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11
12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF NEVADA**

14
15 FEDERAL TRADE COMMISSION,

16 Plaintiff,

17 v.

18 3RD UNION CARD SERVICES INC.,
doing business as
19 PHARMACYCARDS.COM,
a Delaware Corporation; HELMCREST,
20 LTD., a company incorporated under the
laws of Cyprus, doing business as
21 Pharmacycards.com;

22 DAVID GRAHAM TURNER, and
STEVE PEARSON, individually and as
23 officers of the above companies,

24 Defendants.

CV-

**MEMORANDUM OF POINTS
& AUTHORITIES IN
SUPPORT OF PLAINTIFF'S
APPLICATION FOR A TRO
AND ORDER TO SHOW
CAUSE WHY A
PRELIMINARY INJUNCTION
SHOULD NOT ISSUE**

25 **I. INTRODUCTION**

26 The Federal Trade Commission ("FTC" or "Commission") respectfully requests
27 that this Court act to prevent defendants from debiting consumers' checking accounts
28

1 without authorization and to freeze the funds already stolen so that they may be returned
2 to victimized consumers. In little more than three months of operation, individuals
3 David Graham Turner and Steven Pearson, acting through 3rd Union Card Services dba
4 Pharmacards.com and HelmCrest, Ltd., dba Pharmacards.com, through
5 arrangements with third-party payment processors, were able to make unauthorized
6 debits of \$139 each from tens of thousands of consumers' checking accounts. The
7 defendants had no prior relationship with the consumers, but somehow obtained
8 possession of consumers' names and bank account numbers. Although more than two-
9 thirds of the unauthorized debits have been "returned," (credited back to consumers'
10 checking accounts), more than 15,000 consumers have yet to complain or seek a refund
11 and two million dollars remains in reserve accounts held by the processors. It is an
12 unfair practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), for
13 defendants to make these debits without consumers' knowledge or consent.

14 **II. THE PARTIES**

15 **A. Plaintiff**

16 The FTC is an independent agency of the United States government created by the
17 FTC Act, 15 U.S.C. § 41, *et seq.* The FTC is charged, among other things, with the
18 enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or
19 deceptive acts or practices in or affecting commerce. Section 13(b) of the FTC Act, 15
20 U.S.C. § 53(b), authorizes the FTC to initiate proceedings in federal district court to
21 enjoin violations of the FTC Act, as well as to obtain consumer redress and to secure
22 necessary equitable relief.

23 **B. Defendants**

24 Defendant **3rd Union Card Services, Inc.** ("3rd Union"), doing business as
25 Pharmacards.com, is a Delaware corporation.¹ Its mailing address is 555 Route 78,
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27 ¹ Declaration of FTC Investigator Lauren France ("France Dec."), ¶ 6, Exh. D,
28 pp. 159-60.

1 Swanton, Vermont.² Mail has also been directed to 3rd Union Card Services at 377
2 Edgware Road, London, England.³ 3rd Union is owned by defendant David Graham
3 Turner.⁴ 3rd Union contracted with Payment Resources International of Newport Beach,
4 California (“PRI”), to process ACH transactions on its behalf, using the Pharmacards
5 name.⁵ Payments owed to 3rd Union were wired by PRI to a bank account in Cyprus
6 held by HelmCrest, Ltd.⁶

7 Defendant **HelmCrest, Ltd.** (“HelmCrest”), also doing business as
8 Pharmacards.com, is a limited liability company organized under the laws of the
9 country of Cyprus.⁷ The company’s business address is Synyka Building, Nikis Avenue,
10 Nicosia, Cyprus.⁸ In their applications with payment processors, the individual
11 defendants have also claimed that HelmCrest’s address is 377 Edgware Road, London,
12 England⁹ and 37B New Cavendish St., London, England.¹⁰ HelmCrest contracted with
13 payment processors InterBill, Ltd. (“InterBill”), of Las Vegas, Nevada, and Universal
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17 ² This is a mail drop registered to Small America Corporation, the company that
18 incorporated 3rd Union at the request of Turner and Pearson. France Dec., ¶ 6, Exh. D,
pp. 151, 153, 159, 161.

19 ³ France Dec., ¶ 6, Exh. D, p. 154.

20 ⁴ France Dec., ¶ 6, Exh. D, pp. 154, 157, 159, 161.

21 ⁵ France Dec., ¶ 4, Exh. B, pp. 74-78.

22 ⁶ France Dec., ¶ 4, Exh. B, pp. 86-87.

23 ⁷ France Dec., ¶ 3, Exh. A, pp. 17-19.

24 ⁸ France Dec., ¶ 5, Exh. C, p. 135.

25 ⁹ France Dec., ¶ 4, Exh. C, pp. 88-89, 93. This is also the address listed on the
26 website for Creditcardpay.net, a company that Turner advised the payment processors
27 was his “current processor.” France Dec., ¶ 3, Exh. A, p. 34, France Dec., ¶ 16, Exh. S,
p. 274. We note that the contact person for Creditcardpay.net is Steve Pearson. France
Dec., ¶ 16, Exh. S, p. 276.

28 ¹⁰ France Dec., ¶ 3, Exh. A, pp. 1-2.

1 Processing, Inc. (“UP”), of Irvine, California, to process demand drafts and ACH
2 transactions for Pharmacycards.¹¹ All payments from InterBill and UP to HelmCrest
3 were wired to the same bank account in Cyprus where PRI wired payments to 3rd
4 Union.¹² Defendant Turner also owns HelmCrest.¹³

5 Defendant **David Graham Turner** owns both 3rd Union and HelmCrest.¹⁴
6 According to the copy of the passport he provided to several payment processors, he is a
7 British citizen.¹⁵ Turner apparently resides in London, England.¹⁶

8 Defendant **Steve Pearson** is an officer or manager of 3rd Union and HelmCrest.¹⁷ In
9 emails to one payment processor he identifies himself as a “partner” in the business.¹⁸
10 We do not currently have a physical address for Steve Pearson, although he provided a
11 U.K. driver’s license number to one payment processor.¹⁹

12 **III. STATEMENT OF FACTS**

13 **A. Defendants’ Unauthorized Billing Scheme**

14 Defendants’ devised a simple plan to make substantial funds quickly. Conducting
15 business entirely by phone, facsimile and email, defendants obtained lists of consumer
16 names with associated checking account information, fashioned a website and a fake
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18 ¹¹ France Dec., ¶¶ 3 and 5, Exh. A, pp. 1-4; Exh. C, pp. 89-93.

19 ¹² France Dec., ¶¶ 3 - 5, Exh. A, pp. 36,39; Exh. B, pp. 86-87; and Exh. C, p. 89.

20 ¹³ France Dec., ¶¶ 3 and 5, Exh. A, p. 4; Exh. C, pp. 88-89, 93, 135.

21 ¹⁴ See notes 4 and 13, *supra*.

22 ¹⁵ France Dec., ¶ 3.

23 ¹⁶ Turner has claimed both 377 Edgware Road and 78 York Street, London, England
24 as his home address on applications with payment processors and in other business
25 contracts. See France Dec., ¶¶ 3, 5, Exh. A, p. 35; Exh. C, p. 89. 377 Edgware Road is
the location of Central Services, an office services business in London, and neither
Turner’s home nor his companies’ offices are located there. See France Dec., ¶ 14.

26 ¹⁷ France Dec., ¶ 3, Exh. A, pp. 52-53, 55, 62-63, 65.

27 ¹⁸ France Dec., ¶ 3, Exh. A, pp. 1-2.

28 ¹⁹ France Dec., ¶ 3, Exh. A, p. 37.

1 fulfillment product to create the facade of a legitimate business sufficient to establish
2 arrangements with third-party payment processors, and watched the money accumulate.
3 They hired a third party customer service center to bear the brunt of calls from
4 complaining consumers and crafted plausible explanations for the banks and payment
5 processors concerning the skyrocketing return rates. Using this formula the defendants
6 bought themselves nearly a three-month time period in which to illegally debit
7 consumers' checking accounts. Even with high payment processing fees, funds held for
8 reserves, and ever-higher rates of returns, the defendants appear to have cleared
9 \$883,869 before the processing was terminated.²⁰

10 **1. The Pharmacard Facade**

11 Defendants claimed to operate a legitimate internet-based business offering
12 consumers a prescription drug discount card. The Pharmacards.com website touted
13 the benefits of the supposed program, promising that the discount card would be
14 accepted by most major retail pharmacies. Many of the country's largest retail pharmacy
15 chains, including, e.g., Krogers, Wal-Mart, and Target, were listed as "participating
16 pharmacies."²¹ However, it appears that there are no "participating pharmacies" that
17 have any relationship with Pharmacards.com and the major retailers have not
18 authorized the use of their names or logos.²² Moreover, the operators at defendants' toll-
19 free number (answered by a Montreal call center) and their website both referred
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24 ²⁰ France Dec., ¶¶ 3-5, Exh. A, pp. 5-6, Exh. B, p. 86, and Exh. C, p. 120. The
25 payment processors and banks also profited from this scheme, taking in more than \$1.5
26 million in fees.

27 ²¹ France Dec., ¶ 15, Exh. R, pp. 253-64.

28 ²² See Declaration of Mark Woolf, Director of Pharmacy, The Kroger Company,
Exh. Q, p. 252; France Dec., ¶ 9, Exh. G, pp. 194-96.

1 consumers to a physical address in Vancouver, British Columbia that was bogus.²³

2 There simply has never been any genuine “program” involved.

3 Defendants used this facade of legitimacy to contract with at least three payment
4 processors in the U.S. in November and December 2003.²⁴ In addition to the website,
5 defendants provided the payment processors with a draft of the letter and benefits card
6 supposedly sent to consumers,²⁵ business references,²⁶ a balance sheet for HelmCrest
7 circa 2002,²⁷ and corporate documents from HelmCrest.²⁸ The processors did not
8 initially ask for more information. Indeed, they did not even insist on complete
9 application information.²⁹

10 As the weeks went by and the return rates shot ever higher, Turner and Pearson both
11 engaged in stalling tactics to pacify the concerns of the payment processors. They
12 regularly urged the processors to quickly pay out funds to Helmcrest, aware that the
13 returns would soon become so unacceptably high that their cash spigot would close. For
14 example, when one customer’s bank asked a processor for the customer’s written or oral
15 authorization of the ACH transaction, Turner claimed to have looked up the information
16 and verified that the customer had “purchased an electronic product from one of the
17 online retailers we use as a secondary data source.”³⁰ Pearson regularly promised
18 improvements in the return rates being experienced by InterBill’s bank, claiming on one

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20 ²³ France Dec., ¶ 15, Exh. R, pp. 265-66. Mail sent there is returned to senders. *See*
21 *also* declaration of Jeanne Ferrari, Investigator, Office of Consumer Affairs, County of
22 Hunterdon, New Jersey (“Ferrari Dec.”), Exh. J., pp. 224, 228.

22 ²⁴ France Dec., ¶¶ 3-5. *See, e.g.*, Exh. B, pp. 80-81.

23 ²⁵ France Dec., ¶¶ 4- 5, Exh. B, p. 79, Exh. C, pp. 123-25.

24 ²⁶ France Dec., ¶¶ 3, 5, Exh. A, p. 34, Exh. C, p. 89.

25 ²⁷ France Dec., ¶¶ 3, 5, Exh. A, pp. 15-16, Exh. C, pp. 96-97.

26 ²⁸ France Dec., ¶¶ 3, 5, Exh. A, pp. 17-33, Exh. C, pp. 101-117.

27 ²⁹ France Dec., ¶ 5, Exh. C, p. 94; *see also* France Dec., ¶¶ 3, 4, Exh. A, pp. 49, 58,
28 Exh. B, pp. 82, 140-41.

³⁰ France Dec., ¶ 5, Exh. C, pp. 138-39.

1 occasion to “have taken receipt of the first sales files of the A+ sales files and the sales
2 numbers will increase dramatically overnight, we should be running a 70% Bank Rate
3 from next week, and i would like to sit down at this time and re-negotiate the deal
4 properly”³¹

5 **2. Accessing the Payment Processing System**

6 Between January and about March 17, 2004, defendants, through ACH transactions³²
7 and demand drafts,³³ attempted to debit more than 90,000 checking accounts for more
8 than \$12 million. Astronomical return rates averaging 69%, high numbers of consumer
9 and bank complaints, and negative publicity³⁴ caused defendants’ payment processors to
10 cease processing transactions for Pharmacards.com in late February and early March.³⁵
11 The website is now gone, too. Even though a substantial percentage of the transactions
12 were returned, enough transactions were successfully processed to allow more than \$3.5
13 million to be debited from checking accounts. Defendants were paid \$883,869 of that
14 amount by the processors, and a substantial percentage has been paid in processing fees
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18 ³¹ France Dec., ¶ 3, Exh. A, p. 46. (It is interesting to note that his best case scenario
19 still involved a return rate of 30% - far higher than industry averages.)

20 ³² The ACH Network is an electronic, batch-processing funds transfer system that
21 provides for the interbank clearing of credit and debit payments, such as direct deposit of
22 payroll, Social Security benefits and tax refunds, direct payment of consumer bills,
23 business-to-business payments, Federal tax payments, and so on. ACH payments are
24 subject to various Federal statutes and regulations, such as the Electronic Funds Transfer
25 Act (“EFTA”), and its implementing regulation, Regulation E (“Reg E”). Typically ACH
26 transactions require either written or taped, verbal authorization by the account holder.

27 ³³ Demand drafts are paper-based transactions and are not processed electronically
28 through the ACH Network, and therefore are not subject to NACHA Rules or Reg E.
Demand drafts are subject to state UCC laws.

³⁴ MSNBC carried an article about Pharmacards.com on March 16, 2004. *See*
Exh. N, pp. 241-44.

³⁵ InterBill ceased processing on or about March 15, 2004 (France Dec., ¶ 3, Exh. A,
p. 68); PRI ceased processing on or about March 2, 2004 (France Dec., ¶ 2, Exh. B,
p. 84); and UP ceased processing on or about February 23, 2004.

1 and to the customer call center in Montreal. More than \$2 million remains in reserve
2 accounts, not yet distributed.³⁶

3 **3. “Negative Option” Debiting**

4 Defendants had no relationship with consumers whose accounts they debited beyond
5 possessing their names, addresses and account numbers. They claimed to have obtained
6 the consumer information under a “Joint Venture Operating Agreement”³⁷ established
7 pursuant to New York law. Nonetheless, they had no legal right to debit consumers’
8 accounts without the prior knowledge and consent of the account holders.

9 In some cases, after their accounts were debited, some consumers received a letter
10 from Pharmacycards.com.³⁸ The letter was sent third-class bulk mail with the return
11 address of their Swanton, Vermont, mail drop. The letter enclosed a bogus “pharmacy
12 savings card” and advised consumers that the lifetime membership fee:

13 is charged one-time to your Checking or Savings account. . . . If you
14 decide that you do not want to receive or keep the Pharmacycards.com
15 savings card then simply call our customer service department . . . within 5
16 days of receiving this letter . . . and one of our customer service
17 representatives will gladly deal with your enquiry.³⁹

18 Because consumers accounts were debited prior to their receipt of this letter it was
19 impossible for them to avoid the charge by calling customer service. Steve Pearson
20 admitted to billing prior to shipment of the letters in an email to InterBill, exhorting
21 InterBill to pay them more quickly:

22
23 ³⁶ France Dec., ¶ 13.

24 ³⁷ France Dec., ¶ 5, Exh. C, pp.132-35. The Joint Venture - doing business as
25 “Pharmacycards.com”– provided that HelmCrest would provide the necessary
26 management expertise and the unidentified Joint Venturer would provide “it’s past and
present customer information databases consisting of, but not limited to, names, addresses
and credit card and checking account numbers.” Exh. C, p. 133.

27 ³⁸ France Dec., ¶¶ 6,7, Exh. D, p. 151, Exh. E, pp. 163, 165, 169.

28 ³⁹ Ferrari Dec., Exh. J, p. 226.

1 Please try and sort something out on payments this morning, as we really
2 need to try and get in front here with a regular payment plan, so that we
3 can get things well and truly organised on the front end, like i told you last
4 week, this week i want to get out of the “GREY” and into the pearl white
5 zone, and *start shipping before we bill*, and with the new data we will have
6 becoming available by Thursday, we will be netting a minimum of 70%
7 approved sales, and the balance will be entirely 100% accurate
8 (emphasis added).⁴⁰

9 Even if defendants had sent the letters prior to debiting consumers’ accounts, debiting
10 consumers’ accounts without authorization is illegal.⁴¹ Moreover, many consumers did
11 not recall receiving any mailing.⁴² With or without the letter, consumers could do
12 nothing to protect themselves from the unauthorized debits of their checking accounts.

13 **B. Consumer Injury**

14 Defendants attempted to debit over 90,000 checking accounts for \$139 each, without
15 the knowledge or authorization of the account holders. Although not all of these charges
16 went through to existing accounts (many debits were returned because of inactive
17 accounts or inaccurate account data), a large number did.⁴³ In some cases, the
18 unauthorized debits caused consumers’ accounts to be overdrawn and they incurred bad
19 check charges.⁴⁴ In other cases, the consumers may not have noticed and protested the
20 debit. For some consumers, even when they did protest, their banks refused to accept
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22 ⁴⁰ France Dec., ¶ 3, Exh. A, p. 44.

23 ⁴¹ See FTC Trade Regulation Rule Regarding Use of Negative Option Plans by
24 Sellers in Commerce, 16 C.F.R. Part 425.

25 ⁴² France Dec., ¶ 10, Exh. H, pp. 197-202, Exh. O, p. 246, Exh. P, p. 248. The letter,
26 mailed under a standard pre-sort mailing permit, resembles a direct mail solicitation and
27 could easily be mistaken for junk mail.

28 ⁴³ See, e.g., Exh. L, p. 236, Exh. N, p. 239.

⁴⁴ See, e.g., Ferrari Dec., Exh. J, concerning consumer John Oslovich who incurred
\$90 in bad check charges. See also France Dec. ¶ 10, Exh. H., pp. 197-202.

1 that the debit was unauthorized and the consumers were forced to pay the \$139 charge.⁴⁵
2 Even for consumers who successfully challenged the unauthorized debits, there was a
3 cost in time and effort.⁴⁶

4 Beyond the injury to the more than fifteen thousand consumers who have not received
5 refunds, the consumers' banks, too, suffered losses. One source estimates that it costs a
6 bank between \$15 and \$30 in customer service costs for each returned ACH
7 transaction.⁴⁷ It seems likely that the costs to handle demand draft returns are similar, if
8 not higher, because the banks have to handle the actual paper draft. Ultimately these
9 costs are passed on to all of the banks' customers.

10 **IV. JURISDICTION & VENUE**

11 Subject matter jurisdiction here is proper pursuant to 28 U.S.C. §§ 1331, 1337(a), and
12 1345. This Court has personal jurisdiction over the defendants, and venue is appropriate
13 in the District of Nevada. Federal statutes that permit service of process wherever the
14 defendant may be found, such as Section 13(b) of the FTC Act, 15 U.S.C. § 53(b),
15 authorize nationwide service of process.⁴⁸ Federal courts have routinely held that such
16 provisions authorize the exercise of personal jurisdiction over a foreign defendant who
17 has constitutionally sufficient minimum contacts with the United States as a whole. Go-
18 Video, Inc. v. Akai Elec. Co., 885 F.2d 1406, 1413-16 (9th Cir. 1989).

19 Using this national contacts approach, a court, after ascertaining that constitutionally
20 acceptable minimum contacts exist, must analyze whether the exercise of jurisdiction
21 over a foreign defendant offends traditional notions of fair play and substantial justice.

23 ⁴⁵ France Dec., ¶ 10, Exh. H, pp. 198-99, 201; Exh. P, p. 249.

24 ⁴⁶ Exh. M., p. 238, Exh. N, p. 239, Exh. O, pp. 245-46, Exh. P, pp. 248-250.

25 ⁴⁷ France Dec., ¶ 11, Exh. I, pp. 208-09.

26 ⁴⁸ Although the courts have yet to interpret the service of process provisions of
27 Section 13(b), the language of this statute is virtually identical to language in other
28 federal statutes, such as the Securities Exchange Act, 15 U.S.C. § 78aa, where courts have
applied the minimum national contacts analysis. See Securities Investor Protection Corp.
v. Vigman, 764 F.2d 1309, 1314-16 (9th Cir. 1985).

1 The constitutional analysis flows through the Due Process clause of the Fifth
2 Amendment, rather than the Fourteenth Amendment, because of the federal nature of the
3 inquiry. This analysis is fact-dependent and must be applied on a case-by-case basis, but
4 in general where, as here, a defendant has acted within any district of the United States
5 or sufficiently caused foreseeable consequences in this country, jurisdiction is conferred
6 in any federal district court. Securities Investor Protection Corp. v. Vigman, 764 F.2d
7 1309, 1316 (9th Cir. 1985); *see also* International Shoe Co. v. Washington, 326 U.S. 310
8 (1945) and its progeny, *e.g.*, Asahi Metal Indus. Co. v. Superior Court of California, 480
9 U.S. 102 (1987) (examining whether defendant purposefully availed itself of privilege of
10 conducting business in the forum and whether defendant's conduct in connection with
11 the forum is such that it should reasonably anticipate being haled into court there).

12 Here, the defendants' contacts with the United States far exceed the constitutional
13 minimum. Among other things, defendants have contracted with at least three U.S.
14 based payment processors that attempted to debit the U.S. checking accounts of tens of
15 thousands of consumers on behalf of defendants. They also contracted with a Vermont
16 company to incorporate 3rd Union in Delaware,⁴⁹ hired a U.S. mailing house to print and
17 send direct mail pieces to U.S. residents,⁵⁰ and entered into a joint venture pursuant to the
18 laws of New York to obtain lists of U.S. consumer names and checking account
19 numbers.⁵¹ In the course of this business venture they also communicated extensively
20 with U.S. payment processors, mailhouses and others by telephone, facsimile and
21 email.⁵² Under these circumstances, defendants have purposely availed themselves of
22 the privilege of doing business in the United States and can reasonably expect to be
23 haled into court in the United States.

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25 ⁴⁹ France Dec., ¶ 6, Exh. D, pp. 153-61.

26 ⁵⁰ France Dec., ¶ 7, Exh. E, pp. 162-86.

27 ⁵¹ France Dec., ¶ 5, Exh. C, p. 133.

28 ⁵² France Dec., ¶¶ 3-6, Exhs. A - E.

1 Venue is also proper in the District of Nevada. The defendants have transacted
2 business throughout the United States. As “aliens,” defendants may be sued in any
3 district court. 28 U.S.C. § 1391(d).⁵³ Additionally, pursuant to the FTC Act, an action
4 may be brought where a corporation or person “resides or transacts business.” See
5 U.S.C. § 53(b). Defendants have transacted business in Las Vegas, Nevada. Indeed,
6 through the Las Vegas payment processor, InterBill, more than \$2 million in cash
7 reserve accounts is located in this District.⁵⁴ Accordingly, this case is properly filed
8 here.

9 **V. ARGUMENT**

10 **A. SECTION 13(B) OF THE FTC ACT AUTHORIZES THIS COURT TO** 11 **GRANT THE REQUESTED RELIEF**

12 The FTC seeks a permanent injunction and equitable relief to redress the injury
13 caused by defendants' unfair practices. To prevent defendants from committing further
14 law violations pending resolution of this action, and to preserve the possibility of
15 effective final relief, the FTC also seeks a noticed temporary restraining order, expedited
16 discovery, an asset freeze and an order to show cause why a preliminary injunction
17 should not issue. This Court has the authority to grant the requested preliminary and
18 permanent relief pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), the All
19 Writs Act, 28 U.S.C. § 1651(a), and Rule 65 of the Federal Rules of Civil Procedure.
20 See also FTC v. Pantron I Corp., 33 F.3d 1088, 1102 (9th Cir. 1994).

21 Section 13(b) of the FTC Act (second proviso) provides that "in proper cases the FTC
22 may seek, and after proper proof, the Court may issue, a permanent injunction."⁵⁵ A

23
24 ⁵³ An alien is a person who is not a citizen of the United States or is a corporation
incorporated under the laws of a foreign country.

25 ⁵⁴ See, e.g., France Dec., ¶ 3, Exh. A, pp. 5-6.

26 ⁵⁵ The Commission proceeds under the second proviso of Section 13(b) which gives
27 the FTC the authority to bring a permanent injunction action in district court. FTC v.
H.N. Singer, Inc., 668 F.2d 1107, 1110-11 (9th Cir. 1982); see also FTC v. U.S. Oil &

28 (continued...)

1 "proper case" includes any matter involving a violation of a law the FTC enforces. FTC
2 v. Evans Products Co., 775 F.2d 1084, 1086-87 (9th Cir. 1985); FTC v. H.N. Singer,
3 Inc., 668 F.2d 1107, 1113 (9th Cir. 1982). In actions brought under Section 13(b), the
4 district court may exercise the full breadth of its equitable authority, including the
5 imposition of additional relief necessary to accomplish complete justice, such as
6 restitution to consumers. Singer, 668 F.2d at 1113. Incident to its authority to issue
7 permanent injunctive relief, this Court has the inherent equitable power to grant all
8 temporary and preliminary relief necessary to effectuate ultimate relief and accomplish
9 complete justice. *See* FTC v. World Wide Factors, 882 F.2d 344, 346-47 (9th Cir. 1989)
10 (affirming district court's power to freeze assets); Singer, 668 F.2d at 1110-13 (affirming
11 preliminary injunction and personal and corporate asset freeze).

12 **B. FTC Meets the Standard for Preliminary Relief**

13 To obtain a preliminary injunction, the FTC must show a likelihood of success on the
14 merits, and that the equities weigh in favor of granting the preliminary relief. FTC v.
15 Affordable Media, LLC, 179 F.3d 1228, 1233 (9th Cir. 1999). Harm to the public is
16 presumed. *Id.* *See also* United States v. Odessa Union Warehouse Co-op, 833 F.2d 172,
17 175 (9th Cir. 1987) (where injunction authorized by statute, enforcing agency need not
18 show irreparable injury). Because irreparable injury is presumed in statutory
19 enforcement cases, a federal agency need only demonstrate "some chance of probable
20 success on the merits" to obtain preliminary relief. Odessa Union, 833 F.2d at 176.
21 Further, in weighing the public and private equities in a statutory enforcement action,
22 public equities should receive greater weight. World Wide Factors, 882 F.2d at 347, *see*
23
24

25 ⁵⁵(...continued)
26 Gas Corp., 748 F.2d 1431, 1434 (11th Cir. 1984) ("Congress did not limit the court's
27 powers under the [second and] final proviso of Section 13(b)"). By contrast, the first
28 portion of the statute, through and including the first proviso, which was added two years
before the second proviso, is concerned with provisional injunctive relief in aid of an
administrative complaint. This first proviso is not relied upon in the current action.

1 *also Affordable Media*, 179 F.3d at 1236. The FTC easily meets this standard in the
2 present case.

3 **1. Overwhelming Evidence That FTC will Succeed on the Merits**

4 **a. Defendants Have Violated Section 5 of the FTC Act**

5 Defendants' billing of consumers' checking accounts without their authorization
6 constitutes an "unfair" practice in violation of the FTC Act. An act or practice is
7 "unfair" under the FTC Act if it causes injury to consumers that: (1) is substantial, (2) is
8 not outweighed by countervailing benefits to consumers or competition; and
9 (3) consumers themselves could not reasonably have avoided. 15 U.S.C. § 45(n). *See*
10 *also Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1363-66 (11th Cir. 1988).

11 The act of charging consumers' credit or debit cards without authorization constitutes
12 an unfair practice.⁵⁶ *FTC v. The Crescent Publishing Group, Inc.*, 129 F. Supp. 2d 311,
13 322 (S.D.N.Y. 2001); *FTC v. J.K. Publications, Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D.
14 Cal. 2000); *FTC v. Windward Marketing, Ltd.*, 1997 U.S. Dist. LEXIS 17114, at *29-31
15 (N.D.Ga. Sept. 30, 1997). Here, defendants debited \$139 from consumers' checking
16 accounts without notice or authorization, causing, in the aggregate, millions of dollars of
17 consumer injury. Taking consumers' money in exchange for nonexistent goods or
18 services serves no countervailing benefit to consumers or competition, and could not
19 reasonably have been avoided by consumers. Thus, as in *Crescent Publications, J.K.*
20 *Publications*, and *Windward*, defendants have engaged in the unfair practice of debiting
21 consumers' accounts without their authorization in violation of Section 5 of the FTC
22 Act.

23
24 ⁵⁶ Turner claimed to the payment processors that his debiting plan was lawful under
25 the FTC's "Negative Option" Rule. This is not the case. The Negative Option Rule
26 authorizes charges to a consumer's account on a regular basis only after the seller has
27 made certain disclosures and the consumer has affirmatively agreed to participate in the
28 plan with the seller. FTC Trade Regulation Rule Regarding Use of Negative Option
Plans by Sellers in Commerce, 16 C.F.R. Part 425. Consumers whose accounts were
debited by defendants had no prior relationship with Pharmacards, had received no
disclosures about debits to their accounts, and had never agreed to participate in a
discount prescription drug program.

1 **b. Individuals Are Liable**

2 Defendants David Graham Turner and Steve Pearson are individually liable for the
3 unlawful conduct. Not only are they each liable for their own acts, FTC v. Gill, 71
4 F. Supp. 2d 1030, 1046 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944 (9th Cir. 2001), they are
5 also liable for the corporate misconduct. An individual may be held liable for corporate
6 violations under the FTC Act if the individual participated directly in the violative acts
7 or practices or had the authority to control them. *See* FTC v. Publishing Clearing House,
8 Inc., 104 F.3d 1168, 1170 (9th Cir. 1997). Where the individual has knowledge of
9 corporate violations, she or he is also liable for restitution. Knowledge in this context is
10 defined as actual knowledge of material misrepresentations and omissions, reckless
11 indifference to the truth or falsity of a misrepresentation or material omission, or an
12 awareness of a high probability of fraud along with an intentional avoidance of the truth.
13 Publishing Clearing House, 104 F.3d at 1171. The extent of an individual's involvement
14 in a fraudulent scheme alone is sufficient to establish the requisite knowledge for
15 personal restitutionary liability. Affordable Media at 1235, *citing* FTC v. Sharp, 782
16 F. Supp. 1445, 1450 (D. Nev. 1991); FTC v. Amy Travel Service, Inc., 875 F.2d 564,
17 574 (7th Cir. 1989) ("Also, the degree of participation in business affairs is probative of
18 knowledge.").

19 Turner has assumed the role of corporate officer and has signed contracts with third-
20 party payment processors on behalf of both companies. Moreover, in correspondence
21 with at least one payment processor, he described the bogus benefits program in detail
22 and referenced his supposed compliance with the FTC's guidelines on negative option
23 plans.⁵⁷ Pearson, too, has corresponded with payment processors, ostensibly on behalf of
24 3rd Union, but also exhorting one payment processor to accelerate payments to
25

26 ⁵⁷ Feb. 15, 2004 fax from David Turner to Matt Loewen at Payment Resources
27 International. France Dec., ¶ 4, Exh. B, pp. 80-81. In an email the following week,
28 Turner explains to Loewen that he is unable to get a legal letter of opinion on his business
model because it would cost \$5,000 to \$10,000. Exh. B, p. 82.

1 HelmCrest's Cyprus account.⁵⁸ From his email correspondence with InterBill, it is clear
2 both that he expected high returns and that he knew that debiting consumers' accounts
3 prior to providing fulfillment was in the "GREY" area.⁵⁹ Pearson also played an active
4 management role in the scheme, offering to rework deals with payment processors and
5 having contacts with the customer service company and the lead provider.⁶⁰

6 **c. Defendants have operated as a common enterprise**

7 3rd Union, HelmCrest, Turner and Pearson are a common enterprise and therefore
8 should be subject to joint and several liability. *See* FTC v. Wolf, 1996 WL 812940, at
9 *8, 1997-1 Trade Cases ¶ 71,713 (S.D. Fla. Jan. 31, 1996) (defendants found to be a
10 common enterprise are held "jointly and severally liable for the injury caused by their
11 violations of the FTC Act"). Entities constitute a common enterprise where "the
12 evidence shows that there [is] no real distinction among the companies." J.K.
13 Publications, 99 F. Supp. 2d at 1201-02 (corporate defendants constituted a common
14 enterprise where, among other things, they were under common control and shared
15 employees and officers). *See also* Delaware Watch Co. v. FTC, 332 F.2d 745, 746 (2d
16 Cir.1964) (where the same individuals were transacting an integrated business through a
17 maze of interrelated companies the pattern and frame-work of the whole enterprise must
18 be taken into consideration); Wolf, 1996 WL 812940, at *8.

19 Here, there is no real distinction between the individuals and the corporate entities.
20 Whether acting on behalf of the Delaware corporation or the Cyprus corporation they
21 have used the common dba of Pharmacards.com, and both companies' payments were
22 wired to the same Cyprus bank account.⁶¹ Both entities have used the same London
23 address and the same Vermont mail drop, and both refer to David Turner as owner.

24
25 ⁵⁸ France Dec., ¶ 3, Exh. A, p. 40.

26 ⁵⁹ France Dec., ¶ 3, Exh. A, p. 44.

27 ⁶⁰ France Dec., ¶ 3, Exh. A, pp. 52-54.

28 ⁶¹ France Dec., ¶ 4, Exh. B, pp. 86-87.

1 Turner and Pearson have used both corporate entities interchangeably. Perhaps
2 explaining why they incorporated 3rd Union, in a fax to payment processor PRI on 3rd
3 Union letterhead, David Turner notes that,

4 “[t]o help prevent any further confusion or over active imaginations, to any
5 person or people involved or affected through our business relations,
6 please note that for your records you can use our United States Delaware
7 corporation as the merchant of record, as naming our International
8 company, could set imaginations running wild.”⁶²

9 The corporate and individual defendants at issue in this case are inextricably related to
10 each other and thus comprise a common enterprise subject to joint and several liability.

11 **2. Equities Weigh Heavily in Favor of the FTC**

12 The balance of the equities weighs heavily in the FTC’s favor. Where public and
13 private equities are at issue, as they are in this matter, public equities prevail. World
14 Wide Factors, 882 F.2d at 347; *see also* FTC v. Warner Communications, Inc., 742 F.2d
15 1156, 1165 (9th Cir. 1984) (in balancing the public and private interests, the public
16 interest should receive greater weight). This balance is particularly appropriate here,
17 where defendants have no legitimate business to protect and are simply stealing money
18 from unwary consumers by manipulating the banking system. Without this action,
19 defendants would be free to continue their unauthorized debiting scheme and the banks
20 and payment processors would be free to release funds stolen from consumers to
21 defendants or to themselves.

22 **C. Requested Relief Necessary**

23 **1. Noticed TRO**

24 To halt defendants’ unfair practices, prevent further consumer injury and preserve the
25 possibility of final equitable relief in this matter, the Commission seeks a noticed
26 temporary restraining order, including expedited discovery and an asset freeze, and an
27

28 ⁶² France Dec., ¶ 4, Exh. B, p. 81.

1 order to show cause why a preliminary injunction should not issue. Although the
2 payment processors that we know about have stopped processing for defendants, there
3 may well be additional processors that we have yet to uncover which are still actively
4 processing payments or which hold money on behalf of defendants.⁶³ Moreover, as long
5 as defendants continue to have access to lists of consumer names and checking account
6 or credit card numbers, they are free to engage in further unauthorized debiting, whether
7 through these payment processors or others that they can con for access to the banking
8 system.⁶⁴ To protect consumers from potential future harm, a TRO is necessary.⁶⁵

9 **2. An Asset Freeze is Necessary to Preserve the Possibility of Redress**

10 This Court should freeze defendants' assets to preserve the status quo and ensure that
11 funds do not disappear or dissipate during the course of this litigation. The Court may
12 impose an asset freeze when the "possibility" of dissipation of assets exists. FSLIC v.
13 Sahni, 868 F.2d 1096, 1097 (9th Cir. 1989). The Court's power to order an asset freeze
14 derives from its equitable power to order consumer redress. World Wide Factors, 882
15 F.2d at 348. Thus, an asset freeze is appropriate to the extent it is needed to assure that
16 restitution would be available as a remedy to defrauded consumers if a finding is made
17 that Defendants are in violation of the FTC Act, 15 U.S.C. § 45(a), at the conclusion of
18 these proceedings. See FTC v. World Travel Vacation Brokers, Ltd., 861 F.2d 1020,

21 ⁶³ We have reason to believe defendants also have lists of consumer names and credit
22 card numbers, and have attempted to engage in the unauthorized charging of credit cards.
See France Dec., ¶ 7, Exh. E, pp. 166 and 168.

23 ⁶⁴ At least one payment processor noted in a March 14, 2004, email communication
24 to Turner "[o]n another note, I'm very interested to hear about your other programs that
25 you have on deck. Please outline and forward any information you'd like us to consider
in this matter. As you are well aware, your leads are far superior to what everyone else
has." France Dec., ¶ 4, Exh. C., p. 146.

26 ⁶⁵ The need for the TRO is not rendered moot by cessation of the illicit actions.
27 Affordable Media at 1237-38 ([I]t is actually well-settled "that an action for an injunction
28 does not become moot merely because the conduct complained of was terminated, if there
is a possibility of recurrence, since otherwise the defendants would be free to return to
[their] old ways.") (citations omitted).

1 1031 (7th Cir. 1988) (freeze of corporate and personal assets and compulsory production
2 of defendants' financial records).

3 Here, an asset freeze is necessary to prevent the release of funds held by the payment
4 processors and their banks, either to defendants themselves or to pay the processing and
5 bank fees that have accumulated. The banks and processors are currently under no legal
6 compulsion to maintain the more than \$2 million dollars in the reserve accounts where
7 these funds are currently held, and dissipation is more than possible – it is likely. These
8 funds were essentially stolen from consumers' checking accounts and should be
9 available to be returned to victims. An asset freeze is also important in the event that we
10 find additional funds in the U.S. held by or on behalf of defendants.

11 **3. Modified Discovery Under Rule 26(d)**

12 District courts are authorized to depart from normal discovery procedures and fashion
13 discovery by order to meet discovery needs in particular cases. Fed. R. Civ. P. 1, 26(b)
14 and (d). The Court's broad flexible authority in equity to grant preliminary relief in
15 cases involving the public interest allows for modification of the discovery rules, where
16 the public interest warrants. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398
17 (1946); *FSLIC v. Dixon*, 835 F.2d 554, 562 (5th Cir. 1987).

18 Here, the Commission seeks relief from the requirements of Rule 26(d) of the Federal
19 Rules of Civil Procedure prohibiting a party from seeking discovery from any source
20 before the parties have met and conferred as required by Rule 26(f). The Commission
21 needs to proceed quickly with discovery from third parties who have done business with
22 defendants. Such discovery will help to determine the full scope of defendants' unlawful
23 activities, identify other unauthorized debiting schemes that defendants may be involved
24 in, locate additional assets, and locate the individual defendants, who have hidden their
25 location through an international maze of email addresses, prepaid cell phones and mail
26 forwarding locations. Relief from the requirements of Rule 26(d) is particularly
27 appropriate in cases like this one, where the corporate defendants are closely held by
28

1 individuals who have chosen to conceal their location information, and complying with
2 the meet and confer requirements of Rule 26(f) may well be difficult.

3 **VI. CONCLUSION**

4 For the above-stated reasons, the Commission respectfully requests that the Court
5 protect the consumers victimized by defendants' unauthorized debits of their checking
6 accounts and grant the Commission's application for a temporary restraining order,
7 including an asset freeze and expedited discovery, and an order to show cause why a
8 preliminary injunction should not issue..

9
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