers for failing to detect and dispute unauthorized billing activity" and noting that, "[a]s other courts have wisely concluded, the burden should not be placed on defrauded consumers to avoid charges that were never authorized to begin with"); *Direct Benefits Grp.*, 2013 WL 3771322, at *14 ("[R]efunds… do[] not render the injury avoidable."). "Moreover, the conclusion that consumers could not reasonably

avoid the injury is supported by the fact that so many consumers sought cancellation of payment and charge-backs…, complained to state and federal authorities, and sought refunds from Defendant." *FTC v. Alcoholism Cure Corp*., 2011 WL 13137951, at *55 (M.D. Fla. Sept. 16, 2011), *aff'd sub nom. FTC v. Krotzer*, 2013 WL 7860383 (11th Cir. May 3, 2013).

Third, there was no countervailing benefit to consumers or competition from the Discount Club's unauthorized debiting. *See FTC v. JK Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1203 (C.D. Cal. 2000) (unauthorized charging lacks "any benefits to consumers or competition"); *Windward Mktg., Ltd.*, 1997 WL 33642380, at *11 (N.D. Ga. Sept. 30, 1997) (same). Indeed, almost the entire universe of charged consumers never used the Discount Club.

Finally, the unfairness of debiting consumers' bank accounts for Discount Club charges that they never authorized – *i.e.*, stealing – is grounded in well-established legal policy. *See, e.g., Direct Benefits Grp.,* 2013 WL 3771322, at *8-*11, *14 (unauthorized debiting is unfair practice); *Windward Mktg.*, 1997 WL 33642380, at *12 (same).

**2. The Discount Club Scheme's Operation Constituted Deceptive Acts or Practices in Violation of Section 5 (Count II).**

The Discount Club scheme also violated the FTC Act's prohibition against "deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). Deception occurs when: (1) defendants make a representation or omission; (2) that is likely to

mislead consumers acting reasonably; and (3) that representation or omission is material to consumers' decisions. *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003). The undisputed facts show that the Discount Club scheme meets all three elements.

First, throughout the Discount Club's existence, its customer service representatives repeatedly made false statements to consumers who complained about unauthorized charges that those charges were, in fact, authorized.

Second, these representations were likely to mislead consumers because they were false. *FTC v. Nat'l Urological Grp.*, 645 F. Supp. 2d 1167, 1190 (N.D. Ga. 2008). The charges were not authorized as asserted by the customer service representatives because the Discount Club scheme debited consumer bank accounts without authorization.

Third, the misrepresentations were material. A claim is material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *FTC v. Cyberspace.com*, 453 F.3d 1196, 1201 (9th Cir. 2006) (citations omitted); *see also Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992) (same). This definition is met here because the representatives stated the misrepresentations to discredit consumers complaining about unauthorized charges and dissuade them from pursuing refunds. Express claims, such as those made by the Discount Club customer service representatives, "are presumed to be material." *FTC v.*

*Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1267 (S.D. Fla. 2007); *FTC v. NPB Advertising, Inc.*, 218 F. Supp. 3d 1352, 1358 (M.D. Fla. 2016).

**3. The Discount Club Scheme Violated ROSCA (Count IV).**

The Discount Club scheme is subject to ROSCA because it sold memberships on the Internet through a negative option feature that charged a recurring monthly fee until the consumer affirmatively canceled. 15 U.S.C. § 8403. A violation of ROSCA is a violation of the Section 5(a) of the FTC Act. *Id.* §§ 8404, 57a(d)(3).

The Discount Club scheme violated ROSCA in two ways. First, by debiting consumers' bank accounts without authorization, the Discount Club scheme by definition failed to obtain the required "express informed consent." *Id.* § 8403(2). Second, the Discount Club obtained the consumer's billing information before "disclos[ing] all material terms of the transaction." *Id.* § 8403(2). In fact, the Hornbeam Entities obtained consumers' bank account information either on their loan-finding websites or from third parties running loan-finding websites, prior to the consumer completing any form on the Discount Club landing page – a *per se* violation of ROSCA.

**4. The Discount Club Scheme Violated the TSR (Counts V & VI).**

As a threshold matter, the Hornbeam Entities are subject to the Telemarketing Sales Rule ("TSR") because they are either "telemarketers" or "sellers" whom the Rule regulates. 16 C.F.R. §§ 310.2(dd), (ff), and (gg). The undisputed facts show that from

October 2013 through June 2015, the Hornbeam Defendants used a foreign call center to "initiate[] telephone calls" to consumers seeking loans to sell the Discount Club.[15] Therefore, they are "telemarketers" subject to the TSR. 16 C.F.R. § 310.2 (ff). The defendants also "provide[d] goods or services to the customer in exchange for consideration," namely the Discount Club membership for the initial and recurring charges, and are therefore "sellers" subject to the TSR. 16 C.F.R. § 310.2 (dd). A violation of the TSR is a violation of Section 5(a) of the FTC Act. 15 U.S.C. §§ 6102(c), 57a(d)(3).

The Discount Club scheme violated the TSR in two ways. First, the scheme violated the TSR's prohibition against submitting a consumer's billing information for payment without the consumer's "express informed consent." 16 C.F.R. §§ 310.4(a)(7) (Count VI). Here, the consumers did not authorize, and scores indicated that they were not even informed about, the charges for the Discount Club. Therefore, they could not have provided informed consent.

Second, even if the charges were authorized, none of the defendants produced in discovery any records of "express verifiable authorizations" required by the TSR. 16 C.F.R. § 310.3(a)(3) (Count V). In fact, the only recordings of consumers' oral

[15] The TSR applies to telemarketing that "involves at least one interstate telephone call." 16 C.F.R. § 310.2(gg). Calling U.S. consumers from abroad qualifies.

authorization raised the Hornbeam Defendants' concerns that their telemarketers were misleading consumers. [PX 667]. Having shown the FTC's entitlement to summary judgment on Counts I, II, and IV to VI, the FTC below sets forth McCarter's liability on those counts as a matter law.

**B. Jim McCarter Is Liable for the Violations of the Hornbeam Entities.**

An individual defendant is liable for the violations of the FTC Act committed by a corporate entity where the individual defendant participated directly in the acts or practices or had authority to control them and the individual had some knowledge of the practices. [Dkt. 181 at 12]. Further, "authority to control . . . may be established by 'active involvement in business affairs and the making of corporate policy' and by evidence that 'the individual had some knowledge of the practices.'" [Dkt. 181 at 12]. Knowledge may be proven by showing the defendant had actual knowledge of the violative conduct, was recklessly indifferent to whether the conduct was violative, or had an awareness of a high probability of the violative nature of the conduct and intentionally avoided learning the truth. *See id.* at 13; *see also Inc21.com Corp.*, 745 F. Supp. 2d at 1005–06 (Individual liability established where defendants knew company received complaints about unauthorized sales, knew their products were "broken," and knew the vast majority of consumers did not use them).

The evidence overwhelmingly demonstrates that Jim McCarter participated in, controlled, and knew about the Discount Club scheme. McCarter was a Member of the Company, which, as a matter of Georgia law, gave him authority to control the business. [PX 515 at ¶ 6.2; Ga. Code Ann. § 14-11-304]. He also participated directly in the operations of the Hornbeam Entities, giving direction from his position as a member of the management committee ("Board"). Jim McCarter knew or was recklessly indifferent to whether the Discount Club scheme was a scam; he knew of the Discount Club's outrageously high return rates for both online and telemarketing enrollments, the complaints that poured into the Company about the scheme, and that none of the consumers enrolled ever used the coupons. Accordingly, Jim McCarter is liable for the violations caused by the Discount Club scheme.

### C. McCarter's Affirmative Defenses Are Unavailing.

Concerning liability, Jim McCarter has asserted affirmative defenses of estoppel, laches, waiver, unclean hands, and "proximate caus[ation]." *See* Dkt. 260 at 129-30; PX 1296 (McCarter Interrogatories). McCarter cannot establish the factual or legal bases for any of these defenses, and the FTC is entitled to judgment as a matter of law on each. *See Blue Cross & Blue Shield of Alabama v. Weitz,* 913 F.2d 1544, 1552 (11th Cir. 1990) (defendant's burden to establish affirmative defense is applicable); *Cent. Transp., LLC v. Glob. Aeroleasing, LLC*, 2020 WL 2617891, at *5 (S.D. Fla. May 25, 2020) (same); *see*

*also United States v. McCorkle*, 321 F.3d 1292, 1297 (11th Cir. 2003) (estoppel); *SEC v. Silverman*, 328 F. App'x 601, 605 (11th Cir. 2009) (laches); *FTC v. Directv, Inc.*, 2016 WL 6947503, at *3 (N.D. Cal. Nov. 26, 2016) (waiver); *CFTC v. Mintco, LLC*, 2016 WL 3944101, at *7-8 (S.D. Fla. May 17, 2016) (laches); *FTC v. Consumer Health Benefits Ass'n*, No. 10CIV3551ILGRLM, 2011 WL 13295634, at *3–4 (E.D.N.Y. Oct. 5, 2011) (unclean hands); *FTC v. Leshin*, 2007 WL 9703567, at *2-3 (S.D. Fla. Oct. 9, 2007) (laches).[16]

McCarter relies on unsupported, conclusory allegations and bare assertions – and identifies no admissible evidence – in support of his Affirmative Defenses. *See* McCarter Answer; PX 1296 (McCarter Interrogatories). *See also FTC v. Alcoholism Cure Corp.*, 2011 WL 13137951, at *22 (M.D. Fla. Sept. 16, 2011) ("A non-moving party 'cannot merely rest upon his bare assertions, conclusory allegations, surmises, or conjectures.'"). Thus, the Court should enter summary judgment against Jim McCarter on his defenses.

## III. CONCLUSION

For the foregoing reasons, the FTC respectfully asks the Court to grant summary judgment on liability in the FTC's favor and against Jim McCarter on his Affirmative Defenses.

[16] McCarter's "proximate caus[ation]" Affirmative Defense is similarly insufficient. Individual liability is available under the FTC Act. *See* Section III.B, above.

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Respectfully submitted,

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**LR 5.1 CERTIFICATION**

Pursuant to LR 7.1(D), I hereby certify that this brief was prepared with 14-point Times New Roman font in accordance with LR 5.1(C).

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