| | |
|---|---|
| DISTRICT COURT, DENVER COUNTY, COLORADO<br>Court Address:<br>1437 Bannock Street, Rm 256, Denver, CO, 80202 | DATE FILED: May 3, 2016 3:16 PM<br>CASE NUMBER: 2015CV30672 |
| **Plaintiff(s)** ST OF COLO<br>v.<br>**Defendant(s)** SUBSCRIBER SERV INC et al. | ⚠ **COURT USE ONLY** ⚠ |
| | Case Number: 2015CV30672<br>Division: 409 Courtroom: |

**Order: Plaintiff's Findings of Fact and Conclusions of Law**

The motion/proposed order attached hereto: GRANTED IN PART.

The Court has considered Marsha Ness' cooperation in the investigation. The Court has considered, her cooperation and testimony in the trial. The Court finds her testimony, especially regarding her ignorance of the prior investigations of Mr. Keown, to lack credibility. Her lack of savings or assets after substantial earnings over the years is also not credible. However, she was not the owner of SSI and acted at the direction of Mr. Keowan. Still, she was an integral part of the fraud inflicted on thousands of unwitting customers over the years, and therefore a penalty is appropriate. In deciding the penalty as to her, the Court also considers her lack of education and work experience in other areas and her ability to pay. Accordingly, as to Ms. Ness, she is jointly and severally liable for only $500,000.00 of the $3,000,000.00 imposed against the other defendants.
Further, the Court denies the request as to the disgorgement of $400,000.00 requested against Ms. Ness in Paragraph 108 of the Proposed Order.
In summary, as to Ms. Ness, she is jointly and severally liable for only $500,000.00 of the total $3 million in civil penalties. The Order is adopted in all other respects.

Issue Date: 5/3/2016

MICHAEL JAMES VALLEJOS
District Court Judge

| | |
|---|---|
| DISTRICT COURT, DENVER CITY AND COUNTY, COLORADO<br>1437 Bannock Street<br>Denver, Colorado 80202 | |
| STATE OF COLORADO, ex rel. CYNTHIA H. COFFMAN, ATTORNEY GENERAL,<br><br>Plaintiffs,<br><br>v.<br><br>SUBSCRIBER SERVICES, INC., a Colorado corporation; DAVID KEOWN, individually and MARSHA NESS, individually.<br><br>Defendants. | ▲ **COURT USE ONLY** ▲ |
| Attorneys for Plaintiff:<br>CYNTHIA H. COFFMAN<br>Attorney General<br>JAY B. SIMONSON, 24077*<br>First Assistant Attorney General<br>MARK T. BAILEY, *36861<br>Senior Assistant Attorney General<br>SARAH P. JACKSON, *45212<br>BENJAMIN J. SAVER, *47475<br>Assistant Attorneys General<br>1300 Broadway, 7th Floor<br>Denver, CO 80203<br>(720)508-6209<br>(720)508-6040 Fax<br>*Counsel of Record | Case No.: 2015cv30672<br><br>Div.: 409 |

**PLAINTIFF'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT**



Plaintiff, the State of Colorado, upon relation of Cynthia H. Coffman, Attorney General for the State of Colorado ("the "State"), by and through the undersigned counsel, respectfully submits its Proposed Findings of Fact, Conclusions of Law, and Judgment:

Having considered the parties' pleadings and all other documents filed of record in this action, having considered all the admissible evidence and arguments of counsel, and being otherwise fully advised, the Court enters its Findings of Fact, Conclusions of Law, and Judgment.

## PROCEDURAL BACKGROUND

1. On February 25, 2015, the State filed a civil law enforcement action against Defendants David Keown ("Keown"), Subscriber Services, Inc., ("Subscriber Services" or "Subscriber"), and Marsha Ness ("Ness") for alleged violations of the Colorado Consumer Protection Act, C.R.S. §§ 6-1-101 *et seq.* ("CCPA").

2. On the same day, the State filed a Motion for Temporary Restraining Order and Preliminary Injunction against all Defendants.

3. On February 27, following a hearing at which all parties were present and represented by counsel, the Court entered a Temporary Restraining Order against all Defendants.

4. A Preliminary Injunction hearing was held on March 11, 2015. All parties were present and represented. On March 12, the Court converted the Temporary Restraining Order into a Preliminary Injunction.

5. On November 23, 2015, the State filed a Motion for Summary Judgment. Keown and Subscriber did not respond to the Motion. The Court granted the State's Motion for Summary Judgment on January 29, 2016.

6. A one-day trial was held on February 22, 2016; the sole issue was damages. Keown and Subscriber did not appear. Ness appeared and was represented by counsel.

7. Under C.R.C.P. 65(a)(2), all admissible evidence received at the March 11, 2015 preliminary injunction hearing is part of the trial record.

## FINDINGS OF FACT

8. The Court incorporates herein the Court's findings and conclusions in support of the Preliminary Injunction Order, including the findings and conclusions the Court made from the bench on March 12, 2015 (attached hereto as **Exhibit 1**).

9. The Court incorporates herein the facts stipulated to by the State and Ness in the Trial Management Order the Court entered on February 1, 2016.

**Uncontested Facts from the State's Motion for Summary Judgment**[1]

10. Defendant Subscriber Services, Inc. ("Subscriber Services") is a Colorado Corporation that has conducted business at 6660 Wadsworth Boulevard, Arvada, Colorado 80003. *Defendants' Answer*, April 9, 2015, ¶ 4.

11. Subscriber Services' business records reflect that it made calls in Denver County and secured orders from consumers in Denver as recently as July 2013. Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction ("Motion for TRO and PI"), February 25, 2015, Ex. A, Aff. of Ken King, at ¶ 9; *see also Defendants Answer* at ¶ 8 (admitting that venue in Denver County is proper).

12. Defendant David Keown has informed the State that Subscriber Services ceased its business operations in or around March 2015.

13. Defendant Keown is the sole owner of Subscriber Services. He controlled Subscriber Services' business operations at all relevant times. *Defendants' Answer* at ¶ 5.

14. Defendant Marsha Ness began working for Defendant Keown at Subscriber Services in 1995. *See* Exhibit A to State's Motion for Summary Judgment ("MSJ"), *Excerpts from Record on December 17, 2014 Civil Investigative Demand Hearing Testimony of Defendant Marsha Ness*, at 16:13-16.

15. Defendant Ness began running Subscriber Services' office sometime between 2004 and 2006 and did not report to anyone else besides David Keown. *See* Exhibit A to MSJ at 27:18-28:4, 28:13-22.

16. Defendant Ness was Subscriber Services' office manager through at least April 9, 2015. *Defendants' Answer*, April 9, 2015, ¶ 6.

17. The managers for all of Subscriber Services' departments – sales, verifications, quality control, customer service, and collections – reported to either Defendant Ness or Defendant Keown. *See* Exhibit B to MSJ, *Excerpts from Record on March 11, 2015 Preliminary Injunction Hearing*, at 164:8-165:10 (Testimony of Defendant Ness).

[1] These facts are drawn from the State's November 23, 2015 Motion for Summary Judgment. Some citations are updated with citations to the February 22 damages trial. These facts are established against all Defendants. At the damages trial on February 22, the Court deemed them established as to Subscriber and Keown. Ness's response to the Motion for Summary Judgment "only argued legal theories of liability rather than providing genuine issue of material fact," Order, Jan. 29, 2016, at 15, and she did not meaningfully contest these facts at the damages trial. C.R.C.P. 56(d).

18. Defendant Ness's duties included "[m]aking sure that the managers are doing what they're supposed to do with each department with their employees [and] just overseeing the everyday operations." *See* Exhibit A to MSJ at 28:23-29:3.

19. Subscriber Services purchased lists of consumer "leads" from a variety of sources, including companies that offered entries into sweepstakes and drawings. Pl. Exs. 44 and 44A at 2:08; Exhibit B to MSJ at 208:1-209:8 (Testimony of Defendant Keown).

20. Subscriber Services sent text messages and postcards to the consumer "leads." The postcards made no mention of magazines and stated, "We are holding a reward of $250.00 in gift savings good at Wal-mart or Best Buy in your name." *See* Exhibit B to MSJ at 206:14-208:4 (Keown Testimony); Pl. Ex. 12 at SS_SS015458-59.

21. The text messages were sent to consumers who had visited the website(s) of Subscriber Services' lead providers. Exhibit B to MSJ at 208:1-209:8 (Keown Testimony).

22. None of the text messages mentioned magazines. *See* Exhibit B to MSJ at 207:17-208:4 (Keown Testimony); Pl. Ex. 12, p. SS_SS015459. One text message stated, "Thx for visiting our site. Call . . . now to redeem your $250 Walmart Gift Voucher." *Id.* Another text message was identical but referred instead to a "$250 Target Gift Voucher." *Id.* Some of the text messages stated they pertained to the consumers' "sweepstakes entry." *Id.*

23. Consumers called Subscriber Services because they believed they had an unclaimed reward. *See, e.g.*, Exhibit B to MSJ at 48:20-49:17 (Testimony of Margaret Shelton), 57:24-58:17 (Testimony of Kathleen Troje), 63:18-64:24 (Testimony of Dora Dean Eastwood), 76:7-24 (Testimony of Nadia Wilson).

24. Subscriber Services' telemarketers answered incoming calls by saying, "Thank you for calling Redemption Center." *See* Exhibit B to MSJ at 40:24-41:6 (Testimony of Edward Tanner), 94:20-95:9 (Testimony of Ken King); Pl. Ex. 2 at p. SS_SS024936.

25. Subscriber Services provided their telemarketers with a sales script. Exhibit B to MSJ at 209:23-210:4 (Keown Testimony); Pl. Ex. 2 at SS_SS024936-37. Subscriber Services required all employees to follow the script. *See* Exhibit B to MSJ at 185:1-12 (Ness Testimony), 246:10-247:13, 256:1-3 (Testimony of Michael Hedlun).

26. Among other things, the sales script stated:

- "[F]or participating in our promotion, your $250 gift voucher is good at participating restaurants and retail stores."

- "Along your $250 gift voucher, you have already been selected to receive three of your favorite monthly magazines, at absolutely no charge!"

- "[Y]ou really can't beat getting 3 magazines free plus a $250 voucher just for taking 1 at a reduced rate."

Pl. Ex. 2 at SS_SS024936-37 (emphasis in original).

27. Defendants cannot identify any subscription rate from which the price of the one magazine has been "reduced." Exhibit B to MSJ at 212:5-18 (Keown Testimony).

28. Subscriber Services' rebuttal script for sales calls stated that the one magazine the consumer would be paying for was priced "at a 40% discount!" Defendants cannot identify any 40% discount for any magazine. Exhibit C to MSJ, *Excerpts from Record on December 19, 2014 Civil Investigative Demand Hearing of Defendant David Keown*, at 107:16-108:19, 109:17-110:6 and Ex. 9, p. SS_SS015390.

29. The total price for Subscriber Services' "service" was $1,297.20. Exhibit B to MSJ at 211:1-3 (Keown Testimony).

30. The closest the sales script came to informing consumers that they were being offered five years of magazine subscriptions was its claim that Subscriber Services "guarantee[s] this promotion for the next 60 months, and so far everyone I've talked to has said YES." Pl. Ex. 2 at SS_SS024936.

31. Consumers testified and averred that they were misled about the price of Subscriber Services' service and were unaware of the total cost until they received their "confirmation letter" in the days following their order. *See, e.g.*, Exhibit B to MSJ at 64:16-65:20 (Eastwood Testimony), 79:11-80:1 (Wilson Testimony).

32. Two former Subscriber Services telemarketers testified that consumers were unaware of the total cost of Subscriber Services' "service" after the sales call. Exhibit B to MSJ at 18:6-19:6 (Testimony of David Valdez), 42:3-43:1 (Tanner Testimony).

33. If a consumer said "I don't want the magazines," Subscriber Services' "rebuttal script" provided the following response: "Well, these 3 magazines are part

of the promotion to get your $250 gift voucher." See Exhibit C to MSJ at 107:16-108:5 and Ex. 9 at SS_SS015390.

34. Subscriber Services' rebuttal script also told consumers that "[y]ou were individually selected to participate in the promotion because of your location and we are starting a new service in your area." Exhibit C to MSJ at Ex. 9, p. SS_SS015930.

35. This statement is false. *See* Exhibit C to MSJ at 109:6-16.

36. The initial payment of $64.86 was charged to consumers' credit cards or bank accounts before completion of the original sales call. Exhibit B to MSJ at 166:17-167:6 (Ness Testimony), 212:19-21 (Keown Testimony).

37. On the same day as the sales call, possibly on the next day, or within the next few days, a representative from Subscriber Services' verification department would call the consumer back and utilize Subscriber Services' "verification" script. *See* Exhibit B to MSJ at 169:8-24, 173:20-174:3 (Ness Testimony); Pl. Ex. 2 at SS_SS024938-39; Exhibit C to MSJ at 97:25-98:5.

38. The verification script stated that "the order is changeable not cancelable because we have already committed the order for the full term of service." Pl. Ex. 2 at SS_SS024939.

39. Subscriber Services provided scripted rebuttals for their verifiers to use if a consumer asked to cancel her order. Exhibit B to MSJ at 170:4-172:19 (Ness Testimony); Pl. Ex. 27. The rebuttal script stated "your order is changeable not cancelable because we pre pay the order in advance to lock in today's rate." *See* Pl. Ex. 27.

40. Subscriber Services ordered magazines for consumers on a weekly basis, on Thursdays. Exhibit B to MSJ at 171:16-18 (Ness Testimony).

41. At the time of verification, Subscriber Services had not ordered, much less pre-paid, magazines for the vast majority of their customers. *See* Exhibit B to MSJ at 171:5-172:6, 175:15-21, 193:1-4, 194:2-22 (Ness Testimony), 227:12-229:19 (Keown Testimony).

42. The verification rebuttal script directed employees to refuse the consumer's first three requests to cancel. Pl. Ex. 27.

43. Neither the sales script nor the verification script explained the terms and conditions of the gift voucher. *See* Exhibit B to MSJ at 210:1-25 (Keown Testimony), 142:17-143:6 (King Testimony); Pl. Ex. 2 at SS_SS024936-39.

44. Neither the sales script nor the verification script stated the total cost of Subscriber Services' "service." *See* Exhibit B to MSJ at 212:22-213:11 (Keown Testimony), 254:18-21 (Hedlun Testimony); Pl. Ex. 2 at SS_SS024936-39.

45. Transcripts of recordings of sales calls offered into evidence by Defendants at the preliminary injunction hearing show that Subscriber Services' sales representatives made false and misleading statements beyond those found in the scripts. This includes false and misleading statements about how, when, and where the $250 gift voucher could be used, *see* Exhibit B to MSJ at Def. Ex. V at 2:12-21, Def. Ex. Y at 6:5-19, Def. Ex. Z at 4:11-22, and false and misleading statements about the price of magazines. Exhibit B to MSJ at Def. Ex. V at 4:17-22, Def. Ex. Z at 6:18-25.

46. Similarly, recordings submitted by Plaintiff reveal other false and misleading statements and failures to disclose pertaining to the price of Subscriber Services "service," Pl. Ex. 44 and 44A, Call No. 1 at 4:00, Call No. 3 at 2:12 and 3:01, and Call No. 4 at 1:12, and about how, when, and where the "$250 gift voucher" could be used, Pl. Ex. 44 and 44A, Call No. 2 at 6:59, Call No. 1 at 1:53, Call No. 3 at 3:01, Call No. 4 at 1:12.

47. After the initial payment had been charged to consumers' credit cards or bank accounts and the verification process had been completed, Subscriber Services mailed consumers the "$250 reward voucher." *See* Exhibit B to MSJ at 170:20-23 (Ness Testimony).

48. Contrary to Subscriber Services' prior representations, The "Reward Voucher" was not a "Walmart Gift Voucher," a "Target Gift Voucher," or "good at participating restaurants and retail stores including Wal-Mart, Target, Red Lobster . . . ." *See* Exhibit B to MSJ at 158:18-159:14 (King Testimony), 213:12-224:11 (Keown Testimony) and Pl. Ex. 18, pp. SS_SS022253-57.

49. Instead, the "Reward Voucher" itself stated that it was "an offer" that "cannot be redeemed at merchant locations." Exhibit B to MSJ at Pl. Ex. 18, p. SS_SS022254.

50. Defendants did not have a business relationship with Wal-Mart, Target, or Red Lobster. *See* Exhibit B to MSJ at 224:5-11 (Keown Testimony).

51. Defendants did not have a business relationship with ANY restaurant, retail store, or gas station. *See* Exhibit B to MSJ at 224:5-11 (Keown Testimony).

52. The "Reward Voucher" itself stated that it was not "sponsored or endorsed by, or affiliated with," any restaurant, retailer, or gas station, and it was

"administered and fulfilled exclusively by Rewards Redemption Center." Exhibit B to MSJ at Pl. Ex. 18, p. SS_SS022254.

53. The "Reward Voucher" listed sixteen terms and conditions (which had not been previously disclosed to consumers) and stated that that it was "only redeemable when all requirements as stated herein have been met." Pl. Ex. 18 at SS_SS022254.

54. According to the letter that accompanied the "Reward Voucher," to participate in Subscriber Services' "offer," consumers were required to send a copy of their driver's license and completed registration form via certified mail in order to receive a "rebate voucher." Pl. Ex. 18, p. SS_SS022253.

55. If they followed these steps, consumers received a "Merchant Selection Form" and were advised of additional terms and conditions. Exhibit B to MSJ at 178:7-10 (Ness Testimony) and Pl. Ex. 18 at SS_SS022255.

56. If they returned the Merchant Selection Form, consumers received a letter explaining that "Reward Redemption Center is a monthly rebate Reward program, with a $25 company check available to you each month you send in qualified receipts and vouchers on or before the appropriate date." Pl. Ex. 18 at SS_SS022256.

57. Along with the letter, Subscriber Services sent consumers ten "Redemption Vouchers," each of which contained the name of the pre-selected merchant and the month it could be used (the ten months immediately following receipt of the vouchers). Pl. Ex. 18 at SS_SS022258-59.

58. Instead of a "$250 gift voucher," Subscriber Services provided the possibility of receiving ten $25 rebate checks if the consumer complied with all terms and conditions, spent $1,000 in non-grocery items in increments of at least $100 in ten consecutive months at the same store, and mailed these receipts to Defendants every month with a self-addressed, stamped envelope. *See* Pl. Ex. 18.

59. Subscriber Services "Customer Service Book" directed Subscriber Services' employees to take a "minimum of 30 days for each step of the voucher redemption process." Exhibit B to MSJ at 181:20-182:17 (Ness Testimony); Pl. Ex. 17 at SS_SS015534.

60. The "Reward Voucher" stated, "Please allow . . . a minimum of 30 days to process your registration form" and "please allow 8-10 weeks for processing." Pl. Ex. 18 at SS_SS022254, SS_SS022257.

61. The information that Subscriber Services provided in response to the State's investigative subpoena shows that only 18 out of 35,692 of consumers (0.05%) who received the "$250 reward voucher" actually received $250 through the rebate program. Exhibit B to MSJ at 102:11-103:3 (King Testimony); Pl. Exs. 93 and 95; February 22, 2016 Trial Testimony of Investigator Kenneth King ("King Trial Testimony").

62. The information that Subscriber Services provided in response to the State's investigative subpoena shows that only 0.75% of consumers who received the $250 rewards voucher received ANY money through the rebate program. King Trial Testimony; Pl. Exs. 93 and 95.

63. Subscriber Services' "Customer Service" book set out scripted answers for when consumers "claim(ed) misrepresentation/scam," said "I would like to cancel," or said "I refuse to pay." Pl. Ex. 17 at SS_SS0015530-33. None of the "rebuttals" authorize or suggest cancelation of the consumer's order. *Id.*

64. Subscriber Services provided their collections employees with a one-page set of responses to use when consumers sought to cancel their orders. Exhibit B to MSJ at 189:11-190:8 (Ness Testimony); Pl. Ex. 39. This document does not authorize cancelation and provides three separate responses for customer requests to cancel. Exhibit B to MSJ at 192:9-12 (Ness Testimony); Pl. Ex. 39.

65. One such response states "your order is changeable just non cancellable *because we prepay the order to the publishers* and you did agree to that." Pl. Ex. 39 (emphasis added).

66. However, at the time of the original order, Subscriber Services did not prepay for five years of magazines for each consumer. Exhibit B to MSJ at 227:12-229:19 (Keown Testimony),192:13-194:22 (Ness Testimony).

67. Subscriber Services frequently ordered consumers' magazines for just one year at a time. Exhibit C to MSJ at 100:14-102:2 and Ex. 7.

68. Subscriber Services' rebuttal scripts included a "Scam Rebuttal" and a rebuttal for consumers who complain about the $250 gift voucher. Exhibit B to MSJ at 188:8-13, 195:9-18 (Ness Testimony); Pl. Ex. 29.

69. Defendant Ness knew that consumers complained that they were misled about the price of Defendants' "service" and the terms and conditions of the "$250 gift voucher." Exhibit A to MSJ at 111:1-3, 171:10-21.

70. In August 2011, Defendant Keown and Billy Ness (Marsha Ness's son) received an email from a lead generator informing them that "when referencing the

retail rebate certificates . . . we just cannot call it a 'gift voucher' / 'gift card', etc – we've found that it implies an instant cash reward in the consumer's mind." Exhibit D to MSJ.

71. Subscriber Services continued to refer to their rebate program as a "gift voucher." Exhibit B to MSJ at Pl. Ex. 12, p. SS_SS024936.

72. Subscriber Services also induced consumers with text messages and a sales script that offered a "$100 gift voucher" that were substantively identical to the advertisements described above with regard to the "$250 gift voucher." Pl. Ex. 12 at SS_SS015459; State's Deposition Designation of Keown at 18:9-17, 19:12-20:1 and Ex. 3 (filed Feb. 17, errata filed Feb. 19)

73. The information that Subscriber Services provided in response to the State's investigative subpoena shows that only 15 out of 11,981 consumers (0.12%) who received the "$100 reward voucher" actually received $100 through the rebate program. King Trial Testimony; Pl. Exs. 92 and 95.

74. The information that Subscriber Services provided in response to the State's investigative subpoena shows that only 0.79% of consumers who received the $100 reward voucher received ANY money through the rebate program. King Trial Testimony; Pl. Exs. 92 and 95.

**Additional Facts**

75. The violations alleged in the State's complaint occurred, in part, in Denver County, Colorado. Therefore, venue is proper in Denver County pursuant to C.R.S. § 6-1-103 and C.R.C.P. 98. *Defendants' Answer* at ¶ 8.

76. Ness and Keown first met in the mid-1980's, when Ness was working for a telemarketing company owned by Dale Lenard. Ness Trial Testimony. Ness admits she has been working for Keown and Subscriber since 1995. Feb. 1, 2016 Pre-Trial Order, Stipulated Fact No. 4.

77. In 1996, the Federal Trade Commission ("FTC") issued a Consent Order against Keown and Lenard (along with several other companies and individuals) that prohibited them from engaging in a number of deceptive trade practices – including several that Defendants subsequently employed in the twenty years that Subscriber operated in Colorado. King Trial Testimony; Pl. Ex. 3.

78. Ness testified that she was not aware of the FTC Consent Order. Given that she began working for Keown in 1995 and worked for Lenard before that, and that she subsequently became the manager of Keown's operations, the Court does not find this testimony to be credible.

79. Investigator King testified that Ness gave him a tour of SS's telemarketing facility when he went there in August 2014 to serve the State's investigative subpoenas. King Trial Testimony. King testified that Ness explained Subscriber's business operations and that Subscriber's employees provided him their scripts when directed to do so by Ness. *Id.*

80. Investigator King identified business records of several hundred Better Business Bureau ("BBB") complaints that had been filed against and provided to Subscriber. The records show that Subscriber Services received 133 BBB complaints stating that Defendants misled consumers about the cost of Defendants' service, eighty-two BBB complaints stating that Defendants misled consumers about the "gift voucher," and 494 complaints stating that Defendants refused to cancel customer orders. King Trial Testimony; Pl. Exs. 70-72.

81. Investigator King also identified 140 complaints that Subscriber had received from thirty-six State Attorneys General. King Trial Testimony; Pl. Ex. 96.

82. The Court finds that Keown and Ness had a clear and complete understanding of the deceptive nature of their business model. This knowledge and notice is established not just from the complaints they received and not just because they equipped their telemarketers with rebuttals to questions about "scams" and trained them how to handle threats to file complaints with the BBB and law enforcement, but also from the FTC Order, which covered similar conduct. Keown and Ness continued their deceptive trade practices despite this knowledge.

83. The Court heard live telephonic testimony from consumers Callen Beasley, Sharon Stewart, and Aisha Clarke-Martin. With the stipulation of Ness, the Court admitted the affidavits of consumers Kristine Knight (Pl. Ex. 10), Leopold Santogrossi (Pl. Ex. 57), Maria Dean (Pl. Ex. 6), and Kathy Schneider (Pl. Ex. 59) and the Better Business Bureau complaint of consumer William Robinson (Pl. Ex. 63) as these witnesses' trial testimony.

84. This additional consumer testimony corroborated the consumer and former employee testimony, audio recordings, and telemarketing scripts that the State presented at the preliminary injunction hearing, all of which together establish consumer reliance on, and injury from, Defendants' scripted misrepresentations.

85. The evidence establishes the deceptive nature of Defendants' scripts and business practices, which Defendants systematically utilized since at least 2010 to induce consumers to order magazines and provide Defendants their credit card and bank account numbers. *See* Trial Testimony of Marsha Ness and Pl. Ex. 97; Pl.

Deposition Designation of Keown at 18:9-17 and Ex. 3 (filed Feb. 17, errata filed Feb. 19); King Trial Testimony; Pl. Exs. 92-95.

86. The evidence establishes that consumers relied on and were injured by Defendants' scripted misrepresentations and that Defendants systematically, and as part of their business model, refused consumer requests to cancel.

87. Keown admits that the misleading postcard found in Pl. Ex. 12 was sent to "millions" of consumers. Deposition Designation of Keown at 22:11-23:8 and Ex. 4. Keown also admits that the misleading text messages found in Pl. Ex. 12 were sent to thousands of consumers. *Id.* at 25:10-14, 25:22-26:3, and Ex. 4.

88. Defendants' former IT Director, Michael Brandenburg, testified at trial about how Defendants' computer system maintained records of consumer payments, chargebacks, and refunds.

89. Brandenburg also testified about Def. Ex. L to the Preliminary Injunction Hearing, which purported to show more than $2,000,000 of refunds made by Subscriber. Upon further trial testimony, the Court finds that Def. Ex. L does not contain an accounting of refunds that Subscriber voluntarily gave to consumers.

90. On the contrary, consistent with the admissions in the State's Designations of C.R.C.P. 30(b)(6) testimony of David Keown (filed Feb. 17), Brandenburg testified that Def. Ex. L included bank and consumer-initiated chargebacks. Investigator King testified that the State subpoenaed chargeback records from Defendants' merchant processors, and the response was voluminous.

91. Brandenburg also testified that Ness was Defendants' General Manager, that he reported directly to Ness, and that multiple of Ness's family members were the managers of specific departments at Subscriber.

92. In his trial testimony, Investigator King explained how he used Defendants business records to determine how much Subscriber collected from consumers from September 2010 through September 5, 2014. After accounting for chargebacks and refunds, Subscriber collected $2,277,881 from approximately 12,076 consumers who were solicited through the $100 gift voucher and $5,902,411 from approximately 35,692 consumers who were solicited through the $250 gift voucher. King Trial Testimony; Pl. Exs. 94 and 95.



## CONCLUSIONS OF LAW AND JUDGMENT

93. Civil law enforcement actions brought by the State under the CCPA serve to protect the public and ensure full and fair competition. *See, e.g., May Dep't Stores Co. v. State,* 863 P.2d 967, 980 (Colo. 1993) (noting that the CCPA was

enacted to protect the public and abate evils arising from business pursuits); *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Lining, Inc.*, 62 P.3d 142, 146 (Colo. 2003) ("The CCPA deters and punishes businesses which commit deceptive trade practices in their dealings with the public by providing prompt, economical, and readily available remedies against consumer fraud."); *People ex rel. Dunbar v. Gym of America, Inc.*, 177 Colo. 97, 107, 493 P.2d 660, 665 (Colo. 1972) (declaring that the CCPA was "clearly enacted to control various deceptive trade practices in dealing with the public and as such is obviously designed to both declare and enforce an important public policy").

94. The Colorado Supreme Court has a long history of giving the CCPA a "liberal construction" in accordance with its "broad remedial relief and deterrence purposes." *Hall v. Walter*, 969 P.2d 224, 230 (Colo. 1998). In interpreting the CCPA, the Court should "avoid any interpretation that 'defeats the legislative intent.'" *Gen. Steel Domestic Sales, LLC v. Hogan & Hartson, LLP*, 230 P.3d 1275, 1281 (Colo. App. 2010) (internal citations omitted).

95. The State has asserted claims for relief against Defendants under C.R.S. §§ 6-1-105(1)(e), (i), (l), (n), (r), and (u). The Court has determined that all Defendants are liable for violations of these provisions. *See* Order, January 29, 2016.

96. Once a violation of the CCPA has been established,

> [t]he court may make such orders or judgments as may be necessary to prevent the use or employment by such person of any such deceptive trade practice or which may be necessary to completely compensate or restore to the original position of any person injured by means of any such practice or to prevent any unjust enrichment by any person through the use or employment of any deceptive trade practice.

C.R.S. § 6-1-101(1). The remedial authority set forth in section 6-1-110(1) "must be read in light of the broad legislative purpose to provide prompt, economical, and readily available remedies against consumer fraud." *Western Food Plan, Inc. v. Dist. Court*, 598 P.2d 1038, 1041 (Colo. 1979). The Court has "considerable discretion in entering orders and judgment" to completely compensate injured consumers under C.R.S. § 6-1-101(1). *In re Jensen*, 395 B.R. 472, 485 (Bankr. Colo. 2008); *see also Showpiece Homes Corp. v. Assur. Co. of Am.*, 38 P.3d 47, 51 (Colo. 2001) ("[A]n expansive approach is taken in interpreting the CCPA in its entirety and interpreting the meaning of any one section by considering the overall legislative purpose.").

**A. Restitution**

97. The Court concludes that Keown and Subscriber are liable for restitution to the injured consumers.

98. The State presented evidence that more than 47,000 consumers were injured through Defendants' deceptive $100 and $250 gift voucher ruse. King Trial Testimony; Pl. Ex. 96.

99. Consistent with the CCPA's purpose to "provide prompt, economical, and readily available remedies against consumer fraud," *Western Food Plan*, 598 P.2d at 1041, it is well established that restitution may be awarded for all affected consumers, not just those consumers who testified at trial.[2]

100. The Court may infer that a company engaged in numerous uniform, material misrepresentations or omissions based on circumstantial evidence. *Bp Am. Prod. Co. v. Patterson*, 263 P.3d 103, at 109-10 (Colo. 2011); *see also Garcia v. Medved Chevrolet, Inc.,* 263 P.3d 92, 94 (Colo. 2011).

101. Here, the State presented evidence that every affected consumer was contacted over the telephone and received the same, scripted sales and "verification" pitches and "rebuttals." The State also presented consumer testimony and audio recordings showing that Defendants' customer service and collections employees employed Defendants' scripts and rebuttals in making further false representations and refusing to cancel magazine orders.[3]

102. "[U]sing the defendant's gross receipts is a proper baseline in calculating the amount of sanctions necessary to compensate injured consumers." *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004) (en banc); *see also FTC v. Freecom Commc'n., Inc.*, 401 F.3d 1192, 1206 (10th Cir. 2005) (same).

103. The State has established that Subscriber collected $8,180,292 from consumers whose orders were obtained through the $250 or $100 gift voucher programs as part of an series of deceptive trade practices that was ongoing as of September 1, 2010 and continued until the Court's orders in early 2015. *See* § 6-1-



[2] *FTC v. Freecom Comm., Inc.*, 401 F.3d 1192, 1206 (10th Cir. 2005); *Kuykendall*, 371 F.3d at 765; *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000); *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *People, ex rel. Lockyer v. Fremont Ins. Co.*, 128 Cal. Rptr. 2d 463, 482 (Cal. App. 2003); *State ex rel. Kidwell v. Master* Distribs., 101 Idaho 447, 456 (Idaho 1980); *see also Hall*, 969 P.2d at 232-33 ("[I]t is helpful . . . to examine other states' interpretation of their consumer protection statutes.").

[3] A Maryland Supreme Court case with similar facts, *Consumer Protection Div. Office of Attorney Gen. v. Consumer Pub. Co.*, 501 A.2d 48 (Md. 1985), is instructive. In *Consumer Pub. Co.*, as in the present case, all sales were made via the same mechanism and there was no evidence that "consumers purchased [the products at issue] in any other way than from the advertisements in evidence." *Id.* at 74. Noting that "there is no direct evidence that any consumers actually relied on the Company's deceptive or misleading advertisements," the Court concluded that "we do not believe that such evidence is necessary." Here, the State has provided evidence of consumer reliance.

115 ("All actions brought under this article must be commenced within three years after . . . the date on which the last in a series of such acts or practices occurred . . . .")

104. The Court orders Defendants David Keown and Subscriber Services, Inc., jointly and severally, to pay **$8,180,292** in restitution to compensate the approximately 47,000 injured consumers.

### B. Unjust Enrichment

105. To prevent Defendants from being unjustly enriched by the employment of deceptive trade practices, the Court concludes that it is proper to disgorge them of their unlawful gains. As in other consumer fraud cases, this Court may use its equitable discretion to determine a disgorgement figure. *See, e.g., FTC v. QT, Inc.*, 472 F. Supp. 2d 990, 995 n.2 (N.D. Ill. 2007).

106. The amount of Defendants' gross receipts is a proper starting point for calculating the amount of disgorgement that is appropriate as to Keown and Subscriber. *FTC v. Freecom Commc'ns*, 401 F.3d 1192, 1206 (10th Cir. 2005) (citing *FTC v. Kuykendall*, 371 F.3d 745, 764 (10th Cir. 2004)). In calculating disgorgement, it is appropriate to require the government to "'show that its calculations reasonably approximated' the amount of the defendant's unjust gains, after which 'the burden shifts to the defendants to show that those figures were inaccurate.'" *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006) (quoting *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997)).

107. The Court concludes that Keown and Subscriber should be disgorged of all moneys they collected from consumers in connection with the $100 and $250 gift voucher orders. Therefore, the Court orders Defendants David Keown and Subscriber Services, Inc., jointly and severally, to pay an unjust enrichment award of **$8,180,292**.[4]

108. The Court also concludes that an award of unjust enrichment is appropriate as to Ness. The evidence establishes that Ness earned more than $150,000 per year for serving as the day-to-day manager of Defendants' deceptive business operation. The Court finds that it is appropriate to disgorge Ness of $100,000 for each full year for which the State has established the ongoing deceptive trade practices described herein (September 2010-September 2014). Therefore, the Court orders Defendant Marsha Ness to pay an unjust enrichment award of **$400,000**.

### C. Civil Penalties

[4] Because this award accounts for the same moneys that formed the basis for the Court's restitution award, it shall not be in addition to the Court's restitution award.

109. Section 6-1-112(1) of the CCPA governs the imposition of civil penalties in this action:

> Any person who violates or causes another to violate any provision of this article shall forfeit and pay to the general fund of this state a civil penalty of not more than two thousand dollars for each such violation. For purposes of this paragraph (a), a violation of any provision shall constitute a separate violation with respect to each consumer or transaction involved; except that the maximum civil penalty shall not exceed five hundred thousand dollars for any related series of violations.

C.R.S. § 6-1-112(1).

110. Civil penalties are mandatory upon a finding that a defendant has violated or caused another to violate the CCPA. *May Dep't Stores*, 863 P.2d at 972. Further, "[i]n order to effectuate the broad remedial relief and deterrence purposes, the CCPA does not require proof of actual injury" for an award of penalties. *Id*. at 973.

111. Because of the "strong and sweeping remedial purposes of the CCPA," the Colorado Supreme Court has ruled that "in determining whether conduct falls within the purview of the CCPA, it should ordinarily be assumed that the CCPA applies to the conduct." *Showpiece Homes*, 38 P.3d at 53.

112. The Court may order civil penalties on both a "transaction involved" and a "consumer . . . involved" basis. *May Dep't Stores*, 863 P.2d at 973-74. The State has elected to seek civil penalties on both "transaction involved" and a "consumer involved" basis.

113. Any violation of the CCPA is a separate violation "with respect to each consumer . . . involved." C.R.S. § 6-1-112(1). A "consumer . . . involved" means a person who has been exposed to [the Defendants'] violations and either purchases merchandise subject to the misleading information or undertakes other activities in reliance on the advertisement." *May Dep't Stores,* 863 P.2d at 973-74. The term "transaction involved" means one advertisement per media outlet per day regardless of whether any consumer suffered actual injury or took any action in reliance on the advertisement. *May Dep't Stores*, 863 P.2d at 974-76.

114. The State seeks an award of $3,000,000 in penalties against all Defendants, jointly and severally.

115. The Court has concluded that multiple representations in Defendants' scripts, mailers, and text messages violated six distinct sections of the CCPA. (C.R.S. §§ 6-1-105(1)(e), (i), (l), (n), (r), and (u). *See* Order, January 29, 2016.

116. The Court "should apply the following concepts in determining the amount of [the penalty] award:

> (a) the good or bad faith of the defendant;
> (b) the injury to the public;
> (c) the defendant's ability to pay; and
> (d) the desire to eliminate the benefits derived by violations of the CCPA."

*State* ex rel. *Woodard v. May Dep't Stores Co.*, 849 P.2d 802, 810 (Colo. App. 1992).

117. The Court concludes that the maximum penalty is justified by the bad faith of all Defendants, the substantial injury to the public, and the fact that all Defendants derived substantial benefits from the deceptive scheme.

118. The Court concludes that all Defendants knowingly violated and caused others to violate the CCPA as part of a business model that they knew was permeated with deception at all levels.

119. Defendants enriched themselves by misleading consumers into providing their financial information and then taking money from consumer accounts for as long as they possibly could. The Court heard testimony from consumers who could not afford Defendants' charges, who were harassed by Defendants' collections employees, and who were greatly inconvenienced by having to replace credit cards and debit cards.

120. With regard to ability to pay, Keown and Subscriber offered no evidence of their inability to pay. The evidence in the record shows that their business model was highly lucrative.

121. Ness testified that she is unable to pay a substantial penalty. Ness's testimony was not credible in other regards, including her claim not to have known about the 1996 FTC Order. Further, at trial she showed little if any remorse or acknowledgment of her wrongdoing. Such wrongdoing resulted in substantial financial benefit to her, at the expense of the thousands of consumers Defendants victimized.

122. The Court concludes that an award of $2,000 per violation for each of the six series of violations is appropriate.

123. At $2,000 per violation, the $500,000 statutory cap is easily met for each of the six series of violations, whether the Court applies penalties on a "per consumer" or "per transaction" basis. The State has established that 47,000 consumers were signed up for a "contract" through the $100 or $250 gift voucher ruse. Millions more received the deceptive mailer and text message, and it stands to reason that many of these consumers called Subscriber and Subscriber utilized at least part of the deceptive scripts on them.

124. The State's request for $3,000,000 in penalties is reasonable and justified by law. Therefore, the Court orders all Defendants, jointly and severally, to pay a penalty of **$3,000,000**.

125. All payments under this Order, and any interest thereon, shall be held in trust by the Colorado Attorney General to be used in the Attorney General's sole discretion for attorney fees and costs, restitution, if any, and for future consumer education and for consumer enforcement. C.R.S. § 6-1-110.

**D. Injunction**

126. An injunction is an extraordinary and equitable remedy that is intended to prevent future harm. *May Dep't Stores*, 863 P.2d at 978. Here, as in other consumer protection cases, this Court has a duty to ensure that the injunctive relief will effectively redress and prevent future violations. *See id.* As set forth above, the Court concludes that Defendants engaged in a pattern and practice of deceptive conduct, which has the capacity to continue if not permanently enjoined.

127. In fashioning an appropriate injunctive remedy, the Court notes that Defendants were subject to a Consent Order from the Federal Trade Commission during the entire time that they employed their deceptive business model. The State set forth its requested Permanent Injunction in the February 1 Trial Management Order. At the February 22 trial, Ness stipulated to the State's requested injunction.

128. In order to prevent the Defendants from using or employing deceptive trade practices, this Court concludes that it is in the public interest to permanently enjoin Defendants and any other persons or entities acting under their control or in concert or participation with them from:

> Operating, controlling, directing, receiving compensation from, having an ownership interest in, or receiving payment of any kind from any person or entity that engages in magazine solicitations or

collections in the State of Colorado. This expressly includes any person or entity that:

a. solicits magazine consumers in Colorado;

b. collects on magazine orders from consumers in Colorado;

c. places magazine-related telephone calls that originate from Colorado; or

d. has operations that are controlled or directed, in whole or in part, by any person located in Colorado.

129. C.R.S. 6-1-113(4) provides that attorney fees and costs are mandatory when the Colorado Attorney General successfully enforces the CCPA: "Costs and attorney fees *shall* be awarded to the attorney general . . . in all actions where the attorney general . . . successfully enforces this article" (emphasis added). *Id.* As indicated by the awards of injunctive relief, civil penalties, restitution, and disgorgement of unjust enrichment, the Colorado Attorney General has successfully enforced the CCPA and is entitled to all reasonable attorney fees and costs.

130. Within two weeks from the date of entry of this Order, the Colorado Attorney General shall provide affidavits of attorney fees and costs. This Court concludes that recovery of fees for governmental prosecution should be calculated at market rate. *Balkind v. Telluride Mountain Title Co.*, 8 P.3d 581, 588 (Colo. App. 2000).



DATED this _____ day of _____, 2016.

_____
Michael J. Vallejos
District Court Judge