

CAUSE No. 03-01-628-B

STATE OF TEXAS,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
vs.	§	
	§	
VAVRO, McDONALD & ASSOCIATES,	§	
LLC a/k/a VAVRO, McDONALD,	§	DALLAS COUNTY, TEXAS
KENNEDY & ASSOCIATES, LLC and	§	
TEXAS TRAVEL PARTNERS, LLC d/b/a	§	
SUN COUNTRY TRAVEL; JERRY L.	§	
McDONALD, SR., individually;	§	
JERRY L. McDONALD, JR. individually;	§	
and DAVID G. VAVRO, individually,	§	
Defendants.	§	44th JUDICIAL DISTRICT

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.
2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by evidence in this case.
3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.
4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. During trial it was permissible for you to take notes. You may carry those notes to the jury room for your personal use during deliberation on the court's charge. You may not share these notes with other jurors. Your personal recollection of the evidence takes precedence over any notes you have taken. A juror may not rely on the notes of another juror. If you disagree about the evidence, the presiding juror may apply to the court and have the court reporter's notes read to the jury.

6. You will not decide a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers, that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

7. You may render your verdict upon the vote of ten (10) or more members of the jury. The same ten (10) or more of you must agree upon all of the answers made and to the entire verdict. You will not enter into an agreement to be bound by a majority or any other vote of less than ten (10) jurors. If the verdict and all of the answers are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other definition or meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence, unless otherwise instructed. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "**PREPONDERANCE OF THE EVIDENCE**" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in evidence in this case. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence.

A fact may be established by direct evidence, by circumstantial evidence, or both. A fact is established by **DIRECT EVIDENCE** when proved by witnesses who saw the act done or heard the words spoken or by documentary evidence. A fact is established by

CIRCUMSTANTIAL EVIDENCE when it may be fairly and reasonably inferred from other facts proved.

A party's conduct includes the conduct of another who acts with the party's authority or apparent authority.

AUTHORITY for another to act for a party must arise from the party's agreement that the other act on behalf and for the benefit of the party. If a party so authorizes another to perform an act, that other party is also authorized to do whatever else is proper, usual, and necessary to perform the act expressly authorized.

APPARENT AUTHORITY exists if a party (1) knowingly permits another to hold himself out as having authority or, (2) through lack of ordinary care, bestows on another such indications of authority that lead a reasonably prudent person to rely on the apparent existence of authority to his detriment. Only the acts of the party sought to be charged with responsibility for the conduct of another may be considered in determining whether apparent authority exists.

A person's conduct includes the conduct of others that the person has ratified. **RATIFICATION** may be express or implied.

IMPLIED RATIFICATION occurs if a person, though he may have been unaware of unauthorized conduct taken on his behalf at the time it occurred, retains the benefits of the transaction involving the unauthorized conduct after he acquired full knowledge of the unauthorized conduct.

IMPLIED RATIFICATION results in the ratification of the entire transaction.

You are instructed that a corporation is not a natural person and thus can act only through its agents, servants, employees and representatives.

The knowledge of officers, directors, employees, and agents of an entity is considered in law to be the knowledge of the entity, if that knowledge was acquired in the course and scope of their duties.

Individuals may be held liable for the acts of a corporation, if the evidence shows that the individual defendants participated directly in the practices or acts or had authority to control them. Also, the evidence must show that the individuals had some knowledge of the practices. Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer.

In answering questions about money, answer each question separately in accordance with the evidence. Do not increase or reduce the amount in one answer because of your answer to any other question about money. Do not speculate about what the ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

QUESTION N° 1

Did any defendant named below engage in any false, misleading, or deceptive act or practice in the conduct of trade or commerce?

ANSWER separately in the blank for each defendant named following each alleged “false, misleading, or deceptive act or practice” with a ‘yes’ or ‘no’:

“Person” means an individual, partnership, corporation, association, or other group, however organized.

“Trade” and **“commerce”** mean the advertising, offering for sale, sale, lease, or distribution of any good or service, of any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this state.

“False, misleading, or deceptive act or practice” means any of the following:

An act or series of acts that have the tendency to deceive an average ordinary person, even though that person may have been ignorant, unthinking, or credulous.

VAVRO, McDONALD & ASSOCIATES, LLC	<u>Yes</u>
JERRY L. McDONALD, SR.	<u>Yes</u>
JERRY L. McDONALD, JR.	<u>Yes</u>

– and/or –

Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services.

VAVRO, McDONALD & ASSOCIATES, LLC	<u>Yes</u>
JERRY L. McDONALD, SR.	<u>Yes</u>
JERRY L. McDONALD, JR.	<u>Yes</u>

- and/or -

causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another.

VAVRO, McDONALD & ASSOCIATES, LLC	<u>Yes</u>
JERRY L. McDONALD, SR.	<u>Yes</u>
JERRY L. McDONALD, JR.	<u>Yes</u>

- and/or -

Representing that goods or services had or would have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not.

VAVRO, McDONALD & ASSOCIATES, LLC	<u>Yes</u>
JERRY L. McDONALD, SR.	<u>Yes</u>
JERRY L. McDONALD, JR.	<u>Yes</u>

- and/or -

Failing to disclose information about goods or services that was known at the time of the transaction with the intention to induce identifiable persons into a transaction identifiable persons otherwise would not have entered into if the information had been disclosed.

(i) "Intentionally" means actual awareness of the falsity, deception, or unfairness of the act or practice, or the condition, defect, coupled with the specific intent that consumers act in detrimental reliance on the falsity or deception or in detrimental ignorance of the unfairness.

(i i)

Intention may be inferred from objective manifestations that indicate that the person acted intentionally or from facts showing that a defendant acted with flagrant disregard of prudent and

fair business practices to the extent that the defendant should be treated as having acted intentionally.

VAVRO, McDONALD & ASSOCIATES, LLC	<u>Yes</u>
JERRY L. McDONALD, SR.	<u>Yes</u>
JERRY L. McDONALD, JR.	<u>Yes</u>

- and/or -

(6) Using the term "corporation," "incorporated," or an abbreviation of either of those terms in the name of a business entity that is not incorporated under the laws of this state or another jurisdiction.

VAVRO, McDONALD & ASSOCIATES, LLC	<u>Yes</u>
JERRY L. McDONALD, SR.	<u>Yes</u>
JERRY L. McDONALD, JR.	<u>Yes</u>

- and/or -

(7) While soliciting persons to attend a sales presentation, failing to fully, clearly, and conspicuously disclose that a refundable deposit is required for a gift or prize involving lodging, airfare, a trip, or a recreational activity.

"Refundable deposit" means a deposit that is required to be returned in its entirety to a consumer if: (1) it is paid by the consumer for a reservation that is used by the consumer; or (2) the consumer provides at least five possible reservation dates, none of which can be confirmed.

A condition that restricts the refund of the deposit must be clearly and conspicuously disclosed in at least 10-point type on the solicitation.

"Gift" means an item of value that is offered, transferred, or given to a person as an inducement to attend a sales presentation but that is not offered, transferred, or awarded by chance through a contest. The term does not include a manufacturer's rebate or discount available to the public.

"Prize" means an item of value that is offered, awarded, or

given to a person through a contest. The term does not include a manufacturer's rebate or discount available to the public.

VAVRO, McDONALD & ASSOCIATES, LLC	<u>Yes</u>
JERRY L. McDONALD, SR.	<u>Yes</u>
JERRY L. McDONALD, JR.	<u>Yes</u>

- and/or -

(8) While soliciting persons to attend a sales presentation, notifying a person that he or she would receive a gift, a condition of receipt of which required the person to pay consideration of any kind or a charge or expense to a person for the gift, when the consideration, charge, or expense was not fully, clearly, and conspicuously disclosed.

"Gift" means an item of value that is offered, transferred, or given to a person as an inducement to attend a sales presentation but that is not offered, transferred, or awarded by chance through a contest. The term does not include a manufacturer's rebate or discount available to the public.

VAVRO, McDONALD & ASSOCIATES, LLC	<u>Yes</u>
JERRY L. McDONALD, SR.	<u>Yes</u>
JERRY L. McDONALD, JR.	<u>Yes</u>

- and/or -

(9) Directly representing or implying that a gift promotion was a contest.

"Gift" means an item of value that is offered, transferred, or given to a person as an inducement to attend a sales presentation but that is not offered, transferred, or awarded by chance through a contest. The term does not include a manufacturer's rebate or discount available to the public.

"Contest" means a promotional device in which: (A) a person is offered, as an inducement to attend a sales presentation, a chance to win or receive a prize by complying with specified entry requirements; (B) the chance to win any prize is determined by random selection; and (C) all offered prizes are awarded.

VAVRO, McDONALD & ASSOCIATES, LLC	<u>Yes</u>
JERRY L. McDONALD, SR.	<u>Yes</u>

JERRY L. McDONALD, JR.

Yes

- and/or -

(10) In a gift promotion using the term "finalist," "major award winner," "grand prize recipient," "winner," "won," "will win," or "will be awarded," or using words or phrases of similar meaning that imply that a person is being solicited to enter or participate in a contest.

"Gift" means an item of value that is offered, transferred, or given to a person as an inducement to attend a sales presentation but that is not offered, transferred, or awarded by chance through a contest. The term does not include a manufacturer's rebate or discount available to the public.

"Contest" means a promotional device in which: (A) a person is offered, as an inducement to attend a sales presentation, a chance to win or receive a prize by complying with specified entry requirements; (B) the chance to win any prize is determined by random selection; and (C) all offered prizes are awarded.

VAVRO, McDONALD & ASSOCIATES, LLC
JERRY L. McDONALD, SR.
JERRY L. McDONALD, JR.

Yes
Yes
Yes

- and/or -

(11) In a gift promotion using the term "sweepstakes" or "contest" or using words or phrases of similar meaning that imply that the respondent is being solicited to enter or has won a contest.

"Gift" means an item of value that is offered, transferred, or given to a person as an inducement to attend a sales presentation but that is not offered, transferred, or awarded by chance through a contest. The term does not include a manufacturer's rebate or discount available to the public.

"Contest" means a promotional device in which: (A) a person is offered, as an inducement to attend a sales presentation, a chance to win or receive a prize by complying with specified entry requirements; (B) the chance to win any prize is determined by random selection; and (C) all offered prizes are awarded.

VAVRO, McDONALD & ASSOCIATES, LLC	<u>Yes</u>
JERRY L. McDONALD, SR.	<u>Yes</u>
JERRY L. McDONALD, JR.	<u>Yes</u>

- and/or -

(12) Failing to disclose the retail value of a gift.

"Gift" means an item of value that is offered, transferred, or given to a person as an inducement to attend a sales presentation but that is not offered, transferred, or awarded by chance through a contest. The term does not include a manufacturer's rebate or discount available to the public.

If a prize or gift involves lodging, airfare, a trip, or a recreational activity, the retail value is the retail sales price of that lodging, airfare, trip, or recreational activity to a member of the public who is not involved in a promotional or other discount transaction.

VAVRO, McDONALD & ASSOCIATES, LLC	<u>Yes</u>
JERRY L. McDONALD, SR.	<u>Yes</u>
JERRY L. McDONALD, JR.	<u>Yes</u>

If you answered "yes" to any part of QUESTION N° 1, then answer QUESTION N° 2 only for those same parts to which you answered "yes." Otherwise, do not answer QUESTION N° 2.

QUESTION N° 2

Do you find that any defendant named below engaged in any of the misleading, or deceptive acts or practices on which you based your answer(s) to QUESTION N° 1 in a manner that was calculated to acquire or deprive money or other property from a consumer who was 65 years of age or older when the act or practice occurred?

ANSWER separately, in the blank for each defendant named below, with a 'yes' or 'no':

VAVRO, McDONALD & ASSOCIATES, LLC
JERRY L. McDONALD, SR.
JERRY L. McDONALD, JR.

Yes

Yes

Yes

If you answered “yes” to any part of QUESTION N° 1, then answer QUESTION N° 3 only for those same parts to which you answered “yes.” Otherwise, do not answer QUESTION N° 3.

QUESTION N° 3

On how many occasions do you find that each defendant named below engaged in the false, misleading, or deceptive acts or practices upon which you based your answers to QUESTION N° 1?

ANSWER separately in the blank, with a whole number, for each defendant named below for each “false, misleading, or deceptive act or practice”:

VAVRO, McDONALD & ASSOCIATES, LLC
JERRY L. McDONALD, SR.
JERRY L. McDONALD, JR.

72,000

72,000

72,000

If you answered "yes" to any part of QUESTION N° 1, then answer QUESTION N° 4 only for those same parts to which you answered "yes." Otherwise, do not answer QUESTION N° 4.

QUESTION N° 4

What sum of money, if any, should be assessed against each defendant named below as a civil penalty for the false, misleading, or deceptive acts or practices on which you based your answer(s) to QUESTIONS N° 1, N° 2, and N° 3?

You are hereby instructed that a civil penalty may be assessed against any defendant named below for every false, misleading, or deceptive act or practice.

"A civil penalty" means an amount that you may in your discretion award as punishment of the wrongdoer and as a warning and example to the wrongdoer and others to deter the same or similar conduct in the future.

A penalty is a sum of money of which the law exacts payment by way of punishment for doing some act that is prohibited, or omitting to do some act that is required to be done.

In determining the amount of a penalty, if any, you shall consider:
the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited act or practice;
the history of previous violations;
the amount necessary to deter future violations;
the economic effect on the person against whom the penalty is to be assessed;
knowledge of the illegality of the act or practice; and
any other matter that justice may require.

ANSWER in Dollars and Cents for a civil penalty, if any, for each defendant named below:

VAVRO, McDONALD & ASSOCIATES, LLC	\$ 6,000,000.00
JERRY L. McDONALD, SR.	\$ 3,000,000.00
JERRY L. McDONALD, JR.	\$ 3,000,000.00

If you answered "yes" to any parts of QUESTION N° 1, then answer QUESTION N° 5 only for those same parts to which you answered "yes." Otherwise, do not answer QUESTION N° 5.

QUESTION N° 5

What sum of money, if any, if paid now, is necessary to restore money taken from identifiable persons by means of any unlawful acts or practices committed by each defendant named below?

ANSWER in Dollars and Cents for each defendant named below:

VAVRO, McDONALD & ASSOCIATES, LLC	\$ 32,737,671.00
JERRY L. McDONALD, SR.	\$ 8,000,000.00
JERRY L. McDONALD, JR.	\$ 8,000,000.00

QUESTION N° 6

Did any defendant named below make, or cause to be made, a telemarketing call to a telephone number that had been published more than 60 days on the then-current Texas No-Call list?

The **Texas No-Call List** is a database compiling a list of names, zip codes, and telephone numbers of consumers in this state who object to receiving unsolicited telemarketing or telephone calls. The Texas no-call list is a combined list consisting of the name and telephone numbers of each consumer in this state who has requested to be on that list and of each person in the portion of the national do-not-call registry maintained by the United States government that relates to this state.

A “**telemarketing call**” is an unsolicited telephone call made to:

- (1) solicit a sale of a consumer good or service;
- (2) solicit an extension of credit for a consumer good or service; or
- (3) obtain information that may be used to solicit a sale of a consumer good or service or to extend credit for the sale.

“**Telephone call**” means a call or other transmission which is made to or received at a telephone number, including:

- (A) a call made by an automated telephone dialing system;
- (B) a transmission to a facsimile recording device; and

(C) a call to a mobile telephone number serviced by a provider of commercial mobile service, as defined by Section 332(d), Communications Act of 1934 (47 U.S.C. Section 151 et seq.), as amended, Federal Communications Commission rules, and the Omnibus Budget Reconciliation Act of 1993 (Pub. L. No. 103-66), as amended.

"Consumer good or service" means property of any kind that is normally used for personal, family, or household purposes.

A person makes a telemarketing call if the person effects a telemarketing call on the person's own behalf or on behalf of another entity. A person makes a telemarketing call on behalf of another entity if, as a result of the telemarketing call, the other entity:

(1) can become entitled to receive money or other property of any kind from a sale solicited during the call; or

(2) can receive information that is obtained during the call and that is to be used for the purpose of:

(A) extending or offering to extend credit for a consumer good or service to the person solicited; or

(B) directly soliciting a sale of a consumer good or service or extending credit for the sale.

ANSWER separately in the blank for each defendant named below with a 'yes' or 'no':

VAVRO, McDONALD & ASSOCIATES, LLC	<u>Yes</u>
JERRY L. McDONALD, SR.	<u>Yes</u>
JERRY L. McDONALD, JR.	<u>Yes</u>

If you answered "yes" for any defendant identified in QUESTION N° 6, then answer QUESTION N° 7 only as to those defendants for whom you answered "yes." Otherwise, do not answer QUESTION N° 7.

QUESTION N° 7

Do you find that any of the defendants named below **willfully** or **knowingly** made, or caused to be made, any of the telemarketing calls upon which you based your answers to QUESTION N° 6?

Actual awareness may be inferred where objective manifestations indicate that a party acted with actual awareness. For purposes of determining whether conduct is committed knowingly, knowledge of industry standards may be imputed to one who does business in that industry.

Each telemarketing call to a telephone number on the no-call list shall be deemed a separate occurrence.

ANSWER separately in the blank for each defendant named below with a 'yes' or 'no':

VAVRO, McDONALD & ASSOCIATES, LLC	<u>Yes</u>
JERRY L. McDONALD, SR.	<u>Yes</u>
JERRY L. McDONALD, JR.	<u>Yes</u>

If you answered "yes" for any defendant identified in QUESTION N° 6, then answer QUESTION N° 8 only as to those defendants for whom you answered "yes." Otherwise, do not answer QUESTION N° 8.

QUESTION N° 8

On how many occasions do you find that each defendant named below made, or caused to be made, the telemarketing calls upon which you based your answers to QUESTION N° 6?

Each telemarketing call to a telephone number on the no-call list shall be deemed a separate occurrence.

ANSWER separately, in the blank for each defendant named below, with a whole number for each telemarketing call:

VAVRO, McDONALD & ASSOCIATES, LLC	<u>52</u>
JERRY L. McDONALD, SR.	<u>52</u>
JERRY L. McDONALD, JR.	<u>52</u>

If you answered "yes" for any defendant identified in QUESTION N° 6, then answer QUESTION N° 9 only as to those defendants for whom you answered "yes." Otherwise, do not answer QUESTION N° 9.

QUESTION N° 9

What sum of money, if any, should be assessed against each defendant named below as a civil penalty for every telemarketing call on which you based your answer(s) to QUESTIONS N° 6, N° 7 and N° 8?

Against any defendant named below, you may assess a civil penalty in an amount of not more than \$1,000 per telemarketing call.

If you answered “yes” to QUESTIONS N° 7 that a defendant willfully or knowingly made such a telemarketing call, you may increase the amount of that defendant’s civil penalty to an amount not to exceed \$3,000 for each telemarketing call.

ANSWER in Dollars and Cents for each defendant named below:

VAVRO, McDONALD & ASSOCIATES, LLC	\$ 156,000.00
JERRY L. McDONALD, SR.	\$ 52,000.00
JERRY L. McDONALD, JR.	\$ 0

In answering questions 10 through 18, inclusive, you may consider only the conduct of David G. Vavro for his actions, if any, occurring after March 8, 2003.

QUESTION NO. 10

Did any defendant named below engage in any false, misleading, or deceptive act or practice in the conduct of trade or commerce?

ANSWER separately in the blank for each defendant named following each alleged “false, misleading, or deceptive act or practice” with a ‘yes’ or ‘no’:

c. **“Person”** means an individual, partnership, corporation, association, or other group, however organized.

“Trade” and **“commerce”** mean the advertising, offering for sale, sale, lease, or distribution of any good or service, of any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this state.

“False, misleading, or deceptive act or practice” means any of the following:

An act or series of acts that have the tendency to deceive an average ordinary person, even though that person

may have been ignorant, unthinking, or credulous.

DAVID G. VAVRO Yes

– and/or –

Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services.

DAVID G. VAVRO Yes

– and/or –

Causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another.

DAVID G. VAVRO Yes

– and/or –

Representing that goods or services had or would have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not.

DAVID G. VAVRO Yes

– and/or –

Failing to disclose information about goods or services that was known at the time of the transaction with the intention to induce identifiable persons into a transaction identifiable persons otherwise would not have entered into if the information had been disclosed.

- (i) "Intentionally" means actual awareness of the falsity, deception, or unfairness of the act or practice, or the condition, defect, coupled with the specific intent that consumers act in detrimental reliance on the falsity or deception or in detrimental ignorance of the

unfairness.

(i i)

Intention may be inferred from objective manifestations that indicate that the person acted intentionally or from facts showing that a defendant acted with flagrant disregard of prudent and fair business practices to the extent that the defendant should be treated as having acted intentionally.

(a) DAVID G. VAVRO
Yes

- and/or -

(6) Using the term "corporation," "incorporated," or an abbreviation of either of those terms in the name of a business entity that is not incorporated under the laws of this state or another jurisdiction.

(a) DAVID G. VAVRO
Yes

- and/or -

(7) While soliciting persons to attend a sales presentation, failing to fully, clearly, and conspicuously disclose that a refundable deposit is required for a gift or prize involving lodging, airfare, a trip, or a recreational activity.

"Refundable deposit" means a deposit that is required to be returned in its entirety to a consumer if: (1) it is paid by the consumer for a reservation that is used by the consumer; or (2) the consumer provides at least five possible reservation dates, none of which can be confirmed.

A condition that restricts the refund of the deposit must be clearly and conspicuously disclosed in at least 10-point type on the solicitation.

"Gift" means an item of value that is offered, transferred,

or given to a person as an inducement to attend a sales presentation but that is not offered, transferred, or awarded by chance through a contest. The term does not include a manufacturer's rebate or discount available to the public.

"Prize" means an item of value that is offered, awarded, or given to a person through a contest. The term does not include a manufacturer's rebate or discount available to the public.

(a) DAVID G. VAVROYes.....

- and/or -

(8) While soliciting persons to attend a sales presentation, notifying a person that he or she would receive a gift, a condition of receipt of which required the person to pay consideration of any kind or a charge or expense to a person for the gift, when the consideration, charge, or expense was not fully, clearly, and conspicuously disclosed.

"Gift" means an item of value that is offered, transferred, or given to a person as an inducement to attend a sales presentation but that is not offered, transferred, or awarded by chance through a contest. The term does not include a manufacturer's rebate or discount available to the public.

DAVID G. VAVRO Yes

- and/or -

(9) Directly representing or implying that a gift promotion was a contest.

"Gift" means an item of value that is offered, transferred, or given to a person as an inducement to attend a sales presentation but that is not offered, transferred, or awarded by chance through a contest. The term does not include a manufacturer's rebate or discount available to the public.

"Contest" means a promotional device in which: (A) a person is offered, as an inducement to attend a sales presentation, a chance to win or receive a prize by complying with specified entry requirements; (B) the chance to win any prize is determined by random selection; and (C) all offered prizes are awarded.

(a) DAVID G. VAVRO No

– and/or –

(10) In a gift promotion using the term “ finalist,” “major award winner,” “grand prize recipient,” “winner,” “won,” “will win,” or “will be awarded,” or using words or phrases of similar meaning that imply that a person is being solicited to enter or participate in a contest.

"Gift" means an item of value that is offered, transferred, or given to a person as an inducement to attend a sales presentation but that is not offered, transferred, or awarded by chance through a contest. The term does not include a manufacturer's rebate or discount available to the public.

"Contest" means a promotional device in which: (A) a person is offered, as an inducement to attend a sales presentation, a chance to win or receive a prize by complying with specified entry requirements; (B) the chance to win any prize is determined by random selection; and (C) all offered prizes are awarded.

DAVID G. VAVRO No

– and/or –

(11) In a gift promotion using the term "sweepstakes" or "contest" or using words or phrases of similar meaning that imply that the respondent is being solicited to enter or has won a contest.

"Gift" means an item of value that is offered, transferred, or given to a person as an inducement to attend a sales presentation but that is not offered, transferred, or awarded by chance through a contest. The term does not include a manufacturer's rebate or discount available to the public.

"Contest" means a promotional device in which: (A) a person is offered, as an inducement to attend a sales presentation, a chance to win or receive a prize by complying with specified entry requirements; (B) the chance to win any prize is determined by random selection; and (C) all offered prizes are awarded.

DAVID G. VAVRO No

- and/or -

(12) Failing to disclose the retail value of a gift.

"Gift" means an item of value that is offered, transferred, or given to a person as an inducement to attend a sales presentation but that is not offered, transferred, or awarded by chance through a contest. The term does not include a manufacturer's rebate or discount available to the public.

If a prize or gift involves lodging, airfare, a trip, or a recreational activity, the retail value is the retail sales price of that lodging, airfare, trip, or recreational activity to a member of the public who is not involved in a promotional or other discount transaction.

DAVID G. VAVRO Yes

If you answered "yes" to any part of QUESTION N° 10, then answer QUESTION N° 11 only for those same parts to which you answered "yes." Otherwise, do not answer QUESTION N° 11.

QUESTION N°11

Do you find that any defendant named below engaged in any of the misleading, or deceptive acts or practices on which you based your answer(s) to QUESTION N° 10 in a manner that was calculated to acquire or deprive money or other property from a consumer who was 65 years of age or older when the act or practice occurred?

ANSWER separately, in the blank for each defendant named below, with a 'yes' or 'no':

DAVID G. VAVRO Yes

If you answered “yes” to any part of QUESTION N° 10, then answer QUESTION N° 12 only for those same parts to which you answered “yes.” Otherwise, do not answer QUESTION N° 12.

QUESTION N° 12

On how many occasions do you find that each defendant named below engaged in the false, misleading, or deceptive acts or practices upon which you based your answers to QUESTION N° 10?

ANSWER separately in the blank, with a whole number, for each defendant named below for each “false, misleading, or deceptive act or practice”:

DAVID G. VAVRO 1,044

If you answered “yes” to any part of QUESTION N° 10, then answer QUESTION N° 13 only for those same parts to which you answered “yes.” Otherwise, do not answer QUESTION N° 13.

QUESTION N° 13

What sum of money, if any, should be assessed against each defendant named below as a civil penalty for the false, misleading, or deceptive acts or practices on which you based your answer(s) to QUESTIONS N° 10, N° 11, and N° 12?

You are hereby instructed that a civil penalty may be assessed against any defendant named below for every false, misleading, or deceptive act or practice.

b. "A civil penalty" means an amount that you may in your discretion award as punishment of the wrongdoer and as a warning and example to the wrongdoer and others to deter the same or similar conduct in the future.

A penalty is a sum of money of which the law exacts payment by way of punishment for doing some act that is prohibited, or omitting to do some act that is required to be done.

In determining the amount of a penalty, if any, you shall consider:

the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited act or practice;
the history of previous violations;
the amount necessary to deter future violations;
the economic effect on the person against whom the penalty is to be assessed;
knowledge of the illegality of the act or practice; and any other matter that justice may require.

b. If you answered “yes” to QUESTIONS N° 11 that any of Defendant DAVID G. VAVRO’s false, misleading, or deceptive acts or practices were calculated to acquire or deprive money or other property from any consumers who were 65 years of age or older when such acts or practices occurred, then you may assess an *additional* amount as a civil penalty.

ANSWER in Dollars and Cents for a civil penalty, if any, for each defendant named below:

DAVID G. VAVRO \$ _3,000,000.00__

If you have answered “yes” to any parts of Question No 10, the answer Question No. 14 only for those parts to which you answered “yes.” Otherwise, do not answer Question No. 14.

QUESTION N° 14

What sum of money, if any, if paid now, is necessary to restore money taken from identifiable persons by means of any unlawful acts or practices committed by each defendant named below?

ANSWER in Dollars and Cents for each defendant named below:

DAVID G. VAVRO \$ 406,396.00

QUESTION N° 15

Did any defendant named below make, or cause to be made, a telemarketing call to a telephone number that had been published more than 60 days on the then-current Texas No-Call list?

The **Texas No-Call List** is a database compiling a list of names, zip codes, and telephone

numbers of consumers in this state who object to receiving unsolicited telemarketing or telephone calls. The Texas no-call list is a combined list consisting of the name and telephone numbers of each consumer in this state who has requested to be on that list and of each person in the portion of the national do-not-call registry maintained by the United States government that relates to this state.

A “**telemarketing call**” is an unsolicited telephone call made to:

- (1) solicit a sale of a consumer good or service;
- (2) solicit an extension of credit for a consumer good or service; or
- (3) obtain information that may be used to solicit a sale of a consumer good or service or to extend credit for the sale.

“**Telephone call**” means a call or other transmission which is made to or received at a telephone number, including:

- (A) a call made by an automated telephone dialing system;
- (B) a transmission to a facsimile recording device; and
- (C) a call to a mobile telephone number serviced by a provider of commercial mobile service, as defined by Section 332(d), Communications Act of 1934 (47 U.S.C. Section 151 et seq.), as amended, Federal Communications Commission rules, and the Omnibus Budget Reconciliation Act of 1993 (Pub. L. No. 103-66), as amended.

“**Consumer good or service**” means property of any kind that is normally used for personal, family, or household purposes.

A person makes a telemarketing call if the person effects a telemarketing call on the person's own behalf or on behalf of another entity. A person makes a telemarketing call on behalf of another entity if, as a result of the telemarketing call, the other entity:

- (1) can become entitled to receive money or other property of any kind from a sale solicited during the call; or
- (2) can receive information that is obtained during the call and that is to be used for the purpose of:
 - (A) extending or offering to extend credit for a consumer good or service to the person solicited; or
 - (B) directly soliciting a sale of a consumer good or service or extending credit for the sale.

ANSWER separately in the blank for each defendant named below with a ‘yes’ or ‘no’:

DAVID G. VAVRO

NO

If you answered “yes” for any defendant identified in QUESTION N° 15, then answer QUESTION N° 16. Otherwise, do not answer QUESTION N° 16.

QUESTION N° 16

Do you find that any of the defendants named below **willfully** or **knowingly** made, or caused to be made, any of the telemarketing calls upon which you based your answers to QUESTION N° 6?

Actual awareness may be inferred where objective manifestations indicate that a party acted with actual awareness. For purposes of determining whether conduct is committed knowingly, knowledge of industry standards may be imputed to one who does business in that industry.

Each telemarketing call to a telephone number on the no-call list shall be deemed a separate occurrence.

ANSWER separately in the blank for each defendant named below with a ‘yes’ or ‘no’:

DAVID G. VAVRO No

If you answered “yes” for any defendant identified in QUESTION N° 15, then answer QUESTION N° 17 only as to those defendants for whom you answered “yes.” Otherwise, do not answer QUESTION N° 17.

QUESTION N° 17

On how many occasions do you find that each defendant named below made, or caused to be made, the telemarketing calls upon which you based your answers to QUESTION N° 6?

Each telemarketing call to a telephone number on the no-call list shall be deemed a separate occurrence.

ANSWER separately, in the blank for each defendant named below, with a whole number for each telemarketing call:

DAVID G. VAVRO 0

If you answered “yes” for any defendant identified in QUESTION N°15, then answer QUESTION N° 18 only as to those defendants for whom you answered “yes.” Otherwise, do not answer QUESTION N° 18.

QUESTION N° 18

What sum of money, if any, should be assessed against each defendant named below as a civil penalty for every telemarketing call on which you based your answer(s) to QUESTIONS N° 15, 16 and 17?

Against any defendant named below, you may assess a civil penalty in an amount of not more than \$1,000 per telemarketing call.

If you answered “yes” to QUESTIONS N° 7 that a defendant willfully or knowingly made such a telemarketing call, you may increase the amount of that defendant’s civil penalty to an amount not to exceed \$3,000 for each telemarketing call.

ANSWER in Dollars and Cents for each defendant named below:

DAVID G. VAVRO \$ 0

If you answered “yes” to any part of QUESTIONS N° 1 or N° 6, as to Vavro, McDonald & Associates, LLC or Jerry McDonald Sr. or Jerry McDonald Sr. then answer QUESTION N° 19. Otherwise, do not answer QUESTION N° 10.

QUESTION N° 19

What is a reasonable fee for the necessary services of the Office of the Attorney General of the State of Texas in this case?

“Reasonable and necessary attorneys’ fees” mean the sum of money that would fairly and reasonably compensate a party for his, her or its attorneys’ fees.

Factors that should be considered when determining the reasonableness of a fee include:

- the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
- the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;
- the fee customarily charged in the locality for similar legal services;
- the amount involved and the results obtained;
- the time limitations imposed by the client or by the circumstances;
- the nature and length of the professional relationship with the client;
- the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

ANSWER separately in the blank following each stage of work in dollars and cents, if any, for each of the following:

For preparation and trial \$ 223,540.00

In the event of an appeal to the Court of Appeals \$ 12,500.00

In the event that discretionary review by the Supreme Court of Texas is sought \$ 7,500.00

In the event that discretionary review by the Supreme Court of Texas is granted \$ 7,500.00

If you answered “yes” to any part of QUESTIONS N° 10 or 15 as to David G. Vavro then answer QUESTION N° 20. Otherwise, do not answer QUESTION N° 20.

QUESTION N° 20

What is a reasonable fee for the necessary services of the Office of the Attorney General of

the State of Texas in this case?

“Reasonable and necessary attorneys’ fees” mean the sum of money that would fairly and reasonably compensate a party for his, her or its attorneys’ fees.

Factors that should be considered when determining the reasonableness of a fee include:

- the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
- the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;
- the fee customarily charged in the locality for similar legal services;
- the amount involved and the results obtained;
- the time limitations imposed by the client or by the circumstances;
- the nature and length of the professional relationship with the client;
- the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

ANSWER separately in the blank following each stage of work in dollars and cents, if any, for each of the following:

For preparation and trial \$ 223,540.00

In the event of an appeal to the Court of Appeals \$ 12,500.00

In the event that discretionary review by the Supreme Court of Texas is sought \$ 7,500.00

In the event that discretionary review by the Supreme Court of Texas is granted \$ 7,500.00

After you retire to the jury room, you will select your presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked. It is the duty of the presiding juror —

- (1) to preside during your deliberations;
- (2) to see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;
- (3) to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the Judge;
- (4) to vote on the questions;

- (5) to write your answers to the questions in the spaces provided; and
- (6) to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

After you have retired to consider your verdict, no one has any authority to communicate with you except the bailiff of this Court. You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the Judge of this fact.

When you have answered all of the questions which you are required to answer under the instructions of the Court, and the presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, the presiding juror shall advise the bailiff, at the door of the jury room, that you have reached a verdict and give the verdict to the bailiff to deliver to the Judge. You will then wait to be called back into the courtroom.

JUDGE PRESIDING