

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

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	Case No. 10 C 3168
)	
ASIA PACIFIC TELECOM, INC, a foreign)	Judge William T. Hart
corporation, also d/b/a ASIA PACIFIC)	
NETWORKS,)	Magistrate Judge Morton Denlow
)	
REPO B.V., a foreign corporation,)	
)	
SBN PERIPHERALS, INC., a California)	
corporation, also d/b/a SBN DIALS,)	
)	
JOHAN HENDRIK SMIT DUYZENTKUNST,)	
individually and as an officer or owner of)	
ASIA PACIFIC TELECOM, INC., REPO B.V.,)	
and SBN PERIPHERALS, INC.,)	
)	
and)	
)	
JANNEKE BAKKER-SMIT DUYZENTKUNST,)	
individually and as an officer of REPO B.V.,)	
)	
Defendants.)	
)	

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

I. INTRODUCTION

The Federal Trade Commission asks the Court to take immediate action to stop an enterprise responsible for delivering millions of illegal “robocalls” that make deceptive product claims and are sent in blatant violation of telemarketing laws. Defendants’ broadcasting of prerecorded messages – a practice known as “voice broadcasting” or “robocalling” – has resulted in tens of thousands of consumer complaints to the FTC and caused millions of dollars of consumer loss.

Defendants deliver their deceptive prerecorded messages on behalf of clients selling a variety of dubious products, including extended auto warranties and credit card interest rate reduction programs. Defendants’ clients include at least seven entities sued by the FTC or state attorneys general for fraud and multiple businesses with “F” ratings from the Better Business Bureau. Since January 2008, Defendants have received \$9 million in fees from its clients.

Defendants’ recordings often falsely assert that the caller possesses urgent information about the call recipient’s auto warranties or credit card account. However, in most, if not all, cases, neither Defendants nor their clients know anything about the individuals called. Consumers who are induced by the recording to “press 1” are transferred by Defendants to their clients’ telemarketing boiler rooms, where consumers are subjected to additional fraudulent sales practices aimed at selling inferior extended auto service contracts or worthless debt reduction services. District courts have already found these sales practices to be deceptive in violation of the FTC Act.

In addition to making false claims to consumers, Defendants’ calls blatantly violate telemarketing laws. The practice of robocalling is expressly prohibited in most cases by federal law. Yet, despite tighter regulations on robocalls that went into effect on September 1, 2009, Defendants continue to deliver the calls utilizing a foreign shell company and offshore bank accounts. Defendants also illegally call individuals on the National Do Not Call Registry. Many of these unwanted calls are placed to cell phones, causing consumers to incur additional charges. To make it difficult for consumers and law enforcement to find them, Defendants often transmit caller ID information vaguely identifying the caller as “SALES DEPT” and displaying telephone numbers registered to their foreign company. In the past year, consumers have filed over 25,000 complaints with the FTC about just three telephone numbers connected to Defendants.

The FTC brings this motion *ex parte* to seek an immediate halt to this operation and to freeze its assets. Defendants have gone to great lengths to hide their misconduct and to insure that there is virtually nothing consumers can do to stop receiving these calls. To further insulate themselves from scrutiny, Defendants make use of foreign companies and regularly transfer assets offshore.

Defendants' pattern of fraud, as well as their attempts to conceal their identity and location, suggests that they would hide or dissipate assets if they received notice of this action. The requested relief is therefore necessary to preserve the Court's ability to provide effective final relief.

II. DEFENDANTS

Defendants are three companies that operate as a common enterprise and their principals, Johan Hendrik Smit Duyzentkunst ("Smit") and Janneke Bakker-Smit Duyzentkunst ("Bakker-Smit"), a married couple.

A. SBN Peripherals, Inc. ("SBN")

SBN is a California company registered to the home of Smit and Bakker-Smit. (PX 1 ¶ 6, Att. A.) SBN uses the name "SBN Dials" and is responsible for the website sbndials.com. (PX 11 ¶¶ 3-4, Att. A at pp 1-2.) On its website, SBN identifies itself as a "premium . . . Voice Broadcast service provider." (PX 1 ¶ 7, Att. B.) SBN claims to provide "commercial message delivery" and states that its "dialing service" has a "total capacity of several million call attempts per hour." (*Id.*) SBN leases space in a telecom facility in Los Angeles where its dialing equipment is located. (PX 18 ¶¶ 3-5; PX 7, Att. A at p. 11; PX 21 ¶ 13; PX 9 ¶ 5, Att. A at pp 6, 47.)

With a user name and password, clients of SBN can log into a section of the sbndials.com website and manage the number of robocalls sent by SBN. (PX 21 ¶¶ 5-6; PX 19 ¶ 9.) Clients state that SBN provides the caller ID numbers transmitted to consumers for the robocalls (PX 21 ¶ 9; PX 19 ¶ 8), and, in at least some cases, SBN supplies its clients with the phone numbers that are called and the prerecorded messages that are delivered (PX 21 ¶ 7; PX 20 ¶ 3; PX 19 ¶ 8.) After the robocalls are sent, consumers who "press 1," as urged by the robocall messages, are transferred by SBN to a phone number provided by SBN's client. (PX 21 ¶ 5; PX 19 ¶ 7.) SBN has received nearly \$9 million from clients since January 2008. (PX 9; PX 11; PX 12; PX 1 ¶ 9.)¹

B. Asia Pacific Telecom, Inc. ("Asia Pacific")

Asia Pacific is the foreign company that "fronts" this operation. The Smits appear to utilize this company to cloak SBN's and their personal involvement in the conduct involved in this case. Asia Pacific has a Hong Kong bank account (PX 7 ¶ 3; PX 17 ¶ 2), and, in dealing with third parties,

¹ Records show that SBN receives some payments from resellers of its voice broadcasting services (PX 1 ¶ 11(h)), and, in fact, on its website, SBN states that "[w]e are the provider of choice to large resellers" (*id.* ¶ 7, Att. B.)

identifies its address as in Hong Kong, the Netherlands, or in the Northern Mariana Islands (PX 7 ¶ 3, Att. A at pp. 11, 14; PX 17 ¶ 2; PX 6 ¶ 3; PX 8 ¶¶ 3-4.)²

Services necessary for Defendants' robocall operation are purchased or controlled in the name of Asia Pacific. For example, the domain name for the sbndials.com website was purchased with a credit card in the name of Asia Pacific (PX 16 ¶ 3), and the domain name is publicly registered to Asia Pacific with an address in Hong Kong (PX 1 ¶ 8, Att. C.) Acting as Asia Pacific, Defendants have obtained access to telecommunications networks from at least three service providers. (PX 6; PX 7; PX 8.) Analysis of call records received from these providers demonstrate that over 370 million calls have been initiated from the "Asia Pacific" accounts in the past year (PX 2; PX 1 ¶ 25(a)), over 15 million of which have been delivered to consumers in this district (PX 2; PX 1 ¶ 26.) Call records demonstrate that the calls use one of multiple originating caller ID phone numbers when delivering the robocalls. (PX 2; PX 1 ¶¶ 23-25.)³ Defendants, as Asia Pacific, have procured these phone numbers. (PX 1 ¶¶ 27-31, Atts. G-I; PX 17 ¶¶ 2-3, Att. A.)

Asia Pacific often identifies its owner to third parties as "Dalong Chin," who uses the email address `dalong_chin@yahoo.com`. (PX 16 ¶ 3; PX 17 ¶ 2; PX 20 ¶ 5.) However, this email address is logged into from three Internet accounts controlled by the Smits and SBN. (PX 13, Att. A; PX 14 ¶¶ 3-4, Att. A; PX 15 ¶¶ 3-4; PX 1 ¶ 20.) Thus, "Dalong Chin" is merely an alias used to hide the Smits' involvement in this activity.

C. Repo B.V. ("Repo")

Repo is a company registered in the Netherlands. (PX 1 ¶¶ 12-13, Att. D.) The Smits are the sole directors of Repo. (*Id.*) Over the last two years, over \$6 million has been transferred from SBN to a bank account in the Netherlands in the name of Repo. (PX 10; PX 1 ¶ 18.) Many of these funds are then used to pay the telephone service providers for network access to deliver Defendants' robocalls. (PX 10 ¶ 4, Att. A at pp. 78-88; PX 1 ¶¶ 16-17.)

D. The Smits

SBN's registered address is the Smits' home in Los Angeles (PX 1 ¶¶ 6, 21, Att. A), and both Smit and Bakker-Smit have authority over the SBN bank account (PX 9 ¶ 5, Att. A at pp. 3-4.) Smit

² The FTC has not been able to identify if Asia Pacific is actually registered in any country.

³ The caller ID numbers include: 202-367-9272, 206-397-1715, 240-210-7138, 240-210-7143, 240-699-8945, 240-699-8981, 301-223-0027, 301-882-9986, 434-533-9022, 571-261-0012, 571-431-1944, 571-431-1945, 571-431-1988, 702-520-0076, 703-291-9045, 703-291-9047, 757-990-8981, and 804-234-9010. (PX 2; PX 1 ¶¶ 23-25.)

is an officer or director of SBN and Repo (PX 1 ¶ 6, Att. A), and Smit-Bakker is a director of Repo (*Id.* ¶¶ 12-13, Att. D.) As described above, Asia Pacific’s “Dalong Chin” is merely an alter ego of the Smits and SBN.

Smit has actively solicited robocall clients. In an email message to a potential auto warranty client in October 2008, Smit noted that he was “very familiar with dialing for Auto [sic] warranty” and that he previously “generat[ed] 13000-15000 p’1 [‘press 1s’] a day” for a similar company. (PX 20 ¶ 4, Att. A.) During the summer of 2009, Smit also personally met with a mortgage loan modification telemarketer to pitch his robodialing services. (PX 21 ¶¶ 3, 10.) During some solicitations, Smit has referred individuals interested in robocalling services to “Dalong Chin” in Hong Kong. (PX 20 ¶ 5.) For example, in a March 2010 email message, Smit told a potential auto warranty client: “Anything that is FTC compliant you can do with us direct. If you are not sure if you are safe, you can deal with Dalong Chin (Dalong_Chin@yahoo.com).” (*Id.*, Att. B.)

III. DEFENDANTS’ ILLEGAL BUSINESS PRACTICES

Since at least 2008, Defendants have delivered millions of illegal robocalls to consumers. The robocalls make various false product claims, blatantly violate multiple telemarketing laws, and are continuing to harm consumers.⁴

A. False Product Claims

Many of Defendants’ robocalls falsely suggest that the caller has specific, critical information about the call recipients’ automobile warranty or credit card. However, Defendants place these calls indiscriminately. The recordings are simply aimed at inducing consumers to “press 1” to be transferred to telemarketing boiler rooms run by Defendants’ clients, where consumers often are deceived into paying hundreds or thousands of dollars for a variety of dubious products.

1. Automobile Warranty Claims

Defendants deliver robocalls falsely claiming that consumers’ automobile warranties have expired or are about to expire and that consumers therefore need to purchase extended coverage. Representations in the robocalls are calculated to mislead consumers into believing that the caller is

⁴ The FTC has attached a sample of consumer complaints about the caller ID numbers used by Defendants. (PX 1 ¶ 73, Att. V.) These complaints demonstrate that Defendants deliver robocalls for a laundry list of products, including auto warranties, vacation programs, mortgage loan modification programs, credit card interest rate reduction services, carpet cleaning, and government grants. The complaints also show that the calls almost never disclose the identity of the caller; instead, caller ID often displays the caller as “SALES DEPT.” (*Id.*) In addition to providing the Court with complaints about these calls, the FTC also has attached audio files and transcripts of recordings sent by Defendants that were captured by consumers. (PX 22, Atts. A-B; PX 23, Atts. A-B; PX 24 ¶¶ 4-5; PX 25 ¶ 5.)

somehow affiliated with a consumer's car manufacturer or dealer. For example, the prerecorded messages include statements such as:

- “This is not a solicitation call. We have critical information about your warranty which has expired or is about to expire. We have sent you several notifications by mail but you have yet to respond, so this is our last attempt to contact you.” (PX 22 ¶¶ 19-20, Att. A & Att. B at pp. 18-19);
- “You were contacted today because your warranty and manufacturer recall files need to be updated. Your warranty needs to be extended if it is not already and this will serve as your final notice.” (PX 23 ¶¶ 6-7, Att. A & Att. B at pp. 3-5); and
- “As per you or your dealer's request, I am contacting you in regards to your automobile warranty to verify if your factory warranty has expired.” (PX 24 ¶ 4; PX 25 ¶ 5.)

Despite the impression created in these messages, complaints show that Defendants know little, if anything, about the consumers called, much less the types of cars they drive or the status of their warranties. Many consumers who receive these calls report that they do not have an auto warranty that needs to be extended and, in some cases, do not even own a car. (PX 1 ¶ 73, Att. V at pp. 1-24, 98-100, 136-46, 189-209.)

Defendants have blasted deceptive auto warranty messages on behalf of at least four clients.⁵ Consumers who “press 1” are transferred by Defendants to telemarketing boiler rooms run by these clients. Hundreds of consumers have filed complaints with the FTC and the BBB concerning deceptive sales practices of these companies. (PX 1 ¶¶ 37, 41, 44; PX 3 ¶¶ 8-9.) The BBB publicly has rated each of these companies an “F” for reliability, its lowest rating. (PX 3 ¶¶ 11-12, Atts. A-D.)

Consumers who have paid money to one of Defendants' largest auto warranty clients, My Car Solutions (“MCS”), have later found that MCS was not affiliated with their car's manufacturer or dealer (PX 3 ¶ 9; PX 26 ¶ 4; PX 27 ¶ 5; PX 28 ¶ 3; PX 29 ¶ 4), that the coverage they purchased was actually a service contract, not an extension of their manufacturer's warranty (PX 3 ¶ 12, Att. E; PX 26 ¶ 6; PX 27 ¶ 8; PX 29 ¶ 8), and that the contracts did not, as promised, provide comprehensive “bumper to bumper” coverage similar to a new car warranty (PX 26 ¶ 6; PX 27 ¶¶ 6-9; PX 28 ¶¶ 3-4, 6-7; PX 29 ¶¶ 5, 8; PX 30 ¶¶ 4-5; PX 31 ¶¶ 4, 9-11.) Three former MCS employees confirm that the

⁵ Bank and credit card records show that Defendants have received over \$2.2 million from four auto warranty clients since November 2008. (PX 9; PX 11; PX 12; PX 1 ¶¶ 32, 36, 39, 42.)

company regularly used these and a variety of other deceptive sales practices. (PX 32 ¶¶ 4, 8-9, 20; PX 33 ¶¶ 8, 10-11; PX 34 ¶¶ 12-16.)⁶

2. Credit Card Interest Rate Reduction Claims

Defendants also deliver robocalls falsely promising consumers that they qualify for lower credit card interest rates. The robocalls suggest that Defendants are somehow affiliated with the consumer's credit card issuer or have urgent information about the status of the consumer's account. For example, the prerecorded messages have stated:

- “Hello, this is Stacey at Account Holder Services calling in reference to your current credit card account. There are no problems currently with your account. It is urgent that you contact us concerning your eligibility for lowering your interest rate to as little as 6.9 percent. Your eligibility expires shortly, so please consider this your final notice.” (PX 22 ¶¶ 23, 25, Att. A & Att. B at pp. 16-17);⁷
- “Don’t be alarmed, but this is your final notice for lower interest rates on your current account. This offer expires today. Press one now to speak to your account manager to reduce your rates.” (*Id.* ¶¶ 9-10, Att. A & Att. B at pp. 19-21);
- “Congratulations, you have been pre-qualified for a reduced interest rate on your existing account. Press one now to speak to a representative so your new rate will take effect.” (*Id.* ¶¶ 9, 11, 28, 31-35, 37, Att. A & Att. B at pp. 25, 27-28, 30-32, 36); and
- “Hey, this is Christie concerning your current credit card account. This is your final notice to take advantage of lower interest rates on these accounts. This offer expires today, so please press one and speak to your account manager to reduce your rates today.” (PX 23 ¶¶ 9, 12, Att. A & Att. B at pp. 8-10.)

Despite the impression made in the robocalls, neither Defendants nor their clients have a relationship with call recipients or possess any information about their credit card accounts. Indeed, many consumers who receive these calls do not even own credit cards. (PX 1 ¶ 73, Att. V at pp. 88-97, 127-35, 156-65.)

⁶ Simultaneous with this case, the FTC has filed a complaint and contempt action for deceptive sales practices in U.S. District Court in the Middle District of Florida against MCS and its principal, Fred Khalilian. Khalilian, who was previously sued by the FTC for deceptively telemarketing travel promotions (*see* PX 1 ¶ 35, Att. J), played a central role in Defendants’ relationship with another operation engaged in the deceptive sale of extended service contracts, Transcontinental Warranty. The FTC sued, and obtained an *ex parte* TRO against, Transcontinental and its owner, Christopher Cowart, in May 2009 for violating the FTC Act and Telemarketing Sales Rule. *See FTC v. Transcontinental Warranty, Inc.*, No. 09 C 2927 (N.D. Ill. May 13, 2009). At Khalilian’s urging, Cowart briefly purchased robocalling services from Defendants. (PX 19 ¶¶ 5-10.)

⁷ Defendants have delivered a similar message from “Rachel at Cardholder Services.” (PX 22 ¶¶ 12-13, 23, 25-26, 28-30, Att. A & Att. B at pp. 15-16, 22-24, 37.)

Defendants transfer “press 1s” to their clients’ boiler rooms, where telemarketers make additional misstatements about the ability of consumers to lower their credit card interest rate. In the last six months, the FTC has sued, and obtained *ex parte* TROs against, three of the “credit card” companies to which Defendants have transferred consumers.⁸ These FTC enforcement actions were precipitated by scores of consumer complaints concerning deceptive sales practices of the companies (PX 1 ¶¶ 47, 50, 54.) The complaints show consumers were induced to pay advance fees ranging from \$500 to \$2,000 for worthless interest rate reduction services. (*Id.*) Consumers were told a variety of false statements, including that the caller: (1) had special relationships with financial institutions;⁹ (2) would dramatically reduce consumers’ interest rates, thereby saving consumers thousands of dollars; and (3) offered an unconditional money-back guarantee if consumers do not realize the promised savings. (*Id.*)¹⁰

B. Abusive Telemarketing Practices

In addition to making fraudulent claims, Defendants’ calls violate multiple provisions of the Telemarketing Sales Rule (“TSR”), 16 C.F.R. 310. Defendants make it virtually impossible for consumers to avoid receiving these robocalls. To make matters worse, many of Defendants’

⁸ Two weeks ago, the FTC obtained an *ex parte* TRO against Advanced Management Services, for alleged deceptive sales practices. *See FTC v. Advanced Management Services NW LLC*, Civ.-10-148-LRS (E.D. Wash. May 10, 2010) (FTC press release and documents at www.ftc.gov/opa/2010/05/ams.sthm). SBN received \$21,220 from AMS from March through November 2009. (PX 1 ¶ 45.) In November 2009, the FTC obtained *ex parte* TROs against two other companies deceptively selling credit card interest rate reduction services. *See FTC v. 2145183 Ontario Inc. et al.*, No. 09-CV-7423 (N.D. Ill. Nov. 30, 2009) (Grady, J.) and *FTC v. JPM Accelerated Services, Inc.*, No. 09-CV-2021 (M.D. Fla. Nov. 30, 2009) (FTC press release and documents at <http://www.ftc.gov/opa/2009/12/robocall.shtm>). Documents obtained in those matters show that SBN initiated robocalls for those operations. (PX 1 ¶¶ 52, 55, Atts. P-Q.)

⁹ Recordings of Defendants’ calls captured by consumers show that after consumers “pressed 1” and were transferred by Defendants they were falsely told that the caller was affiliated with Visa or Mastercard. (PX 22 ¶¶ 9-10, Att. A & Att. B at pp. 20-22 (caller identified as being the “the qualifying department with Visa, Mastercard and American Express”); PX 23 ¶¶ 9, 12, Att. A & Att. B at pp. 8-10 (caller identified as “Card Services with Visa Mastercard”).)

¹⁰ In a December 2009 report filed with the court, the receiver in *214583 Ontario* found “that portions of the [sales] scripts were intentionally written to mislead or confuse the consumer” and that some “statements on the original and rebuttal scripts are false.” (PX 1 ¶ 51, Att. O at p. 3.) The receiver also examined consumer complaints found in the defendants’ offices, noting: “The general nature of most complaints was lack of a consumer being able to obtain results from the credit card issuer, not receiving any claimed benefit from the purchased program, and an alarming trend of the [defendants] deferring action on requests from consumers for refunds.” (*Id.* at p. 9.)

unwanted calls are placed to cell phones, creating additional costs for consumers. (PX 4 ¶¶ 3-12; PX ¶¶ 4-14; PX 1 ¶ 73, Att. V at pp. 38-46, 59-61, 83-85, 149-55.)¹¹

1. Call Abandonment / Pre-Recorded Messages

Defendants have delivered millions of prerecorded messages which are, in most cases, illegal. The TSR 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. Moreover, effective September 1, 2009, the TSR was amended to explicitly ban robocalls like those made by Defendants without the prior express written consent of the consumer being called. 16 C.F.R. § 310.4(b)(1)(v)(A)(i)-(iv). Consumer complaints show that Defendants consistently have delivered illegal robocalls over the past year, and are continuing to do so despite the new restrictions. (PX 1 ¶¶ 70-73, Att. V.)¹²

2. Do Not Call Violations

Defendants also call consumers whose phone numbers are on the National Do Not Call Registry (the “Registry”) and who have previously stated that they did not wish to receive further calls. The TSR, as amended in 2003, established the Registry of consumers who do not wish to receive telemarketing calls. Since October 17, 2003, sellers and telemarketers have been prohibited from calling numbers on the Registry. 16 C.F.R. § 310.4(b)(1)(iii)(B). In addition, the TSR prohibits sellers and telemarketers from calling any person when that person previously has stated that he or she does not wish to receive a telephone call made by or on behalf of the seller whose goods or services are being offered. 16 C.F.R. § 310.4(b)(1)(iii)(A).

Complaints show that Defendants consistently call consumers who are on the Registry and/or have previously asked that the calls cease. (PX 1 ¶¶ 70-73, Att. V at 26-37, 47-58, 62-79, 101-28, 166-88, 198-202.) Indeed, during the past year, just three phone numbers registered to Defendants have generated over 25,000 complaints to the FTC, including the top two complaint generating phone

¹¹ Verizon Wireless and AT&T have submitted evidence showing the staggering volume of calls received by their subscribers from phone numbers controlled by Defendants. (PX 4, 5.) For example, on a single day in May 2009, AT&T wireless subscribers received approximately one call per second from one of Defendants’ telephone numbers. (PX 4 ¶ 3.) On April 21, 2009, AT&T landline subscribers received an astonishing 2,384,491 calls from this number, equivalent to 27.6 calls per second. (*Id.*)

¹² Some robocalls are exempted under the TSR, including political messages and certain charitable solicitations and business to business calls. Although Defendants may possibly deliver some exempted robocalls, if so, those calls are a small percentage of Defendants’ business.

numbers. (*Id.* ¶ 70.) In the last two months, consumers have filed over 1000 additional complaints about phone numbers controlled by Defendants. (*Id.* ¶ 72.)¹³

IV. ARGUMENT

Defendants' practices violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and multiple provisions of the TSR. The Commission seeks an *ex parte* temporary restraining order: (1) prohibiting Defendants' ongoing illegal practices; (2) freezing Defendants' assets to preserve them for restitution to victims; and (3) appointing a receiver to assess the extent of Defendants' illegal activity and make an independent report of Defendants' activities to the Court. The Court has full authority to enter the requested relief, which is strongly supported by the evidence. Courts in this district have repeatedly granted similar TROs in FTC actions.¹⁴

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). Once the Commission invokes the federal court's equitable powers, the full breadth of the court's authority is available, including the power to grant such ancillary final relief as rescission of contracts and restitution. *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989). The court may also enter a temporary restraining order, a preliminary injunction, and whatever additional preliminary relief is necessary to preserve the possibility of providing effective final relief. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988); *see also Amy Travel*, 875 F.2d at 571. Such ancillary relief may include an asset freeze to preserve assets for

¹³ One of Defendants' former clients states that Defendants did not appear to have a procedure to remove phone numbers despite being responsible for handling consumer opt-out requests. (PX 21 ¶ 8.)

¹⁴ *See, e.g., FTC v. API Trade, LLC*, 10 C 1543 (March 10, 2010) (Guzman, J.) (*ex parte* TRO with asset freeze); *FTC v. 2145183 Ontario Inc., et al.*, No. 09 C 7423 (N.D. Ill. Nov. 30, 2009) (Grady, J.) (*ex parte* TRO with asset freeze and appointment of receiver); *FTC v. Transcontinental Warranty, Inc. et al.*, No. 09 C 2927 (N.D. Ill. May 13, 2009) (Grady, J.) (*ex parte* TRO with asset freeze and appointment of receiver); *FTC v. Integration Media, Inc.*, No. 09 C 3160 (N.D. Ill. May 27, 2009) (*ex parte* TRO with asset freeze) (Bucklo, J.) (same); *FTC v. Data Bus. Solutions, Inc.*, No. 08 C 2783 (N.D. Ill. May 14, 2008) (Dow, J.) (same); *FTC v. Union Consumer Benefits*, No. 08 C 2309 (N.D. Ill. April 23, 2008) (Aspen, J.) (same); *FTC v. Spear Systems, Inc.*, No. 07 C 5597 (N.D. Ill. Oct. 3, 2007) (Andersen, J.) (same); *FTC v. Sili Neutraceuticals, LLC*, No. 07 C 4541 (N.D. Ill. Aug. 13, 2007) (Kennelly, J.) (same); *FTC v. 1522838 Ontario Inc.*, No. 06 C 5378 (N.D. Ill. Oct. 4, 2006) (Gettleman, J.) (same); *FTC v. Datacom Mktg.*, No. 06 C 2574 (N.D. Ill. May 9, 2006) (Holderman, C.J.) (same); *FTC v. Cleverlink Trading Ltd.*, No. 05 C 2889 (N.D. Ill. May 16, 2005) (St. Eve, J.) (same); *FTC v. 3R Bancorp*, No. 04 C 7177 (N.D. Ill. Nov. 17, 2004) (Lefkow, J.) (*ex parte* TRO with asset freeze and appointment of receiver).

eventual restitution to victimized consumers. *World Travel*, 861 F.2d at 1031. All FTC Act equitable remedies are equally available for violations of the TSR. *See* 15 U.S.C. § 6105(b).

B. A Temporary Restraining Order Is Appropriate and Necessary

To grant preliminary injunctive relief in an FTC Act case, the district court must: (1) determine the likelihood that the Commission will ultimately succeed on the merits, and (2) balance the equities. *World Travel*, 861 F.2d at 1029. Under this “public interest” test, “it is not necessary for the FTC to demonstrate irreparable injury.” *Id.* When the court balances the equities, the public interest “must receive far greater weight” than any private concerns. *Id.*

1. There is a Strong Likelihood That Defendants Have Violated Section 5(a) of the FTC Act and the TSR

The threshold showing of likelihood of success on the merits under the Seventh Circuit’s test for injunctive relief is a “better than negligible” chance of success. *See Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999). Here, Defendants have violated multiple laws, and the FTC’s likelihood of success is strong. Defendants are directly liable for delivering illegal robocalls with false product claims in violation of the TSR and the FTC Act. Moreover, even if Defendants could be found not directly liable, they are liable for assisting and facilitating the litany of TSR violations here.¹⁵

a. Direct Liability for False Claims and TSR Violations

Defendants are telemarketers who are directly liable for a variety of false statements made to consumers in violation of the TSR and the FTC Act. Both “sellers” and “telemarketers” are potentially liable under the TSR for engaging in deceptive or abusive telemarketing conduct. *See* 16 C.F.R. §§ 310.3(a); 310.4(a). The TSR defines a “telemarketer” as an entity that, “in connection with telemarketing, initiates or receives telephone calls to or from a customer.” 16 C.F.R. § 310.2(bb).¹⁶ Here, Defendants have initiated millions of robocalls with the use of their dialing hardware and software. They provide the caller ID numbers that are transmitted to consumers for the calls and, in at least some circumstances, supply the numbers that are called and the prerecorded messages that are delivered. Defendants are telemarketers liable for TSR violations. *See, e.g., The Broadcast Team v. FTC*, 429 F. Supp. 2d 1292, 1295 (M.D. Fla. 2006).

¹⁵ Any violation of the TSR also is an “unfair or deceptive act or practice” under Section 5 of the FTC Act. *See* 15 U.S.C. §§ 45(a), 57a(d)(3), 6102(c).

¹⁶ A “seller” is defined under the TSR as an entity that, “in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.” *See* 16 C.F.R. § 310.2(z).

Defendants' robocalls make various false statements that violate the TSR and the FTC Act. The TSR prohibits telemarketers from misrepresenting their "affiliation with, or endorsement or sponsorship by, any person[.]" 16 C.F.R. § 310.3(a)(2)(vii). Moreover, the TSR prohibits telemarketers from "making a false or misleading statement to induce any person to pay for goods or services[.]" 16 C.F.R. § 310.3(a)(4). As explained above, Defendants falsely claim in their telemarketing calls that they are calling from, on behalf of, or are otherwise affiliated with the manufacturer or dealer of the call recipient's automobile or the issuer of the call recipient's credit card. Moreover, Defendants' calls make false statements aimed at inducing consumers to pay for extended automobile service contracts and credit card interest rate reduction programs.

District courts already have found similar conduct to violate the FTC Act and the TSR. For example, this district court recently entered a preliminary injunction against a company delivering auto warranty robocalls similar to those found in this case. *See FTC v. Voice Touch, Inc.*, 09 C 2929 (N.D. Ill. May 29, 2009) (Grady, J.) In entering a preliminary injunction in that matter, Judge Grady stated:

[the robocalls] clearly [said] that this call is from someone authorized to act on behalf of the warrantor of the automobile, namely the manufacturer or the dealer. And the reference to the warranty expiring is designed to imply a familiarity with the situation of the person being called. And, of course, there is absolutely no truth to that representation, as we now know. And, nonetheless, people were induced to pay substantial amounts of money for what is said in the complaint to have been a virtually worthless repair contract, not the manufacturer or the dealer but with some third-party repair service. That's a serious fraud.

(PX 35 p. 97.) In addition, as explained above at Section III.A.2, three federal district courts, including this district, have entered injunctions against "credit card" companies who received "press 1s" from Defendants and made deceptive interest rate reduction claims.

Defendants also are directly liable for the following abusive telemarketing practices discussed above at § III.B that are illegal under the TSR: (1) call abandonment, 16 C.F.R. § 310.4(b)(1)(iv); (2) robocalls since September 1, 2009, 16 C.F.R. § 310.4(b)(1)(v)(A)(i)-(iv); and (3) failing to honor do-not-call requests by calling consumers who previously stated they do not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered, or by calling phone numbers on the Registry. 16 C.F.R. § 310.4(b)(1)(iii)(A) & (B).

b. Assisting and Facilitating TSR Violations

Even if Defendants were not directly liable for the false claims and abusive telemarketing practices discussed above, they still would be liable for assisting and facilitating those violations

under the TSR. To establish assisting and facilitating liability under the TSR, the FTC must demonstrate that: (1) third parties violated Section 310.3(a) or 310.4 of the TSR; (2) Defendants provided “substantial assistance or support” to these third parties; and (3) Defendants “knew or consciously avoided knowing” that these third parties were engaged in the unlawful practices. 16 C.F.R. § 310.3(b).

The facts necessary for assisting and facilitating liability are present here. First, as explained above at § IV.B.1.a, the calls delivered by Defendants make various misrepresentations in violation of § 310.3(a) of the TSR and also constitute abusive telemarketing practices in violation of § 310.4. Second, Defendants have provided substantial assistance to their clients by, among other things: (1) providing the infrastructure, including specialized hardware and software, to make the robocall campaigns possible, (2) procuring telephone numbers for clients that appear in recipients’ caller ID displays; (3) supplying telephone numbers to call and the prerecorded messages delivered to consumers; and (4) transferring calls to clients’ telemarketing boiler rooms.

Finally, Defendants knew or consciously avoided knowing of the illegal practices involved in this case. Tellingly, Defendants placed calls for auto “warranty” companies despite recognizing the industry’s reputation for fraud. In fact, Smit stated in an October 2008 email message that “we know the FTC is cracking down on many fraudulent auto warranty companies, and more will follow.” (PX 20 ¶ 4, Att. A.) Nevertheless, after sending that email message, Defendants received over \$2.2 million from at least four such companies. (PX 1 ¶¶ 32, 36, 42, 45.)¹⁷ Defendants knowledge is also evident by their use of a foreign company and bank account to purchase telecom services, procure caller ID number and solicit clients. In fact, as recently as March 2010, Smit offered to assist an auto warranty company to conduct a “non-FTC-compliant” telemarketing campaign through his “Dalong Chin” alias. (PX 20 ¶ 5, Att. B.)

Many of the illegal practices involved here were readily discernible. Minimal due diligence by Defendants would have revealed that several of their clients previously had been sued by the FTC or state attorneys general for fraud, or had “F” ratings with the BBB. (PX 1 ¶¶ 35, 47, 48, 58; 61-63, Atts. J-N, S-U; PX 3 ¶¶ 5-6, 12, Atts. A-D.) Moreover, a simple Internet search of the telephone

¹⁷ In his October 2008 email message, Smit noted that one warranty company, Automotive Warranty Solutions (“AWS”), was particularly troubling because “they simply refused to comply with even the most basic forms of decency towards the public, with agents telling the press candidates to go F themselves and no organized DNC management.” (PX 20 ¶¶ 3-5, Att. A.) Nevertheless, after that email message was sent, Defendants did an additional \$440,000 of work for AWS. (PX 1 ¶ 36.)

numbers that Defendants transmitted as caller ID display numbers in their robocalls would have revealed the illegal practices at issue in this matter. (PX 1 ¶¶ 65-69.)¹⁸

c. The Smits are Individually Liable

Smit and Bakker-Smit are individually liable for the violations described above. An individual may be liable for corporate practices where he or she has authority to control the business affairs, such as by assuming the duties of a corporate officer, and has or should have had knowledge of the deceptive practices of the business. *See FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 636 (7th Cir. 2005); *World Travel*, 861 F.2d at 1031. Here, as explained above in Section II.D, both Smit and Bakker-Smit have sufficient knowledge and participation in the business affairs of this enterprise to be held individually liable.

2. The Equities Tip Decidedly in the Commission's Favor

Once the Commission has shown a likelihood of success on the merits, the Court must balance the equities, assigning “far greater weight” to the public interest than to any of Defendants’ private concerns. *World Travel*, 861 F.2d at 1029. The public equities in this case are compelling, as the public has a strong interest in halting Defendants’ illegal activities and preserving assets necessary to provide effective final relief to victims. Defendants, by contrast, have no legitimate interest in engaging in illegal conduct. *See FTC v. World Wide Factors, Ltd*, 882 F.2d 344, 347 (9th 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”).

C. The Court Should Enter the FTC's Proposed TRO

The FTC requests that the Court issue a TRO that prohibits future law violations and preserves assets and documents to ensure that the Court can grant effective final relief in this case.¹⁹

¹⁸ For example, one website, www.800notes.com, appears prominently in Internet search results for Defendants’ caller ID numbers. (PX 1 ¶¶ 65-68.) The 800notes site collects information about abusive telemarketing practices. Results for one of Defendants’ caller ID numbers – 301-882-9986 – shows that, between May 2008 and September 2009, consumers posted 28 pages of complaints and comments about calls. (*Id.* ¶ 66.) Comments generally concern the receipt of prerecorded sales pitches for credit card interest rate reduction services and about receiving multiple calls from the phone number despite being registered on state or federal do-not-call registries and despite efforts to make the calls stop. (*Id.*)

¹⁹ A Proposed TRO has been filed concurrently with the FTC’s TRO motion.

1. Asset Freeze

Part of the relief sought by the Commission in this case is restitution for the victims of Defendants' fraud. The false statements contained in Defendants' telemarketing calls have resulted in millions of dollars of consumer loss. Indeed, just one of Defendants' auto warranty clients – MCS – took in over \$6 million last year from consumers. (PX 1 ¶ 34.) Defendants have delivered robocalls containing deceptive claims for a variety of other clients and products.²⁰ Moreover, Defendants have caused consumers to incur additional charges for unwanted calls made to their cell phones.

An asset freeze is appropriate once the Court determines that the Commission is likely to prevail on the merits and that restitution would be an appropriate final remedy. *See World Travel*, 861 F.2d at 1031 & n.9. The district court, at that juncture, has “a duty to ensure that the assets of the corporate defendants [are] available to make restitution to injured consumers.” *Id.* at 1031 (upholding freeze of company and individual assets). To preserve the possibility for equitable monetary relief, the Commission seeks, at Sections II and III of its Proposed TRO Order, a freeze of Defendants' assets and, at Section VIII, the repatriation of funds transferred outside of the United States. This district court recently issued a similar asset freeze in an almost identical case. *See Voice Touch*, 09 C 2929 (May 29, 2009) (Grady, J.), PX 35 at pp. 97-98 (entering preliminary injunction with asset freeze against company and its principal for deceptive auto warranty claims, stating “persons who were defrauded should be protected by the Court from the dissipation of assets properly allocable to restitution”).

2. Appointment of Receiver

The appointment of a temporary receiver would prevent the destruction of documents and the dissipation of assets while the case is pending. Such an appointment, set forth at Section VII of the Proposed TRO, is particularly appropriate in light of Defendants' pervasive fraud, which 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 with a minimal disruption of any legitimate business

²⁰ In addition to the “auto warranty” and “credit card” companies previously discussed in this brief, Defendants also delivered robocalls for entities selling loan modification and grant procurement services as well as vacation promotions. (PX 21; PX 22 ¶¶ 5-8, 12, 14, 36, Att. B at pp. 5-6, 11-14, 33-34; PX 24 ¶ 5; PX 1 ¶¶ 57-64, 73 Att. V at pp. 73-82, 83-87.) The FTC has concerns regarding whether claims made for these and other products were also misleading, especially in light of the fact that many of Defendants' clients have been the subject of law enforcement actions. (PX 1 ¶¶ 58-59, 61-63.)

activity. The receiver also would be helpful to assess the extent of Defendants' fraud, trace the proceeds of that fraud, prepare an accounting, and make an independent report of Defendants' activities to the Court.

3. Additional Relief

The additional relief requested in the FTC's proposed TRO is also appropriate and necessary to maintain the *status quo*. Section I of the Proposed TRO enjoins Defendants from making further violations of the FTC Act and the TSR. Section IV of the Proposed TRO requires Defendants to complete financial forms. Section V requires Defendants to preserve records and report new business activity. Section VI prohibits Defendants from selling or otherwise disclosing their customers' sensitive information. Section IX allows for expedited discovery of information relevant to a preliminary injunction hearing. These are necessary provisions to identify the scope of the unlawful practices, other participants, and the location of ill-gotten gains.

D. The Temporary Restraining Order Should Be Issued *Ex Parte*

To prevent Defendants from dissipating or concealing their assets, the requested TRO should be issued *ex parte*. An *ex parte* TRO is warranted where the facts show that immediate and irreparable injury, loss, or damage will occur before the defendants can be heard in opposition. *See* Fed. R. Civ. P. 65(b). Here, as in similar FTC actions in this district where courts have granted an *ex parte* TRO (*see supra* p. 9, n. 14), there is a serious risk that assets and evidence stemming from the illegal activity will disappear if Defendants receive prior notice.²¹ Defendants already have shown the ability to hide their identities. They purchase telecom services and utilize caller ID numbers tied to an offshore company. Moreover, they control overseas bank accounts and regularly transfer funds to those accounts. In sum, *ex parte* relief is necessary to preserve the *status quo* and ensure that Defendants cannot move assets and records outside of this Court's reach.

²¹ *See* Declaration in Support of *Ex Parte* Motion for TRO and Application to File Papers Under Seal (describing need for *ex parte* relief and citing cases in which defendants who learned of impending FTC action withdrew funds, destroyed vital documents, and fled the jurisdiction).

V. **CONCLUSION**

Defendants have caused and are likely to continue to cause substantial injury to consumers as a result of their violations of the FTC Act and TSR. The Commission therefore asks that the Court issue the requested injunctive relief to prevent ongoing harm and to help ensure the possibility of effective final relief, including monetary restitution.

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