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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

OCT 30 2017 DC

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

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FEDERAL TRADE COMMISSION, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 A1 JANITORIAL SUPPLY CORP., )  
 a dissolved Illinois corporation, also doing )  
 business as A One Janitorial, )  
 )  
 CENTURY MANUFACTURING CORP., )  
 a New York corporation, also doing )  
 business as A-1 Janitorial Supply, )  
 )  
 COMMERCIAL MAINTENANCE CHEMICAL )  
 CORP., a New York corporation, also )  
 doing business as CMC, )  
 )  
 GLOBAL DIRECT RESOURCES, INC., )  
 a New York corporation, also doing )  
 business as A-1 Janitorial, Century )  
 Manufacturing, Commercial Maintenance )  
 Chemical, and Target Supplies, )  
 )  
 ERIC STERNBERG, )  
 individually and as an officer of A1 )  
 Janitorial Supply Corp., Century )  
 Manufacturing Corp., Commercial )  
 Maintenance Chemical Corp., and Global )  
 Direct Resources, Inc., )  
 and )  
 )  
 MATTHEW STERNBERG, )  
 individually and as an officer of Century )  
 Manufacturing Corp. and Commercial )  
 Maintenance Chemical Corp., )  
 )  
 Defendants. )

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Case No.

1:17-cv-07790  
Judge Samuel Der-Yeghiayan  
Judge M. David Weisman

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

**I. INTRODUCTION**

The Federal Trade Commission ("FTC") asks this Court to halt a predatory telemarketing scheme in which Defendants offer small businesses and other organizations a free sample of a cleaning product, but then send multiple shipments of the product followed by invoices demanding payment each time. After shipping the purportedly free sample, typically a large bucket of powdered sewer drain cleaner, Defendants send an invoice demanding the payment of approximately \$130 for the product and shipping. Defendants then repeatedly ship additional buckets of the product, often in ever-larger quantities, followed by invoices seeking commensurately larger payments, despite the fact that consumers never ordered these shipments. Many consumers pay these invoices, mistakenly believing someone within their organization ordered and agreed to pay for the shipments. Defendants' victims include small businesses, municipalities, and charitable organizations ("consumers") throughout the United States and Canada, including consumers in this district. Defendants' practices have generated more than 700 complaints and caused millions of dollars in losses.

The FTC brings this motion *ex parte* to halt this operation immediately, to freeze its assets, and to appoint a temporary receiver over the business. The requested relief is supported by overwhelming evidence, including dozens of sworn declarations from Defendants' victims and declarations from Better Business Bureaus ("BBB"), which have received hundreds of complaints about Defendants. The evidence shows that Defendants are violating multiple federal consumer protection laws:

- 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 Telemarketing Sales Rule, 16 C.F.R. Part 310 (“TSR”), which implements the Telemarketing Act, 16 U.S.C. §§ 6101-6108, and prohibits unfair, deceptive, or abusive telemarketing practices; and
- Subsections (a) and (c) of the Unordered Merchandise Statute, 39 U.S.C. § 3009(a) and (c), which prohibit sending and billing for unordered merchandise.

Defendants have continued these violations since at least 2012 despite a flood of complaints, BBB business alerts warning the public about Defendants, and a consent decree obtained by the Kansas Attorney General barring Defendants from doing business in that state.<sup>1</sup> Defendants’ scheme has generated more than \$15 million.<sup>2</sup>

Defendants’ widespread pattern of fraud strongly suggests that they would hide or dissipate assets if they received notice of this action. The requested relief is necessary and appropriate to preserve the Court’s ability to provide effective final relief, including eventual restitution to the victims.

## **II. DEFENDANTS’ UNLAWFUL BUSINESS PRACTICES**

Defendants call consumers and offer to send a free product sample. After the calls, Defendants ship the product, typically a powdered drain cleaner. Later, they mail or fax an invoice demanding payment, usually about \$130 for the product and shipping. Defendants send

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<sup>1</sup> See, e.g., Plaintiff’s Exhibit (“PX”) 1 Menjivar (FTC Investigator) ¶¶ 40-41 (describing complaints); PX 2 (BBB Manitoba) ¶ 10, Att. A (alerts & actions) at 2-4; PX 3 (BBB NY) ¶ 10, ¶ 14 (alert); PX 4 (BBB NJ) ¶ 8, ¶ 12 (alert) Att. A at 2; PX 5 (BBB Chicago) ¶ 10 Att. A; PX 1 Menjivar ¶¶ 37-39, Att. S (consent decree).

<sup>2</sup> See, e.g., PX 1 Menjivar ¶¶ 31d, 32d (over \$17 million into account opened by Century Mfg. dba A-1 Janitorial Supply (Att. Q at 2, 4)); PX 3 (BBB NY) ¶¶ 13-15 (describing Century Mfg.’s unordered merchandise scheme).

the sample even to consumers who specifically state in the telemarketing call that they do not wish to receive it.<sup>3</sup>

Defendants' invoices typically list the name of the person who received the initial telemarketing call offering the free sample.<sup>4</sup> The person listed on the invoice often is not the person who pays the organization's bills.<sup>5</sup> When consumers refuse to pay for the purportedly free sample, Defendants insist that the person whose name is listed on the invoice ordered the product and agreed to pay for it.<sup>6</sup> Some consumers pay the invoice, not realizing that the person listed on the invoice did not order or agree to pay for the product.

Following the initial shipment, Defendants then often ship increasingly larger amounts of the product and invoice consumers for increasingly more money.<sup>7</sup> When consumers complain about repeat deliveries of unordered merchandise, Defendants claim that they had to make

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<sup>3</sup> PX 6 Clodfelter (Archdale, NC) ¶¶ 3,4; PX 10 Houghton (Hermann's European Café, Cadillac, MI) ¶¶ 3,4; PX 12 Eubanks (Residence Inn, Cincinnati, OH) ¶¶ 3,4; PX 19 Hendrix (Claremore, OK) ¶ 5; PX 27 Wilson (Bishopville, SC) ¶ 3.

<sup>4</sup> PX 6 Clodfelter (Archdale, NC) ¶ 4 (Att. A); PX 14 Lyster (Picture Butte, AB, Canada) ¶ 3 (Att. A); PX 20 Kadakia (Quality Inn, Wickenburg, AZ) ¶10 (Att. B); PX 22 Markley (Miami Indians of Indiana, Peru, IN) ¶ 6 (Att. A); PX 23 Nix (Hamilton, AL) ¶ 4 (Att. A); PX 24 Pearce (Holiday Inn, Ocean City, MD) ¶5 (Att. B); PX 26 Skippergosh (Odawa Casino Resort, Petoskey, MI) ¶ 5 (Att. B); PX 27 Wilson (Bishopville, SC) ¶ 7 (Att. C).

<sup>5</sup> *E.g.*, PX 7 Ehmig (Archdale) ¶¶ 3, 8; PX 11 McCann (Hermann's European Café, Cadillac, MI) ¶¶ 2-3; PX 13 Quinn (Residence Inn, Cincinnati, OH) ¶¶ 2-4; PX 14 Lyster (Picture Butte, AB, Canada) ¶¶ 2-4; PX 16 Davis (Clarksville, TN) ¶¶ 2-3; PX 19 Hendrix (Claremore, OK) ¶¶ 2-6; PX 22 Markley (Miami Indians of Indiana, Peru, IN) ¶¶ 2,6; PX 23 Nix (Hamilton, AL) ¶¶ 2, 4; PX 24 Pearce (Holiday Inn, Ocean City, MD) ¶¶ 2, 5; PX 25 Pedersen (Willits, CA) ¶¶ 2-3, 5; PX 26 Skippergosh (Odawa Casino Resort, Petoskey, MI) ¶¶ 3, 5; PX 27 Wilson (Bishopville, SC) ¶¶ 2, 5-6.

<sup>6</sup> PX 11 McCann (Hermann's European Café, Cadillac, MI) ¶ 4; PX 18 Hackett (Elberton, GA) ¶¶ 3-4; PX 23 Nix (Hamilton, AL) ¶ 11.

<sup>7</sup> PX 13 Quinn (Residence Inn, Cincinnati, OH) ¶¶ 3, 5, 7, 10-11 (first bill for \$132.75, second bill for \$133.87, third bill for \$346.04, fourth bill for \$562.61); PX 16 Davis (Clarksville, TN) ¶¶ 3, 10 (first bill for \$131.91, second bill for \$342.14); PX 18 Hackett (Elberton, GA) ¶¶ 3,8 (first bill \$133.95 for a pail, bill for \$358.13 for larger second shipment); PX 20 Kadakia (Quality Inn, Wickenburg, AZ) ¶¶ 5, 10 (first bill for \$131.26, second bill for \$358.05 for remainder of first shipment); PX 22 Markley (Miami Indians of Indiana, Peru, IN) ¶ 6 (first bill for \$131.93, second bill for \$331.73, third bill for \$531.53, fourth bill for \$995.19); PX 23 Nix (Hamilton, AL) ¶¶ 3, 4, 10 (first bill \$134.36 for three gallons, second bill \$289.28 for five gallons); PX 24 Pearce (Holiday Inn, Ocean City, MD) ¶¶ 4-8 (first bill for \$132.46 for two gallons, second bill for \$313.18, third bill for \$576.93); PX 25 Pedersen (Willits, CA) ¶¶ 5, 8 (first bill for \$132.46, second bill for \$357.73).

multiple shipments to fulfill a single order because the initial order was incomplete or damaged in shipping.<sup>8</sup> Defendants typically refuse to cancel invoices or to accept returns, often claiming that they cannot accept returns because the product is a chemical.<sup>9</sup>

Defendants aggressively pursue collection of supposedly overdue accounts. Consumers who do not pay receive correspondence dunning them for payment, including letters, past due notices, account statements, and multiple copies of the original invoice.<sup>10</sup> Some consumers also have received collection calls.<sup>11</sup> During these calls, Defendants insist that the employee named on the invoice placed an order.<sup>12</sup>

In their correspondence with consumers, Defendants use mail drop addresses to conceal the true location of their business. The addresses listed on their invoices and dunning correspondence are mail drops located in Chicago, Illinois, Thunder Bay, Ontario, Canada, and Summit, New Jersey.<sup>13</sup> Invoices listing the Chicago and Thunder Bay addresses identify Defendants' business as A1 Janitorial Supply, and invoices from the Summit mail drop identify

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<sup>8</sup> PX 18 Hackett (Elberton, GA) ¶ 9; PX 21 Lee (Farwell, MI) ¶¶ 7-8; PX 22 Markley (Miami Indians of Indiana, Peru, IN) ¶ 4; PX 24 Pearce (Holiday Inn, Ocean City, MD) ¶ 6; PX 25 Pedersen (Willits, CA) ¶ 16.

<sup>9</sup> PX 20 Kadakia (Quality Inn, Wickenburg, AZ) ¶ 11; PX 21 Lee (Farwell, MI) ¶¶ 10, 12; PX 22 Markley (Miami Indians of Indiana, Peru, IN) ¶ 11; PX 23 Nix (Hamilton, AL) ¶ 11.

<sup>10</sup> PX 7 Ehmig (Archdale, NC) ¶¶ 11, 14, 15; PX 8 Nurse (Archdale, NC) ¶¶ 8, 11; PX 11 McCann (Hermann's European Café, Cadillac, MI) ¶ 5; PX 17 Gatlin (Burr Ridge, IL) (CMC) ¶ 10; PX 18 Hackett (Elberton, GA) ¶ 6; PX 23 Nix (Hamilton, AL) ¶ 8; PX 26 Skippergosh (Odawa Casino Resort, Petoskey, MI) ¶¶ 10-14; PX 27 Wilson (Bishopville, SC) ¶¶ 7, 9.

<sup>11</sup> PX 7 Ehmig (Archdale, NC) ¶¶ 5, 6, 12; PX 14 Lyster (Picture Butte, AB, Canada) ¶ 10-12; PX 16 Davis (Clarksville, TN) ¶ 6; PX 17 Gatlin (Burr Ridge, IL) (CMC) ¶¶ 9, 10; PX 19 Hendrix (Claremore, OK) ¶ 10.

<sup>12</sup> PX 19 Hendrix (Claremore, OK) ¶ 12.

<sup>13</sup> PX 1 ¶¶ 10, 11, 16 (Chicago, Summit, Thunder Bay are UPS mailboxes); Defendants also used a mail drop in Mississauga, ON (¶ 17 (Pakmail)). They have recently continued their scheme as "Target Supplies," sending an invoice for \$135 to Glen Ellyn, IL in February 2017 (¶ 41, Att. V, 1-3, Invoice at 2)). "Target Supplies" is an alias of Global (PX 1 ¶ 31e, Att. R (bank account)). It uses domain names registered by Matthew Sternberg (PX 1 ¶¶ 33, 34) (listed on Glen Ellyn invoice (PX1 Att. V, 2) and a Philadelphia mail drop (PX 1 ¶ 15 (UPS) (at same address listed on Glen Ellyn invoice, PX 1 Att. V, 2)).

the business as A One Janitorial.<sup>14</sup> Defendants' invoices, however, list the same telephone number that they acquired in 2014: (888) 293-5820.<sup>15</sup> Defendants' history of complaints, and their failure to resolve those complaints, have generated an F rating from the three BBBs serving the areas where the mail drops are located.<sup>16</sup> The FTC's internal database of complaints and the files of BBBs where the mail drops are located are replete with complaints about Defendants' delivery of, and billing for, merchandise consumers either did not order or agree to purchase.<sup>17</sup>

### III. DEFENDANTS

Defendants are a dissolved Illinois corporation (**A1 Janitorial Supply Corp. ("A1 Janitorial")**)<sup>18</sup> and three New York corporations (**Century Manufacturing Corp. ("Century")**, **Commercial Maintenance Chemical Corp. ("Commercial Maintenance")**, and **Global Direct Resources, Inc. ("Global")**) controlled by the Individual Defendants, **Eric and Matthew Sternberg**, who are brothers. Eric Sternberg is and/or has held himself out as the president of all four Corporate Defendants and the CEO of Century and Commercial Maintenance.<sup>19</sup> He signed documents to open, and is a signatory on, the corporations' known bank accounts.<sup>20</sup> He opened the mail drops in Chicago, Illinois, and Summit, New Jersey.<sup>21</sup> Matthew Sternberg is and/or has held himself out as the president, secretary, and treasurer of Century; the vice president and

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<sup>14</sup> E.g., PX 12 Eubanks ¶ 4 (Att. A) and PX 13 Quinn ¶ 3 (Att. A) (Residence Inn, Cincinnati, OH) (Chicago invoices); PX 14 Lyster ¶ 3 (Att. A) and PX 15 West ¶ 4 (Att. A) (Picture Butte, AB, Canada) (Thunder Bay invoices); PX 16 Davis (Clarksville, TN) ¶ 3 (Att. A) (Summit invoice).

<sup>15</sup> PX 1 Menjivar ¶ 35; *Compare, e.g.*, PX 12 Att. A, PX 16 Att. A, PX 14 Att. A.

<sup>16</sup> PX 2 (BBB Manitoba) ¶ 9 Att. A at 1, 2; PX 4 (BBB NJ) ¶ 9 Att. A at 1, 2, 5, 7; PX 5 (BBB Chicago) ¶ 10 Att. A.

<sup>17</sup> PX 1 Menjivar ¶¶ 41, 42 Att. V (complaints); PX 2 (BBB Manitoba) ¶ 10; PX 3 (BBB NY) ¶ 10; PX 4 (BBB NJ) ¶ 8; PX 5 (BBB Chicago) ¶ 10.

<sup>18</sup> The corporation was involuntarily dissolved on April 14, 2017, for failing to file an annual report and failing to pay related fees. PX 1 Menjivar ¶ 6 Att. A. Suit against a dissolved Illinois corporation is permitted for five years after dissolution. 805 Ill. Comp. Stat. 5/12.80 (2015).

<sup>19</sup> PX 1 Menjivar ¶¶ 6-9 Atts. B-C (CEO Century, Commercial Maintenance), Att. A at 2 (pres. A1 Janitorial), ¶ 31 Atts. N-R (pres. Century, Commercial Maintenance, Global).

<sup>20</sup> PX 1 Menjivar ¶ 31 (all corporations except A1 Janitorial (Plaintiff is unaware of whether it has a separate bank account)).

<sup>21</sup> PX 1 Menjivar ¶¶ 10, 11 Atts. E-F.

secretary of Commercial Maintenance; and the controller of Global.<sup>22</sup> He signed documents to open, and is a signatory on, Century and Commercial Maintenance bank accounts.<sup>23</sup> He arranged for Internet domain names and telephone service including telephone number (888) 293-5820.<sup>24</sup> Both brothers signed as officers of Century, Commercial Maintenance, and Global to arrange for merchant accounts to process credit and debit card payments.<sup>25</sup>

The Corporate Defendants operate as a common enterprise, and, as such, are jointly and severally liable for their violations of the FTC Act, the TSR, and the Unordered Merchandise Statute.<sup>26</sup> The Corporate Defendants share the same officers, operate a common scheme, and commingle funds.<sup>27</sup> Century has used the same merchant accounts as A-1 Janitorial and Global.<sup>28</sup> Global has held itself out as doing business as the other three corporations, and consumer checks have been deposited into its accounts.<sup>29</sup> Although Defendants purport to have different addresses and use mail drops to convey that impression, they all operate from the same physical business location in Farmingdale, New York.<sup>30</sup>

#### IV. ARGUMENT

Defendants' deceptive scheme violates the FTC Act, the TSR, and the Unordered Merchandise Statute. To prevent further injury to consumers, the FTC asks that the Court issue

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<sup>22</sup> PX 1 Menjivar ¶ 8e, Att. C (Commercial Maintenance sec'y), ¶ 31d (Century sec'y and treasurer), ¶ 31a (Commercial Maintenance vice president), ¶ 31b (Commercial Maintenance sec'y) ¶ 13 (Century pres.), ¶ 28c (Global controller).

<sup>23</sup> PX 1 Menjivar ¶ 31a, b, d Atts. N-O, Q.

<sup>24</sup> PX 1 Menjivar ¶¶ 33-36.

<sup>25</sup> PX 1 Menjivar ¶¶ 18-29 Atts. G-M.

<sup>26</sup> See *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1011 (N.D. Ind. 2000) (citing *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973)), *aff'd*, 312 F.3d 259 (7th Cir. 2002); *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746-47 (2nd Cir. 1964).

<sup>27</sup> E.g., PX 1 Menjivar ¶ 32f-i (transfers among Century, Commercial Maintenance, and Global).

<sup>28</sup> PX 1 Menjivar ¶¶ 21, 24-27.

<sup>29</sup> PX 1 Menjivar ¶ 31e; E.g., PX 22 Markley Att. A at 6.

<sup>30</sup> Despite their physical location in New York, suit is proper in this district because Defendants include an Illinois corporation, they maintain a Chicago mail drop where they collect payments from their victims, and their victims include numerous residents of this district. See 28 U.S.C. § 1391(b)(2).

*ex parte* the proposed Temporary Restraining Order (“TRO”). This order would enjoin Defendants’ ongoing law violations and provide other equitable relief designed to preserve the Court’s ability to provide restitution to victims.

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

“[I]n proper cases the Commission may seek, and after proper proof, the Court may issue, a permanent injunction.” 15 U.S.C. § 53(b). Once the FTC invokes the Court’s equitable powers, the full breadth of the Court’s authority is available, including the power to grant such ancillary final relief as rescission of contracts and restitution. *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989). The Court also may enter a temporary restraining order, a preliminary injunction, and whatever additional preliminary relief is necessary to preserve the possibility of providing effective final relief. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988). Such ancillary relief may include an asset freeze to preserve assets for eventual restitution to victimized consumers, *World Travel*, 861 F.2d at 1031, and the appointment of a receiver. *See, e.g., FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432 (11th Cir. 1984).

**B. The FTC Meets the Standard for Issuing a Temporary Restraining Order and Preliminary Injunction.**

To grant preliminary injunctive relief, the Court must: (1) determine the likelihood that the FTC will ultimately succeed on the merits, and (2) balance the equities. *World Travel*, 861 F.2d at 1029. Under this “public interest” test, “it is not necessary for the FTC to demonstrate irreparable injury.” *Id.* In balancing the equities, the public interest “must receive far greater weight” than any private concerns. *Id.* As detailed below, the FTC has demonstrated that it will succeed on the merits and that the balance of equities favors injunctive relief.



**1. The FTC is Likely to Succeed on the Merits.**

Defendants' deceptive practices squarely violate the FTC Act, multiple provisions of the TSR, and the Unordered Merchandise Statute.

**a. Count One: Defendants Violate Section 5(a) of the FTC Act.**

Defendants' misrepresentations that they will send a sample of goods at no cost to consumers and that consumers have agreed to pay for the goods that Defendants ship to them are deceptive acts or practices that violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). An act or practice is deceptive if it involves a material misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances. *See FTC v. Bay Area Bus. Council*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. World Media Brokers*, 415 F.3d 758, 763 (7th Cir. 2005); *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 957 (N.D. Ill. 2006). The materiality requirement is satisfied if the misrepresentation or omission involves information that is likely to affect a consumer's choice of, or conduct regarding, a product or service. *See Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). Reliance on express claims is presumptively reasonable. *See World Travel*, 861 F.2d at 1029. In deciding whether particular statements are deceptive, courts must look to the overall net impression of consumers. *See FTC v. US Sales Corp.*, 785 F. Supp. 737, 745 (N.D. Ill. 1992).

Defendants call consumers and falsely claim that they will send only a free product sample at no cost to the consumer. Instead, Defendants follow the delivery of the purportedly free sample with an invoice demanding payment. Defendants' invoices list the name of an employee, typically obtained during the earlier telemarketing call, as if that employee had agreed to pay for the goods. Some consumers pay the invoice without realizing the employee listed on it agreed at most to receive a free sample, and, sometimes, did not even agree to that. When

consumers resist paying, Defendants pressure them with dunning correspondence and collection calls in which Defendants insist that the employee listed on the invoice agreed to purchase their products. Defendants' misrepresentations are material because they have caused consumers to pay millions of dollars for merchandise that they did not order or agree to purchase.

**b. Defendants Violate the TSR.**

The TSR implements the Telemarketing Act, 15 U.S.C. §§ 6101-08, and prohibits various deceptive and abusive telemarketing practices. Although telemarketing calls to businesses generally are exempt from the TSR, telemarketing calls to businesses to induce the retail sale of nondurable office or cleaning supplies are subject to the TSR.

16 C.F.R. § 310.6(b)(7). In promulgating the rule, the FTC observed that:

[T]he Commission's enforcement experience against deceptive telemarketers indicates that office and cleaning supplies have been by far the most significant business-to-business problem area; such telemarketing falls within the Commission's definition of deceptive telemarketing acts or practices.

60 Fed. Reg. 43842, 43861 (Aug. 23, 1995). A violation of the TSR is also a violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). *See* 15 U.S.C. § 6102(c), 15 U.S.C. § 57a(d)(3).

**i. Count II: Defendants Misrepresent the Total Cost of Goods.**

TSR Section 310.3(a)(2)(i) prohibits sellers and telemarketers from misrepresenting "the total costs to purchase, receive, or use" goods or services. 16 C.F.R. § 310.3(a)(2)(i). By misrepresenting that they would send consumers a free sample of their goods and then charging consumers more than one hundred dollars for it, Defendants have violated Section 310.3(a)(2)(i) of the TSR.

**ii. Count III: Defendants Misrepresent that They Would Send a Sample of Goods at No Charge and that Consumers Agreed to Purchase those Goods.**

TSR Section 310.3(a)(4) prohibits sellers and telemarketers from making misrepresentations to induce payment for goods or services. 16 C.F.R. § 310.3(a)(4). By misrepresenting that they would send a free sample of goods, and that consumers had ordered and agreed to pay for those goods, Defendants have violated Section 310.3(a)(4) of the TSR.

**iii. Count IV: Defendants Fail to Disclose that the Purpose of Their Telephone Call is to Sell Goods.**

TSR Section 310.4(d)(2) requires telemarketers in outbound calls to disclose clearly and conspicuously to the person receiving the call that the purpose of the call is to sell goods or services. 16 C.F.R. § 310.4(d)(2). By claiming to offer a free product sample during outbound calls to consumers, without disclosing that the real purpose of the call is to charge consumers for the purportedly free sample and to obtain an employee's name to put on invoices for subsequent, unordered shipments of the product, Defendants have violated Section 310.4(d) of the TSR.

**c. Count V: Defendants Violate the Unordered Merchandise Statute and FTC Act.**

The Unordered Merchandise Statute, 39 U.S.C. § 3009(a), prohibits sending merchandise without the prior expressed request or consent of the recipient, unless the merchandise is clearly and conspicuously marked as a free sample or is sent by a charitable organization soliciting contributions. 39 U.S.C. § 3009(a). The statute further prohibits sending bills or dunning communications for unordered goods. 39 U.S.C. § 3009(c). Violating the statute also violates Section 5(a)(1) of the FTC Act. 39 U.S.C. § 3009(a). In FTC actions, the standards of the Unordered Merchandise Statute apply regardless of whether materials are sent by United States mail or some other means. *See* 43 Fed. Reg. 4113 (Jan. 31, 1978); *see also UMG Recordings, Inc. v. Augusto*, 558 F. Supp. 2d 1055, 1062 n.5 (C.D. Cal. 2008). Moreover, even if a consumer consents to an initial shipment, sending subsequent shipments and billing for those shipments is unlawful. *See Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1173-74 (1st Cir. 1973).

Defendants offer to send a free sample, and then ship merchandise, followed by invoices, dunning correspondence, and collection calls seeking payment for the purportedly free sample. Defendants conduct violates subsections (a) and (c) of the Unordered Merchandise Statute and therefore the FTC Act *per se*.

**d. Defendants Eric and Matthew Sternberg are Individually Liable.**

Defendants Eric and Matthew Sternberg are responsible for the Corporate Defendants' activities and therefore should be subject to the temporary restraining order and asset freeze. Under the FTC Act, an individual defendant is liable for corporate misconduct if he (1) participated directly in, or had some control over, a corporation's deceptive practices; and (2) had actual or constructive knowledge of the practices, or an awareness of a high probability of fraud coupled with an intentional avoidance of the truth. *World Media Brokers*, 415 F.3d at 764; *Bay Area Bus. Council*, 423 F.3d at 636. The FTC does not need to show intent to defraud. *Amy Travel*, 875 F.2d at 573-74. The Sternbergs have directed and participated in the acts and practices of the Corporate Defendants and consequently have knowledge of those practices.

Eric Sternberg, as an officer of all four Corporate Defendants, and Matthew Sternberg, as an officer of two of them, plainly have authority to control those corporations. *See id.* at 573 ("Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer"). Both Eric and Matthew Sternberg opened corporate bank accounts and control the accounts as signatories. Eric Sternberg also opened mail drops to operate the scheme.

Not only do the Sternbergs control the Corporate Defendants, but they have actual knowledge that they, and the Corporate Defendants, are engaged in widespread fraud by shipping, and billing for, merchandise that they misrepresent as free or that consumers have not

ordered. The Sternbergs are officers of, and control, Commercial Maintenance Chemical Corp., which entered into a consent decree in 2013 with the State of Kansas banning the company from doing business in that state as a result of the very practices that are the subject of the FTC's Complaint here. BBBs also routinely forward complaints to the Corporate Defendants for response, and the complaints and F ratings are online, putting the Sternbergs on notice of the fraud committed by the corporations that they control.

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

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

## **C. The Scope of the Proposed TRO is Necessary and Appropriate.**

The evidence shows that the FTC is likely to succeed in proving that Defendants have engaged in deceptive and unlawful conduct, and the balance of equities strongly favors

protecting the public. Temporary injunctive relief preventing Defendants from continuing to engage in such misconduct, freezing Defendants' assets, and appointing a receiver is justified.

**1. The Conduct Relief is Necessary and Appropriate.**

The FTC is asking this Court to halt Defendants' scheme by (a) prohibiting Defendants from making further misrepresentations; and (b) enjoining Defendants from sending unordered merchandise, billing for such merchandise, and falsely offering free samples. This relief is consistent with that ordered in previous FTC actions in this District and others. *See, e.g., FTC v. Big Dog Sols. LLC*, No. 16-cv-6607 (N.D. Ill. June 28, 2016) (Blakey, J.) (*ex parte* TRO prohibiting deceptive conduct and further charging of consumers); *FTC v. Stark Law, LLC et al.*, No. 16-cv-3463 (N.D. Ill. Mar. 22, 2016) (Pallmeyer, J.) (*ex parte* TRO prohibiting deceptive conduct); *FTC v. Telear Consulting, Inc.*, No. CV-16-555-SJO (SSx) (C.D. Cal. Feb. 1, 2016) (*ex parte* TRO prohibiting sending and billing consumers for products they did not agree to buy).

**2. An Asset Freeze and the Appointment of a Receiver are Necessary and Appropriate.**

The relief the FTC ultimately will seek in this case includes restitution for the victims of Defendants' fraud. To preserve the possibility of such relief, the FTC seeks a freeze of Defendants' assets, an immediate accounting to prevent concealment or dissipation of assets, and appointment of a temporary receiver. These provisions are well within this Court's authority and are similar to provisions that other courts in this District have granted in prior FTC fraud cases. *See, e.g., Big Dog Sols.* No. 16-cv-6607; *Stark Law*, No. 16-cv-3463; *Caprice Marketing*, No. 13-cv-6072; *Apogee One Enterprises*, No. 12-cv-588.

An asset freeze is appropriate once the Court determines that the FTC is likely to prevail on the merits. *See World Travel*, 861 F.2d at 1031 & n.9. The district court at that juncture has "a duty to ensure that the assets of the corporate defendants [are] available to make restitution to

the injured consumers.” *Id.* at 1031. Here, a freeze would reduce the very tangible risk that Defendants would quickly conceal or dissipate funds. An asset freeze also is needed to prevent Defendants from moving their cash and other assets outside the United States. In a case such as this, in which the FTC is likely to succeed in showing that the Sternbergs are individually liable for the payment of restitution, the freeze should extend to individual assets as well. *See id.* (affirming freeze on individual assets); *see also FTC v. Datacom Mktg. Inc.*, 2006 WL 1472644, at \*5 (N.D. Ill. 2006) (freezing assets of individual and corporate defendants).

Appointing a temporary receiver to manage the Corporate Defendants also is necessary and appropriate. “[A] federal court’s authority to grant ancillary relief includes the authority to appoint a receiver.” *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1021 (N.D. Ind. 2000). The appointment of a receiver is appropriate upon a “prima facie showing of fraud and mismanagement.” *SEC v. Keller Corp.*, 323 F.2d 397, 403 (7th Cir. 1963). When, as here, Defendants have perpetrated a widespread fraud, a receiver would help assess the extent of the fraud, trace the proceeds of that fraud, prepare an accounting, and make an independent report of Defendants’ activities to the Court. Additionally, a receiver would prevent the destruction of documents and the dissipation of assets while the case is pending.

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

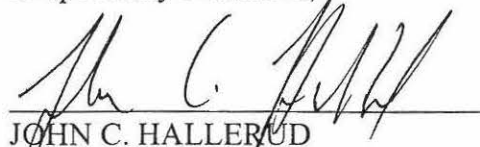
To prevent Defendants from dissipating or concealing their assets and destroying evidence, the requested TRO should be issued *ex parte*. An *ex parte* TRO is warranted when the facts show that immediate and irreparable injury, loss, or damage will occur before the defendants can be heard in opposition. *See* Fed. R. Civ. P. 65(b); *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 439 (1974) (*ex parte* TROs are available in order to “preserv[e] the status quo and prevent[ ]

irreparable harm.”). Here, assets and evidence stemming from the illegal activity are seriously at risk of disappearing if Defendants receive prior notice. The deceptive nature of Defendants’ scheme, their efforts to hide their involvement by using and switching DBAs and mail drops, and their continued operation despite hundreds of complaints and a court order in Kansas all indicate a high risk that Defendants will destroy documents and dissipate assets if given advance notice of the FTC’s motion.<sup>31</sup> Courts routinely grant the FTC’s requests for *ex parte* TROs in such circumstances. *See, e.g., Big Dog Sols.*, No. 16-cv-6607; *Stark Law*, No. 16-cv-3463; *Caprice Marketing*, No. 13-cv-6072; *Apogee One Enterprises* No. 12-cv-588.

**V. CONCLUSION**

For the above reasons, the FTC respectfully requests that the Court enter the proposed *ex parte* TRO to halt Defendants’ violations of the FTC Act, the TSR, and the Unordered Merchandise Statute and to help ensure the possibility of effective final relief for consumers. The Court should also require Defendants to show cause why a preliminary injunction should not issue.<sup>32</sup>

Respectfully submitted,



JOHN C. HALLERUD  
GUY G. WARD  
Federal Trade Commission  
230 South Dearborn Street, Room 3030  
Chicago, IL 60604  
(312) 960-5634 [telephone]  
(312) 960-5600 [facsimile]  
[jhallerud@ftc.gov](mailto:jhallerud@ftc.gov)  
[gward@ftc.gov](mailto:gward@ftc.gov)  
Attorneys for Plaintiff  
FEDERAL TRADE COMMISSION

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<sup>31</sup> *See* Declaration and Certification of Plaintiff’s Counsel pursuant to Fed. R. Civ. P. 65(b) and Local Rule 5.5(d).

<sup>32</sup> Along with this Memorandum, the FTC has submitted a proposed *Ex Parte* TRO.