

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: OTHER CIVIL

State of Minnesota, by its Attorney General,
Keith Ellison,

Court File No. 62-CV-18-6812

Judge Leonardo Castro

Plaintiff,

vs.

**STATE'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**American Federation of Police and Concerned
Citizens, Inc.,

Defendant.

INTRODUCTION

The State of Minnesota, by its Attorney General, Keith Ellison (“AGO”) brings this enforcement action against American Federation of Police and Concerned Citizens, Inc. (“AFPCC”) for its numerous violations of the Charitable Solicitation Act (“Act”), Minn. Stat. §§ 309.50–.61. As demonstrated below, AFPCC’s solicitation mailers use individually deceptive tactics that create an overall net impression that AFPCC is something it is not—an official, police-affiliated charity that is urgently raising funds for the sole program of helping police families in a donor’s local area. In reality, AFPCC is not formally affiliated with local police departments, it does not specifically set aside donations for local Minnesota police families, and its largest charitable program is sending mailers with claimed educational content. AFPCC also improperly inflated its reported charitable program expenses in its financial statements, thereby violating the Act and exacerbating its deception, by making it appear more efficient to donors than it actually is. Finally, AFPCC’s conduct violates a Consent Decree entered between the parties over 20 years ago resolving substantially similar misconduct. The AGO respectfully requests that this Court grant summary judgment on all of its claims and requested relief, in order

to remedy AFPCC's long-standing pattern of deceptive conduct, and to protect Minnesota donors from future harm.

STATEMENT OF THE ISSUES

- I. IS THE STATE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON ITS MINNESOTA CHARITABLE SOLICITATION ACT DECEPTIVE SOLICITATION CLAIM (COUNT I)?**
- II. IS THE STATE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON ITS MINNESOTA CHARITABLE SOLICITATION ACT FAILURE TO DISCLOSE CLAIM (COUNT II)?**
- III. IS THE STATE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON ITS MINNESOTA CHARITABLE SOLICITATION ACT FALSE FILING CLAIM (COUNT III)?**
- IV. IS THE STATE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON ITS BREACH-OF-CONTRACT CLAIM (COUNT IV)?**
- V. ARE DEFENDANT'S AFFIRMATIVE DEFENSES BARRED AS A MATTER OF LAW?**
- VI. IS THE STATE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON ALL OF ITS REQUESTED REMEDIES FOR AFPCC'S STATUTORY AND CONTRACTUAL VIOLATIONS?**

STATEMENT OF THE RECORD

1. September 25, 2019 Affidavit of Carol R. Washington ("Aff.") and Exhibits 1 – 112
2. October 12, 2017 Affidavit of Cynthia Dale ("Dale Aff.")
3. October 16, 2017 Affidavit of Dorothy Holden ("Holden Aff.")
4. October 19, 2017 Affidavit of Mark Goldburt ("Goldburt Aff.") and Exhibit A
5. November 8, 2017 Affidavit of Shirley Garcia ("Garcia Aff.") and Exhibits A and B
6. March 1, 2018 Affidavit of William H. Johnson ("Johnson Aff.") and Exhibit A
7. May 17, 2018 Affidavit of Gladys Anderson ("Anderson Aff.")
8. May 29, 2019 Affidavit of Adeline Daniels ("Daniels Aff.") and Exhibits 1 and 2
9. June 4, 2018 Affidavit of Frank Cruz ("Cruz Aff.") and Exhibit 1
10. June 26, 2018 Affidavit of Tom Adams ("Adams Aff.") and Exhibit 1
11. August 22, 2018 Affidavit of Gladys Anderson ("2d Anderson Aff.") and Exhibit 1
12. September 4, 2018 Affidavit of Mary Matthews ("Matthews Aff.") and Exhibit 1
13. September 10, 2018 Affidavit of Janet Meier ("Meier Aff.") and Exhibit 1
14. October 26, 2018 Affidavit of Eva Nico ("Nico Aff.")
15. Pleadings and other filings in the above-captioned action.

STATEMENT OF THE UNDISPUTED FACTS

I. THE AGO BRINGS THIS ENFORCEMENT ACTION IN THE PUBLIC INTEREST TO PROTECT MINNESOTA CHARITABLE DONORS.

In his role as “chief law officer of the state,” *State ex rel. Hatch v. Am. Family Mut. Ins. Co.*, 609 N.W.2d 1, 3 (Minn. Ct. App. 2000) (citation omitted), the Attorney General serves multiple functions designed to protect the donating public that are relevant to this lawsuit. First, the Minnesota Attorney General’s Office (“AGO”) is the primary regulator of charitable organizations that solicit contributions in Minnesota under the Charitable Solicitation Act (“Act”), Minn. Stat. §§ 309.50-.61 (2018). To enable the AGO to proactively oversee their operations, the Act requires charitable organizations to register with the AGO, file annual public reports containing detailed financial information, and provide additional information to the AGO upon request. Minn. Stat. §§ 309.52, -.53, -.54.

If the AGO has a reasonable basis to suspect a violation of the law, it can investigate the charity or related parties. Minn. Stat. §§ 8.31, 309.533. If the investigation reveals that a party has violated the law, the AGO can bring a lawsuit to redress the violations. Minn. Stat. §§ 8.31, 309.57. Such actions are authorized not only by statute, but also by common law, including the *parens patriae* doctrine. This doctrine recognizes the AGO’s broad authority to bring a lawsuit in the public interest where Minnesota residents have been harmed. *State ex rel. Hatch v. Cross Country Bank, Inc.*, 703 N.W.2d 562, 569 (Minn. Ct. App. 2005). It is within this role—acting in the public interest on behalf of Minnesota citizens to ensure the integrity of the state’s charitable giving sector—that the AGO brings the current action.

II. AFPC’s PROGRAMS, OPERATIONS, AND EXPENSES.

A. AFPC Overview.

American Federation of Police and Concerned Citizens, Inc. (“AFPC”) is a Titusville,

Florida-based nonprofit that is exempt from taxation under section 501(c)(3) of the IRS Code. (Aff. Ex. 1 at 2; Aff. Ex. 2 at 21:6-16.¹) It was formerly known as “American Federation of Police, Inc.” (Aff. Ex. 3 at 115 Resp. 41.) AFPCC first registered in 1991 with the AGO as a soliciting charity pursuant to the Act, and most recently renewed its registration in December 2018. (Aff. Ex. 4 at 117; Aff. Ex. 112 at 1016.)

AFPCC states that its mission is “to support and promote the law enforcement profession.” (Aff. Ex. 5 at 123.) AFPCC is not, however, formally affiliated with any federal, state, or local law enforcement agencies. (Aff. Ex. 6 at 134 Resp. 22.) AFPCC’s general “membership” is not restricted to police officers, but rather is open to every adult “interested in the furtherance of the purposes” of AFPCC. (Aff. Ex. 5 at 123.) Only one of AFPCC’s ten board members has any law enforcement experience. (Aff. Ex. 7 at 137 Answer 3; Aff. Ex. 2 at 26:4-14.)

B. AFPCC’s Solicitation Expenditures and Revenue.

AFPCC solicits donations throughout the United States, including in Minnesota. (Aff. Ex. 112 at 1016; Aff. Ex. 6 at 133 Resp. 21; Aff. Ex. 8 at 58:23—59:3.) It solicits the vast majority of its donations by paying two for-profit professional fundraisers to solicit directly on its behalf and provide fundraising “consulting” services. (*Compare* Aff. Ex. 1 at 2 Part I, Line 8 (total funds raised) *with* 27 Schedule G (funds raised by professional fundraisers).) In the 2018 fiscal year,² AFPCC raised approximately \$3.8 million in donations. (Aff. Ex. 1 at 2 Part I, Line 8.) It spent at least \$1.6 million of its total revenue on fundraising expenses, including paying

¹ For clarity, citations to transcript excerpts only will reference the original transcript pagination, instead of the exhibit pagination. Italics indicate document foundation testimony.

² AFPCC’s fiscal year runs from July 1 to June 30, and is denoted by “FY” before the fiscal-year end date in question.

professional fundraisers, mail houses, brokers who sell AFPCC mailing lists, and other for-profit vendors. (Aff. Ex. 1 at 2 Part I, Lines 8, 16b.)

AFPCC's mailed solicitations bring in the vast majority of its revenue. (Aff. Ex. 2 at 44:11-13.) Between 2013 and 2018, AFPCC mailed at least 351,352 written solicitations to Minnesota residents. (Aff. Ex. 9 at 230 Resp. 1 (admitting specified solicitations were mailed in Minnesota); Aff. Ex. 10 at 237 Resp. 12.) At least 5,113 Minnesotans donated at least \$298,637 to AFPCC between January 2013 and December 2018 in response to its mailed solicitations. (Aff. Ex. 11 at 242; Aff. Ex. 12 at 87:18—89:2; Aff. Ex. 13 (list of Minnesota donors and amounts of donations, indicating the mailer triggering each donation)).

C. AFPCC's Charitable Programs.

AFPCC claims to have spent a total of \$1.9 million on its charitable programing in FY 2018. (Aff. Ex. 1 at 11 Part IX, line 25(B).) AFPCC claims two main charitable programs: (1) "public education" activities, and (2) the "Police Family Survivor's Fund." (Aff. Ex. 1 at 3 Part III.)

AFPCC categorizes the vast majority of its claimed charitable spending—almost \$1.6 million, or 83%—as "public education" activities. (Aff. Ex. 14 at 263 Resp. 16; Aff. Ex. 1 at 3 Part III, Line 4a.) The majority of this public education spending consists of AFPCC paying its fundraisers and other for-profit agents to create and include "announcements" in its mailed solicitations that AFPCC claims either educate the public with "safety tips," or serve as "calls-to-action" asking the public to contact AFPCC and let it know if any police officers are slain in the line of duty. (Aff. Ex. 1 (*compare* Part III, Line 4a (\$1,581,830) *with* Part IX, Line 26, column (B) (\$876,187)); *see also* Aff. Ex. 15 at 60:7-12; Aff. Ex. 2 at 126:23—127:2; Aff. Ex. 8 at 69:1-7.) An example of its claimed public education program content is illustrated below:

YOU CAN HELP PREVENT CRIME IN 2017

Stay Alert: Criminals look for easy targets. If you are aware of your surroundings, you have a better chance to avoid becoming a victim.

Secure Your Home: Make sure your home has adequate outside lighting. Trim shrubs to allow maximum visibility of your home from the street. Check all locking hardware for proper function and keep locks in good working order. Do not sleep with windows open. Street numbers should be easily visible from the street at night. Lock all doors even while you are at home. Know who is at the door before opening it. Talk to strangers through a closed and locked door.

Report Crimes to the Police: An accurate description of the suspect will help you the most when reporting a crime to the police.

Important characteristics to look for:

- Body – shape, height, weight, build
- Face – shape, hair, distinguishing marks, eye shape & color, nose size & shape, mouth size & shape, glasses
- Hair – style, color, texture, length
- Clothing – color, style, shoes, hat, etc.
- Mannerisms – walk, speech, etc.

AMERICAN FEDERATION OF POLICE & CONCERNED CITIZENS • POLICE FAMILY SURVIVORS FUND
6350 Horizon Drive • Titusville, Florida 32780 • (321) 264-0911 • www.afp-cc.org • policeinfo@phf.org

(Aff. Ex. 16 at 334; Aff. Ex. 8 at 59:17—60:3, 71:6-18.)

The second, dramatically smaller aspect of AFPCC’s charitable programing consists of grants (which AFPCC calls “Emergency Financial Assistance”), educational scholarships, gifts, greeting cards, and similar types of assistance to families of fallen officers. (Aff. Ex. 1 at 3 Part III, Line 4b). AFPCC refers to these activities collectively as its “Police Family Survivors Fund” (“Fund”). (Aff. Ex. 1 at 3 Part III, Line 4b). AFPCC’s Fund expenditures constituted about \$324,327, or 17%, of its claimed charitable spending in FY 2018, and only 8.6% of the \$3.78 million in donations that AFPCC raised that year. (Aff. Ex. 1 Part III, Line 4b divided by Part IX, Line 25, column (B) (\$1,906,157)). This is consistent with AFPCC’s spending for the 2013 through 2017 fiscal years, in which it spent only between 13.8% and 16.7% of its claimed charitable spending on Fund activities. (See Aff. Ex. 17; Aff. Ex. 18 at 22:9—24:11.)

In its mail solicitations, AFPCC generally solicits contributions for all of its programs and activities, and not just for the Fund. (Aff. Ex. 2 at 70:19-25.) From FY 2013 to FY 2017, there was just one three month period between October 2014 and December 2014 when this was not the case, because it restricted donations made in response to a specific mailer for its “Emergency Financial Assistance” Fund program by making associated notations in its general

ledger. (Aff. Ex. 7 at 139 Resp. 28; Aff. Ex. 19 at 352 Resp. 28; Aff. Ex. 2 at 26:4-14; 71:24—73:7, 74:6-75:9.)

D. AFPCC’s Fundraising Operations.

AFPCC solicits donations using two professional fundraisers. (Aff. Ex. 2 at at 41:14-16.) Barry Shepherd, AFPCC’s CEO, testified that AFPCC uses professional fundraisers because they “take care of everything,” they “just send us part of the check,” and “I don’t have to do any work.” (Aff. Ex. 8 at 169:20—170:1.)

Midwest Publishing-DN, Inc., primarily solicits donations for AFPCC by telephone. (*See* Aff. Ex. 20 at 354). Odell, Simms Inc., and its affiliate Stephen Winchell and Associates (collectively “Odell”), draft AFPCC’s mailed solicitations at issue in this lawsuit. (Aff. Ex. 2 at 42:10-11; 44:14-16; Aff. Ex. 8 at 16:14-18.) However, Odell performs all work “under the specific direction of [AFPCC],” who preapproves all copy and design of these solicitations prior to their printing, and who “exercise[s] control and approval over the timing and the volume of all mailings.” (Aff. Ex. 21 at 370; Aff. Ex. 22 at 375; Aff. Ex. 8 at 18:11-23, 19:23—21:4, 21:10-16.) AFPCC reviews for accuracy and signs forms approving all solicitations before they are mailed to potential donors. (Aff. Ex. 23 at 376; Aff. Ex. 24 at 377; Aff. Ex. 8 at 17:23—18:8, 22:9-17, 27:13-19, 27:24—28:5.)

AFPCC sends one identical mailer to donors nationwide,³ with the exception of the customization of certain phrases in the mailer “to reflect the state, sometimes county or an area” where the potential donor lives. (Aff. Ex. 2 at 45:5-13.) AFPCC’s mailers often contain

³ Although many of the exemplar mailers contained in this Motion reference addresses of persons in different states, AFPCC also mailed these solicitations to Minnesota residents. (Aff. Ex. 9 at 230 Resp. 1; Aff. Ex. 8 at 58:23—59:1 (“[I]f we sent a mailer to one [state], we send them to all that we’re registered in.”).

different “themes,” many of which are consistent in content from year to year, and which are discussed in further detail below in Part II. (*See* Aff. Ex. 25 at 378-83; Aff. Ex. 8 at 45:18—46:4, 48:16-21, 147:5-8; Aff. Ex. 26 (complete solicitations).)

AFPCC has two main types of solicitation mailing lists: its “housefile,” which refers to AFPCC’s in-house database of persons who have donated to AFPCC in the past, and its “prospect” list, which generally refers to persons who have not yet donated to AFPCC (but it may also include former AFPCC donors who have not made a contribution for a substantial period of time, referred to as “expires”). (Aff. Ex. 27 at 21:18—22:2; Aff. Ex. 2 at 53:5-15; Aff. Ex. 28 at 402.) As discussed in more detail below in Part III.B.4, Odell recommends to AFPCC the names of potential donors with specified demographic and other criteria for AFPCC to approve and acquire from third-party mailing-list brokers. (Aff. Ex. 28 at 402; Aff. Ex. 2 at 43:25—44:4, 54:17—55:2.)

Each housefile and prospect mailer contains a unique code in the response form completed by the donor and mailed to AFPCC with their contribution, which allows AFPCC to track which mailers caused the person to donate, and thus to determine how successful each mailer is by analyzing the resulting reports of these donations. (Aff. Ex. 2 at 64:3-7; Aff. Ex. 12 at 25:18-25.) These reports reveal that AFPCC’s net revenue margin on each mailer is miniscule. (Aff. Ex. 29 at 406; Aff. Ex. 15 at 9:10-16, 25:7-19.) For housefile mailings, which are the most lucrative, AFPCC hopes for “any positive amount” of net revenue. (Aff. Ex. 15 at 25:7-22). For prospect mailings, AFPCC frequently loses money on mailers—under the hope that the investment is worth it to identify future housefile donors. (Aff. Ex. 15 at 27:12—28:9.) Because of the low margins, the *slightest* variation in a mailer—even changing the color of the mailing envelope—can impact its success or failure. (Aff. Ex. 30 at 410; Aff. Ex. 8 at 40:23—

41:7, 45:8-16.)

Despite AFPCC's acknowledged responsibility for the content of its mailers, it knowingly "loosened the reins completely" to allow Odell to "run the horses pretty much anyway . . . [it] asked" over the years, because Odell was adept at making AFPCC money. (Aff. Ex. 31 at 411; Aff. Ex. 32 at 412; Aff. Ex. 8 at 22:20—23:3, 34:7-24, 36:23—37:6.) AFPCC's CEO, who was in charge of approving its mailers, testified that because of Odell's success generating revenue, he did not "make a lot of recommendations" to Odell, and allowed it to "do the things [it] felt was necessary" to raise money for AFPCC. (Aff. Ex. 8 at 36:5-14.) It was under this model that the organization's leadership "plod[ded] along" for years, "day in and day out," collecting their "paychecks" without "any financial goals, other than to raise money [and] give it away." (Aff. Ex. 33 at 414; Aff. Ex. 8 at 173:13—175:8.)

II. AFPCC DECEPTIVELY SOLICITS CONTRIBUTIONS FROM THOUSANDS OF MINNESOTA DONORS BY SENDING HUNDREDS OF THOUSANDS OF MISLEADING MAILERS INTO THE STATE.

From at least January 1, 2013, and continuing through May 2018,⁴ AFPCC mailed numerous deceptive and misleading solicitations to potential Minnesota donors, as described further below.

A. AFPCC Deceptively Represents that Its Sole Charitable Program Is the Police Family Survivor's Fund, When it Has Consisted of Less Than 18% of Its Charitable Spending at All Relevant Times.

AFPCC first deceives Minnesota donors by creating a misleading impression that its sole charitable program is the Police Family Survivors Fund ("Fund"), which consists of aid to families of police officers killed in the line of duty. AFPCC accomplishes this by both (1) fostering an overall deceptive impression that its sole charitable program is the Fund in its

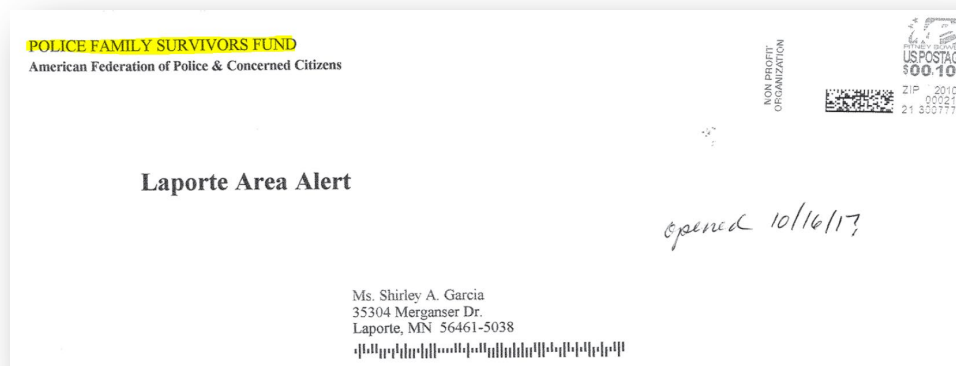
⁴ AFPCC asserts that in spring 2018, it decided to voluntarily stop soliciting in Minnesota for an "indeterminate" period of time. (See Aff. Ex. 2 at 136:12-15.)

mailers through graphics, font size, express misrepresentations, and other deceptive practices; and (2) making additional, specific deceptive representations that are independently misleading and contribute to AFPCC's overall Fund-specific deception.

1. AFPCC uses tactics in all of its mailers that give an overall impression that its only program is the Fund, or that donations will be used solely for Fund charitable purposes.

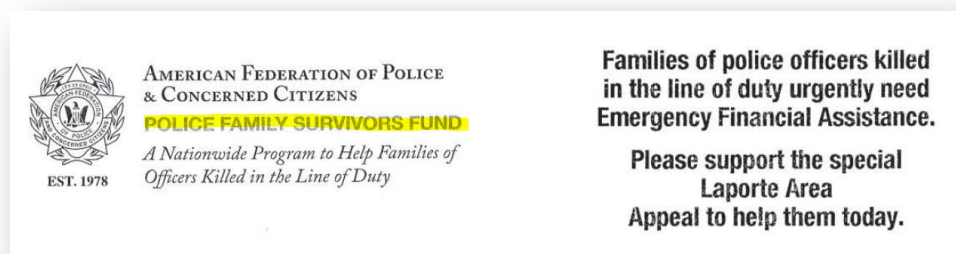
From when a donor first opens the mailing envelope, to when the donor submits her contribution, AFPCC employs multiple deceptive tactics giving the impression that its sole charitable program is the Fund. These tactics are generally present in nearly all, if not all, of AFPCC's solicitations mailed in Minnesota, and work in combination with each other to deceive donors. (*See* Aff. Ex. 26.)

The first thing a donor sees—the mailing envelope—features the Fund prominently next to AFPCC's name (and in many instances, more prominently than AFPCC's name). To illustrate:



(Garcia Aff. Ex. A (highlighting added to all examples).)

When a donor opens the envelope, she then sees the masthead of the solicitation prominently featuring the Fund in AFPCC's logo. For example:



(Garcia Aff. Ex. A.)

If a donor continues reading, she encounters multiple misleading statements or outright misrepresentations, further solidifying the perception that AFPCC’s sole program is the Fund, despite the fact that the Fund has at all relevant times constituted less than 18% of AFPCC’s claimed charitable programming. (*See* Aff. Ex. 1 at 2; Aff. Ex. 17.) Some solicitations, for example, begin by stating that AFPCC is “reach[ing] out on behalf of spouses and children of police officers killed in the line of duty.” (Goldburt Aff. Ex. A) Some solicitations specifically ask donors to support an “Appeal for the Police Family Survivor’s Fund.” (Goldburt Aff. Ex. A.) Many state, “Whatever donation you send will be greatly appreciated and put toward our Police Family Survivors Fund immediately,” when in reality, AFPCC generally uses donations for all of its programs and activities and not just the Fund—including its far larger program of inserting “educational” content in its solicitation mailers. (Aff. Ex. 2 at 70:19-25; Goldburt Aff. Ex. A.)

Many mailers also claim a “funding goal” of a specified amount of money for the Fund, suggesting that this amount would be set aside with other donations for Fund purposes, when that is not actually the case. (*See* Aff. Ex. 34 at 417; Aff. Ex. 2 at 80:10-12.) Others state that \$12,400 is the amount of money each police family can “access,” when in reality, AFPCC spent a total average of \$33 on each Minnesota police family beneficiary from 2011 to 2016. (*See* Garcia Aff. Ex. A; Aff. Ex. 35 at 424; Aff. Ex. 15 at 31:15—32:11.) This tactic gives the false

impression that AFPCC provides \$12,400 to each family, and in turn, inflates the perceived size of AFPCC's Fund program overall.

The deception continues on the "response card" a donor includes when sending her donation to AFPCC, which instructs her to "Return To: AMERICAN FEDERATION OF POLICE & CONCERNED CITIZENS POLICE FAMILY SURVIVORS FUND," indicating that donations will be put toward that purpose only. (Adams Aff. Ex. 1.)

Finally, to the extent a donor has any lingering doubts about the use of the money before she decides to mail her check, AFPCC assuages them by featuring the Fund prominently on the donation envelope addressee line or elsewhere on the envelope, as follows:



(Garcia Aff. Ex. B; *see also* Aff. Ex. 16 at 333; Aff. Ex. 8 at 59:17-3; 60:13—62:7.)

2. Additional misrepresentations contribute to AFPCC's Fund-specific deception, as well as constitute independent deceptive practices.

In addition to the general tactics and language cited above, AFPCC uses other deceptive tactics that both contribute to its overall Fund-specific deception, and which constitute independent deceptive practices in their own right. These include, but are not limited to, the following:

- In some solicitations mailed throughout the time period between FY 2013 and FY 2017,

AFPCC falsely stated that “100% of your gift — every penny — will immediately be used to provide Emergency Financial Assistance,” which is a Fund program. (*See* Aff. Ex. 36 at 437; Aff. Ex. 37 at 443.) In reality, AFPCC only restricted donations to this Fund program that were received in response to a mailer sent between October 2014 and December 2014. (Aff. Ex. 2 at 70:19-25; Aff. Ex. 7 at 139 Resp. 28; Aff. Ex. 19 at 352 Resp. 28; Aff. Ex. 2 at 26:4-14; 71:24—73:7, 74:6-19; 74:20—75:9.)

- AFPCC includes a solicitation with its newsletters that specifically requests donations to “Help Send a Kid to Summer Camp,” claims “any gift you send will help many boys and girls get back on track as they prepare for summer camp,” and states “**YES**, I want to donate to the **2018 Summer Camp Program!**” (Aff. Ex. 38 at 449; Aff. Ex. 2 at 77:24-78:20.) In reality, AFPCC does not set aside any amount of contributions it receives in response to this, or any other mailer, for its summer camp Fund activity. (Aff. Ex. 14 at 265 Resp. 19; Aff. Ex. 39 at 456 IR 30; Aff. Ex. 2 at 80:5; Aff. Ex. 7 at 139 Resp. 30.)
- In an effort to improve its credibility and make donors “feel less convinced [it was] a scam,” AFPCC sought favorable credentials from various charities review organizations, including GuideStar. (*See* Aff. Ex. 40 at 459; Aff. Ex. 41 at 461; Aff. Ex. 42 at 463; Aff. Ex. 43 at 11:15-22, 17:3-10, 18:17-19, 18:25—19:4, 22:13-21, 25:6-9.) When it received a “Platinum Seal of Transparency” from GuideStar, AFPCC included a full-page insert in mailers stating that the “Platinum Seal of Transparency certifies that we use your contributions the way you intend – to comfort and assist police family survivors,” and that GuideStar “has verified” its Fund programs. (Aff. Ex. 44 at 483; Aff. Ex. 2 at 65:4-19.) AFPCC also stated in its main solicitation letters that because GuideStar “has awarded AFP&CC their Platinum Seal of Transparency,” a donor’s “gift will be used wisely.” (Aff. Ex. 45 at 486; Aff. Ex. 8 at 104:1-7.) In reality, GuideStar did not review, verify, or certify the accuracy of AFPCC’s solicitations, how it used its contributions, or whether it used its contributions “wisely.” (Nico Aff. ¶¶ 6-8.) AFPCC removed the GuideStar references after the AGO’s lawsuit, and admitted that it could not say whether the statements “were absolutely true or not.” (*See* Aff. Ex. 46 at 490; Aff. Ex. 2 at 67:22-68:5, 68:12-25; *compare* Aff. Ex. 47 at 491; Aff. Ex. 15 at 47:4-10, 49:8—52:5, *with* Aff. Ex. 48 at 513 ¶¶ 38-43; *see also* Aff. Ex. 15 at 50:14-20, 52:2-8.)

3. AFPCC’s Fund-specific deception is intentional.

AFPCC intentionally emphasizes the Fund program generally, and Fund activities like “Emergency Financial Assistance” specifically, in order to raise more money. (*See* Aff. Ex. 16 at 327; Aff. Ex. 8 at 59:17—60:7, 63:10-15 (testifying the Fund is featured in larger letters than AFPCC’s name to provide “emphasis on the Fund”).) This is because AFPCC “solicits feedback from its donors to ascertain which of its program services are ‘most popular,’” and has determined from these questionnaires that emphasizing “certain programs are more important”

for prompting donations. (Aff. Ex. 78 at 656 Ans. 19; Aff. Ex. 8 at 76:10—77:1.)

Specifically, to “eliminate any donor tendency to not respond because of a focus on a program service they feel is not as important,” mailers are “focused on either the general appeal of the program’s benefit to family survivors . . . or the need to support the Emergency Financial Assistance Program.” (Aff. Ex. 49 at 538; Aff. Ex. 8 at 77:3-9, 82:22—83:3.) As described further below in Part II.A.5, AFPCC’s largest, but less-sympathetic “public education program,” is not even mentioned in the mailers. (*See* Aff. Ex. 50 at 45:1-7 (“I don’t need a mailer to tell me that families of slain police officers need help. I want to help them, not [be] told that they need help.”).)

4. Minnesota donors were deceived by AFPCC’s Fund-specific tactics.

As further evidence that AFPCC’s mailers are deceptive, its tactics are successful. Initially, multiple persons in Minnesota and other states filled out donation checks directing their donation to the “Police Family Survivors Fund,” instead of to AFPCC. (*See* Aff. Ex. 51 at 545; Aff. Ex. 27 at 27:5—28:10, 29:2—30:1.) AFPCC’s bookkeeper testified that the confusion was the likely result of the fact that the Fund is “on the appeal form that [donors] receive.” (Aff. Ex. 27 at 29:24—30:4.)

Most importantly, multiple Minnesota donors testified that AFPCC deceived them into believing that the Fund was its only charitable program. Minnesota donors Cynthia Dale (Dale Aff. ¶¶ 4-6), Dorothy Holden (Holden Aff. ¶¶ 3-4), Mark Goldburt, (Goldburt Aff. ¶¶ 4, 6), Shirley Garcia (Garcia Aff. 34 ¶¶ 2-3), William Johnson (Johnson Aff. ¶¶ 3, 5-6), Adeline Daniels (Daniels Aff. ¶¶ 4-5), Frank Cruz (Cruz Aff. ¶ 3), Mary Matthews (Matthews Aff. ¶¶ 3-4), Gladys Anderson (Anderson Aff. ¶ 2), and Tom Adams (Adams Aff. ¶¶ 4-5), all stated that AFPCC’s mailers led them to believe AFPCC’s sole charitable program consisted of aid to police families, that AFPCC did not disclose its public education programs, and that they would

not have donated if they knew Fund-related programs constituted such a small part of AFPCC's charitable programs. For example:

- Janet Meier donated \$15 to AFPCC in 2018. (Meier Aff ¶¶ 1, 3.) AFPCC's mailers led her to believe it was asking for money for the sole charitable purpose of providing aid to police families. (Meier Aff ¶ 4.) Ms. Meier specifically identified the prominence of "Police Family Survivor Fund" next to AFPCC's name as contributing to her impression. (Meier Aff ¶ 4; Aff. Ex. 52 at 15:6-13.)
- Adeline Daniels donated because she believed her contribution would be used to provide aid to families of slain police officers based on AFPCC's solicitations. She thought that it was "outrageous" that such a small portion of AFPCC's funds were used to provide aid to police families. (Daniels Aff ¶¶ 4-5.)
- Gladys Anderson testified that she specifically donated in response to a mailer that led her to believe that her donation would specifically be used to help send kids of fallen officers to summer camp, which is one of AFPCC's "Fund" activities, because of "the way it was worded." (1st Anderson Aff ¶ 4; Aff. Ex. 53 at 19:12—20:10.) When she made the donation, it made her "happy to think of the kids who would be excited to go to summer camp." (Anderson Aff. ¶ 4.)
- Cynthia Dale said she donated to AFPCC because, based on its mailers, she believed that its only charitable program consisted of giving aid to the families of fallen police officers. (Dale Aff ¶¶ 1 4; Aff. Ex. 50 at 23:3-16, 31:1-9.) She stated helping police families was "close to [her] heart," because she had a close friend whose police officer husband was injured in the line of duty. (Dale Aff ¶ 3.) Ms. Dale testified that she was "genuinely appalled at the . . . lack of percentage of the monies going to the actual police families," and that it "really struck my heart in a painful way." (Aff. Ex. 50 at 34:19-23.)

5. AFPCC's Fund-specific deception is compounded by the fact that it does not disclose its largest "public education" program in mailers.

AFPCC's mailers not only significantly overemphasize the Fund; they also fail to disclose its largest charitable program: "public education" activities, including its largest single program expenditure of sending mailers to potential donors containing purported "educational" content combined with the request for money.

Indeed, AFPCC's CEO and CFO admit that AFPCC's mailers do not specifically state that it is raising money for its public education charitable programming, including safety tips and public awareness:

13 Q. I'm asking do they disclose it in this
14 particular mailer -- anywhere in this mailer, does
15 AFP disclose that it's raising money for safety tips
16 and public awareness?
17 A. No.

(Aff. Ex. 8 at 72:9-17; *see also, e.g.*, Aff. Ex. 2 at 96:19-21, 98:24—99:5.)

Further, Minnesota residents testified that AFPCC did not disclose any public education programs or activities in its mailers, or that they could not recall any such information in the mailers they received. (Adams Aff ¶ 4; Anderson Aff ¶ 2; Dale Aff ¶ 4; Aff. Ex. 50 at 43:25—44:8; Cruz Aff. ¶ 3; Daniels Aff. ¶ 4; Golburt Aff ¶ 4; Garcia Aff ¶ 2; Aff. Ex. 55 at 35:23—36:3, Holden Aff. ¶ 3, Johnson Aff ¶ 3; Matthews Aff ¶ 3; Aff. Ex. 52 at 23:19-22.)

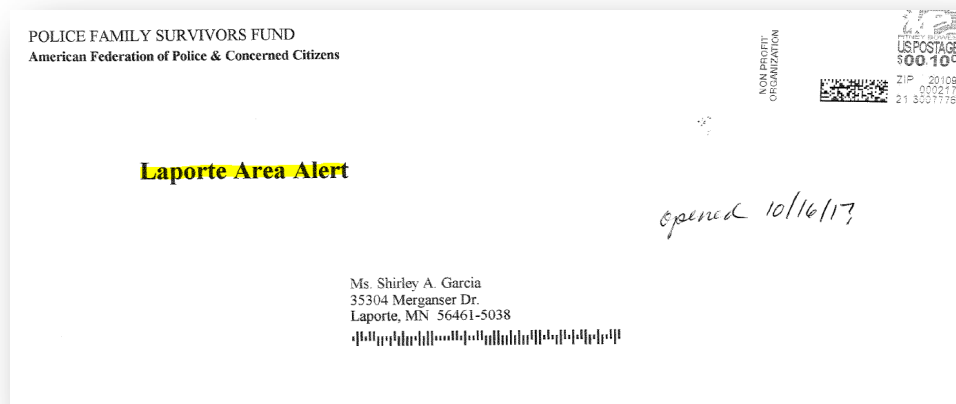
B. AFPCC Deceptively Represents that Donations Are Solely Being Raised in, and for the Benefit of Police Families in, a Minnesota Donor's Local City or County.

AFPCC does not have any state or local branches, chapters, or offices in Minnesota. (Aff. Ex. 14 at 266 Resp. 20.) It mails its solicitations on a nationwide basis and does not conduct special fundraising appeals in Minnesota statewide or in specific Minnesota localities. (Aff. Ex. 6 at 133 Resp. 21; Aff. Ex. 8 at 58:23—59:3.) It further does not “set aside donations made to AFPCC to fund program services for any specific state or geographic area,” including Minnesota. (Aff. Ex. 7 at 139 Resp. 29; *see also* Aff. Ex. 14 at 264 Resps. 17-18.) Nonetheless, AFPCC persistently fosters a false affiliation with a donor's local area in many of its mailers to induce more contributions.

1. AFPCC uses deceptive localizing language in its mailers.

Like its Fund-specific deception, AFPCC's localizing tactics are contained in both prospect and housefile mailings. (*See* Aff. Ex. 25 at 378-83; Aff. Ex. 8 at 52:19—53:15; Aff. Ex. 56 at 565; Aff. Ex. 8 at 112:7-12, 112:17—113:19.) Also like its Fund deception, AFPCC's

“localization” deception generally starts when a donor receives the solicitation in the mail, as the envelope enclosing such mailers reference a local “Area Alert” or “Area Notification.” For example:



(Garcia Aff. Ex. A; *see also* Aff. Ex. 34 at 416; Aff. Ex. 2 at 80:10-13; *see also* Aff. Ex. 57 at 566 (housefile); Aff. Ex. 37 at 442 (housefile); Aff. Ex. 8 at 83:19-22; Aff. Ex. 58 at 574 (prospect); Aff. Ex. 8 at 134:12-16.)

The solicitation itself references an “appeal” or other fundraising effort for or in the donor’s local area in the letterhead of some mailers, as follows:



(Garcia Aff. Ex. A.)

The body of solicitations advance the overall localization deception by stating or suggesting that AFPCC is holding a fundraising drive for local police families, or that a specific

amount of money needs to be raised in or for families in the donor's local area. For example, mailers ask donors to "join your friends and neighbors in supporting our 2016 Hennepin County Area Annual Appeal for the Police Family Survivor's Fund," to "join other supporters from your area this year by helping meet our funding goal of \$7,102," (Goldburt Aff. Ex. A), or to "support the special Laporte Area Appeal." (Garcia Aff. Ex. A.) Other mailers state that AFPCC is "reach[ing] out to caring citizens like you in the Hennepin County area," (Golburt Aff. Ex. A), that it is "launching a special campaign" seeking to raise funds from "caring and concerned friends like you in the [donor's city] area," (Aff. Ex. 37 at 443), or that it has a "funding goal" specific to the donor's local area. (Aff. Ex. 34 at 417; Aff. Ex. 57 at 567; Aff. Ex. 58 at 575.)

Even AFPCC's response cards deceptively promote the impression that contributions were being raised in, or would be used to help members of a donor's local community, by containing references to a "reply" or an "appeal" for the donor's local area. For example:

LAPORTE AREA APPEAL REPLY

Ms. Garcia, please send a special gift today to help provide emergency financial assistance, grief counseling, scholarships, and birthday and holiday gifts to grieving families of police officers killed in the line of duty.

\$50 \$75 \$100 Other: \$ _____

Please RSVP before October 30. Thanks!

Ms. Shirley A. Garcia
35304 Merganser Dr.
Laporte, MN, 56461-5038

JJ711
FG5195833

Please make checks payable to: "AFP&CC." Thank you! All donations are tax-deductible. See other side to charge your contribution to your credit card.
Return this form with your gift in the enclosed envelope to: AMERICAN FEDERATION OF POLICE & CONCERNED CITIZENS
6350 Horizon Drive, Titusville, FL 32780 • (321) 264-0911 • policeinfo@aphf.org • www.afp-cc.org

(Garcia Aff. Ex. B.)

2. AFPCC's deceptive "localizing" tactics are intentional.

AFPCC intentionally deceives Minnesota donors about its affiliation with their local area in order to raise more money. AFPCC knows it is "important" for donors to see a local benefit for AFPCC's programs to increase its chances at receiving a contribution. (See Aff. Ex. 43 at

63:18—64:21.) AFPCC’s CEO testified that having the donor’s local area prominently featured on a mailer is effective in making the donor “feeling attached to the piece.” (Aff. Ex. 8 at 115:14—116:4.) Emails from Odell to AFPCC show that it believed that personalizing mailers with donors’ local area in “much smaller type” than it currently uses would be a “big mistake,” and that without such city-specific personalization, “there would be no program” because of “very poor results.” (Aff. Ex. 59 at 582; Aff. Ex. 8 at 114:13—115:23.) As AFPCC’s CEO again testified, “if you personalize the mail toward a specific city, the results are much better” than without the local-area personalization. (Aff. Ex. 8 at 116:22—117:2.) Without emphasizing the donor’s city, he continued, “the results [are] so bad, that the cost to do the mail by piece outweighs the returns.” (Aff. Ex. 8 at 117:3-9.)

3. Minnesota donors were deceived by AFPCC’s localizing tactics.

AFPCC’s deceptive localizing tactics worked. As with its Fund-specific deception, multiple Minnesota donors indicated on checks they wrote to AFPCC their intent to direct their donation to their local area by paying to the order of “Ramsey County Area AFP&CC” (or other locality), or by writing in the memo line “Maple Grove Police Fund 2018” (or similar language). (See, e.g., Aff. Ex. 51 at 547; Aff. Ex. 27 at 25:23—26:12, 32:19—33:12, 34:2-10.) Further, Minnesota donors Tom Adams, Frank Cruz, Shirley Garcia, and Mark Goldburt all stated that AFPCC’s mailers misled them into believing that AFPCC was raising funds specifically to benefit their local area. To illustrate:

- Tom Adams made multiple large donations to AFPCC over the past few years, including a \$600 donation in July 2016. (Adams Aff ¶¶ 1-3.) Adams explained that he mostly gives to local charities, and believes “things can be hard at times for police officers and their families,” so when he made the \$600 donation, he wanted to support police families in his area. (Adams Aff ¶ 3.) Adams testified that he specifically donated because the mailer referenced his city of Sauk Rapids, and led him to believe his donation would “stay closer to home.” (Aff. Ex. 60 at 10:6-13, 19:13-18.)
- Frank Cruz said that he donated to AFPCC because he thought his donations would be

used to help police families living in Minnesota. (Cruz Aff ¶ 4). Cruz said he is more likely to support charities that help Minnesota police officers because he “believe[s] in the work that they do.” (Cruz Aff. ¶ 4.) Cruz would not have donated to AFPCC if he had known that it does not set aside money to specifically help Minnesota families. (Cruz Aff. ¶ 4.)

- Shirley Garcia stated that she donated to AFPCC in January of 2016 after receiving a mailer that she thought indicated that her donation would help the families of the local Laporte police department. (Garcia Aff ¶ 2). She does not usually donate to police charities, but she did at that time because she wanted to help the Laporte police, who had been very helpful to her in the past. (Garcia Aff ¶ 2). Garcia stated that she would not have donated if she had known that the organization did not actually set aside any funds to help the Laporte area. (Garcia Aff ¶ 3.) Rather, she would have “thrown the mailer in the garbage.” (Garcia Aff ¶ 3.)
- Mark Goldburt donated \$20 to AFPCC in November 2016. (Goldburt Aff ¶ 3.) He testified that when he saw “Hennepin” referenced on the mailer, he “paid a little bit more attention.” (Aff. Ex. 55 at 18:17-20.) When “he went through the letter,” it was his understanding that AFPCC “was kind of a small charity that was collecting for Hennepin County specifically.” (Aff. Ex. 55 at 13:5-8, 24:5-9.) Goldburt pointed to the specific mailer language discussed above as contributing to his perception. (Aff. Ex. 55 at 34:24—35:2, 35:3-7, 35:14-22). Had he known the purported Hennepin County “funding goal” referenced in the mailer he received was not based on any local need, he would not have donated. (Goldburt Aff ¶ 6.)

C. AFPCC’s Mailers Create a Misleading Impression that It Has an Official Affiliation with the Police.

AFPCC has no official affiliation with any federal, state, or local law enforcement agency, and is not a police membership organization.⁵ (Aff. Ex. 6 at 134 Resp. 22; Aff. Ex. 5 at 123; Aff. Ex. 7 at 137 Resp. 3.) Its mailers nonetheless foster the misleading impression that it is comprised of members of, or affiliated with, police departments. This tactic is not only individually deceptive—it also helps further AFPCC’s deceptive Fund-specific and localizing tactics.

Among other tactics often overlapping with the types of deception alleged above, and again because of positive donation results, AFPCC created an “‘Official’ looking,” black-and-

⁵ *Contrast with, e.g.*, Minnesota Fraternal Order of Police, <https://www.mnfop.com> (last visited September 23, 2019.)

white mailer to serve as its primary solicitation mailer—also referred to as its “control” mailer—to send to AFPCC’s “prospect” list. (*See* Aff. Ex. 61 at 587; Aff. Ex. 62 at 601-02; Aff. Ex. 8 at 144:25—145:5, 151:8-15, 154:15—155:2.) The mailers state, among other things, “For Private Use Only” and “Special . . . Notice” on the mailer envelope, giving it the appearance of a government notice. (Aff. Ex. 8 at 148:3-149:13; Aff. Ex. 61 at 595.) AFPCC also ensures that a police officer signs all solicitation mailers to “lend[] credibility,” as “having a police officer, retired or otherwise, [is] very important, especially when the mail piece is an institutional-looking-local area package,” according to Odell. (Aff. Ex. 63 at 603; Aff. Ex. 8 at 139:9-15.) AFPCC’s CEO further testified, “[I]f you’re sending a mailer representing a law enforcement-associated organization, it’s best to have a law enforcement officer sign it.” (Aff. Ex. 8 at 143:23—144:1.)

As with its other tactics, AFPCC knows that donors are deceived by its methods. AFPCC discussed how the recipients of its mailers “bother[] their local Police Department!” because of their confusion about whether AFPCC is formally affiliated with the police. (Aff. Ex. 64 at 606; Aff. Ex. 43 at 27:9-14, 29:2-8.) Indeed, AFPCC “periodically” receives calls directly from police departments inquiring about its activities, because donors ask the departments whether they are affiliated with AFPCC. (Aff. Ex. 43 at 29:20-25; Aff. Ex. 8 at 156:16-19.) As AFPCC’s CEO testified, such calls are “generally because they’re confused” about “receiving a mail piece for law enforcement,” and because donors frequently want to know if they can “donate straight to their department” rather than to AFPCC. (Aff. Ex. 8 at 156:21—157:12.)

Finally, like with its other tactics, Minnesota donors were, in fact, deceived by AFPCC’s official-affiliation deception. For example, Adeline Daniels stated that she made numerous donations to AFPCC from December 2012 to September 2017 because she believed it was an

official police entity. (Daniels Aff. ¶ 6.) Similarly, Frank Cruz stated that AFPCC’s mailers led him to believe that the organization was formally made up of police officers, such as a police union or professional association. (Aff. Ex. 65 at 21:10-20; Cruz Aff ¶ 5.) And Gladys Anderson stated that she thought AFPCC was formally affiliated with police departments based on its mailers, and that she would not have donated to AFPCC had she known the truth. (Anderson Aff. ¶ 3; Aff. Ex. 53 at 18:6-23.)

D. AFPCC Misrepresents that It Has An Urgent Need for Donations and Is at Risk for Cutting Its Fund Programs Due to Nonexistent “Budget Shortfalls.”

Between 2013 and 2018, AFPCC mailed nine variations of what it referred to as its “Budget” solicitation to its housefile (i.e., prior donor) mailing list, asking these prior donors to urgently contribute again because of budgetary “shortfalls.” (Aff. Ex. 25 at 379-83; Aff. Ex. 8 at 55:18—59:13.). These budgetary “shortfall” numbers are created by Odell, however, and are not based upon any internal AFPCC review of its financial condition. (Aff. Ex. 66 at 611 (email from Odell stating how it calculated the “shortfall” numbers); Aff. Ex. 8 at 117:14-18, 120:5-9.) AFPCC mailed these Budget-themed mailers and follow-ups around the same time every year, based upon a pre-planned schedule that was created “three, four, even five,” *years* in advance. (See Aff. Ex. 25 at 378-83; Aff. Ex. 8 at 47:16—48:8.) Further, the budgetary-shortfall language was “deliberately made ‘stronger’ and more urgent” in 2014 based upon positive donor results. (Aff. Ex. 66 at 611; Aff. Ex. 8 at 119:3-6.)

As such, AFPCC sent mailers claiming it had a dire financial need that did not actually exist. To illustrate:

- In a mailer sent on or around June 16, 2014, labeled “Emergency Appeal,” AFPCC represented that “[d]espite all we’ve done to cut costs and manage expenses, AFP&CC is facing a serious budget shortfall of about \$51,000,” and warned that “the threat of cutting back on our critical programs is all too real.” (Aff. Ex. 67 at 613.)
 - But a few months before in January of 2014, AFPCC’s CEO and CFO increased

employee salaries, including their own, stating that they believed a pay increase “was justifiable and merited” because the organization “had a good year.” (Aff. Ex. 68 at 620; Aff. Ex. 15 at 40:19—41:1, 42:7-13, 42:22-24.)

- And just a month before it sent this mailer, on May 15, 2014, AFPCC’s CFO predicted in his report to the board a “projected net gain of about \$50,000 [in revenue] for the fiscal year.” (Aff. Ex. 69 at 622; Aff. Ex. 2 at 85:5-18; 87:24—88:5.)
- In a mailer sent on or around May 21, 2015, AFPCC represented that an “increase in officer deaths” had caused a “serious funding emergency” for AFPCC, and that it was sending a “SPECIAL FUNDING EMERGENCY GIFT REMINDER” to donors. (Aff. Ex. 70 at 625-27; Aff. Ex. 2 at 88:16-19)
 - The minutes for an AFPCC board meeting held only a week prior, however, on or around May 14, 2015, included the CFO’s report projecting a “net gain of about \$75,000 for the fiscal year.” (Aff. Ex. 71 at 633; Aff. Ex. 2 at 90:1-6; 90:16—91:3.)
- In a mailer sent on or around April 22, 2016, AFPCC represented that it was “facing a critical funding situation,” and that it “hope[d] to raise \$196,200 as quickly as possible to help ensure we’ll be there for every family survivor.” (Aff. Ex. 72 at 636; Aff. Ex. 2 at 91:14-16, 92:13-24.)
 - But just a few weeks later, in a May 2016 report to AFPCC’s board, the CFO reported that AFPCC was in “good, stable financial condition,” that its revenue was up by \$307,000 in the last fiscal year, and that he projected a net revenue gain of \$150,000 in the upcoming fiscal year. (Aff. Ex. 73 at 644; Aff. Ex. 2 at 93:6-15.)

Indeed, in its entire history, AFPCC has never had to turn down a request for assistance because of insufficient revenue. (Aff. Ex. 2 at 83:15-18.)

E. AFPCC Compounds the Harm from Its Deception by Targeting Its Mail Solicitations to Senior Citizens.

AFPCC’s tactics are deceptive to all demographics. Its deception is aggravated, however, by its targeting of senior citizens.

AFPCC determines the ages and other demographic criteria of its donors by, among other methods, requesting a third-party “data overlay” of its donor database. (Aff. Ex. 74 at 646; Aff. Ex. 75 at 647; Aff. Ex. 12 at 66:8-17, 66:20—67:5, 68:10-24, 70:10-18, 71:17-24.) For

housefile mailings, AFPCC selects specific subsets of its donor list based on demographic criteria; and for prospect mailings, AFPCC acquires donor names with specific demographic criteria from the brokers from which it purchases mailing lists. (*See, e.g.*, Aff. Ex. 76 at 648-50 (housefile example), Aff. Ex. 12 at 28:11-24, 32:13-19, 33:2—34:2; Aff. Ex. 28 at 403 (prospect example).) When deciding to whom to send a specific mailer, AFPCC often specifically selects senior citizens to receive them, or selects other conditions that appear to be proxies for older donors. (*See, e.g.*, Aff. Ex. 28 at 403 (selecting female donors to various causes aged “70+” and “75+”); Aff. Ex. 2 at 58:7-12; Aff. Ex. 77 at 652 (citing, among other selections, “Active Consumer Lifestyle DB 3M Fem 70+ FL,” “Alliance for Retired Americans \$10+ L12M,” and “Association of Mature Amer Citizens \$10+ L12.”))

Indeed, AFPCC admits that it “analyzes its donor data to identify the demographic that tends to donate the most,” and states that in doing so, it “has found that the values held by older people relate well” to AFPCC’s mission. (Aff. Ex. 78 at 658 Ans. 22.) Internally, it recognizes its own donor base as “older . . . than most.” (Aff. Ex. 12 at 84:5-10; *see also* Aff. Ex. 2 at 147:6-13.)

III. AFPCC FILED FALSE FINANCIAL STATEMENTS WITH THE AGO THAT IMPROPERLY INFLATED THE MAGNITUDE OF ITS CHARITABLE PROGRAM SPENDING.

A. AFPCC Maintains Responsibility for, and Control over, Its Financial Statements Filed With the AGO.

As required by the Act for charities soliciting in Minnesota, AFPCC files an Annual Report each year attaching its IRS tax return—a public document commonly known as a “Form 990”—as well as its audited financial statements. (*See generally* Aff. Ex. 79 at 661; Aff. Ex. 15 at 64:25—65:12.) In all of its Annual Reports filed between 2013 and 2018, AFPCC’s officers signed an acknowledgement stating, among other things, that they “have supervised, and will continue to supervise, the finances of the organization,” and that the information supplied is

“true, correct and complete to the best of our knowledge.” (*See, e.g.*, Aff. Ex. 79 at 666, 676; Aff. Ex. 15 at 66:7—69:12; Aff. Ex. 8 at 159:13—162:19.)

Every year, AFPCC’s accounting firm of over 18 years, Robbins Moroney (“Robbins”), sends AFPCC an extensive list of requested documents and information to prepare its Forms 990. (*See* Aff. Ex. 80 at 705-07; Aff. Ex. 82 at 710; Aff. Ex. 81 at 708; Aff. Ex. 15 at 74:4-8, 77:1-6, 81:6-12.) AFPCC’s officers then meet with Robbins to “review the draft of the 990” to ensure its accuracy, and AFPCC’s CFO makes any “tweaks” to the documents that he deems necessary. (Aff. Ex. 27 at 42:7-22; Aff. Ex. 82 at 710; Aff. Ex. 15 at 8:20—9:7, 79:14-19, 80:18—81:3.) AFPCC’s CFO then signs the Forms 990 under an acknowledgment that states: “Under penalties of perjury, I declare that I have examined this return, including the accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete,” before submitting the Forms 990 to the IRS and the AGO. (Aff. Ex. 83 at 711; Aff. Ex. 15 at 70:10-13, 70:17—74:1.)

AFPCC also admits that it is responsible for ensuring that its financial statements are “fairly presented in conformity with U.S. generally accepted accounting principles,” for its “compliance with laws, regulations, and provisions of contracts and grant agreements applicable to [it],” and for the “design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of the financial statements that are free from material misstatement, whether due to fraud or error,” in its audit representation letter to Robbins, as well as in the audit itself. (*See, e.g.*, Aff. Ex. 84 at 719, 731; Aff. Ex. 85 at 768-70, 771-73; Aff. Ex. 15 at 93:4-94:4; 94:9—101:14; 87:6-13, 90:1—91:16.)

B. AFPCC Failed to Meet the Generally Accepted Accounting Principles Required to Employ an Accounting Method Called “Joint-Cost Allocation,” and Therefore Falsely Inflated Its Charitable Program Service Expenses in Its Financial Statements.

As AFPCC is aware, it is of the utmost importance to donors that charities spend a high percentage of their donations on their charitable programs, versus on their fundraising and overhead costs. (See Part III.B.2.) This incentivizes charities to categorize as much of their spending as possible as charitable “program service expenses” on their Forms 990, so they can claim to be good stewards of donors’ money. Some charities, therefore, improperly categorize some of their fundraising expenses as charitable program service expenses by abusing an accounting method called “joint-cost allocation,” which allows them to appear more efficient and thus more appealing to donors.

1. “Joint-cost allocation” explained.

Under the Act, charities that solicit in Minnesota are required to comply with generally accepted accounting principles, or “GAAP,” when accounting for their expenses in their Forms 990 and other financial statements filed with the AGO. See Minn. Stat. § 309.52, subd. 3. The official, authoritative source of GAAP for nongovernmental organizations in the United States is the Financial Accounting Standards Board’s *Accounting Standards Codified* (“FASB ASC”). (Aff. Ex. 9 at 230 Resp. 2; Aff. Ex. 86 at 789; Aff. Ex. 15 at 107:7-24.)

Under GAAP, money spent asking for donations must generally be accounted for as fundraising expenses. (Aff. Ex. 86 at ¶¶ 958-720-20; 958-720-45-9, -10 (generally defining fundraising activities).) When a charity combines a fundraising activity and charitable activity, however, GAAP allows it—in very limited circumstances—to categorize a portion of its fundraising expenses as charitable “program service” expenses in its Forms 990 and other financial statements, through an accounting method called “joint-cost allocation” (“joint

costing”). (See generally Aff. Ex. 86 at ¶ 958-720-45.) Charities like AFPCC indicate in their Forms 990 their intent to use joint costing, and follow the GAAP standard in doing so, by checking the box and filling out Line 26 on their Forms 990, as follows:

25	Total functional expenses. Add lines 1 through 24	3,885,257	1,906,157	376,499	1,602,601
26	Joint costs. Complete this line only if the organization reported in column (B) joint costs from a combined educational campaign and fundraising solicitation. Check here <input checked="" type="checkbox"/> if following SOP 88-2 (ASC 958-720)	1,836,599	876,187	35,518	924,894
DAA		Form 990 (2017)			

(Aff. Ex. 1 at 11 Part IX.)

Charities are only permitted to use the joint costing accounting method if they can meet three criteria laid out by GAAP. These three criteria are designed to ensure that any charity that treats a portion of its fundraising expenses as charitable expenses is properly doing so because these expenditures truly serve a program purpose, instead of acting as a means for the organization to make its charitable programs look larger than they actually are.

The three criteria at issue are known as the “purpose,” “audience,” and “content” criteria as laid out by GAAP. (Aff. Ex. 86 at ¶ 958-720-45-29; Aff. Ex. 2 at 104:13—105:24.) If any *one* criterion is not met, then a charity must report *all* of the expenses related to that activity as fundraising costs. (Aff. Ex. 86 at ¶ 958-720-45-29; see also Aff. Ex. 18 at 71:5-10.)

2. AFPCC reports its charitable spending in a manner that makes it appear more efficient, and therefore more appealing, to donors and charities watchdog groups.

As AFPCC acknowledges, donors and nonprofit watchdog groups often evaluate the “efficiency” of a charity, or “how well they spend their money,” when deciding whether to donate. (Aff. Ex. 15 at 55:14-22.) In general, the higher the percentage of a charity’s program service expenses in comparison to its fundraising and other overhead expenses, the more appealing it is to donors and charity watchdog groups. (Aff. Ex. 15 at 55:23—56:10, 59:15-21;

see also Aff. Ex. 88 at 810 (stating “our dependence on direct mail hurts us” with watchdogs), Aff. Ex. 43 at 60:4-12, 60:19—61:23.) This is frequently referred to as a charity’s “efficiency ratio.”⁶

As AFPCC’s CEO acknowledged in an email to one of its fundraisers, AFPCC’s “total percentage for fundraising is high” because it “utilize[s] third-party organizations to raise funds,” and as a result its “program service percentage (what we give to help law enforcement, programs, et cetera) is low...which is not a good thing.” (Aff. Ex. 107 at 939; Aff. Ex. 8 at 167:19—168:2.) This is because the “general public often ask[s] how much of the money, their donation, actually goes to law enforcement and the families.” (Aff. Ex. 107 at 939.)

Accordingly, AFPCC has an incentive to misuse joint costing to improve its efficiency ratio. Indeed, AFPCC specifically sought to improve its program service expenses through the joint costing accounting method to be more appealing to donors and watchdog groups. (*See, e.g.*, Aff. Ex. 89 at 811; Aff. Ex. 43 at 49:19-24, 59:15—60:3; Aff. Ex. 90 at 821; Aff. Ex. 27 at 62:6-20, 62:23—63:21; Aff. Ex. 91 at 823; Aff. Ex. 92 at 824; Aff. Ex. 15 at 59:15-20, 61:4-9, 62:10—63:6.) As AFPCC’s CEO testified, even a few percentage point change in its efficiency ratio can make a difference in the public’s perception of a charity. (Aff. Ex. 8 at 166:3-7; *see also* Aff. Ex. 107 at 939 (stating that even “very small” percentage point improvements in a charity’s efficiency ratio can “make a difference to our overall company as perceived by the general public”).)

AFPCC reports that its efficiency ratio for FY 2018 was 49%—i.e., that it spent 49% of its expenses that year on charitable program services. (*See* Aff. Ex. 1 at 11 Part IX.) If AFPCC

⁶ *See, e.g.*, Charity Watch, “Our Charity Rating Process,” <https://www.charitywatch.org/our-charity-rating-process> (last visited Sep. 23, 2019).

were unable to report any joint costing, however, its efficiency ratio for FY 2018 would drop to the significantly less appealing 26.5%. (*Compare* Aff. Ex. 1 Part IX, Line 25, column (B) (\$1,906,157) divided by Line 25, column (A) (\$3,885,257) equals 49.06%, *with* Aff. Ex. 1 Part IX, Line 25, column (B) (\$1,029,970) minus Line 26, column (B) ((\$876,187), equals \$1,029,970 divided by (Line 25, column (A) (\$3,885,257) equals 26.51%.)

3. AFPCC failed to meet GAAP’s “purpose” criterion for its Forms 990 filed during the relevant time period.

AFPCC first violated GAAP and Minnesota law by jointly allocating expenses despite failing GAAP’s joint costing “purpose” criterion. GAAP sets forth three tests for determining whether expenses meet the purpose criterion. (Aff. Ex. 86 at 952-720-45-38.) The mandatory, threshold inquiry to meet this criterion—the “Compensation or Fees Test”—states that the “purpose criterion is not met if a majority of compensation or fees for any party’s performance of any component of the discrete joint activity varies based on contributions raised for that discrete joint activity.” (Aff. Ex. 86 at ¶ 958-720-45-40; Aff. Ex. 2 at 107:15—108:7; Aff. Ex. 18 at 78:10-24.) Expenses paid to a party like a professional fundraiser that keeps a percentage of every dollar it raises for the charity, vary based upon contributions raised, fail the mandatory threshold Compensation or Fees Test, and consequently fail the purpose criterion. (Aff. Ex. 86 at ¶ 958-720-45-40; Aff. Ex. 2 at 108:3-14.)

Since 2013, AFPCC has paid one of its for-profit fundraisers, Midwest Publishing-DN, Inc. (“Midwest”), pursuant to an arrangement by which Midwest retained either 90% or 88% of all funds that it raised for AFPCC. (*See* Aff. Ex. 20 at 355 ¶ 3(a); Aff. Ex. 18 at 163:21-25.) Despite its percentage-based contract with Midwest, AFPCC treated a total of \$755,312 in fees that it paid to Midwest as charitable programing expenses from 2013 through 2018 using the joint costing accounting method, incorporated such allocations into its Forms 990 for each of

these years, and filed these Forms 990 with the AGO—thereby improperly boosting the amount that AFPCC reported in these Forms 990 that it spent on charitable programs, in violation of GAAP and Minnesota law. (*See* Aff. Ex. 108 at 941 (items noted with a “J” are jointly allocated, including “Midwest Publishing Donor Exp.”); Aff. Ex. 18 at 100:13-22.)

Following an inquiry letter from the Michigan Attorney General in January 2019 about AFPCC’s accounting practices, AFPCC and Robbins re-examined AFPCC’s joint costing practices, and acknowledged (as the AGO had already asserted for at least a year by that time) that “[Midwest] is not to be included in jca”—meaning that fees AFPCC paid to Midwest “should not have been jointly allocated.” (Aff. Ex. 93 at 836; Aff. Ex. 2 at 110:8-23, 112:12—113:6; *see also* Aff. Ex. 94 at 839-40.) Or, as Robbins stated to AFPCC’s CFO: “By Midwest failing the purpose test, it is a hundred percent fundraising and not a joint cost.” (Aff. Ex. 95 at 841; Aff. Ex. 15 at 114:8-14.) AFPCC and Robbins both further acknowledged when deposed that jointly allocating Midwest-related expenses was incorrect, Robbins stated that AFPCC’s returns for the last three years should be amended, and AFPCC acknowledged that it did not take any direct steps to ensure it met the purpose criterion prior to jointly allocating expenses. (Aff. Ex. 15 at 85:2-5; Aff. Ex. 18 at 165:12-21; Aff. Ex. 2 at 106:21—107:3.)

On or around February 5, 2019, nearly four months after the AGO filed this lawsuit, AFPCC filed an Amended Form 990 with the IRS and the AGO reallocating costs associated with Midwest from program service expenses to fundraising expenses for only FY 2018. (Aff. Ex. 2 at 114:4-12, 114:18—115:6; Aff. Ex. 1; Aff. Ex. 2 at 21:6-13.) AFPCC did not, however, file Amended Forms 990 for any prior years, despite the fact that it had also improperly jointly allocated expenses pertaining to Midwest on its Forms 990 from 2013 through 2017, and despite its accountant’s testimony that such amendments were required. (*See* Aff. Ex. 93 at 831; Aff.

Ex. 18 at 165:12-21.)

4. AFPCC separately failed to meet GAAP’s “audience” criterion for statements filed during the relevant time period.

GAAP also requires charities to meet the “audience” criterion to use joint costing, which pertains to a charity’s selected audience for the combined joint activity. (Aff. Ex. 86 at ¶¶ 958-720-45-29, 45-48). This criterion states that a “rebuttable presumption exists that the audience criterion is not met if the audience includes prior donors or is otherwise selected based on its ability or likelihood to contribute” to the charity. (Aff. Ex. 86 at ¶ 958-720-45-48; Aff. Ex. 2 at 115:7-20.)

The criterion further states that the “presumption can be overcome if the audience is also selected for any of the reasons” enumerated therein, which include the “audience’s need to use or reasonable potential for use of the specific action called for by the program component of the joint activity,” and the “audience’s ability to take specific action to assist the [charity] in meeting the goals of the program component of the joint activity.” (Aff. Ex. 86 at ¶ 958-720-45-49; Aff. Ex. 2 at 116:4-25.) Lists providing the “source of the names and the characteristics of the audience” can help determine whether the audience meets the criterion, since the “characteristics of those on the lists may indicate the purpose or purposes for which they were selected.” (Aff. Ex. 87 at 809; Aff. Ex. 18 at 65:4-15.) In “determining whether that presumption is overcome, a[] [charity] shall consider the extent to which the audience is selected based on its ability or likelihood to contribute to the [charity] and contrast that with the extent to which it is selected for one or more of the reasons” stated above reflecting a *true* program motive for the audience selection. (Aff. Ex. 86 at ¶ 958-720-45-48; Aff. Ex. 2 at 115:21—116:3.)

AFPCC “admits that it targets its mailed solicitations to those prospective donors that, based upon analyses, are more likely to donate to AFPCC.” (Aff. Ex. 9 at 231-32 Resp. 6.) It

does so by selecting potential donors that have certain characteristics that Odell believes will increase the likelihood of donations, and accordingly recommends to AFPCC for its approval. These characteristics include, for example, the age of the donor, how recently the donor has contributed to charity, the amount of the recent donation, and the organization to which the donor made prior contributions. (*See, e.g.*, Aff. Ex. 28 at 403; Aff. Ex. 2 at 57:19—58:12.) Potential donor lists also contain predictions on how effective the mailer will be on generating revenue for AFPCC. (*See, e.g.*, Aff. Ex. 28 at 403; Aff. Ex. 2 at 57:7-17.) The proposed mailing lists do not, however, contain any selected criteria or predictions based upon the proposed audience’s potential to use AFPCC’s program content. (*See generally, e.g.*, Aff. Ex. 28 at 403.)

AFPCC also runs tests to determine the popularity of its programs with its audience and to decide which items to emphasize in its mailers in the future to raise more money. (Aff. Ex. 2 at 60:1-16.) AFPCC does not, however, test which charitable *program* content in its mailers is most effective with which audiences. (Aff. Ex. 2 at 60:17-25.) Rather, the purpose of its analyses is to “generate more net dollars” for AFPCC. (Aff. Ex. 2 at 60:12-16.)

AFPCC admits that its officers and employees take no direct steps to ensure that its mailing list selections comport with GAAP’s audience criterion. (Aff. Ex. 2 at 117:1-6, 118:16-25.) AFPCC’s CFO and corporate representative, who is responsible for selecting audiences to receive an AFPCC mailer, testified that he “barely look[s]” at Odell’s proposed selections, and has never rejected its recommendations since he started working at AFPCC in 2003. (Aff. Ex. 2 at 10:11-12, 55:3-10.) Indeed, when reviewing Odell’s proposed selections, the only factor AFPCC considers is “how much money it’s going to lose.” (Aff. Ex. 2 at 55:3-7.)

IV. AFPCC VIOLATED A 1996 CONSENT DECREE WITH THE AGO CONCERNING THE SAME CONDUCT AT ISSUE IN THIS LAWSUIT.

A. The AGO Sued AFPCC in 1995 for Its Allegedly Deceptive Solicitation Practices and for Filing False Documents with the AGO.

On November 27, 1995, the AGO sued AFPCC. (*See* Aff. Ex. 96 at 842; Aff. Ex. 2 at 119:3-11.) The AGO alleged that AFPCC deceived Minnesota donors and violated the Act's disclosure requirements by, among other things: overstating the degree and level of "support" it provided to families of fallen officers through the Fund (Aff. Ex. 96 at 848 ¶ 22a); misrepresenting that donations would be restricted to the Fund (Aff. Ex. 96 at 849 ¶ 22c); misrepresenting that the Fund was its primary charitable program (Aff. Ex. 96 at 851 ¶ 22i); misleading potential donors that it was conducting a special fundraising campaign in their local communities (Aff. Ex. 96 at 850 ¶ 22g); and falsely implying that specified fundraising goals were unique to a local community or commensurate with a community's ability to give (Aff. Ex. 96 at 851 ¶ 22h). The AGO also alleged that AFPCC violated Minnesota law by filing financial statements that did not comply with GAAP because the statements improperly treated certain AFPCC fundraising expenses as charitable programming expenses using the joint costing accounting method. (Aff. Ex. 96 at 851-56 ¶¶ 23-33.)

The AGO attached to its 1995 Complaint examples of AFPCC solicitations containing the same deceptive tactics that are alleged in the current lawsuit more than 20 years later. (*See* Aff. Ex. 96 at 862-73.) AFPCC's CEO conceded similarities between AFPCC's 1995 and current mailers, including: (1) the "Area Campaign" and "funding goal" language, (2) the plea to "join with your friends and neighbors by supporting our [donor's local area] annual campaign for the Police Family Survivors Fund," (3) the prominent reference to the donor's local area in bold letters at the top of mailings, (4) the prominent reference to "Police Family Survivors Fund" next to AFPCC's name and official-looking logo in the masthead of the mailers, (5) the statement that

“[w]ithout your support, I may not be able to fund all the programs for families of sworn officers,” (6) the language stating “whatever you can send will be greatly appreciated and put toward our Police Family Survivors Fund immediately,” (7) the exclusive reference to “Police Family Survivors Fund” programs to the exclusion of its much larger public education program, and additional deceptive language and tactics throughout the mailers as generally described above. (Aff. Ex. 8 at 182:11—189:1.)

B. The AGO and AFPCC Resolved the 1995 Lawsuit with a Consent Decree.

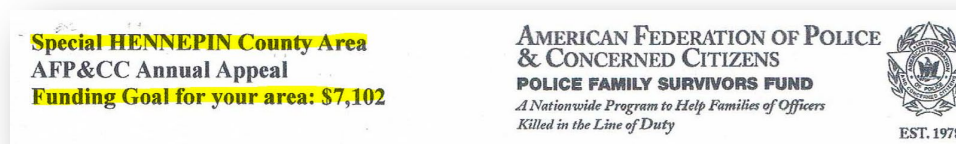
The AGO, AFPCC, and its officers and directors stipulated to the entry of a Consent Decree to settle the 1995 lawsuit. (Aff. Ex. 97 at 874; Aff. Ex. 2 at 121:17-25, 122:21-23.) In the decree, AFPCC was enjoined from engaging in deceptive solicitation practices, including: misrepresenting that the Fund was its primary charitable program (Aff. Ex. 97 at 877 ¶ 4E); misrepresenting that donors’ contributions would be used for a particular purpose (Aff. Ex. 97 at 877 ¶ 4B); using certain phrases related to the donor’s local area, including the phrase “funding goal” in close proximity to a donor’s location, or without disclosing the basis of the “goal” (Aff. Ex. 97 at 878 ¶ 6); and failing to “clearly disclose a description of the charitable program for which the campaign is being carried out, and if different, [a] description of the organization’s other primary programs and activities.” (Aff. Ex. 97 at 878 ¶ 7.)

AFPCC further agreed in the decree to report its expenses in compliance with GAAP, as well as to satisfy additional, specifically enumerated steps prior to treating its fundraising expenses as charitable programing expenses under the joint costing accounting method. (Aff. Ex. 97 at 879-80 ¶¶ 10A-D.) These steps included not jointly allocating expenses based upon a “call-to-action” without “having verifiable indications of the reasons for the allocations” and “gathering objective and reasonable evidence of the effectiveness of the call-to-action,” and not jointly allocating expenses based upon public education without “develop[ing], in advance of the

publication and mailing of a direct mail solicitation or the initiation of telemarketing solicitations, a public awareness or education plan” as described in the Consent Decree, and disseminating that plan to its accountants and various other persons. (Aff. Ex. 97 at 879-80 ¶¶ 10A-D.)

C. AFPCC Violated the Consent Decree’s Specific Requirements Intended to Remedy Its Deceptive Mailers and Improper Reporting of Joint Costs.

AFPCC did not comply with multiple provisions of the Consent Decree. Through its corporate representative, AFPCC admits that it did not follow the Consent Decree’s specific prohibition on including the phrase “funding goal” in “close proximity” to a donor’s location, as is illustrated below:



(Compare Aff. Ex. 97 at 878 ¶ 6, with Goldburt Aff. Ex. A; see also Aff. Ex. 2 at 81:16-19 (Q: “Is Hillsboro Area located in close proximity to the phrase Funding Goal? A: “I guess.”); Aff. Ex. 34 at 417; Aff. Ex. 57 at 567; Aff. Ex. 58 at 575.)

AFPCC also failed to follow the Consent Decree’s specific requirements pertaining to its use of the joint costing accounting method. (Aff. Ex. 97 at 879 ¶ 10.) Initially, public education served as one basis of AFPCC’s joint allocations during the relevant time period. (Aff. Ex. 2 at 126:23—127:2.) Despite the Consent Decree’s mandate that it do so in these circumstances, AFPCC admits that it did not create a public awareness or education plan in advance of the publication and mailing of a direct mail solicitation, nor did it provide such a plan to its accountants and other persons as required by the Consent Decree. (Aff. Ex. 97 at 879-80 ¶¶ 10(C), (D); Aff. Ex. 98 at 889 Resps. 22-23; Aff. Ex. 2 at 127:5-17, 127:18—128:10.)

AFPCC also allocated expenses based upon a call-to-action, which includes language stating how a donor can help its mission. (*See* Aff. Ex. 91 at 823 (seeking to increase allocations to program service based upon its “call-to-action”), Aff. Ex. 15 at 60:7-12.) Contrary to the Consent Decree’s requirements, AFPCC did not track the effectiveness of the purported mailer charitable program content on its audience, and admitted that it had “no way of knowing” whether and how mail recipients were impacted by the claimed program content included therein. (Aff. Ex. 39 at 453 IR 21; Aff. Ex. 98 at 889 Resp. 21.)

V. PROCEDURAL HISTORY.

On or around January 19, 2017, the AGO served a Civil Investigative Demand (“CID”) on AFPCC, as authorized by Minnesota Statutes section 8.31. (Aff. Ex. 39 at 452.) Throughout the AGO’s investigation, AFPCC engaged in effort to—in its own words—“stonewall” the AGO’s investigation. (Aff. Ex. 99 at 892; Aff. Ex. 15 at 117:15-24.) As a result, in November 2017, the AGO was forced to bring a separate action by petition to obtain a court order to secure AFPCC’s compliance with the CID, which was granted in March 2018. (*See* Aff. Ex. 100 at 893; Aff. Ex. 101 at 895-96.)

On October 10, 2018, the AGO filed the current lawsuit. (Compl.) On December 26, 2018, the parties agreed to a temporary injunction prohibiting AFPCC from soliciting in Minnesota while the current action remains pending, or until further order of this Court. (*See* December 28, 2018 Order.) On November 5, 2018, AFPCC filed its Answer, including 19 separate affirmative defenses with little to no factual basis therefor. (Aff. Ex. 102 at 917-19.)

In or around February 2018, the AGO served Interrogatory No. 6 asking AFPCC to identify the factual bases for all of its affirmative defenses asserted in its Answer. (Aff. Ex. 78 at 654 Ans. 6.) AFPCC provided no specific facts or allegations in response, citing only to its Initial Disclosures. (Aff. Ex. 78 at 655 Ans. 6; Aff. Ex. 103 at 922.) The AGO put AFPCC on

notice that its answer to Interrogatory No. 6 was deficient in letters dated March 27, April 19, and May 3, 2019 (Aff. Ex. 104 at 930; Aff. Ex. 105 at 934; Aff. Ex. 106 at 936.) AFPCC still failed to supplement its answer. (Washington Aff. ¶ 108.) The AGO again asked AFPCC for the factual bases for its affirmative defenses at its corporate representative's deposition, after specifically noticing the topic. (Aff. Ex. 2 at 12:20-25; Aff. Ex. 109 at 952-53 ¶¶ 9, 16.) Other than alleging that its solicitations were "complete and/or truthful," AFPCC again identified no evidence supporting any of its affirmative defenses. (Aff. Ex. 102 at 918; Aff. Ex. 2 at 12:20—17:20.)

ARGUMENT

I. PROCEDURAL STANDARD.

A court "shall grant summary judgment" if the movant shows, by citing to depositions, documents, affidavits, and other "particular parts of materials in the record," that "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01, 56.03; *see also State by Humphrey v. Alpine Air Prod., Inc.*, 500 N.W.2d 788, 790 (Minn. 1993) (holding preponderance burden of proof applies to consumer fraud cases). The nonmovant fails to establish a genuine issue of material fact when it "presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Under this standard, "unverified and conclusory allegations, or postulated evidence that might be developed at trial," is not sufficient to establish a genuine issue of material fact. *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004) (citations omitted). Rather, a nonmovant must present "substantial evidence," and counter the movant's showing with

“specific facts,” in order to survive summary judgment. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (citations omitted); *Lundgren v. Eustermann*, 370 N.W.2d 877, 881 (Minn. 1985).

As shown by the abundant, undisputed facts presented by the AGO above, there is no genuine dispute that AFPCC (1) violated the Minnesota Charitable Solicitation Act (“Act”), Minn. Stat. §§ 309.50–309.61, by deceptively soliciting contributions in Minnesota; (2) violated the Act by failing to clearly disclose its charitable programs; (3) violated the Act by failing to file accurate and compliant financial statements/Forms 990 with the AGO; and (4) breached the parties’ 1996 Consent Decree by engaging in related conduct. Accordingly, the AGO is entitled to judgment as a matter of law on all of its claims and remedies.

II. AFPCC VIOLATED THE ACT BY USING DECEPTIVE PRACTICES TO SOLICIT CHARITABLE CONTRIBUTIONS FROM MINNESOTA PERSONS (COUNT I).

The Act states that no “charitable organization and no person acting on behalf of a charitable organization shall use or employ any fraud, false pretense, false promise, misrepresentation, misleading statement, misleading name, mark or identification, or deceptive practice, method or device, with the intent that others should rely thereon in connection with any charitable solicitation.” Minn. Stat. § 309.55, subd. 5.⁷ The Act also specifically prohibits “any such actions or omissions designed to confuse or mislead a person . . . that the funds being solicited are or will be used for purposes and programs conducted within or for persons located within the state of Minnesota when such is not the case,” or for a charity “to otherwise present purposes and uses of the funds which are not as provided within the purposes and uses filed upon

⁷ There is no dispute that AFPCC is a “charitable organization” that “solicited” “contributions” in Minnesota as those terms are defined by the Act. *See* Minn. Stat. § 309.50, subds. 4 (defining “charitable organization”); 5 (defining “contribution”); 10 (defining “solicitation”); *see also* Aff. Ex. 79 (AFPCC registration forms required for organizations soliciting charitable contributions in Minnesota under the Act).

registration of said organization under this chapter.” *Id.*

The Act is “designed to protect the contributing public and charitable beneficiaries against fraudulent practices in the solicitation of contributions for purportedly charitable purposes.” *Larson v. Valente*, 456 U.S. 228, 230-31 (1982). Remedial statutes like the Act “are generally very broadly construed to enhance consumer protection,” and “reflect a clear legislative policy encouraging aggressive prosecution of statutory violations.” *State v. Philip Morris Inc.*, 551 N.W.2d 490, 495-96 (Minn. 1996) (applying equivalent consumer protection statutes). Because of its broad construction and statutory basis, common law fraud elements do not apply to the Act. *See Alpine Air*, 500 N.W.2d at 790. The Act does not require proof of a wrongdoer’s intent to *deceive*, only the wrongdoer’s “intent that others should *rely*” upon the representation. Minn. Stat. § 309.55, subd. 5 (emphasis added). Nor does the Act require the AGO to prove literal falsity. Rather, the standard for finding unlawful deception is a permissive one—it only requires conduct that “tends to deceive or mislead a person.” *See Graphic Commc’ns Local 1B Health & Welfare Fund A v. CVS Caremark Corp.*, 850 N.W.2d 682, 695 (Minn. 2014) (interpreting the Consumer Fraud Act).

Under this standard, unlawful deception is established when “direct mail solicitations . . . taken as a whole, create [a misleading] overall impression.” *State v. Directory Publ’g Servs., Inc.*, No. C1-95-1470, 1996 WL 12674, at *2 (Minn. Ct. App. Jan. 16, 1996) (citation omitted); *see also State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 34 (Iowa 2013) (collecting cases supporting that “courts typically evaluate the overall or ‘net impression’ created by the representation”). Finally, in “consumer protection cases brought in the public interest by the Attorney General, where establishing a violation hinges upon the content of the solicitations themselves, summary judgment may be granted without the need for extrinsic evidence and even

in the presence of extrinsic evidence offered by the defense.” *Com. ex rel. Corbett v. Peoples Benefit Servs., Inc.*, 923 A.2d 1230, 1235–36 (Pa. Commw. Ct. 2007) (citing cases).⁸

As demonstrated below, the undisputed facts also show that AFPCC’s mailers: (1) deceptively represented that AFPCC’s sole charitable program is its Police Family Survivors Fund; (2) deceptively represented that donations are being raised only in, or for the benefit of, a donor’s local community; (3) deceptively represented that it is officially or formally affiliated with police departments; and (4) deceptively used high-pressure language to give donors the false impression that there is an urgent need to donate right away to overcome “budget shortfalls.” These tactics are not only individually deceptive, but they also work in conjunction with each other to create an overall net impression that AFPCC is something it is not—an official, police-affiliated charity urgently raising funds to use in, or for the sole purpose of, helping police families in a donor’s local area.

A. AFPCC Has Violated the Act by Engaging in Deceptive Solicitation Practices Designed to Mislead Potential Minnesota Donors that Its Sole Charitable Program Is Its “Police Family Survivors Fund.”

There is no genuine issue of material fact that AFPCC engages in deceptive tactics that mislead potential donors that its sole charitable program is its most-popular “Police Family Survivors Fund.” In reality, it is undisputed that AFPCC’s largest charitable program, as represented in its financial statements filed with the AGO, consists of sending mailers with

⁸ See also *See Direct. Publ’g*, 1996 WL 12674, at *3 (upholding grant of summary judgment for AGO when defendant’s written solicitations “had a tendency to deceive”); *State v. Coalition Against Breast Cancer, Inc.*, 40 Misc. 3d 1228(A), 975 N.Y.S.2d 712 (N.Y. Sup. 2013), *aff’d sub nom.* (finding on summary judgment that charitable “solicitation materials provided by [defendants] to consumers were false, deceptive, inaccurate and misleading”); *FTC v. Global Marktg., Grp., Inc.*, 594 F. Supp. 2d 1281, 1284 (M.D. Fla. 2008) (granting affirmative summary judgment to FTC based on deceptive script and telemarketing practices); *FTC v. USA Fin., LLC*, 415 Fed. App’x 970, 973–74 (11th Cir. 2011) (affirming grant of summary judgment to FTC based on deceptive solicitations).

safety tips and other “public education” activities. (*See, e.g.*, Aff. Ex. 1 at 3 Part III, Line 4a.) Further, with limited exceptions, AFPCC solicits for all of its programs, and not just the Fund. (*See, e.g.*, Aff. Ex. 19 at 352 Resp. 28; Aff. Ex. 2 at 74:20—75:9.) AFPCC’s mailers foster an overall deceptive net impression, through graphics, font size, express misrepresentations, and other deceptive practices, that its sole charitable program is the Fund, and that it is soliciting for that purpose alone.

First, in all of its mailers, AFPCC prominently features the Fund on its mailing envelopes, letterhead, logo, response cards, and donation envelopes in a manner that portrays the Fund as coextensive with AFPCC as a whole. (*See* Aff. Ex. 26; *see also, e.g.*, Golburt Aff. Ex. A; Garcia Aff. Exs. A, B.) Further, AFPCC includes numerous deceptive statements about its programs and how donations will be used in the body of its solicitations, including, for example, that donations will be “put toward our Police Family Survivors Fund immediately,” despite the fact that donations were used for all of AFPCC’s programs. (Golburt Aff. Ex. A.) There is no dispute that these practices are deceptive and misleading, and represent that a donor’s contribution will be used in a manner inconsistent with AFPCC’s financial statements—which reflect that the Fund has always consisted of *less than 18%* of AFPCC’s charitable spending during the relevant time period. *See* Minn. Stat. § 309.55, subd. 5; *See also People of State of New York v. Coalition Against Breast Cancer, Inc.*, No. 20432-2011, 2013 WL 4283360, at *12 (N.Y. Sup. Ct. May 2, 2013) (granting summary judgment to the New York Attorney General on its charitable solicitation fraud claims based on scripts and mailings that solely referenced defendant’s charitable programs of breast cancer early detection and mammograms for women without insurance, when they only constituted a small portion of its charitable expenditures).

AFPCC uses additional tactics in specific mailers that contribute to its Fund-specific

deception, as well as constituting violations in their own right. These include falsely stating in multiple mailers that “100% of your gift — every penny — will immediately be used to provide Emergency Financial Assistance” when from 2013 to 2017, donations were only restricted in this manner in response to one mailer sent between October 2014 and December 2014 (Aff. Ex. 36 at 437; Aff. Ex. 37 at 443; Aff. Ex. 19 at 352 Resp. 28; Aff. Ex. 2 at 74:20—75:9); falsely stating in newsletter solicitations that gifts will be used for its summer camp Fund activity (*see* Aff. Ex. 14 at 265 Resp. 19; Aff. Ex. 38 at 449); and falsely claiming that GuideStar has “certified” that AFPCC uses donations the way donors “intend” and that donations will be used “wisely”—while admitting that it could not say for certain that the statements “were absolutely true or not.” (*See, e.g.*, Aff. Ex. 44 at 483; Aff. Ex. 45 at 486; Aff. Ex. 15 at 49:8—52:5; *see also* Nico Aff. ¶¶ 6-8.)

Intent to deceive is not an element of a violation of the Act. Minn. Stat. § 309.55, subd. 5 (requiring only “intent that others should rely” upon the representation); *see also 301 Clifton Place L.L.C. v. 301 Clifton Place Condominium Ass’n*, 783 N.W.2d 551, 563 (Minn. Ct. App. 2010) (stating that liability under the analogous Consumer Fraud Act “does not require that the false statement be intentional”). The undisputed facts show, however, that in this case, AFPCC does intentionally place an “emphasis on the Fund” in its mailers because it knows the Fund is “more important” to donors, and avoids an accurate description of its programs because donors have a “tendency to not respond because of a focus on a program service they feel is not as important.” (*See, e.g.*, Aff. Ex. 16 at 327; Aff. Ex. 8 at 63:10-15, 76:10-77:1, 82:22-83:3; Aff. Ex. 49 at 538.) AFPCC’s knowledge that its donors prefer its Fund program, and its intent to emphasize the Fund in order to increase its donations, further evidences that its solicitations were, in fact, deceptive. *See In re Lutheran Bhd. Variable Ins. Prod. Co. Sales Practices*, No. 99-MD-1309 (PAM/JGL), 2004 WL 909741, at *5 (D. Minn. Apr. 28, 2004) (“Evidence of what

the defendant knew or thought about the sales practice involved is evidence that the sales statements were misleading.”).

Additionally, while again not required for liability under Minnesota law, the fact that multiple donors *were* actually deceived by AFPCC’s Fund-specific tactics, is substantial evidence that AFPCC’s mailers are deceptive under the Act. In addition to writing out checks to the “Police Family Survivors’ Fund,” (*see* Aff. Ex. 51 at 545; Aff. Ex. 27 at 29:2—30:1), Minnesota donors testified that they were deceived into believing that AFPCC’s sole charitable program was the Fund and that it was only raising money for that purpose, and that they would not have donated if they had known it was such a small part of AFPCC’s charitable programs. (Dale Aff. ¶¶ 4-6; Holden Aff. ¶¶ 3-4; Goldburt Aff. ¶¶ 4, 6; Garcia Aff. ¶¶ 2-3; Johnson Aff. ¶¶ 3, 5-6; Daniels Aff. ¶¶ 4-5; Cruz Aff. ¶ 3; Matthews Aff. ¶¶ 3-4; Anderson Aff. ¶ 2; Adams Aff. ¶¶ 4-5). Donors specifically identified the prominence of “Police Family Survivor Fund” next to AFPCC’s name as contributing to this impression (Meier Aff. ¶ 4; Aff. Ex. 52 at 15:6-13), and were “genuinely appalled at the . . . lack of percentage of the monies going to the actual police families.” (Aff. Ex. 50 at 34:19-23.)

Finally, it is important to distinguish what this case is *not* about. The AGO is not suing AFPCC because it is spending a high percentage of its money on sending mailers containing public education content. Rather, the AGO is suing AFPCC for *misleading Minnesotans* about the purposes for which it is raising and spending money. *Illinois, ex rel. Madigan v. Telemarketing Associates, Inc.*, is instructive on this point. 538 U.S. 600 (2003). In that case, professional fundraisers for a charitable organization asserted that the Illinois Attorney General violated the charity’s First Amendment rights by suing it under Illinois’ charities laws for overemphasizing its most sympathetic charitable activities in solicitations to the exclusion of its

dominant charitable programs. *See id.* at 607-10. In ruling for Illinois, the U.S. Supreme Court explained that the “Attorney General here has not suggested that a charity must desist from using donations for information dissemination, advocacy, the promotion of public awareness, the production of advertising material, the development or enlargement of the charity’s contributor base, and the like.” *Id.* at 622. Rather, the Court explained, “she has alleged that Telemarketers attracted donations by misleading potential donors into believing that a substantial portion of their contributions would fund specific programs or services, knowing full well that was not the case.” *Id.* As the Court held, such “representations remain false or misleading, however legitimate the other purposes for which the funds are in fact used.” *Id.*

There is no genuine, material question that AFPCC has misled donors about what its programs were and how donations would be used. As such, it has engaged in deceptive solicitations prohibited by the Act.

B. AFPCC Has Violated the Act by Creating a Deceptive Impression that Donations Are Being Raised in, and for the Benefit of Police Families in, a Minnesota Donor’s Local City or County.

AFPCC has further violated the Act by mailing solicitations to potential Minnesota donors that create a deceptive impression of a local benefit or connection to each donor’s area that does not exist. This violates the Act’s general prohibitions on deceptive solicitations, as well as its specific prohibitions on using localizing language. *See* Minn. Stat. § 309.55, subd. 5 (specifically prohibiting “actions or omissions” designed to “mislead a person” into believing that “the funds being solicited are or will be used for purposes and programs conducted within or for persons located within the state . . . when such is not the case”); *see also State v. Coalition Against Breast Cancer, Inc.*, 40 Misc. 3d 1228(A), 975 N.Y.S.2d 712 (N.Y. Sup. 2013) (in granting the New York Attorney General summary judgment on other deception grounds, citing favorably the Attorney General’s argument that the defendant’s solicitation materials were

deceptive under New York charities laws because, among other things, they “convey[ed] the false impression that donations would stay in the community” by “misleadingly refer[ring] to a ‘local drive’ to fight breast cancer” when in fact it fundraised nationwide from its call centers, and when its services “were available without reference to the residence of the recipient”).

Despite the fact that AFPCC does not have any state or local chapters, does not conduct special fundraising drives in Minnesota, and does not set aside contributions raised for Minnesota or any other state, (*see, e.g.*, Aff. Ex. 14 at 264 Resps. 17-18, 20; Aff. Ex. 8 at 58:23—59:3); its mailers create a deceptive impression that donations will benefit local Minnesota police families through various tactics. These include, among others, using localizing language like “Laporte Area Alert” on the mailing envelope (Garcia Aff. Ex. A); prominently featuring “Special Hennepin County Area” appeal for local donations in the letterhead of the mailer (Goldburt Aff. Ex. A); referencing the donor’s local city or county in the text of the mailer, such as “join your friends and neighbors in supporting our 2016 Hennepin County Area Annual Appeal for the Police Family Survivors Fund” (Goldburt Aff. Ex. A); and stating, for example, “Laporte Area Appeal Reply” on the response card that a donor submits with each contribution. (Garcia Aff. Ex. A.)

Although it is not required for this Court to grant the AGO summary judgment under the Act, *see, e.g.*, Minn. Stat. § 309.55, subd. 5 (requiring only “intent that others should rely” upon the representation), extrinsic evidence of AFPCC’s intent to mislead reinforces the deceptive nature of its solicitations, *see In re Lutheran Bhd.*, 2004 WL 909741, at *5. AFPCC’s CEO acknowledged that it is important to emphasize the donor’s city or county despite the lack of a local connection to make the donor feel “attached” to the piece and to create “much better” donation results. (Aff. Ex. 8 at 115:14—116:4, 116:22—117:2.) Indeed, AFPCC’s emails and

deposition testimony demonstrate that its localizing tactics are so fundamental to its business model that, in light of its thin margins, it would have “no program” if it was forced to abandon them. (*See, e.g.*, Aff. Ex. 59 at 582; Aff. Ex. 8 at 115:14—116:4, 117:3-9.)

Again, while it is not required for liability under applicable law, the fact that Minnesota donors were, in fact, deceived about AFPCC’s local affiliation, further reinforces that the deception occurred. This is evidenced by, among other things, the fact that Minnesota donors referenced an intent for their donation to be used for local purposes in the checks they wrote to AFPCC. (*See, e.g.*, Aff. Ex. 51 at 547; Aff. Ex. 27 at 25:23—26:12, 32:19—33:12, 34:2-10.) Most importantly, Minnesota donors directly testified that they were deceived. (*See, e.g.*, Aff. Ex. 60 at 10:6-13, 19:13-18; Cruz Aff ¶ 4; Garcia Aff ¶ 3; Aff. Ex. 55 at 13:5-8, 24:5-9.) Minnesota donor Tom Adams, for example, testified that he specifically donated because AFPCC’s mailer referenced his city of Sauk Rapids, and led him to believe his donation would “stay closer to home.” (Aff. Ex. 60 at 10:6-13, 19:13-18.) There is no genuine, material fact dispute that AFPCC’s misleading localizing tactics violated the Act here.

C. AFPCC Has Violated the Act by Creating a Misleading Impression that It Is Officially Affiliated with a Donor’s Police Department.

There is no genuine, material dispute that AFPCC’s official police-affiliation tactics also violate the Act. *See* Minn. Stat § 309.55, subd. 5; *see also State v. LA Investors, LLC*, 2 Wash. App. 2d 524, 541 (Wash. Ct. App. 2018) (affirming grant of partial summary judgment in favor of Washington Attorney General for claims under state consumer protection statutes prohibiting deceptive acts where defendant’s mailers “repeatedly featured the official-sounding name of the sender,” “appeared governmental in its formatting and language,” and employed other tactics intended to mislead donors that “it was a government document”).

As established, AFPCC is not affiliated with any federal, state, or local law enforcement

agency, and is not a police membership organization. (*See, e.g.*, Aff. Ex. 6 at 134 Resp. 22; Aff. Ex. 5 at 123.) Nonetheless, AFPCC’s mailers foster the misleading impression that it is comprised of members of, or is affiliated with, police departments in a donor’s local area. For example, AFPCC made an “‘Official’ looking,” black-and-white mailer to use as its control mailer sent to its prospect list because of its positive donation results, which included, among other tactics, statements like “For Private Use Only” and “Special . . . Notice” on the mailer envelope to give it an official government feel. (*See* Aff. Ex. 61 at 587, 595; Aff. Ex. 62 at 601-02; Aff. Ex. 8 at 148:3-149:13, 154:15—155:2.) AFPCC also ensures that a police officer signs all solicitation mailers to “lend[] credibility” to its mailers, because it believes that “having a police officer, retired or otherwise, [is] very important,” especially for an “institutional-looking” mailer. (Aff. Ex. 63 at 603; Aff. Ex. 8 at 139:9-15.) As AFPCC’s CEO testified, “[I]f you’re sending a mailer representing a law enforcement-associated organization, it’s best to have a law enforcement officer sign it.” (Aff. Ex. 8 at 143:23—144:1.)

As with AFPCC’s other tactics, this form of deception is intentional. AFPCC knows that recipients of its mailers “bother[] their local police department” because of their confusion about AFPCC’s formal affiliation with the police. (Aff. Ex. 64 at 606; Aff. Ex. 43 at 29:2-8.) Indeed, AFPCC “periodically” receives calls from police departments inquiring about AFPCC and its activities when donors would ask them about AFPCC’s affiliation with their local departments. (Aff. Ex. 43 at 29:20-25; Aff. Ex. 8 at 156:16-19.) As AFPCC’s CEO testified, such calls are “generally because they’re confused” about “receiving a mail piece for law enforcement,” and because donors frequently want to know if they can “donate straight to their department” rather than to AFPCC—evidencing donors’ belief that AFPCC is coextensive with their local department. (Aff. Ex. 8 at 156:21—157:12.)

Finally, like with AFPCC's other solicitation practices, Minnesota donors were in fact deceived by AFPCC's official-affiliation deception. (*See, e.g.*, Daniels Aff. ¶ 6; Aff. Ex. 65 at 21:10-20; Cruz Aff ¶ 5; Anderson Aff. ¶ 3; Aff. Ex. 53 at 18:6-23.) For example, Minnesota donor Frank Cruz stated that AFPCC's mailers led him believe that the organization was a police union or professional association. (Aff. Ex. 65 at 21:10-20; Cruz Aff ¶ 5.) There is no genuine issue of material fact that AFPCC violated the Act by employing these tactics.

D. AFPCC Has Violated the Act by Misrepresenting That It Has an Urgent Need for Donations, and Is at Risk for Cutting Its Fund Programs, Due to “Budget Shortfalls.”

There is no genuine dispute that AFPCC also violated the Act by misrepresenting in certain mailers that it has an urgent need for donations due to internal “budget shortfalls.” (*See* Aff. Ex. 25 at 378-83; Aff. Ex. 8 at 55:18—59:13.) This deceptive tactic includes objectively false misrepresentations about AFPCC's financial condition. This is demonstrated by, among other things the fact that: (1) the shortfall numbers were concocted by AFPCC's fundraisers, and not based upon any internal review by AFPCC (Aff. Ex. 66 at 611; Aff. Ex. 8 at 120:5-9); (2) AFPCC planned these mailers *years* in advance and sent them on a pre-planned schedule, before it had any knowledge of what its actual financial condition would be (*See* Aff. Ex. 25 at 378-83; Aff. Ex. 8 at 47:16—48:8); (3) AFPCC's fundraisers deliberately decided to make the copy on these mailers “stronger” and “more urgent” to encourage donations (Aff. Ex. 66 at 611; Aff. Ex. 8 at 119:3-6); and (4) AFPCC has never had to turn down a request for assistance because of insufficient revenue. (Aff. Ex. 2 at 83:15-18.)

But most importantly, the evidence shows that AFPCC's financial condition was not, in fact, “serious,” “critical,” or a “funding emergency”—as AFPCC's officers reported revenue gains in the prior year and projected gains for the upcoming year at board meetings overlapping with the *same* time period these mailers were sent, reported that AFPCC was in “good, stable

financial condition” to the board around the same time it sent these mailers, and gave themselves pay raises because they “had a good year” around the same time that they pressured donors to give right away to overcome a “funding emergency.” (*Compare* Aff. Ex. 67 at 613; Aff. Ex. 70 at 625-27; Aff. Ex. 72 at 636; *with* Aff. Ex. 68 at 620; Aff. Ex. 69 at 622; Aff. Ex. 2 at 87:24—88:5; Aff. Ex. 71 at 633; Aff. Ex. 2 at 90:16—91:3; Aff. Ex. 73 at 644.) AFPCC’s deceptive “budget shortfall” tactics clearly violate the Act.

E. AFPCC’s Deceptions Work in Conjunction with Each Other to Bolster the Overall Deceptive Effect of its Mailers.

Finally, it is important to note that the examples of deceptive conduct described above should not be evaluated in a piecemeal fashion. These deceptions work in conjunction with each other to create a deceptive net impression and to bolster the overall misleading effect in each solicitation. *See Direct. Publ’g. Servs.*, 1996 WL 12674, at *2 (so holding in the context of a prior case by the AGO over deceptive mailers); *see also State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 34 (Iowa 2013).

For example, AFPCC’s localization deception bolsters the false impression that it is officially affiliated with police departments, since donors know that police departments are based locally. Indeed, AFPCC’s emails with its fundraisers evidence its understanding that these deceptions work together and reinforce each other. (*See* Aff. Ex. 63 at 603 (emphasizing the importance of a police officer signatory “when the mail piece is an institutional-looking-local area package”).) To further illustrate, AFPCC’s high-pressure tactic of warning donors of nonexistent “budget shortfalls,” echoes familiar refrains from state and local police departments across the country, and further deceptively aligns AFPCC with police departments.

AFPCC’s Fund-specific deception also reinforces its localization deception. For example, its relatively small “funding goal” not only creates the misleading impression that this

amount raised from donors will be set aside for the Fund; it also suggests that AFPCC is serving a smaller, local area by claiming to be raising what would be considered a relatively small amount for a nationwide charity like itself. Indeed, Minnesota donor Mr. Goldburt testified that he thought “AFPCC was a smaller, local charity” in part because its mailer “referenced a relatively small amount of money, \$7,102, as its fundraising goal.” (Golburt Aff. ¶ 3.)

For all the above reasons, the AGO is entitled to judgment as a matter of law Count I.

III. AFPCC VIOLATED THE ACT BY FAILING TO DISCLOSE ITS LARGEST CHARITABLE PROGRAM IN ITS MAILED SOLICITATIONS (COUNT II).

AFPCC separately violated the Act by failing to clearly disclose its charitable programs. The Act requires a charity, “contemporaneously with a written request for a contribution,” to “*clearly* disclos[e]” a “description of the charitable program for which the solicitation campaign is being carried out; and, if different, a description of the programs and activities of the organization on whose behalf the solicitation campaign is being carried out.” Minn. Stat. § 309.556, subd. 1(c) (emphasis added). These disclosures are important to ensure donors are fully apprised of what a charity’s activities are before donating. *See Famine Relief Fund v. State of W.Va.*, 905 F.2d 747, 752 (4th Cir. 1990) (“A state can require charities soliciting funds within its borders to accurately describe their mission and how the donations will be used.”).

Except in limited circumstances, AFPCC solicits charitable contributions in Minnesota for all of its charitable programs and activities, and does not restrict contributions for any specific charitable program. (*See, e.g.*, Aff. Ex. 19 at 352 Resp. 28; Aff. Ex. 2 at 74:20—75:9.) Nonetheless, all of AFPCC’s solicitations fail to even *mention* AFPCC’s largest “public education” program that at all times constituted in excess of 80% of its charitable program spending, including its largest activity of sending solicitation mailers to potential donors with claimed educational content. (Aff. Ex. 14 at 263 Resp. 16; Aff. Ex. 1 at 3 Part III, Line 4a.)

Indeed, AFPCC acknowledges that its mailers do not disclose or describe this program. (Aff. Ex. 8 at 72:9-17; *see also, e.g.*, Aff. Ex. 2 at 98:24—99:5.)

Instead, AFPCC asserts that its disclosure obligation is discharged by one sentence in the tiny print of what AFPCC refers to as its “multi-state disclosures,” which are contained on the back of an insert on a separate page from its solicitation letters. This single sentence states: “A substantial portion of this mailing will be allocated to program services pursuant to AICPA SOP 98-2.” (Aff. Ex. 15 at 38:18-21, 39:16-24; Aff. Ex. 2 at 98:14-23; Aff. Ex. 54 at 556-57; Aff. Ex. 8 at 105:20—106:3.) This fails to meet the Act’s requirements for multiple reasons.

First, on its face, this sentence says nothing about what AFPCC’s programs are. Second, this language is indecipherable to even a sophisticated donor, let alone the average person. *See FTC v. Data Med. Capital, Inc.*, No. SACV 99-1266AHS(EEX), 2010 WL 1049977, at *17 (C.D. Cal. Jan. 15, 2010) (finding potential violations of federal consumer disclosure requirements when the provision at issue appeared “at the end of three pages of legalese”). Third, the language is hidden in the fine print on a separate page from the main solicitation letter. *See id.*, *see also Direct. Publ’g. Servs.*, 1996 WL 12674, at *3 (holding material terms in advertisements were not “clearly disclosed” when they were placed “in fine print on the back of defendants’ solicitations”). There is no genuine, material dispute that AFPCC failed to disclose at all—let alone “clearly” disclose—its programs as required by the law, and that the AGO is entitled to judgment as a matter of law on Count II.

IV. AFPCC VIOLATED THE ACT BY FILING NONCOMPLIANT FINANCIAL STATEMENTS WITH THE AGO (COUNT III).

There is no genuine issue of material fact that AFPCC also violated the Act by filing noncompliant financial statements with the AGO. Minnesota law requires charities like AFPCC that solicit in Minnesota to file an annual report. Minn. Stat. § 309.53, subdivision 2. Such

annual reports must include “a financial statement covering the immediately preceding 12-month period of operation,” *id.*, or alternatively, a “federal tax return,” called a “Form 990,” so long as that return is “prepared in accordance with generally accepted accounting principles” (“GAAP”) and meets the statutory “requirements for financial statements,” Minn. Stat. § 309.53, subdivision 3a. If a charity files a Form 990 in lieu of another financial statement, it is required to include, among other things, a “statement of functional expenses” which “shall be prepared in accordance with generally accepted accounting principles so as to make a full disclosure” of its costs, including program services and fundraising costs. Minn. Stat. § 309.53, subdivision 3.

Under the GAAP rules incorporated by reference into the Act, charities are only allowed to categorize a portion of their fundraising expenses as charitable program service expenses if they satisfy all three of the strict “purpose,” “audience,” and “content” tests laid out by GAAP. (Aff. Ex. 86 at ¶ 958-720-45-29.) AFPCC has acknowledged and attested in various contexts its responsibility for and control over the accuracy of its financial statements and their compliance with GAAP. (*See, e.g.*, Aff. Ex. 79 at 666; Aff. Ex. 83 at 711; Aff. Ex. 84 at 719; Aff. Ex. 85 at 768-70.) Nonetheless, AFPCC failed to meet at least two of the criterion required by GAAP to jointly allocate expenses in its Forms 990—purpose and audience—and therefore violated the Act.

A. AFPCC Financial Statements Fail to Comport With GAAP and the Act Because They Jointly Allocate Expenses that Fail the Purpose Criterion.

AFPCC first filed statements in noncompliance with GAAP, and therefore the Act, by jointly allocating expenses despite failing GAAP’s “purpose” criterion. As explained in detail above, the “purpose criterion is not met if a majority of compensation or fees for any party’s performance of any component of the discrete joint activity varies based on contributions raised for that discrete joint activity.” (Aff. Ex. 86 at ¶ 958-720-45-40; Aff. Ex. 2 at 107:15—108:7.)

Expenses paid to a party based upon a contract that pays the party a percentage of funds raised vary based upon contributions raised, and therefore fail the purpose criterion. (Aff. Ex. 86 at ¶ 958-720-45-40; Aff. Ex. 2 at 108:8-14.) Nonetheless, AFPCC treated a total of \$755,312 in fees that it paid to Midwest, which was paid a percentage of funds raised, as charitable programming in its Forms 990 filed with the AGO for the relevant years, in violation of GAAP and Minnesota law. (See Aff. Ex. 108 at 941; Aff. Ex. 20 at 355 ¶ 3(a); see also *James v. Paton*, No. C15-1914-RSL, 2017 WL 378557, at *2 (W.D. Wash. Jan. 25, 2017) (granting bankruptcy trustee summary judgment against a charity and ruling that charity, among other things, unlawfully jointly allocated costs associated with fundraising fees paid on a percentage basis by violating the GAAP “purpose” criterion).

AFPCC has admitted that these expenses “should not have been jointly allocated,” (Aff. Ex. 2 at 112:12—113:6; see also Aff. Ex. 93 at 836); its accountant stated that the relevant expenses “fail[ed] the purpose test,” (Aff. Ex. 95 at 841); AFPCC amended its most recent Form 990 to reallocate expenses related to Midwest (but not its prior noncompliant filings); (Aff. Ex. 2 at 114:4-12; Aff. Ex. 1), and AFPCC admits it takes no direct steps to ensure it meets the purpose criterion prior to jointly allocating expenses. (Aff. Ex. 2 at 106:21-107:3). There is no genuine, material dispute that AFPCC failed GAAP’s purpose criterion, and therefore violated the Act.

B. AFPCC’s Financial Statements Fail to Comport with GAAP and the Act Because They Jointly Allocate Expenses that Fail the Audience Criterion.

AFPCC independently violated GAAP and the Act by failing GAAP’s “audience” criterion, which focuses on the characteristics of persons a charity selects as its audience for the relevant activity, and the reasons why those persons were selected. The criterion states that a “rebuttable presumption exists that the audience criterion is not met if the audience includes prior

donors or is otherwise selected based on its ability or likelihood to contribute” to a charity. (Aff. Ex. 86 at ¶ 958-720-45-48.) The presumption can only be overcome by the presence of specific circumstances enumerated in GAAP indicating a true program purpose underlying the selection of the audience, as described in detail above. (See Aff. Ex. 86 at ¶ 958-720-45-49; Aff. Ex. 2 at 116:4-25.) Those circumstances are then weighed against, or “contrasted” with, the circumstances evidencing a pecuniary motive, to determine whether the criterion is met. (See Aff. Ex. 86 at ¶ 958-720-45-48.)

There is no genuine doubt that AFPCC selected its audience *solely* “based on its ability or likelihood to contribute,” and did not select its audience based upon *any* circumstances evidencing a program purpose, as required by GAAP. (See, e.g., Aff. Ex. 86 at ¶ 958-720-45-48; Aff. Ex. 27 at 21:18—22:2; Aff. Ex. 2 at 53:5-15; Aff. Ex. 28 at 403.) This is demonstrated by, among other things: (1) the inclusion of prior donors in AFPCC’s audience; (2) AFPCC’s admission that “it targets its mailed solicitations to those prospective donors that . . . are more likely to donate to AFPCC” (Aff. Ex. 9 at 231-32 Resp. 6); (3) the pecuniary-focused characteristics of its donor selection lists (see, e.g., Aff. Ex. 28 at 403; Aff. Ex. 2 at 57:7—58:12); (4) AFPCC’s testing of the popularity of its mailings for the sole purpose of “generat[ing] more net dollars,” but failing to test for the effectiveness of mailers ability to achieve any program goal (Aff. Ex. 2 at 60:1-3, 12-16); (4) AFPCC’s admission that its officers and employees take no direct steps to ensure that its list selections comport with GAAP’s audience criterion (Aff. Ex. 2 at 117:1-6, 118:16-25); (5) AFPCC’s corporate testimony that its officers “barely look” at and have never rejected its profit-motivated fundraiser’s proposed list selections (Aff. Ex. 2 at 55:3-10); and, (6) AFPCC’s corporate testimony that the only factor it considers in selecting its audience is “how much money it’s going to lose.” (Aff. Ex. 2 at 55:3-

7.)

Importantly, although it is not a legal requirement of the AGO's claim, AFPCC's accounting failures are both intentional and material. As described in detail above, AFPCC was motivated to manipulate joint costing to improve its "efficiency ratio," rather than use it for its intended purpose of reporting a charitable program function it actually performed, in order to be more appealing to donors and watchdog groups. (*See generally* Part III.B.2.) Even a few percentage point difference in its efficiency ratio can make a difference in the public's perception of a charity, according to AFPCC's CEO. (Aff. Ex. 8 at 166:3-7; *see also* Aff. Ex. 107 at 939). Currently, donors who review AFPCC's public financial statements are under the impression that AFPCC's efficiency ratio is nearly twice as high—49% versus 26.5%—as it would be if AFPCC properly allocated its expenses. AFPCC's accounting violations, therefore, are just another component of its overall deceptive business model. The AGO is entitled to judgment as a matter of law on Count III.

V. AFPCC VIOLATED THE 1996 CONSENT DECREE (COUNT IV).

The AGO is also entitled to judgment as a matter of law on its breach-of-contract claim for AFPCC's violations of the 1996 Consent Decree. A "settlement agreement can be enforced by an ordinary action for breach of contract." *Voicestream Minneapolis, Inc. v. RPC Properties, Inc.*, 743 N.W.2d 267, 271–72 (Minn. 2008) (citation omitted); *see also Trebelhorn v. Agrawal*, 905 N.W.2d 237, 246 (Minn. Ct. App. 2017) (citation omitted) (stating that the "essential elements of a breach-of-contract claim are (1) formation of a contract, (2) performance by plaintiff of any conditions precedent to his right to demand performance by the defendant, and

(3) breach of the contract by the defendant”).⁹

There is no genuine issue of material fact that AFPCC violated multiple provisions of the Consent Decree. First, AFPCC violated the Consent Decree’s general prohibitions on engaging in deceptive solicitation practices for all the same reasons it violated the Act as described above, including many of the specific deceptive tactics alleged in the current lawsuit. (*See generally supra* Part IV.A; Aff. Ex. 97 at 876-77 ¶¶ 4(A), (B), (E).) Second, AFPCC violated the Consent Decree’s specific prohibition on including the phrase “funding goal” in “close proximity” to a donor’s location. (*Compare* Aff. Ex. 97 at 878 ¶ 6, *with* Goldburt Aff. Ex. A; Aff. Ex. 34 at 417; Aff. Ex. 57 at 567; Aff. Ex. 58 at 575.) AFPCC has admitted this is the case. (Aff. Ex. 2 at 81:16-19.) Third, AFPCC violated the Consent Decree’s requirement that it “clearly disclose a description of the charitable program for which the campaign is being carried out, and if different, a description of the organizations other primary programs and activities,” as again demonstrated above. (*Supra* Part IV.C; Aff. Ex. 97 at 878 ¶ 7.)

Finally, AFPCC violated the Consent Decree’s general and specific provisions pertaining to its joint costing. (Aff. Ex. 97 at 879 ¶ 10.) Despite allocating costs based upon public education, AFPCC admits that it did not create or disseminate a public awareness or education plan as required by the Consent Decree; and despite jointly allocating costs based upon a call-to-action, AFPCC admits that it did not track the effectiveness of its purported program content. (Aff. Ex. 97 at 879-80 ¶¶ 10(C), (D); Aff. Ex. 2 at 126:23—128:10.) Because no genuine, material fact issue remains on the AGO’s breach-of-contract claim, the AGO is entitled to judgment as a matter of law on Count IV.

⁹ There is no dispute that the Consent Decree is a contract between the AGO and AFPCC. *See Trebelhorn*, 905 N.W.2d at 246. The Consent Decree further does not set forth any conditions precedent to be performed by the AGO. (*See* Aff. Ex. 97.)

VI. AFPCC'S AFFIRMATIVE DEFENSES SHOULD BE STRICKEN.

The State further respectfully requests that this Court strike AFPCC's affirmative defenses for failing to plead or produce in discovery evidence providing a factual basis for its affirmative defenses; or alternatively, grant the AGO judgment as a matter of law on each of AFPCC's affirmative defenses.

A party bears the burden of proof on its affirmative defenses. *See BankCherokee v. Insignia Dev., LLC*, 779 N.W.2d 896, 902 (Minn. Ct. App. 2010). Affirmative defenses “must be ple[d] with sufficient clarity and factual basis so the opposing parties understand the underlying elements of the pleader’s affirmative defense.” 15 Roger S. Haydock et al., *Minnesota Practice—Civil Practice Forms* § 8.1 (3d ed. 2018); *see also* Minn. R. Civ. P. 12.06 (allowing a court to order “stricken from any pleading any insufficient defense”). Further, if “a party fails to provide information . . . as required by Rule 26.01 or 26.05, the party is not allowed to use that information . . . to supply evidence on a motion . . . unless the failure was substantially justified or is harmless.” Minn. R. Civ. P. 37.03(a); *see also Thorson v. Zollinger Dental, P.A.*, 728 N.W.2d 261, 263-64 (Minn. Ct. App. 2007) (affirming district court’s order striking affirmative defense on summary judgment where defendant failed to answer interrogatory asking for him to “state all facts in support of” its affirmative defense, and where plaintiff was prejudiced by defendant’s failure).

AFPCC asserted 19 affirmative and other defenses in its Answer. (Aff. Ex. 102 at 917-19.) AFPCC failed to specifically plead any factual bases supporting them. (*See generally id.*) Accordingly, the AGO asked AFPCC in an Interrogatory to identify the factual bases for all of its affirmative defenses. (Aff. Ex. 78 at 654 Ans. 6.) AFPCC failed to identify any facts in response, failed to supplement this Interrogatory answer despite the AGO’s three separate deficiency letters, and failed to provide any testimony supporting its defenses at its corporate

deposition, despite the fact that the topic was specifically noticed. (*See* Aff. Ex. 78 at 655 Ans. 6; Aff. Ex. 103 at 922; Aff. Ex. 104 at 930; Aff. Ex. 105 at 934; Aff. Ex. 106 at 936; Aff. Ex. 2 at 12:20-17:22; Aff. Ex. 109 at 952-53 ¶¶ 9, 16.)

Because of AFPCC's failures, the AGO has not had a chance to test AFPCC's affirmative defenses in discovery, and cannot sufficiently address these defenses on the merits in this motion, causing prejudice to its case. Rather, the first time the AGO will learn of AFPCC's factual bases (if at all) will be in AFPCC's summary judgment response brief, subjecting the AGO to the "unjust surprise and prejudice" that discovery is intended to prevent. *Zollinger*, 728 N.W.2d at 263-64. As such, to the extent AFPCC asserts facts and evidence for the first time on summary judgment supporting a specific defense, the AGO respectfully requests that this Court strike that evidence under Minn. R. Civ. P. 37.03(a). To the extent that AFPCC fails to present sufficient evidence for any affirmative defense, the AGO requests that the Court grant the AGO summary judgment thereon.

VII. THE AGO IS ENTITLED TO SUMMARY JUDGMENT ON ALL OF THE REMEDIES IT SEEKS FOR AFPCC'S VIOLATION OF MINNESOTA LAW AND THE 1996 CONSENT DECREE.

The AGO is entitled to judgment as a matter of law on all of its remedies. Specifically, the AGO respectfully requests (1) a declaration that AFPCC violated the Act and the Consent Decree;¹⁰ (2) an injunction permanently revoking AFPCC's registration, prohibiting AFPCC from soliciting contributions in Minnesota, and requiring it to amend its Forms 990 since FY 2013 to reallocate all joint-costed program service expenses to fundraising expenses; (3) restitution of the entire \$298,637 that Minnesota persons contributed to AFPCC during the time period set forth in the Complaint in response to its deceptive solicitation mailers; (4) an

¹⁰ The Consent Decree allows the Court to grant relief, whether legal or equitable, as the Court deems appropriate, for purposes of enforcement or modification of the Consent Decree. (*See* Aff. Ex. 97 at 882-83 ¶¶ 15-16.)

additional \$298,637 in civil penalties; and (5) an award of the AGO's attorney fees, investigative costs, and litigation costs.

A. The AGO is Entitled to Injunctive and Declaratory Relief to Remedy AFPCC's Past Unlawfulness and Protect Minnesota Donors Against Future Violations in the Public Interest.

The AGO respectfully requests that this Court issue an order declaring that AFPCC violated the Act and Consent Decree as described above, as well as permanently enjoining AFPCC from soliciting in Minnesota.

This Court is “vested with jurisdiction to restrain, enjoin, and redress violations” of the Act. Minn. Stat. § 309.57, subd. 1; *see also* Minn. Stat. 8.31, subd. 3. This Court is specifically authorized to award the AGO permanent injunctive relief under the Act, including the revocation of a defendant charity's registration authorizing it to solicit contributions in Minnesota. Minn. Stat. §§ 309.52, subd. 1(a) (acknowledging that a charity's registration can be “revoked by a court of competent jurisdiction”); *see also* 309.57, subd. 1 (authorizing the suspension of registration as injunctive relief to the AGO). “In ordering injunctive relief, the attorney general shall not be required to establish irreparable harm but only a violation of statute or that the requested order promotes the public interest.” *Id.*; *see also State v. Minnesota Sch. of Bus.*, 899 N.W.2d 467, 472 (Minn. 2017) (“[A] permanent injunction sought under Minn. Stat. § 8.31, subd. 3, does not, by the terms of the statute, require a showing of irreparable harm, inadequacy of other remedies, consideration of equitable principles, or analysis of the *Dahlberg* factors.”).

Here, the relief the AGO seeks is appropriate based upon AFPCC's repeated violations of Minnesota's charities laws and the public interest the AGO seeks to promote. Initially, a permanent solicitation ban is specifically authorized by statute, and is justified based on AFPCC's longstanding pattern of deception, as well as its failure to remediate its deceptive and unlawful practices despite a prior Consent Decree with the AGO. *See State v. Coalition Against*

Breast Cancer, Inc., 40 Misc. 3d 1228(A), 975 N.Y.S.2d 712 (N.Y. Sup. 2013) (finding that “the Attorney General is entitled to the injunctive relief it seeks, prohibiting [defendants] from . . . engaging in any future charitable solicitations for profit whatsoever within the State of New York,” taking into “consideration the huge number of repetitive deceptive, false and misleading statements, contained in the written and scripted material disseminated” by defendants and their knowledge that “they were false,” as well as an “undisputed prior consent order in [another] proceeding, pursuant to which [defendant] was required to refrain from precisely the kinds of acts involving false advertising that are the subject of this action”).¹¹

Further, the State has demonstrated that AFPCC violated GAAP and consequently the Act by jointly allocating fundraising expenses to charitable program service expenses for the purpose of appearing more “efficient” than it really was, with the full knowledge that donors rely on this information when deciding whether or not to contribute. The AGO’s requested injunctive relief requiring AFPCC to remediate its false financial statements since FY 2013, therefore, is appropriate to correct these public documents, and to further prevent AFPCC from deceiving donors about the scope and nature of its charitable spending.

B. The AGO Is Entitled to Full Restitution of All \$298,637 that Minnesota Donors Contributed in Response to AFPCC’s Deceptive Mailers.

The AGO also respectfully requests that this Court award the AGO restitution of the entire \$298,637.23 that Minnesota persons contributed to AFPCC in response to the solicitation mailers it sent during the time period reflected in the Complaint.

¹¹ See also, e.g. *FTC v. Global Mktg. Grp.*, 594 F. Supp. 2d 1281, 1290 (M.D. Fla. 2008) (“A permanent injunction restraining a defendant ‘from engaging, directly or indirectly, in any and all . . . telemarketing operations’ is an appropriate remedy if it would protect the public from potential future violations by the defendant.”) (citation omitted); *FTC v. John Beck Amazing Profits LLC*, 888 F. Supp. 2d 1006, 1011 (C.D. Cal. 2012) (“[C]ourts have routinely imposed . . . barring violators from participating in certain lines of business or forms of marketing.”).

An award of restitution to the AGO is specifically authorized by the Act, as well as by common law under the doctrine of *parens patriae*. Minn. Stat. § 309.57, subd. 1; *State by Humphrey v. Ri-Mel, Inc.*, 417 N.W.2d 102, 112 (Minn. Ct. App. 1987). “Restitution is a traditional equitable remedy” within the Court’s broad discretion. *State by Humphrey v. Alpine Air Prod., Inc.*, 490 N.W.2d 888, 895 (Minn. Ct. App. 1992), *aff’d*, 500 N.W.2d 788 (Minn. 1993). Where a party’s “fraud infect[s] every single” solicitation, complete restitution to all donors is appropriate. *Id.* (awarding full restitution because the fraud “infect[ed]” every sale). Indeed, because a major purpose of governmental enforcement actions “is to protect consumers from economic injuries,” courts “have regularly awarded, as equitable ancillary relief, the full amount lost by consumers.” *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997).¹²

Here, as demonstrated throughout, AFPCC’s fraud “infects” every one of its mailed solicitations. *See Alpine Air*, 490 N.W.2d at 895. AFPCC’s own business records contain codes that demonstrate its deceptive solicitations directly resulted in each Minnesota donor’s contribution. (*See* Aff. Ex. 11.) The AGO thus respectfully requests that this Court award it restitution of the entire amount that Minnesota donors contributed in response to AFPCC’s mailers—\$298,637—to enable the AGO to recompense donors in any manner authorized by applicable law.

¹² *See also State ex rel. Swanson v. Integrity Advance, LLC*, 846 N.W.2d 435, 443 (Minn. Ct. App. 2014) (affirming restitution award of entire amount of ill-gotten gains); *State ex rel. Swanson v. Am. Family Prepaid Legal Corp.*, 2012 WL 2505843, at *4 (Minn. Ct. App. July 2, 2012) (holding that “[t]he Minnesota Attorney General’s authority . . . includes the power to seek restitution for all Minnesota consumers injured by a pattern and practice of fraudulent conduct”); *Directory Publ’g Services, Inc.*, 1996 WL 12674 at *7 (same).

C. The AGO Is Entitled to Substantial Civil Penalties, Particularly In Light of State's First Lawsuit Against It 20 Years Ago for the Exact Same Type of Unlawful Conduct.

The AGO also respectfully requests a \$298,637 award in civil penalties for AFPCC's violations of the Act and the Consent Decree, separate from and in addition to its restitution award of the same amount.

The Act specifically authorizes this Court to award the AGO "civil penalties up to \$25,000 for *each* violation" of its provisions. Minn. Stat. § 309.57, subd. 1 (emphasis added); *see also* Minn. Stat. § 645.24; *Alpine Air*, 490 N.W.2d at 896 (stating that the "state is entitled to civil penalties up to \$25,000 for each violation"). The purpose of civil penalties is to "specifically and generally deter similar conduct" and "lower[] the incentive to engage in consumer fraud." *Id.* at 792. A court "should consider the following factors in determining the size of a civil penalty: (1) the good or bad faith of the defendant; (2) the injury to the public; (3) the defendant's ability to pay; and (4) the desire to eliminate the benefits derived by the violation." *Id.* at 896-97. A court's civil penalty award "will only be disturbed for a clear abuse of discretion." *Integrity Advance*, 846 N.W.2d at 443 (citations and quotations omitted). In cases like this, where calculating penalties on a per-violation basis would result in an incalculable amount, courts may consider the total restitution amount in awarding an appropriate civil penalty. *See, e.g., People ex rel. Kennedy v. Beaumont Inv., Ltd.*, 3 Cal. Rptr. 3d 429, 434, 451-52 (Cal. Ct. App. 2003).

A substantial civil penalty is warranted under this standard. First, AFPCC mailed hundreds of thousands of mailers containing multiple violations in each one during the relevant time period. (*See* Aff. Ex. 9 at 230 Resp. 1; Aff. Ex. 10 at 237 Resp. 12.) Second, AFPCC's bad faith is evidenced by its persistent, pervasive pattern of deception occurring over the course of decades, despite a prior lawsuit and Consent Decree from the AGO, in which AFPCC agreed to

pay the AGO \$110,000 for the same alleged unlawful conduct committed over 20 years ago. (Aff. Ex. 97 at 882 ¶¶ 13-14.) The AGO has further demonstrated that AFPCC's deceptive conduct is not inadvertent or limited, but rather intentional and fundamental to its business model. *See State v. LA Inv'rs, LLC*, 410 P.3d 1183, 1191 (Wash. Ct. App. 2018) (affirming civil penalty of \$10 for each of the defendant's 256,998 solicitations mailed into the state, based in part on finding of bad faith and that the acts "were not isolated instances of misjudgment, but rather, an intentional and deliberate practice perpetuated" over almost four years).

Further, the AGO seeks to deter future significant harm to the public for the conduct evidenced here, including the injury to the faith and trust of Minnesota donors in contributing to charities. *See* Aff. Ex. 50 at 29:19-21 (Minnesota donor testifying that she's "stopped giving a lot of money" because she doesn't "know what's real and not" since AFPCC). The harm of AFPCC's conduct is aggravated by its intentional targeting of vulnerable Minnesota senior citizens as part of its business model. *See Alpine Air*, 490 N.W.2d at 897 (finding defendant's impact on "especially vulnerable" consumers helped justify civil penalty award); *cf.* Minn. Stat. § 325F.71 (in the consumer fraud context, awarding an additional \$10,000 civil penalty for each violation if "the defendant knew or should have known that the defendant's conduct was directed to one or more senior citizens").

Finally, AFPCC has the ability to pay substantial civil penalties. The most recent evidence that AFPCC produced to the AGO in discovery shows that it has substantial liquid assets as of August 2, 2019.¹³ (Aff. Ex. 110 at 954.) As such, the AGO's request for a \$298,637 award of civil penalties, separate from and in addition to its restitution award of the same

¹³ AFPCC recently claimed that it now has substantially less in liquid assets, but has not produced evidence in discovery to the AGO substantiating these amounts. *See* Minn. R. Civ. P. 26.05 (requiring timely supplementation).

amount, is appropriate.

D. The AGO is Entitled to Its Attorneys' Fees and Costs.

Finally, the Act allows this Court to award the AGO “reasonable attorney fees, and costs of investigation and litigation.” Minn. Stat. § 309.57, subd. 1. The AGO has demonstrated that AFPC engaged in efforts to “stonewall” the AGO’s investigation from before it even filed the current lawsuit, including by, among other things, requiring the AGO to bring a separate action to compel its compliance with its pre-lawsuit investigation. (Aff. Ex. 99 at 892; Aff. Ex. 100 at 893; Aff. Ex. 101 at 895-96.) The AGO respectfully asserts that an award of the AGO’s attorney fees and costs from the investigation and litigation, in an amount to be determined by future affidavits, is appropriate in this case.

CONCLUSION

For all the above reasons, the State respectfully requests that the Court grant its motion for summary judgment on the claims and remedies sought herein, in order to remedy AFPC’s pervasive, long-standing deceptive conduct, and to protect Minnesota donors from future harm.

Dated: September 26, 2019

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MINN. STAT. § 549.211
ACKNOWLEDGMENT

The party on whose behalf the attached document is served acknowledges through its undersigned counsel that sanctions, including reasonable attorney fees and other expenses, may be awarded to the opposite party or parties pursuant to Minn. Stat. § 549.211 (2018).

Dated: September 26, 2019

/s/Carol R. Washington
CAROL R. WASHINGTON
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