

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	Civ. No. 09-cv-2929
)	
v.)	
)	
VOICE TOUCH, INC., a Florida)	
corporation, dba Voice Touch,)	
)	
NETWORK FOUNDATIONS, LLC, a)	
Delaware corporation,)	
)	
JAMES A. DUNNE,)	
)	
MAUREEN E. DUNNE, and)	
)	
DAMIAN KOHLFELD,)	
)	
Defendants.)	

**PLAINTIFF FEDERAL TRADE COMMISSION'S MEMORANDUM
IN SUPPORT OF ITS MOTION FOR A TEMPORARY RESTRAINING
ORDER WITH ASSET FREEZE AND THE APPOINTMENT OF A RECEIVER**

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I. INTRODUCTION

The Federal Trade Commission asks that the Court take immediate action to stop a massive illegal enterprise that is plaguing tens of millions of consumers with prerecorded telemarketing calls made in direct and blatant violation of the Do Not Call laws. These calls make deceptive claims on behalf of companies claiming to sell extended warranties for cars.¹ One of the individuals who runs this enterprise, Defendant James A. Dunne, even brags to prospective clients about his ability to operate in violation of the law and about the impossibility of the Federal Trade Commission ever holding him responsible for his illicit conduct. Dunne and his associates specialize in a practice known as “voice blasting” or “robocalling,” which involves broadcasting prerecorded telephone messages to millions of consumers. Typically, Defendants’ calls tell consumers that their automobile warranties are expired or about to expire. In the vast majority of cases, however, Defendants know nothing about the consumers called, much less the status of their automobile warranties. Defendants blast these false claims in order to convince consumers that the caller possesses important information about consumers’ automobiles obtained from a trusted source, such as a dealership or manufacturer. Defendants script and record these deceptive messages for their clients.

The scope of Defendants’ conduct – and its impact on consumers – is alarming. Defendants’ robocalls have generated tens of thousands of complaints from consumers who have received robocalls despite being registered on the National Do Not Call Registry (“Registry”), and from consumers who have specifically demanded that the calls stop. Indeed, a single telephone number associated with one of Defendants’ clients is responsible for over 11,000 Do Not Call (“DNC”) complaints, by far the most complaints received by the FTC for any single number in several years. Consumers receive Defendants’ robocalls on their home, work, and cell phones, sometimes several times a day. Not even businesses, government offices, or 911 dispatchers are immune from receiving Defendants’ prerecorded calls.

Defendants go to great lengths to hide their misconduct from law enforcement and to insure that there is virtually nothing consumers can do to stop receiving these calls. Every call

¹ Concurrently with the filing of this lawsuit, the FTC is bringing a related action seeking similar relief against one of Defendants’ clients, Transcontinental Warranty, Inc. (“Transcontinental”), and its owner, Christopher D. Cowart.

originated by Defendants contains fake or “spoofed” caller ID information. As a result, numbers that appear on a recipient’s caller ID display are typically out-of-service or non-existent, making it impossible for consumers to determine the calls’ origins. Consumers who ask that the calls stop are often subjected to rude, abusive behavior from sales representatives employed by Defendants’ clients. To further insulate themselves from scrutiny, Defendants make use of offshore shell corporations and bank accounts.

Defendants are operating their voice blasting scheme in blatant violation of the law. They are flagrantly violating the Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310,² by calling telephone numbers listed on the Registry, ignoring consumers’ do not call requests, transmitting false caller ID information, and abandoning calls. These practices are specifically prohibited by the TSR. Defendants also are violating a newly enacted TSR provision requiring that their prerecorded calls “promptly, and in a clear and conspicuous manner” disclose, among other things, the identity of their client.³ In recently amending the TSR to explicitly address prerecorded telemarketing calls, the Commission recognized that such calls not only negatively impact 911 centers,⁴ but also constitute a major invasion of consumers’ privacy.⁵

Additionally, Defendants are violating Section 5(a) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(a). Defendants’ robocalls are deceptive in nature, designed to deceive consumers into believing that their warranties are expiring and that Defendants’ clients are selling an extension on their warranties from their original manufacturer or dealer. Defendants’ clients actually have no affiliation whatsoever with consumers’ original manufacturers or dealers. These clients are selling extended service contracts (not extensions on original warranties), which typically contain significant coverage limitations. Defendants are jointly and severally liable, as are their clients, for every sale predicated on this deception.

² For the Court’s convenience, a copy of the TSR, as well all as the Federal Register Notice adopting new amendments to the TSR, are attached hereto as Plaintiff’s Exhibit (“PX”) 1.

³ 16 C.F.R. § 310.4(b)(1)(v)(B) (requiring prerecorded call to disclose: 1) the identity of the seller; 2) that the purpose of the telemarketing call is to sell goods or services; and 3) the nature of the goods or services) (PX 1); *see also* 16 C.F.R. § 310.4(d) (requiring same disclosures).

⁴ *See* 73 Fed. Reg. 51,164, 51,168, fn. 44.

⁵ *See id.* at 51,177.

The FTC's evidence of Defendants' law violations is overwhelming. This evidence includes Dunne's own recorded admissions that he is engaged in illegal conduct, sworn testimony as well as hundreds of pages of written communications provided by a former client, declarations from consumers victimized by Defendants' robocalling, detailed bank records showing millions of dollars in fees collected by Defendants from their auto warranty clients, and calling data from telecommunications providers showing the astronomical volume of Defendants' robocalls received by these companies' subscribers. Taken together, this evidence reveals an enterprise utterly permeated with fraud, leaving no doubt that the Commission is likely to succeed in showing that Defendants are violating the FTC Act and the TSR.

To bring an immediate halt to Defendants' law violations and to preserve assets for eventual restitution to victims, the Commission asks that the Court issue a temporary restraining order ("TRO") that includes a freeze of Defendants' assets, expedited discovery, and the appointment of a temporary receiver over one of the corporate Defendants. Typically, the FTC would seek *ex parte* relief against defendants like these. Unfortunately, Defendants became aware of an FTC investigation after Wachovia Bank inadvertently disclosed to them that the Commission had issued a Civil Investigative Demand to the bank seeking certain records. An attorney for Defendants subsequently contacted the Commission. In light of this contact, the Commission proposes that Defendants be provided with notice of the TRO motion. Since finding out about the investigation, Defendants appear to be hiding assets, and there is a danger that evidence already has been destroyed. The Commission therefore urges the Court to adopt the requested relief in order to prevent continued injury to consumers, the destruction of evidence, and the dissipation of assets, thereby preserving the Court's ability to provide effective final relief.

II. DEFENDANTS

Defendants are two corporations and three individuals that, together, operate this massive and illegal voice broadcasting operation. Defendant **Voice Touch, Inc.**, is a Florida corporation also doing business as Voice Touch.⁶ Voice Touch was formed in October 2007 by individual

⁶ PX 2, Menjivar Dec. ¶ 4(a)-(b) & Atts. A-B (Voice Touch corporate records).

Defendant **Maureen E. Dunne**,⁷ and its business address is Dunne's primary residence.⁸ Voice Touch is the face of the operation, entering into contracts with clients to provide robocalling services.⁹ Defendant **James A. Dunne** holds himself out as "senior partner" and "manager" of Voice Touch,¹⁰ and is a signatory on corporate bank accounts into which clients deposit fees for Voice Touch services.¹¹

Defendant **Damian Kohlfeld** is a member of Defendant **Network Foundations, LLC** ("Network Foundations"), a Delaware corporation formed in June 2005¹² with its primary place of business located in Chicago, Illinois.¹³ Kohlfeld and Network Foundations provide the technological expertise to broadcast the millions of prerecorded calls.¹⁴ Kohlfeld himself is responsible for supplying the list of telephone numbers dialed by Defendants.¹⁵ Between December 2007 and January 2009, Voice Touch has wired nearly \$5 million – over half the total robocalling fees collected by Defendants during this period – to Network Foundations' corporate

⁷ *Id.* Maureen Dunne also is listed as "President" on corporate bank records. *See id.* at ¶¶ 24(b), 32(b) & 33(b).

⁸ *Id.* at ¶¶ 10-11 & Atts. L-M (indicating Jim and Maureen Dunne's home address in Daytona Beach, Florida is the same as the address listed on Voice Touch corporate records).

⁹ *See* PX 4, Atkinson Dec. Att. A at p.2 (Voice Touch agreement with client).

¹⁰ PX 2, Menjivar Dec. ¶ 57 & Att. BB at p.2 (Dunne identifies himself in email correspondence as Voice Touch "senior partner"); *id.* ¶ 32(c) (Jim Dunne listed as "manager" on bank records).

¹¹ *Id.* at ¶ 25(a).

¹² *Id.* at ¶¶ 5, 7 & Atts. G & I (Network Foundations' corporate papers).

¹³ *Id.* at ¶ 7 & Att. I (principal business address is 33 N. LaSalle Street, Chicago).

¹⁴ *See* PX 4, Atkinson Dec. Att. M at p.1 (Kohlfeld delivered servers to one of Defendants' clients); PX 5, Austin Tr. at p.21 ("The way I understood his relationship was Kohlfeld was an outsourced member of Dunne's team."). Kohlfeld also registered the domain name used by Defendants' clients to remotely manage their robocalling campaigns. PX 2, Menjivar Dec. ¶ 24 (Kohlfeld registered domain name "telc.info"); *id.* at ¶ 18 & Att. R at pp.5-6 (Dunne instructing prospective client on how to log on to "www.telc.info").

¹⁵ PX 4, Atkinson Dec. Att. J.

bank account.¹⁶ These transfers coincide with payments to Voice Touch from its extended auto warranty clients.¹⁷

III. DEFENDANTS' ILLEGAL BUSINESS PRACTICES

Over the past two years, Defendants have provided voice broadcasting services to at least three major clients purporting to sell extended automobile warranties: Transcontinental, Certified Warranty Services, LLC, and National Automotive Warranty Services, Inc. (“NAWS”).¹⁸ These clients have paid Defendants nearly \$9 million,¹⁹ some of which Defendants have transferred overseas.²⁰ Defendants provide their clients with a comprehensive voice broadcasting service consisting of three essential components: 1) creating a prerecorded sales pitch warning consumers that their automobile warranty is about to “expire” and instructing them to press “1” to speak to a “warranty specialist”; 2) blasting this message to millions of telephone numbers supplied by Defendants; and 3) transferring the “press 1” calls to their clients’ telemarketing rooms. In this way, Defendants play a critical role in their clients’ overall schemes to deceive consumers into purchasing expensive automobile service contracts.

A. Defendants’ Illegal Robocalls

1. Defendants create the deceptive recordings.

Defendants record the messages that they then blast to consumers on behalf of their clients. In most cases, Defendants’ prerecorded messages inform consumers that their car warranty is expiring and then provide the option of connecting to a “warranty specialist.” For example, Defendants recorded this message on behalf of their largest client, NAWS:

By now you should have received your written note regarding your vehicle warranty expiring. This call is to give you a final

¹⁶ PX 2, Menjivar Dec. ¶ 31.

¹⁷ *Id.*

¹⁸ *See id.* at ¶ 30 (summarizing bank records identifying Defendants’ clients); *see also* PX 4, Atkinson Dec. ¶ 3 (acknowledging that NAWS hired Defendants to conduct robocalling campaigns).

¹⁹ *See* PX 2, Menjivar Dec. ¶ 30.

²⁰ *Id.* at ¶ 28.

opportunity to extend coverage before it is too late. Press 1 now to speak to a warranty specialist regarding your options on your vehicle. Vehicles today are over 70-percent electronic which has forced labor rates to increase to over \$100 an hour. If you would like to protect yourself from costly repairs and obtain the peace of mind of having your vehicle covered, then press 1 now to speak to a warranty advisor. Press 9 if you would like to have a representative remove you from this offer.²¹

Another message broadcast by Defendants on behalf of NAWS told consumers that their automobiles were subject to a recall:

Now, find out what car manufacturers hope you never notice. Your vehicle is subject to a recall or a service bulletin. Press 1 for free information on your vehicle. There is [sic] currently over a half-million cars that have been recalled or are covered under service bulletins. Press 1 now to see if your vehicle is on the list. Press 9 if you do not want to take advantage of this free service.²²

In addition to recording these messages, evidence obtained from NAWS establishes that Defendants scripted some of the messages as well.²³

Defendants are intimately familiar with other aspects of their clients' warranty businesses. They have reviewed copies of telemarketing scripts,²⁴ provided Internet and email marketing advice,²⁵ counseled one client about the benefits of offshore banking and

²¹ PX 5, Austin Tr. at p.19; *see also* PX 10, Ciaburri Dec. ¶ 5 (received a prerecorded message saying warranty about to expire); PX 12, Dabrowski Dec. ¶ 4 (same); PX 11, Davis Dec. ¶ 3 (same); PX 14, Foss Dec. ¶ 5 (same); PX 20, Potter Dec. ¶ 5 (same) & PX 21, Weegar Dec. ¶ 5 (same); PX 17, O'Brien Dec. ¶ 5; PX 15, Hauser Dec. ¶ 4; PX 13, Dempsey Dec. ¶ 5 (82 year-old husband with Alzheimer's received warranty expiration robocall); PX 18, Papp Dec. ¶¶ 4-5; PX 19, Potter Dec. ¶ 5.

²² PX 5, Austin Tr. at 19; *see also* PX 4, Atkinson Dec. ¶ 11 (discussion of recall message).

²³ PX 4, Atkinson Dec. ¶¶ 7 & 11 ("Dunne agreed to record, as well as script, the pre-recorded message.").

²⁴ *See* PX 2, Menjivar Dec. ¶ 57 & Att. BB at p.2 (Dunne refers to seeing a client's "fronter" script).

²⁵ *See* PX 4, Atkinson Dec. ¶ 12 & Att. G (Dunne sharing website with client that he developed for client's benefit); PX 2, Menjivar Dec. ¶ 57 & Att. BB at p.1 (Dunne agreeing to provide client advice on email blasting).

incorporation,²⁶ and recommended methods for avoiding consumer complaints.²⁷

2. Defendants illegally blast the deceptive recordings.

After creating the recorded messages, Defendants then dial millions of telephone numbers, inundating consumers with unwanted robocalls in violation of numerous provisions of the TSR. The size of Defendants' illegal dialing operation is staggering. Dunne claims that he has done more than \$40 million worth of dialing for extended automobile warranty companies,²⁸ including *one billion dials* on behalf of his largest client.²⁹ Defendants claim to be the largest voice broadcasters in the world.³⁰ They blast their messages to consumers indiscriminately, hiding behind false caller ID information in an attempt to conceal their blatant disregard of the Do Not Call Registry and other TSR provisions.

Indiscriminate Dialing. The vast majority of Defendants' robocalls appear to be the product of mass, indiscriminate dialing. Instead of using a conventional lead database "scrubbed" against do not call registries (as the law requires), Defendants simply dial every telephone number within a particular area code and prefix sequentially.³¹ As a result, no one is spared from Defendants' robocalls: they call consumers whose warranties are not expiring or

²⁶ *Id.* at ¶ 18 & Att. N (series of emails from Voice Touch to NAWS about setting up a foreign corporation and bank account, and attaching a copy of Belize's money laundering statute); *see also id.* at ¶ 20 & Att. R at p.22 (Dunne contends he has an offshore company named "International Business Corp.").

²⁷ PX 4, Atkinson Dec. Att. P at p.8 (Dunne recommends that client privatize a domain name in order to hide the client's identity from consumers).

²⁸ PX 2, Menjivar Dec. ¶ 16 & Att. Q at p.7.

²⁹ *Id.* Att. R at p.20; *see also* PX 5, Austin Tr. at p.17 (Voice Touch operation made millions of calls per week for NAWS).

³⁰ PX 2, Menjivar Dec. ¶ 16 & Att. Q at p.5. Defendants' dialing is not confined to the United States – they also dial Canadian consumers. PX 4, Atkinson Dec. ¶ 13, Att. H at p.1.

³¹ For example, in a September 19, 2007 email, a NAWS employee informed Dunne: "We need 605-357-4400, 605-330-4400 and any number with 605 area code and [XXX] prefix removed today . . . this is the South Dakota US District Attorney's office and all their extensions are being called today." PX 2, Menjivar Dec. ¶ 58(a) & Att. CC at p.1 (prefix redacted).

which expired years ago,³² and tens of thousands of consumers who are registered on the National Do Not Call Registry.³³ Indeed, 911 centers,³⁴ government offices,³⁵ and businesses³⁶ have been flooded with Defendants' deceptive warranty expiration messages. A former employee of one of Defendants' clients, after speaking to thousands of consumers who "pressed 1" to speak to a "warranty specialist," confirms that he had no specific information about consumers' automobiles³⁷ and that consumers appeared to be receiving Defendants' robocalls at random.³⁸

Two major telecommunications providers have concluded that only a "random or sequential number generator is capable of placing the high volume of calls during [such] short time span" blasted by Defendants.³⁹ Dunne admits as much when he brags to a prospective

³² See PX 10, Ciaburri Dec. ¶ 6 (car warranty not about to expire); PX 11, Davis Dec. ¶ 3 (all of his cars out of warranty); PX 20, Potter Dec. ¶ 7 (car warranty expired three years ago); PX 21, Weegar Dec. ¶ 7 (both cars still under factory warranty).

³³ PX 2, Menjivar Dec. ¶ 54 (tallying nearly 30,000 DNC complaints associated with just five telephone numbers associated with Defendants' clients).

³⁴ PX 5, Austin Tr. at pp.54, 57 & Ex. 8 (complaints from 911 centers); see also PX 4, Atkinson Dec. Att. P at p.1 (complaint from 911 center forwarded to Dunne).

³⁵ PX 12, Dabrowski Dec. ¶ 5 (describing robocalls received on unlisted numbers at the Secret Service's New York field office).

³⁶ PX 9, Cart Dec. ¶ 4 (believed robocalls received at his office to be a "scam" given "the purchase of auto warranties was unrelated to [his] business").

³⁷ PX 3, Israel Dec. ¶¶ 20-21 ("[I]n my experience, Transcontinental did not have any actual information about consumers or their automobiles. When I "pulled" a consumer's information, I had no way of knowing whether the consumer's warranty was about to expire or had expired.").

³⁸ *Id.* at ¶ 17 ("It appeared to me that Transcontinental was robo-calling consumers at random, and not necessarily calling those consumers whose automobile warranties were expired or about to expire.").

³⁹ PX 7, Rogers Dec. ¶ 3; see also PX 6, Myrick Dec. ¶ 3 (AT&T Mobility). One of the spoofed numbers associated with Defendants' clients, (352) 357-4151, is connected to over 100 million calls (or one call every .23 seconds) placed to AT&T landline subscribers in a one-year period. *Id.* at ¶ 2(e)(ii); see also PX 2, Menjivar Dec. ¶¶ 52-53 (connecting same telephone number to NAWS during time period Defendants' conducted robocalling campaigns on their behalf).

client of his ability to “call everybody in the United States in about three hours,”⁴⁰ and contends that his operation has “unique and unlisted numbers that nobody else has.”⁴¹ If Defendants only contacted consumers whose warranties were expiring, their access to “unique and unlisted numbers” (as opposed to a list of consumers containing specific information about their automobiles) would not, of course, be a selling point. When Defendants promise to procure “leads” for their clients,⁴² they simply mean that they will call consumers indiscriminately.

Caller ID Spoofing. Defendants engage in “spoofing,” whereby they transmit phony caller ID information to consumers. Defendants know full well that they are engaged in illegal activity and they do everything possible to avoid detection.⁴³ In a conversation with a potential client, Dunne explains his belief that spoofing provides protection from consumers and law enforcement:

Well, they can’t prove it. . . . So, we knock the caller ID, they don’t know where it’s coming from or we have the removals. Yeah, we’ve never been in trouble and we never will get in trouble.⁴⁴

One of Defendants’ former clients confirms that Defendants spoofed all one billion robocalls Dunne claims to have initiated on the client’s behalf.⁴⁵ Consumers also verify this is Defendants’ practice: when consumers have attempted to dial the telephone number that

⁴⁰ *Id.* at ¶ 23 & Att. S at p.28.

⁴¹ *Id.* at ¶ 16 & Att. Q at p.5.

⁴² *See* PX 4, Atkinson Dec. ¶ 14 & Att. J (email promising leads from Kohlfeld).

⁴³ *See, e.g.*, PX 2, Menjivar Dec. ¶ 22 & Att. S at pp.14-15 (Dunne: “Well, the – as far as the Federal Trade Commission, I mean, it’s a – automated – the use of automated dialing is prohibited. It’s a violation of the Telemarketing Sales Rule. But the thing is [] nobody ever admits to it and there’s no way to prove it.”).

⁴⁴ *Id.* at pp.27-28; *see also id.* at Att. Q p.10 & Att. R at p.8 (“We mask the ante so that nobody can – they mask the ante so that they can never trace who the call is coming from.”). Dunne also describes a web of offshore entities that Defendants utilize to avoid detection. *Id.* at ¶ 20 & Att. R at p.22.

⁴⁵ PX 5, Austin Tr. at pp.49-50 (Defendants insisted on spoofing caller ID information for all calls).

appeared on their caller ID display after receiving one of Defendants' robocalls, invariably the number is either out of service or they receive a busy signal.⁴⁶ Defendants also do not transmit their company name, or that of their clients, to enable consumers to identify the caller.⁴⁷ By hiding behind false caller ID information, Defendants frustrate consumers' efforts to exercise their rights under the Do Not Call provisions of the TSR and lodge complaints with law enforcement against Defendants or their clients. As Dunne himself stated: consumers "don't know who's calling unless [sales representatives] give out the information."⁴⁸ For this precise reason, at least of one of Defendants' clients trains its sales representatives either not to disclose their employer's name or to instead give consumers phony company information.⁴⁹

Ignoring the DNC Registry and Do Not Call Requests. Defendants are determined to hide because they are brazenly ignoring the FTC's National Do Not Call Registry, and consumers specific do-not-call requests, in blasting their prerecorded messages. As an initial matter, neither Defendants nor their auto warranty clients have paid the required fees for accessing numbers on the Registry.⁵⁰ Telemarketers are required to "scrub" Registry numbers

⁴⁶ PX 9, Cart Dec. ¶ 5 (busy signal); PX 10, Ciaburri Dec. ¶ 7 (not in service); PX 12, Dabrowski Dec. ¶ 6 (not in service); PX 20, Potter Dec. ¶ 8 (both); PX 21, Weegar Dec. ¶ 8 (both). Another consumer conducted Internet research on the phone number appearing on the caller ID at his place of business, and e-mailed one of Defendants' clients, after which, the calls significantly lessened. PX 9, Cart Dec. ¶ 10.

⁴⁷ See, e.g., PX 21, Weegar Dec. ¶ 5 ("The messages do not identify the company placing the call."); PX 20, Potter Dec. ¶ 5 (same); PX 11, Davis Dec. ¶ 3 (same).

⁴⁸ PX 2, Menjivar Dec. ¶ 22 & Att. R at p.12.

⁴⁹ PX 3, Israel Dec. ¶ 13. Indeed, some of Defendants' clients have slipped up and revealed who they were to consumers pretending to be interested in purchasing a warranty. These consumers pressed "1," subjected themselves to the sales pitch, and just before purchasing, were able to coax the sales representative into identifying the company selling the warranty. See PX 11, Davis Dec. ¶ 9; PX 14, Foss Dec. ¶ 6; PX 19, Potter Dec. ¶ 7; PX 20, Potter Dec. ¶ 9; PX 21, Weegar Dec. ¶ 9. Bank records establish that Defendants were conducting dialing campaigns for these warranty companies during the time period that these consumers received these robocalls. See PX 2, Menjivar Dec. ¶¶ 40-43 (describing methodology for connecting spoofed telephone numbers to Defendants' clients).

⁵⁰ Though Defendants have registered as organizations with the Registry, they have not accessed all of the area codes they are calling. *Id.* at ¶ 59 & Att. DD. Likewise, Defendants' most recent client is registered as an organization, but has not accessed any area codes. *Id.* at ¶¶ 60-63 & Atts. EE-HH.

from their lists to avoid soliciting consumers who do not wish to receive such calls.⁵¹ Although Defendants assure their clients that they comply fully with the DNC Registry,⁵² they do not appear to be scrubbing their lists at all.⁵³ One former client reports receiving *hundreds of complaints per day* from outraged consumers demanding that Defendants' robocalls cease.⁵⁴ Defendants knew about these complaints, but did nothing to curb them.⁵⁵ Instead, Defendants advised their client to take certain steps to make it even more difficult for consumers to determine who was responsible for the calls.⁵⁶

An analysis of the Commission's DNC complaint data reveals the alarming extent to which Defendants are ignoring the DNC Registry – just one of the spoofed telephone numbers linked to Defendants has generated over 11,000 complaints, the most generated by any single telephone number in the past several years.⁵⁷ In total, the Commission has received nearly 30,000 DNC complaints for just five telephone numbers associated with Defendants' clients.⁵⁸ As alarming as these complaint numbers are, they are likely understated. Consumers report

⁵¹ The TSR requires the seller, either directly or through another person, to pay an annual fee for access to a given area code before a telemarketer can initiate calls on the seller's behalf to any person within that area code. 16 C.F.R. § 310.8(b).

⁵² PX 4, Atkinson Dec. Att. A at p.2; PX 5, Austin Tr. at p.24.

⁵³ *Id.* at p.48 & Ex. 7.

⁵⁴ *Id.* at p.52; *see also id.* at pp.37 & 42 (referring to 31,000 "urgent" removals); PX 4, Atkinson Dec. Atts. O & P at p.3.

⁵⁵ PX 5, Austin Tr. at p.42 ("And that was part of the issue I had with Jim [Dunne] at the time was why we were getting so many complaints when we were doing everything that he requested of us uploading the do not call files and people saying they were pressing the 9 to get removed from the call list, but were still receiving calls."); PX 4, Atkinson Dec. ¶ 21 (Dunne not responsive to DNC complaints). Ultimately, as a result of these complaints, the client terminated its relationship with Defendants. PX 4, Atkinson Dec. ¶ 20 (terminated Defendants because receiving "hundreds of complaints from consumers each day who had been called by Voice Touch and who were either registered on the DNC Registry or had previously requested that NAWS no longer call them").

⁵⁶ *Id.* at Att. P at p.8.

⁵⁷ PX 2, Menjivar Dec. ¶ 48 & Att. Z.

⁵⁸ *Id.* at ¶ 54.

receiving multiple calls a week, and sometimes a day, from Defendants.⁵⁹ These calls continue even after consumers make a specific opt-out request, either through an automated feature included in many of Defendants' robocalls,⁶⁰ or in direct conversations with Defendants' clients.⁶¹ Further, Defendants' most recent client, Transcontinental, has heeded Dunne's advice, directing its telemarketers to simply hang up on consumers who ask to be removed from the calling list, without honoring such requests.⁶² In fact, the client's motto posted on signs around the office is: "Hang Up. Next."⁶³ This motto epitomizes the utter contempt that Defendants and their clients have for consumers' privacy and the law.

Defendants' robocalls impose real costs on people and businesses. The relentless nature of these solicitations drives some desperate consumers to undertake elaborate, time-consuming ruses in order to put a stop to the calls. One elderly woman pretended for several minutes to be interested in purchasing an extended warranty from one of Defendants' clients until being transferred to a "closer," at which point she stated:

They call me five times a day. Every time I have responded to them to take my number off your calling list. Now, I want my number removed. . . . I don't want them calling me and waking me up or disturbing me. I have a hip problem. I cannot get up to move to answer the phone. I'm almost crippled; and I want these

⁵⁹ See, e.g., PX 5, Austin Tr. at p.37 (consumer called five times a day even after repeatedly requesting her name be removed from the calling list). A former employee of one of Defendants' clients reports answering 100 calls per hour from consumers during the time period that Defendants conducted robocalling campaigns on that client's behalf. PX 3, Israel Dec. ¶ 17.

⁶⁰ According to Defendants' former client NAWS, Defendants were responsible for ensuring that consumers who selected the automated opt-out were not called again. PX 5, Austin Tr. at p.53.

⁶¹ PX 10, Ciaburri Dec. ¶ 9 (pressed automated opt-out but still received calls); PX 12, Dabrowski Dec. ¶ 6 (continued to receive calls on her home line, despite exercising automated opt-out and after talking to live agents); PX 14, Foss Dec. ¶ 3 (received robocall despite number being on the Registry); PX 19, Potter Dec. ¶¶ 3-6 (same); PX 21, Weegar Dec. ¶ 7; see also PX 3, Israel Dec. ¶ 12 (spoke to one angry consumer who received fourteen calls from Defendants).

⁶² PX 3, Israel Dec. ¶ 11 ("Telemarketers were supposed to hang up on consumers even if they were requesting to be removed from the company's call list. To my knowledge, Transcontinental did not capture any information about these consumers who were asking not to be called again.").

⁶³ *Id.*

people to stop calling me.⁶⁴

Another consumer took the drastic measure of changing her telephone number to stop Defendants' robocalls.⁶⁵ Likewise, a Texas business manager indicates that at one point nearly all of his business phone lines were tied up due to Defendants' robocalls.⁶⁶ His business lost productivity, and due to the high volume of warranty expiration messages received after hours, his answering service waived its usual fees for answering such calls.⁶⁷ Telecommunications providers also incur costs in the form of increased customer service costs and network stress as a result of Defendants' robocalls.⁶⁸ Finally, as discussed next, the deceptive content of Defendants' robocalls inflicts further harm on consumers.

B. Defendants' Role in the Deceptive Sales Pitch

Defendants' robocalling campaigns are a key component of an overall scheme to deceive consumers into purchasing extended automobile warranties. As discussed above, Defendants are responsible for making the first contact with consumers through the prerecorded telemarketing calls, and then transferring consumers who "press 1" to their clients' telemarketing rooms to close the sale.⁶⁹ Defendants have crafted their robocall messages to make consumers believe that Defendants are somehow affiliated with a consumer's car manufacturer or dealership, when in fact there is no such affiliation. Defendants' initial deception is then reinforced and furthered by Defendants' clients when they speak to consumers directly.

Defendants' warranty expiration recordings typically begin by telling consumers that

⁶⁴ PX 5, Austin Tr. at pp.37-38.

⁶⁵ PX 10, Ciaburri Dec. ¶ 10.

⁶⁶ PX 9, Cart Dec. ¶ 5 (over six-month period, company received prerecorded warranty calls "sometimes as often as three times a day on each of its eight business telephone lines").

⁶⁷ *Id.* at ¶¶ 7 & 9 (answering service costs, lost productivity, tying up phone lines).

⁶⁸ PX 7, Rogers Dec. ¶ 4 (Verizon Wireless); PX 6, Myrick Dec. ¶ 4 (AT&T Mobility).

⁶⁹ *See* PX 5, Austin Tr. at p.15 (Dunne says: "We do call campaigns where we route the calls live inbound through voice broadcasting."); *id.* at pp.8 & 11 (Voice Touch sends out "press 1" messages); PX 4, Atkinson Dec. ¶ 3.

their “vehicle warranty [is] expiring,” implying that the caller already knows something about consumers or their automobiles. This message is furthered when Defendants caution consumers that they must “extend coverage before it is too late” – a warning crafted to make consumers think that their dealership, manufacturer, or the original warrantor is contacting consumers again to avoid a gap in coverage. Even referring to sales representatives as “warranty specialists” furthers the notion that the caller is somehow affiliated with the dealer or manufacturer that sold consumers their original warranties. Perhaps most tellingly, Defendants’ recordings do not disclose the identity of their clients, and in some instances, it is not even clear from the recorded messages that Defendants’ clients are selling anything.⁷⁰

Consumers report that Defendants’ warranty expiration messages have led them to believe that Defendants are somehow affiliated with the manufacturer or dealer of the consumer’s automobile. One consumer became “very concerned about [her] car warranty” after receiving a warranty expiration message that Defendants delivered on behalf of their most recent client, Transcontinental.⁷¹ The consumer “believed that Toyota was calling [her] because the caller seemed to know that [her] warranty was expiring.”⁷² She chose to speak to a representative, whereupon the Transcontinental representative told her explicitly that he was calling from Toyota.⁷³ Only after the consumer subsequently tried to cancel the “warranty” she purchased from Transcontinental and received the run-around, did she discover (by calling Toyota) that neither Defendants nor Transcontinental were affiliated with the manufacturer.⁷⁴

Despite the impressions that they create in their prerecorded messages, for the vast majority of calls, neither Voice Touch nor its clients know anything about the millions of

⁷⁰ This is true of Defendants’ “recall” robocalls, which offered consumers “free information on their vehicles” as a way to entice consumers to “press 1” to be connected to Defendants’ clients. PX 5, Austin Tr. at p.19.

⁷¹ PX 17, O’Brien Dec. ¶ 6.

⁷² *Id.*

⁷³ *Id.* at ¶ 7.

⁷⁴ *Id.* at ¶ 18.

consumers randomly called, much less the type of cars they drive or the status of their warranties. This is evident from the indiscriminate manner in which Defendants are broadcasting their prerecorded messages, as discussed above.⁷⁵ Defendants are simply using this ruse to induce consumers to purchase expensive extended service contracts.⁷⁶

Defendants transfer consumers who “press 1” to their client’s telemarketing center, whereupon consumers then are subjected to additional deceptive practices designed to reinforce the initial false claims made in Defendants’ recordings. Telemarketing scripts obtained from a former Transcontinental employee confirm that this client uses a generic name – “Warranty Service Center” – and pretends to already have information about the consumer’s automobile.⁷⁷ Further, Transcontinental sales people claim to be affiliated with the consumer’s car manufacturer or dealer. A section of the company’s training manual entitled “Rebuttals to Overcome Objections!” instructs sales representatives to answer the question, “Who are you?” with the following lie: “We are the Warranty Service Center. We provide extended warranty services for _____ (Ford, GMC, Honda, Toyota, Nissan,, etc.) throughout the United States and Canada.”⁷⁸ Neither Defendants nor their clients have a relationship with consumers’ automobile manufacturers or dealers.⁷⁹ Consumers confirm that this affiliation claim was central to their

⁷⁵ Neither do Defendants know whether consumers’ vehicles are the subject of a recall, which some of Defendants’ robocalls claim.

⁷⁶ Defendants’ clients sell the purported warranties for thousands of dollars. *See, e.g.*, PX 13, Dempsey Dec. ¶ 6 (Transcontinental “warranty” costs \$2,989); PX 15, Hauser Dec. ¶ 6 (“warranty” costs \$2,900); PX 16, Kane Dec. ¶ 6 (“warranty” costs between \$2,300 and \$2,500).

⁷⁷ PX 3, Israel Dec. ¶ 14 & Att. B; *see also* PX 17, O’Brien ¶ 7 (representative said that the company had been trying to call her for the past 90 days about her warranty expiring). After asking for the year, model, and mileage of the consumer’s car, the telemarketing script directs agents to say: “Please allow me to put you on hold while I pull up your information Even though we have not heard from you and before we close out your file, we give you one last cou[r]tesy call to ***extend your warranty or reinstate it.***” *Id.* at Att. B (emphasis added). Offering an extension or a reinstatement of consumers’ warranties, of course furthers the notion that Defendants’ clients are somehow affiliated with the consumer’s car manufacturer or dealer.

⁷⁸ PX 2, Menjivar Dec. ¶ 35 Att. U at p.50; *see also* PX 17, O’Brien Dec. at ¶ 15 (Transcontinental sales representative claimed to be an “administrator” for Ford).

⁷⁹ Nevertheless, Transcontinental’s “rebuttal” script directs sales representatives to tell wavering
(continued...)

decision to purchase an extended warranty from Defendants' clients.⁸⁰

Neither Defendants nor their clients have a relationship with consumers' automobile manufacturers or dealers. Although Defendants' clients claim to sell extended "warranties" to consumers, they are actually selling service contracts administered by third-party vendors and financed by other third-parties.⁸¹ Consumers do not always realize this. Nor do they typically see the terms of the service contract, until after paying Defendants' clients and receiving a packet of materials (including the actual coverage terms) in the mail.⁸² These service contracts, as compared to their original manufacturer's warranty, are laden with conditions and restrictions that Defendants' clients did not disclose during the telemarketing call.⁸³

Defendants' clients currently are the subject of several lawsuits resulting from their deceptive practices. In March 2008, the State of Missouri sued NAWS, alleging, among other things, that: 1) NAWS omitted the material fact from consumers that it is not affiliated with the dealer or manufacturer of the consumer's vehicle; and 2) NAWS misrepresented that consumer auto warranties are expired or about to expire when in fact the warranties are still good.⁸⁴ The

⁷⁹(...continued)

consumers who ask if they can call the company back that Transcontinental has the authority to "reinstate" consumers' original factory warranty: "We have already sent you a couple of postcards and this is just one last courtesy call before we close your file. So, if you plan on keeping the make and model of consumer's car] you need to reinstate the warranty coverage now." PX 2, Menjivar Dec. ¶ 35 Att. U at p.51.

⁸⁰ PX 15, Hauser Dec. ¶¶ 8-9 (decided to cancel after realizing warranty purchased from Transcontinental was in no way connected to her vehicle's manufacturer); PX 8, Ames ¶¶ 7-9 (felt pressured to purchase warranty from Transcontinental after representative told her he was from Nissan and her warranty was expired); *see also* PX 3, Israel Dec. ¶ 21 ("I had the impression that those consumers who were interested in purchasing a warranty believed Transcontinental's representation that their warranties were expired or about to expire.").

⁸¹ PX 8, Ames Dec. ¶ 12; PX 13, Dempsey Dec. ¶¶ 7-9; PX 16, Kane Dec. ¶ 8; PX 15, Hauser Dec. ¶ 8; PX 17, O'Brien Dec. ¶ 23.

⁸² *Id.*

⁸³ PX 8, Ames Dec. ¶ 13; PX 15, Hauser Dec. ¶ 8; PX 16, Kane Dec. ¶ 9.

⁸⁴ PX 2, Menjivar Dec. ¶ 64 & Att. II (State of Missouri complaint). NAWS also recently settled a lawsuit filed against it by Verizon Wireless stemming from NAWS' robocall practices. *Id.* at ¶ 66 & (continued...)

Commission also is concurrently seeking in a related case a temporary restraining order with an asset freeze and other equitable relief against Transcontinental, Defendants' most recent client.

IV. ARGUMENT

Defendants' business practices violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and multiple provisions of the TSR, 16 C.F.R. Part 310. To stop this conduct and to prevent any further injury to consumers, the Commission asks that the Court issue its proposed TRO. This order would enjoin Defendants' ongoing law violations and would provide for other equitable relief designed to preserve the Court's ability to provide full restitution to victims at the conclusion of the proceeding.

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

The FTC Act provides that "in proper cases the Commission may seek, and after proper proof, the court may issue a permanent injunction." 15 U.S.C. § 53(b). The practice of defrauding consumers by misrepresenting or omitting material facts in violation of Section 5(a) of the FTC Act presents a "proper case" for injunctive relief under 15 U.S.C. § 53(b). *See FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026-28 (7th Cir. 1988); *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982).

Once the Commission invokes the federal court's equitable powers, moreover, 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. *Febre*, 128 F.3d at 534; *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir.), *cert. denied*, 493 U.S. 954 (1989). The court may also enter a TRO, a preliminary injunction, and whatever additional preliminary relief is necessary to preserve the possibility of providing effective final relief. *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432 (11th Cir. 1984); *see also World Travel*, 861 F.2d at 1026. Such ancillary relief may include a freeze of Defendants' assets to preserve them for eventual restitution to victims, and the appointment of a receiver. *U.S. Oil & Gas*, 748 F.2d at 1432-34;

⁸⁴(...continued)
Att. KK (announcement of settlement).

see also World Travel, 861 F.2d at 1031; *FTC v. Am. Nat'l Cellular, Inc.*, 810 F.2d 1511, 1512, 1514 (9th Cir. 1987).

The court's expansive equitable powers also are available under the TSR, as all FTC Act remedies are equally available under the TSR. *See* 15 U.S.C. § 6105(b). Courts are authorized to enter any relief necessary to redress injury to consumers caused by the TSR violation, including the "rescission or reformation of contracts [and] the refund of money or return of property." 15 U.S.C. § 57b(a)(1) & (b).

B. The FTC Meets the Applicable Standard for Injunctive Relief.

Section 13(b) of the FTC Act authorizes a temporary restraining order and a preliminary injunction "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b). In the Seventh Circuit, courts consider two factors in determining whether to grant a preliminary injunction under Section 13(b): 1) the likelihood that the Commission will succeed on the merits; and 2) the balance of equities. *See World Travel*, 861 F.2d at 1029. Unlike private litigants, moreover, the Commission "need not prove irreparable harm." *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 903 (7th Cir. 1989).

C. The FTC Has Demonstrated a Likelihood of Success on the Merits.

1. Defendants are Violating the FTC Act and the TSR.

Multiple TSR provisions explicitly prohibit the precise dialing practices in which Defendants are engaged. Some of the conduct that violates these provisions, as outlined below, also violates Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits deceptive acts or practices. A deceptive act or practice involves a material misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances. *FTC v. World Media Brokers*, 415 F.3d 758, 763 (7th Cir. 2005); *see also FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003). Courts consider the overall net impression created by the acts or practices when evaluating their deceptiveness. *Renovation Intern. Corp. v. FTC*, 844 F.2d 1489, 1496 (1st Cir. 1989); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1010 (N.D. Ind. 2000).

TSR Section 310.3(a)(2)(vii): This provision prohibits telemarketers from

misrepresenting that they are affiliated with, or endorsed or sponsored by, any person. 16 C.F.R. § 310.3(a)(2)(vii). As explained above, Defendants falsely claim at the outset of their telemarketing calls that they are calling from, on behalf of, or are otherwise affiliated with the manufacturer or dealer of the consumer's automobile. This claim is blatantly false and violates TSR Section 310.3(a)(2)(vii). The same false claims also constitute material misrepresentations under the FTC Act.

TSR Section 310.3(a)(4): This TSR provision prohibits telemarketers from making false or misleading statements to induce consumers to pay for goods or services. 16 C.F.R. § 310.3(a)(4). In addition to their deceptive manufacturer or dealer affiliation claim, Defendants also falsely claim that expiration of consumers' original automobile warranties is imminent, or, alternatively falsely claim that consumers' vehicles are "subject to a recall or service bulletin." Defendants make these misleading claims in order to induce consumers to purchase their clients' extended service contracts. Again, these same false claims also constitute material misrepresentations under the FTC Act.

TSR Section 310.4(d): This provision requires telemarketers to disclose "truthfully, promptly, and in a clear and conspicuous manner" the identity of the seller, that the purpose of their telemarketing call "is to sell goods or services," and the nature of those goods or services. 16 C.F.R. § 310.4(d)(1), (2) & (3). Defendants' recordings never disclose their clients' identities, and, in some instances, the recordings warn consumers that their car is subject to a recall without disclosing that their clients are selling extended service contracts. This conduct also violates the newly enacted TSR Section 310.4(b)(1)(v)(B)(ii), which mandates that these disclosures be made at the outset of all outbound telephone calls delivering prerecorded messages. 16 C.F.R. § 310.4(b)(1)(v)(B)(ii).

TSR Sections 310.4(b)(1)(iii)(A) & (B): These provisions prohibit telemarketers from initiating outbound telephone calls to: 1) a consumer who previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered; and 2) to a consumer's telephone number on the National Do Not Call Registry. 16 C.F.R. § 310.4(b)(1)(iii)(A) & (B). Defendants and their clients are associated with tens of thousands of DNC complaints received by the FTC. By indiscriminately

dialing millions of consumers, Defendants pay no attention to the Registry, or to consumers' removal requests conveyed to Defendants or their clients.

TSR Section 310.4(a)(7): This provision requires telemarketers to transmit or cause to be transmitted the telephone number and name of the telemarketer or seller to any caller identification service in use by a recipient of a telemarketing call. 16 C.F.R. § 310.4(a)(7). Defendants do not transmit a telephone number, their name, or their clients' name to consumers' caller ID services. Defendants instead spoof or omit such information, in clear violation of the TSR.

TSR Section 310.4(b)(1)(iv): This provision prohibits call abandonment, which occurs when telemarketers fail to connect a call to a sales representative within two (2) seconds of the completed greeting of the person answering the call. 16 C.F.R. § 310.4(b)(1)(iv). By definition, the practice of robocalling violates this provision. Consumers who receive Defendants' robocalls are subjected to a thirty-second prerecorded message before being transferred to a live representative. Because Defendants do not connect calls to a sales representative within two seconds of the person's completed greeting, they necessarily run afoul of this provision.⁸⁵

TSR Section 310.8: Finally, this provision of the TSR prohibits the initiation of outbound telephone calls to a telephone number within a given area code on behalf of a seller who has not, either directly or through another person, paid the required annual fee for access to the telephone numbers within that area code that are included in the National Do Not Call Registry. 16 C.F.R. § 310.8. Here, neither Defendants nor their clients have paid for access to the telephone numbers in the area codes into which they are dialing.

2. Individual Defendants Are Personally Liable.

The Commission is likely to succeed in showing that all three individual Defendants are liable for the violations described above. An individual may be held liable for FTC Act violations if the court finds that the individual: 1) actively participated in or had authority to control the deceptive practices, and 2) had or should have had knowledge or awareness of the

⁸⁵ Since Defendants transmit nothing but prerecorded messages, they cannot take advantage of the TSR's call abandonment safe harbor, which allows telemarketers to play a prerecorded message in a maximum of three percent of all calls answered in person by a consumer. 16 C.F.R. 310.4(b)(4).

practices. *See Amy Travel*, 875 F.2d at 573-74; *World Media Brokers*, 415 F.3d at 764.

Authority to control can be evidenced by “active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer.” *Id.* (citing *Amy Travel*, 875 F.2d at 573). In addition, the defendant’s “degree of participation in business affairs is probative of [his] knowledge.” *Amy Travel*, 875 F.2d at 574.

James Dunne holds himself out as a senior partner and manager of Voice Touch.⁸⁶ He is heavily involved in all aspects of the voice broadcasting operation, including recruiting new clients,⁸⁷ negotiating contracts,⁸⁸ writing and recording voice broadcast messages,⁸⁹ facilitating technical support,⁹⁰ and billing.⁹¹ Since November 2006, Dunne has withdrawn over \$1 million in cash from Voice Touch bank accounts.⁹² In sum, Dunne has actively participated in or is in a position to control Defendants’ practices, and had or should have had knowledge of the practices.

Maureen Dunne is James Dunne’s wife and is the incorporator, president, and sole officer of Defendant Voice Touch.⁹³ She also registered the Florida fictitious business name Voice

⁸⁶ PX 2, Menjivar Dec. ¶ 57 & Att. BB at p.2; *id.* ¶ 32(c).

⁸⁷ *See id.* at Atts. Q-R (transcripts of conversations between Dunne and a prospective client).

⁸⁸ *See, e.g.*, PX 4, Atkinson Dec. ¶¶ 5-8 & Att. A at p.2 (Dunne’s signature as “Partner” on “Rate Buy Down and Call Agreement”).

⁸⁹ *See, e.g., id.* at ¶¶ 11-14 & Att. B (June 5, 2007 email from Dunne to NAWS: “How do you like the new wave recording i sent you today? I am also having this recorded in a guys voice which we will have on wed.”) & Att. F (Nov. 1, 2007 email from Dunne: “will get script written and recorded and have in place for Monday”).

⁹⁰ *See, e.g.*, PX 5, Austin Tr. at p.15 (voice mail to NAWS employee from Dunne regarding technical problem); p.21 (email from Dunne to NAWS arranging for the delivery of servers from Kohlfeld) & p.16 (Dunne was “acting as the agent that connected us to whoever his technical people were that actually made the calls work”).

⁹¹ *See, e.g.*, PX 4, Atkinson Dec. ¶¶ 15-18 & Att. K.

⁹² *See* PX 2, Menjivar Dec. ¶ 26.

⁹³ *Id.* at ¶¶ 4(a), 25(b), 32(b) & 33(b).

Touch,⁹⁴ is a signatory on Voice Touch bank accounts,⁹⁵ and has withdrawn nearly \$300,000 in cash from these accounts.⁹⁶ Defendant M. Dunne's officer position alone establishes her ability to control corporate acts and practices. *See, e.g., World Media Brokers*, 415 F.3d at 764-65 (corporate officer "hard-pressed to establish that he lacked authority or control" over corporate entity); *Amy Travel*, 875 F.2d at 574.

Finally, Damian Kohlfeld has provided Defendants' operation with the technical expertise necessary to execute the enormous robocalling campaigns. His expertise includes supplying the equipment necessary to run the operation,⁹⁷ and the phone numbers to dial.⁹⁸ Kohlfeld works directly with clients in blasting the messages⁹⁹ and must have known their content and that they were false given the telephone numbers he provided. Further, he is a member of Network Foundations which has received millions in proceeds from Defendants' illegal practices.¹⁰⁰ Certainly Kohlfeld actively participated in Defendants' practices, and had or should have had knowledge of the practices.

D. The Balance of Equities Tip Decidedly in the Commission's Favor.

Not only is the Commission likely to succeed on the merits, but the balance of the equities also tips decidedly in the Commission's favor. In balancing the equities, the Court must assign greater weight to the public interest than to any of defendants' private concerns. *World*

⁹⁴ *Id.* at ¶ 4(b) & Att. B.

⁹⁵ *Id.* at ¶ 25(a), 32(a) & 33(a).

⁹⁶ *Id.* at ¶ 27.

⁹⁷ PX 5, Austin Tr. at p.21 ("The way I understood his relationship was Kohlfeld was as an outsourced member of Dunne's team."); & p.22 (Kohlfeld sent NAWS servers); *see also* PX 4, Atkinson Dec. Att. M at 1 (same).

⁹⁸ PX 4, Atkinson Dec. Att. J ("Damian has [g]uaranteed the new leads this week and will stay on top of making sure they are sent to be DNC'd and loaded for Monday dials."). As explained above, however, the Commission does not believe that any of the telephone numbers were in fact scrubbed against the DNC Registry.

⁹⁹ PX 2, Menjivar Dec. Att. AA at pp.3-19.

¹⁰⁰ *Id.* at ¶¶ 7-8 & Atts. I-J (identifying Kohlfeld as a "member" and "manager"); *id.* at ¶ 31 (identifying transfers).

Travel, 861 F.2d at 1029; *see also* *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981) (private equities alone insufficient to justify denial of injunction).

The public equities in this case are compelling, as the public has a strong interest in immediately halting illegal robocalls about which literally thousands of consumers have complained, and in preserving the assets necessary to provide effective final relief to those consumers who fell victim to defendants' deceptive calls. Defendants, by contrast, have no legitimate interest in continuing to violate the law by operating a business permeated with fraud. *See* *FTC v. Datacom Mktg. Inc.*, 2006 WL 1472644, at *5 (N.D. Ill. May 24, 2006).

E. A TRO Should Be Issued and Should Include an Asset Freeze, a Temporary Receivership, and Other Ancillary Relief.

In issuing injunctive relief under the FTC Act, district courts have authority “to grant any ancillary relief necessary to accomplish complete justice[.]” *World Travel*, 861 F.2d at 1026 (quoting *H.N. Singer*, 668 F.2d at 1113); *see also* *Febre*, 128 F.3d at 534 (district court has authority in FTC action to “order any ancillary equitable relief necessary to effectuate the exercise of the granted powers”). Here, the FTC requests that the Court issue a TRO that includes ancillary equitable relief narrowly tailored to stop Defendants' scam immediately and preserve the possibility to refund victimized consumers.¹⁰¹

A district court has “a duty to ensure that . . . assets . . . [are] available to make restitution to injured customers” where the court determines that it is “probable that the FTC [will] prevail in a final determination of the merits.” *World Travel*, 861 F.2d at 1031; *see also* *FTC v. World Wide Factors*, 882 F.2d 344, 347 (7th Cir. 1989) (upholding 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”); *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1009 (N.D. Ill. 1998) (same). Here, Defendants' assets should be preserved to ensure that they are available to make restitution to injured consumers. Defendants, along with their clients, are jointly and severally liable for the harm caused to consumers as a result of their deceptive practices. *World Media Brokers*, 415 F.3d at 765. An asset freeze is especially warranted here, where the threat of asset dissipation is high. Defendants already have

¹⁰¹ The FTC has submitted a Proposed Temporary Restraining Order with its papers.

transferred some of their assets offshore,¹⁰² and could easily do the same with any remaining funds.

For the same reason, the Court should appoint a temporary receiver over corporate Defendant Network Foundations.¹⁰³ The appointment of a temporary receiver would serve to prevent the destruction of documents and the dissipation of assets while the case is pending. Defendant Network Foundations likely possesses the key technological equipment, including computer servers, used to place the robocalls. Appointment of a temporary receiver is particularly appropriate where Defendants' pervasive fraud presents the likelihood of continued misconduct. If Defendants are allowed to remain in control of their business, it is likely that evidence will be destroyed and the fruits of their fraud will be dissipated. A temporary receiver would eliminate those risks without disrupting any legitimate business activity. At the same time, a temporary receiver would be helpful to the Court in assessing the extent of Defendants' fraud, tracing the proceeds of that fraud, preparing an accounting, and making an independent report of Defendants' activities to the Court.

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¹⁰² *Id.* ¶ 28.

¹⁰³ At this time, the FTC is not requesting that a temporary receiver be appointed over corporate Defendant Voice Touch. The only known address associated with Voice Touch is the Dunnes' primary residence, and the company does not appear to engage in any legitimate business activity for a receiver to oversee. Instead, the proposed TRO requires Voice Touch to immediately turn over to the FTC documents relating to Defendants' business practices. This includes documents located at an address for Black Coat Marketing, Inc., a company which lists Jim Dunne as an incorporator and officer and which Voice Touch transferred nearly \$40,000 to from its account. *See id.* at ¶ 4(c) & Att. C (Black Coat Marketing, Inc., corporate papers); *see also id.* at ¶ 29 (bank records indicating the transfer).

V. CONCLUSION

Defendants have caused and are likely to continue to cause substantial injury to the public through their violations of the FTC Act and the TSR. The Federal Trade Commission respectfully requests that the Court issue the proposed TRO to protect the public from further harm and to help ensure the possibility of effective final relief.

Respectfully Submitted,

DAVID SHONKA
Acting General Counsel

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s/ Rozina C. Bhimani
ROZINA C. BHIMANI
JAMES H. DAVIS
DAVID A. O'TOOLE
Federal Trade Commission
55 West Monroe Street, Suite 1825
Chicago, Illinois 60603
(312) 960-5634 [telephone]
(312) 960-5600 [facsimile]
rbhimani@ftc.gov
jdavis@ftc.gov
dotoole@ftc.gov