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8 Federal Trade Commission

9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA

11 FEDERAL TRADE COMMISSION,

12 Plaintiff,

13 v.

14 MDK MEDIA INC., a California  
corporation also doing business as SE  
15 VENTURES, GMK COMMUNICATIONS,  
and EMG;

16 MAKONNEN DEMESSOW KEBEDE,  
17 individually and as an officer and owner of  
18 MDK Media Inc.;

19 TENDENCI MEDIA LLC, a California  
limited liability company;

20 SARAH ANN BREKKE, individually and  
21 as a member of Tendenci Media LLC;

22 MINDKONTROL INDUSTRIES LLC, a  
California limited liability company;

23 CHRISTOPHER THOMAS  
24 DENOVELLIS, individually and as a  
member of Mindkontrol Industries LLC;

25 ANACAPA MEDIA LLC, a California  
26 limited liability company;

27 WAYNE CALVIN BYRD II, individually  
28 and as a member of Anacapa Media LLC;

CLERK, U.S. DISTRICT COURT  
JULY-7 2014  
CENTRAL DISTRICT OF CALIFORNIA  
BY DEPUTY

Case No. CV14-5099 JFW-SHx

MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF PLAINTIFF FTC'S  
EX PARTE APPLICATION FOR  
TEMPORARY RESTRAINING  
ORDER WITH ASSET FREEZE,  
APPOINTMENT OF  
TEMPORARY RECEIVER, AND  
OTHER EQUITABLE RELIEF,  
AND ORDER TO SHOW CAUSE  
WHY A PRELIMINARY  
INJUNCTION SHOULD NOT  
ISSUE AND A PERMANENT  
RECEIVER SHOULD NOT BE  
APPOINTED

LODGED  
CLERK, U.S. DISTRICT COURT  
JUL - 1 2014  
CENTRAL DISTRICT OF CALIFORNIA  
BY DEPUTY

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BEAR COMMUNICATIONS LLC, a  
California limited liability company;  
  
JAMES MATTHEW DAWSON,  
individually and as a member of Bear  
Communications LLC;  
  
NETWORK ONE COMMERCE INC., a  
Nevada corporation; and  
  
CASEY LEE ADKISSON, individually and  
as an officer an owner of Network One  
Commerce Inc.,  
  
Defendants.

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1       **I.     INTRODUCTION**

2               Since at least August 2012, Defendants have participated in a scheme  
3 through which they have crammed over \$100 million in unauthorized charges onto  
4 the mobile phone bills of over one million consumers nationwide. Plaintiff Federal  
5 Trade Commission (“FTC”) seeks an *ex parte* temporary restraining order  
6 (“TRO”) enjoining Defendants from continuing their fraudulent sales practices and  
7 ordering ancillary equitable relief, including: an asset freeze; the appointment of a  
8 receiver; immediate access to Defendants’ business premises and records; an  
9 accounting; immediate production of documents; limited expedited discovery; and  
10 an order to show cause why a preliminary injunction should not issue and why a  
11 permanent receiver should not be appointed. These measures are necessary to  
12 prevent continued consumer injury, dissipation of assets, and destruction of  
13 evidence, thereby preserving this Court’s ability to provide effective final relief to  
14 Defendants’ victims.

15       **II.    DEFENDANTS’ BUSINESS PRACTICES**

16               Defendants<sup>1</sup> are vendors (known in the mobile billing industry as “premium  
17 SMS content providers”) that purport to sell digital content in the form of premium  
18 SMS text messages containing informational tidbits on topics such as daily  
19 horoscopes, romance advice, and texting tips.<sup>2</sup> They have placed well over one  
20

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21       <sup>1</sup> “Corporate Defendants” refers to MDK Media Inc. (“MDK”), Tendenci Media  
22 LLC (“Tendenci”), Mindkontrol Industries LLC (“Mindkontrol”), Anacapa Media  
23 LLC (“Anacapa”), Bear Communications LLC (“Bear”), and Network One  
24 Commerce Inc. (“Network One”). “Individual Defendants” refers to Makonnen  
25 Demessow Kebede, Sarah Ann Brekke, Christopher Thomas DeNovellis, Wayne  
26 Calvin Byrd II, James Matthew Dawson, and Casey Lee Adkisson. “Defendants”  
27 refers to the Corporate and Individual Defendants, collectively.

28       <sup>2</sup> “SMS” stands for “Short Message Service” and refers to standard rate text  
messages that can be sent from one mobile phone to another. Whether the sender  
and recipient of the text are charged for the text depends on their mobile phone  
plans. For example, some mobile phone plans allow unlimited SMS texting for a

1 million charges on consumers' mobile phone bills, ostensibly in exchange for  
2 providing digital content to consumers on a subscription basis using various  
3 "campaign names" such as "My Phone Beatz," "Text Groove," and "Mobile Tune  
4 Club" under an assigned "short code" (4- or 5-digit telephone numbers). These  
5 charges recur each month on the consumers' mobile phone bills until the  
6 consumers cancel the subscription. Defendants placed these charges on  
7 consumers' mobile phone bills without the consumers' knowledge or consent.  
8 Defendants have made over \$65 million by engaging in these illegal activities.

9 **A. Defendants purport to sell text message "subscription services"**

10 The products that Defendants purport to sell are subscriptions to  
11 informational text messages. For example, consumers interested in receiving their  
12 horoscope by text messages delivered to their mobile phones could subscribe to  
13 "Fortunes 4 You Horoscopes," offered by Tendenci for \$9.99 per month and  
14 receive three weekly texts such as: "Both money worries and relationship concerns  
15 will have you fretting throughout the day today, but needlessly!"<sup>3</sup> If a consumer  
16 were interested in receiving random factoids by text, he or she could also purchase  
17 a subscription to Anacapa's "Mobile Tune Club," which sends out three text  
18 messages per week, with factoids such as: "Add a small amount of lemon juice to  
19

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20  
21 flat fee, while other plans charge 10 or 20 cents per text message. In contrast,  
22 "premium SMS" is a service that allows you to use your mobile phone bill as a  
23 payment method for services (in Defendants' case, monthly "subscriptions" for  
24 digital content) received using text messages. The amount charged for premium  
25 SMS texts is set by the vendor selling the premium SMS service and is typically  
26 substantially more than the standard rate charged for text messages. *See* Gonzalez  
27 ¶91, Att.65 (Vol.5, p.135) (defining "standard rate" and "premium rate"). *See also*  
28 [http://support.sprint.com/support/article/Know\\_the\\_difference\\_between\\_text\\_messaging\\_and\\_Premium\\_Text\\_Messaging/case-gb746811-20090622-120302](http://support.sprint.com/support/article/Know_the_difference_between_text_messaging_and_Premium_Text_Messaging/case-gb746811-20090622-120302).

<sup>3</sup> Declaration of John Bird ("Bird") ¶3 (Vol.1, p.3), Att.1 (Vol.1, p.5); Declaration of David S. Gonzalez ("Gonzalez") ¶106.b. (Vol.2, p.55), Att.85 (Vol.5, p.260).

1 the artichoke cooking water to retain the color of the artichoke.”<sup>4</sup> The content  
2 provider may advertise its services through unsolicited SMS text messages or  
3 through websites on the Internet.

4 In order to place charges on a wireless phone customer’s phone bill,  
5 premium SMS content providers like Defendants are supposed to obtain “double  
6 opt-in” verification that the customer is authorizing the charge or enrollment in the  
7 content provider’s program. Gonzalez Att.64 (Vol.5, p.99). The customer first  
8 indicates his or her intention to subscribe to the program by providing the mobile  
9 phone number that the customer wants to be billed and at which he or she wishes  
10 to receive the premium SMS content. The content provider then sends the  
11 customer a text message which includes a special code that the customer will send  
12 back to the content provider (either by entering it into a website or by including it  
13 in a reply text sent back to the content provider) as his or her second confirmation  
14 of the charge. Gonzalez ¶¶90-91 (Vol.2, pp.41-42), Att.64 (Vol.5, p.99), Att.65  
15 (Vol.5, p.110, p.111 at §A1-01 (“Opt-In”), p.115 at §D1 (“Opt-In”)).<sup>5</sup>

16 Consumers pay the premium SMS charges to their wireless phone carriers as  
17 part of their monthly mobile phone bills. The wireless phone carriers send a  
18 portion of this money (net of its fees and any refunds the carrier has made to  
19 consumers) to Defendants’ billing aggregator, a group of companies that holds

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20  
21 <sup>4</sup> Gonzalez ¶16(a)(ii) (Vol.2, p.9), Att.7 (Vol.3, p.123).

22 <sup>5</sup> The content provider does not have direct access to the wireless phone carriers’  
23 premium SMS billing platforms. Rather, the content provider must have a  
24 contractual relationship with a billing aggregator, which serves as a gateway to the  
25 wireless phone carriers and acts as an intermediary. Gonzalez ¶89(c) Vol.2, p.40),  
26 Att.63 (Vol.5, pp.64-66). For example, the billing aggregator is responsible for  
27 identifying which wireless phone carrier is associated with the customer’s phone  
28 number, determining whether that phone number has an active account which is  
eligible for third-party billing, and submitting these charges to the appropriate  
wireless phone carrier for placement on the consumer’s mobile phone bill as a  
premium SMS charge. Gonzalez ¶88 (Vol.2, pp.38-39).

1 itself out as “Mobile Messenger.” Mobile Messenger then transmits a portion of  
2 what it received from the wireless phone carriers (net of its fees and any refunds it  
3 made directly to consumers) to the Corporate Defendants. Gonzalez ¶52 (Vol.2,  
4 p.28).

5 **B. How Defendants obtain consumers’ mobile phone numbers**

6 Defendants obtain their customers in two ways: (1) by tricking consumers  
7 into entering their mobile phone number into a deceptive website, which  
8 Defendants then enroll in their purported premium SMS subscriptions for a  
9 recurring monthly fee; and (2) by enrolling mobile phone numbers in their  
10 subscriptions without previously interacting with the consumers associated with  
11 those phone numbers.

12 Defendants are associated with websites that offer freebies or provide  
13 entertainment such as online quizzes or games. These websites collect consumers’  
14 mobile phone numbers as part of the information the consumers need to provide in  
15 order to collect the freebies, take the quizzes, or play the games. Webpages  
16 associated with Defendants include walmart.rewardhubzone.com, which offers a  
17 free \$1,000 Walmart gift card. Gonzalez ¶7 (Vol.2, p.3), Att.2 (Vol.2, pp.69-97).  
18 Other websites associated with Defendants include quizwhiz.org,  
19 onlinerewardcenter.com, exclusivegiftcards.com, and onlinegiftrewards.com.  
20 Gonzalez ¶¶8-9 (Vol.2, pp.4-6), Att.3 (Vol.2, pp.98-174), Att.4 (Vol.2, pp.175-  
21 180); Att.80 (Vol.5, pp.246-49).

22 Consumer complaints show that at least some consumers were enrolled in  
23 Defendants’ programs without their knowledge after they visited these types of  
24 websites. One consumer reported: “There is a fake post from facebook going  
25 around about a \$500 gift card from Target. Here is the link: [http://target4.net/?ko](http://target4.net/?ko7uf06vwo03qvj)  
26 [7uf06vwo03qvj](http://target4.net/?ko7uf06vwo03qvj) When you follow it you get a text message from 544-80 about  
27 [luvmatchscore.com](http://luvmatchscore.com).” Gonzalez ¶11 (Vol.2, p.6), Att.5 (Vol.3, pp.99-100).

28 Another consumer reported that she “was at PCH.com website and playing lotto

1 and won something[;] in the process of giving my Info to claim my gift suddenly  
2 this 83016 related intercepted my no. and txt me[.]” Gonzalez ¶19 (Vol.2, p.12),  
3 Att.8 (Vol.3, p.190); Att.9 (Vol.3, p.215). A third consumer does not know how  
4 Tendenci got her cell phone number but speculates that it might have been through  
5 a website on which she entered her name and cell phone number for a chance to  
6 win tickets to the first Hunger Games movie; however, nothing in the website  
7 alerted her to the fact that she might be agreeing to purchase anything. Carstensen  
8 ¶¶6, 8 (Vol.1, pp.8-9).

9 Defendants have also simply enrolled consumers in their programs without  
10 any previous interaction with the consumers whatsoever. Neumann ¶3 (Vol.1,  
11 p.33); Gonzalez ¶16(c) (Vol.2, pp.10-11), Att.5 (Vol.3, p.82) (Hackett); Gonzalez  
12 ¶16(b) (Vol.2, p.10), Att.5 (Vol.3, p.87) (Lee); Gonzalez ¶13(a) (Vol.2, pp.7),  
13 Att.5 (Vol.3, pp.3-4) (Berrios); Gonzalez Att.5 (Vol.3, p.27) (Hovde-Klingman);  
14 Gonzalez Att.5 (Vol.3, p.41) (Whitbread); Gonzalez Att.8 (Vol.3, p.127)  
15 (Anonymous) (“I never requested any such service, from anyone, ever. I never  
16 received any texts! Deceptive practice Company is robbing the unknowing!”).  
17 Several consumers report that their first contact with Defendants was an  
18 unsolicited text message that appeared to be “spam,” sent to the consumers’ mobile  
19 phones. Accardi ¶4 (Vol.1, p.1); Bird ¶2 (Vol.1, p.3), Goldberg ¶5 (Vol.1, p.21),  
20 Lou ¶3 (Vol.1, p.24), Lovern ¶2 (Vol.1, p.30), Tuttle ¶3 (Vol.1, p.71), Gonzalez  
21 Att.8 (Vol.3, p.128) (MWaite).

22 **C. Defendants have billed consumers without their authorization or**  
23 **knowledge**

24 Regardless of which method Defendants used to obtain consumers’ mobile  
25 phone numbers, the result is the same: Defendants begin placing monthly charges  
26 on consumers’ mobile phone bills, purportedly for text message subscriptions,  
27 without the consumers’ authorization or knowledge. Accardi ¶¶5,8 (Vol.1, p.1),  
28 Bird ¶6 (Vol.1, p.4), Carstensen ¶2 (Vol.1, p.7), Dunn ¶¶3,4 (Vol.1, p.12), Geranis

1 ¶¶2,3 (Vol.1, p.15), Goldberg ¶2 (Vol.1, p.21), Lou ¶4,5,8 (Vol.1, pp.25-26),  
 2 Lovern ¶¶2,3,4 (Vol.1, p.30), Neumann ¶3 (Vol.1, p.33), Santis ¶3-7 (Vol.1, pp.46-  
 3 47), Tuttle ¶¶4,5,6, (Vol.1, p.71); Gonzalez ¶¶11-12 (Vol.2, pp.6-7), Att.5, 6  
 4 (Vol.3, Hovde-Klingman, pp.27, 113; Hattam, pp.84, 114); Gonzalez Att.8 (Vol.3,  
 5 Erica, pp.128). *See also* Gonzalez ¶¶12, 20 (Vol.2, pp.7, 12), Att.6, 9 (Vol.3,  
 6 pp.113-14, pp.197-216) (summaries of consumer complaints). As noted above, the  
 7 charges for these subscriptions—typically \$9.99 or \$14.99 per month—show up on  
 8 consumers’ mobile phone bills until the consumer instructs the content provider or  
 9 mobile phone carrier to stop the charges. As discussed in Section II.E.1., *infra*, it  
 10 often takes some time before consumers become aware of the fact that they have  
 11 been crammed. By then, however, consumers have been significantly harmed.  
 12 Defendants have received over \$65 million from these crammed charges.<sup>6</sup>

13 **D. Defendants’ refund rates are consistent with cramming**

14 The wireless phone carriers have granted refunds to some of their customers  
 15 who complained about Defendants’ unauthorized charges. Accardi ¶9 (Vol.1, p.1)  
 16 (removed charge); Goldberg ¶¶3, 7 (Vol.1, pp.21-22) (removed charge); Santis  
 17 ¶¶11-12 (Vol.1, p.48) (refunded 2 out of 7 months). The wireless phone carriers  
 18 track the amount of these refunds as a “refund rate.”<sup>7</sup> A refund rate of 5% or more  
 19 is considered high for purposes of determining whether a content provider’s short  
 20 code campaign is legitimate and indicates a content provider is engaged in  
 21

22  
 23 <sup>6</sup> From 2009 to 2011, Mobile Messenger US Inc. wired \$2,904,744.95 to MDK.  
 24 Gonzalez ¶55 (Vol.2, pp.29-30), Att.40 (Vol.4, pp.150-153). From 2012 to 2013,  
 25 Mobile Messenger US Inc. wired \$64,685,040.24 to Defendants. Gonzalez ¶52  
 26 (Vol.2, p.28), Att.37 (Vol.4, pp.87-121), ¶¶65, 68, 71, 74, 77 (Vol.2, pp.33-35).

27 <sup>7</sup> The wireless phone carriers’ refund rates are calculated by dividing the dollar  
 28 amount of the refunds that the wireless carrier issues in a month by the dollar  
 amount of the revenues collected by the wireless carrier in that same month.  
 Gonzalez ¶94 (Vol.2, p.44).



1 cramm<sup>8</sup>. Refund data provided by AT&T, Sprint, T-Mobile, and Verizon show  
2 that all or a majority of Defendants' short codes listed in the tables set forth in  
3 Gonzalez ¶¶96-102 (Vol.2, pp.46-51), Att.66-72 (Vol.5, pp.177-218), at some  
4 point had a refund rate of 10% or more, and many of Defendants' short code  
5 campaigns registered refund rates of over 25%. Gonzalez ¶95.a. (Vol.2, p.45).<sup>9</sup> In  
6 other words, all or a majority of Defendants' short code campaigns listed in  
7 Gonzalez Attachments 66-72 have engaged in cramming.

8 Moreover, the refund rate undercounts the number of consumers who have  
9 complained to the wireless carriers that Defendants' charges are unauthorized.  
10 Indeed, many consumers have not been able to obtain a refund, even after  
11 complaining to their phone carrier. Geranis ¶4 (Vol.1, pp.15-16); Neumann ¶4  
12 (Vol.1, pp.33-34); Tuttle ¶8,10 (Vol.1, p.71); Gonzalez ¶11 (Vol.2, p.6), Att.5  
13 (Vol.3, p.9). For example, Verizon's overall refund rate for Bear's 54480/"Love  
14 Match Score" campaign was 6.7%.<sup>10</sup> Consumer Joyce Geranis was one of the

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15  
16 <sup>8</sup> See, e.g., Gonzalez ¶105.c. (Vol.2, p.55), Att.81 (Vol.5, p.251) (a refund rate in  
17 the 5 to 7.99% range "exceeds the acceptable limit for Verizon"), Att.81 (Vol.5,  
18 pp.252-53) (Verizon terminated Bear's 54480 and 27460 short codes because  
19 refund rate was 8% or higher); Att.82 (Vol.5, p.254) (Verizon suspended three of  
20 Network One's short codes because of 6.88% refund rate); ¶89.b. (Vol.2, p.40),  
Att.63 (Vol.5, p.62) (13% refund rate is high enough to suggest that "many charges  
21 appearing on consumers' wireless bills are unauthorized.")

22 <sup>9</sup> By way of comparison, the average chargeback rate on charges billed to credit  
23 cards is around 0.2%, and a chargeback rate of 1% for any one merchant is flagged  
24 for further investigation. See *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d  
1048, 1075 (C.D. Cal. 2012); *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199,  
1222 (D. Nev. 2011). A chargeback occurs when a customer disputes a charge  
with a credit card company.

25 <sup>10</sup> Verizon placed 347,045 charges (\$3,466,979.55) on their customers' bills on  
26 behalf of Bear's 54480 "Love Match Score" campaign. Gonzalez ¶97 (Vol.2,  
27 p.47), Att.67 (Vol.5, pp.181-182). It granted 23,235 refunds (\$232,876.89) to  
28 consumers, which is an overall 6.7% refund rate. Gonzalez ¶97 (Vol.2, p.47),  
Att.67 (Vol.5, pp.181-182).



1 consumers who found crammed 54480/“Love Match Score” charges on her  
 2 Verizon bill. Verizon told her it could not give her a refund for the three months of  
 3 unauthorized charges and provided no information about the company that placed  
 4 the charges on her bill. Geranis ¶4 (Vol.1, pp.15-16). Thus, the 6.7% refund rate  
 5 actually undercounts the number of consumers who complained to Verizon that  
 6 Bear’s 54480/“Love Match Score” charge was unauthorized.<sup>11</sup>

7 **E. Defendants’ business model is to cram charges onto the phone**  
 8 **bills of a large number of consumers and collect money from**  
 9 **those consumers until they become aware of the unauthorized**  
 10 **charges**

11 **1. Reasons why consumers pay the crammed charges**

12 Like other cramming scams, Defendants’ business model relies on the fact  
 13 that consumers often are not aware that their mobile phone bills contain  
 14 unauthorized charges.<sup>12</sup> Consumers who do not knowingly order anything from  
 15 Defendants do not expect to have to look for these charges on their phone bills.  
 16 *See, e.g.,* Gonzalez ¶11 (Vol.2, p.6), Att.5 (Vol.3, pp.13–14) (Klipa: “As my bill  
 17 was thought to be pretty standard I don't check it frequently and this charge went  
 18 undetected from May 2013 to November 8, 2013”); Gonzalez Att.8 (Vol.3, p.128)  
 19 (MWaite: “Received text from this ID and deleted. You would think by not  
 20

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21 <sup>11</sup> Another example is Tendenci’s 25260/“Text Groove” short code campaign,  
 22 which had an overall refund rate of 16.8% (Gonzalez ¶102 (Vol.2, p.50), Att.72  
 23 (Vol.5, p.214). But consumer “Evro” reported that “T-Mobile said they couldn't  
 24 refund the charges because ‘it had been too long’ even though I called as soon as I  
 25 saw the charge on my current bill.” Gonzalez ¶20.j.ii (Vol.2, p.18), Att.8 (Vol.3,  
 26 p.129). Thus, T-Mobile’s 16.8% refund rate undercounts the number of consumers  
 27 who complained that Tendenci’s 25260/“Text Groove” charges were unauthorized.

28 <sup>12</sup> One recent expert survey in another cramming case determined that only 5% of  
 the crammer’s customers were aware that charges for the products had appeared on  
 their telephone bills. *See FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1004  
 (N.D. Cal. 2010), *aff’d* 475 F. App’x 106 (9th Cir. 2012).

1 replying it would do nothing. I was billed \$9.99 by Sprint (thief of a company  
2 itself) with no recourse offered.”); Gonzalez ¶19 (Vol.2, p.12), Att.8 (Vol.3, p.174)  
3 (Steven B.: “These scum bags somehow force a charge onto your Verizon bill  
4 through txt message. ... Why does Verizon allow these scammers to charge our  
5 accounts? I have never downloaded any ring tones or wall papers, which is what  
6 this company is claiming they charged me for. I went back through old bills and  
7 found this charge has happened before and I missed it. Look for premium  
8 messaging on your bill. This is where the charge will appear.”)

9 Even those consumers who look through their bills do not necessarily see the  
10 unauthorized charges. In many instances, the unauthorized charge is presented on  
11 the bill with a description which is vague or cryptic,<sup>13</sup> or placed under seemingly  
12 innocuous categories like “Voice” and “multimedia” (Tuttle Att.3, Vol.1, p.96). In  
13 addition, it is often difficult to find Defendants’ crammed charges because they  
14 appear several pages into a lengthy phone bill. Carstensen Att.2 (Vol.1, p.11),  
15 Geranis Att.1, 2, 3 (Vol.1, p.18-20), Lou Att.1 (Vol.1, pp.28-29), Neumann Att.1  
16 (Vol.1, pp.38-39), Santis Att.1, 2 (Vol.1, pp.59-69), Tuttle Att.1, 3 (Vol.1, pp.73-  
17 86, 88-101); Gonzalez ¶11 (Vol.2, p.10), Att.5 (Vol.3, pp.71–72) (Colson: “The  
18 charges are BURIED in the middle of 20-something page bills.... It took me 9  
19 months to figure out what was going on!”).

20 Then there are those consumers who have prepaid or “auto-pay” accounts.

21  
22 <sup>13</sup> Examples of how the premium SMS charges have been described on consumers’  
23 bills include: “Usage Fees and Overage” (Tuttle Att.1, Vol.1 at p.75), “Mobile  
24 Usage Charges” (Tuttle, Att.1, Vol.1 at p.76), “Premium Messaging” (Geranis  
25 Att.1, Vol.1 at p.18); “PREM\_SMS 54480 LoveMatchScore (Geranis Att.1, Vol.1  
26 at p.19); “8004166129 MbilNine 84653” (Neumann Att.1 (Vol.1, p.38); “SE  
27 Ventures 8004166129DlzOnFire49734.” Gonzalez ¶11 (Vol.2, p.6), Att.5 (Vol.3,  
28 pp.39–40, Wagner); and “SE Ventures: Alerts – 24992 YourHoroPath-07/21”  
(Santis Att.1, 2) (Vol.1, pp.53, 65). *See also* Geranis ¶8 (Vol.1, p.17) (difficult to  
distinguish unauthorized premium services charges from the legitimate charges for  
taxes and other services).

1 They do not have an opportunity to review the charges placed on their mobile  
2 phone bill—including Defendants’ crammed charges—before the charge is  
3 deducted from their prepaid balance. *See, e.g.*, Gonzalez ¶11 (Vol.2, p.6), Att.5  
4 (Vol.3, pp.41–42) (Whitbread); Gonzalez ¶20 (Vol.2, p.12), Att.9 (Vol.3, p.206)  
5 (Jim) (“I’m a prepaid customer and tmobile doesn’t have a way that I could find to  
6 see account activity history so I had to call them for this info”); Geranis ¶4, 7  
7 (Vol.1, pp.15–17), Att.3 (Vol.1, p.20).

8 In addition, in many instances, even consumers who notice the unauthorized  
9 charges on their phone bills and attempt to have these charges removed are still  
10 required to pay the charges. Geranis ¶4 (Vol.1, pp.15–16); Santis ¶¶11–12 (Vol.1,  
11 p.48) (received refunds for only 2 of 7 charges); Gonzalez ¶11 (Vol.2, p.6), Att.5  
12 (Vol.3, p.41) (Whitbread received no refund); Gonzalez ¶11 (Vol.2, p.6), Att.5  
13 (Vol.3, p.19) (Tasker received partial refund); Gonzalez ¶19 (Vol.1, p.12), Att.8  
14 (Vol.3, p.132) (Maggie and Lewis received no refunds); Gonzalez ¶19 (Vol.2,  
15 p.12), Att.8 (Vol.3, pp.128, 133, 143) (Terri, Peter, and Jo Ann Cory received  
16 partial refunds). Other consumers cannot get the unauthorized charges removed or  
17 refunded because the content provider was unreachable. *See, e.g.*, Gonzalez ¶11  
18 (Vol.2, p.6), Att.5 (Vol.3, pp.43–44) (Andreas: “Some of the phone number’s that  
19 show up on the bill don’t even work when he calls them”); Gonzalez ¶19 (Vol.2,  
20 p.12), Att.8 (Vol.3, p.159) (Donna: “Have no idea how I became subscribed to this  
21 but I just noticed the 9.99 per month on my verizon bill. Have been charged for  
22 months. I could not find how to unsubscribe as I don't receive texts from this  
23 company); Gonzalez ¶11 (Vol.2, p.6), Att.5 (Vol.3, pp.53–54) (Huffaker: “This  
24 number doesn't even seem reachable even though it states you can text ‘stop’ to  
25 stop the charges.”).

26 **2. Defendants’ business model is wholly reliant on consumers**  
27 **not spotting the crammed charges**

28 Defendants’ modus operandi is to cram charges onto the phone bills of a

1 breathtakingly large number of consumers, and then reap the payments for as long  
2 as those consumers—for all of the reasons described above—fail to notice the  
3 unauthorized charges.

4 Verizon's data for Bear's "Love Match Score" campaign under short code  
5 54480 illustrates how Defendants' illegal, but highly profitable, scam works.  
6 Gonzalez ¶97 (Vol.2, p.47), Att.67 (Vol.5, p.181). Bear ran the "Love Match  
7 Score" short code campaign for a total of six months. In its first month (October  
8 2012), Bear crammed \$183,875.94 onto the phone bills of 18,406 consumers. In  
9 its second month (November 2012), it added a net 84,112 new "customers" (for a  
10 total of 102,518 customers), with total charges of \$1,024,154.82. In its third month  
11 (December 2012), its revenues dropped to \$788,930.28, which means that a net  
12 23,546 "customers" found the unauthorized charges on their bills and canceled  
13 their "Love Match Score" subscriptions. Despite these 23,546 cancelations,  
14 Verizon granted only 4,910 refunds (\$49,200.75) that month, indicating that many  
15 of the canceling consumers did not get a refund. Still, the refunds that Verizon did  
16 grant were voluminous enough that Bear's refund rate for that month was 6.24%.  
17 Gonzalez ¶97 (Vol.2, p.47), Att.67 (Vol.5, p.181). The 6.24% refund rate caused  
18 Verizon to issue a "Urgent Resolution of Refund Policy Violation" to Bear on  
19 January 7, 2013, ordering Bear to "block all new opt-in attempts to all of their  
20 campaigns by Verizon customers and cease all marketing efforts, if any, directed at  
21 obtaining new opt-ins by customers of Verizon for a period of 90-days as of  
22 01/10/2013." Gonzalez ¶105.c. (Vol.2, p.55), Att.81 (Vol.5, p.251).

23 Due to the fact that Defendants set up these "subscriptions" to automatically  
24 bill each month until canceled, during the three months following its January 2013  
25 suspension, Bear was able to make over \$1 million (\$647,731.62 in January 2013,  
26 \$426,742.83 in February 2013, and \$295,324.38 in March 2013) from existing  
27 "customers" who had not yet caught on that they were being crammed. Gonzalez  
28

1 Att.67 (Vol.5, p.181). This is despite the tens of thousands of consumers who were  
2 noticing the crammed charges each month and canceling their subscriptions: In  
3 January 2013, 22,121 consumers successfully canceled their subscriptions.<sup>14</sup> In  
4 February 2013, an additional 13,155 consumers successfully canceled their  
5 subscriptions.<sup>15</sup> Yet even with these mass cancelations, Bear still made a  
6 whopping \$295,324.38 in its last month of running its Love Match Score  
7 campaign. Gonzalez ¶97 (Vol.2, p.47), Att.67 (Vol.5, p.181).<sup>16</sup> Based on its  
8 11.97% refund rate for March 2013, Verizon terminated Bear's billing privileges  
9 on April 9, 2013. Gonzalez ¶105.c. (Vol.2, p.55), Att.81 (p.252-53). The revenue  
10 and refund rate data for MDK, Tendenci, Mindkontrol, Anacapa, and Network One  
11 show that those Defendants also ran short code campaigns under this same illegal  
12 but highly profitable business model until their billing privileges were revoked.<sup>17</sup>

13 **F. Many consumers who promptly cancel their enrollments in**  
14 **Defendants' programs do not get refunds for the unauthorized**  
15 **charges they paid**

16 As discussed above, many consumers have reported that they are unable to  
17 get any refund for the unauthorized charges they paid. In addition, numerous

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18  
19 <sup>14</sup> The 22,121 January 2013 cancelations figure is calculated as the 64,838  
20 consumers enrolled in January 2013 minus 42,717 consumers who remained in the  
21 program as of February 2013.

22 <sup>15</sup> The 13,155 February 2013 cancelations figure is calculated as the 42,717  
23 consumers enrolled in February minus the 29,562 consumers who remained in the  
24 program as of March 2013.

25 <sup>16</sup> Defendants operate from mail drop addresses. Gonzalez ¶¶34-50 (Vol.2, pp.22-  
26 25), Att.22 (MDK), 23 (Tendenci), 24 (Bear), 25 (Anacapa) (Vol.4, pp.43-64). In  
27 addition, they have virtually no wholesale product costs, so Defendants' share of  
28 these revenues is almost all profit.

<sup>17</sup> See Gonzalez Att.66, 68, 69, 70, 71, 72 (Vol.5, pp.177-180, 183-218, revenue  
and refund data); Att.73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83 (Vol.5, pp.223-255,  
terminations and suspensions).

1 consumers who got a refund did not get a full refund. *See e.g.*, Santis ¶11-12  
2 (Vol.1, p.48); Lou ¶8 (Vol.1, p.26); Gonzalez Att.5 (Vol.3, p.79, Song). These  
3 reports are corroborated by wireless phone carriers' data, which shows that most  
4 consumers who canceled their enrollments in Defendants' programs do not receive  
5 refunds, even if they cancel as soon as they receive the first bill with the  
6 unauthorized charge.

7 For example, Verizon's data for MDK's "Ringtone Excess Portal" campaign  
8 (short code 36862) shows that in November 2011, MDK "enrolled" 62,134  
9 consumers in "Ringtone Excess Portal" subscriptions. Gonzalez Att.68 (Vol.5,  
10 p.185). Each successive month, tens of thousands of consumers canceled out of  
11 the program:

- 12 • 32,802 consumers canceled in January 2012,<sup>18</sup> but Verizon issued refunds  
13 for only 1,033 months. *Id.* This means that, at most, 1,033 consumers  
14 received a one-month refund (or a smaller number of consumers received  
15 a refund for one or more months). In other words, at least 31,769 (96.8%)  
16 of the 32,802 consumers who canceled their MDK Ringtone Excess  
17 Portal "subscriptions" in January 2012 did not receive any refunds from  
18 Verizon, even though they canceled within the first one or two months of  
19 the charges first appearing on their bills.
- 20 • 29,297 consumers canceled in February 2012,<sup>19</sup> but Verizon issued  
21 refunds for only 2,019 months. *Id.* This means that, at most, 2,019  
22

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23  
24 <sup>18</sup> The 32,802 cancelations in January 2012 is calculated by subtracting the 29,332  
25 Verizon consumers who remained enrolled in MDK's Ringtone Excess Portal  
26 program as of January 2012 from the 62,134 Verizon consumers who were  
27 enrolled the previous month (December 2011).

28 <sup>19</sup> The 29,297 cancelations in February 2012 is calculated by subtracting the 35  
consumers who were still enrolled as of February 2012 from the 29,332 consumers  
who were enrolled in the previous month (January 2012).



1 consumers received a one-month refund, or a smaller number of  
2 consumers received refunds for one or more months. In other words, at  
3 least 27,278 (93.1%) of the 29,297 consumers who canceled their MDK  
4 Ringtone Excess Portal “subscriptions” in February 2012 did not receive  
5 any refunds from Verizon, even though they canceled within the first two  
6 or three months of the charges first appearing on their bills.

7 **G. Defendants have made tens of millions of dollars from this**  
8 **cramming scheme**

9 Each of the Corporate Defendants has received millions of dollars from  
10 cramming. MDK received over \$22.6 million during the time period May 20,  
11 2009 through November 5, 2013. Gonzalez ¶65 (Vol.2, p.33), Att.40 (Vol.4,  
12 pp.150–158). Tendenci has received over \$5.5 million in revenues. Gonzalez ¶68  
13 (Vol.2, p.34), Att.37 (Vol.4, pp.117–121). Mindkontrol has received over \$10.9  
14 million in revenues. Gonzalez ¶¶70-71 (Vol.2, p.34), Att.37 (Vol.4, p.102-07).  
15 Anacapa has received over \$22.9 million in revenues from its aggregator Mobile  
16 Messenger. Gonzalez ¶74 (Vol.2, p.35), Att.37 (Vol.4, pp.87–92). Bear received  
17 over \$4.4 million in revenues. Gonzalez ¶77 (Vol.2, p.35), Att.37 (Vol.4, pp.92–  
18 96). Network One received over \$1 million in revenues. Gonzalez ¶80 (Vol.2,  
19 p.36), Att.37 (Vol.4, pp.107–111).

20 **H. Defendants have continued their cramming scheme even after**  
21 **being disciplined by the wireless phone carriers**

22 Defendants’ business model is so profitable that Defendants do not stop  
23 cramming just because a wireless carrier has terminated them.

24 MDK’s billing privileges were terminated by Verizon in October 2011 and  
25 by AT&T in July 2012, because of its high refund rates and deceptive websites.  
26 Gonzalez ¶105.a. (Vol.2, p.55), Att.79 (Vol.5, pp.240–241); Gonzalez ¶104.a.  
27 (Vol.2, p.53), Att.73 (Vol.5, pp.224–225). Despite these terminations, MDK  
28 continued cramming through other wireless carriers’ billing platforms, including

1 starting at least five new short code campaigns on Sprint. Gonzalez ¶108 (Vol.2,  
2 p.59), Att.1 (Vol.2 at p.64). Moreover, even after AT&T terminated MDK’s  
3 billing privileges in July 2012, MDK continued to bill on AT&T’s platform, under  
4 the name “SE Ventures.” Gonzalez ¶108 (Vol.2, p.59), Att.71 (Vol.5, p.209). In  
5 fact, MDK—doing business as “Makonnen Kebede (MDK Media Inc.),” “SE  
6 Ventures,” and “GMK Communications”—received over \$19.5 million in  
7 revenues after being blacklisted by Verizon, over \$17.0 million of which came in  
8 after MDK was also blacklisted by AT&T. Gonzalez ¶108 (Vol.2, p.59), Att.37  
9 (Vol.4, pp.99–102).

10 Tendenci began cramming charges by February 2012, four months after  
11 MDK was terminated by Verizon. Gonzalez ¶6 (Vol.2, pp.2–3), Att.1 (Vol.2,  
12 p.68); Gonzalez ¶102 (Vol.2, pp.51-53), Att.72 (Vol.5, p.216). In July 2012,  
13 Tendenci was blacklisted by Verizon. Gonzalez ¶105 (Vol.2, pp.55-56), Att.80  
14 (Vol.5, pp.243–245). Like MDK, Tendenci, despite being terminated from one  
15 billing platform, continued cramming charges through other wireless carriers’  
16 billing platforms, including through four new campaigns on T-Mobile and Sprint.  
17 Gonzalez ¶109 (Vol.2, p.59), Att.1 (Vol.2, pp.67–68). Indeed, for the period  
18 March 2012 to October 2013, Tendenci received over \$5.5 million in revenues.  
19 Over \$3.9 million of that amount came in after Tendenci was blacklisted by  
20 Verizon. Gonzalez ¶109.b. (Vol.2, p.59), Att.37 (Vol.4, pp.117–121).

21 Mindkontrol began cramming by July 2012. Gonzalez ¶99 (Vol.2, p.49),  
22 Att.69 (Vol.5, p. 200). On December 1, 2012, AT&T imposed a 30-day  
23 suspension on one of Mindkontrol’s short code campaigns. Gonzalez ¶104.f.  
24 (Vol.2, p.54), Att.78 (Vol.5, p.239). From June 2012 to November 2013,  
25 Mindkontrol received over \$11 million in revenues. Gonzalez ¶110.a. (Vol.2,  
26 p.60), Att.37 (Vol.4, pp.102–07). Over \$6 million of that amount came in after the  
27 30-day suspension went into effect.

28 Anacapa began cramming by January 2012. Gonzalez ¶6 (Vol.2, pp.2–3),



1 Att.1 (Vol.2, p.63); Gonzalez ¶96 (Vol.2, pp.46-47), Att.66 (Vol.5, p. 177–180).  
2 AT&T suspended Anacapa’s short code 97841 on February 12, 2013. Gonzalez  
3 Att.75 (Vol.5, p.233). In all, Anacapa received over \$22.9 million in revenues.  
4 Gonzalez ¶111.a. (Vol.2, p.60), Att.37 (Vol.4, pp.87–92). Over \$13.8 million of  
5 that amount was generated after the suspension.

6 Bear began cramming by October of 2012. Gonzalez ¶6 (Vol.2, pp.2–3),  
7 Att.1 (Vol.2, pp.63–64); Gonzalez ¶97 (Vol.2, pp.47-48), Att.67 (Vol.5, p.181). In  
8 January 2013, Verizon suspended Bear. Gonzalez ¶111 (Vol.2, p.60), Att.81  
9 (Vol.5, p.251). The next month (February 2013), it began cramming through  
10 AT&T using short code 27460 under the campaign name “Horoscopes Now,” and  
11 in March 2013 using short code 21446 under the campaign name “Tons of  
12 Mobile.” Gonzalez Att.67 (Vol.5, p.181). These two AT&T campaigns were also  
13 highly profitable: Bear’s “Horoscopes Now” campaign generated \$740,340.29 in  
14 just two months (June and July 2013), and its “Tons of Mobile” campaign  
15 generated \$42,832.10 in one month (July 2013), at which point AT&T shut down  
16 these campaigns. Gonzalez ¶104.e. (Vol.2, p.54), Att.77 (Vol.5, p.238). In all,  
17 Bear received over \$4.4 million in revenues, with over \$3.5 million coming in after  
18 Verizon’s suspension went into effect. Gonzalez ¶¶111.d.-e. (Vol.2, p.60), Att.37  
19 (Vol.4, pp.92–96).

20 Network One began cramming by February 2012. Gonzalez ¶6 (Vol.2,  
21 pp.2–3), Att.1 (Vol.2, p.66); Gonzalez ¶100 (Vol.2, p.50), Att.70 (Vol.5, p.204).  
22 Network One’s five short codes were suspended by Sprint, but it still received over  
23 \$1 million in revenues, with over \$410,000 of that amount coming in after Sprint’s  
24 suspensions. Gonzalez ¶112 (Vol.2, p.61), Att.37 (Vol.4, pp.107–111).

### 25 **III. The Individual Defendants’ roles in the cramming scheme**

26 Each of the Individual Defendants had authority to control the unlawful  
27 activities of his or her company and participated directly in those unlawful  
28 activities. Moreover, each of the Individual Defendants knew that his or her

1 company was placing charges on consumers' mobile phone bills. They knew or  
2 should have known these charges were unauthorized. Specifically:

3 **Defendant Kebede** is the sole owner, officer, and director of MDK.  
4 Gonzalez ¶21 (Vol.2, p.20), Att.10 (Vol.4, pp.3-5). He signed MDK's corporate  
5 filings and MDK's fictitious business name statements. Gonzalez ¶21 (Vol.2,  
6 p.20), Att.10 (Vol.4, p.1); Gonzalez ¶29 (Vol.2, p.21), Att.17 (Vol.4, pp.28, 30).  
7 He established and pays the rent for MDK's office space and private mail box at  
8 879 W. 190th Street, Suite 400, Gardena, CA 90248. Gonzalez ¶56 (Vol.2, p.30),  
9 Att.41 (Vol.4, pp.159-168); Gonzalez ¶35 (Vol.2, p.22), Att.22 (Vol.4, pp.44-46).  
10 Kebede represents himself to the wireless carriers as MDK's principal. Gonzalez  
11 Att.21 (Vol.4, p.40), Att.73 (Vol.5, p.224), Att.74 (Vol.5, pp.227-28); Att.90  
12 (Vol.5, p.276). He established and controls MDK's bank accounts. Gonzalez  
13 ¶¶53.a.-d. (Vol.2, pp.28-29), Att.38 (Vol.4, pp.134-136); Gonzalez ¶54 (Vol.2,  
14 p.29), Att.39 (Vol.4, pp.139-149); Gonzalez ¶56 (Vol.2, p.30), Att.41 (Vol.4,  
15 pp.159-168). Kebede also pays for and controls MDK's domain names  
16 MDKMediaOnline.com, SEVenturesOnline.com, and GMKCommunications.net.  
17 Gonzalez ¶84.b. (Vol.2, p.37), Att.56 (Vol.5, pp.3-12). Through MDK, he  
18 received most of the revenues that Tendenci, Mindkontrol, Anacapa, Bear, and  
19 Network One generated from their cramming activities. Gonzalez ¶¶68-82 (Vol.2,  
20 pp.34-36), Att.37 (Vol.4, pp.87-121), Att.51 (Vol.4, p.213), Att.45 (Vol.4, pp.184-  
21 88), Att.52 (Vol.4, pp.214-15), Att.43 (Vol.4, pp.177-79), Att.47 (Vol.4, pp.193-  
22 94). Kebede has transferred most of the funds in MDK's accounts to personal  
23 accounts and the accounts of other corporate entities, both domestic and foreign.  
24 Gonzalez ¶¶113.a.-g. (Vol.2, pp.61-62), Att.92 (Vol.5, pp.280-85).

25 **Defendant Brekke** is the sole owner and member of Tendenci. Gonzalez  
26 Att.11 (Vol.4, p.8), Att.18 (Vol.4, p.33), Att.30 (Vol.4, pp.76-77). She arranged  
27 for LegalZoom.com to set up Tendenci as a California LLC. Gonzalez ¶51 (Vol.2,  
28 p.26), Att.27 (Vol.4, p.67), Att.28 (Vol.4, p.68), Att.30 (Vol.4, pp.76-77). She

1 signed the fictitious business name statement that Tendenci filed with the Los  
2 Angeles County Recorder's Office. Gonzalez Att.18 (Vol.4, p.33). She established  
3 and pays the rent for Tendenci's mail forwarding services at 10940 Wilshire Blvd.,  
4 Suite 1600, Los Angeles, CA 90024. Gonzalez ¶38 (p.23), Att.23 (Vol.4, pp.47,  
5 49). Brekke represents herself to the wireless phone carriers as Tendenci's  
6 principal. Gonzalez Att.89 (Vol.5, p.273). She established and has control over  
7 Tendenci's bank account. Gonzalez ¶61 (Vol.2, p.31), Att.49 (Vol.4, p.205). She  
8 controls and pays for Tendenci's domain name TendenciMedia.com. Gonzalez  
9 ¶84 (Vol.2, p.37), Att.57 (Vol.5, pp.14d-14e). Brekke has transferred most of the  
10 funds in Tendenci's accounts to other accounts, including that of MDK. Gonzalez  
11 ¶61 (Vol.2, p.31-32), Att.50 (Vol.4, pp.208-212); Gonzalez ¶62 (Vol.2, p.32),  
12 Att.51 (Vol.4, p.213), Gonzalez ¶¶68-69 (Vol.2, p.34), Att.37 (Vol.4, pp.117-121).

13 **Defendant DeNovellis** is the sole owner and member of Mindkontrol.  
14 Gonzalez Att.12 (Vol.4, pp.12-13). DeNovellis represents himself to the wireless  
15 carriers as Mindkontrol's principal. Gonzalez Att.74 (Vol.5, pp.229-30). He  
16 established and has control over Mindkontrol's bank account. Gonzalez ¶58  
17 (Vol.2, p.30), Att.44 (Vol.4, pp.180-183). He has transferred most of the funds in  
18 Mindkontrol's account to personal and other corporate accounts, including that of  
19 MDK. Gonzalez ¶58 (Vol.2, p.31), Att.45 (Vol.4, pp.184-88).

20 **Defendant Byrd** is the sole owner and member of Anacapa. Gonzalez  
21 Att.13 (Vol.4, p.17), Att.32 (Vol.4, pp.79-80). He arranged for LegalZoom.com to  
22 set up Anacapa as a California LLC. Gonzalez ¶51.d. (Vol.2, p.27), Att.29 (Vol.4,  
23 pp.71, 75). He established and pays the rent for Anacapa's mail forwarding  
24 services at 8335 Sunset Blvd., Suite 245, Los Angeles, CA 90069. Gonzalez ¶48  
25 (Vol.2, p.25), Att.25 (Vol.4, pp.62, 64). He controls and pays for Anacapa's  
26 domain name AnacapaLive.com. Gonzalez ¶84.d. (Vol.2, p.37), Att.58 (Vol.5,  
27 pp.15, 23). Byrd has transferred most of the funds in Anacapa's account to other  
28 accounts, including that of MDK. Gonzalez ¶76 (Vol.2, p.38), Att.52 (Vol.4, pp.

1 214–15).

2 Byrd has also participated in the operation of Tendenci and Bear. He has  
3 communicated with GoDaddy.com on Tendenci’s behalf in managing Tendenci’s  
4 domain name. Gonzalez ¶84.c. (Vol.2, p.37), Att.57 (Vol.5, p.13 (5/9/2013 entry:  
5 “Customer’s Name: wayne”), p.14b (1/30/2012 entry: “Name and Callback  
6 number: Wayne [redacted]” and 1/23/2012 entry: “Caller: Wane”). Byrd and  
7 Brekke used the same credit card account to pay LegalZoom.com for its  
8 incorporation services for Tendenci and Anacapa. See Gonzalez ¶¶51.c.-d. (Vol.2,  
9 p.27), Att.28 (Vol.4, pp.67–69) (Brekke/Tendenci); Att.29 (Vol.4, pp.72-74)  
10 (Byrd/Anacapa)

11 **Defendant Dawson** is the sole owner and member of Bear. Gonzalez Att.14  
12 (Vol.4, p.21), Att.35 (Vol.4, p.83). He arranged for LegalZoom.com to set up Bear  
13 as a California LLC. Gonzalez ¶51.j. (Vol.2, p.28), Att.35 (Vol.4, pp.83–84). He  
14 established and paid the rent for Bear’s mail forwarding services at 10866 Wilshire  
15 Blvd., 4th Floor, Los Angeles, CA 90024. Gonzalez ¶42 (Vol.2, p.24), Att.24  
16 (Vol.4, pp.53–59). He established and has control over Bear’s bank account.  
17 Gonzalez ¶57 (Vol.2, p.30), Att.42 (Vol.4, pp.173–176). He controls Bear’s  
18 domain name BearCommunicationsLLC.com. Gonzalez ¶84.e. (Vol.2, p.37),  
19 Att.59 (Vol.5, pp.24–27). Dawson has transferred most of the funds in Bear’s  
20 account to other accounts, including to MDK. Gonzalez ¶57 (Vol.2, p.30), Att.43  
21 (Vol.4, pp.177–179).

22 Dawson has also participated in Tendenci’s and Anacapa’s operations. He  
23 has communicated with LegalZoom.com on Tendenci’s behalf in managing  
24 Tendenci’s corporate filings. Gonzalez ¶51.f. (Vol.2, p.27), Att.31 (Vol.4, p.78)  
25 (LegalZoom.com’s 1/12/2012 call notes: “talked to matt, not auth, re: SDE option,  
26 went over fees. He will ask sarah to call in to add”). GoDaddy.com records show  
27 Dawson also has a Tendenci email address (matt@tendencimedia.com). Gonzalez  
28 ¶84.c. (Vol.2, p.37), Att.57 (Vol.5, pp.14a, 14c). With respect to Anacapa, he is

1 listed as authorized to act on Byrd’s and Anacapa’s LegalZoom.com account.  
2 Gonzalez ¶51 (pp.26, 28), Att 34 (p.82); *see also* Gonzalez ¶51.h. (Vol.2, p.27),  
3 Att.33 (Vol.4, p.81) (2/9/2012: Byrd asks LegalZoom.com to add “Matthew  
4 James” as an authorized contact).

5 **Defendant Adkisson** is the sole owner, officer, and director of Network  
6 One. Gonzalez ¶59.a. (Vol.2, p.31), Att.46 (Vol.4, pp.190-92). He established and  
7 has control over Network One’s bank account. Gonzalez ¶59.a. (Vol.2, p.31),  
8 Att.46 (Vol.4, pp.190-92). Through his d/b/a “Apex Digital Marketing,” Adkisson  
9 controls and pays for three domain names used by Tendenci (FunRingTone.mobi,  
10 QFrogs.com, and SmartMobileQuiz.com). Gonzalez ¶84.f. (Vol.2, p.37), Att.60  
11 (Vol.5, pp.31–35). He has also represented that Apex Digital Marketing is a d/b/a  
12 of Tendenci. Gonzalez ¶87 (Vol.2, p.38), Att.62 (Vol.5, pp.53-57). Through his  
13 d/b/a Dormart LLC, he has received funds from Tendenci. Gonzalez ¶60 (Vol.2,  
14 p.31), Att.50 (Vol.4, p.208). He has also received money directly from MDK.  
15 Gonzalez ¶59 (Vol.2, p.31), Att.47 (Vol.4, pp.193–194). He has transferred most  
16 of the funds in Network One’s account to other accounts, including that of MDK.  
17 Gonzalez ¶59 (Vol.2, p.31), Att.47 (Vol.4, pp. 193–194).

#### 18 **IV. LEGAL ARGUMENT**

19 Plaintiff asks the Court to enter a TRO to halt immediately Defendants’  
20 illegal acts and practices. The TRO also would preserve the status quo and prevent  
21 the destruction of documents or the dissipation of assets by freezing Defendants’  
22 assets, authorizing immediate access to Defendants’ books and records, appointing  
23 a temporary receiver, and authorizing expedited discovery. The TRO also includes  
24 an order to show cause why a preliminary injunction should not be entered.

##### 25 **A. The Court Has the Authority to Grant the Requested Relief**

26 Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the Court to  
27 issue the temporary and preliminary relief that Plaintiff seeks. The second proviso  
28

1 of Section 13(b) authorizes the FTC to seek and this Court to issue a permanent  
2 injunction in proper cases. A routine “fraud” case such as this one, replete with  
3 misrepresentations of material facts in violation of Section 5(a) of the FTC Act  
4 qualifies as a proper case under Section 13(b). *FTC v. H.N. Singer, Inc.*, 668 F.2d  
5 1107, 1111-13 (9th Cir. 1982).

6 The authority to issue a permanent injunction includes the authority to grant  
7 ancillary and preliminary equitable relief. The Court may exercise the full breadth  
8 of its equitable authority in a Section 13(b) action because Congress “did not limit  
9 that traditional equitable power” when it passed the FTC Act. *Id.* at 1113.

10 Exercise of the court’s broad, equitable authority is particularly appropriate where,  
11 as here, the public interest is at stake. *Porter v. Warner Holding Co.*, 328 U.S.  
12 395, 398 (1946); *U.S. v. Laerdal Mfg.*, 73 F.3d 852, 857 (9th Cir. 1995). Thus,  
13 under Section 13(b), the Court may order ancillary equitable remedies, such as  
14 rescission of contracts and restitution, as well as whatever additional temporary or  
15 preliminary relief is necessary to preserve the possibility of effective final relief.  
16 *Singer*, 668 F.2d at 1113-14. Initial relief may include a temporary restraining  
17 order and a preliminary injunction freezing assets, enjoining practices, and  
18 appointing a receiver. *Id.*; *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432-34  
19 (11th Cir. 1984); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *see*  
20 *also* S. Rep. No. 103-130 (1993), as reprinted in 1994 U.S.C.C.A.N. 1790-91  
21 (“Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation  
22 of the FTC [Act]. The FTC can go into court *ex parte* to obtain an order freezing  
23 assets, and is also able to obtain consumer redress”). District courts may also alter  
24 discovery in particular cases. *See* Rules 1, 26(b)(2)(A), 30(a)(2), 33(a)(1),  
25 34(b)(2)(A) of the Federal Rules of Civil Procedure (“FRCP”). The exercise of  
26 this broad equitable authority is particularly appropriate where, as here, the public  
27 interest is at stake. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946);  
28



1 *Laerdal Mfg.*, 73 F.3d at 857; *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347  
2 (9th Cir. 1989).

3 **B. The Court Should Issue a TRO and Order to Show Cause Why a**  
4 **Preliminary Injunction Should Not Issue Because the FTC is**  
5 **Likely to Succeed on the Merits and a Balancing of the Equities**  
6 **Tips in the FTC's Favor**

7 An application for a TRO is governed by the same standard applicable to  
8 preliminary injunctions. *Cal. Indep. Sys. Operator Corp. v. Reliant Energy Servs.,*  
9 *Inc.*, 181 F. Supp. 2d 1111, 1126 (E.D. Cal. 2001). A plaintiff may obtain a  
10 preliminary injunction if it shows: (1) a likelihood of success on the merits, (2) the  
11 likelihood of irreparable injury, (3) that the balance of hardships tips in its favor,  
12 (4) an injunction is in the public interest. *Winter v. Natural Resources Defense*  
13 *Council, Inc.*, 555 U.S. 7, 20 (2008).

14 Courts may also balance the plaintiff's likelihood of success on a sliding  
15 scale with whether serious questions are raised and the balance of hardships tips  
16 sharply in the plaintiff's favor. *Alliance for Wild Rockies v. Native Ecosystems*  
17 *Council*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Thus, a "stronger showing of  
18 one element may offset a weaker showing of another." *Id.* The public interest  
19 should receive greater weight when weighing the public and private equities. *FTC*  
20 *v. Affordable Media*, 179 F.3d 1228, 1236 (9th Cir. 1999). Requiring defendants to  
21 comply with the FTC Act, to refrain from fraudulent representations, or to preserve  
22 their assets from dissipation or concealment is not an oppressive hardship. *World*  
23 *Wide Factors*, 882 F.2d at 347.

24 Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in  
25 or affecting commerce." 15 U.S.C. § 45. As alleged in Count One of the  
26 Complaint, Defendants' practice of placing unauthorized charges on the mobile  
27 phone bills of consumers is deceptive in violation of Section 5. As alleged in  
28 Count Two, these practices also violate Section 5 as unfair practices.

1           The FTC “meets its burden on the likelihood of success issue if it shows  
2 preliminarily, by affidavit or other proof, that it has a fair and tenable chance of  
3 ultimate success on the merits.” *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229  
4 (D.C. Cir. 1978) (quoting *FTC v. Lancaster Colony Corp.*, 434 F.Supp. 1088, 1090  
5 (S.D.N.Y. 1977)). This can be shown “by a prima facie showing of illegality.”  
6 *FTC v. GTP Mktg., Inc.*, 1990-1 Trade Cas. (CCH) ¶68,959 at 63,150 (N.D. Tex.  
7 1990). In considering an application for a temporary restraining order or  
8 preliminary injunction, the Court has the discretion to consider hearsay evidence.  
9 *Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) (“the trial  
10 court may give even inadmissible evidence some weight when to do so serves the  
11 purpose of preventing irreparable harm before trial”).

12           **1. The FTC is likely to succeed on Count One (Deceptive Acts**  
13           **and Practices in Violation of Section 5 of the FTC Act)**

14           An act or practice is deceptive under Section 5(a) of the FTC Act if it  
15 involves a material representation or omission that is likely to mislead consumers  
16 acting reasonably under the circumstances. *FTC v. Stefanchik*, 559 F.3d 924, 928  
17 (9th Cir. 2009). A representation is material if it involves facts that a reasonable  
18 person would consider important in choosing a course of action. *FTC v.*  
19 *Cyberspace.Com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006). The FTC need not  
20 prove that Defendants’ misrepresentations were made with an intent to defraud or  
21 deceive, or were made in bad faith. *See, e.g., FTC v. World Travel Vacation*  
22 *Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *Removatron Int’l Corp. v.*  
23 *FTC*, 884 F.2d 1489, 1495 (1st Cir. 1989). The FTC does not need to prove  
24 reliance on the misrepresentation by each consumer in order to establish that the  
25 misrepresentation violates Section 5 of the FTC Act. *FTC v. Figgie Int’l, Inc.*, 994  
26 F.2d 595, 606 (9th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994). ““Requiring  
27 proof of subjective reliance by each individual consumer would thwart effective  
28 prosecutions of large consumer redress actions and frustrate the statutory goals of



1 [Section 13(b)].” *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993)  
2 (internal citations omitted). The placement of charges on a consumer’s telephone  
3 bills by a company, and the inclusion of those charges in the “total amount due”  
4 shown on these bills, constitutes an affirmative representation by the company that  
5 the consumer *in fact* authorized the purchase and owes payment to Defendants.  
6 *FTC v. Inc21.com*, 745 F. Supp. 2d 975, 1000 (N.D. Cal. 2010). The FTC’s  
7 evidence shows that Defendants placed well over one million charges on  
8 consumers’ mobile phone bills. Each charge constitutes an affirmative  
9 representation by Defendants that the consumers owe to Defendants the amount  
10 charged.

11 In addition, these affirmative representations that consumers owe the  
12 charges are express claims, made to induce consumers to pay the charges. Thus,  
13 these representations are presumed to be material. *Pantron I Corp.*, 33 F.3d 1088,  
14 1095-96 (9th Cir. 1994). *See also Inc21.com*, 745 F. Supp. 2d at 1001 (fraudulent  
15 charges placed on consumers’ landline phone bills were material  
16 misrepresentations); *FTC v. Verity Int’l, Ltd.*, 443 F.3d 48, 64-65 (2d Cir. 2006)  
17 (same).

18 Finally, the consumers who have been charged by Defendants are presumed  
19 to have acted reasonably in paying their mobile phone bills even though they did  
20 not authorize the charges. Consumer reliance on express claims is presumptively  
21 reasonable. *FTC v. Five-Star Auto Club Inc.*, 97 F. Supp. 2d 502, 528 (S.D.N.Y.  
22 2000). As discussed in Section II.E., *supra*, there are several reasons why  
23 consumers paid the charges even though the charges were not authorized, all of  
24 which are comport with common sense or have been expressly recognized by the  
25 courts as reasonable. Consumers do not expect third parties to bury unauthorized  
26 charges in their phone bills (*see Verity Int’l*, 443 F.3d at 63; *Inc21.com*, 745 F.  
27 Supp. 2d at 1000-04), and many consumers do not notice these unauthorized  
28 charges. *See, e.g., Inc21.com*, 745 F. Supp. 2d at 996 (only 5% of a crammer’s

1 tens of thousands of “customers” were aware that the crammer’s unauthorized  
2 charges were on their landline phone bills). By design, consumers who have  
3 prepaid or auto-pay mobile phone accounts do not have an opportunity to review  
4 the charges placed on their mobile phone bill before the charge is deducted from  
5 their prepaid balance or from their financial account. *See* Section II.E.1., *supra.*  
6 Moreover, because of the built-in time lag between when a charge is placed on a  
7 consumer’s phone account and when the bill is finally sent to the consumer, more  
8 than one month can pass before a consumer has the opportunity to review his or  
9 her bill. Even consumers who spot and promptly complain about the unauthorized  
10 charges are still told that they are required to pay the charges. *Id.* Thus, the FTC is  
11 likely to succeed on Count One of the Complaint, and the Court should issue the  
12 proposed temporary restraining order.

13 **2. The FTC is likely to succeed on Count Two (Unfair Billing**  
14 **Practices in Violation of Section 5 of the FTC Act)**

15 Defendants’ placement of unauthorized charges on consumers’ telephone  
16 bills also violates Section 5 of the FTC Act as an unfair act or practice. An act or  
17 practice is unfair if (1) it causes or is likely to cause substantial injury to  
18 consumers; (2) the harm is not reasonably avoidable by consumers; and (3) the  
19 harm is not outweighed by countervailing benefits to consumers or competition.  
20 15 U.S.C. § 45(n).

21 First, Defendants’ placement of unauthorized charges has caused substantial  
22 injury to consumers. Injury is deemed substantial when the harm is caused to a  
23 large class of people, even if the harm to an individual is small. *See Orkin*  
24 *Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988); *FTC v.*  
25 *Windward Mktg., Inc.*, 1997 WL 33642380, at \*11 (N.D. Ga. 1997). Crammed  
26 charges cause “substantial harm.” *See Inc21.com*, 745 F. Supp. 2d at 1004  
27 (substantial injury in landline phone cramming case); *Windward Mktg*, 1997 WL  
28 33642380 at \*11 (substantial injury where large numbers of consumers harmed).

1 In this case, Defendants typically placed charges of \$9.99 or \$14.99 per month on  
2 consumers' mobile phone bills. The FTC estimates that the total out-of-pocket  
3 monetary injury that Defendants have caused consumers exceeds \$100 million.

4 Second, consumers cannot reasonably avoid the injury caused by  
5 Defendants' cramming. Defendants signed consumers up for their subscription  
6 services without the consumers' permission. By design, consumers cannot become  
7 aware of these charges until after they received their phone bills, which is  
8 sometimes more than one month after Defendants have crammed the charge on the  
9 consumers' bills. Even worse is the situation for consumers who have prepaid cell  
10 phones or "auto-pay" accounts, who are not given the opportunity to review their  
11 phone bill until after they have made payment. Courts have squarely held that the  
12 burden should not be on defrauded consumers to avoid charges that they never  
13 authorized. *See Inc21.com*, 745 F. Supp. 2d at 1004 ("given the evidence that  
14 nearly 97 percent of defendants' 'customers' never agreed to purchase defendants'  
15 products in the first place, it follows that these 'customers' had no reason to  
16 scrutinize their telephone bills for defendants' fraudulent charge"); *FTC v.*  
17 *Kennedy*, 574 F. Supp. 2d 714, 720-21 (S.D. Tex. 2008) (consumers cannot  
18 reasonably avoid charges they never authorized); *FTC v. Crescent Publ'g Grp.,*  
19 *Inc.*, 129 F. Supp. 2d 311, 322 (S.D.N.Y. 2001) (same).

20 Finally, Defendants' practice of unauthorized billing offers no  
21 countervailing benefit to consumers or competition. The victimized consumers do  
22 not want the so-called "services" provided by Defendants' subscription plans.  
23 Neither consumers nor competition benefit when consumers are charged for  
24 services they did not order. *See Inc21.com*, 745 F. Supp. 2d at 1004 (unauthorized  
25 charges to telephone bills have no countervailing benefits and are an unfair  
26 practice); *Kennedy*, 574 F. Supp. 2d at 721 (no evidence of countervailing benefit  
27 to consumers); *see also Crescent Publ'g Grp.*, 129 F. Supp. 2d at 322 (no  
28 countervailing benefit for fraudulent charges). Thus, the FTC is likely to prevail

1 on Count Two of the Complaint. This provides an additional or alternative basis  
2 on which to grant the requested temporary restraining order.

3 **3. The Balance of Equities Favors Issuing Injunctive Relief**

4 Once the FTC establishes a likelihood of success on the merits, the Court  
5 must weigh the equities. If relief would be in the public interest, preliminary  
6 injunctive relief is warranted. *Affordable Media*, 179 F.3d at 1236. In balancing  
7 the equities between the parties, the public equities must be given far greater  
8 weight. *Affordable Media*, 179 F.3d at 1236; *see also World Travel Vacation*  
9 *Brokers*, 861 F.2d at 1030.

10 The preliminary relief sought will serve the public interest by prohibiting  
11 Defendants from placing unauthorized charges on consumers' mobile phone bills,  
12 whether through premium SMS billing or any other billing platform (including, for  
13 example, through direct carrier billing), in all states and under any corporate name.  
14 As discussed in Section II.E., II.F., and II.H., *supra*, Defendants have continued to  
15 place unauthorized charges on consumers' mobile phone bills despite the eye-  
16 popping volume of consumers who immediately cancel their subscriptions, the  
17 high refund rates, and the suspensions and terminations imposed by AT&T, Sprint,  
18 T-Mobile, and Verizon. That conduct indicates that they will likely continue to  
19 defraud the public in the absence of a court order.<sup>20</sup> *Five-Star Auto Club, Inc.*, 97  
20

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21 <sup>20</sup> Although AT&T, Sprint, T-Mobile, and Verizon have announced their intent to  
22 cut off billing for premium text messaging services, that does not foreclose  
23 Defendants from continuing their scam through other means. First, not all  
24 domestic wireless phone carriers have stated they will be cutting off such types of  
25 billing, and there is evidence that even after this announcement, Defendants have  
26 continued to bill through at least one other carrier. *See, e.g.*, Gonzalez ¶16.a.  
27 (Vol.2, p.9), Att.7 (Vol.3, p.120) (Hattam); ¶14.a. (Vol.2, p.8), Att.5 (Vol.3, p.53)  
28 (Huffaker). It also appears that the wireless phone carriers will continue to allow  
other types of third-party billing such as "direct carrier billing." (Similarly, phone  
carriers continued to allow premium SMS billing even after they stopped allowing  
third-party billing to landline, a/k/a "wireline," customers. Gonzalez Att.64, Vol.5,

1 F. Supp. 2d at 536 (“[P]ast illegal conduct is highly suggestive of the likelihood of  
2 future violations.”); *SEC v. R.J. Allen & Assocs.*, 386 F. Supp. 866, 877 (S.D. Fla.  
3 1974) (past misconduct suggests likelihood of future violations). Equally  
4 importantly, the requested relief will serve the public interest by preventing the  
5 Defendants from destroying evidence and dissipating assets.

6 In contrast, the requested preliminary relief will not impose an unreasonable  
7 burden on Defendants. *See World Wide Factors*, 882 F.2d at 347 (affirming  
8 district court’s finding that “there is no oppressive hardship to Defendants in  
9 requiring them to comply with the FTC Act, refrain from fraudulent representation  
10 or preserve their assets from dissipation or concealment”). Defendants “can have  
11 no vested interested in a business activity found to be illegal,” *United States v.*  
12 *Diapulse Corp. of Am.*, 457 F.2d 25, 29 (2d Cir. 1972) (internal quotations and  
13 citations omitted); *see also CFTC v. British American Commodity Options Corp.*,  
14 560 F.2d 135, 143 (2d Cir. 1977) (quoting *FTC v. Thomsen-King & Co.*, 109 F.2d  
15 516, 519 (7th Cir. 1940)) (“A court of equity is under no duty ‘to protect  
16 illegitimate profits or advance business which is conducted illegally.’”). Because  
17 the injunction will preclude only harmful, illegal behavior, the public equities  
18 supporting the proposed injunctive relief outweigh the burden imposed by such  
19 relief on Defendants. *See, e.g., National Soc’y of Prof. Eng’rs. v. United States*,  
20 435 U.S. 679, 697 (1978).

21  
22  
23  
24  
25 pp.89-93.) Given Defendants’ propensity to evade restrictions that the wireless  
26 carriers have placed on them (*see* Section II.H., *supra*), Defendants may shift their  
27 scam to this alternative method of third-party billing. Moreover, because their  
28 policy shift is voluntary, the carriers mentioned above may, at any time, return to  
their original policy permitting third-party premium text messaging billing, thereby  
again granting Defendants access to consumer phone bills.

1                   **4. The FTC is likely to prevail in obtaining injunctive and**  
2                   **monetary relief against the individual defendants**

3                   The Court may hold an individual liable for a corporate entity's violations of  
4                   the FTC Act if the individual (1) had the authority to control the unlawful activities  
5                   or (2) participated directly in them. *FTC v. Publishing Clearing House, Inc.*, 104  
6                   F.3d 1168, 1170 (9th Cir. 1997). An individual's status as a corporate officer or  
7                   controlling shareholder gives rise to a presumption of liability to control a small,  
8                   closely held corporation. *FTC v. John Beck Amazing Profits, LLC*, 865 F. Supp.  
9                   2d 105, 1080 (C.D. Cal. 2012) (citing *FTC v. Nat'l Urological Group, Inc.*, 645 F.  
10                  Supp. 2d 1167, 1207 (N.D. Ga. 2008)). "A heavy burden of exculpation rests on  
11                  the chief executive and primary shareholder of a closely held corporation whose  
12                  stock-in-trade is overreaching and deception." *Standard Educators, Inc. v. FTC*,  
13                  475 F.2d 401, 403 (D.C. Cir.), *cert. denied*, 414 U.S. 828 (1973). Assuming the  
14                  duties of a corporate officer is probative of an individual's participation or  
15                  authority. *Publishing Clearing House*, 104 F.3d at 1170; *FTC v. Amy Travel Serv.*  
16                  *Inc.*, 875 F.2d 564, 573 (7th Cir. 1989); *Five-Star Auto Club*, 97 F. Supp. 2d 502,  
17                  538 (S.D.N.Y. 2000). This standard applies to determining the individual liability  
18                  of limited liability company members, as well as corporate officers and directors.  
19                  *In re National Credit Management Group, L.L.C.*, 21 F. Supp. 2d 424, 461 (D.N.J.  
20                  1998).

21                  The Court may hold an individual liable for monetary redress for a corporate  
22                  defendant's practices if the individual had, or should have had, knowledge or  
23                  awareness of the corporate defendant's misrepresentations. *Affordable Media*, 179  
24                  F.3d at 1234; *Publishing Clearing House*, 104 F.3d at 1171. This knowledge  
25                  element need not rise to the level of subjective intent to defraud consumers.  
26                  *Affordable Media*, 179 F.3d at 1234; *Amy Travel*, 875 F.2d at 574. Instead, the  
27                  FTC need only demonstrate that the individual had actual knowledge of material  
28                  misrepresentations, reckless indifference to the truth or falsity of such



1 representations, or an awareness of a high probability of fraud coupled with the  
2 intentional avoidance of the truth. *Affordable Media*, 179 F.2d at 1234; *FTC v.*  
3 *Medicor*, 217 F. Supp. 2d 1048, 1055 (2002). Participation in corporate affairs is  
4 probative of knowledge. *Publishing Clearing House*, 104 F.3d at 1170-1171;  
5 *Affordable Media*, 179 F.3d at 1235; *Amy Travel*, 875 F.2d at 574.

6 As discussed in Section III, *supra*, Defendants Kebede, Brekke, DeNovellis,  
7 Byrd, Dawson, and Adkisson had the authority to control and in fact exercised  
8 control over Defendants MDK, Tendenci, Mindkontrol, Anacapa, Bear, and  
9 Network One, respectively. Each has held himself or herself out to public, the  
10 wireless phone carriers, and others as the owners and principals of their respective  
11 companies. Each is the only signatory on his or her company's bank accounts and  
12 exerts sole control those accounts. Moreover, each also had, or should have had,  
13 knowledge or awareness of the Corporate Defendants' wrongful acts. The  
14 Corporate Defendants received many complaints about unauthorized charges,  
15 including BBB and carrier complaints to which they occasionally responded.  
16 Further, the Corporate Defendants received numerous suspension and termination  
17 notices from AT&T, Sprint, T-Mobile, and Verizon based on high refund rates and  
18 other misconduct related to their billing practices. Their corporate positions would  
19 have made it impossible to be unaware of the unlawful practices. In short, they  
20 have authority to control, participate in, and know about the corporate Defendants'  
21 wrongful acts. The Court should hold Kebede, Brekke, DeNovellis, Byrd,  
22 Dawson, and Adkisson liable for injunctive and monetary relief for the law  
23 violations committed by their companies MDK, Tendenci, Mindkontrol, Anacapa,  
24 Bear, and Network One.

25 **C. The Scope of the Proposed TRO Is Necessary and Appropriate**

26 **1. Conduct Relief**

27 The proposed TRO would enjoin Defendants from placing any charges on  
28

1 telephone bills without having first obtained a consumer's express informed  
2 consent to the charge and from selling or otherwise transferring the personal  
3 information of the consumers they crammed. Proposed TRO, §§I, II. This  
4 injunction is well within the Court's broad equitable authority under Section 13(b)  
5 of the FTC Act to grant ancillary relief necessary to accomplish complete justice.  
6 *Singer*, 668 F.2d at 1113.

## 7                   2.     **Asset Freeze**

8           The proposed TRO would freeze Defendants' assets to avoid further asset  
9 dissipation and to preserve funds for consumer redress. This Court may freeze  
10 assets whenever it is "reasonably necessary . . . to preserve the possibility of  
11 complete and meaningful relief at the conclusion of the litigation." *FTC v.*  
12 *Southwest Sunsites*, 665 F.2d 711, 722 (5th Cir. 1982). "A party seeking an asset  
13 freeze must show a likelihood of dissipation of the claimed assets, or other  
14 inability to recover monetary damages, if relief is not granted." *Johnson v.*  
15 *Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009). Courts have concluded that an  
16 asset freeze is justified where a Defendant's business is permeated with fraud. *See,*  
17 *e.g., SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972); *R.J.*  
18 *Allen & Assocs.*, 386 F.Supp. at 881. Moreover, in addition to freezing company  
19 assets, courts have frozen the assets of individual defendants who controlled the  
20 deceptive activity and had actual or constructive knowledge of the deceptive nature  
21 of the practices in which the companies were engaged. *Amy Travel*, 875 F.2d at  
22 574; *World Travel Vacation Brokers*, 861 F.2d at 1031.

23           The Court may conclude that an individual is likely to dissipate assets based  
24 on the individual's prior conduct. *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th  
25 Cir. 2009). In *Couturier*, this prior conduct included "somehow convinc[ing] his  
26 fellow directors and trustees to consent to diverting nearly \$35 million from the  
27 company's employee stock ownership plan into his personal bank account." *Id.* at  
28



1 1085. *See also Affordable Media*, 179 F.3d at 1236 (likelihood of dissipation  
2 existed “[g]iven the [defendants’] history of spiriting their commissions away to a  
3 Cook Islands trust”). Defendant Kebede has transferred millions of dollars to  
4 financial accounts in Luxembourg and Canada, as well as domestic accounts in the  
5 name of other corporate entities. Gonzalez Att.92 (Vol.5, pp.280-281, 285).  
6 Defendants Brekke (Gonzalez Att.50, Vol.4, pp.208-212; Att.51, Vol.4, p.213),  
7 DeNovellis (Gonzalez Att.45, Vol.4, pp.184-188; Att.53, Vol.4, pp.216-217), Byrd  
8 (Gonzalez Att.52, pp.214-215), Dawson (Gonzalez Att.43, Vol.4, pp.177-179), and  
9 Adkisson (Gonzalez Att.47, Vol.4, pp.193-194) have also transferred millions of  
10 dollars from their corporate accounts to other accounts. These past transfers,  
11 coupled with Defendants’ patently illegal activity and the possibility of a large  
12 monetary judgment, show that absent an asset freeze, the Individual Defendants are  
13 likely to conceal or dissipate assets during the course of this lawsuit.

14 The proposed TRO also includes a provision directing financial institutions  
15 and other third parties to freeze Defendants’ assets in their custody or control. The  
16 Court has the authority to direct its order to such third parties to preserve assets  
17 that are easily dissipated and may be difficult or impossible to trace. *See Deckert*  
18 *v. Independence Shares Corp.*, 311 U.S. 282, 289-90 (1940); *United States v. First*  
19 *Nat’l City Bank*, 379 U.S. 378, 385 (1965); *Waffenschmidt v. Mackay*, 763 F.2d  
20 711, 714 (5th Cir. 1985).

21 **3. Appointment of a Temporary Receiver, Immediate Access**  
22 **to Defendants’ Business Records, Order to Preserve**  
23 **Evidence, and Limited Expedited Discovery**

24 A temporary receiver is appropriate “where necessary to prevent the  
25 dissipation of a defendant’s assets pending further action by the court” and to help  
26 preserve the status quo to allow an examination of the defendant’s past business  
27 transactions. *SEC v. American Board of Trade, Inc.*, 830 F.2d 431, 436 (2nd Cir.  
28 1987). *See also Leone Indus. v. Assoc. Packaging Inc.*, 795 F. Supp. 117, 120

1 (D.N.J. 1992); *U.S. Oil & Gas*, 748 F.2d at 1432. A receiver is necessary to take  
2 control of the Corporate Defendants' operations, prevent the destruction of  
3 documents and computer records, help identify injured consumers and the extent of  
4 consumer harm, determine the corporate defendants' financial status, and locate,  
5 marshal and safeguard corporate assets. *See SEC v. First Fin. Grp. of Tex.*, 645  
6 F.2d 429, 438 (5th Cir. 1981).

7 The proposed TRO would also allow the FTC and the receiver immediate  
8 access to Defendants' business premises and direct Defendants to preserve records,  
9 including electronically stored information, and evidence. These provisions will  
10 allow the FTC and the receiver to inventory and collect Defendants' records and  
11 assets as soon as possible after Defendants learn of this action and decrease  
12 Defendants' opportunities to destroy, hide, or alter their business records and to  
13 dissipate their assets.

14 The proposed TRO includes a provision which would allow the FTC and  
15 receiver to conduct limited expedited discovery regarding the existence and  
16 location of documents and assets. This type of discovery order is permitted under  
17 FRCP 26(d), 33(a), and 34(b). *See also Federal Express Corp. v. Federal*  
18 *Expresso, Inc.*, 1997 U.S. Dist. LEXIS 19144, at \* 6 (N.D.N.Y. 1997) (early  
19 discovery "will be appropriate in some cases, such as those involving requests for a  
20 preliminary injunction") (quoting commentary to FRCP 26(d)).

21 **D. The Temporary Restraining Order Should Be Issued *Ex Parte* to**  
22 **Preserve the Court's Ability to Fashion Meaningful Relief**

23 FRCP 65(b) permits this Court to enter non-noticed *ex parte* orders under a  
24 clear showing that "immediate and irreparable injury, loss, or damage will result"  
25 if notice is given. Such orders are proper in cases where "notice to the defendant  
26 would render fruitless the further prosecution of the action." *Am. Can Co. v.*  
27 *Mansukhani*, 742 F.2d 314, 322 (7th Cir. 1984); *see also Granny Goose Foods,*  
28 *Inc. v. Bd. of Teamsters*, 415 U.S. 423, 439 (1974); *In re Vuitton et Fils, S.A.*, 606

1 F.2d 1, 4-5 (2d Cir. 1979). Where there is pervasive deception in the case, “it [is]  
2 proper to enter the TRO without notice, for giving notice itself may defeat the very  
3 purpose for the TRO.” *Cenergy Corp. v. Bryson Oil & Gas P.L.C.*, 657 F. Supp.  
4 867, 870 (D. Nev. 1987). Given Defendants’ conduct—including moving large  
5 sums between the Corporate Defendants’ accounts and to overseas and Individual  
6 Defendants’ accounts—and the nature of Defendants’ illegal scheme, it is highly  
7 likely that Defendants will conceal or dissipate assets absent *ex parte* relief. Thus,  
8 it is in the interest of justice to waive the notice requirement of Local Rule 7-19.2.

9 **V. CONCLUSION**

10 Defendants’ deceptive and unfair practices have caused substantial injury to  
11 consumers, and this injury will grow absent the Court’s intervention. The FTC  
12 thus requests that this Court issue the proposed temporary restraining order with  
13 asset freeze, appointment of a temporary receiver over the corporate defendants,  
14 and other equitable relief, including expedited discovery, and order to show cause  
15 why a preliminary injunction should not be entered and why a permanent receiver  
16 should not be appointed over the corporate defendants.

17  
18 Dated: **JUL 1 2014**

Respectfully submitted,

19 David Shonka  
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