

**RECEIVED**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

MAR 14 2013

THOMAS G. BRUTON  
CLERK, U.S. DISTRICT COURT

FEDERAL TRADE COMMISSION, )  
Plaintiff, ) 13 CV 1999  
v. ) JUDGE THARP JR.  
CONSTRUCT DATA PUBLISHERS a. s., ) MAGISTRATE JUDGE MASON  
a foreign corporation, also doing business )  
as FAIR GUIDE, *et al.*, )  
Defendants. )

**FEDERAL TRADE COMMISSION'S MEMORANDUM IN SUPPORT OF  
ITS EX PARTE MOTION FOR A TEMPORARY RESTRAINING ORDER  
WITH ASSET FREEZE, OTHER EQUITABLE RELIEF, AND ORDER TO  
SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

## I. INTRODUCTION

Defendants are operating an international scam that deceives small businesses and other organizations into paying for worthless directory listings that they did not intend to order and do not want. Defendants mail forms to companies, organizations, and educational institutions that have registered for or participated in trade shows or exhibitions, and request that they update their contact information for “the exhibitors guide.” The forms refer to a specific trade show where the consumer hosts an exhibit to create the impression that consumers are being asked to update their contact information for that trade show. Defendants, however, have nothing to do with that trade show, and fine print on their form then purports to bind consumers to an expensive three-year contract for online advertising on Defendants’ obscure website. Defendants likely have swindled consumers across the country out of millions of dollars.

Whenever a consumer returns the deceptive form, Defendants respond with an invoice for \$1717 for the first year of the contract. Consumers who initially refuse to pay then receive a series of letters from Defendants, threatening lawsuits and purporting to assess late fees. Eventually, many consumers pay some or all of the demanded amount, either mistakenly believing they owe the money, or just succumbing to Defendants’ threats. Either way, consumers do not receive anything of value as a result of their payment. Defendants have no connection to any trade show or exhibition. Their online directory has no presence on the Internet, except as a notorious scam, and is useless as advertising.

Defendants have been running this scam around the world for over a decade. Their company, Construct Data Publishers, originally operated from Austria, contacting businesses in Europe. After generating numerous consumer complaints and negative press coverage, however, the company agreed to a settlement in an Austrian court that prohibited further solicitations in

the European Union. The company also agreed in that settlement to stop demanding payment from previously contacted businesses that had objected to its contracts and invoices. In late 2008, the company relocated to Slovakia, and since then has been aggressively targeting consumers in the United States and other countries outside Europe. In the U.S. alone, the company typically sends its deceptive mailings to over 100,000 consumers each month.<sup>1</sup>

The FTC is quite familiar with this type of business directory scheme. Indeed, in the last few years, Chief Judge Holderman and Judges Gettleman, Darrah, Bucklo, Kennelly and Leinenweber have enjoined directory schemes operating in a similar manner to Defendants in this case.<sup>2</sup>

The Commission's evidence of Defendants' fraud is overwhelming. This scam has triggered more than 1600 complaints in the United States alone – including 48 complaints in the last 30 days – a sampling of which are provided along with this Memorandum.<sup>3</sup> In addition, we are submitting records obtained from Defendants' Chicago-based printing company, and six declarations from small businesses and organizations that were targeted by the scam. Taken together, this evidence reveals that Defendants' operation is both widespread and entirely fraudulent, leaving no doubt that the Commission is likely to succeed on the merits of its claims.

We ask the Court to enter an *ex parte* temporary restraining order enjoining Defendants'

---

<sup>1</sup> PX 1, Menjivar Dec. ¶¶ 15d, 16, 24 & Atts. L (postage), Att. U-W (European proceedings).

<sup>2</sup> See *FTC v. Yellow Page Marketing B.V.*, No. 11 C 5035 (N.D. Ill. Aug. 9, 2011) (Leinenweber, J.); *FTC v. 6555381 Canada Inc.*, No. 09 C 3158 (N.D. Ill. June 1, 2009) (Gettleman, J.); *FTC v. Integration Media Inc.*, No. 09 C 3160 (N.D. Ill. May 28, 2009) (Bucklo, J.); *FTC v. 6654916 Canada Inc.*, No. 09 C 3159 (N.D. Ill. May 27, 2009) (Darrah, J.); *FTC v. Datacom Mktg, Inc.*, No. 06 C 2574, 2006 WL 1472644 (N.D. Ill. May 24, 2006) (Holderman, C.J.); *FTC v. 4049705 Canada, Inc.*, No. 04 C 4694 (N.D. Ill. Sept. 9, 2004) (Kennelly, J.) (transcript filed as PX 1, Att. V).

<sup>3</sup> PX 1, Menjivar Dec. ¶ 26-29 & Att. Y.

deceptive practices and freezing their assets to preserve the Court’s ability to provide effective final relief. Although based in Slovakia, Defendants have assets in the U.S., including close to \$100,000 in cash being held by their printer, and incoming mail from consumers who have signed their deceptive forms. On a daily basis, Defendants are pressuring U.S. consumers to wire money to Slovakia. The FTC seeks to halt this activity and preserve the status quo.

## **II. DEFENDANTS**

Defendant Construct Data Publishers a.s. (“Construct Data”) is a Slovakian joint stock company formed in 2008. It is the successor to an Austrian company, Construct Data Verlag A.G., which ran the same business before Defendants moved from Austria to Slovakia. In targeting U.S. consumers, Construct Data uses Post Office boxes in the Chicago area as mail drops.<sup>4</sup>

Defendant Wolfgang Valvoda (“Valvoda”) was managing board member of Construct Data from the company’s formation in 2008 through at least December 2010, and held himself out as CEO. Before that, from at least 1998 to 2008, he was the CEO of Construct Data’s predecessor entity in Austria. He continued to manage Construct Data for at least several months into 2011, including coming to Chicago in January 2011 to visit Microdynamics, Defendants’ printing and mail forwarding contractor.<sup>5</sup> Defendant Susanne Anhorn (“Anhorn”) is

---

<sup>4</sup> PX 1, Menjivar Dec. ¶¶ 5-7, 19 & Att. A (corporate records), Att. H (PO Boxes in Glendale Heights and Naperville, Illinois), Att. P (default judgment and injunction in *National Ass’n for the Specialty Food Trade, Inc. v. Construct Data Verlag A.G.*, No. 04 Civ. 2983 (MBM) (S.D.N.Y. Oct. 18, 2005) against Construct Data Verlag AG under Lanham Act for same deceptive conduct at issue here).

<sup>5</sup> *Id.* ¶¶ 5, 6c, 12, 15c-e, 18m & Att. A, pp. 1-2 (corporate records), Att. G, p. 4 (Valvoda listed as registrant and contact person for domain fairguide.com as of Jan. 1, 2011), Att. K, p. 5 (Valvoda signed contract with Microdynamics as CEO), Att. L, pp. 17-23 (Microdynamics invoices addressed to Valvoda through May 2011), Att. M, p. 1 (email of Feb. 7, 2011 regarding Valvoda’s visit to Chicago and departure from Bratislava office), Att. O, p. 49 (Daily Mirror article about Valvoda dated Aug. 2, 2002).

currently the managing member and CEO of Construct Data. She oversees its operations, and has been in regular contact with Microdynamics.<sup>6</sup>

### **III. DEFENDANTS' DECEPTIVE BUSINESS PRACTICES**

Defendants have been targeting U.S. consumers with their scam since at least 2004. Following a pattern of deception and relentless intimidation, Defendants likely have bilked consumers out of millions of dollars for a worthless directory listing that they never intended to order. Just in 2011-12, U.S. consumers paid Defendants over \$1.2 million.<sup>7</sup>

#### **A. Defendants' Deceptive Mailings**

Defendants' scheme begins with an unsolicited mailing to an unsuspecting business or organization that has registered for or participated in a trade show or exhibition. Examples in the FTC's exhibits include a non-profit working in Sudan, a home-based arts and crafts business, and a developer of safety related software for pipelines. Defendants' mailing is designed to make consumers believe its contents pertain to a preexisting directory listing that is directly related to the trade show. In fact, Defendants have no prior relationship with the consumers, and no connection whatsoever to the trade show.<sup>8</sup>

---

<sup>6</sup> *Id.* ¶¶ 5, 6d, 12, 15d-f & Att. A, p. 2 (corporate records), Att. G p. 1, 3 (Anhorn listed as registrant and contact person for domain fairguide.com), Att. L, pp. 1-16 (Microdynamics invoices addressed to Anhorn), Att. M, p. 1 (email of Feb. 7, 2011 identifying Anhorn as partner and CEO), Att. N, pp. 1-2 (Anhorn's email of Jan. 8, 2013 regarding termination of contract by Microdynamics).

<sup>7</sup> This reflects only wire transfer records for 2011-12; Construct Data also accepts payment by credit card and personal check. *Id.* ¶¶ 17; PX 6, Sienkiewich Dec. ¶ 10 & Att. D , p. 2 (credit card payment form); PX 7, Twomey Dec. ¶ 8 (consumer paid with check). Construct Data has been targeting U.S. consumers for roughly a decade, and also targets consumers in numerous other countries. *See, e.g.*, PX 1, Menjivar Dec. ¶ 18g, 18l, 19 & Att. O, pp. 22, 43-44 (warnings by Australian officials and Canadian trade association), Att. P (U.S. trade association sued Construct Data in 2004).

<sup>8</sup> PX 3, Jones Dec. ¶¶ 4-6; PX 4, Ooyman Dec. ¶¶ 4-5; PX 5, Salanitro Dec. ¶¶ 3-4; PX 6, Sienkiewich Dec. ¶¶ 4-8; PX 7, Twomey Dec. ¶¶ 3-6.

The front of the envelope states: "Trade Show Documents included." The return address lists "Fair and Exhibitors Guide" at a P.O. Box in a Chicago suburb. The consumer's address is printed on the documents inside and is visible through a window in the envelope. Inside the envelope is a cover letter, a one-page form, and a business reply envelope.<sup>9</sup>

### **1. Defendants' Cover Letter**

Defendants' cover letter is a standard form letter, with certain specifics printed at the top that are tailored to the consumer recipient, including the consumer's name and address and an "expiry deadline." In addition, printed in the upper right, under the heading "Current entry," is the name of a trade show at which the consumer hosted or will host an exhibit. Under the name of the trade show is text stating that the consumer's "pre-registered company data is listed under the above event." The body of the letter opens with similar language, stating that the recipient's "pre-registered data in the exhibitors directory is available in the form enclosed." The letter goes on to state that it is necessary for the consumer to "update" the information contained "in the exhibitors directory" to ensure its accuracy and avoid problems.<sup>10</sup>

Defendants' letter plainly suggests that the consumer has a preexisting listing in a directory connected to the trade show, that the listing is shown on the enclosed form, and that the consumer must update the listing and verify its accuracy before the "the next data revision" or there could be negative consequences. This is precisely how it comes across to many consumers who review Defendants' letter, often while busy at work. Language Defendants have placed

---

<sup>9</sup> PX 1, Menjivar Dec. ¶¶ 15a-b, 16, 29 & Att. I-J (template envelopes), Att. Y, pp. 50-54, 61-63 (letters, forms and envelopes); see PX 3, Jones Dec. ¶ 4; PX 6, Sienkiewich Dec. ¶¶ 4-8 & Atts. A-B.

<sup>10</sup> PX 1, Menjivar Dec. ¶ 29 & Att. Y, pp. 9, 24, 62 (letters); PX 6, Sienkiewich Dec. ¶ 4 & Att. A (letter). Prior versions of letter are equally deceptive. See PX 1, Menjivar Dec. ¶ 29 & Att. Y, p. 51.

toward the end of the letter – that “Fair Guide is independent, objective and not affiliated to any organizer or marketing association” does not cure the deception. Many consumers do not notice or understand this language. It sounds like legalistic boilerplate, and its meaning is unclear. Based on the letter’s overall content, consumers still reasonably believe the letter is related to the trade show named in the letter.<sup>11</sup> Many consumers promptly return the form with no expectation of being charged thousands of dollars by a company they have never dealt with before.

## **2. Defendants’ Form**

The one-page form enclosed with the cover letter reinforces the deception. The form is designed to make consumers believe that by completing the form, they are simply updating information for an existing directory listing related to the consumer’s participation in the trade show. The form is not labeled as a contract or purchase order, and appears to be for the purpose of correcting a previously established listing relating to a specific trade show. The form is pre-populated with contact information for the consumer, and instructs the consumer to “confirm the accuracy” of this information by checking a series of boxes labeled “correct” or by making corrections “right away in the spaces below!” The form also states that the consumer’s listing “has been published to date for free under the following event,” under which it names the same trade show and organizer printed on the cover letter. A business reply envelope is enclosed, addressed to the mail drop in Illinois, making it simple and convenient to submit the completed

---

<sup>11</sup> See, e.g., PX 1, Menjivar Dec. ¶¶ 26-29 & Att. Y, pp. 1, 3, 8, 23, 27, 31, 33-44, 49-50, 56-57, 64-73, 77 (consumer complaints); PX 3, Jones Dec. ¶ 4 & Att. D, p. 2 (consumer thought Fair Guide was working with convention’s organizers); PX 4, Ooyman Dec. ¶ 5 (consumer thought mailing came from show’s organizer); PX 6, Sienkiewich Dec. ¶¶ 4-5 & Att. A (contents of letter led consumer to believe it related to trade show she attends annually).

form. Many consumers promptly do so.<sup>12</sup>

The success of Defendants' scam relies on consumers signing the form without reading (or understanding the import of) carefully buried fine print. This fine print, at the bottom of the form, well below the instructions to confirm or correct the listing, indicates that by signing and returning the form, the consumer is entering into a three-year advertising contract requiring an annual payment of \$1717, which automatically renews each year if a written cancellation is not received at least three months in advance.<sup>13</sup>

Of the hundreds of thousands of consumers who have likely received Defendants' forms throughout the United States, some consumers may well read the fine print, comprehend it, and decide not to return the form. Other consumers may read the fine print and sign anyway, all the while believing that they are renewing a listing connected to their participation in a trade show. Hundreds of consumers who have complained, however, state that they never even saw the fine print on the form.<sup>14</sup> Defendants clearly know from experience that many consumers will miss or misunderstand the fine print, and fall prey to their lucrative scheme.

## B. Defendants' Intimidating Collection Tactics

After tricking consumers into signing and returning their form, Defendants then bombard the consumers with invoices demanding payment of \$1717 for the first year of a purported three-

---

<sup>12</sup> PX 3, Jones Dec. ¶¶ 4-7 & Att. A, p. 3 (copy of form); PX 4, Ooyman Dec. ¶¶ 4-6 & Att. A, p. 3; PX 5, Salanitro Dec. ¶¶ 3-4 & Att. A, p. 2; PX6, Sienkiewich Dec. ¶¶ 68 & Att. B; PX 7, Twomey Dec. ¶¶ 4-6 & Att. A.; *see also* PX 1, Menjivar Dec. ¶¶ 26-29 & Att. Y, pp.3, 8, 22-23, 26-27, 31, 33, 35-38, 40-45, 49-50, 56-57, 64-78 (consumer complaints).

<sup>13</sup> PX 3, Jones Dec. ¶¶ 4-7 & Att. A, p. 3 (form).

<sup>14</sup> See, e.g., PX 1, Menjivar Dec. ¶¶ 26-29 & Att. Y, pp. 3, 33, 36, 39-40, 44, 57, 64, 68 (consumer complaints); PX 2, Mayer Dec. ¶ 10 & Att. E; PX 3, Jones Dec. ¶¶ 8-9; PX 4, Ooyman Dec. ¶¶ 5-6 & Att. A, p. 3; PX 5, Salanitro Dec. ¶ 5; PX 6, Sienkiewich Dec. ¶ 8 & Att. B; PX 7, Twomey Dec. ¶ 6 & Att. A.

year contract. Often, receipt of this invoice is a consumer's first indication that the form they signed was not merely to update an existing listing. Consumers are directed to wire their payment directly to Defendants' account at a Slovakian bank.<sup>15</sup>

Some consumers likely pay Defendants under the mistaken impression that they are paying someone with whom they have previously done business. Many consumers, however, recognize upon receiving the invoice that Defendants are unknown to them, and attempt to cancel the unwanted listing. Consumers often have difficulty reaching Defendants. If they get through, a representative invariably tells them the cancellation period has expired. Despite this, many consumers resist paying the invoice – often arguing that the person who signed the form was not authorized to purchase new advertising for the organization or that they thought completing the form was required for the trade show. Defendants threaten consumers who do not pay with additional fees, interest charges, and lawsuits.<sup>16</sup> These threats, though empty, are all too effective in convincing consumers to pay.<sup>17</sup>

Defendants have been undeterred by the throngs of complaints forwarded to them by the BBB and law enforcement agencies. In some instances, Defendants offer and agree to a reduced “settlement” rate from consumers. In general, however, they defend their practices by relying on

---

<sup>15</sup> PX 3, Jones Dec. ¶¶ 7-8 & Att. A, pp. 1-2; PX 4, Ooyman Dec. ¶ 6 & Att. A, pp. 1-2; PX 5, Salanitro Dec. ¶ 5; PX 6, PX 7, Twomey Dec. ¶ 7.

<sup>16</sup> PX 2, Mayer Dec. ¶¶ 4-5 & Atts. A-I; PX 3, Jones Dec. ¶¶ 7-18 & Atts. A-I; PX 4, Ooyman Dec. ¶¶ 6-10 & Atts. A-F; PX 5, Salanitro Dec. ¶¶ 5-13 & Atts. A-F; PX 6, Sienkiewich Dec. ¶¶ 10-12 & Atts. D-E; PX 7, Twomey Dec. ¶¶ 7-11 & Atts. B-D; *see also* PX 1, Menjivar Dec. ¶¶ 26-29 & Att. Y (consumer complaints).

<sup>17</sup> See, e.g., PX 7, Twomey Dec. ¶ 8 (“I decided to pay the first year fee as I did not have time to fight Construct Data or hire a lawyer, and I did not want to see [my company’s] credit rating suffer.”); PX 1, Menjivar Dec. ¶¶ 17-18, 26-29 & Att. O, p. 49 (Valvoda admits litigation threats are bogus), Att. Y, p. 5 (consumer paid in hopes of canceling).

the fine print at the bottom of the form.<sup>18</sup>

### C. Defendants' Worthless Internet Directory

As in previous directory scams, Defendants' listings are of no practical value to consumers as a form of advertising. Contrary to what consumers are led to believe, the directory has no connection to any trade show, exhibition or other event, so it has essentially no chance of drawing patrons to a trade show exhibit or its host business. Rather, the directory exists only on Construct Data's website, fairguide.com, one of several hundred million websites on the Internet. While this website has gained some notoriety over the years, particularly among victims of the scam and law enforcement, there is no evidence that a listing on the site provides any commercial benefit.<sup>19</sup>

Additionally, performing searches for exhibitors on fairguide.com quickly reveals major deficiencies. A search for "dentist" in the United States yields only five results; a search for "restaurant" in New York City yields three; and a search for "hotel" in Las Vegas yields two. A search for "food" in Chicago retrieves seven results; and a search for "boat" in Chicago retrieves just three, even though Chicago has an annual boat show with over 200 exhibitors. Running similar searches on Google, by contrast, yields hundreds or thousands of results.<sup>20</sup> Construct Data's directory thus seems to be the proverbial drop of water in the ocean, and useless for advertising. Absent deception, consumers would not agree to pay \$1717, or any amount, for

---

<sup>18</sup> PX 2, Mayer Dec. ¶¶ 8-9 & Att. D; PX 3, Jones Dec. ¶ 11 & Att. D; PX 4, Ooyman Dec. ¶ 9 & Att. E; PX 5, Salanitro Dec. ¶ 7 & Att. A, p. 1; PX 1, Menjivar Dec. ¶ 15f & Att. N, p. 1 (Anhorn email).

<sup>19</sup> Defendants are reviled in the industry they claim to serve. PX 1, Menjivar Dec. ¶¶ 18-19, 26-29 & Att. O & Att. Y, pp. 18, 48 (warnings issued by trade show organizers about Fair Guide scam).

<sup>20</sup> *Id.* ¶¶ 8-11 & Atts. C-F; See <http://www.chicagoboardshow.com> (listing exhibitors).

such a listing.<sup>21</sup>

#### **IV. ARGUMENT**

Defendants likely have tricked consumers out of millions of dollars with their deceptive business practices, which clearly violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). The Commission seeks an *ex parte* temporary restraining order and a preliminary injunction prohibiting Defendants' ongoing deceptive practices. The Commission also asks that the Court freeze assets, both corporate and personal, to preserve them for restitution to victims, and have the mail (containing the deceptive forms signed by consumers) redirected to the FTC.<sup>22</sup> The Court has full authority to enter the requested relief, which is strongly supported by the evidence.

##### **A. This Court has the Authority to Grant the Requested Relief.**

The FTC Act provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." 15 U.S.C. § 53(b). Once the Commission invokes the federal court's equitable powers, the full breadth of the court's authority is available, including the power to grant such ancillary final relief as rescission of contracts and restitution. *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989). The court may also enter a temporary restraining order, a preliminary injunction, and whatever additional preliminary relief is necessary to preserve the possibility of providing effective final relief. *World Travel*, 861 F.2d at 1026; *see also Amy Travel*, 875 F.2d at 571. Such ancillary relief may include an asset freeze to preserve assets for eventual restitution to victimized consumers. *World Travel*, 861 F.2d at 1031.

---

<sup>21</sup> PX 3, Jones Dec. ¶ 9; PX 4, Ooyman Dec. ¶ 11 & Att. G; PX 1, Menjivar Dec. ¶¶ 26-29 & Att. Y (consumer complaints).

<sup>22</sup> The FTC has submitted a Proposed Temporary Restraining Order with its papers.

**B. The Commission Meets the Applicable Legal Standard for Issuance of a Temporary Restraining Order and Preliminary Injunction.**

To grant preliminary injunctive relief in an FTC Act case, the district court must ““(1) determine the likelihood that the Commission will ultimately succeed on the merits and (2) balance the equities.”” *World Travel*, 861 F.2d at 1029 (quoting *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984)); *see also Datacom Mktg.*, 2006 WL 1472644, at \*3. Under this “public interest” test, “it is not necessary for the FTC to demonstrate irreparable injury.” *World Travel*, 861 F.2d at 1029. Unlike a private litigant, who generally must show a substantial likelihood of success on the merits, the Commission need only make the statutory showing of a likelihood of ultimate success. *Id.* And when the court balances the equities, the public interest “must receive far greater weight” than any private concerns. *Id.*

**1. Defendants Have Violated Section 5(a) of the FTC Act.**

There is no doubt that Defendants’ activities qualify as deceptive acts or practices under Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). An act or practice is deceptive if it involves a material misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances. *FTC v. Bay Area Bus. Council*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. World Media Brokers*, 415 F.3d 758, 763 (7th Cir. 2005); *World Travel*, 861 F.2d at 1029. A misrepresentation or omission is material if it involves information that is likely to affect a consumer’s choice of, or conduct regarding, a product or service. *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992); *Datacom Mktg.*, 2006 WL 1472644, at \*4.

Here, Defendants violate the FTC Act by making a series of deceptive claims that are designed to induce consumers to purchase unwanted directory listings. As described above, Defendants falsely represent that they have a preexisting relationship with consumers, and that

their solicitations are connected to specific trade shows. The Commission's sworn consumer declarations demonstrate that these misrepresentations often succeed in misleading consumers to purchase or pay for listings that they do not want or need. The misrepresentations are clearly material, in that they are likely to and do affect consumers' conduct. In similar circumstances, Chief Judge Holderman found that the defendants had violated the FTC Act by misleading consumers into erroneously believing that they had a previous business relationship with defendants, when none existed, and that consumers had agreed to buy defendants' directories, when they had not. *Datacom Mktg.*, 2006 WL 1472644, at \*4. As in *Datacom*, the Commission has shown a likelihood of success on its claim that defendants are violating the FTC Act.

## **2. The Equities Tip Decidedly in the Commission's Favor.**

Once the Commission has shown a likelihood of success on the merits, the Court must balance the equities, assigning greater weight to the public interest than to any of defendants' private concerns. *World Travel*, 861 F.2d at 1029. The public equities in this case are compelling, as the public has a strong interest in halting the deceptive scheme, and in preserving the assets necessary to provide effective final relief to victims. See *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1009 (N.D. Ill. 1998); *Datacom Mktg.*, 2006 WL 1472644, at \*5. Defendants, by contrast, have no legitimate interest in continuing to deceive consumers and persisting with conduct that violates federal law. See *Sabal*, 32 F. Supp. 2d at 1009; *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) (upholding district court finding of "no oppressive hardship to defendants in requiring them to comply with the FTC Act, refrain from fraudulent representation or preserve their assets from dissipation or concealment.""). An injunction is required to ensure that Defendants' scheme does not continue while the case is pending.

### **3. Valvoda and Anhorn are Individually Liable Under the FTC Act.**

Defendants Valvoda and Anhorn are responsible for the deceptive practices of Construct Data, and therefore should be subject to the temporary restraining order and an asset freeze. An individual defendant is subject to injunctive relief and liable for monetary restitution under the FTC Act when he (1) participated directly in, or had some control over, a corporation's deceptive practices, and (2) knew or should have known of the practices. *World Media Brokers*, 415 F.3d at 764; *Bay Area Bus. Council*, 423 F.3d at 636; *Amy Travel*, 875 F.2d at 573-74. The Commission does not need to show intent to defraud. *Amy Travel*, 875 F.2d at 573.

The Commission's evidence shows that Valvoda and Anhorn have actively participated in the acts and practices of Construct Data and had authority to control them. Both have been listed in the official corporate records as managing members, and have held themselves out as CEO. See, e.g., *World Media Brokers*, 415 F.3d at 764-65 (corporate officer "hard-pressed to establish that he lacked authority or control" over corporate entity). Valvoda and Anhorn also have directly participated in the deceptive acts and practices, including working closely with the contractor in Chicago that printed the deceptive mailings. Both are certainly aware of Construct Data's long history of deception, through hundreds or thousands of consumer complaints, and being banned from the European market.<sup>23</sup>

### **C. An Asset Freeze is Necessary and Appropriate.**

The relief sought by the Commission includes restitution for the victims of Defendants' fraud. To preserve the possibility of such relief, the Commission seeks a freeze of Defendants'

---

<sup>23</sup> PX 1, Menjivar Dec. ¶¶ 6, 15, 18m, 24, 26-29 & Att A (corporate records), Atts. K-N (Microdynamics records), Att. O, p. 49 (Daily Mirror article), Att. P (2005 default judgment), Atts. U-W (proceedings in Europe), Att. Y (consumer complaints).

assets and an immediate accounting to prevent concealment or dissipation of assets. An asset freeze is needed to prevent Defendants from moving their cash and other assets outside the U.S.

An asset freeze is appropriate once the Court determines that the Commission is likely to prevail on the merits and that restitution would be an appropriate final remedy. *See World Travel*, 861 F.2d at 1031 & n.9. In the words of the Seventh Circuit, the district court at that juncture has “a duty to ensure that the assets of the corporate defendants [are] available to make restitution to injured consumers.” *Id.* at 1031. In a case such as this, where the Commission is likely to succeed in showing that a corporate officer is individually liable for the payment of restitution, the freeze should extend to individual assets as well. *Id.* (affirming freeze on individual assets); *see also Datacom Mktg.*, 2006 WL 1472644, at \*5 (freezing assets of individual and corporate defendants).<sup>24</sup>

**D. The Temporary Restraining Order Should Be Issued *Ex Parte*.**

To prevent Defendants from dissipating or concealing their assets, the requested TRO should be issued *ex parte*. An *ex parte* TRO is warranted where the facts show that immediate and irreparable injury, loss, or damage will occur before the defendants can be heard in opposition. *See Fed. R. Civ. P. 65(b)*. The utterly fraudulent nature of Defendants’ scheme, coupled with their efforts to avoid law enforcement by moving to Slovakia, and their dishonest and abusive collection practices, indicates that Defendants likely would conceal or dissipate assets if notified of the Commission’s motion. Moreover, Defendants currently have assets here which they intend to move overseas, including forms returned by consumers that Defendants

---

<sup>24</sup> This Court’s jurisdiction over foreign assets not located within its jurisdiction is well established. Once the Court has jurisdiction over a party, the Court “has the authority to order it to ‘freeze’ property under its control, whether the property is within or without the United States.” *United States v. First Nat’l City Bank*, 379 U.S. 378, 384 (1965).

will use to harass those consumers for years to come.<sup>25</sup> In similar circumstances in past FTC cases, courts in this district have consistently granted restraining orders on an *ex parte* basis.<sup>26</sup>

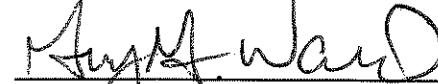
**V. CONCLUSION**

Defendants have caused and are likely to continue to cause substantial injury to consumers as a result of their violations of the FTC Act. The Commission therefore asks that the Court issue the requested injunctive relief to prevent ongoing harm and to help ensure the possibility of effective final relief, including monetary restitution.

Respectfully submitted,

DAVID SHONKA  
Acting General Counsel

DATED: March 14, 2013

  
\_\_\_\_\_  
GUY G. WARD  
55 West Monroe Street, Suite 1825  
Chicago, Illinois 60603  
(312) 960-5634 [telephone]  
(312) 960-5600 [facsimile]  
[gward@ftc.gov](mailto:gward@ftc.gov) [email]

Attorney for Plaintiff  
FEDERAL TRADE COMMISSION

---

<sup>25</sup> See Declaration in Support of *Ex Parte* Motion for Temporary Restraining Order and Application to File Papers Under Seal (describing need for *ex parte* relief here and citing cases in which defendants who learned of impending FTC action withdrew funds and destroyed vital documents); PX 1, Menjivar Dec. ¶ 16. Microdynamics has shipped recently received contents of the Naperville PO Box to the FTC as responsive to its Civil Investigative Demand, and is currently holding about \$100,000 pre-paid by Defendants for services that were canceled. Defendants, however, recently hired a Florida attorney who has contacted both Microdynamics and the FTC and is seeking return of those assets.

<sup>26</sup> See, e.g., *FTC v. Yellow Page Marketing B.V.*, No. 11 C 5035 (N.D. Ill. July 26, 2011) (Feinerman, J.); *FTC v. Nat'l Sales Group*, No. 11 C 1230 (N.D. Ill. Feb. 22, 2011) (Guzman, J.); *FTC v. Am. Tax Relief*, No. 10 C 6123 (N.D. Ill. Sept. 24, 2010); *FTC v. Central Coast Nutraceuticals, Inc.*, 10 C 4931 (N.D. Ill. Aug. 5, 2010) (Norgle, J.); *FTC v. Asia Pacific Telecom Inc.*, No. 10 C 3168 (N.D. Ill. May 25, 2010) (Hart, J.); *FTC v. API Trade, LLC*, No. 10 C 1543 (N.D. Ill. Mar. 10, 2010) (Guzman, J.); *FTC v. 2145183 Ontario Inc.*, No. 09 C 7423 (N.D. Ill. Nov. 30, 2009) (Grady, J.).