

RECEIVED

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

NOV - 8 2010

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

DIRECT FINANCIAL MANAGEMENT INC.,
et al.,

Defendants.

JUDGE JOANITA R. CASANOVA

MAGISTRATE JUDGE VALDEZ

Case No

1007704

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

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	DEFENDANTS' FRAUDULENT BUSINESS PRACTICES	3
A.	Defendants Violate the FTC Act	3
1.	The Initial Deceptive Robocalls and Telemarketing Calls	3
2.	The Telemarketing Pitch	4
3.	The Welcome Package	7
4.	Defendants' "Services"	9
5.	Refund Refusals	11
B.	Defendants Violate the TSR	12
III.	DEFENDANTS	13
IV.	ARGUMENT	18
A.	This Court Has the Authority to Grant the Relief Requested	19
B.	The FTC Meets the Applicable Standard for Injunctive Relief	20
C.	The FTC has Demonstrated a Likelihood of Success on the Merits	21
1.	Defendants are Violating the FTC Act and the TSR	21
2.	The Equities Tip Decidedly in the Commission's Favor	23
3.	The Individual Defendants are Personally Liable	24
D.	<i>Ex Parte</i> Relief is Necessary	25
E.	An Asset Freeze is Necessary to Preserve Assets for Effective Consumer Redress	26
F.	Appointment of a Receiver is Necessary to Ensure Effective Relief	27
V.	CONCLUSION	27

TABLE OF AUTHORITIES

Cases

<i>CFTC v. Wall Street Underground, Inc.</i> , No.03-2193-CM, 2003 U.S. Dist. LEXIS 15865 at *23 (D. Kan. July 18, 2003)	14
<i>Delaware Watch Co. v. FTC</i> , 332 F.2d 745 (2nd Cir. 1964)	14
<i>FTC v. 1522838 Ontario, Inc.</i> , No. 06 C 5378 (N.D. Ill. Oct. 4, 2006)	19
<i>FTC v. 2145183 Ontario Inc., et al.</i> , No. 09 C 7423 (N.D. Ill. Nov. 30, 2009)	3, 19
<i>FTC v. 6555381 Canada Inc., et al.</i> , No. 09 C 3158 (N.D. Ill. May 27, 2009)	19
<i>FTC v. American Tax Relief</i> , No. 10 C 6123 (N. D. Ill. Sept. 24, 2010)	19
<i>FTC v. Am. Nat’l Cellular, Inc.</i> , 810 F.2d 1511 (9th Cir. 1987)	20
<i>FTC v. Amy Travel Serv., Inc.</i> , 875 F.2d 564 (7th Cir.), <i>cert. denied</i> , 493 U.S. 954 (1989)	19, 20, 24, 25
<i>FTC v. API Trade, LLC, et al.</i> , No. 10 C 1543 (N.D. Ill. Mar. 10, 2010)	19
<i>FTC v. Asia Pacific Telecom, Inc., et al.</i> , No. 10 C 3168 (N.D. Ill. May 25, 2010)	19
<i>FTC v. Bay Area Bus. Council</i> , 423 F.3d 627 (7th Cir. 2005)	21, 24
<i>FTC v. Central Coast Nutraceuticals, Inc., et al.</i> , No. 10 C 4931 (N.D. Ill. Aug. 6, 2010)	19
<i>FTC v. Cleverlink Trading Ltd., et al.</i> , No. 05 C 2889 (N.D. Ill. May 16, 2005)	19
<i>FTC v. Data Bus. Solutions Inc., et al.</i> , No. 08 C 2783 (N.D. Ill. May 14, 2008)	19
<i>FTC v. Datacom Mktg., et al.</i> , No. 06 C 2574 (N.D. Ill. May 9, 2006)	19
<i>FTC v. Febre</i> , 128 F.3d 530 (7th Cir. 1997)	19
<i>FTC v. Integration Media Inc., et al.</i> , No. 09 C 3160 (N.D. Ill. May 27, 2009)	19
<i>FTC v. Sabal</i> , 32 F. Supp. 2d 1004 (N.D. Ill. 1998)	23, 24

FTC v. Sili Neutraceuticals, LLC, et al., No. 07 C 4541 (N.D. Ill. Aug. 13, 2007) 19

FTC v. Spear Systems, Inc. et al., No. 07 C 5597 (N.D. Ill. Oct. 3, 2007) 19

FTC v. Think Achievement Corp., 144 F. Supp. 2d 993 (N.D. Ind. 2000),
aff'd, 312 F.3d 259 (7th Cir. 2002) 14

FTC v. Union Consumer Benefits, No. 08 C 2309 (N.D. Ill. Apr. 23, 2008) 19

FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431 (11th Cir. 1984) 20

FTC v. Warner Commc 'ns, Inc., 742 F.2d 1156 (9th Cir. 1984) 20

FTC v. World Media Brokers, 415 F.3d 758 (7th Cir. 2005) 21, 24

FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020
(7th Cir. 1988) 19, 20, 21, 23, 26

Kraft, Inc. v. FTC, 970 F.2d 311 (7th Cir. 1992)
cert. denied, 507 U.S. 909 (1993) 21

Sunshine Art Studio, Inc. v. FTC, 481 F.2d 1171 (1st Cir. 1973) 14

U.S. v. First Nat'l City Bank, 379 U.S. 378 (1965) 26

Statutes

FTC Act 12, 19, 20, 21, 24

Federal Trade Commission Act, 15 U.S.C. § 45(a) 2, 18, 21

15 U.S.C. § 53 (b) 19

15 U.S.C. § 57b(a)(1) & (b) 20

15 U.S.C. § 6105(b) 20

Rules and Regulations

Fed. R. Civ. P. 65(b)	25
Telemarketing Sales Rule, 16 C.F.R. Part 310	2, 12, 18, 20, 21, 22, 23
16 C.F.R. § 310.2 (r), (t) & (u)	21
16 C.F.R. § 310.3(a)(2)(iii)	21
16 C.F.R. § 310.3(a)(2)(iv)	21
16 C.F.R. § 310.4(b)(1)(iii)(B)	22
16 C.F.R. § 310.4(b)(1)(iv)	23
16 C.F.R. § 310.4(b)(1)(v)(A)	22
16 C.F.R. § 310.4(b)(1)(v)(A)(i)-(iv)	12
16 C.F.R. § 310.4(b)(1)(v)(B)(ii)	23
16 C.F.R. § 310.4(d)(1), (2) & (3)	23

I. INTRODUCTION

We ask that the Court take immediate action to stop a massive enterprise that uses illegal prerecorded telemarketing calls to sell consumers fraudulent credit card interest rate reduction services. Since 2007, Defendants have been charging consumers nearly a thousand dollars each for a service that they falsely claim will dramatically reduce consumers' existing credit card interest rates and save them thousands of dollars in a short time. Defendants have defrauded nearly 13,000 consumers out of almost \$13 million.

Defendants often contact consumers initially with illegal prerecorded telemarketing calls, or "robocalls." Defendants tell consumers who answer and are connected to Defendants' telemarketers that they will negotiate dramatically lower interest rates on their credit cards. Defendants claim that they will "save you \$2500.00 or more positioning you to get out of debt 3-5 times faster." Defendants bolster their claims by guaranteeing to provide a full refund if they are unable to deliver the promised savings within thirty days. Defendants convince consumers that purchasing their credit reduction "services" is completely risk-free because of the money-back guarantee and because the fee, though substantial, is more than offset by the tremendous savings in credit card interest payments that Defendants claim they will deliver. To get Defendants' "services," consumers pay a hefty up-front fee of \$995.

At most, Defendants' services consist of three-way telephone calls involving the consumer, one of Defendants' so-called financial advisors, and the consumer's credit card issuer. These calls are ineffective. Occasionally, a credit card issuer reduces a rate, but for only a slight amount and for a short introductory term. More often, card issuers simply refuse to change the rates, and some card issuers refuse to participate in the telephone calls at all. Instead of realizing the promised savings from interest rate reductions, Defendants' victims, who apparently are in

dire enough financial straits to fall for Defendants' false claims in the first place, find themselves saddled with even more credit card debt after purchasing Defendants' purported services.

This international scheme is designed to shield its operators from liability. Defendants have used at least ten different business aliases. They routinely change names and switch telephone numbers. Consumers are unaware that the telemarketing boiler rooms are in Florida. Three individuals in Rochester, New York, set up mail drops in five different states and arrange for credit card processing services from multiple sources. Defendant Dave Richards ("Richards"), in Toronto, Canada, directs the overall scheme and proceeds from Defendants' United States victims are sent to him there. Richards once bragged that the authorities could not close his business because if an "office got raided, we would be up and running three days later somewhere else and no one would even know where we were."¹

Defendants' practices violate the FTC Act, 15 U.S.C. § 45(a), and the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310.² To bring an immediate halt to Defendants' law violations and to preserve assets for eventual restitution to victims, the Commission asks that the Court enter: (1) an *ex parte* temporary restraining order ("TRO") that freezes Defendants' assets, provides expedited discovery, and appoints a temporary receiver over the domestic corporate Defendants, and (2) a preliminary injunction, after service of the TRO and notice to Defendants. The requested relief is necessary to prevent Defendants from continuing to injure consumers, destroying evidence, and dissipating assets, thereby preserving the Court's ability to provide effective final relief.

¹ Plaintiff's Exhibit ("PX") 4 Garcia ¶ 21, Att. A (transcript of telephone call).

² For the Court's convenience, a copy of the TSR is attached as PX1.

Defendants' practices are nearly identical to those that the Court halted a year ago in *FTC v. 2145183 Ontario Inc.*, Case No. 09 7423 ("*Dynamic*") (N.D. Ill. 2009) (Grady, J.) (*ex parte* TRO with asset freeze and appointment of receiver). In fact, Richards was a manager at *Dynamic* and the telephone number of another individual Defendant, Jacqueline ("Jacky") Fisher, appears in a contact list found at *Dynamic's* business premises.³ Plaintiff seeks the relief in this case that is similar to that granted in *Dynamic*.

II. DEFENDANTS' FRAUDULENT BUSINESS PRACTICES

A. Defendants Violate the FTC Act

1. The Initial Deceptive Robocalls and Telemarketing Calls

Defendants often use illegal automated "robocalls" to pitch their scheme. The robocalls deliver a recorded message stating that call recipients can lower their credit card interest rates and instructing them to press a number on the telephone's dial pad to hear more about the program.⁴ Defendants also cold call consumers with live telemarketers.⁵

³ PX2 McKenney ¶ 13, Att. G. (documents found at *Dynamic's* business premises include a memorandum from Richards explaining the business's organizational structure; a contact list identifying him as a "Director/Office Manager;" also another list that includes Jacky Fisher's telephone number).

⁴ PX8 Beattie ¶¶ 3, 4 (repeated calls to cell phone; message said press 1); PX16 Hamilton ¶ 4 (message said program could cut credit card bills in half; press 1); PX18 Kirk ¶ 4 (press 9); PX23 Roberts ¶ 4; PX30 Tuerck ¶ 4; PX32 Yong ¶ 4 (press 1).

⁵ *E.g.*, PX6 Ames ¶ 4; PX7 Barnhill ¶ 3; PX9 Beere ¶ 3; PX10 Christman ¶ 3; PX11 Diamond ¶ 3; PX12 Farsee ¶ 4; PX13 Frazier ¶ 3; PX14 Gale ¶ 3; PX15 Groccia ¶ 3; PX17 Varner-Howe ¶ 3; PX19 Knaack ¶ 3 (consumer stayed on line because call was from person, instead of recorded message); PX20 Large ¶ 3; PX22 Porras ¶ 3; PX24 Roy ¶ 3; PX25 Salvino ¶ 6; PX26 Shykes ¶ 4; PX27 Sigler ¶ 4; PX28 Smith ¶ 4; PX31 Volion ¶ 3; PX33 Maas ¶ 3; PX34 Chamber ¶ 3.

2. The Telemarketing Pitch

Defendants transfer consumers who press the dial pad number to live telemarketers.

From this point, the sales technique applied to consumers who are initially contacted by robocalls and those who are contacted by live telemarketers is essentially the same.

The first telemarketers to speak to the consumers often answer the telephone by identifying themselves as “Card Services,” leading some consumers to believe that the call is from their bank or credit card company.⁶ At times, Defendants’ telemarketers flatly, and falsely, state that they are affiliated with a credit card issuer.⁷ Defendants use other tactics to create this misimpression, such as claiming that they are calling about a specific credit card account and revealing details about it, or claiming a general affiliation with banks.⁸ Defendants also ask consumers to identify the credit card type, offer them the first digit of the card number, and then ask them to reveal the final digits.⁹ Consumers think that the telemarketer already has the account number because most consumers are unaware that all Visa credit card numbers begin with “4,” MasterCard with “5,” and American Express with “3.”

The telemarketers claim that Defendants can reduce consumers’ interest rates substantially, save consumers a minimum of \$2500, and get consumers out of debt three to five

⁶ PX7 Barnhill ¶ 3 (thought call was from legitimate company directly involved with credit cards because consumer paid her bills to company that identified itself as “card services”); PX20 Large ¶ 3 (representative said she was with MasterCard); PX24 Roy ¶ 4 (thought it was company through which consumer paid credit card bills); PX25 Salvino ¶¶ 4-6 (thought call was from his credit card company, Emerge); PX32 Yong ¶¶ 5-7 (thought representative was with Citibank).

⁷ PX20 Large ¶ 3 (representative claimed she was associated with MasterCard).

⁸ PX12 Farsee ¶¶ 4, 5 (representative “said that she could lower interest rates because her company was affiliated with banks...I thought she represented a legitimate company and that her company was affiliated with my bank.”); PX13 Frazier ¶ 3 (claimed to be calling about my VISA account and “led me to believe she was working for my credit card company or an affiliated company.”).

⁹ PX18 Kirk ¶ 7.

times faster. For example, Defendants claim that they can reduce interest rates by 20% to 40%,¹⁰ or reduce a high rate such as 25% or 30% to 9%.¹¹ In telemarketing scripts, Defendants claim a “97% success rate” and purport that they can package the consumer’s debt “with somewhere between 500 to 700 clients” of one bank, who represent “over a million dollars of debt that is owed to that bank,” providing the “leverage necessary to negotiate on your behalf and get you the lowest rates possible based on your payment history.”¹² Defendants stress that the results are guaranteed and promise a full refund to consumers who do not obtain the represented results.¹³ The telemarketers routinely create the impression that the interest rate reduction service is essentially costless because the consumer will more than offset the \$995 fee with significant savings from reduced interest rates.¹⁴ Defendants also lead consumers to believe that they will not incur the \$995 fee until they complete and return paperwork that will be delivered to them.¹⁵ In fact, Defendants charge consumers’ credit cards almost immediately.¹⁶

After pitching the service, Defendants ask for basic information about the consumer’s credit card debt and interest rates. The telemarketers claim that they need this information to

¹⁰ PX6 Ames ¶ 5; PX18 Kirk ¶ 6; PX20 Large ¶ 4; PX33 Maas ¶ 4.

¹¹ PX25 Salvino ¶ 7.

¹² PX3 Velez ¶ 6b.

¹³ *E.g.*, PX13 Frazier ¶ 3 (representative guaranteed that current debt load would be reduced by 20% within the next sixty days and “I would receive a full refund if they could not meet their minimal guarantees.”); PX14 Gale ¶ 3 (promised full refund if “they could not save me \$2,500.00 in one year.”) PX34 Chambers ¶ 8 (“I also remember being told at least half a dozen times during this first call with AFL, by more than one person, that I would get all of my money back if AFL did not save me at least \$2,500.”).

¹⁴ PX9 Beere ¶ 5; PX27 Sigler ¶ 3.

¹⁵ PX18 Kirk ¶¶ 11-12; PX32 Yong ¶ 11.

¹⁶ PX18 Kirk ¶¶ 4, 18.

determine whether the credit card account meets the criteria to “qualify” for an interest rate reduction program, such as a large enough credit balance and a high enough interest rate.¹⁷ After obtaining the credit card information, the telemarketer places the consumer on hold and contacts the credit card issuer, ostensibly to confirm that the credit card account qualifies for a rate reduction.¹⁸ The real purpose, of course, is to determine whether the credit card has sufficient available credit for a \$995 charge.¹⁹

After obtaining the credit card information, Defendants’ telemarketers sometimes transfer, or pretend to transfer the consumer to a second telemarketer, or “closer,” who repeats the claims.²⁰ These telemarketers transfer the consumer to a “verifier” who records the portion of the telephone call that verifies the consumer’s agreement to the credit card charge. To reassure consumers about the veracity of the sales pitch, Defendants claim that the verifiers are neutral third parties even though they are actually Defendants’ employees.²¹

The verifier asks a series of closed-ended questions to create a recording of the consumer’s agreement to permit the \$995 credit card charge.²² The verification calls are designed to elicit “yes” responses, and the calls are re-recorded when a consumer answers “no” or asks questions that might detract from proof of the consumer’s agreement to the credit card

¹⁷ PX33 Maas ¶ 7.

¹⁸ PX23 Roberts ¶ 8; PX33 Maas ¶ 7.

¹⁹ PX4 Garcia ¶ 26 (purpose of call to confirm large enough credit card debt for potentially negotiating a lower interest rate and a credit card account with large enough available credit to pay Defendants’ fee).

²⁰ PX4 Garcia ¶ 40.

²¹ PX4 Garcia ¶¶ 41, 44 (script states that verification is conducted by third-party verification department).

²² PX4 Garcia ¶ 26.

charge and purchase.²³ Although the verification portion of the call is recorded, the underlying sales pitch and misrepresentations are not,²⁴ which is not surprising because Defendants use the recordings to browbeat consumers who seek refunds or try to cancel,²⁵ and to prove to credit card issuers that consumers have authorized the charges.²⁶

3. The Welcome Package

Defendants continue their deceptive claims in packages of written materials that they mail to consumers. In these materials, Defendants use various business aliases interchangeably and purport to explain their services. Often, the package contains materials that refer to a different alias from the one used in the sales call or that refer to more than one of Defendants' company names. The consumer's credit card statement often refers to yet another name.²⁷

The package includes a letter ("Welcome Letter") welcoming the consumer to Defendants' service. The letter repeats the guarantee of a "minimal savings of \$2500.00," although "[m]ost clients save twice as much and more," and promises that Defendants will get

²³ PX23 Roberts ¶¶ 8-10 (three attempts to make recording); PX33 Maas ¶¶ 8-10.

²⁴ *E.g.*, PX6 Ames ¶ 7; PX9 Beere ¶ 7; PX12 Farsee ¶ 21 (representative played tape to prove that consumer had agreed to purchase but tape included only portions of conversation in which consumer had agreed to program); PX23 Roberts ¶¶ 8-10.

²⁵ PX4 Garcia ¶ 28 (Richards explained that Defendants would play verification recording to prove that consumer had entered non-cancellable verbal contract and consumers would write off the loss because of their "passive demeanor.") PX12 Farsee ¶¶ 20, 21; PX18 Kirk ¶ 27; PX25 Salvino ¶¶ 13, 14 (Defendants used recording to prove to consumer that he had authorized the credit card charge.)

²⁶ Defendants, like other telemarketers, presumably use the recordings to demonstrate to credit card companies that a consumer who disputes a credit card charge has authorized it. *See* PX9 Beere ¶ 23 (Defendants noted "voice recorded auth." on documentation submitted to consumer's credit card issuer when consumer disputed credit card charge).

²⁷ PX7 Barnhill ¶¶ 9, 15 (Direct Services Group materials and Choice Services Group charge); PX9 Beere ¶¶ 9, 10, 16 (AFS Services Ltd. materials, billed by AFL Financial Services); PX31 Volion ¶¶ 4, 8 (AFL credit card charge and Freedom Choice Financial materials).

the consumer out of debt three to five times faster as a result of reduced interest rates.²⁸

Variations include a Welcome Letter that “guarantees you a minimal savings of at least 20% of your current debt, while most clients save twice as much, if not more!”²⁹

The package also contains a “Debt Profile Form” and a “Receipt.” The Debt Profile Form asks consumers to list each of their credit card accounts, and, for each account, the current balance, credit limit, interest rate, suggested minimum payment, the consumer’s monthly payment, and whether the account is current.³⁰ Consumers are instructed to return the completed Debt Profile Form and signed Receipt. Although the forms are ostensibly designed to elicit information needed to negotiate reduced interest rates, Defendants expect simply to pocket the credit card charges because most of their victims will not return the forms, resulting in what Richards calls “pure profit” or “breakage.”³¹

The package also contains a list of “Frequently Asked Questions.” (“FAQs”). The FAQs repeat the guarantee that Defendants will “save you \$2500.00 or more positioning you to get out of debt 3-5 times faster” and although “\$2500.00 is our minimal guarantee, we usually save consumers 2-4 times this amount.”³² Variations include “Common Questions,” instead of FAQs,

²⁸ *E.g.*, PX8 Beattie ¶ 16, Att. D (Freedom Choice Financial) (Sept. 2009).

²⁹ PX6 Ames ¶ 16, Att. B p. 1 (AFS Services Ltd.) (Jan. 2010); PX7 Barnhill ¶ 9, Att. B, p. 1 (Welcome Letter guarantees minimal savings of “at least 20-40% of your current debt load!”) (Direct Services Group) (Mar. 2010).

³⁰ *E.g.*, PX16 Hamilton ¶ 28, Att. E (Affiliated Financial Services). Defendants vary the form, for example, calling it a “Program Enrollment Form,” but request the same information. PX18 Kirk ¶ 21, Att. D, p. 3 (Direct Services Group).

³¹ PX4 Garcia ¶ 28 (Richards explained that most consumers who were persuaded to purchase in the first place are “more passive Type B personalities” who will not return the completed forms).

³² PX16 Hamilton, Att. C, p. 4.

that “guarantee that you will benefit from a savings of 20% - 40% of your current debt load within twelve months” from lowered credit card interest rates.³³

Defendants further emphasize their claims with testimonials included in the welcome materials. In one testimonial, a Dallas consumer proclaims, “I saved \$3,500.00 in one day!” (*emphasis in original*). In another, a San Diego couple announces that “[w]ithin 1 hour, we saved \$2,700.00, it was simple and fast!” (*emphasis in original*).³⁴

4. Defendants’ “Services”

Defendants falsely claim that they will negotiate the lower interest rates and substantial savings promised in their sales calls and written materials. To achieve these results, Defendants explain that representatives whom Defendants grandiosely call “financial advisors” will contact consumers to negotiate lower interest rates after they complete and return the Debt Profile Form. Defendants suggest that their representatives are professional negotiators, although they are really uncertified, unprofessional, and mostly untrained sales personnel.³⁵ Consumers report that often no one telephones them.³⁶ Other consumers have called Defendants repeatedly to arrange for an appointment but were never successful.³⁷

³³ PX7 Barnhill, Att. B, p. 3. (Direct Services Group) (Mar. 2010). For another variation, see PX9 Beere, ¶ 10, Att. A (FAQ’s state that “AFS guarantees that, through lower credit card interest rates, you will experience a savings of at least 20% within 12 months.”) (Jan. 2010).

³⁴ *E.g.*, PX17 Varner-Howe ¶ 19, Att. A, p. 4 (Affiliated Financial Services) (Dec. 2009).

³⁵ PX4 Garcia ¶ 49.

³⁶ *E.g.*, PX9 Beere ¶¶ 8, 15, 17-19.

³⁷ PX14 Gale ¶ 12; PX26 Shykes ¶ 24 (called AFS nine times before reaching someone who would schedule appointment); PX27 Sigler ¶¶ 14-17; PX28 Smith ¶ 15.

Those consumers who manage to arrange the telephone calls with Defendants' representatives learn that negotiations are nothing that consumers could not pursue themselves.³⁸ Negotiations are nothing more than three-way calls with Defendants' representative, the consumer, and the consumer's credit card issuer that are made to the customer service number on the back of the consumer's credit card.³⁹ Once all parties are on the line, Defendants' representative asks the card issuer to reduce the interest rate.⁴⁰ Typically, the issuer refuses. For example, one representative refused even to telephone three of the consumer's four credit card accounts because he knew that they would refuse.⁴¹ Sometimes a credit card issuer agrees to a minor rate reduction, for a short period of time, or agrees to transfer the consumer to a card with a short term introductory rate,⁴² but these tricks do not generate any meaningful savings.⁴³ Some issuers will speak only with their credit card customer and refuse to speak with Defendants' representative also on the line.⁴⁴

³⁸ PX17 Varner-Howe ¶ 28; PX26 Shykes ¶¶ 28, 30.

³⁹ PX17 Varner-Howe ¶ 28; PX26 Shykes ¶¶ 24-31.

⁴⁰ PX17 Varner-Howe ¶¶ 27-29.

⁴¹ PX26 Shykes ¶¶ 26, 27, 29, 30.

⁴² PX4 Garcia ¶ 50; PX14 Gale (no reduction on American Express card 28% rate; transferred to existing Visa for promotional rate of 3.9%; Visa would not reduce 15.24% rate on previous \$6000 balance); PX22 Porras ¶¶ 15, 16 (Wells Fargo lowered rate from 11.9% to 7.9% for one year, then back to 11.9%. AT&T Universal lowered rate from 14.9% to 11.9% for one year).

⁴³ PX4 Garcia ¶ 50.

⁴⁴ PX5 Wilhelm ¶ 20 (financial institutions prefer to work directly with their customers on a one to one basis, and do not respond to pressure from third parties); PX22 Porras ¶ 15 (when Wells Fargo refused to speak with someone other than cardholder on the line, Defendants' representative asked consumer "to lie and say that no one was on the line.")

Defendants' negotiations, when they happen to take place at all, are invariably unsuccessful. Whether Defendants actually conduct negotiations or simply cease communication once they have collected the consumer's money, Defendants do not deliver the substantial interest rate reduction that they promised or fail to deliver any reduction at all.⁴⁵

5. Refund Refusals

Defendants routinely ignore refund requests after failing to reduce interest rates or to achieve any savings for consumers.⁴⁶ Defendants provide various excuses for refusing refunds.⁴⁷ Many consumers are given the runaround or cannot reach anyone even to request a refund.⁴⁸ Refund requests go unanswered, including those forwarded by the Better Business Bureau ("BBB").⁴⁹ Defendants sometimes flatly lie that they have given the consumer a refund.⁵⁰ Defendants even falsely told the BBB that they had provided a refund, despite ignoring two

⁴⁵ PX4 Garcia ¶ 50 ("in most cases it appeared that the financial advisors could not accomplish anything substantial, even temporarily..."). PX5 Wilhelm ¶ 16 (likelihood that the defendants, in a different case, could negotiate the dramatically lower interest rates that they claim or enable consumers to get out of debt three to five times faster "is extremely low if not impossible.")

⁴⁶ E.g. PX9 Beere ¶¶ 15-19, 22; PX11 Diamond ¶ 28; PX12 Farsee ¶ 34 (Defendants refused refund request despite promising not to charge credit card in first place).

⁴⁷ PX13 Frazier ¶ 18 (Defendants claimed that consumer's three day right to cancel had expired, although consumer had not even received package within that time); PX19 Knaack ¶¶ 17, 22 (Defendants claimed that she had not given them enough time "to complete their job").

⁴⁸ PX6 Ames ¶¶ 27, 28 (telephone disconnected when she called about refund that Defendants told her she would be receiving); PX7 Barnhill ¶¶ 16-18; PX11 Diamond ¶¶ 25, 26 (telephone number disconnected when she made fourth call); PX18 Kirk ¶ 20 (consumer called to ask about a refund but no one called her back as promised); PX20 Large ¶ 14; PX24 Roy ¶ 20.

⁴⁹ PX2 McKenney ¶ 69; PX34 Chambers ¶¶ 21-26 (Defendants ignored two written refund requests).

⁵⁰ PX6 Ames ¶¶ 27, 28, 36. PX10 Christman/Nowakowski Christman ¶ 20 Nowakowski ¶¶ 25, 27, 30-36 (during twelve calls, Defendants falsely told daughter calling for her father that refund had been issued, and once said that her "father was a fool" for purchasing in the first place); PX14 Gale ¶ 17 (told she was eligible for a refund but never received it); PX16 Hamilton ¶¶ 34, 35, 45 (Defendants told consumer that she had already received a refund when she never did).

written requests from the consumer for a refund.⁵¹ When consumers raise disputes and pursue refunds from their credit card issuers, Defendants would persuade the consumers to withdraw their disputes so that Defendants could issue refunds directly, but would not actually issue them.⁵²

B. Defendants Violate the TSR

Defendants violate the law in two distinct ways. One, they violate both the FTC Act and the TSR by falsely claiming that they will dramatically reduce credit card interest rates and, as a result, save consumers thousands of dollars. Two, Defendants' live telemarketing calls and robocalls themselves violate the TSR. Defendants violate the TSR by: (1) making outbound live telemarketing calls and robocalls to consumers who are registered with the National Do Not Call Registry ("Registry"),⁵³ and (2) indiscriminately blasting robocalls which, since September 2009, have been illegal in almost all situations.⁵⁴ Defendants also violate the TSR by making robocalls that do not connect consumers to live sales representatives promptly⁵⁵ and not

⁵¹ PX34 Chambers ¶¶ 21-26.

⁵² PX4 Garcia ¶ 27.

⁵³ Complaint Count Four ¶ 50: *e.g.*, Live calls to registered consumers: PX6 Ames ¶¶ 3,4; PX12 Farsee ¶¶ 3,4; PX16 Hamilton ¶¶ 3, 4; PX21 Larson ¶¶ 3, 4; PX23 Roberts ¶¶ 3, 4; PX24 Roy ¶¶ 3, 4; PX26 Shykes ¶¶ 3, 4; PX28 Smith ¶¶ 3, 4; PX33 Maas ¶¶ 3, 4; PX34 Chambers ¶¶ 3, 4;

Robocalls to registered consumers: PX18 Kirk ¶¶ 3, 4; PX29 Tarr ¶¶ 3, 4; PX30 Tuerck ¶¶ 3, 4; PX32 Yong ¶¶ 3, 4.

⁵⁴ The TSR prohibits most robocalls made after Sept. 2009 without the express written consent of the call's recipient. 16 C.F.R. § 310.4(b)(1)(v)(A)(i)-(iv). Defendants have continued to contact consumers with robocalls after Sept. 2009. *See* PX16 Hamilton ¶ 4 (robocall Dec. 14, 2009); PX18 Kirk (robocall Mar. 15, 2010).

⁵⁵ Complaint Count Five ¶ 51: *e.g.*, PX18 Kirk ¶¶ 3, 4; PX29 Tarr ¶¶ 3, 4; PX30 Tuerck ¶¶ 3, 4; PX32 Yong ¶¶ 3, 4.

promptly making required disclosures about their identity and the purpose of their telemarketing calls.⁵⁶

III. DEFENDANTS

Defendants, four individuals and four interrelated corporations, have used at least ten different business aliases and, because of hundreds of consumer complaints, generated “F” reliability ratings from the BBB under all but one of them.⁵⁷ Defendants conduct different aspects of their scheme from Florida, New York, and Canada. They make telemarketing calls from two Orlando, Florida, boiler rooms managed by Richards, in Canada, and Jacky Fisher, in Rochester, New York. Three of the individual Defendants in or near Rochester arrange for credit card processing, obtain telephone lines, and open mail drops and bank accounts. Richards directs overall operations from the Toronto, Canada, area and receives money originally taken from his United States victims there.

⁵⁶ Complaint Count Six ¶ 52 (required disclosures in live calls and robocalls): e.g., PX7 Barnhill ¶ 3 (caller said he was with “Card Services”); PX13 Frazier ¶ 9 (consumer had not heard of “Direct Financial until she called her credit card company to identify who charged her card”); PX16 Hamilton ¶ 5 (learned name Affiliated Financial Services after pressing one and speaking to live representative); PX18 Kirk ¶ 5 (learned name Direct Services Group after pressing one and speaking to live representative); PX20 Large ¶ 3 (representative stated she was with “Card Services” and was associated with MasterCard); PX24 Roy ¶ 4 (representative stated that he was with “Card Services”); PX25 Salvino ¶¶ 4-6 (recorded calls from Card Services causing consumer to think that call was from his credit card issuer; live representative identified herself as with “Card Services.”); PX29 Tarr ¶¶ 4, 5 (after consumer pressed one during message, live representative identified AFS Services, Ltd.); PX30 Tuerck ¶¶ 4, 5 (after consumer pressed one during message, live representative identified Insight Management Services); PX32 Yong ¶¶ 4, 5 (after consumer pressed one during message, live representative stated that he was with “Card Services”).

Count Seven ¶ 53 (required disclosures in prerecorded messages made in robocalls after December 2008): PX16 Hamilton ¶ 5; PX18 Kirk ¶ 5; PX25 Salvino ¶¶ 4-6; PX29 Tarr ¶¶ 4, 5; PX30 Tuerck ¶¶ 4, 5; PX32 Yong ¶¶ 4, 5.

⁵⁷ The BBB did not issue a reliability rating for that one. PX2 McKenney ¶ 69.

Defendants operate the corporations as a common scheme, making them jointly and severally liable for their various law violations. See *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1011 (N.D. Ind. 2000), *aff'd*, 312 F.3d 259 (7th Cir. 2002) (citing *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973)); *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746-7 (2nd Cir. 1964)); see also *CFTC v. Wall Street Underground, Inc.*, No. 03-2193-CM, 2003 U.S. Dist. LEXIS 15865, at *23 (D. Kan. July 18, 2003).

Two of the corporations are owned and controlled by Richards and two by Baird Fisher (in Rochester). Richards is an officer of Direct Financial Management Inc.⁵⁸ His residence is the registered office of the other Canadian corporate defendant, 2194673 Ontario Inc (“2194673 Ontario”).⁵⁹

Baird Fisher is an owner or officer of F&F Payment Processing Inc. (“F&F”) and Bajada Management Group Inc. (“Bajada”), a corporation whose name likely derives from the first two initials of the first names of individual Defendants Baird Fisher, his wife, Jacqueline Fisher, and David Richards.⁶⁰ The name Bajada appears on the door of an Orlando telemarketing sales room licensed to Bajada where a telephone number registered to F&F rings.⁶¹ Toll-free telephone calls

⁵⁸ PX2 McKenney ¶ 7.

⁵⁹ PX2 McKenney ¶ 8 (first director is Vanessa Richards, who is believed to be Richards’s daughter).

⁶⁰ PX2 McKenney ¶¶ 9-11.

⁶¹ PX2 McKenney ¶ 18; PX3 Velez ¶ 15.

from consumers are forwarded to two Orlando boiler rooms licensed to Bajada⁶² for which F&F pays rent.⁶³

Defendants' use of assumed names also indicates a common enterprise. Defendants' websites are virtually identical except that the business name and contact information varies.⁶⁴ Richards told a prospective telemarketing room manager that he was "the owner of AFL."⁶⁵ Baird Fisher sent mail to consumers under his own name as "AFL Financial Services"⁶⁶ and opened a bank account with himself as sole signatory on an account for "DBA Elite - AFLFinancial Services."⁶⁷ Baird Fisher also registered himself as doing business as Direct Financial,⁶⁸ the name of Richards's other Canadian corporation. Joseph Foley ("Foley"), for his part, opened three merchant accounts for "AFL Financial Services"(listing himself as 100%

⁶² PX2 McKenney ¶¶ 17,18 (telephone numbers were to AFL Financial Services, Affiliated Financial Services, Freedom Choice Financial, Elite Choice Financial, First Choice Financial, Direct Services Group, Freedom Choice Financial); PX3 Velez ¶ 12a.vi.

⁶³ PX2 McKenney ¶ 62a-b.

⁶⁴ See PX2 McKenney ¶ 14 (*Compare* www.afifinancial.com, www.fchoicefinancial.com, www.freedomchoiceservices.info, www.affiliatedservices.info, www.insight-management.net, and www.cdc-management.net); See also PX4 Garcia ¶¶ 23, 24 (Richards explained that he had "a guy that does my websites and if we need to add an additional company or something, we're not going to change the whole website. All we do is we just change the name, the company name, okay?")

⁶⁵ PX4 Garcia ¶ 18.

⁶⁶ PX34 Chambers, Att. B, p. 8.

⁶⁷ PX2 McKenney ¶ 41.

⁶⁸ PX2 McKenney ¶ 12.

owner in one application)⁶⁹ and is the sole signatory on two AFL Financial Services bank accounts.⁷⁰

Money routinely flows among the corporations' bank accounts. Together Direct Financial Management and 2194673 Ontario, Richards's Canadian corporations, received over half a million dollars from Baird Fisher's Elite - AFL Financial account from October 2008 to May 2010.⁷¹ One of Foley's AFL Financial Services's bank accounts deposited \$440,000 into one of Baird and Jacky Fisher's Bajada Management Bank account.⁷² One of Foley's AFL Financial Services bank accounts received deposits of over \$12.2 million primarily from merchant accounts connected to Defendants' unlawful activities. Over \$1.8 million was transferred from that account to Richards' two Canadian corporations, almost \$580,000 to Baird Fisher's two corporations, Bajada and F&F, and other amounts to Foley dba AFL Financial Services, Baird Fisher d/b/a Direct Financial, F&F, Elite - AFL Financial Services, and Foley and the Fishers personally.⁷³

⁶⁹ PX2 McKenney ¶¶ 31, 36-37, ¶ 35 (additional AFL Financial Services account opened by Kathleen Foley, who is believed to be his daughter).

⁷⁰ PX2 McKenney ¶¶ 48, 52.

⁷¹ PX2 McKenney ¶ 43.

⁷² PX2 McKenney ¶¶ 51, 57, 58.

⁷³ PX2 McKenney ¶¶ 48, 50, 51 (since May 1, 2007, approximately \$1,423,000 were transferred to 2194673 Ontario (wire transfer) and \$413,000 to Direct Financial Management (wire); \$440,000 to Bajada (wire) and \$139,000 to F&F Processing (checks and wire); \$378,000 to Foley dba AFL Financial Services (acct. transfer), \$224,000 to Baird Fisher d/b/a Direct Financial, \$123,000 to Elite-AFL Financial Services (wire), \$24,000 to Jacky Fisher (checks and wire), \$16,000 to Foley (checks), and \$6500 to Baird Fisher (checks)).

The roles of the four individuals substantially overlap. Richards and Jacky Fisher directly manage telemarketing operations.⁷⁴ Baird Fisher purchased seven toll-free telephone numbers in Richards' name, and documentation for the account includes contact information for both Richards and Jacky Fisher.⁷⁵ Five of these numbers are on an account under the name AFL Financial Services,⁷⁶ another number is on an account for Elite Choice Financial,⁷⁷ and another number is on an account for First Choice Financial.⁷⁸ Telephone numbers appearing next to charges on consumers' credit card statements are controlled by Baird Fisher.⁷⁹ Jacky Fisher and her husband, Baird, opened at least seven mail drops.⁸⁰ Consumers send Debt Profile Forms to mail drops opened by the Fishers,⁸¹ and mail sent to those drops is forwarded to a mail drop opened by Baird Fisher.⁸² Jacky Fisher and Foley are the account holders or contacts associated

⁷⁴ *E.g.*, PX4 Garcia ¶ 48, Att. H (Jacky Fisher exercised considerable control over the call center and was thoroughly involved in its operations; Att. H: email from Jacky Fisher directing call center disciplinary matters to her and Richards;).

⁷⁵ PX2 McKenney ¶ 16a - c.

⁷⁶ PX2 McKenney ¶ 16a.

⁷⁷ PX2 McKenney ¶ 16b.

⁷⁸ PX2 McKenney ¶ 16c.

⁷⁹ PX2 McKenney ¶¶ 64-66 (two of these numbers are listed to the Fishers' residence under Jeremy J. Fisher, who is believed to be the Fishers' son).

⁸⁰ PX2 McKenney ¶¶ 20-26; ¶ 20 Jacky Fisher (as Direct Financial); ¶ 21 Jacky Fisher (as Elite-AFL Financial Services); ¶ 22 Baird Fisher (as First Choice Financial); ¶ 23 Baird Fisher (as Freedom Choice Financial, with correspondence from Jacky Fisher); ¶ 24 Baird Fisher (as Affiliated Financial Services); ¶ 25 Baird Fisher (as Direct Services Group); ¶ 26 Baird Fisher (as AFS Services Ltd.).

⁸¹ PX2 McKenney ¶¶ 21, 23-26.

⁸² McKenney ¶¶ 23, 24, 26.c (mail forwarding instructions from Jacky Fisher).

with various merchant accounts used by Defendants to process credit card charges.⁸³ Baird Fisher and Foley manage the bank accounts receiving credit card processing deposits from these merchant accounts.⁸⁴

Defendants were richly rewarded with almost \$13 million in net proceeds taken from their United States victims.⁸⁵ Richards' two Canadian corporations, Direct Financial Management and 2194673 Ontario, received over \$2.5 million. The Fishers' corporations, Bajada and F&F, took in almost \$1.1 million. Jacky Fisher, individually, directly received over \$650,000. Baird Fisher received almost \$500,000. Foley received nearly \$132,000.⁸⁶

IV. ARGUMENT

Defendants have bilked millions of dollars from United States consumers in violation of 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 prevent further injury to innocent consumers, the Commission seeks a temporary restraining order and a preliminary injunction prohibiting Defendants' ongoing deceptive and illegal practices. The Commission also asks that the Court freeze Defendants' assets, both corporate and personal, to preserve them for restitution to victims, and appoint a temporary

⁸³ Jacky Fisher is listed as an account contact or representative on five merchant accounts: PX2 McKenney ¶ 30 (Direct Financial), ¶ 33 (American Financial Leadership), ¶ 34 (K&D), ¶ 35 (AFL Financial Services), ¶ 36 (K&D Collection Consultants). Foley is listed as the owner of four accounts: PX2 McKenney ¶ 31 (AFL Financial Services), ¶ 34 (K&D), ¶ 36 (AFL Financial Services) (Foley requested name change from K&D Collection Consultants to AFL Financial Services) , and ¶ 37 (AFL Financial Services). Kathleen Foley, who is believed to be Foley's daughter, is listed as the owner of two other accounts. PX2 McKenney ¶ 30 (Direct Financial), ¶ 35 (AFL Financial Services)

⁸⁴ See PX2 McKenney ¶ 38, Att. V.

⁸⁵ PX2 McKenney ¶ 38, Att. V (chart detailing net sales from merchant processors).

⁸⁶ PX2 McKenney ¶ 63 (summarizing bank records).

receiver both to preserve assets and to manage the affairs of the United States corporations. In FTC actions, Courts in this district have consistently granted *ex parte* TROs with similar relief.⁸⁷

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

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). *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir. 1988). 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.), *cert. denied*, 493 U.S. 954 (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.

⁸⁷ See, e.g., *FTC v. American Tax Relief*, No. 10 C 6123 (N.D. Ill. Sept. 24, 2010) (*ex parte* TRO with asset freeze appointment of receiver) (entered by Gottschall, J., sitting as emergency judge); *FTC v. Central Coast Nutraceuticals, Inc., et al.*, No. 10 C 4931 (N.D. Ill. Aug. 6, 2010) (Norgle, J.) (*ex parte* TRO with asset freeze and appointment of receiver); *FTC v. Asia Pacific Telecom, Inc., et al.*, No. 10 C 3168 (N.D. Ill. May 25, 2010) (Hart, J.) (same); *FTC v. API Trade, LLC, et al.*, No. 10 C 1543 (N.D. Ill. 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. 6555381 Canada Inc., et al.*, No. 09 C 3158 (N.D. Ill. May 27, 2009) (Gettleman, J.) (*ex parte* TRO and asset freeze for violations of FTC Act); *FTC v. Integration Media, Inc., et al.*, No. 09 C 3160 (N.D. Ill. May 27, 2009) (Bucklo, J.) (same); *FTC v. Data Bus. Solutions, Inc., et al.*, 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., et al.*, No. 07 C 5597 (N.D. Ill. Oct. 3, 2007) (Andersen, J.) (same); *FTC v. Sili Nutraceuticals, LLC, et al.*, No. 07 C 4541 (N.D. Ill. Aug. 13, 2007) (Kennelly, J.) (same); *FTC v. 1522838 Ontario Inc., et al.*, No. 06 C 5378 (N.D. Ill. Oct. 4, 2006) (Gettleman, J.) (same); *FTC v. Datacom Mktg., et al.*, No. 06 C 2574 (N.D. Ill. May 9, 2006) (Holderman, C.J.) (same); *FTC v. Cleverlink Trading Ltd., et al.*, No. 05 C 2889 (N.D. Ill. May 16, 2005) (St. Eve, J.) (same).

World Travel, 861 F.2d at 1026; see also *Amy Travel*, 875 F.2d at 571. Such ancillary relief may include a freeze of defendants' assets to preserve them for eventual restitution to victims, and the appointment of a receiver. *FTC v. U.S. Oil & Gas*, 748 F.2d 1431, 1432-34 (11th Cir. 1984); 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 FTC is empowered to enforce the TSR with the same functions and powers as the FTC Act. 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

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 (quoting *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984)). Under this "public interest" test, "it is not necessary for the FTC to demonstrate irreparable injury." *Id.* Unlike a private litigant, who generally must show a strong or substantial likelihood of success on the merits, the Commission need only make the statutory showing of a likelihood of ultimate success. *Id.* And when the court balances the equities, the public interest "must receive far greater weight" than any private concerns. *Id.* Preliminary injunctive relief is therefore appropriate if the Commission shows a likelihood of success on the merits and that a balancing of the equities, giving greater weight to the public interest, favors such relief.

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

1. Defendants are Violating the FTC Act and the TSR

Defendants' activities constitute deceptive acts or practices under Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). An act or practice is deceptive if it involves a material misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances. *FTC v. Bay Area Bus. Council*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. World Media Brokers*, 415 F.3d 758, 763 (7th Cir. 2005); *World Travel*, 861 F.2d at 1029. The materiality requirement is satisfied if the misrepresentation or omission involves information that is likely to affect a consumer's choice of, or conduct regarding, a product or service. *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). In deciding whether particular statements are deceptive, courts must look to the "overall net impression" of consumers. *See id.*

The same conduct that violates the FTC Act violates the TSR. The TSR prohibits sellers and telemarketers from (1) misrepresenting any material aspects of the goods or services for sale, and (2) misrepresenting any material aspects of the nature or terms of the seller's refund or cancellation policies.⁸⁸

Defendants violate the FTC Act and the TSR by making false claims that are designed to induce consumers to purchase or pay for credit card interest rate reduction services. Defendants misrepresent that they will substantially reduce consumers' credit card interest rates, enabling consumers to save thousands of dollars in a short period of time and to pay off their credit card debt much faster. Defendants further misrepresent that they will provide full refunds if they fail

⁸⁸ 16 C.F.R. §§ 310.3(a)(2)(iii) and (iv) The Defendants are "sellers" or "telemarketers" as defined by the Rule and are engaged in "telemarketing" as defined in the Rule. 16 C.F.R. § 310.2(r), (t), and (u).

to deliver the promised results. Sworn consumer declarations demonstrate that these lies often succeed in convincing consumers to purchase Defendants' credit card interest rate reduction services. These misrepresentations are material because they are likely to and, in fact, have affected consumers' conduct.

Defendants also engage in telemarketing practices that are prohibited by specific provisions of the TSR. These practices include calling consumers who are registered with the Do Not Call list and placing illegal robocalls as detailed below:

Calling Consumers Listed with Do Not Call Registry (Complaint Count Four): The TSR prohibits telemarketers from initiating outbound telephone calls to consumer telephone numbers listed on the Registry.⁸⁹ From just three telephone numbers and two business aliases alone, Defendants generated over one thousand Do-Not-Call complaints received by the FTC.⁹⁰ Defendants also contacted several declarants registered with the Registry.⁹¹

Placing Illegal Robocalls (Count 8): Since September 2009, making robocalls without the prior express written consent of recipients has been illegal.⁹² Defendants have continued to contact consumers with robocalls after that date.⁹³

Call Abandonment (Count Five): The TSR prohibits "call abandonment," a practice in which telemarketers fail to connect a call to a sales representative within two (2) seconds of the

⁸⁹ 16 C.F.R. § 310.4(b)(1)(iii)(B).

⁹⁰ PX2 McKenney ¶ 71.

⁹¹ See note 52.

⁹² 16 C.F.R. § 310.4(b)(1)(v)(A).

⁹³ See note 53. See PX16 Hamilton ¶ 4 (robocall Dec. 14, 2009); PX18 Kirk (robocall Mar. 15, 2010).

completed greeting of the person answering the call.⁹⁴ Robocalling necessarily violates this provision. Defendants' robocalls deliver a prerecorded message that consumers must hear before they can be transferred to a live representative, which, in practice, means that the consumer cannot be connected to a live sales representative within two seconds of the completed greeting. Several declarants experienced call abandonment by Defendants.⁹⁵

Disclosures During the Call (Counts Six and 7): The TSR 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.⁹⁶ Defendants failed to disclose the required information in both live telemarketing calls and robocalls.⁹⁷

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 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 the deceptive scheme, and in preserving the assets necessary to provide effective final relief to victims. *See FTC v. Sabal*, 32 F. Supp. 2d 1004, 1009 (N.D. Ill. 1998). Defendants, by contrast, have no legitimate interest in continuing to

⁹⁴ 16 C.F.R. § 310.4(b)(1)(iv).

⁹⁵ See note 54.

⁹⁶ 16 C.F.R. § 310.4(d)(1), (2) & (3). This failure to make disclosures also violates TSR Section 310.4(b)(1)(v)(B)(ii) (Count Seven), which requires robocalls made after December 1, 2008, to disclose the telemarketer's identity, the purpose of the call, and the nature of the goods or services offered. Defendants' robocalls to several declarants did not contain the required disclosures. See note 51.

⁹⁷ See note 55.

deceive U.S. consumers and persisting with conduct that violates federal law. *See Sabal*, 32 F. Supp. 2d at 1009. An injunction is therefore required to ensure that Defendants' scheme does not continue while the case is pending.

3. The Individual Defendants are Personally Liable

The individual Defendants are responsible for the deceptive and unfair practices of the companies they control and should be subject to the TRO and asset freeze. An individual defendant may be held liable for injunctive relief and monetary restitution under the FTC Act if the Court finds (1) that he participated directly in or had some measure of control over a corporation's deceptive practices and (2) that he had actual or constructive knowledge of the practices. *World Media Brokers*, 415 F.3d at 764; *Bay Area Bus. Council*, 423 F.3d at 636; *Amy Travel*, 875 F.2d at 573-74. Authority to control may be evidenced by "active involvement in the corporate affairs, including assuming the duties of a corporate officer." *World Media Brokers*, 415 F.3d at 764 (citing *Amy Travel*, 875 F.2d at 573). The knowledge requirement is satisfied by a showing that the defendant (1) had actual knowledge of the deceptive acts or practices, (2) was recklessly indifferent to the truth or falsity of the representations, or (3) had an awareness of a high probability of fraud coupled with an intentional avoidance of the truth. *Id.*; *Bay Area Bus. Council*, 423 F.3d at 636; *Amy Travel*, 875 F.2d at 573. An individual's "degree of participation in business affairs is probative of knowledge." *Id.* The Commission does not need to prove subjective intent to defraud. *Id.*

The Commission is likely to succeed in showing that all four individual Defendants are liable under the above standards. Two of them, Richards and Baird Fisher, are owners or officers of the four corporate Defendants. These authority positions alone establish their 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.

The evidence shows that the individual Defendants actively participated in the practices and possessed the requisite levels of knowledge to be held individually liable. Richards and Jacky Fisher were well aware that their activities were unlawful because they honed their skills at *Dynamic*⁹⁸ before they began operating the same scheme in this case. Foley opened new merchant accounts and Baird Fisher opened new mail drops when Defendants changed business names to escape detection and to avoid losses when consumer credit chargebacks mounted. All the while, Defendants generated large numbers of consumer complaints and consistent BBB “F” ratings under their assorted business aliases. Therefore, Richards, Baird and Jacky Fisher, and Foley should each be held individually liable.

D. *Ex Parte* Relief is Necessary

Ex parte relief is necessary here. An *ex parte* TRO is warranted where facts show that irreparable injury, loss, or damage may result before defendants may be heard in opposition. See Fed. R. Civ. P. 65(b). Here, as in other FTC actions in this district where courts have granted *ex parte* TROs, giving Defendants prior notice creates a tangible risk that assets and evidence stemming from the illegal activity will disappear.

Defendants have already shown their ability to hide their identities. Their telemarketers initially claim to be calling from “Card Services,” rather than disclosing the company name. Defendants have repeatedly switched business names in response to consumer complaints or to avoid credit card chargebacks, using at least ten different aliases, and used multiple telephone

⁹⁸ See note 3. PX2 McKenney ¶ 13, Att. G

numbers.⁹⁹ Defendants have used many different mail drops and merchant accounts. Finally, one of the individual Defendants and two of the corporate Defendants are located outside the United States, and proceeds from the scheme are regularly transferred to Canadian bank accounts. In sum, *ex parte* relief is necessary to preserve the *status quo* and ensure that Defendants cannot destroy records and dissipate assets, including by moving assets outside the United States.

E. An Asset Freeze is Necessary to Preserve Assets for Effective Consumer Redress

Part of the relief sought by the FTC in this case is restitution to consumers who were defrauded by Defendants' misrepresentations. To preserve the possibility for such relief, the Commission seeks a freeze of Defendants' assets and an immediate accounting to prevent concealment or dissipation of assets pending a final resolution of this litigation.

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. At that juncture, the District Court has "a duty to ensure that the assets of the corporate defendants [are] available to make restitution to injured consumers." *Id.* at 1031. In a case such as this, where the Commission is likely to succeed in showing that corporate officers are individually liable for the payment of restitution, the freeze should extend to individual assets as well. *Id.* (affirming freeze on individual assets). This Court has authority to order a party to "freeze" property under its control, whether the property is within or outside the United States. *U.S. v. First Nat'l City Bank*, 379 U.S. 378, 384 (1965). Such an order is necessary and appropriate here to ensure the possibility of effective final relief.

⁹⁹ Plaintiff submits 28 consumer declarations, at least one of each relates to each of the ten business aliases and Defendants' various telephone numbers.

F. Appointment of a Receiver is Necessary to Ensure Effective Relief

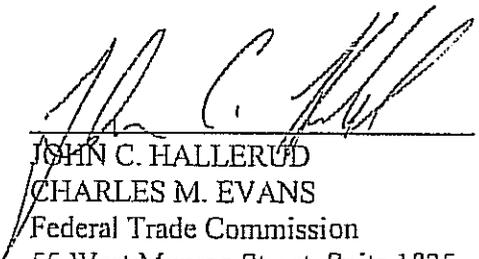
Appointing a temporary receiver over the corporate Defendants is necessary to preserve the potential for a complete remedy. Such an appointment is particularly appropriate where defendants' pervasive fraud presents the likelihood of continued misconduct. If Defendants here are allowed to remain in control of their business, it is likely that evidence will be destroyed and the fruits of their fraud will be dissipated. By taking custody of the business, a neutral receiver would prevent further harm to consumers and prevent destruction or concealment of assets and records 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.

V. CONCLUSION

The 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.¹⁰⁰

Respectfully Submitted,

DATED: November 8, 2010



JOHN C. HALLERUD
CHARLES M. EVANS
Federal Trade Commission
55 West Monroe Street, Suite 1825
Chicago, Illinois 60603
(312) 960-5634 [telephone]
(312) 960-5600 [facsimile]
email: jhallerud@ftc.gov

¹⁰⁰ The FTC has submitted a proposed Temporary Restraining Order and a Preliminary Injunction with its papers.