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I. INTRODUCTION

We ask that the Court bring an immediate end to a Canadian telemarketing scam that has defrauded U.S. businesses and charitable organizations (“consumers”) out of tens of millions of dollars – and may be taking in as much as a million dollars a month. Like other operators of business directory scams,¹ defendants trick consumers into paying for unordered and worthless directories that the consumers never agreed to purchase. Defendants have operated this scheme since at least 2000.²

Canada’s Competition Bureau, an agency similar to the FTC, began a criminal investigation into the practices alleged in the FTC’s complaint and executed criminal search warrants on defendants’ business premises on May 4, 2004. In response, defendants briefly halted but soon resumed their deceptive practices in Canada. Despite the execution of the search warrants, defendants have continued to make the same deceptive claims to United States victims without interruption.

Defendants telephone from Toronto implying that they have an existing relationship with consumers and are calling to verify name, address, and other contact information for an established directory listing or to renew a previous listing. Many of those who answer believe that they are dealing with the *Yellow Pages*. The consumers then receive a business directory, followed by an invoice that usually requests payment of \$399. The invoices typically list the person who answered the original telephone call as ‘authorizing’ the order. Many consumers pay the invoices unaware that they never agreed to purchase anything. Others pay to resolve billing disputes and others are pursued by debt collectors.

Defendants’ own documents demonstrate that their scheme is carefully constructed to con victims into paying for something that they did not order, do not want, and cannot use. Defendants exploit uncertainty created by their telephone calls to make it appear that businesses have agreed to receive and pay for unordered business directories that, in the words of

¹ A Federal Trade Commission (“FTC”) *Business Alert* against business directory scams may be found at: <http://www.ftc.gov/bcp/online/pubs/alerts/directoryalrt.htm>.

² Defendants may have been operating since as early as 1994 through predecessor corporations. Defendants engage in the same practices in Canada.

defendants' own sales training materials, "[n]obody **needs . . . , wants, knows, or has.**" (*emphasis in original*).³

Needless to say, defendants' practices violate the Federal Trade Commission Act's ("FTC Act") prohibition of unfair or deceptive acts or practices, 15 U.S.C. § 45(a). Defendants have cost individual United States businesses and organizations hundreds of dollars each and collectively tens of millions of dollars for unordered directories.

We therefore ask that the Court enter a temporary restraining order ("TRO") to put an immediate end to defendants' practices and preserve funds for eventual return to victims. Our request is supported by declarations from a variety of businesses and organizations such as a small shoe store, a battered women's shelter, and a medical clinic on an Indian reservation. Courts in this district have consistently issued TROs against other Canadians who have violated the FTC Act.⁴ The requested relief is similar to that which has been granted in other fraudulent business directory cases.⁵

³ Plaintiff's Exhibit ("PX"), PX 19, p. 30.

⁴ See *FTC v. Centurion Financial Benefits LLC*, 05 C 5542 (N.D. Ill. 2005) (Nordberg, J.); *FTC v. Oleg Oks*, 05 C 5389 (N.D. Ill. 2005) (Guzman, J.); *FTC v. 120194 Canada, Ltd.*, 04 C 7204 (N.D. Ill. 2004) (Gottschall, J.); *FTC v. 9094-5114 Quebec Inc.*, 03 C 7486 (N.D. Ill. 2003) (Leinenweber, J.); *FTC v. Pacific First Benefit LLC*, 02 C 8678 (N.D. Ill. 2002) (Norgle, J.); *FTC v. 1492828 Ontario Inc. d/b/a First Capital Consumers Group*, 02 C 7456 (N.D. Ill. 2002) (Guzman, J.); *BABC*, 02 C 5762 (N.D. Ill. 2002) (Darrah, J.) (TRO appointing receiver); *FTC v. Xtel Marketing*, 04 C 7238 (N.D. Ill. 2004) (Zagel, J.) (defendants claimed to be with Social Security Administration and debited bank accounts for drug discount cards).

⁵ See *FTC v. 4049705 Canada Inc.*, 04 C 4694 (N.D. Ill. 2004) (Kennelly, J.) (final judgment for approximately \$2.9 million); *FTC v. Datatech Communications, Inc.*, 03 C 6249 (N.D. Ill. 2003) (Lefkow, J.) (default judgment for approximately \$9 million against one individual defendant; stipulated permanent injunction with remaining defendants); *FTC v. Ambus Registry, Inc.*, CV 03-1294 (W.D. Wash. 2003) (final judgment entered May 11, 2004, banning defendants from further telemarketing of business directory listings, available at www.ftc.gov/opa/2004/05/ambus.htm); *FTC v. Hanson Publications, Inc.*, 1:02 CV 2205 (N.D. Ohio 2002) (final judgments with similar bans entered January 7, 2004 and May 24, 2004, available at www.ftc.gov/opa/2004/01/hansonpubs.htm and www.ftc.gov/opa/2004/05/hanson.htm).

II. PARTIES

A. Federal Trade Commission

The FTC is an independent agency created by the FTC Act, 15 U.S.C. §§ 41-58. The FTC is charged with, *inter alia*, enforcing Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC is authorized to bring suit in U.S. District Court to enjoin violations of the FTC Act to secure such equitable relief as may be appropriate in each case, including consumer redress and disgorgement of ill-gotten gains. 15 U.S.C. §§ 53(b) and 57b.

B. Defendants

Defendants are two Canadian corporations and their five controlling individual officers, directors, and shareholders. All but two of the individual defendants are members of the same family.

1. Corporate Defendants

Defendants have operated their business directory scheme in its current corporate form since August 1, 2000, when Datacom Marketing Inc. (“Datacom Marketing”), Ontario Corporation No. 1431798,⁶ an Ontario Corporation, was formed.⁷ Datacom Marketing also

⁶ An Ontario corporation is assigned a number when incorporated and, by default, is typically referred to by that number followed by “Ontario Inc.” (*e.g.*, 1431798 Ontario Inc.). A corporation may also designate a name to which it is referred. When appropriate, this memorandum refers to numbered Ontario corporations with the designation, “OCN” (Ontario Corporation Number), followed by the assigned number, *e.g.*, OCN 1431798.

⁷ Datacom Marketing Inc., was formed from the amalgamation of several corporations: OCN 1260665 (d.b.a. Datacom Marketing), OCN 1345387 (d.b.a. Direct Data), OCN 1396750 (d.b.a. Publication Distribution Centre), and OCN 1396753 (d.b.a. Telecom Marketing). For a time, these same corporation names and numerical designations were used along with the name “Datacom Marketing Inc.” and its numerical designation. PX 19, p. 1; PX 20, pp. 1-2, 40-41, 47-56.

Canadian corporations may be formed under the laws of a province or under Canadian federal law. The corporations that merged to form Datacom Marketing were incorporated originally under federal law as Canada corporations. The first of these corporations was formed in 1994 followed by a number of others during the next several years. The jurisdiction of incorporation of these various corporations was eventually transferred from Canada to the province of Ontario. These Ontario corporations merged to form Datacom Marketing, an Ontario corporation, in August 2000. PX 19, p.1; PX 20, pp. 1-2, 40-41, 47-56.

operates under several registered business names: Direct Data, Ontario Business I.D. No. 101109023; Publication Distribution Centre, Ontario Business I.D. No. 101109031; Telecom Marketing, Ontario Business I.D. No. 101109049; Thesrus Publishing, Ontario Business I.D. No. 101109056.⁸

The other corporate defendant, Datacom Direct Inc. (“Datacom Direct”), OCN 1417524, is also an Ontario corporation.⁹

The corporate defendants are separately incorporated but operate as a common enterprise out of the same principal address, 1835 Yonge Street, Suite 500, Toronto, Ontario M4S 1X8, Canada, sharing officers, directors, and other personnel, and transferring funds between the two corporate defendants.¹⁰

2. Individual Defendants

The individual defendants are current or former officers or directors and owners of the corporate defendants. All have participated in shareholder meetings and/or directors meetings.¹¹

Bernard Fromstein founded the defendants’ business directory enterprise.¹² Fromstein was the sole director, officer, and president of Datacom Marketing when that corporation was created in August 2000 and the president of all four corporations that combined to form Datacom Marketing.¹³ Fromstein was also the sole director, officer, and president of Datacom Direct from its incorporation date, January 1996, until February 2002.¹⁴

⁸ These registered business names were previously used by the corporations that merged to form Datacom Marketing Inc. PX 19, p. 1; PX 20, pp. 1-2, 25, 40-41, 47-56.

⁹ PX 20, p. 59.

¹⁰ Common address (PX 20, pp. 6, 67); sharing officers, directors, and other personnel (PX 20, pp. 3-10, 59-66); transferring funds (PX 19, pp. 5-7).

¹¹ PX 19, pp. 8-22.

¹² PX 19, p. 53.

¹³ PX 20, pp. 1-4, 40-56.

¹⁴ PX 20, pp. 59, 63-65, 87-108.

Judy Provencher resides at the same address as Bernard Fromstein. Provencher has been a director of the corporate defendants since at least February 2002.¹⁵

Paul Barnard is or was an officer or director of the corporate defendants. He has been variously the president, vice president, an officer, and a director of the corporate defendants. From at least February 2002 to July 2004, Barnard was an officer, president, and a director of the corporate defendants.¹⁶

Judy Neinstein is Bernard Fromstein's sister. Neinstein has been an officer or director of the corporate defendants since at least February 2002.¹⁷

Stanley Fromstein is Bernard Fromstein and Judy Neinstein's brother. Stanley Fromstein has been an officer or director the corporate defendants since at least February 2002.¹⁸

3. Defendants Transact Business Throughout the United States

The defendants transact business throughout the United States and in the Northern District of Illinois.¹⁹ Defendants ship directories by United Parcel Service or U.S. mail from a Nashua, New Hampshire, mail drop that also receives returns and payments from defendants' victims.²⁰ Defendants identify the mail drop as their "U.S. Mailing Address."²¹ The volume of directories shipped from that address suggests sales of as much as one million dollars a month.²²

¹⁵ PX 20, pp. 10, 22, 63, 82.

¹⁶ PX 20, pp. 8, 16, 60-61, 76-77.

¹⁷ PX 20, pp. 9-10, 21-22, 62, 81.

¹⁸ PX 20, pp. 9, 21, 69, 80.

¹⁹ PX 1-18, 22.

²⁰ PX 21, ¶¶ 8, 9, 14.

²¹ *E.g.*, PX 3, ¶ 9, Att. B.

²² PX 21, ¶ 11. The operator of the mail drop told a United States Postal Inspector that "2000 to 3000 books were shipped per month . . . [returns] ran about 300 on a shipment of 2000, which he [the operator] noted was not bad, noting that it was about 15%." *Id.* If 85% of the unreturned shipments result in successful billings, defendants' sales volume would be as much as about \$1,020,000 per month (*i.e.*, 85% X 3000 directories/month X \$400/directory, or approximately \$12,240,000 per year).

III. DEFENDANTS' DECEPTIVE BUSINESS PRACTICES

Declarations from defendants' victims as well as defendants' own internal training materials demonstrate that defendants create the false appearance of an agreement to receive and pay for unordered business directories that the businesses do not want and cannot use. Below is an overview of defendants' scheme after which each complaint count is addressed in turn.

A. Overview of the Scheme

Defendants cold call United States businesses and organizations and ask the recipient of the telephone call to verify information such as the business's name, address, and telephone number for a business directory listing.²³ Typically, defendants do not identify Datacom by name but instead claim to be calling from one of defendants' various directories, such as the *Southeast Business Directory*.²⁴ The telemarketers often simply ask to verify information for a listing.²⁵ The telemarketers suggest that the business is already listed in the directory,²⁶ that the business has received the directory in the past,²⁷ or that someone else has already agreed to a listing in the directory.²⁸ The telemarketers often do not mention price.²⁹ Defendants' tactics lead some

²³ PX 2, ¶ 5; PX 5, ¶ 5; PX 8, ¶ 5; PX 10, ¶ 5; PX 11, ¶ 5; PX 16, ¶ 6; PX 17, ¶ 9; PX 22, ¶ 5.

²⁴ Although the list is not exhaustive, defendants' various directory titles include: *Southeast Business Directory* (PX 7, ¶ 6); *New York Business Directory* (PX 2, ¶ 5); *Western Business Directory* (PX 19, pp. 32-33), *Arizona, Colorado, New Mexico Business Directory* (PX 13, ¶ 5), *N Carolina/S Carolina/Virginia Directory* (PX 3, ¶ 9), and *Pacific Business Directory* (PX 18, ¶ 11). The directories identify the publisher as Thesrus Publishing, one of Datacom Marketing's registered business names (PX 20, p. 25).

²⁵ PX 2, ¶ 5. The pitch is varied, of course, with telemarketers, for example, sometimes asking whether the business would like to be listed in the directory (PX 10, ¶ 5) or describing the directory (PX 7, ¶ 6).

²⁶ PX 8, ¶ 5.

²⁷ PX 5, ¶ 5.

²⁸ PX 7, ¶ 7 (the telemarketer "told me that he had spoken to someone else about the book").

²⁹ PX 2, ¶ 5; PX 5, ¶ 5; PX 7, ¶ 7; PX 10, ¶ 5; PX 16, ¶ 6; PX 17, ¶¶ 8 -10 (the representative "did not ask me to order them [directories], nor did she quote any prices * * * led me to believe that the only purpose of the call was to verify information * * * If I had been presented with an

(continued...)

consumers to conclude that defendants are their local telephone carriers or are calling to ensure a correct listing in the *Yellow Pages*.³⁰ Not surprisingly, recipients of the telemarketing calls often confirm the information believing that they are verifying information to update or to confirm a listing.³¹

Later that same day or the next, a different telemarketer again telephones the business ostensibly to verify the contact information for shipping purposes.³² This telephone call is recorded.³³ The telemarketer claims to be with the shipping department and quickly asks a series of leading closed-end “yes” or “no” questions about the consumer’s shipping information: name, address, city, state, zip code, etc.³⁴ Defendants’ sales scripts indicate that the telemarketers are instructed to end the verification call by stating that the directory will be delivered within four to six weeks and that an invoice, usually for \$399, will follow shortly, a week later.³⁵ In practice, the cost is often not mentioned, or is revealed only if the consumer pushes for the information.³⁶

Several weeks after the recorded verification call, defendants ship a directory, and sometimes a CD Rom, to their victims³⁷ by United Parcel Service³⁸ or U.S. mail³⁹ from the New

²⁹ (...continued)

offer, it was my practice to always contact World Savings Bank headquarters to gain approval”); PX 22, ¶ 5.

³⁰ PX 2, ¶ 5; PX 11, ¶ 5.

³¹ PX 2, ¶ 5; PX 5, ¶ 5; PX 7, ¶ 7; PX 17, ¶¶ 7, 8, 9.

³² *E.g.* PX 1, ¶ 12, Att. F, p. 2; PX 2, ¶ 10, Att. B, p. 2; PX 7, ¶¶ 7, 8.

³³ PX 19, p. 31.

³⁴ PX 7, ¶ 8.

³⁵ PX 19, p. 31

³⁶ Price not mentioned: PX 5, ¶ 6; PX 2, ¶ 5; PX 7, ¶¶ 7, 8; PX 10, ¶ 5; PX 16, ¶ 6; PX 17 ¶ 8; PX 22, ¶ 5. Price only mentioned after consumer insisted on information: PX 8, ¶ 6.

³⁷ PX 1, ¶ 5 (directory, cd-rom); PX 5, ¶ 7, Att. A, p. 2 (cd-rom); PX 11, ¶ 4; PX 22, ¶ 6.

³⁸ PX 1, ¶ 5; PX 3, ¶ 8; PX 7, ¶ 9, Att. A.

³⁹ PX 2, ¶ 6; PX 3, ¶ 8 (directory); PX 5, ¶ 7(cd-rom); PX 7, ¶ 9, Att. A (directory); PX 11, (continued...)

Hampshire mail drop.⁴⁰ The directories are two to three inches thick and contain the names, addresses, and telephone numbers of businesses listed alphabetically in various categories.⁴¹ Recipients of the directories have found the directories to be useless and also reported that listings were missing, incomplete, or inaccurate.⁴²

About a week after shipping a directory, defendants send an invoice, typically for \$399 (US) (\$379 plus \$20 shipping and handling).⁴³ The invoice lists the name of someone in the organization or business as the person who authorized the invoice for the directory, typically the person who answered the original telephone call.⁴⁴ The invoice instructs the recipient to return “YOUR PAYMENT TO U.S. MAILING ADDRESS,”⁴⁵ the New Hampshire mail drop.⁴⁶

Defendants successfully collect payments using the invoices because of confusion created by the telephone calls about what, if anything, was ordered and by whom. The person who answers the first telephone call, and whose name is listed on the invoice as providing

³⁹ (...continued)
¶ 4 (directory); PX 16, ¶ 7 (directory); PX 17, ¶¶ 11 (ten business directories).

⁴⁰ PX 21, ¶ 13 (New Hampshire mail drop operator told Postal Inspector that “most [directories] are shipped by UPS, although some go by mail, and the returns come back by various means, including the mail”); PX 7, ¶ 9, Att. A (UPS label from mail drop address).

⁴¹ PX 1, ¶ 5. The FTC did not include a directory with this filing because the directories are several inches thick, but can provide one to the Court.

⁴² PX 1, ¶ 7; PX 2, ¶ 6 (“contact information was incorrect, misspelled and partially missing . . . directory was useless and . . . would create more harm for our business because of our incorrect listing”); PX 7, ¶¶ 10, 12; PX 13, ¶ 9 (a second unordered directory “did not even list our company and was completely useless to my business”); PX 17, ¶ 16; PX 22, ¶ 6.

⁴³ PX 1, ¶ 6, Att. B; PX 2, ¶ 7, Att. A; PX 3, ¶ 9, Att. B; PX 5, ¶ 7; PX 6, ¶ 5; PX 7, ¶ 11, Att. B; PX 9, ¶¶ 5, 10, Att. A, Att. B; PX 10, ¶¶ 6, 8, Att. A, Att. B; PX 11, ¶ 4; PX 12, ¶ 5; PX 13, ¶¶ 5, 8, Att. A, Att. B; PX 14, ¶ 5, Att. A; PX 16, ¶ 7, Att. A; PX 17, ¶ 12; PX 18, ¶ 11, Att. B; PX 22, ¶ 7, Att. B.

⁴⁴ PX 1, ¶ 6, Att. B; PX 2, ¶ 7, Att. A; PX 3, ¶ 9, Att. B; PX 5, ¶ 7; PX 6, ¶ 5; PX 7, ¶ 11, Att. B; PX 9, ¶¶ 5, 10, Att. A, Att. B; PX 10, ¶¶ 6, 8, Att. A, Att. B; PX 11, ¶ 4; PX 14, ¶ 5, Att. A; PX 16, ¶ 7, Att. A; PX 18, ¶ 11, Att. B; PX 22, ¶ 7, Att. B.

⁴⁵ PX 1, ¶ 6, Att. B; PX 2, ¶ 7, Att. A; PX 3, ¶ 9, Att. B; PX 9, ¶ 10, Att. B; PX 10, ¶ 8, Att. B; PX 14, ¶ 5, Att. A; PX 16, ¶ 7, Att. A; PX 18, ¶ 11, Att. B; PX 22 ¶ 7, Att. B.

⁴⁶ PX 3, ¶ 9, Att. B; PX 21 ¶¶ 14, 17.

authorization, may be distracted by other tasks or may not ordinarily answer such calls.⁴⁷ That person may lack the authority to approve purchases⁴⁸ and typically is not asked to provide authorization in any event.⁴⁹ When defendants' scheme is most successful, consumers pay the invoices unaware that they have been billed for something that they never intended to purchase.⁵⁰ Other times, consumers realize that they have been scammed when they receive the invoices.⁵¹ Other consumers pay simply to resolve disputes about whether a purchase is valid⁵² and others are pursued by collection agencies.⁵³

B. Complaint Count I: False Claims of a Preexisting Business Relationship

1. The Sales Pitch

The telemarketers make the person who answers the telephone believe that defendants have a preexisting relationship with the business or organization.⁵⁴ Defendants train their telemarketers to “get the right person on the line as easily as possible without any questions from

⁴⁷ PX 7, ¶ 7. Since defendants hope to catch the victim off guard, they instruct their telemarketers to “sound professional . . . [t]he person answering the telephone will devote only 80% of their attention to you; and the remaining 20% will be focused on the activity they were involved with prior to taking your call.” PX 19, pp. 25-26.

⁴⁸ PX 5, ¶¶ 5-11.

⁴⁹ PX 16, ¶ 5.

⁵⁰ Large businesses, in particular, may find it difficult to police against unordered merchandise scams like defendants. Stein Mart, for example, with over 260 stores and 12,000 to 18,000 employees, PX 15, ¶ 3, first became aware of defendants when one of its stores alerted the corporate office with a note stating, “Joe, I think this is a scam. You may want to alert other stores.” PX 15, ¶ 5. Stein Mart notes that, because of its size, “our stores are often the victims of scams and we often receive invoices for products and services that we never ordered. As a result, it is impossible for me [vice president of security] to handle each of these matters personally.” PX 15, ¶ 7.

⁵¹ PX 2, ¶ 8 (“I started to realize that this was a scam because we received an outrageously priced directory that we never ordered and then we were subsequently billed for it.”); PX 13, ¶ 6 (“I felt very disappointed that I had ‘fallen’ for their sales technique and made the purchase”).

⁵² PX 6, ¶ 5; PX 9, ¶ 8.

⁵³ PX 3, ¶¶ 14, 15, Att. E, Att. F; PX 9, ¶¶ 11, 14, Att. C, Att. E.

⁵⁴ PX 5, ¶ 5; PX 7, ¶ 7; PX 8, ¶ 6; PX 17, ¶ 8.

the receptionist” and “to come across as having a past relationship with” the business or organization.⁵⁵ Defendants have told businesses that confirmation of contact information is necessary to renew a listing⁵⁶ or is part of a longstanding order.⁵⁷ Defendants’ telemarketers have even insisted that supposed deliveries of directories to the prior owner of a business created a justification to ship and bill for unwanted business directories.⁵⁸ Indeed, defendants operate similarly to other business directory scams in which, according to a United States Postal Inspector, the “aim is to fool the prospective victim into thinking that the solicitor is someone with whom the victim has a prior relationship.”⁵⁹

2. The “Assumptive Sales Approach”

Defendants’ internal training documents refer to their sales technique as the “assumptive sales approach” because the sales pitch assumes a preexisting relationship or a prior agreement to purchase listings or directories.⁶⁰ These same documents demonstrate that the whole purpose of the sales pitch is to trick consumers into believing that they have already agreed to purchase. The assumptive sale, in defendants’ own words, is:

NOT like selling shoes, insurance, chocolate bars etc.

We are not selling the book.

Nobody **needs** this book, **wants**, **knows** or **has** this book.

You can’t sell these books based on its [*sic*] merits.

BUT they DO buy these books!!

⁵⁵ PX 7, ¶ 7; PX 19, pp. 24-27.

⁵⁶ PX 5, ¶ 5 (“Although I had never heard that we had a directory listing with Datacom, I figured that since the Datacom representative said the word ‘renew’ that we must have had a prior listing with them”).

⁵⁷ PX 17, ¶ 8 (telemarketer “indicated that these business directories were sent to us every year”).

⁵⁸ PX 4, ¶¶ 7, 11 (Jeanne Testerman, of Foot Solutions, a small shoe store, told defendants’ telemarketer that Foot Solutions was not interested in a directory, telemarketer persisted, “saying that the directory was sent to Mr. Emmanuel [the previous owner] every year.” Defendants sent Foot Solutions a directory addressed to the previous owner. The subsequent invoice listed Ms. Testerman as the person who had authorized the order).

⁵⁹ PX 21, ¶ 5.

⁶⁰ PX 19, pp. 24-29.

The call is approached as they do need it. They do want it, know it and have it. You are a CSR [customer service representative]!! Not a salesperson.

* * *

TWO WORLDS:

REAL WORLD: THEY HAVE NOT PAID

PHONE WORLD: EVERYONE HAS BOUGHT BEFORE

You can't say they have done this before, or paid for this before. That is a lie

You are leading them to believe that they have paid/done this before.

It is not your fault if they think they have done this before.

RENEW means they have paid. You cannot say this word!!⁶¹

Defendants continue this ruse in instructing their telemarketers how to respond to questions:

Q: Was I listed previously? (Have I done this before)

A: I assume that you did since I've been given your listing to update for the new edition (but I can't be sure.)

(*emphasis in original*).⁶² When pressed for proof that a customer previously purchased a directory or a listing, telemarketers are instructed to play dumb or put off the questions with rebuttals such as: “[u]nfortunately, I don’t have access to your financial records since we are only the publisher’s agents.”⁶³ Using the “assumptive sales approach,” defendants are able to trick consumers into believing that they have already purchased a directory or a listing.

3. Repetitive Billing: “Established Accounts”

Defendants refer to businesses and organizations that make the mistake of paying defendants’ invoices as “established accounts” and employ a calculated strategy to bilk these victims repeatedly. Defendants use a special group of sales personnel to contact these victims

⁶¹ PX 19, pp. 28-29. Despite this directive, defendants’ telemarketers do, in fact, tell consumers who have never previously paid defendants that the contact information is needed to “renew” a listing. PX 5, ¶ 5.

⁶² PX 19, p. 30.

⁶³ PX 19, p. 30.

again two or three weeks after the initial invoice is paid, *i.e.*, three to six months after the initial sales call, repeating the sales call, verification, and invoice process all over again.⁶⁴ Defendants even pay an additional commission to their telemarketers for a successful resale.⁶⁵ Several declarants apparently were treated by defendants as established accounts.⁶⁶

C. Complaint Count II: False Claims of an Agreement to Purchase

When consumers resist paying for these worthless directories, defendants falsely claim that the consumers agreed to make the purchase. For example, defendants claim that a preexisting business relationship establishes an agreement to purchase. Defendants contacted a battered women's shelter "trying to use the basis that because we had supposedly ordered and paid for Datacom's products in the past that it could just mail us unsolicited products, then bill us for the goods and that we would continue to pay its invoices."⁶⁷ More directly, the telemarketers suggest that someone else in a business or organization has already authorized the purchase.⁶⁸ Finally, defendants' invoices, containing statements such as "Invoice payable net 15 days," convey the false impression of an agreement because they list someone within the business or

⁶⁴ PX 19, pp. 34-39.

⁶⁵ PX 19, pp. 34-39.

⁶⁶ PX 1, ¶ 8 ("representative was trying to use the basis that because we had supposedly ordered and paid for Datacom's products in the past that it could just mail us unsolicited products, then bill us for the goods and that we would continue to pay its invoices."); PX 4, ¶¶ 6-11 (billed for a directory despite refusing a directory because defendants claimed that a directory was sent to the previous owner every year); PX 6, ¶¶ 7-8 (contacted about second cd-rom of four cd-rom set); PX 8, ¶¶ 6-7 ("strongly implied that we had purchased a directory two years ago"); PX 9, ¶¶ 8, 10 ("decided to pay the [first] invoice simply because I wanted the matter resolved" and received invoice for second directory); PX 13, ¶¶ 7-9 (received invoice for second directory after paying the first invoice).

⁶⁷ PX 1, ¶ 8. The shelter has no record of previously paying defendants. *id.* The shelter advertises its services through an Internet Web site, newsletters, and advertisements and had no use for the books. PX 1, ¶¶ 3, 8.

⁶⁸ PX 7, ¶ 7 ("He told me that he had spoken to someone else about the book").

organization as authorizing a purchase and because they look like ordinary bills that would be sent in the normal course of business pursuant to an agreement.⁶⁹

In addition, defendants use the recorded verifications to create the false appearance of an agreement to purchase a directory or a listing in a directory, a common practice in directory schemes.⁷⁰ Tellingly, the verification caller's statement concerning shipping and the invoice is not a question and does not call for a response.⁷¹ The verification pitch happens so quickly that consumers believe that they are only confirming additional information rather than indicating consent for the delivery of the directory.⁷² Defendants treat affirmative statements or even silence in response to the rapid fire closed-end verification questions that are recorded on the verification tapes as proof that a business agreed to purchase.

Defendants also confront businesses with the recordings to 'prove' that the businesses agreed to purchase. Sometimes defendants play back the recordings and other times defendants simply claim to possess the recordings as proof of an agreement to pay.⁷³ If consumers were clearly told the cost of the directory or that a sales transaction was contemplated by defendants' telephone calls, they would have expressed their lack of consent.⁷⁴

⁶⁹ E.g. PX 9, ¶ 10, Att. A.

⁷⁰ PX 21, ¶ 5 ("Since whatever false representations were made were in the first call, which was not taped, such 'verification tapes' bolster the defense that there was a valid order.")

⁷¹ PX 19, p. 31.

⁷² PX 5, ¶ 6; PX 7, ¶ 14 ("person was speaking very fast and I did not hear anything about [a] \$399 invoice when I had that conversation."); PX 16, ¶ 8 ("recording of me stating Winters' address and my name, then at the end of the recording, a representative came on the tape and talking very quickly mentioned the cost of the directory. Although the cost of the directory is mentioned on the recording, I do not remember this portion of the phone call ever taking place"). PX 22, ¶ 10.

⁷³ PX 7, ¶ 14 ("At the end [of] the recording, the shipping person says that an invoice for \$399 will follow. The person was speaking very fast, and I did not hear anything about \$399 invoice when I had that conversation."); PX 9, ¶ 7 ("representative did not play the recording for me."); PX 16, ¶ 8; PX 22 ¶¶ 9-10.

⁷⁴ PX 1, ¶ 7; PX 2, ¶ 10; PX 5, ¶¶ 5, 6; PX 7, ¶ 12; PX 10, ¶ 5; PX 14, ¶ 8; PX 16, ¶ 8 ("If I was told the cost of the directory, I would have canceled the order immediately."); PX 17, ¶ 10 ("If I had been presented with an offer, it was my practice to always contact World Savings Bank headquarters to
(continued...)

D. Complaint Count III: Defendants Falsely Claim that Consumers Owe Money - Defendants' Collection Practices

In attempting to collect unpaid invoices, defendants falsely represent that consumers owe money for something that they never agreed to purchase in the first place. Defendants first try collecting by sending facsimiles and making telephone calls requesting information about the payment status of the unpaid invoices.⁷⁵ When that fails, defendants turn over the accounts to a third party collection agency, Debtguard Corporation (“Debtguard”). Debtguard sends collection letters by facsimile that instruct consumers to “PROTECT YOUR CREDIT RATING, PAY TODAY!”⁷⁶ The letters describe accounts as “delinquent” and threaten that failure to pay immediately will leave Debtguard with “no alternative but to take appropriate action to enforce payment.”⁷⁷ If still unsuccessful, Debtguard sends additional letters that threaten legal action stating, “I will have no alternative but to turn your account over to our legal department with my recommendation that we proceed without delay.”⁷⁸ Both defendants’ internal collection activities and its use of a third party debt collector perpetuate the myth created by defendants that consumers owe money for directories that they never intended to purchase in the first place.

E. Defendants Have Caused Tens of Millions of Dollars in Harm

Defendants have been enormously successful and have caused substantial harm. At a minimum, businesses and organizations waste valuable time and money to avoid losing money to defendants.⁷⁹ More significantly, defendants generated over twenty million dollars (CDN) in

⁷⁴ (...continued)
gain approval of such an order”).

⁷⁵ PX 1, ¶ 9, Att. C.

⁷⁶ PX 3, ¶ 13, Att. D; PX 9, ¶ 11, Att. C.

⁷⁷ PX 3, ¶ 13, Att. D; PX 9, ¶ 11, Att. C (“no alternative but to proceed with further action to enforce payment”).

⁷⁸ PX 9, ¶ 11, Att. E.

⁷⁹ PX 1, ¶ 15; PX 2, ¶ 12; PX 6, ¶ 11; PX 11, ¶ 12; PX 17, ¶ 17; PX 18, ¶ 15.

revenue in a single year.⁸⁰ Finally, the volume of directories shipped from New Hampshire suggests that defendants are defrauding consumers out of much as one million dollars a month.⁸¹

We ask that the Court use its equitable powers to bring this substantial harm to an end.

IV. ARGUMENT

The Court has the full authority to issue the requested injunctive relief and ancillary asset freeze to prevent defendants from violating the law pending final resolution and to preserve the possibility of an effective final remedy. The facts strongly support issuing such relief.

A. This Court Has Jurisdiction and Venue is Proper

This Court has subject matter jurisdiction, 28 U.S.C. §§ 1331, 1337(a), and 1345, and personal jurisdiction over defendants because the FTC Act provides for nationwide service of process. *See* FTC Act, 15 U.S.C. § 53(b). When a federal statute provides for nationwide service of process, personal jurisdiction may be obtained over any defendant having minimum contacts with the United States as a whole. *United States v. De Ortiz*, 910 F.2d 376, 382 (7th Cir. 1990); *see also United Rope Distributors, Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 534 (7th Cir. 1991). The Canadian defendants have the necessary minimum contacts because, among other things, they market and sell throughout the United States. Venue is proper because “[a]n alien may be sued in any district.” 28 U.S.C. § 1391(d). *See also* 15 U.S.C. § 53(b) (suit may be brought where person, partnership, or corporation resides or transacts business, or wherever venue is proper under 28 U.S.C. § 1391).

B. This Court Has the Authority to Grant the Requested Relief

A district court may issue injunctions to enjoin violations of the FTC Act. *See* 15 U.S.C. 53(b); *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir. 1988). The Court’s authority to grant injunctions includes the power to grant “any ancillary equitable relief necessary to effectuate the exercise of the granted powers.” *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir.

⁸⁰ PX 19, pp. 40-47 (Quebec provincial return for fiscal year ending July 31, 2002).

⁸¹ The New Hampshire shipper stated that he ships two thousand to three thousand directories per month, with a 15% return rate. PX 21, ¶ 11. If 85% of the unreturned shipments result in successful billings, defendants’ United States sales volume would be as much as about \$1,020,000 per month (*i.e.*, 85% X 3000 directories/month X \$400/directory, or approximately \$12,240,000 per year).

1989). Such ancillary relief includes, *inter alia*, rescission of contracts, restitution, disgorgement, and freezing of assets. *See, e.g., Febre*, 128 F.3d at 534 (redress as restitution or rescission); *World Travel*, 861 F.2d at 1026, 1031 (freeze of corporate and individual defendants' assets); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102-03 (9th Cir. 1994) (restitution and disgorgement). Courts appropriately invoke Section 13(b) remedies in fraud cases.⁸² *World Travel*, 861 F.2d at 1024-28; *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982).

C. **The FTC Meets the Applicable Standard for Issuance of a Temporary Restraining Order and Preliminary Injunction**

Section 13(b) authorizes a temporary restraining order and a preliminary injunction “[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest.” 15 U.S.C. § 53(b). Unlike litigation between private parties, the traditional four pronged injunctive relief test is inapplicable to Section 13(b). *See World Travel*, 861 F.2d at 1028-29. Instead, irreparable injury is presumed in a statutory enforcement action, *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 903 (7th Cir. 1989), and the Court need only “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. Under this two pronged test, once the FTC establishes the likelihood of ultimate success, *i.e.*, a “‘better than negligible’ chance of succeeding on the merits,” *see FTC v. Windermere Big Win Int’l*, 98 C 8066, 1999 U.S. Dist. LEXIS 12259, at *17 (N.D. Ill. 1999), issuing an injunction is appropriate if the balance of equities favors the requested relief. The public interest is given greater weight in balancing public and private interests. *World Travel*, 861 F.2d at 1029.

⁸² Courts in this district regularly enter TROs in FTC fraud cases. *See, e.g., FTC v. 120194 Canada, Ltd.*, 04 C 7204 (N.D. Ill. Nov. 8, 2004); *FTC v. 9094-5114 Quebec Inc.*, 03 C 7486 (N.D. Ill. Oct. 23, 2003); *FTC v. QT Inc.*, 03 C 3578 (N.D. Ill. May 29, 2003); *FTC v. STF Group, Inc.*, 03 C 0977 (N.D. Ill. Feb. 12, 2003); *FTC v. CSCT, Inc.*, 03 C 880 (N.D. Ill. Feb. 11, 2003); *FTC v. 1492828 Ontario Inc.*, 02 C 7456 (N.D. Ill. Oct. 17, 2002); *FTC v. Bay Area Bus. Council, Inc.*, 02 C 5762 (N.D. Ill. Aug. 15, 2002); *FTC v. Stuffingforcash.com, Inc.*, 02 C 5022 (N.D. Ill. July 16, 2002); *FTC v. TLD Network Ltd.*, 02 C 1475 (N.D. Ill. Feb. 28, 2002); *FTC v. 1st Financial Solutions, Inc.*, 01 C 8790 (N.D. Ill. Nov. 19, 2001); *FTC v. Growth Plus Int’l Mktg., Inc.*, 00 C 7886, 2001 WL 128139 (N.D. Ill. Jan. 9, 2001).

The public interest in protecting consumers from defendants' deceptive practices outweighs defendants' interest in continuing to operate a business permeated by fraud. Both the likelihood of success and a balancing of the equities favor granting preliminary injunctive relief.

D. The Evidence Demonstrates an Overwhelming Likelihood that the FTC Will Prevail on the Merits

1. Defendants' Business Directory Scheme Violates Section 5 of the FTC Act

Section 5 of the FTC Act declares unlawful "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). Acts or practices are deceptive if the representations, omissions, or practices are likely to mislead consumers, acting reasonably, to their detriment. *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992); *World Travel*, 861 F.2d at 1029. "Misrepresentations of material facts made for the purpose of inducing customers to purchase goods or services constitute unfair or deceptive acts or practices forbidden by Section 5(a)." *World Travel*, 861 F.2d at 1029 (citation omitted). A representation, omission, or practice is material if it is likely to affect a consumer's decision to buy a product or service. *FTC v. Sabal*, 32 F. Supp. 2d 1004, (N.D. Ill. 1998). To be actionable, the "misrepresentations or practices need not be made with an intent to deceive." *World Travel*, 861 F.2d at 1029.

The declarations of consumers who were duped into accepting shipment of and paying hundreds of dollars for unordered business directories by defendants' false claims and defendants' own documents amply demonstrate that defendants have violated Section 5. Defendants have falsely claimed to have a preexisting relationship with their victims and used that phony relationship to create the appearance of an agreement to purchase defendants' directories or listings in those directories.

2. Defendants are Liable as a Common Enterprise

Defendants operate as a common enterprise. "Where one or more corporate entities operate in common enterprise, each may be held liable for the deceptive acts and practices of the others." *FTC v. Think Achievement Corp.*, 144 F. Supp.2d 993, 1011 (N.D. Ind. 2000), *aff'd*, 312 F.3d 259 (7th Cir. 2002) (citing *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973); *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746-7 (2nd Cir. 1964)); *See also CFTC v. Wall Street Underground, Inc.*, No. 03-2193-CM, 2003 U.S. Dist. LEXIS 15865, at *23 (D. Kan.

July 18, 2003). “Factors considered in determining common enterprise include: (1) common control, (2) shared office space and offices, (3) transaction of business through a ‘maze of interrelated companies,’ and (4) commingling of funds.” *Think Achievement*, 144 F. Supp.2d at 1011 (citations omitted).

Defendants’ scheme has all the factors of a common enterprise. The individual defendants are or were officers, directors, and shareholders of the two corporate defendants.⁸³ The corporate defendants have the same address and transact business jointly.⁸⁴ Finally, defendants’ internal documents show transfers of funds between the two corporate defendants.⁸⁵

3. The Individual Defendants are Jointly and Severally Liable

The individual defendants are liable for the deceptive practices that they have inflicted upon U.S. consumers. Individuals may be held liable for corporate violations of the FTC Act if the individuals “either participated directly in the deceptive acts or practices or had authority to control them. *Amy Travel*, 875 F.2d at 573; *see also* [FTC v.] *Freecom Communications*, 401 F.3d [1192] at 1204; *FTC v. Publ’g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997).” *FTC v. World Media Brokers*, 415 F.3d 758, 764 (7th Cir. 2005). The FTC must also prove that the individuals either knew or should have known about the deceptive practices, but it is not required to prove subjective intent to defraud. *World Media*, 415 F.3d at 764 (*citing Amy Travel*, 875 F.2d at 573-74). Instead, the knowledge requirement may be fulfilled by showing that the individuals had “‘actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.’” *World Media*, 415 F.3d at 764 (*quoting Amy Travel*, 875 F.2d at 574).

The individual defendants’ roles as corporate principals and their participation in the affairs of the corporate defendants demonstrate that the individual defendants possess the requisite control and knowledge to be held individually liable. Authority to control “may be

⁸³ PX 20, pp. 3-10, 59-66.

⁸⁴ PX 19, pp. 2-4, 7; PX 20, pp. 6, 67.

⁸⁵ PX 19, pp. 5-7.

demonstrated by the active participation in the corporate affairs, including assuming duties as a corporate officer.” *World Media*, 415 F.3d at 764 (citing *Amy Travel*, 875 F.2d at 573). “The extent of an individual’s involvement in a fraudulent scheme alone is sufficient to establish the requisite knowledge for personal restitutionary liability. See *FTC v. Sharp*, 782 F.Supp. 1445, 1450 (D. Nev. 1991); *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 574 (7th Cir. 1989) (‘Also, the degree of participation in business affairs is probative of knowledge.’)” *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1235 (9th Cir. 1999). See *Amy Travel*, 875 F.2d at 574; *Standard Educators, Inc. v. FTC*, 475 F.2d 401, 403 (D.C. Cir. 1973) (“A heavy burden of exculpation rests on the chief executive and primary shareholder of a closely held corporation whose stock in trade is overreaching and deception.”)

The individual defendants should be held individually liable, jointly and severally, because they have authority to control the corporations and knowledge of their practices. Each is or has been a director, officer, and shareholder and has participated in corporate meetings.⁸⁶ Indeed, during at least one meeting in 2004 attended by defendants Neinstein, Barnard, and Stanley Fromstein, defendants’ legal exposure for directory sales was discussed, and, yet, defendants continued their deceptive directory business.⁸⁷ Even the execution of a Canadian search warrant on defendants’ businesses failed to deter defendants from continuing their deceptive practices. The individual defendants should be held liable individually, jointly and severally, because of their authority to control the corporate defendants and clear knowledge of deceptive practices.

E. Balance of the Equities Favors the Requested Relief

In balancing the equities, the Court must assign greater weight to the public interest than to any of defendants’ private concerns. *World Travel*, 861 F.2d at 1029. The public has a strong interest in preventing defendants from collecting millions of dollars from businesses and organizations for unordered and unwanted business directories and in preserving assets necessary for effective final relief. In contrast, defendants have no legitimate interest in foisting unwanted

⁸⁶ PX 19, pp. 8-22; PX 20, pp. 3-10, 59-66.

⁸⁷ PX 20, pp. 19-22.

directories on unsuspecting businesses. *See FTC v. Sabal*, 32 F. Supp.2d 1004, at 1009 (N.D. Ill. 1998) (“no legitimate interest in continuing to make false and misleading claims”). The FTC’s strong likelihood of success on the merits tips the balance of equities even more decidedly in favor of the FTC. *See id.* (citing *Elder’s Grain*, 868 F.2d at 903).

F. An Asset Freeze is Necessary to Preserve Assets for Consumer Redress

The FTC seeks an immediate freeze of defendants’ assets to preserve them for restitution to defendants’ victims. This Court has authority to order a party to “freeze” property under its control whether the property is within or outside the United States. *U.S. v. First Nat’l City Bank*, 379 U.S. 378, 384 (1965). Indeed, once the court determines that the FTC is likely to prevail on the merits and that restitution is an appropriate final remedy, the court has “a duty to ensure that the assets of the corporate defendants [are] available to make restitution to injured consumers.” *See World Travel*, 861 F.2d at 1031 & n.9. When the FTC is likely to succeed in showing that a corporate officer is individually liable for restitution, the freeze should extend to individual assets. *Id.* (affirming freeze on individual assets); *see also FTC v. Austin Galleries of Illinois, Inc.*, 1988-2 Trade Cas. (CCH) ¶ 68,341, at 59,923 (N.D. Ill. Oct. 31, 1988) (asset freeze against corporate officer centrally involved in fraudulent business). The asset freeze should include the individual defendants’ assets because the FTC is likely to succeed in showing that they are liable for restitution.

G. The Requested Temporary Restraining Order Should Be Issued Ex Parte

The TRO should be issued *ex parte* to prevent defendants from dissipating or concealing assets necessary for full and effective final relief.⁸⁸ Issuing an *ex parte* order is appropriate when the evidence demonstrates a likelihood that providing notice to defendants would render issuing the order fruitless. *American Can Co. v. Mansukhani*, 742 F.2d 314, 323 (7th Cir. 1984). The fraudulent nature of defendants’ scheme and the likelihood that defendants would conceal or

⁸⁸ *See* Declaration in Support of *Ex Parte* Motion for Temporary Restraining Order and Application to File Papers Under Seal (citing cases in which defendants who learned of impending FTC action withdrew bank funds, destroyed vital documents, and fled the jurisdiction).

dissipate assets absent *ex parte* relief justify dispensing with notice. Courts in this district have routinely issued *ex parte* relief under similar circumstances in other FTC cases.⁸⁹

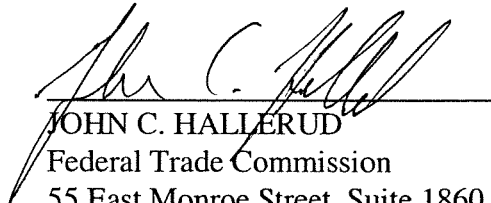
V. **CONCLUSION**

For the foregoing reasons, Plaintiff Federal Trade Commission requests that this Court enter the proposed Temporary Restraining Order *Ex Parte* and issue an Order to Show Cause Why a Preliminary Injunction Should Not Issue.

Respectfully submitted,

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Dated: May 9, 2006



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⁸⁹ See, e.g., *FTC v. 120194 Canada, Ltd.*, 04 C 7204 (N.D. Ill. Nov. 8, 2004) (Gottschall, J.); *FTC v. AVS Marketing, Inc.*, 04 C 6915 (N.D. Ill. October 28, 2004) (Moran, J.); *FTC v. 9094-5114 Quebec Inc.*, 03 C 7486 (N.D. Ill. Oct. 23, 2003) (Leinenweber, J.); *FTC v. Datatech Communications, Inc.*, 03 C 6249 (Lefkow, J.) (*ex parte* TRO entered by St. Eve, J., sitting as emergency judge, on September 8, 2003) (N.D. Ill. 2003); *FTC v. QT Inc.*, 03 C 3578 (N.D. Ill. May 29, 2003) (St. Eve, J.); *FTC v. STF Group, Inc.*, 03 C 977 (N.D. Ill. Feb. 12, 2003) (Zagel, J.); *FTC v. CSCT, Inc.*, 03 C 880 (N.D. Ill. Feb. 11, 2003) (Coar, J.); *FTC v. 1492828 Ontario Inc.*, 02 C 7456 (N.D. Ill. Oct. 17, 2002) (Guzman, J.); *FTC v. Bay Area Bus. Council, Inc.*, 02 C 5762 (N.D. Ill. Aug. 15, 2002) (Darrah, J.); *FTC v. Stuffingforcash.com, Inc.*, 02 C 5022 (N.D. Ill. July 16, 2002) (Norgle, J.); *FTC v. TLD Network Ltd.*, 02 C 1475 (N.D. Ill. Feb. 28, 2002) (Holderman, J.); *FTC v. 1st Financial Solutions, Inc.*, 01 C 8790 (N.D. Ill. Nov. 19, 2001) (Kocoras, J.); *FTC v. Growth Plus Int'l Marketing, Inc.*, 2001 WL 128139 (N.D. Ill. Jan. 9, 2001) (Aspen, J.).