

1 WILLARD K. TOM
 General Counsel
 2 ROBERT J. SCHROEDER
 Regional Director
 3 ELEANOR DURHAM, Maryland Bar
 LAURA M. SOLIS, WA State Bar No. 36005
 4 Federal Trade Commission
 915 Second Ave., Suite 2896
 5 Seattle, WA 98174
 Telephone: (206) 220-6350
 6 Facsimile: (206) 220-6366
edurham@ftc.gov
 7 lsolis@ftc.gov

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CLERK U S DISTRICT COURT DISTRICT OF ARIZONA	
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8 Attorneys for Plaintiffs

9 **IN THE UNITED STATES DISTRICT COURT**
FOR THE DISTRICT OF ARIZONA

10 Federal Trade Commission,
 11
 Plaintiff,
 12
 vs.
 13 ELH Consulting, LLC, *et al.*,
 14
 Defendants.

Civil No. CV-12-2246-PHX-FJM

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

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1 **I. INTRODUCTION**

2 Plaintiff, the Federal Trade Commission (“FTC”) asks this Court to stop
 3 Defendants from promoting fraudulent credit card interest rate reduction services.
 4 Defendants promise to reduce consumers’ credit card interest rates thereby saving
 5 them at least \$2500 in finance charges over a short period of time. Defendants do not
 6 deliver the promised services and have caused millions of dollars in consumer injury
 7 to consumers who are often in difficult financial circumstances. Defendants’
 8 misrepresentations and other business practices violate Section 5 of the Federal Trade
 9 Commission Act (“FTC Act”), 15 U.S.C. § 45(a), and the Telemarketing Sales Rule
 10 (“TSR”), 16 C.F.R. Part 310.

11 To halt Defendants’ violations and preserve assets for eventual victim
 12 restitution, the FTC asks the Court to enter an *ex parte* temporary restraining order
 13 (“TRO”) that freezes Defendants’ assets, appoints a temporary receiver, grants
 14 immediate access to business premises, and permits limited expedited discovery. This
 15 relief is necessary to prevent ongoing injury to consumers, destruction of evidence,
 16 and dissipation of assets, and to preserve the Court’s ability to provide effective final
 17 relief.

18 **II. DEFENDANTS**

19 **A. ELH Consulting, LLC, also d/b/a Proactive Planning Solutions**

20 ELH Consulting, LLC (“ELH”), is an Arizona company owned by Emory L.
 21 “Jack” Holley IV (“Holley”).¹ ELH’s mailing address is 1753 E. Broadway Rd. #525,
 22 Tempe, Arizona, and its office is located at 2655 W. Guadalupe Rd., Suite 9, Mesa,
 23 Arizona.² ELH has telemarketed credit card interest rate reduction services as
 24 Proactive Planning Solutions (“PPS”).³ ELH also provides substantial assistance to
 25

26 _____
 27 ¹ TRO Exh. 1 ¶ 3, p. 1; Att. 1, p. 7.

28 ² TRO Exh. 1 ¶¶ 11 and 12, pp. 3-4; Att. 3, p. 94; Att. 4, p. 96.

³ See, e.g., TRO Exh. 5 p. 1 ¶ 2; TRO Exh. 9 pp. 1-2, 18-19.

1 third party telemarketers.⁴ The Indiana Attorney General sued ELH d/b/a PPS in
 2 February 2012 for deceptively telemarketing credit card interest rate reductions
 3 services.⁵ A default judgment was entered against them in June 2012 and this
 4 judgment has not been satisfied.⁶

5 **B. Purchase Power Solutions, LLC**

6 Purchase Power Solutions, LLC (“PPower”), is an Arizona company owned by
 7 Lisa Miller (“Miller”).⁷ The mailing address for PPower is 3116 S. Mill Ave. # 283,
 8 Mesa, Arizona.⁸ PPower telemarkets credit card interest rate reduction services.⁹ The
 9 Mississippi Commission of Public Privacy (“MCPPI”) sued ELH, PPower, Holley, and
 10 Miller for violations of Mississippi’s telemarketing statute in May 2012.¹⁰ The MCPPI
 11 is seeking entry of a default judgment.¹¹

12 **C. Allied Corporate Connection, LLC**

13 Allied Corporate Connection, LLC (“Allied”), is an Arizona company owned
 14 by Miller.¹² Allied’s mailing address is 2023 W. Guadalupe Rd. #11-217, Mesa,
 15 Arizona,¹³ and its office is located at 2655 W. Guadalupe Rd., Suite 9, Mesa,
 16 Arizona.¹⁴ The West Virginia Attorney General (“WV-AGO”) sued Allied, Miller,
 17

18 ⁴ Section III.B, *infra*.

19 ⁵ **TRO Exh. 9** pp. 1-16.

20 ⁶ **TRO Exh. 9** pp. 17-19.

21 ⁷ **TRO Exh. 1** ¶ 3, p. 1; Att. 1, pp. 12-13.

22 ⁸ **TRO Exh. 1** ¶¶ 5 and 9, pp. 2, 3; Att. 3, p. 89.

23 ⁹ *See, e.g.*, **TRO Exh. 5** pp. 50-61; *see also*, **TRO Exh. 10** pp. 1-12.

24 ¹⁰ **TRO Exh. 10** pp. 1-5.

25 ¹¹ **TRO Exh. 10** pp. 6-12.

26 ¹² **TRO Exh. 1** ¶ 3, p. 1; Att. 1, p. 10-11.

27 ¹³ *Id.*

28 ¹⁴ **TRO Exh. 1** ¶¶ 10 and 17, pp. 3, 6; Att. 3, p. 93; Att. 9, p. 187; *see also*, **TRO Exh. 5** pp. 20, 61 (Allied shipped materials from 2655 W. Guadalupe).

1 and Holley in 2010 for providing web services and a mail drop to First Secure
 2 Management, LLC (“First Secure”), a company engaged in deceptive telemarketing.
 3 Allied, Miller, and Holley settled with the WV-AGO, reimbursing five WV
 4 consumers.¹⁵

5 **D. Complete Financial Strategies, LLC**

6 Complete Financial Strategies, LLC (“Complete”), is an Arizona company
 7 owned by Miller,¹⁶ that has shipped materials for third party telemarketers.¹⁷

8 **E. Emory L. Holley IV and Lisa Miller**

9 Holley is the owner of ELH and holds a management position with Allied.¹⁸
 10 Miller is the owner of PPower, Allied, and Complete.¹⁹ Miller is a recidivist and in
 11 contempt of the 2004 Order entered by the court in connection with *FTC v. Vector*
 12 *Direct Marketing, LLC, et al.*, CV04 0095 PHX SMM. Miller was the sole owner of
 13 Vector Direct, which deceptively telemarketed a “Do Not Call service.”²⁰

14 **F. 3Point14 Consultants, LLC, also d/b/a Elite Planning Group, and**
 15 **Rares Stelea**

16 3Point14 Consultants, LLC, also d/b/a Elite Planning Group (“Elite”), owned
 17 by Rares Stelea (“Stelea”), is a Nevada company.²¹ Elite has telemarketed credit card
 18 interest rate reductions services.²² Elite’s mailing address is 315 W. Elliot Rd. #107-

19
 20 ¹⁵ **TRO Exh. 7** pp. 1-11, 34-38.

21 ¹⁶ **TRO Exh. 1** ¶ 3, p. 1; Att. 1, pp. 14-15.

22 ¹⁷ **TRO Exh. 5** pp. 183-184 ¶ 5; Att. 4 p. 195.

23 ¹⁸ **TRO Exh. 1** ¶¶ 3 and 17, pp. 1, 6; Att. 1, pp. 7-8; Att. 9, p. 187; **TRO Exh. 7** p.
 24 35 ¶ 4.

25 ¹⁹ **TRO Exh. 1** ¶ 3, p. 1; Att. 1, pp. 10-15.

26 ²⁰ **TRO Exh. 2** pp. 1-15. The Order prohibits Miller from any violation of the
 27 TSR. *See id.* pp. 2-3.

28 ²¹ **TRO Exh. 1** ¶ 3, p. 1; Att. 1, pp. 16-17; **TRO Exh. 5** p. 140, ¶ 5 (Elite
 consumers were charged by 3Point14-888-779-8875).

²² *See, e.g.*, **TRO Exh. 5** pp. 170-182.

1 166, Tempe, Arizona.²³ Stelea resides in Las Vegas, Nevada.²⁴

2 **G. Key Tech Software Solutions, LLC, also d/b/a Key One Solutions,**
3 **and Justin Journey**

4 Key Tech Software Solutions, LLC, also d/b/a Key One Solutions (“Key
5 One”), owned by Justin Journey (“Journey”), is a Delaware company.²⁵ Key One
6 telemarkets credit card interest rate reduction services.²⁶ Key One’s mailing address is
7 7650 S. McClintock Dr. #103-119, Tempe, Arizona.²⁷

8 **III. DEFENDANTS’ DECEPTIVE BUSINESS PRACTICES**

9 **A. Defendants Make False and Misleading Telemarketing Claims**

10 Defendants often initiate telemarketing calls using a telemarketing service that
11 delivers recorded voice messages, known as “robocalling.”²⁸ The recorded messages
12 often identify the caller as a representative of “Cardholder Services,”²⁹ creating the
13 impression that the call is from a bank or credit card company.³⁰ The recorded
14 messages offer consumers the opportunity to secure lower credit card interest rates
15 and instruct consumers to press “1” to be connected to a live representative.³¹

16 Consumers who choose to connect to a live telemarketer receive a deceptive
17 sales pitch. Defendants tell consumers that they can substantially reduce the interest
18

19
20 ²³ TRO Exh. 1 ¶¶ 3 and 8., p. 1, 3; Att. 3, p. 79-83.

21 ²⁴ TRO Exh. 1 Att. 3, p. 16.

22 ²⁵ TRO Exh. 1 Att. 4, pp. 142-152.

23 ²⁶ See, e.g., TRO Exh 5 pp. 92-103.

24 ²⁷ TRO Exh. 1 ¶ 3, p. 1; Att. 3, pp. 68-69.

25 ²⁸ TRO Exh. 1 ¶ 14.e, pp. 4-5; Att. 6, pp. 181-183; TRO Exh. 5 p. 22 ¶ 2; p. 39 ¶
26 2; p. 42 ¶ 2; p. 62 ¶ 2; p. 82 ¶ 2; p. 92 ¶ 2; p. 139 ¶ 2.

27 ²⁹ See, e.g., TRO Exh. 11 pp. 4-5, 24.

28 ³⁰ See, e.g., TRO Exh. 5 p. 139 ¶ 3; see also, p. 92 ¶ 3. Some recordings suggest
an affiliation with a government program, see, e.g., TRO Exh. 5 p. 92 ¶ 2.

³¹ TRO Exh. 5 p.22 ¶ 2; p. 39 ¶ 2; p.42 ¶ 2; p. 92 ¶¶ 2-3; p.139 ¶ 2.

1 rates on their credit card accounts.³² Defendants often guarantee that these lowered
 2 interest rates will save consumers thousands of dollars, typically at least \$2500, in a
 3 short period of time, and that consumer will be able to pay off their credit card debts
 4 much faster as a result of the lowered interest rates.³³ In some instances, Defendants
 5 promise to help consumers save money by securing for them a 0% or very low interest
 6 credit card that can be used to transfer high interest rate balances from other credit
 7 cards.³⁴ It is impossible for Defendants to truthfully make these claims without a
 8 case-by-case evaluation of the consumer's creditworthiness by the creditor making the
 9 offer.³⁵

10 Defendants charge consumers from \$498 to \$999,³⁶ often claiming that the fee
 11 will be offset by the interest savings.³⁷ Defendants place this charge on consumers'
 12 credit cards during or immediately after the sales call.³⁸ Defendants guarantee that if
 13 consumers do not save the promised amount of money in a short time as a result of
 14

15 ³² TRO Exh. 1 ¶ 14.a, p. 4; Att. 6, pp. 181-183; TRO Exh. 3 ¶¶ 6-8, pp. 2-3;
 16 TRO Exh. 5 p. 1 ¶ 3; p. 15 ¶¶ 2-3; p. 39 ¶¶ 2-3; p. 42 ¶¶ 2-3; pp. 50-51 ¶¶ 2,4; pp.
 17 62-63 ¶¶ 2,4; pp. 82-83 ¶¶ 2-3, 5-6; pp. 92-93 ¶¶ 2-3; p. 104 ¶¶ 2-3; p. 117 ¶ 2;
 18 p. 139 ¶ 3; p. 164 ¶¶ 2-3; p. 170 ¶ 3; p. 200 ¶¶ 2-3; *see also*, TRO Exh. 4 ¶¶ 9, 11,
 19 13, 17, and 21, pp. 4-5, 7-8.

20 ³³ TRO Exh. 1 ¶ 14.b, pp. 4-5; Att. 6, pp. 181-183; TRO Exh. 3 ¶ 9, pp. 3-4;
 21 TRO Exh. 5 p. 1 ¶ 3; pp. 15-16 ¶¶ 3-4; p. 42 ¶ 3; pp. 82-83 ¶¶ 3, 6; p. 93 ¶ 4; p.
 22 104 ¶ 3; p. 118-119 ¶¶ 4-5, 7; p. 139 ¶ 3; p. 164 ¶ 2; pp. 170-171 ¶¶ 3-4; p. 200
 23 ¶ 3. *See also*, TRO Exh. 1 ¶ 13, p. 4; Att. 5, pp. 158, 163, 168, 172, 176 and 180
 24 (websites claim \$2500 in savings in connection with interest savings).

25 ³⁴ TRO Exh. 1 ¶ 14.c, pp.4-5; Att. 6, pp. 181-183; TRO Exh. 5 pp. 22-23 ¶¶ 2, 6;
 26 pp. 92-93 ¶ 3; p. 165 ¶ 4.

27 ³⁵ TRO Exh. 6 ¶¶ 22-33, pp. 15-24.

28 ³⁶ TRO Exh. 1 Att. 6, pp. 181-183; TRO Exh. 4 ¶¶ 9, 13, 17, and 21, pp. 4, 6-8;
 TRO Exh. 5 pp. 1, 14 ¶ 3 and Att. B; pp. 15-17 ¶¶ 4-7; p. 24 ¶ 8; p. 39 ¶ 3; pp. 42-
 43, 46 ¶¶ 3,4 and Att. A; pp. 51-52 ¶¶ 4, 7; pp. 63-64 ¶¶ 5, 7; pp. 83-84 ¶¶ 6,9; pp.
 93-94 ¶¶ 4, 8; pp. 104-105 ¶¶ 3, 7; pp. 117-119 ¶¶ 3-4, 7, 9; pp. 139-140 ¶¶ 3, 5;
 pp. 164-165 ¶ 3; p. 170 ¶ 3; pp. 200-201 ¶¶ 4-5.

³⁷ TRO Exh. 1 ¶ 14.d, pp. 4-5; Att. 6, pp. 181-183; TRO Exh. 5 p. 22 ¶ 2; p. 42 ¶
 3; p. 51 ¶ 4; p. 93 ¶ 4.

³⁸ TRO Exh. 5 p. 16 ¶ 5; p. 43 ¶ 4; p. 64 ¶ 7; p. 84 ¶¶ 8, 9; p. 104-105 ¶¶ 3, 7; p.
 140 ¶ 5; pp. 164-165 ¶ 3.

1 lowered credit card interest rates or by transferring balances to new low interest credit
 2 cards, consumers will receive a full refund.³⁹ Defendants have taken in more than \$15
 3 million since January 2010.⁴⁰

4 1. Defendants' "Services"

5 After receiving their up-front fee, Defendants' typically do little, if anything, to
 6 actually fulfill their interest rate reduction promises.⁴¹ Consumers receive a packet
 7 from Defendants containing forms to complete and return listing all of the consumer's
 8 credit card account information and other sensitive personal information such as date
 9 of birth and Social Security Number.⁴² The packet typically also includes information
 10 of a general nature about credit, debt, and budgeting.⁴³

11 After consumers complete and return the forms, Defendants may initiate three-
 12 way telephone calls with the consumer's credit card company to request lowered
 13 interest rates.⁴⁴ The evidence suggests this rarely occurs but, even if an interest rate
 14 reduction were achieved, it is unlikely it would fulfill the promises made to induce the
 15 purchase of Defendants' services.⁴⁵

16 Most often, Defendants tell consumers that they will negotiate on their behalf
 17

18 ³⁹ TRO Exh. 3 ¶¶ 9 and 11, pp. 3-5; Att. B, pp. 28, 34, 40-41; TRO Exh. 5 p. 1 ¶
 19 3; pp. 15-16 ¶¶ 4, 6; pp. 22-23 ¶¶ 2, 6; p. 39 ¶ 3; p. 42 ¶ 3; p. 83 ¶ 6; p. 93 ¶ 4; p.
 20 104 ¶ 3; pp. 118-119 ¶ 7; p. 139 ¶ 3; p. 164 ¶ 3; p. 170 ¶ 3.

21 ⁴⁰ TRO Exh. 1 ¶ 15, p. 5; Att. 7, p. 184.

22 ⁴¹ TRO Exh. 4 ¶¶ 11, 15, 19, and 23, pp. 5-9; TRO Exh. 5 pp. 2-3 ¶¶ 4, 7; p. 17 ¶
 23 9; pp. 24-28 ¶¶ 9-13, 15-17; pp. 44 ¶ 10; p. 105 ¶ 5; pp. 119-122 ¶¶ 8-16; p. 140 ¶
 24 6; pp. 165-168 ¶¶ 6-12; pp. 171-172 ¶ 5; pp. 202-203 ¶¶ 9-10; *see also*, TRO Exh.
 25 6, ¶¶ 22-33, pp. 15-24.

26 ⁴² TRO Exh. 5 p. 53, 56-58 ¶ 11 and Att. A; pp. 93-94, 96-103 ¶ 6 and Att. A; pp.
 27 119, 124-130 ¶ 8 and Att. A; pp. 171, 176-179 ¶ 5 and Att. A; pp. 201-202, 206-
 28 212 ¶ 6 and Att. A.

⁴³ TRO Exh. 1 ¶ 16, p. 5; Att. 8, pp. 185-186; TRO Exh. 5 pp. 93-94, 96-103 ¶ 6
 and Att. A; pp. 165-167 ¶¶ 6-12; pp. 171-172 ¶ 5.

⁴⁴ TRO Exh. 1 ¶ 14.f, pp. 4-5; Att. 6, pp. 181-183; *see also*, TRO Exh. 5 p. 92 ¶
 3; p. 165 ¶ 4.

⁴⁵ TRO Exh. 6 ¶¶ 22-33, pp. 15-24.

1 and then advise them that they could not obtain reduced interest rates on existing
 2 accounts and offer them an alternative service.⁴⁶ One such alternative is a new credit
 3 card with an introductory temporary 0% or other low interest rate to be used to pay off
 4 existing credit card debt.⁴⁷ Generally consumers' applications for the cards are
 5 declined⁴⁸ but, even where new credit accounts are obtained, the claims made to
 6 induce the purchase of Defendants services are not fulfilled.⁴⁹

7 In most instances, all consumers get from Defendants is an accelerated
 8 payment schedule - or materials instructing consumers how to create their own
 9 accelerated payment schedule. These "debt management plans" advise consumers to
 10 accelerate payments to high interest rate high balance cards, to make balance transfers,
 11 and to open new low interest credit accounts.⁵⁰ They do not produce the savings
 12 Defendants promised to consumers.

13 2. Defendants' Failure to Provide Refunds

14 Despite failing to deliver on their promises, Defendants rarely refund the fee
 15 paid by consumers.⁵¹ Defendants deny refund requests on the grounds that: (1) the
 16 consumer is required to allow them to perform services on their behalf before they can
 17 ask for a refund,⁵² or (2) the advice in the "debt management plan" or CDs sent by the
 18 Defendants outlines potential savings of at least \$2500.⁵³ Thus, consumers are deemed
 19 ineligible for a refund. In many instances when refunds are finally agreed to,

20
 21 ⁴⁶ TRO Exh. 3 ¶ 23, p. 8; TRO Exh. 5 pp. 2-3 ¶ 7; pp. 24-25 ¶¶ 9-11; p. 94 ¶ 7; p.
 120 ¶ 11; p. 140 ¶ 6.

22 ⁴⁷ TRO Exh. 5 pp. 2-3 ¶ 7; p. 140 ¶ 6; p. 165 ¶ 4.

23 ⁴⁸ See, e.g., TRO Exh. 5 p. 166 ¶ 7.

24 ⁴⁹ TRO Exh. 5 pp. 2-3 ¶¶ 7-8; pp. 24-25 ¶¶ 9-11; p. 121 ¶ 13.

25 ⁵⁰ TRO Exh. 5 p. 26 ¶ 13; p. 122, 131-138 ¶ 16 and Att. B.

26 ⁵¹ TRO Exh. 4 ¶¶ 11, 15, and 19, pp. 5-8; TRO Exh. 5 p. 3 ¶ 8; p. 27, 29 ¶¶ 16,
 27 21; p. 44 ¶ 9; pp. 52-53, 55 ¶¶ 9, 15; pp. 120-121, 123 ¶¶ 12, 19.

28 ⁵² See, e.g., TRO Exh. 5 pp. 120-121 ¶ 12.

⁵³ See, e.g., TRO Exh. 5 p. 94 ¶ 7.

1 Defendants delay the refund for months preventing the consumer from seeking a
2 credit card chargeback.⁵⁴

3 **B. The Holley/Miller Defendants Provide Substantial Assistance To**
4 **Elite and Key One**

5 The companies owned and controlled by Holley and Miller provide substantial
6 assistance to third party telemarketers Elite and Key One. ELH, Miller, and Holley
7 registered, paid for, and hosted the websites used by Elite and Key One.⁵⁵ Holley is
8 the registrant for the mail drops used by Elite and Key One,⁵⁶ and Holley on behalf of
9 Allied established the customer service telephone accounts used by Elite and Key
10 One.⁵⁷ The materials received by Key One purchasers, forms and a two-CD package
11 "Establish Financial Freedom," are the same materials received by purchasers of the
12 service telemarketed by ELH d/b/a PPS.⁵⁸ ELH employees claim to provide "financial
13 consulting services" to purchasers of the Key One service.⁵⁹ Further, the evidence
14 indicates that these Defendants have provided similar assistance to numerous other
15 telemarketers of deceptive credit card interest rate reduction services.⁶⁰

16 **C. Common Enterprise**

17 ELH, owned by Holley, and PPower, Allied and Complete, owned by Miller,
18 are all engaged in the sale of credit card interest rate reductions services and operate

19 ⁵⁴ See, e.g., **TRO Exh. 5** pp. 141-142 ¶¶ 9-13.

20 ⁵⁵ **TRO Exh. 1** ¶ 4, pp. 1-2; Att. 2, pp. 20-21, 28, 32, 36, 43, 49, and 55.

21 ⁵⁶ **TRO Exh. 1** ¶¶ 5-6 and 8, pp. 2-3; Att. 3, pp. 64-69, 82-83.

22 ⁵⁷ **TRO Exh. 1** ¶ 17, p. 6; Att. 9, pp. 187-190; see also, Att. 5, p. 167 (KOS cust.
23 service number 888-599-7112); and **TRO Exh. 5** p. 176 (EPG cust.service number
24 888-355-2702).

25 ⁵⁸ **TRO Exh. 1** ¶ 13, p. 4; Att. 5, pp. 157, 167 (PPS and KOS websites show same
26 CD set); see also, **TRO Exh. 5** pp. 93-94 ¶ 6 and pp. 100-103 Att. A.

27 ⁵⁹ **TRO Exh. 3** ¶¶ 19 and 22, pp. 6, 8.

28 ⁶⁰ **TRO Exh. 1** ¶¶ 4, 7, 13 and 17, pp. 1-4, 6; Att. 2, pp. 21, 27, 29, 30, 33-34, 36-
37, 39, 42, 46-47, 52-54, 60; Att. 5, pp. 169-180; and Att. 9, pp. 188-189; **TRO**
Exh. 3 ¶¶ 20-21 p. 7; Att. E, pp. 70-72; **TRO Exh. 5** pp. 144, 146-148, 154-158 ¶¶
2, 7, 17, and Att. 3; pp. 183-184, 187-190 ¶ 5 and Att. 2; **TRO Exh. 7**; **TRO Exh.**
12.

1 as a single enterprise. These Defendants share an office and employees.⁶¹ Holley holds
 2 a management position at Allied,⁶² and Miller is the domain registrar for these
 3 Defendants' websites and she paid for most of the registrations using Holley's credit
 4 card.⁶³ Holley established the mail drop used by PPower,⁶⁴ and Holley on behalf of
 5 Allied established the telephone accounts used by the Defendants.⁶⁵ Purchasers of the
 6 service sold by PPS receive forms and the two-CD package "Establish Financial
 7 Freedom," shipped from Allied.⁶⁶ Miller and Holley both entered into a settlement
 8 with the WV-AGO on behalf of Allied.⁶⁷

9 Defendants who act jointly as a common enterprise are jointly liable for the
 10 violations of each other. Courts have found common enterprises in a variety of FTC
 11 actions under Section 13(b) where there has been common corporate control, shared
 12 office space, shared employees and officers, interrelated funds and other factors. *See,*
 13 *e.g., FTC v. JK Publications*, 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000). These
 14 Defendants operate as a single enterprise. Therefore, the Court should hold each of
 15 them jointly and severally liable for all violations.

16 **IV. ARGUMENT**

17 Defendants' deceptive business practices have cost debt-burdened consumers
 18 millions of dollars and violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and
 19 multiple provisions of the TSR, 16 C.F.R. Part 310. To prevent further injury, the FTC
 20

21 ⁶¹ TRO Exh. 1 ¶¶ 12 and 17, pp. 3-4, 6; Att. 4, p. 96 (ELH at 2655 W.
 22 Guadalupe); Att. 9, pp. 187-192 (Allied has phone lines for all Defendants at 2655
 23 W. Guadalupe); TRO Exh. 5 pp. 18, 20 ¶ 12 and Att. A; pp. 28, 38 ¶ 18 and Att.
 A.

24 ⁶² TRO Exh. 7 ¶ 4, p. 35.

25 ⁶³ TRO Exh. 1 ¶ 4, pp. 1-2; Att. 2, pp. 20-21, 40, 44, 50-51, 56, 58.

26 ⁶⁴ TRO Exh. 1 ¶¶ 5 and 9, pp. 2-3; Att. 3, pp. 85-90.

27 ⁶⁵ TRO Exh. 1 ¶ 17, p. 6; Att. 9, pp. 187-190.

28 ⁶⁶ TRO Exh. 5 pp. 18, 20 ¶ 12 and Att. A; pp. 28, 38 ¶ 18 and Att. A.

⁶⁷ TRO Exh. 7 ¶ 4, pp. 35, 38.

1 seeks a temporary restraining order and a preliminary injunction prohibiting
 2 Defendants' practices, freezing their corporate and personal assets, appointing a
 3 temporary receiver over, and granting immediate access to the business premises of,
 4 ELH, PPower, Allied and Complete, and granting limited expedited discovery. This
 5 relief is necessary to preserve assets for restitution to victims of this enterprise. Courts
 6 in the Ninth Circuit have repeatedly granted such relief.⁶⁸

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

8 "In proper cases the Commission may seek, and after proper proof, the court
 9 may issue, a permanent injunction." 15 U.S.C. § 53(b). Defrauding consumers by
 10 misrepresenting material facts in violation of Section 5(a) of the FTC Act presents a
 11 "proper case" for injunctive relief. *FTC v. World Travel Vacation Brokers, Inc.*, 861
 12 F.2d 1020, 1028 (7th Cir. 1988). Once the FTC invokes the federal court's equitable
 13 powers, the full breadth of the court's authority is available, including such ancillary
 14 final relief as rescission of contracts and restitution. *FTC v. Febre*, 128 F.3d 530, 534
 15 (7th Cir. 1997). The court may also enter a TRO, a preliminary injunction, and other
 16 preliminary relief as needed to preserve effective final relief. *World Travel*, 861 F.2d
 17 at 1026. Such ancillary relief may include a freeze of defendants' assets to preserve
 18 them for eventual restitution to victims. *FTC v. Am. Nat'l Cellular, Inc.*, 810 F.2d
 19 1511, 1512-14 (9th Cir. 1987).

20 **B. The Applicable Standard for Injunctive Relief**

21 To grant preliminary injunctive relief in an FTC Act case, the district court
 22 must (1) find a likelihood that the FTC will ultimately succeed on the merits and (2)
 23 balance the equities, giving greater weight to the public interest. *World Travel*, 861
 24 F.2d at 1029 (quoting *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1160 (9th Cir.
 25 1984)). Under this "public interest" test, "it is not necessary for the FTC to
 26 demonstrate irreparable injury." *Id.* at 1028-29.

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

28

⁶⁸ Durham Declaration.

1 telemarketer they know is engaged in practices that violate the TSR.⁷²

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

3 Once the FTC has shown a likelihood of success on the merits, the Court must
4 balance the equities, assigning greater weight to the public interest than to
5 Defendants' private concerns. *World Travel*, 861 F.2d at 1029. The public equities in
6 this case are compelling. The public has a strong interest in halting the deceptive
7 scheme and preserving assets necessary to provide effective final relief to victims.
8 *See FTC v. Sabal*, 32 F. Supp. 2d 1004, 1009 (N.D. Ill. 1998) (*citing FTC v. World*
9 *Wide Factors*, 882 F.2d 344, 347 (9th Cir. 1989)). Defendants have no legitimate
10 interest in continuing to deceive consumers and violate federal law. *Id.*

11 **D. The Individual Defendants are Personally Liable**

12 The individual defendants are responsible for the deceptive and unfair practices
13 of the companies they own and control and thus should be subject to the TRO and
14 asset freeze. An individual defendant is liable for injunctive relief and monetary
15 restitution under the FTC Act if the Court finds that he (1) participated directly in or
16 had some measure of control over a corporation's deceptive practices and (2) had
17 actual or constructive knowledge of the practices. *FTC v. World Media Brokers*, 415
18 F.3d 758, 764 (7th Cir. 2005). Authority to control may be evidenced by "active
19 participation in the corporate affairs, including assuming duties as a corporate
20 officer." *Id.* citing *FTC v. Amy Travel Serv.*, 875 F.2d 564, 573 (7th Cir. 1989)). The
21 knowledge requirement is satisfied by a showing that the defendant (1) had actual
22 knowledge of the deceptive acts or practices, (2) was recklessly indifferent to the truth
23 or falsity of the representations, or (3) had an awareness of a high probability of fraud
24 coupled with an intentional avoidance of the truth. *Id.*; *FTC v. Bay Area Bus. Council*,
25 423 F.3d 627, 636 (7th Cir. 2005). An individual's "degree of participation in business
26 affairs is probative of knowledge." *Amy Travel Serv.*, 875 F.2d at 574. The FTC does
27 not need to prove subjective intent to defraud. *Id.*

28

⁷² 16 C.F.R. § 310.3(b). *See* fns. 55-60, *supra*.

1 Holley and Miller are liable for the common enterprise entities they own and
 2 operate. Holley and Miller have demonstrated that they have the authority to control
 3 ELH, PPower, Allied, and Complete and they have participated in the business of
 4 these Defendants. In addition to the conduct described in Sections III. A and B,
 5 above, Miller and Holley established merchant accounts on behalf of PPower and
 6 ELH d/b/a PPS. The merchant agreements require signors to affirm significant
 7 responsibility for the merchants, including ensuring the security of consumer credit
 8 card data and monitoring merchant practices for fraud.⁷³ Holley and Miller's level of
 9 participation in the companies they own indicates at least an awareness of a high
 10 probability of fraud coupled with an intentional avoidance of the truth.

11 Miller and Holley are also liable for conduct of the companies they have
 12 assisted and facilitated. As described in Section III.B, above, they are extensively
 13 involved in the conduct of Elite and Key One and thus are aware that the practices of
 14 these companies - which are the same as the practices of the companies they operate
 15 on their own behalf - violate the TSR. There have been several public and private
 16 lawsuits against these Defendants and the companies they have operated and assisted
 17 over the past three years,⁷⁴ and they have received numerous complaints from the
 18 Better Business Bureau.⁷⁵ This indicates at least an awareness of a high probability of
 19 fraud coupled with an intentional avoidance of the truth.

20 Finally, Stelea and Journay are liable for Elite and Key One, respectively. Their
 21 ownership positions alone establish their ability to control company acts and practices.
 22 *See, e.g., World Media Brokers*, 415 F.3d at 764-65; *Amy Travel*, 875 F.2d at 574.
 23 Moreover, each has assumed responsibility for their company by establishing
 24 merchant accounts agreeing to ensure the security of consumer credit card data and
 25

26 _____
 27 ⁷³ **TRO Exh. 1 ¶** 12, pp. 3-4; Att. 4, pp. 96-97, 108-109.

28 ⁷⁴ **TRO Exhs. 7-12.**

⁷⁵ **TRO Exh. 4 ¶¶** 9, 13, 17, pp. 4, 6-8 .

1 monitor merchant practices for fraud.⁷⁶ Thus, Stelea and Journey are personally liable
2 for the injury caused by their respective companies.

3 **E. The Temporary Restraining Order with Asset Freeze Should Be**
4 **Issued *Ex Parte***

5 A TRO may be granted without notice if it appears notice will result in
6 irreparable injury and the applicant certifies the reasons why. Fed R. Civ. P. 65(b).
7 Defendants' conduct provides the basis for the relief sought, and for issuance on an *ex*
8 *parte* basis. Defendants have been the subject of several previous law enforcement
9 actions for violations of state and federal telemarketing and consumer protection
10 statutes.⁷⁷ Defendant Miller is violating a 2004 injunction prohibiting violations of the
11 FTC Act and the TSR entered by this Court.⁷⁸ Defendants' failure to reform in the face
12 of repeated efforts by law enforcement agencies shows a serious lack of concern for
13 the law and a risk that evidence will be destroyed and assets will be dissipated.

14 Defendants' scheme exposes them to substantial liability. If they succeed in
15 concealing assets, any monetary judgment for the FTC will be rendered
16 unenforceable. District Courts therefore have regularly granted the FTC *ex parte* relief
17 in similar cases.⁷⁹ It is particularly appropriate where giving notice could result in an
18 inability to provide any relief at all. *In re Vuitton et Fils S.A.*, 606 F.2d 1, 4 (2d Cir.
19 1979). The asset freeze should include any assets of the individual Defendants, who
20 have no right to dissipate or conceal funds that the Court may later determine were
21 wrongfully gained. Freezing individual assets is warranted where the individual
22 defendant controls the business that perpetrated the unfair and deceptive acts alleged.
23 *World Travel*, 861 F.2d at 1031.

24 **F. Appointment of a Temporary Receiver Is Necessary**

25 _____
26 ⁷⁶ TRO Exh. 1 ¶ 12, pp. 3-4; Att. 4, pp. 130-133, 137-141.

27 ⁷⁷ TRO Exhs. 2, 7 - 10, 12.

28 ⁷⁸ See TRO Exh. 2.

⁷⁹ Durham Declaration.

1 The FTC seeks appointment of a temporary receiver to take control of the
 2 Phoenix-based Defendants, ELH, PPower, Allied, and Complete. This Court has the
 3 inherent power to appoint a receiver as an incident to its statutory authority to issue a
 4 permanent injunction under Section 13(b) of the FTC Act. *FTC v. U.S. Oil & Gas*, 748
 5 F.2d 1431, 1432 (11th Cir. 1984). *E.g.*, *FTC v. Advanced Mgmt. Serv. NW LLC*, CV-
 6 10-148-LRS (E.D. Wash. May 10, 2010). The appointment of a temporary receiver
 7 over these Defendants is necessary to preserve the potential for a complete remedy.
 8 Such an appointment is particularly appropriate where defendants' pervasive fraud is
 9 likely to continue. *SEC v. First Financial Grp. of Tex.*, 645 F.2d 429, 438 (5th Cir.
 10 1981).

11 **G. Immediate Access and Limited Expedited Discovery are**
 12 **Appropriate**

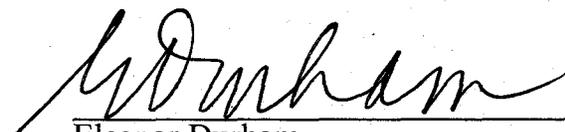
13 The FTC also seeks immediate access to the Phoenix-based Defendants'
 14 business premises to locate assets wrongfully obtained from defrauded consumers and
 15 ensure the integrity of books and records. This relief is often granted in FTC actions
 16 where receivers are appointed. The proposed TRO requires the receiver to provide
 17 both the FTC and Defendants reasonable access to Defendants' premises. Expedited
 18 discovery is particularly appropriate when a party seeks preliminary relief in a case
 19 involving the public interest. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398
 20 (1946). Discovery is limited to locating assets and business records.

21 **V. CONCLUSION**

22 The FTC respectfully requests that the Court issue the proposed *ex parte* TRO
 23 to protect the public from further harm and to help ensure effective final relief for
 24 defrauded consumers.

25 Respectfully Submitted,

26 DATED: October 17, 2012

27 
 28 Eleanor Durham
 Laura M. Solis
 Attorneys for Plaintiff FTC