UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FEDERAL TRADE COMMISSION, Plaintiff, v. **HOLIDAY VACATIONS MARKETING CORP.*, et al.***, Defendants.	Case No.

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

I. INTRODUCTION

Defendants lured consumers into their scheme with Spanish-language ads offering vacation prizes. Everyone who responded to the ads "won"; however, to obtain their prize consumers had to pay $200 to $400 in purported taxes and fees. After collecting the money, Defendants never delivered the promised vacations. Worse yet, Defendants then used the financial information provided by consumers to charge them a second time without any authorization. Compounding the injury, if consumers contested these unauthorized charges, Defendants sent additional information via certified mail. They then presented consumers' signatures on the mail receipts to their credit card processors as proof that

consumers had accepted the unauthorized charges, effectively thwarting consumers' attempts to protect themselves.

Defendants' conduct is deceptive and unfair in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a). To prevent the Defendants from resuming their deceptive advertising and continuing their unfair unauthorized billing practices, and to remedy the substantial injuries these unfair and deceptive practices have caused, the Federal Trade Commission ("FTC" or "Commission") seeks preliminary and permanent injunctive relief, as well as other equitable remedies, including restitution and disgorgement, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). Accordingly, the Commission asks this Court to issue a Temporary Restraining Order ("TRO") enjoining the Defendants from engaging in their deceptive marketing and unfair billing practices; requiring them to preserve and disclose business and financial records; and freezing their assets.[1]

II. FACTS

A. The Parties

1. The Federal Trade Commission

The FTC is an independent agency of the United States government created by statute. 15 U.S.C. § 41 et seq. The FTC enforces 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 initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act, and to secure such equitable relief as may be appropriate in each case, including rescission or reformation of contracts,

[1] *See* "FTC's [Proposed] Temporary Restraining Order and Order to Show Cause," filed concurrently with this motion

restitution, the refund of monies paid, and the disgorgement of ill-gotten gains. 15 U.S.C. §§ 53(b) and 56(a)(2)(A); *see, e.g., FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997) (Section 13(b) authorizes full range of equitable remedies); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996) (same); *FTC v. Ameridebt, Inc.*, 373 F. Supp. 2d 558, 562 (D. Md. 2005) (same).

2. The Defendants

a. Individual Defendants

Defendants Dario A. Jimenez Lopez, also known as Diego Jimenez or Diego Lopez, and Victor M. Ramirez of Miami, Florida (collectively, "Individual Defendants") directed Defendants' scam. Jimenez and Ramirez are not new to vacation prize promotion schemes. Both worked for All Star Vacation Marketing Corp. in 2008, while All Star was conducting a similar vacation "prize" scheme. (PX17; PX 15 at 2.)[2] Puerto Rico's Departamento de Asuntos del Consumidor ("DACO") issued cease-and-desist orders against All Star and a related company, Next Level Tours, in 2008. (PX15 at 1; PX 16 at 1.) DACO ordered the companies to stop running advertisements that were almost identical to the ads used in Defendants' scheme. (PX15 at 5; PX 16 at 1.) All Star and Next Level dissolved shortly thereafter (PX 13; PX 14), and Jimenez and Ramirez began running their own scam through the three Corporate Defendants named below.

---

[2]In this memorandum, Plaintiff uses the following format for evidentiary citations: "PX15 at 2" refers to page 2 of Exhibit 1; "PX12 at ¶¶4-5"refers to Paragraphs 4 through 5 of Exhibit 12; "PX29, Att. G" refers to Attachment G to Exhibit 29.

Exhibits containing sensitive personally identifiable information have been redacted, pursuant to the District of Maryland's Civil Procedures Manual Section IV.A and Federal Trade Commission policy. Additionally, individuals' financial account statements attached to PX24-PX35 have been redacted to show only the relevant transactions, and PX17 (wage information for employees of All Star Vacation Marketing Corp.) has been redacted to show wage information only for the two Individual Defendants.

b. Corporate Defendants

Jimenez and Ramirez are the sole officers of Defendants Holiday Vacations Marketing Corp. ("Holiday Vacations"), Happy Life Carribbean [sic] Corp. ("Happy Life Carribbean"), and Happy Life Corporation of America, Inc. ("Happy Life Corporation")[3] (collectively, "Corporate Defendants"). (PX1; PX2; PX3.) These companies formed in 2008, 2009, and 2008, respectively. *Id.* Corporate filings list the same address for all three Corporate Defendants: 3900 NW 79th Ave., Doral, FL 33166.[4] *Id.* While the Corporate Defendants continued to send and receive mail using Suites 330 and 661 at that address through the fall of 2010, an investigator at the Florida Department of Agriculture and Consumer Services determined in August of 2010 that Suite 330 was vacant and there was no Suite 661. (PX29, Att. G; PX32, Att. J; PX12 at ¶¶4-5.)

Jimenez and Ramirez operate the Corporate Defendants as a web of interlocked entities. The Corporate Defendants all share Jimenez and Ramirez as their sole officers. (PX1; PX2; PX3.) They are all registered to the same address, which they all use in correspondence with consumers. *Id.* Promotional materials use the names "Holiday Vacations," "Happy Life," and "Happy Life Carribbean" interchangeably, often using two or more of those names within the same document. (PX 24, Att. C; PX26, Att. C; PX 33, Att. C.) Consumers report seeing the same toll-free numbers on paperwork from

[3]The state of Florida administratively dissolved Happy Life Corp. in September 2010 for its failure to file an annual report (PX3); however, Florida law permits the commencement of a proceeding against a dissolved corporation in its corporate name. Fla. Stat. § 607.1405(2)(e) (2010); *see also* Fla. Stat. § 607.1407(3) (permitting the filing of suit within four years of dissolution even if the corporation files or publishes notice of dissolution).

[4]Holiday Vacations and Happy Life Carribbean both list Suite 661 as their address; Happy Life Corporation lists Suite 330. (PX1; PX2; PX3.)

each of the Corporate Defendants: 1-866-400-0139 and 1-877-487-3014. (PX24, Att. B and C; PX25, Att. C; PX26, Att. C and D; PX27, Att. C and D; PX28, Att. E and F.) The 866 number is registered to "Holiday Vacation" and was previously registered to "Happy Life Corp. of America;" the 877 number is registered to "JR Reservations;" and Jimenez and Ramirez are both listed as current contacts on each account. (PX6; PX7.)

c. Defendants' Business Activities in Maryland

Jimenez, Ramirez, and their web of companies are based in Florida but transacted business in Maryland and nationwide. They advertised on Maryland television and radio stations, including on WILC Radio Viva 900 in Laurel, Prince George's County. (PX4, Att. A; PX5, Att. A.) Defendants sold their bogus vacation packages to consumers throughout Maryland, including in the Southern Division, and later billed some of those Maryland consumers again without authorization. (PX24 at ¶1; PX 30 at ¶1; PX34 at ¶1; PX35 at ¶1; PX19 at ¶5(c).)[5]

B. Defendants' Deceptive and Unfair Business Practices

1. Sale of Vacation "Prize" Packages

From at least April 2009 until at least June 2010, Defendants advertised vacation giveaways on local Spanish-language radio and television stations, and on national television networks. (PX4, Att. A; PX5, Att. A.) The ads promised free Disney vacations to the first fifteen or sixteen callers who answered a simple question. (PX4; PX5.) The ads asked, for example, "¿Qué animal pone huevos pero no es ave?" ("What animal lays eggs but is not a bird?"). *Id.* The ads further stated that the first five

[5]PX19 summarizes voluminous records pursuant to Federal Rule of Evidence 1006. The original records are available for examination or copying.

callers to answer correctly would win a second vacation to a destination of their choice, including vacation spots such as Cancun, Puerto Rico, Las Vegas, and Punta Cana. *Id.* The ads provided a toll-free phone number, *id.*, which was registered to Happy Life Corporation from June 2008 to March 2010 and to Holiday Vacations after March 2010. (PX6; PX7.)

When consumers called the number, Defendants' Spanish-speaking telemarketers asked for an answer to the trivia question and then congratulated consumers for winning the prize. (PX24 at ¶3; PX2 at ¶2; PX27 at ¶3; PX28 at ¶5; PX30 at ¶¶4-5; PX32 at ¶3; PX33 at ¶3; PX34 at ¶2.) In fact, there was no "prize." Defendants offered the package to any consumer who would pay, whether the consumer correctly answered a question or not.[6] Defendants' telemarketers then contended the packages were worth thousands of dollars, but told consumers they had to pay between $200 and $400 in fees and taxes to claim the "prize."[7] (PX34 at ¶4.) The telemarketers told consumers the packages included lodging for two to four nights at each destination, multiple tickets to Disney parks, and in some cases food and

[6]After consumer Paola Flores "won" the prize, Defendants' telemarketer asked if any of her family members would also be interested; Flores referred Defendants to her cousin, who subsequently paid for a package without entering or winning any contest. (PX26 at ¶¶5-6.) Consumer Jessica Escobar's father-in-law "won" the prize but did not claim it; instead, Jessica Escobar called Holiday Vacations later and purchased a package of vacations. (PX35 at ¶¶2-3.)

[7]Defendants' television ad offered "more than four thousand dollars in prizes, to use whenever you want." (PX4.) Telemarketers reinforced this message by intimating, and sometimes stating outright, that the packages were very valuable. Telemarketers told Alcira Llanos and Mariajose Viteri they were getting a good deal and a wonderful opportunity. (PX30 at ¶7; PX34 at ¶¶4-5.) Telemarketers especially emphasized the packages' value when speaking with reluctant consumers, for example by offering Egle Espinosa an extra vacation when she hesitated to pay. (PX25 at ¶4.) These tactics created the impression that the packages were worth more than Defendants charged for them; for instance, Blanca Arias decided to pay for the package because she believed the three vacations she expected to receive were worth more than the $300 fee. (PX24 at ¶5.)

drinks at "all-inclusive" resorts. (PX24 at ¶4; PX25 at ¶3; PX26 at ¶4; PX28 at ¶5; PX30 at ¶5; PX31 at ¶4; PX32 at ¶4; PX34 at ¶3; PX35 at ¶3.) When consumers accepted, Defendants' telemarketers took consumers' credit or debit card information over the phone. (PX24 at ¶5; PX25 at ¶5; PX26 at ¶6; PX27 at ¶3; PX28 at ¶5; PX30 at ¶7; PX32 at ¶5; PX33 at ¶4; PX34 at ¶6; PX35 at ¶4.)

Defendants then charged consumers' accounts and mailed them a payment invoice, a brochure showing photographs of vacation destinations, and instructions to call 30 days or more before their desired vacation date to make reservations. (PX24 at ¶6, Att. A-C; PX25 at ¶¶6-7, Att. A; PX26 at ¶¶7-8, Att. A-C; PX27 at ¶4, Att. A; PX28 at ¶¶6-7, Att. A-C; PX30 at ¶¶8-9, Att. A-C; PX32 at ¶¶6-7, Att. A-C; PX33 at ¶¶5, 8-9, Att. A-B; PX34 at ¶¶7-8, Att. A-B; PX35 at ¶¶5-6, Att. A-C.) Defendants sometimes mailed a page of "terms and conditions" with the brochure and invoice, which stated that consumers must make reservations within 18 months of purchase, pay for their own airline tickets and taxes, present two forms of ID at the hotel, and be 21 or older. (PX26, Att. D; PX33, Att. C; PX34, Att. C; PX35, Att. D.) The mailings did not disclose any income or marital-status restrictions or state that consumers must attend timeshare presentations to receive hotel stays.

In numerous instances, consumers could not schedule vacations. (PX19 at ¶5(d); PX26 at ¶9; PX34 at ¶14; PX35 at ¶7.) These consumers repeatedly called all of the telephone numbers provided, but the telephones rang with no answer or were disconnected. (PX19 at ¶¶5(d), 5(f); PX26 at ¶9; PX34 at ¶14; PX35 at ¶7.) If consumers reached a live operator, Defendants' telemarketers often told them to call back later. (PX19 at ¶5(f); PX27 at ¶11; PX34 at ¶11.)

Some consumers managed to make reservations but could not reserve as many nights, or did not

receive as many services, as they were promised.[8] (PX19 at ¶5(e); PX32 at ¶9.) Those few consumers who received lodging learned, sometimes after arriving at their destinations, that they had to attend timeshare presentations and meet age, income, and marital-status requirements to receive free hotel stays.[9] (PX19 at ¶5(g); PX27 at ¶6; PX32 at ¶11) At least one such consumer, after traveling from Texas to Florida, was charged for her hotel because she could not attend a timeshare presentation scheduled for the day after her departure. (PX27 at ¶6.) Consumers who complained to the Defendants or demanded refunds had difficulty reaching anyone by phone.[10] (PX24 at ¶9; PX25 at ¶15; PX29 at ¶10; PX31 at ¶10; PX33 at ¶10.) Defendants promised some persistent consumers a refund but never provided it. (PX19 at ¶5(i); PX33 at ¶¶7-8, 10-11, 15; PX34 at ¶¶9-12.)

Defendants appear to have stopped advertising in the summer of 2010, but only after Florida's Department of Agriculture and Consumer Services ("DACS") began investigating them. DACS had received a number of complaints about Happy Life Carribbean and Holiday Vacations. (PX12 at ¶2.) These complaints described Happy Life Carribbean's sales of packages that consumers expected to

---

[8]Consumer Ruth Melendez learned upon booking that Defendants had cut her three-night Daytona vacation down to two nights. (PX32 at ¶9.) While Defendants offered her an extra, free vacation to make up for her trouble, this promise proved illusory. Defendants instead made a new charge to her account without authorization and then ceased operations, preventing Melendez from scheduling the rest of her promised vacation time. (PX32 at ¶10, 18.)

[9]Consumer Ruth Melendez learned for the first time after booking her vacation that she had to attend a sales presentation. (PX32 at ¶11.) Consumer Juanita Garcia did not learn of this requirement until arriving in Florida, where she also discovered that a member of her party had to be 25 (not 21, as Defendants previously stated) and married to receive the hotel package. (PX27 at ¶6.)

[10]Consumer Epifania Santiago attempted to reach a particular manager many times and was told, variously, that he was: out of the office; no longer working for the company; or on the other line, ready to approve her refund. (PX33 at ¶10.)

redeem later for travel. (*See* PX19 at ¶ ¶5(d), 5(f), 5(g), 5(j).) The state of Florida defines such a practice as the sale of "certificate travel." Fla. Stat. § 559.927(13). Sellers of certificate travel must post at least a $50,000 bond, but Happy Life Carribbean had posted only a $10,000 bond[11]. The volume of complaints rose in 2010, and that summer, DACS began reaching out to the company. (PX19 at ¶5(a); PX12 at ¶2.) Happy Life Carribbean then canceled its bond. (PX11.) When DACS could not reach Happy Life Carribbean by phone or e-mail, a state investigator visited the business' listed address in late August 2010. (PX12 at ¶¶2-3.) Upon arrival, however, he learned that Suite 330 was vacant and Suite 661 did not exist. (PX12 at ¶¶4-5.)

When Defendants shut down their public operations, they left consumers holding packages of two, three, or four unused vacations with no way to schedule them. Some consumers purchased packages of multiple vacations as late as May and June of 2010, only to find within a few months that Defendants had disconnected their phones. (PX26 at ¶¶7, 9; PX34 at ¶¶2, 14; PX35 at ¶¶5, 7). Once the phones were disconnected, all the unused "vacation packages" Defendants had sold immediately became worthless because consumers had no way to make reservations.

2. Unauthorized Billing

Although Defendants appear to have stopped advertising in the summer of 2010, they did not stop ripping off consumers. They simply devised a new means to do so. Starting in July 2010 or earlier, Defendants began charging the bank and credit card accounts of former customers without the

[11] Sellers of vacation certificates must post a bond of $50,000 to $300,000, depending on the business' other characteristics. Fla. Stat. § 559.929(1). In its application for a seller-of-travel license, Happy Life Carribbean responded "No" to Item 6, "Vacation certificate seller." (PX11.) Happy Life Carribbean then posted only a $10,000 bond to obtain its license. *Id.*

customers' authorization. (PX19 at ¶5(h); PX24 at ¶8; PX25 at ¶¶9, 13; PX27 at ¶10; PX28 at ¶9; PX30 at ¶¶12-13; PX32 at ¶18.)

The initial charge and the unauthorized charge sometimes appeared in the names of different Corporate Defendants, and the second charge often occurred months after the first. (PX25 at ¶¶6, 9, 11; PX27 at ¶¶4, 10; PX28 at ¶¶6, 9; PX30 at ¶¶8, 12.) Therefore, some consumers did not recognize the name that appeared with the unauthorized charge or did not connect it to their earlier purchase. (PX25 at ¶9; PX32 at ¶18.) Many consumers reported these new charges to their banks or credit card companies as fraudulent. (PX20 at ¶¶9-10; PX24 at ¶9; PX25 at ¶11; PX27 at ¶12; PX29 at ¶8; PX31 at ¶11; PX32 at ¶18.)[12]

Defendants, however, had a scheme to thwart chargebacks. Once the banks or credit card companies notified Defendants of the dispute, Defendants sent the complaining consumers an envelope via certified mail. (PX25 at ¶12; PX27 at ¶13; PX29 at ¶9; PX31 at ¶12; PX32 at ¶19.) The consumer or someone at the consumer's residence signed the return receipt, often without recognizing the sender's information. *Id.* The envelopes contained a brochure and invoice identical to those sent earlier, except for the date and (in some cases) the company name on the letterhead. (PX25 at ¶12, Att. C-D; PX27 at ¶13, Att. C-D; PX29 at ¶9, Att. E-F; PX31 at ¶12, Att. E-F; PX32 at ¶19, Att. H-I.)

After consumers signed for the certified envelope, Defendants sent the credit card company or bank a copy of the certified mail receipt and false invoice, claiming that consumers' signatures on the certified mail receipt demonstrated knowledge and authorization of the charge. (PX20 at ¶10, Att. A;

[12]PX20 summarizes voluminous records pursuant to Federal Rule of Evidence 1006. The original records are available for examination or copying.

PX29 at ¶¶11-12, Att. G; PX32 at ¶20, Att. J; PX24 at ¶10, Att. D.) In addition, Defendants often sent a page of "terms and conditions" along with their documentation listing a requirement that consumers send back the invoice within 30 days to receive a refund.[13] (PX20 at ¶10, Att. A; PX24 at ¶10, Att. D; PX29 at ¶11, Att. G.) This supposed "return policy" was never disclosed to consumers, and even if consumers attempted to "return" a package, Defendants had already vacated their business premises and disconnected their phones. Based on the Defendants' responses, some banks and credit card companies initially refused to process chargebacks. (PX24 at ¶10, Att. D; PX25 at ¶16; PX29 at ¶11, Att. G; PX32 at ¶20, Att. J.) When the banks and credit card companies eventually granted chargebacks, they did so only after consumers spent months navigating the dispute process. (PX24 at ¶12, Att. F; PX25 at ¶16.)

The resulting chargeback rates for the Defendants' merchant accounts demonstrate how deeply fraud permeated their businesses. Discover Financial Services charged back 48% of Happy Life Carribbean's transactions – an astonishing rate, as Discover considers chargebacks above 2% suspicious. (PX20 at ¶¶5, 10.) Discover closed that account less than six months after it opened because of Happy Life Carribbean's failure to cover its costs, including its many chargebacks. (PX20 at ¶10.) Visa accounts for merchant descriptors "Happy Life," "Happy Life Carribbean," "Happy Life Corporation," and "Holiday Vacations" incurred chargebacks at rates between 3.55% and 18.38%. (PX21 at ¶¶12-15.) Visa considers chargebacks in excess of 1% unusually high. (PX21 at ¶¶7, 17.)

3. Defendants' Financial Practices

Jimenez and Ramirez regularly siphoned corporate assets from the Corporate Defendants'

[13]The "terms and conditions" page also included the statement, "At Happy Life Carribbean, your security is paramount. As a result, we do not store detailed bank or credit card information." (PX20, Att. A; PX24, Att. D; PX29, Att. G.)

accounts into their own bank accounts. (PX22 at ¶¶11-14.) Defendant Jimenez received at least $235,502 in checks drawn on corporate accounts, and Defendant Ramirez received at least $845,569, for a total of more than $1 million. (PX22 at ¶¶11, 13.) Bank records reveal that Defendants emptied their corporate accounts regularly, moving money out so quickly they frequently overdrew the accounts even while receiving tens of thousands of dollars per month in payments. (PX22 at ¶15.)

C. Consumer Injury

Bank records indicate the Corporate Defendants' accounts took in about $3.1 million from outside sources from June 2008 through early 2011. (PX22 at ¶¶7-10.) At least $1.2 million of these deposits are from sources clearly identifiable as payment processors and thus are revenues from Defendants' scams. (PX22, Att. B.)

III. A TEMPORARY RESTRAINING ORDER SHOULD ISSUE AGAINST DEFENDANTS

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

Section 13(b) of the FTC Act states that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction" against violations of any provisions of law the FTC enforces. 15 U.S.C. § 53(b); *see also Ameridebt*, 373 F. Supp. 2d at 562. "Proper" cases include those involving fraud that violates Section 5. *See, e.g.*, *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir. 1988); *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982); *Ameridebt*, 373 F. Supp. 2d at 563. This "unqualified grant of statutory authority" enables this Court to exercise its full equitable powers, including permanent, preliminary, and ancillary equitable remedies. *Gem Merch.*, 87 F.3d at 468-70; *see also FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346-47 (9th Cir. 1989); *Ameridebt*, 373 F. Supp. 2d at 562. Courts in this District and throughout the

Fourth Circuit have granted *ex parte* TROs with ancillary equitable relief in FTC fraud cases.[14]

This Court retains its power to grant injunctive and other equitable relief even after the conduct at issue ceases. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Injunctive relief remains available if the conduct is likely to recur, which courts determine by considering the egregiousness of the past conduct, the sincerity of the defendant's intent to comply with the law, and the defendant's capacity to commit future violations. *See id.*; *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1201-1202 (10th Cir. 2009); *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 212 (D. Mass. 2009); *SEC v. Lawbaugh*, 359 F. Supp. 2d 418, 424-25 (D. Md. 2005). The Fourth Circuit even held, in deciding that injunctions may remedy past violations of federal fair-housing laws, "Denial of an injunction is proper only in cases where ... the judge is fully satisfied that the defendant will not continue his unlawful conduct." *U.S. v. Hunter*, 459 F.2d 205, 220 (4th Cir. 1972). Here, Defendants are likely to renew their unlawful conduct absent a direct order to cease. Defendants patterned their deceptive advertisements on All Star Vacation Marketing's ads, even after Puerto Rican authorities took action to halt those ads. It appears Defendants ended their deceptive marketing of vacation "prizes" in the summer of 2010, only after they learned that the state of Florida was investigating their practices. At that point, however,

[14]*See, e.g.*, *FTC v. Residential Relief Foundation, Inc.*, No. 1:10-cv-03214-JFM (D. Md. Nov. 15, 2010) (granting *ex parte* TRO and asset freeze); *FTC v. Borges*, No. 8:09-cv-01634-PJM (D. Md. June 22, 2009) (granting *ex parte* TRO, asset freeze, and order to turn over business records); *FTC v. Innovative Mktg., Inc.*, No. 1:08-cv-03233-RDB (D. Md. Dec. 3, 2008) (granting *ex parte* TRO, asset freeze, and order to produce business records); *FTC v. D Squared Solutions, LLC*, No. 1:03-cv-03108-AMD, 2003 WL 22881377 (D. Md. Oct. 30, 2003) (granting *ex parte* TRO); *FTC v. Premier-Escrow.com*, No. 1:03-cv-00488-JCC (E.D. Va. Apr. 21, 2003) (granting *ex parte* TRO and asset freeze); *FTC v. Tungsten Group, Inc.*, No. 2:01-cv-00773-RAJ (E.D. Va. Oct. 15, 2001) (granting *ex parte* TRO, asset freeze, and order to permit inspection and copying of business records).

Defendants simply turned to a new type of unlawful conduct – unauthorized billing. As the evidence demonstrates, the Defendants' past conduct includes outright fraud and theft; Defendants have given no assurances of compliance and have acted to evade law enforcement; and Defendants still have the capacity to run false advertisements or to continue billing consumers without authorization. Thus, this Court may grant relief necessary to protect consumers.

In cases seeking preliminary injunctive relief under Section 13(b) of the FTC Act, the Fourth Circuit considers two factors: (1) the likelihood that the FTC will succeed on the merits; and (2) the balance of the equities at stake. *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1343 (4th Cir. 1976); *Ameridebt*, 373 F. Supp. 2d at 563. Unlike private litigants,[15] the FTC need not prove irreparable injury, because harm to the public is presumed when a federal statute is violated. *See Kemp v. Peterson*, 940 F.2d 110, 113 (4th Cir. 1991); *World Wide Factors*, 882 F.2d at 346; *Ameridebt*, 373 F. Supp. 2d at 563. The FTC meets its burden on the likelihood of success factor if it shows "a fair and tenable chance of ultimate success on the merits." *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978); *Ameridebt*, 373 F. Supp. 2d at 563.

B. The Commission Has Demonstrated a Likelihood of Success on the Merits

---

[15]When deciding whether a preliminary injunction should issue for private litigants, the Fourth Circuit has stated it will now follow the four-part test explained in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 374 (2008). *See Real Truth About Obama, Inc. v. Federal Election Comm'n*, 575 F.3d 342, 347 (4th Cir. 2009), *vacated on other grounds by* 130 S. Ct. 2371, 2371 (2010). The factors are: (1) the plaintiff's likelihood of success on the merits; (2) the likelihood of irreparable harm to the plaintiff if the relief is denied; (3) that the balance of equities tips in the plaintiff's favor; and (4) the public interest. *Winter*, 129 S. Ct. at 374. Although not required to do so, the FTC can meet all parts of the private-litigant test. Without the requested relief, the public and the FTC will suffer irreparable harm from the likely destruction of evidence and dissipation of assets. This harm is discussed *infra* in Sections III.D and III.E.

The FTC is likely to succeed in establishing that Defendants violated Section 5 of the FTC Act by committing both deceptive and unfair acts.

1. Defendants Made Deceptive Representations

Section 5 of the FTC Act prohibits "unfair or deceptive practices in or affecting commerce." 15 U.S.C. § 45. An act or practice is deceptive under Section 5(a) if it involves a material representation or omission that is likely to mislead consumers, acting reasonably under the circumstances, to their detriment. *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003); *World Travel*, 861 F.2d at 1029; *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1435 (9th Cir. 1986), *cert. denied*, 479 U.S. 828 (1986); *FTC v. Innovative Mktg.*, 654 F. Supp. 2d 378, 385 (D. Md. 2009).

A misrepresentation is material if it involves facts that a reasonable person would consider important in choosing a course of action. *See FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006); *FTC v. Figgie Int'l*, 994 F.2d 595, 603-604 (9th Cir. 1993); *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999). Express claims or those deliberately made to induce the purchase of a product or service are presumed material. *See, e.g., Kraft*, 970 F.2d at 322; *SlimAmerica*, 77 F. Supp. 2d at 1272. Consumer reliance on express claims is presumed reasonable. *FTC v. Pac. First Benefit, LLC*, 472 F. Supp. 2d 974, 979 (N.D. Ill. 2007); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000); *FTC v. Febre*, No. 94-C-3625, 1994 U.S. Dist. LEXIS 9787, at *54 (N.D. Ill. July 15, 1994), *aff'd*, 128 F.3d 530 (7th Cir. 1997). Finally, the omission of material information is itself a violation of Section 5, even in the absence of express falsehoods. *See FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005); *World Travel*, 861 F.2d at 1029; *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1154 (9th Cir. 1984).

Defendants made three express misrepresentations in advertisements and through telemarketers. Specifically, Defendants claimed that: (1) consumers who respond to Defendants' promotions have won a prize; (2) consumers who make a payment will receive a vacation package; and (3) vacation packages will include hotel accommodations of a specified duration. In fact, each of these claims was false in most instances. First, callers had not been singled out as prizewinners; Defendants took money from any consumer who would pay, whether that consumer correctly answered a question or not. Defendants used this representation to convince consumers the "prize package" was worth substantially more than the amount they charged consumers to claim it. They reinforced this false claim by saying that the required payment covered "fees" or "taxes," implying that the payment represented only a fraction of the prize package's total value. Second, Defendants routinely failed to deliver anything to consumers who paid the supposed "fees" and "taxes," instead putting off consumers who called for reservations or simply failing to answer the telephone. Third, those few consumers who received anything from Defendants received fewer nights at hotels than Defendants promised. Each of these representations injured consumers by leading them to pay for services many never received, and that, even when provided, were not what Defendants had promised. Because Defendants made express misrepresentations and consumers reasonably relied on those misrepresentations to their detriment, Defendants violated Section 5 of the FTC Act.

Defendants also failed to disclose material information. As discussed in detail above, Defendants represented in advertisements and through telemarketers that consumers who "won" the contest and paid the fees would receive vacations. This representation reasonably led consumers to believe that once they made Defendants' payment, they would receive the promised vacation package

without further material restrictions. In fact, those few consumers who managed to reach Defendants for reservations, long after they paid Defendant's fees, learned of further conditions and limitations. First, some consumers had to make additional payments for accommodations after arriving at their destinations. This information is material to consumers because it affects the total cost of the vacation packages they expected to receive. *FTC v. Crescent Publ'g Group*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (cost of products or services is material) (citing *In re Thompson Med. Co.*, 104 F.T.C. 648, 816 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir.1986)). Second, consumers had to meet undisclosed age, income, or marital-status requirements to receive hotel vouchers. This information is material because consumers would not pay for accommodations if they knew they would be turned away at the door. *See FTC v. Febre*, No. 94-C-3625, 1996 WL 396117, *4 (N.D. Ill. July 3, 1996) (failure to disclose the true nature of a service or product is material omission); *Five Star Auto Club*, 97 F. Supp. 2d at 532 (undisclosed limitations on sales program that prevented many consumers from achieving the promised benefits were material); *Southwest Sunsites*, 785 F.2d at 1438 (failure to disclose facts about suitability of the offered land for the advertised use was material misrepresentation). Third, consumers were required to attend timeshare or vacation sales presentations to receive accommodations. This information is material because it affects the amount of time consumers have to enjoy the vacations they were promised, and presentation schedules may conflict with the travel plans consumers arranged before learning of this requirement, preventing consumers from receiving the promised benefits altogether. *See id*. Consumers who were unable to meet the undisclosed requirements received nothing in exchange for the money they paid Defendants. Defendants' failure to disclose material information before consumers paid for their services violated Section 5 of the FTC Act.

2. Defendants' Unauthorized Billing Practices Were Unfair in Violation of Section 5

The Commission is likely to succeed in establishing that Defendants' unauthorized billing violated Section 5's prohibition against unfair practices. Unauthorized billing is an unfair practice. *E.g., FTC v. Inc21.com Corp.*, 688 F. Supp. 2d 927, 939 (N.D. Cal. 2010); *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1112-1116 (S.D. Cal. 2008), *aff'd by FTC v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010); *FTC v. Verity Int'l, Ltd.*, 335 F. Supp. 2d 479, 499 (S.D.N.Y. 2004), *aff'd in relevant part and vacated on other grounds by* 443 F.3d 48 (2d Cir. 2006); *J.K. Publ'ns*, 99 F. Supp. 2d at 1203. Indeed, Defendants' unauthorized billing scheme meets each prong of the unfairness standard under Section 5: (1) it causes or is likely to cause substantial injury to consumers; (2) the harm to consumers is not outweighed by any countervailing benefits; and (3) the harm is not reasonably avoidable by consumers. 15 U.S.C. § 45n; *see also International Harvester Co.*, 104 F.T.C. 949, 1064 (1984) ("Unfairness Statement").

First, Defendants' practices caused substantial injury to consumers. Unauthorized billing injures consumers both by taking their money and by forcing them to expend time and resources to contest the charges and protect their accounts. *See Neovi*, 598 F. Supp. 2d at 1115. Defendants charged each affected consumer $200 to $400 without authorization. Because Defendants often used false documents to avoid chargebacks, consumers had to spend weeks or months in a frustrating dispute process to get their money back. Additionally, the substantial injury prong "can be satisfied if the FTC establishes that consumers were injured by a practice for which they did not bargain." *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000) (*citing Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1364 (11th Cir. 1988)). The Defendants' unauthorized billing, which consumers did not even learn about

until after it occurred, constituted a classic "practice for which [consumers] did not bargain." *Id.* Finally, courts may examine injury in the aggregate to determine whether it is "substantial." *See Orkin*, 849 F.2d at 1365; *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985). Bank records show Defendants took in hundreds of thousands of dollars after they stopped advertising for new customers, suggesting that Defendants charged hundreds of consumers without authorization. Defendants' merchant processing accounts had astronomical chargeback rates – nearly 50% for Defendant Happy Life Carribbean's Discover account alone – indicating that many consumers contested charges they had never authorized.

Second, the injury Defendants caused is not outweighed by any countervailing benefits. The unfairness test only takes into account countervailing benefits to "consumers or competition," not benefits to the defendants at the expense of consumers. *E.g.*, Unfairness Statement, *International Harvester Co.*, 104 F.T.C. at 1064. The sole benefits of this unauthorized billing scheme accrued to Defendants, who provided nothing in exchange for the money they took. Finally, because consumers did not learn of the unauthorized charges until after they occurred, consumers had no "free and informed choice that would have enabled them to avoid the unfair practice." *FTC v. Windward Mktg.*, No. 1:96-CV-615F, 1997 WL 33642380, *11 (N.D. Ga. Sept. 30, 1997) (*citing Am. Fin. Servs. Ass'n*, 767 F.2d at 976). Because Defendants caused substantial injury to consumers, without any countervailing benefits, and which consumers could not reasonably avoid, Defendants' unauthorized billing practices were unfair in violation of Section 5.

C. The Individual Defendants Are Liable for Violating Section 5

The complaint seeks to hold Jimenez and Ramirez, along with the corporations they control,

personally liable for injunctive relief, consumer redress, disgorgement, and other equitable relief. Courts apply different tests to determine individual liability for injunctive relief and for monetary relief; Jimenez and Ramirez meet both.

First, Jimenez and Ramirez are personally liable for injunctive relief. Once the Commission establishes that a business violated Section 5 of the FTC Act, individual defendants are personally liable for injunctive relief if they either participated in the wrongful practices or had authority to control them. *See FTC v. Amy Travel Servs., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989); *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1998); *Innovative Mktg.*, 654 F. Supp. 2d at 385; *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1117 (S.D. Cal. 2008). Here, while the Commission need only prove *either* participation in *or* control of the corporations' actions, Jimenez and Ramirez exhibited both. Status as a corporate officer, particularly in a small, closely held corporation, establishes a presumption of authority to control. *Standard Educators, Inc. v. FTC*, 475 F.2d 401, 403 (D.C. Cir. 1973). Jimenez and Ramirez are the sole officers of all three Corporate Defendants. All three corporations appear to be small, closely held corporations whose "stock-in-trade" is deception and abuse, giving rise to a presumption of individual liability. *Standard Educators*, 475 F.2d at 403. Furthermore, assuming the duties of a corporate officer is probative of an individual's participation or authority. *Publ'g Clearing House*, 104 F.3d at 1170; *Innovative Mktg.*, 654 F. Supp. 2d at 386; *cf. Erwin v. United States*, 591 F.3d 313, 324 (4th Cir. 2010) (finding corporate officers are "responsible persons" for paying corporate taxes under 26 U.S.C. § 66729(a) if they control corporations' finances and have check-signing authority); *United States v. Hong*, 242 F.3d 528, 532 (4th Cir. 2001) (finding individual liable for corporation's crime when the individual controlled corporation's finances, purchased the improper filtration system, and

knew about its operations). Jimenez and Ramirez are signatories on the corporations' bank accounts and, through those accounts, paid radio and television stations to air the deceptive ads that initiated their scheme. Jimenez was the contact for Holiday Vacations' account with WILC Radio Viva 900 in Laurel, Maryland. Both Jimenez and Ramirez are contacts on the accounts for Corporate Defendants' toll-free phone numbers, which Defendants used to collect consumers' financial information. The Individual Defendants' status as sole corporate officers and direct participation in the corporations' actions make them individually liable for injunctive relief.

Jimenez and Ramirez are also personally liable for monetary relief. To obtain monetary relief, the FTC must prove that, in addition to participation or control, the Individual Defendants had knowledge of the wrongful acts. *Publ'g Clearing House*, 104 F.3d at 1171; *see also Gem Merch.*, 87 F.3d at 470. The FTC need not establish intent to defraud or even actual knowledge of the wrongful conduct. *See FTC v. Affordable Media*, 179 F.3d 1228, 1234 (9th Cir. 1999); *Amy Travel*, 875 F.2d at 573-74. Instead, reckless indifference to the wrongful conduct or an awareness of a high probability coupled with intentional avoidance of the truth will suffice. *Id.*; *see also FTC v. Atlantex Assocs.*, 1987-2 Trade Cas. (CCH) ¶ 67,788, 59,253 (S.D. Fla. 1987), *aff'd* 872 F.2d 966 (11th Cir. 1989). Participation in corporate affairs is probative of knowledge. *Affordable Media*, 179 F.3d at 1235; *Amy Travel*, 875 F.2d at 564; *cf. Phoenix Sav. & Loan, Inc. v. Aetna Casualty & Surety Co.*, 427 F.2d 862, 869 (4th Cir. 1970) (assuming corporate officers who control activities of corporation have knowledge of those activities, and imputing such knowledge to the corporation). Here, both Individual Defendants participated directly in the scam and thus knew about it. Ramirez, who controlled the Happy Life Carribbean Discover account, must have known about its 48% chargeback rate and Discover's closure

of the account. Jimenez and Ramirez closely monitored the corporate bank accounts and wrote themselves large checks, sometimes on a daily basis, to clean out those accounts. Because both Individual Defendants knew about or consciously avoided knowledge of the wrongful actions, they are personally liable for monetary as well as injunctive relief.

D. The Balance of the Equities Tips Decidedly in Favor of Issuing a Preliminary Injunction

In balancing the equities between the parties, the public equities must be given greater weight. *Affordable Media*, 179 F.3d at 1236; *World Wide Factors*, 882 F.2d at 347; *Ameridebt*, 373 F. Supp. 2d at 564. In fact, in one FTC case, the Fourth Circuit held that the private injuries at issue were "not proper considerations for granting or withholding injunctive relief under § 13(b)." *Food Town Stores*, 539 F.2d at 1346; *see also Kemp*, 940 F.2d at 113 (injunctions sought pursuant to statute do not require consideration of usual equitable factors). Defendants "can have no vested interest in a business activity found to be illegal," *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 29 (2d Cir. 1972), and the court "is under no duty 'to protect illegitimate profits or advance business which is conducted [illegally].'" *CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 143 (2d Cir. 1977) (*citing FTC v. Thomsen-King & Co.*, 109 F.2d 516, 519 (7th Cir. 1940)). In contrast, the public's interest in injunctive relief is especially strong where Defendants' past misconduct "gives rise to the inference that there is a reasonable likelihood of future violations." *SEC v. R.J. Allen & Assocs., Inc.*, 386 F. Supp. 866, 877 (S.D. Fla. 1974).

Here, the balance of equities tips decidedly in favor of granting preliminary injunctive relief. The FTC has presented evidence that Defendants deceived and bilked consumers in Maryland and nationwide. Defendants likely still have financial information for potentially thousands of consumers

and have demonstrated a willingness to misuse it. They retained consumers' financial information for months, and in some cases more than a year, before making unauthorized charges. Additionally, the Individual Defendants are not likely to leave the travel-scam business unless directly ordered to do so. They began their own deceptive advertising campaign shortly after the government of Puerto Rico obtained a cease-and-desist order against their former employer to stop a similar scheme. Absent a preliminary injunction ordering Defendants to give up consumers' financial information and cease deceptive advertising, their past misconduct indicates they are likely to injure consumers again.

E. An *Ex Parte* Order Providing for an Asset Freeze, the Turnover of Records, and the Preservation of Records is Necessary to Preserve Effective Final Relief

An asset freeze is necessary to preserve the possibility of final relief. The Commission plans to seek restitution for injured consumers and disgorgement from all Defendants as part of any final remedy in this case. When a district court determines that the FTC is likely to prevail in a final determination on the merits, it has "a duty to ensure that ... assets ... [are] available to make restitution to the injured customers." *World Travel*, 861 F.2d at 1031. To help ensure the availability of assets, the Court may issue an order freezing Defendants' assets. *See CFTC v. Kimberlynn Creek Ranch Inc.*, 276 F.3d 187, 193 (4th Cir. 2002) (affirming asset freeze obtained by CFTC); *Gem Merch.*, 87 F.3d at 469 (affirming asset freeze obtained by FTC); *World Travel*, 861 F.2d at 1031 (same); *Singer*, 668 F.2d at 1107 (same). Here, the Defendants have engaged in deceptive and unfair business practices, causing an estimated $3 million in consumer injury. They have a pattern of transferring money from corporate accounts to individual accounts. A freeze of Defendants' assets will reduce the risk of dissipation and preserve assets for possible restitution to victimized consumers and disgorgement of Defendants' ill-gotten gains.

An order preserving and requiring the turnover of business records is necessary to preserve the

possibility of restitution for victimized consumers and accurate disgorgement by the Defendants. The Fourth Circuit has upheld the use of similar devices, recognizing that the production of accounting records assists the district court's purpose of monitoring compliance with an asset freeze order and helps ensure effective final relief. *See Kemp*, 940 F.2d at 113. Here, Defendants' history indicates they have no qualms about evading law enforcement and falsifying documents. Defendants lied in corporate filings and mailings to consumers and state agencies, claiming an address that did not exist. To avoid chargebacks, they created false documents purporting to show that consumers authorized charges. Accordingly, preservation and turnover provisions will help ensure that the Defendants do not destroy or conceal the records necessary to fully determine the size and extent of consumer injury and identify injured consumers.

Finally, as set forth more fully in the Declaration of Counsel filed with this motion, the Commission has demonstrated a need to seek this relief on an *ex parte* basis. Federal Rule of Civil Procedure 65(b) permits this Court to enter *ex parte* orders upon a clear showing that "immediate and irreparable injury, loss, or damage will result" if notice is given. Such orders are proper where notice would "render fruitless the further prosecution of the action." *Am. Can Co. v. Mansukhani*, 742 F.2d 314, 322 (7th Cir. 1984); *see also Granny Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 439 (1974) (stating that temporary restraining orders may sometimes be issued *ex parte*); *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 422 (4th Cir. 1999) (same); *In re Vuitton et Fils, S.A.*, 606 F.2d 1, 5 (2d Cir. 1979) (granting *ex parte* TRO where notice was possible but would defeat the purpose of the action).

Here, the Defendants' operations are permeated with fraud. They already fled one law

enforcement investigation, canceling their bond and vacating their offices after learning that Florida was investigating consumer complaints. The Individual Defendants paid themselves large sums of money from corporate accounts and have shown a willingness to falsify documents and use false addresses to avoid law enforcement. Should the Defendants learn of the Commission's application for relief before a court order is in place, it is likely that evidence of wrongdoing and Defendants' ill-gotten gains will simply disappear. Thus, as the court noted in *Cenergy Corp. v. Bryson Oil & Gas P.L.C.*, 657 F. Supp. 867, 870 (D. Nev. 1987), "it [is] proper to enter the TRO without notice, for giving notice itself may defeat the very purpose for the TRO."

IV. CONCLUSION

For the reasons set forth above, the FTC respectfully requests that the Court enter the proposed Preliminary Injunction to address Defendants' violations of the FTC Act.

Respectfully submitted,

Dated: 5/16/2011

Sarah Waldrop
Elsie Kappler
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mailstop M-8102B
Washington, D.C. 20580
Telephone: (202) 326-3444 (Waldrop)
Telephone: (202) 326-2466 (Kappler)
Facsimile: (202) 326-2558
Email: swaldrop@ftc.gov, ekappler@ftc.gov

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION