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FEDERAL TRADE COMMISSION

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

FEDERAL TRADE COMMISSION,

Plaintiff,

– v. –

AMERICAN EVOICE, LTD., et al.,

Defendants,

and

BIBLIOLOGIC, LTD.,

Relief Defendant.

CIVIL ACTION

NO. 9:13-cv-00003-DLC

**PLAINTIFF'S MOTION
FOR PRELIMINARY
INJUNCTION**

Plaintiff Federal Trade Commission (“FTC”) submits this motion pursuant to Fed. R. Civ. P. 65(a) for a preliminary injunction against Defendants American eVoice, Ltd.; Emerica Media Corp.; FoneRight, Inc.; Global Voice Mail, Ltd.; HearYou2, Inc.; Network Assurance, Inc.; SecurDat, Inc.; Techmax Solutions, Inc.; Steven Sann, Terry Lane (a/k/a Terry Sann), Nathan Sann, and Robert Braach. In support of its motion, Plaintiff states as follows:

1. Plaintiff brings this case against Defendants pursuant to Section 13(b) of the Act, 15 U.S.C. § 53(b), to obtain preliminary and permanent injunctive relief, restitution, refunds, and disgorgement of ill-gotten assets for Defendants’ violations of Section 5 of the FTC, 15 U.S.C. § 45.

2. As explained in Plaintiff’s proposed memorandum of law in support of this motion, Defendants have orchestrated a massive “cramming” scheme that has forced over \$70 million in unauthorized charges onto consumers’ telephone bills since 2008. Defendants have channeled a substantial portion of their revenue into a purported nonprofit entity, Relief Defendant Bibliologic, Ltd., controlled by two of the individual defendants.

3. Counts I and II of Plaintiff’s complaint allege that Defendants’ cramming scheme violates Section 5(a) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(a), which prohibits unfair and deceptive acts or practices in or affecting commerce. Count III of Plaintiff’s complaint alleges that Relief

Defendant Bibliologic should be required to disgorge the ill-gotten assets it received from Defendants and to which it has no legitimate claim.

4. For the reasons explained in Plaintiff's memorandum of law, the FTC is likely to succeed on the merits of each count of its complaint, the Court has the authority to enter the requested injunction, and the balance of the equities weighs in favor of granting the relief sought.

5. Plaintiff's proposed preliminary injunction would, among other things, enjoin Defendants from further violations of the FTC Act, freeze Defendants' and Relief Defendant's assets to prevent dissipation and insure the possibility of effective final relief, require Defendants and Relief Defendant to produce an accounting, and provide other appropriate injunctive relief.

WHEREFORE, Plaintiff FTC respectfully requests that the Court issue a preliminary injunction against Defendants and Relief Defendant in the form of the proposed preliminary injunction order annexed hereto as Attachment 1.

Dated: January 8, 2013

Respectfully submitted,

/s/ Richard McKewen

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**MEMORANDUM OF LAW
IN SUPPORT OF
PLAINTIFF'S MOTION
FOR A PRELIMINARY
INJUNCTION**

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I. INTRODUCTION

Since at least January 2008, Defendants Steven Sann, Terry Lane (a/k/a Terry Sann), Nathan Sann, and Robert Braach (“Individual Defendants”), operating through a maze of companies — Defendants American eVoice, Ltd.; Emerica Media Corp.; FoneRight, Inc.; Global Voice Mail, Ltd.; HearYou2, Inc.; Network Assurance, Inc.; SecurDat, Inc.; Techmax Solutions, Inc.; and Voice Mail Professionals, Inc. (“Corporate Defendants”) — have placed charges on consumers’ telephone bills for voice mail or fax services that consumers never ordered, never used, or never even knew they had. Through this scheme, Defendants have caused over \$70 million in bogus charges to appear on consumers’ telephone bills. Those charges — typically less than \$20.00 a month — are buried unnoticed towards the back of consumers’ telephone bills.

Defendants have funneled their ample proceeds into a number of different bank accounts, investment vehicles, and real properties, and a purported nonprofit they control — Relief Defendant Bibliologic, Ltd — and from Bibliologic back to their business and Steven Sann’s criminal defense lawyers. Bibliologic has no legitimate claim to any of these ill-gotten assets.

Defendants’ fraudulent billing practices violate Section 5(a) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(a), which prohibits unfair and deceptive acts or practices in or affecting commerce. Plaintiff FTC brings this case

pursuant to Section 13(b) of the Act, *id.* § 53(b), to obtain preliminary and permanent injunctive relief, restitution, refunds, and disgorgement of ill-gotten assets. The FTC seeks a preliminary injunction that would prohibit Defendants from continuing to bill consumers, freeze Defendants’ assets to prevent dissipation and insure the possibility of effective final relief, require Defendants to produce an accounting, and provide other appropriate relief.

II. DEFENDANTS’ CRAMMING OPERATION

A. Defendants Place Charges on Consumers’ Telephone Bills.

1. LEC Billing Overview

Since the late 1980s, regional landline telephone companies (known as “local exchange carriers” or “LECs”) have opened their billing and collections systems to outside parties.¹ As a result, a consumer may use her home telephone number much like a credit card to purchase services from unrelated third parties, such as Internet service providers or cable television operators.² The charge for the services appears on the consumer’s telephone bill, and after the consumer pays her bill, the LEC pays the third party.³

Usually, an intermediary known as a “billing aggregator” aggregates and

¹ PX12 ¶ 67, Att. 54 (pp. 900-01); *see FTC v. Inc21.com Corp.*, 688 F. Supp. 2d 927, 929 (N.D. Cal. 2010), *aff’d*, 475 Fed. Appx. 106 (9th Cir. 2012).

² PX12 ¶ 67, Att. 54 (pp. 900, 907); *Inc21.com*, 688 F. Supp. 2d at 929.

³ PX12 ¶ 67, Att. 54 (pp. 907-08).

manages billing and payments between the LEC and the service provider.⁴ The LEC pays the billing aggregator, and the aggregator pays the third party.⁵ The aggregator and the LEC are compensated by the third party for their services.⁶ This process is called “LEC billing.”

2. *Defendants’ History of LEC Billing*

Since at least 2008, Defendants have entered into agreements with three aggregators — BSG Clearing Solutions; ILD Telecommunications, Inc.; and Transaction Clearing, LLC — to bill consumers for voice mail and electronic fax services.⁷ Defendants purportedly market these services to consumers over the Internet.⁸ According to Defendants, a consumer provides billing authorization (i.e., a telephone number) via an online form.⁹ Defendants pass that information to an aggregator and the aggregator to the LEC, which causes Defendants’ charge to appear on the consumer’s telephone bill every month until the consumer cancels the

⁴ PX12 ¶ 67, Att. 54 (pp. 907-08) ; *Inc21.com*, 688 F. Supp. 2d at 930.

⁵ PX12 ¶ 67, Att. 54 (pp. 907-08).

⁶ Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges. No. FCC 12-42, FCC Report and Order and Further Notice of Proposed Rulemaking, at 4-5 (Apr. 27, 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-42A1.pdf.

⁷ PX12 ¶¶ 24-29, 32-34, 36, Atts. 20-25 (pp. 333-56, 358-88, 395-401, 408-27), 27-29 (pp. 504-15, 520-23, 554-57), 30 (pp. 574-621).

⁸ PX1 ¶ 4; PX2 ¶ 4; PX3 ¶ 3; PX4 ¶¶ 3-4; PX5 ¶ 3; PX7 ¶ 4; PX8 ¶ 4; PX12 ¶¶ 15, 61-62, Atts. 12-13 (pp. 240-58).

⁹ PX1 ¶ 4, Att. A (p. 6); PX3 ¶ 5, Att. C (p. 24); PX4 ¶ 4, Att. A (p. 28); PX5 ¶ 5, Att. B (p. 45); PX12 ¶¶ 33(j), 39, Atts. 28 (pp. 546-50), 32 (pp. 692-94).

service.¹⁰

The monthly charge is typically \$14.95.¹¹ It is usually buried towards the back of the consumer's statement and identifies both the aggregator and the specific Defendant responsible.¹² Through LEC billing, Defendants have caused over \$70 million in charges to appear on telephone bills since 2008.¹³

B. Defendants Engage in Widespread Unauthorized Billing.

Defendants used LEC billing to perpetrate a massive fraud, billing thousands of consumers around the country for services the consumers never ordered, used, or knew they had.

1. Consumers Never Authorized Defendants' Charges and They Demanded Refunds.

The consumer declarations submitted by the FTC all tell a similar story: Consumers notice a charge on their telephone bill for voice mail or fax services from one of the Corporate Defendants¹⁴ — sometimes right away,¹⁵ but sometimes

¹⁰ PX1 ¶¶ 2-3; PX3 ¶ 5, Att. C (p. 24); PX5 ¶ 2; PX6 ¶ 2; PX9 ¶ 2; PX12 ¶¶ 33(j), 39, Atts. 28 (pp. 549-50) 32 (pp. 692-94).

¹¹ PX1 ¶ 3; PX2 ¶ 2; PX4 ¶ 2; PX5 ¶ 2; PX7 ¶ 2; PX9 ¶ 2.

¹² PX2 ¶ 5, Att. A (p. 11); PX7 ¶ 8, Att. A (pp. 56, 58); PX8 ¶ 8, Att. B (pp. 67, 72); PX9 ¶ 2, Att. A (pp. 78-97).

¹³ PX12 ¶¶ 40-41, Att. 33 (pp. 695-713).

¹⁴ PX1 ¶ 2; PX2 ¶ 2; PX3 ¶ 2; PX4 ¶ 2; PX5 ¶ 2; PX7 ¶ 2; PX8 ¶ 2; PX9 ¶ 2.

¹⁵ PX3 ¶ 2; PX7 ¶ 2; PX8 ¶ 2.

only after months have passed.¹⁶ Not recognizing the charge(s), the consumer contacts her LEC, the aggregator, or the Corporate Defendant named on the statement.¹⁷ If the consumer contacts the LEC, it may issue a credit.¹⁸ The LEC may refer her to the aggregator or the Corporate Defendant, particularly if the consumer seeks credit for multiple months.¹⁹ The aggregator or the Corporate Defendant, however, may claim the consumer signed up for the service online while visiting an affiliated website, such as *www.findjobsnow-usa.com* or *www.lookhere4jobs.com*.²⁰ The consumer responds that she never visited that website or signed up for the service.²¹ Many consumers neither need nor want the service.²²

Defendants often produce a “letter of authorization” (“LOA”) to prove the customer ordered the services. The LOA is nothing more than a screen capture of

¹⁶ PX1 ¶ 2; PX4 ¶ 2; PX5 ¶ 2; PX6 ¶ 2; PX7 ¶ 2; PX9 ¶ 2.

¹⁷ PX1 ¶ 3; PX2 ¶ 3; PX 3 ¶ 3; PX6 ¶ 3; PX7 ¶ 3; PX8 ¶ 2. The contact information for all three may appear on the consumer’s telephone bill. *See, e.g.*, PX2 ¶ 5, Att. A (p. 11); PX9 ¶ 2, Att. A (p. 94).

¹⁸ PX1 ¶ 3; PX12 ¶ 38(g), Att. 32 (pp. 665-66).

¹⁹ PX1 ¶ 3; PX2 ¶ 3; PX4 ¶ 3; PX6 ¶ 3; PX7 ¶ 3; PX8 ¶ 3; PX9 ¶ 4.

²⁰ PX1 ¶ 4; PX2 ¶ 4; PX3 ¶ 3; PX4 ¶ 4; PX5 ¶ 3; PX7 ¶ 4.

²¹ PX1 ¶ 4; PX2 ¶ 4; PX3 ¶ 3; PX4 ¶ 4; PX5 ¶¶ 2-4, Att. A (p. 41); PX6 ¶ 3; PX7 ¶ 4; PX8 ¶ 4.

²² PX1 ¶ 2; PX2 ¶ 4; PX8 ¶ 4; PX9 ¶ 3.

a form supposedly completed by the consumer that authorizes the charge.²³ The LOA identifies the consumer by name, address, telephone number, email address, and a date of birth or mother's maiden name.²⁴ Consumers, however, have never seen the LOA before, much less completed and submitted it.²⁵ Often the billed telephone number ("BTN") is the consumer's, but not the name, email address, or mother's maiden name.²⁶

When pressed by consumers, or required by the LECs or aggregators, Defendants sometimes issue refunds, either as credits or by check.²⁷ Defendants' refund rates have been so high that, since 2008, Defendants have netted less than \$30 million of the more than \$70 million billed to consumers. The difference has

²³ PX3 ¶ 5, Att. C (p. 24); PX12 ¶¶ 33(j), 39, Atts. 28 (pp. 549-50), 32 (pp. 692-94).

²⁴ PX3 ¶ 5, Att. C (p. 24); PX12 ¶¶ 33(j), 39, Atts. 28 (pp. 549-50), 32 (pp. 692-94); *see also* PX1 ¶ 4, Att. A (p. 6); PX4 ¶ 4, Att. A (p. 28).

²⁵ PX1 ¶ 4; PX2 ¶ 4; PX3 ¶ 3; PX4 ¶ 4; PX5 ¶¶ 2-4, Att. A (p. 41); PX6 ¶ 3; PX7 ¶ 4; PX8 ¶ 4.

²⁶ PX1 ¶ 4; PX3 ¶ 5; PX5 ¶ 4; PX9 ¶ 8. All of the LOAs are completed in capital letters, undermining their authenticity. PX3 ¶ 5, Att. C (p. 24); PX12 ¶¶ 33(j), 39, Atts. 28 (pp. 549-50), 32 (pp. 692-94).

²⁷ PX1 ¶ 4; PX2 ¶ 5; PX3 ¶ 6; PX5 ¶ 4; PX6 ¶ 4; PX8 ¶ 8; PX9 ¶ 9. Refunds came by check if consumers canceled their phone service and therefore could not receive credit, or if the consumer requested it. PX9 ¶ 9; PX12 ¶ 34(e), Att. 29 (pp. 569-70). Refund checks were issued to an automobile dealership, a home heating oil company, Union Pacific Railroad, the U.S. General Services Administration, the University of Indianapolis, medical facilities, and the Missouri National Guard — unlikely online purchasers of voice mail and electronic fax services. PX12 ¶¶ 34(e), 49, Atts. 29 (pp. 569-70), 37 (pp. 784-800). Some consumers canceled or transferred their local phone service to another LEC to avoid further unauthorized charges. PX1 ¶ 5; PX7 ¶¶ 7-8.

gone to refunds, credits, fees, taxes, and other adjustments.²⁸

2. *Complaints to Government Agencies, the BBB, and Aggregators Corroborate the Consumer Declarants' Testimony.*

Hundreds of consumers have filed complaints with government agencies and the Better Business Bureau (“BBB”) regarding Defendants’ cramming unauthorized charges. The Federal Communications Commission has received 125 such complaints.²⁹ The FTC’s database contains 224.³⁰ The Spokane, Washington BBB processed 123 and rated Defendants “F.”³¹

Defendants’ LECs and aggregators also received numerous complaints. In one month alone, Verizon received 320 complaints from consumers regarding a single Corporate Defendant, American eVoice.³² The aggregators also received a steady stream of consumer complaints from LECs, state attorneys general, and consumers themselves, generating thousands of pages of correspondence among aggregators, LECs, and Defendants.³³

These complaint volumes, while high, understate the problem. Consumers

²⁸ PX12 ¶¶ 40-41, Att. 33 (pp. 695-713).

²⁹ PX12 ¶ 62.

³⁰ PX12 ¶ 61, Att. 50 (pp. 877-84).

³¹ PX11 (pp. 112-16).

³² PX12 ¶ 30(b)(vi), Att. 26 (pp. 469-70).

³³ PX12 ¶ 63.

can complain directly to Defendants, bypassing the LEC, the aggregator, and the BBB.³⁴ Moreover, in cramming cases, many consumers never notice the unauthorized charges.³⁵

3. *Practically None of the Consumers Billed by Defendants Utilize the Voice Mail Services for Which They Are Billed.*

Consumers normally purchase goods or services intending to use them. Here, almost none of the tens of thousands of consumers billed by Defendants actually used the services. Records from ConnectMe, LLC — Defendants' voice mail provider — show that almost none of Defendants' customers utilize their voice mail service. In April 2012, of 119,810 open voice mail accounts for Defendants' customers, only 12 customers actually accessed their account, a usage rate of .01%.³⁶ Only 8 customers accessed their account more than once that month.³⁷ From March 2010 to April 2012, the monthly usage rate by Defendants' customers never exceeded 1%.³⁸ These abysmally low usage rates strongly suggest

³⁴ PX3 ¶ 3. The contact information for Defendants can appear on the consumer's telephone bill. *See supra* note 17.

³⁵ *See FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 996 (N.D. Cal. 2010) (fewer than five percent of cramming victims realized they had been billed); PX12 ¶ 67, Att. 54 (p. 928).

³⁶ PX12 ¶ 42-44, Att. 34 (pp. 725-26).

³⁷ PX12 ¶ 42, Att. 34 (pp. 725-26).

³⁸ PX12 ¶ 42, Att. 34 (pp. 725-26). According to ConnectMe, when Defendants and ConnectMe were negotiating the terms of their contract, ConnectMe agreed to provide voice mail services at a discounted price because of Defendants' assurances that usage rates would be minimal. *Id.* ¶ 45.

that consumers neither ordered the services nor knew they were being billed for them.³⁹

4. *LECs and Aggregators Demanded that Defendants Address High Levels of Cramming Complaints, Eventually Suspending Billing on Defendants' Behalf.*

Unauthorized charges can reflect negatively on LECs and aggregators, even if the charges do not originate with them. Hence LECs and aggregators have an interest in minimizing cramming complaints.⁴⁰ If cramming complaints exceed a specified threshold, LECs often require a third party service provider and its aggregator to devise an “action plan” to reduce complaints.⁴¹ Aggregators can also, independently of a LEC, investigate complaint levels.⁴² If complaints remain high, a LEC or an aggregator may suspend billing for the third party service provider.⁴³

In this case, the LECs and aggregators repeatedly required Defendants to

³⁹ PX12 ¶ 67, Att. 54 (p. 926) (“Low usage rates are strong evidence that consumers did not knowingly purchase the services and were not aware they were being charged for them.”); *see Inc21.com*, 745 F. Supp. 2d at 996-97.

⁴⁰ PX12 ¶¶ 30(b)(vi), 33(e), Atts. 26 (pp. 471-72), 28 (pp. 532-34).

⁴¹ PX12 ¶ 30(b)(i)-(ii), (v)-(vi); ¶ 33(e), (h), (j); ¶ 34(c); ¶ 38(d), (f), (i); Att. 26 (pp. 549-50, 452-53, 459-65, 471-72); Att. 28 (pp. 532-34, 543-44, 546-47); Att. 29 (p. 560); Att. 32 (pp. 660-61, 663-64, 669-75).

⁴² PX12 ¶¶ 30(b)(i), 33(e), 34(c), Atts. 26 (pp. 449-50), 28 (pp. 532-34), 29 (p. 560).

⁴³ PX12 ¶ 30(b)(i)-(ii), (v)-(vi); ¶ 33(e), (h), (j); ¶ 34(c); ¶ 38(d), (f), (i); Att. 26 (pp. 549-50, 452-53, 459-65, 471-72); Att. 28 (pp. 532-34, 543-44, 546-47); Att. 29 (p. 560); Att. 32 (pp. 660-61, 663-64, 669-75).

produce action plans addressing high levels of cramming complaints. For example, in May, June, and July 2009, aggregator ILD required Defendant FoneRight to propose an action plan to reduce cramming levels.⁴⁴ Complaints did not decrease, and in August 2009, ILD suspended new billing on behalf of FoneRight.⁴⁵ Meanwhile, around the same time, Verizon demanded that Defendant Voice Mail Professionals produce an action plan;⁴⁶ both AT&T and Verizon demanded action plans from Defendant American eVoice,⁴⁷ and AT&T demanded one from Network Assurance and Defendant Global Voice Mail's predecessor company,⁴⁸ then, when complaints continued, suspended regional billing on their behalf.⁴⁹

In mid-2010, LEC Frontier notified an aggregator that it considered *all* charges by Defendants Global Voice Mail and Network Assurance suspect after

⁴⁴ PX12 ¶ 33(e), Att. 28 (pp. 532-34).

⁴⁵ PX12 ¶ 33(i), Att. 28 (p. 545). FoneRight's suspension letter from ILD indicated FoneRight had "significantly surpassed [ILD's cramming] thresholds for four months with no improvement," and that FoneRight had "been involved in recent regulatory and media complaints. *Id.*

⁴⁶ PX12 ¶ 34, Att. 29 (p. 560).

⁴⁷ PX12 ¶ 30(b)(v)-(vi), Att. 26 (pp. 464-72).

⁴⁸ PX12 ¶ 30(b)(v), Att. 26 (458-63). The first draft of the action plans for American eVoice and Global Voice Mail's predecessor were identical. *Id.*

⁴⁹ PX12 ¶ 30(b)(vii), Att. 26 (473-74).

some of the LEC's own office telephones were billed by Defendants.⁵⁰ In June 2011, Frontier required action plans from Defendants FoneRight, HearYou2, Techmax, Voicemail Professionals and SecureatDat,⁵¹ then suspended billing for Defendants Techmax, FoneRight, and HearYou2.⁵² In July 2011, at the request of AT&T and Verizon, Transaction Clearing suspended billing on behalf of Defendant Techmax in those LECs' regions.⁵³

In brief, substantial evidence from consumers, government agencies, the BBB, LECs, billing aggregators, and Defendants' telecommunications service provider show that Defendants caused over \$70 million in unauthorized charges to appear on consumers' telephone bills.

III. DEFENDANTS' ROLES IN THE CRAMMING OPERATION

The Individual Defendants, led by Steven Sann, carried out their cramming operation through a maze of interrelated companies that, as explained in Part IV.F below, constitutes a "common enterprise." Each Individual Defendant played a key role in one or more of the Corporate Defendants.

⁵⁰ PX12 ¶ 30(b)(xi), Att. 26 (pp. 491-93).

⁵¹ PX12 ¶ 38(l), Att. 32 (pp. 681-85).

⁵² PX12 ¶ 38(m), Att. 32 (p. 687).

⁵³ PX12 ¶ 38(n)-(o), Att. 32 (pp. 688-90).

A. Individual Defendants

1. *Steven Sann*

Defendant Steven Sann founded and directs Defendants' entire cramming operation. He is president, secretary, treasurer, and sole director of Defendants Emerica Media and Global Voice Mail, and president of Defendant HearYou2.⁵⁴ Even though some Corporate Defendants are nominally headed by other individuals, Sann had the final say over every aspect of the operation.

Sann is signatory on all the Corporate Defendants' bank accounts⁵⁵ and received the largest portion of the income generated by the scheme.⁵⁶ He executed contracts with aggregators and ConnectMe on behalf of different Corporate Defendants,⁵⁷ and was listed as primary contact for several of them.⁵⁸ Aggregators' requests for action plans, and other correspondence regarding billing irregularities for multiple Corporate Defendants, were addressed to him.⁵⁹ Aggregator ILD's

⁵⁴ PX12 ¶¶ 6(b), 8(g), 36(c)-(d), Atts. 3 (pp. 163, 172, 177-80), 5 (pp. 209-09), 30 (pp. 603-06).

⁵⁵ PX12 ¶ 47, Att. 35 (pp. 738-68).

⁵⁶ PX12 ¶ 53, Att. 41 (pp. 830-33).

⁵⁷ PX12 ¶¶ 26(a)-(b), 29(a)-(b), (d)-(e), 42(c), Atts. 22 (pp. 377-88), 25 (pp. 409-21), 34 (pp. 723-24), 42 (pp. 423-24).

⁵⁸ PX12 ¶ 24(b), 26(c), 29(g), 30(a)(i)-(v), 36(d), Atts. 20 (p. 357), 22 (p. 389), 25 (p. 425), 26 (pp. 435-48), 30 (pp. 605-06).

⁵⁹ PX12 ¶ 30(a)(iv); ¶ 30(b)(i)-(ii), (iv), (ix)-(xi); ¶ 33(d), (h); ¶ 38(d), (i), (l); Att. 26 (pp. 445-46, 449-50, 452-53, 456-57, 481-82, 483-86, 487-93); Att. 28 (pp. 527-31, 543-44); Att. 32 (pp. 660, 669-75, 681-85). As explained below, *see* Part III.B.1, the day-to-day operation of the

notice that it was suspending billing because Defendants FoneRight and Voice Mail Professionals had failed to produce cramming compliance reports was directed to Sann.⁶⁰ When ILD informed several Corporate Defendants that LEC Embarq would no longer bill for Defendants' voice mail services, Sann responded, "I'll take care of it."⁶¹ When Network Assurance and Global Voice Mail's predecessor-in-interest, Voice Mail Services, Ltd. ("VMS"), crammed charges onto Frontier's office telephones, aggregator BSG went to Sann (and Defendant Braach) demanding to know how that happened.⁶² When aggregator Transaction Clearing demanded action plans from — and ultimately terminated billing on behalf of — Defendants Techmax, FoneRight, VMP, SecureatDat, and HearYou2, the aggregator directed its correspondence to Sann.⁶³

Sann is also the contact for Internet domain name registrations for all the Corporate Defendants and registered owner of several of the domain names. He also paid for several of them using his own credit card.⁶⁴ He executed, then

scheme was handled through Corporate Defendant Emerica Media.

⁶⁰ PX12 ¶ 33(g), Att. 28 (pp. 540-43).

⁶¹ PX12 ¶ 33(c), Att. 28 (p. 526).

⁶² PX12 ¶ 30(b)(xi), Att. 26 (pp. 488-93).

⁶³ PX12 ¶ 38(l)-(o), Att. 32 (pp. 681-90).

⁶⁴ PX12 ¶¶ 16(a), 17(a), 18, Atts. 14 (pp. 260-74), 15 (pp. 281-307), 16 (pp. 308-13).

terminated, the services agreement with ConnectMe.⁶⁵ When Vermont pursued cramming complaints against VMS, Sann executed an Assurance of Discontinuance on the company's behalf.⁶⁶

Sann has long been involved in questionable LEC billing practices. He partnered with Cindy Landeen in 2001-04 to operate PhoneBILLit, Inc., a voice mail company that garnered cramming complaints. *See Landeen v. PhoneBILLit, Inc.*, 519 F. Supp. 2d 844, 854-55 (S.D. Ind. 2007). After that firm fell apart, *id.* at 852-54, most of its assets were sold to Sann-owned VMS, *Landeen v. PhoneBILLit, Inc.*, No. 1:04-CV-1815, 2007 U.S. Dist. LEXIS 90048, at *6-9 (Dec. 6, 2007 S.D. Ind.), and the court found that VMS owed over \$100,000 for credits and refunds assessed against PhoneBILLit. *Id.* at *34-35.⁶⁷ After Sann extricated himself from PhoneBILLit, he ramped up his current operation with assistance from his wife, his son, and his business associate, Defendant Robert Braach.

2. *Terry Lane a/k/a Terry Sann*

Defendant Terry Lane is Steven Sann's wife.⁶⁸ She is president, secretary,

⁶⁵ PX12 ¶ 42, Att. 34 (pp. 723-24, 735-36).

⁶⁶ PX12 ¶ 64, Att. 51 (pp. 885-88).

⁶⁷ Sann ended up filing a malpractice suit against his counsel in the PhoneBILLit case. *See* PX12 ¶ 66, Att. 53 (pp. 892-93).

⁶⁸ PX12 ¶ 60, Att. 49 (p. 875).

treasurer, and sole director of Defendants American eVoice and Voice Mail Professionals, and on their behalf she signed numerous contracts and documents submitted to LECs and billing aggregators.⁶⁹ In an affidavit executed for AT&T, she swore that she was president of VMP, that VMP “did not engage in any deceptive marketing practices,” or “use any sweepstakes, prize entry forms, contest forms, or other inducements to authorize the billing of charges,” and that VMP’s “charges are true and correct and accurately reflect proper charges legally owed by the end-user customer.”⁷⁰ When high levels of cramming complaints against VMP and American eVoice resulted in LECs demanding action plans, she responded.⁷¹

She earned substantial income from her involvement and participates in Defendants’ employee pension plan.⁷² In addition, she was the public relations representative for VMP and American eVoice,⁷³ and in a proceeding before the Federal Communications Commission, she urged the agency not to ban third-party LEC billing because it “provide[s] great value to businesses and consumers

⁶⁹ PX12 ¶¶ 4(b), 13(c), 24(e), 28(a)-(b), 36(g), Atts. 1 (pp. 151-52), 10 (pp. 232-35), 20 (pp. 358-72), 24 (pp. 401-06), 30 (pp. 615-16).

⁷⁰ PX12 ¶ 28(c), Att. 24 (pp. 407-08).

⁷¹ PX12 ¶ 30(b)(xiii), 34(c)-(d), 38(a), Atts. 26 (p. 495), 29 (pp. 560-65), 32 (pp. 653-54).

⁷² PX12 ¶¶ 52, 59, Atts. 40 (pp. 781-83), 48 (pp. 868-70).

⁷³ PX12 ¶¶ 32(b), 34(b), Atts. 27 (p. 517), 29 (p. 646).

alike.”⁷⁴

3. *Nathan Sann*

Defendant Nathan Sann is Steven Sann’s son.⁷⁵ He is president, secretary, treasurer, and sole director of Defendant SecurDat.⁷⁶ He identified himself as “COO” of SecurDat and signed contracts and action plans submitted to LECs and billing aggregators on the company’s behalf.⁷⁷ He has also signed hundreds of refund checks on behalf of Corporate Defendants.⁷⁸

In addition to helping manage the companies’ finances and issuing refunds, Nathan was IT/technical contact for all the Corporate Defendants.⁷⁹ He paid for Internet website registrations, renewals, and hosting for several Corporate Defendants.⁸⁰ He processed the Corporate Defendants’ billing records⁸¹ and he

⁷⁴ PX12 ¶ 21, Att. 19 (p. 329).

⁷⁵ PX12 ¶ 60, Att. 49 (p. 875).

⁷⁶ PX12 ¶ 11, Att. 8 (pp. 221, 223-24).

⁷⁷ PX12 ¶ 36(e), 37(c), 38(a), Atts. 30 (pp. 607-11), 31 (p. 630), 32 (pp. 646-47).

⁷⁸ PX12 ¶ 49, Att. 37 (pp. 784-800).

⁷⁹ PX12 ¶¶ 24(d), 30(a)(iii), 32(b), 33(b), 34(b), Atts. 20 (p. 357), 26 (pp. 443-44), 27 (pp. 616-17), 28 (p. 624), 29 (p. 658).

⁸⁰ PX12 ¶¶ 16(b), 17(a)(iii)-(iv), (b), 19, Atts. 14 (p. 265), 15 (pp. 291, 294, 296, 301), 17 (pp. 314-44).

⁸¹ PX12 ¶ 30(a)(iv), Att. 26 (pp. 445-46).

was Defendants' primary point of contact with ConnectMe.⁸² He was involved in all aspects of Defendants' operation.

4. *Robert Braach*

Defendant Robert Braach is a certified public accountant and, on paper, a former director and incorporator of Defendant Network Assurance.⁸³ In reality, however, he was the person in charge of Defendants' day-to-day operations. He was a primary contact for Defendants' aggregators and referred to himself as Corporate Defendants' regulatory manager,⁸⁴ chief operating officer,⁸⁵ and chief financial officer.⁸⁶ His degree of involvement is reflected in the substantial sums of money he earned from the operation.⁸⁷

Braach supervised all aspects of the business, handling questions about technical aspects of billing, regulatory matters, and demands from LECs for action plans to reduce cramming complaints. Steven Sann told an aggregator that Braach

⁸² PX12 ¶ 42(b), Att. 35 (p. 719).

⁸³ PX12 ¶¶ 10, 30(b)(iii), Atts. 7 (p. 214), 26 (p. 454) . Braach has also signed documents in which he identified himself as secretary of Defendant Emerica Media. *Id.* ¶ 6(c), Att. 3 (p. 171).

⁸⁴ PX12 ¶¶ 24(c), 26(c), 29(g), 30(a)(iii), 32(b), 33(b), 34(b), Atts. 20 (p. 357), 22 (p. 389), 25 (p. 434), 26 (p. 443-44), 27 (p. 516-17), 28 (p. 524), 29 (p. 558).

⁸⁵ PX12 ¶¶ 30(b)(iii), 33(d), Atts. 26 (p. 454), 28 (p. 527).

⁸⁶ PX12 ¶ 37(a), Att. 31 (p. 623).

⁸⁷ PX12 ¶ 54, Att. 42 (834-40).

and Nathan Sann “process our billing.”⁸⁸ Braach told another aggregator that all regulatory matters were to be directed to him, with a copy to Steven Sann.⁸⁹

Braach handled the multiple requests for action plans that came from the LECs via the aggregators.⁹⁰ Notices of termination were directed to him and Steven Sann.⁹¹

When a consumer class action alleging cramming was brought against the Corporate Defendants and aggregator BSG, Braach coordinated Defendants’ response, and legal bills were directed to him for payment.⁹² In sum, he played a key leadership role in Defendants’ cramming operation.

B. Corporate Defendants

1. Emerica Media Corp.

Defendant Emerica Media, a Nevada corporation with the same registered agent as the other Corporate Defendants,⁹³ was the base of operations from which the Individual Defendants ran their business. According to Defendant Braach, each of the other Corporate Defendants “has signed a management agreement with

⁸⁸ PX12 ¶ 30(a)(iv), Att. 26 (p. 445).

⁸⁹ PX12 ¶ 37(d), Att. 31 (p. 631).

⁹⁰ PX12 ¶ 26(d); ¶ 30(b)(ii)-(iii), (v), (xi); ¶ 33(f), (k); ¶ 34(d); Att. 22 (pp. 390-92); Att. 26 (pp. 452, 454-55, 458-63, 491-93); Att. 28 (pp. 535-39, 551-53); Att. 29 (pp. 561-65).

⁹¹ PX12 ¶¶ 30(b)(iv), 38(k), (m)-(n), Atts. 26 (pp. 456-57), 32 (p. 687, 690-91).

⁹² PX12 ¶ 30(b)(xiv)-(xv), Att. 26 (pp. 497-500).

⁹³ PX12 ¶ 6(e), Att. 3 (pp. 178-80) (registered address of 2360 Corporate Circle, Las Vegas, NV).

Emerica Media giving Steven [Sann] management and contract authority as necessary.”⁹⁴ For example, the same individual at Emerica Media was the customer service contact for American eVoice, Voice Mail Professionals, and FoneRight.⁹⁵ Another employee of Emerica Media transmitted monthly cramming reports to Transaction Clearing on behalf of Defendants HearYou2, SecurDat, VMP, FoneRight, and Techmax.⁹⁶ Virtually all of the communications between the Individual Defendants and the aggregators were from Emerica Media email addresses.⁹⁷

Despite handling all aspects of the other the Corporate Defendants’ business, Emerica Media never did any LEC billing in its own name. However, almost all the net income of the other Corporate Defendants ended up in Emerica Media’s bank accounts.⁹⁸ From there, other corporate expenses were paid and funds transferred to Defendants Steven Sann and Robert Braach and Relief Defendant Bibliologic.⁹⁹

⁹⁴ PX12 ¶ 30(a)(ii), Att. 26 (p. 439).

⁹⁵ PX12 ¶ 32(c), Att. 27 (p. 519).

⁹⁶ PX12 ¶ 37(f), Att. 31 (p. 637).

⁹⁷ *See, e.g.*, PX12 ¶¶ 30, 33-34, 37-38, Atts. 26 (pp. 437-500), 28 (pp. 526-53), 29 (pp. 561-71), 31 (pp. 622-42), 32 (pp. 643-91).

⁹⁸ PX12 ¶¶ 50-51, Atts. 38-39 (pp. 801-25).

⁹⁹ PX12 ¶¶ 53-54, 56, Atts. 41 (pp. 830-33), 42 (pp. 836-40), 44 (pp. 843-48).

2. *American eVoice, Ltd.; FoneRight, Inc.; Global Voice Mail, Ltd.; HearYou2, Inc.; Network Assurance, Inc.; SecurDat, Inc.; Techmax Solutions, Inc.; and Voice Mail Professionals, Inc.*

These eight Corporate Defendants — all Nevada corporations with the same registered address, same registered agent, and same mailing address at a branch of The Shipping Depot in Missoula, Montana¹⁰⁰ — are the corporate shells through which the Individual Defendants billed consumers.¹⁰¹ Each company has (or had) an agreement with one or more aggregators to process telephone records, and each company has its own bank account into which revenues were deposited, before being transferred to Emerica Media’s bank accounts.¹⁰² ConnectMe provided voice

¹⁰⁰ The registered agent for all the companies is Incorp Services, Inc., 2360 Corporate Circle, Las Vegas, NV. PX12 ¶¶ 4(c), 7(c), 8(f), 9(b), 10(c), 11(c), 12(b), 13(b), Atts. 1 (p. 151), 4 (p. 185), 5 (p. 208), 6 (p. 212), 7 (p. 217), 8 (p. 223), 9 (p. 228), 10 (p. 234). In addition to other mailing addresses, the Corporate Defendants have all used mail drops at The Shipping Depot, 2120 S. Reserve St., Missoula, Montana. PX12 ¶¶ 15, 16(c), 17(a)(ii), 26(d), 29(e), 32(b), 33(b), 34(b), 36(a)-(b), (e)-(h), Atts. 12 (p. 248), 13 (p. 257), 14 (p. 275), 15 (pp. 281, 299, 301, 308-13), 22 (pp. 390-92), 25 (p. 425), 27 (p. 517), 28 (p. 524), 29 (p. 558), 30 (pp. 574, 596, 601, 605, 610, 614, 617, 621).

¹⁰¹ Defendants used straw persons — apparently relatives and friends of the Individual Defendants — to serve as corporate officers of some of the Corporate Defendants, evidently to prevent the LECs from associating the companies with the individuals actually running the scheme. These straw persons had no involvement in the operation of the companies beyond appearing on formal corporate records or signing documents in their official capacity as the nominal head of the company. *See, e.g.*, PX12 ¶ 9, Att. 6 (pp. 212-13) (identifying “Brianna McLaughlin” as only officer and director of company); ¶ 38(j), Att. 32 (pp. 643-45) (action plan signed by “Phyllis Tryon”).

¹⁰² PX12 ¶¶ 24(a), 25, 26(a), 27, 28(a), 29(a), 32, 33(a), 34(a), 36(a)-(b), (e)-(g), 50-51 Atts. 20 (pp. 333-56), 21 (pp. 373-76), 22 (pp. 377-88), 23 (pp. 395-400), 24 (pp. 401-05), 25 (pp. 409-21), 27 (pp. 504-15), 28 (pp. 520-23), 29 (pp. 554-57), 30 (pp. 574-95, 598-600, 607-09, 612-13, 615-16), 38-39 (pp. 801-25).

mail services for all of them through a single contract with Defendant Emerica Media.¹⁰³

Different companies were active at different times. When one company was questioned or terminated by a LEC, Defendants might ramp up billing at a new entity and attempt to transfer the existing consumers to it. For example, in May 2009, aggregator ILD informed Defendants that because of billing irregularities, it would no longer process charges to certain telephone numbers for Defendants American eVoice, Voice Mail Professionals, and FoneRight.¹⁰⁴ In response, Defendants sought to bill those numbers through Defendant Global Voice Mail's predecessor (VMS) by way of a different aggregator, BSG.¹⁰⁵ In June 2011, when aggregator Transaction Clearing terminated Defendant FoneRight for having a high negative balance caused by excessive refunds, Defendants sought to port FoneRight's numbers to Defendant Techmax and continue billing there.¹⁰⁶ These eight Corporate Defendants are indistinguishable except by name; they all engaged in the same cramming activity at the direction of the Individual Defendants.

¹⁰³ PX12 ¶ 42, Att. 34 (pp. 723-24, 729-31).

¹⁰⁴ PX12 ¶ 33(d), Att. 28 (pp. 529-30).

¹⁰⁵ PX12 ¶ 33, Att. 28 (p. 528).

¹⁰⁶ PX12 ¶ 38(k), Att. 32 (p. 686).

C. Relief Defendant Bibliologic, Ltd.

Relief Defendant Bibliologic was incorporated by Defendant Braach as a Montana nonprofit religious organization in December 2009.¹⁰⁷ Defendant Steven Sann has been the president of Bibliologic since its inception, and Braach is its former treasurer.¹⁰⁸ They are the only signatories on the company's U.S. Bank account.¹⁰⁹ In 2009 and 2010, Defendants deposited checks totalling \$1.35 million from Emerica Media's U.S. Bank account into Bibliologic's.¹¹⁰

Almost all of the withdrawals from that account (totaling \$1.2 million) have inured to the benefit of Defendant Sann and his companies. Over a period of several months, \$400,000 was transferred back to Emerica Media.¹¹¹ In August 2011, \$750,000 was transferred to a Charles Schwab brokerage account in Bibliologic's name and controlled by Sann.¹¹² From there, Sann transferred a total of \$425,000 to five different law firms.¹¹³ Two of the firms represent him in a

¹⁰⁷ PX12 ¶ 5(a), Att. 2 (p. 155).

¹⁰⁸ PX12 ¶ 5(b)-(e), Att. 2 (pp. 157-62).

¹⁰⁹ PX12 ¶ 47, Att. 35 (p. 768).

¹¹⁰ PX12 ¶ 56, Att. 44 (pp. 843-45).

¹¹¹ PX12 ¶ 56, Att. 45 (pp. 847-48).

¹¹² PX12 ¶ 56-57, Atts. 45 (p 846), 46 (pp. 850-53).

¹¹³ PX12 ¶ 57, Att. 46 (pp. 858-62).

criminal drug prosecution pending in this Court.¹¹⁴ Another represented him personally in a malpractice suit against the lawyers who represented him in the PhoneBILLit litigation.¹¹⁵ The fourth, a corporate firm in New York, represented VMS in the Vermont cramming investigation,¹¹⁶ and the fifth firm, in Missoula, has handled corporate matters for the Corporate Defendants.¹¹⁷ The transfer orders for each of the firms indicate that the “Final Beneficiary” was Steven Sann — not Bibliologic.¹¹⁸

In addition, Bibliologic has no public presence. Bibliologic and its EIN are not on the IRS’s database of 501(c)(3) organizations.¹¹⁹ Bibliologic has no active website.¹²⁰ A Google search for the company’s name turns up no information about its purpose, presence, or activities.¹²¹ Until 2012, Bibliologic’s registered agent’s address was nothing but a mail drop at the same Shipping Depot as the

¹¹⁴ PX12 ¶ 65, Att. 52 (p. 890).

¹¹⁵ PX12 ¶ 66, Att. 53 (p. 893).

¹¹⁶ PX12 ¶ 64, Att. 51 (p. 888).

¹¹⁷ *See, e.g.*, PX12 ¶¶ 6, 8, Atts. 3(p. 165), 5 (p. 193).

¹¹⁸ PX12 ¶ 57, Att. 46 (pp. 858-62).

¹¹⁹ PX12 ¶ 68.

¹²⁰ PX12 ¶ 70.

¹²¹ PX12 ¶ 69.

Corporate Defendants.¹²² Bibliologic does own approximately 94 acres in rural Missoula County, Montana. Steven Sann purchased the land in May 2010,¹²³ at the same time substantial sums were being transferred from the Corporate Defendants into his personal bank account,¹²⁴ and he then transferred the land to Bibliologic in 2011 through a quitclaim deed.¹²⁵

IV. ARGUMENT

Defendants have operated a fraudulent cramming scheme that has bilked consumers out of tens of millions of dollars. To prevent future injury to consumers and safeguard the possibility of effective final relief, the Court should enter the Commission's requested preliminary injunction.

A. The Court Has the Authority to Issue the Preliminary Injunction.

“Section 13(b) of the Act authorizes the FTC to seek, and the district courts to grant, preliminary and permanent injunctions against practices that violate any of the laws enforced by the Commission.” *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996). This unqualified grant of statutory authority carries with it the full range of equitable remedies, including the power to issue a

¹²² PX12 ¶ 5(c), Att. 2 (pp. 157-60); *see supra* note 101.

¹²³ PX12 ¶ 60, Att. 49 (pp. 871-74).

¹²⁴ PX12 ¶ 53, Att. 41 (pp. 830-33).

¹²⁵ PX12 ¶ 60, Att. 49 (p. 876).

preliminary injunction, freeze assets, grant consumer redress, and disgorge ill-gotten gains. *Id.* at 468-69; *see FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009) (“The district court has broad authority under the FTC Act to ‘grant ancillary relief necessary to accomplish complete justice.’”) (quoting *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994)).

In considering the Commission’s application for injunctive relief under Section 13(b) of the FTC Act, the Court need consider only two factors: (1) “the likelihood the FTC will ultimately succeed on the merits,” and (2) a “balance of the equities.” *FTC v. Affordable Media*, 179 F.3d 1228, 1233 (9th Cir. 1999); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1217 (11th Cir. 1991). Unlike a private litigant seeking injunctive relief, a regulatory agency such as the Commission need not demonstrate irreparable harm; such harm is presumed in statutory enforcement actions. *Affordable Media*, 179 F.3d at 1233; *Univ. Health*, 938 F.2d at 1217. The FTC’s evidence clearly meets this standard.

B. The Commission Has Demonstrated an Overwhelming Likelihood of Success on the Merits.

1. Defendants Make Deceptive Representations in Violation of Section 5 of the FTC Act.

Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits “unfair or deceptive acts or practices in or affecting commerce.” An act or practice is deceptive if “first, there is a representation, omission, or practice that, second, is

likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.” *FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1000 (N.D. Cal. 2010), *aff’d*, 475 Fed. Appx. 106 (9th Cir. 2012); *see also Stefanchik*, 559 F.3d at 928. In general, a misleading representation or omission “is material if it ‘involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.’” *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006).

In this case, Defendants caused over \$70 million in charges to appear on consumers’ telephone bills. Those charges communicated to consumers that they were obligated to pay for voice mail or fax services that they had ostensibly ordered. In fact, consumers never ordered the services for which they were billed. Moreover, Defendants’ representations were material. Thousands of consumers paid the charges; Defendants “capitalized on the common and well-founded perception held by consumers that they must pay their telephone bills.”¹²⁶ *FTC v. Verity Int’l, Ltd.*, 335 F. Supp. 2d 479, 496 (S.D.N.Y. 2004), *aff’d in pertinent part*, 443 F.3d 48 (2d Cir. 2006). Thus Defendants’ practice of cramming

¹²⁶ The Commission need not prove that each consumer who was billed relied on Defendants’ misrepresentations. “[I]t would be virtually impossible for the FTC to offer such proof, and to require it would thwart and frustrate the public purposes of FTC action.” *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000). Rather, reliance is presumed once the FTC has shown that Defendants made material representations that were widely disseminated, and that consumers paid for Defendants’ services. *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993).

unauthorized charges onto consumers' telephone bills is a deceptive practice in violation of the FTC Act. *Accord Inc21.com*, 745 F. Supp. 2d at 1000. The FTC is therefore likely to succeed on the merits of Count II of its Complaint.

2. *Defendants Engage in the Unfair Practice of Billing Consumers Without Authorization*

The FTC Act also bans “unfair” acts or practices. An act or practice is unfair if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” 15 U.S.C. § 45(n).

Defendants' unauthorized billing is an unfair practice under the FTC Act. *See Inc21.com*, 745 F. Supp. 2d at 1004; *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1114-16 (S.D. Cal. 2008), *aff'd*, 604 F.3d 1150 (9th Cir. 2010); *Verity*, 335 F. Supp. 2d at 498.

First, over \$70 million dollars in bogus charges constitutes substantial consumer injury. *Neovi*, 604 F.3d at 1157 (“An act or practice can cause ‘substantial injury’ by doing a small harm to a large number of people.”); *Pantron I*, 33 F.3d at 1102 (“[C]onsumer injury is substantial when it is the aggregate of many small individual injuries.”).

Second, consumers could not reasonably avoid the injury caused by Defendants. The unauthorized charges appeared out of the blue; consumers had no

reason to expect them, and therefore no reason to try to avoid them. “[T]he burden should not be placed on defrauded customers to avoid charges that were never authorized to begin with.” *Inc21.com*, 745 F. Supp. 2d at 1004. Moreover, the charges are for relatively small amounts. As a result, some consumers do not notice the charges until an extended period of time has passed.¹²⁷ There are undoubtedly many consumers who never noticed them at all. *See id.* (only 5% of consumers noticed the crammed charges on their telephone bills); *see also Neovi*, 2009 U.S. Dist. LEXIS 649, at *14 (“It is likely that some consumers never noticed the unauthorized withdrawals.”).

Finally, there are no benefits to consumers or competition from Defendants’ cramming. Indeed, in addition to harming consumers, cramming harms competition by poisoning the LEC billing marketplace with bad actors. *See* PX12 ¶ 67, Att. 54 pp. 916-20). Defendants’ cramming of unauthorized charges onto consumers’ telephone bills is therefore an unfair practice in violation the FTC Act, and the FTC is likely to succeed on the merits of Count I of its Complaint.

3. *Relief Defendant Bibliologic Has No Legitimate Claim to Defendants’ Ill-Gotten Assets.*

Federal courts may order equitable relief against a person not accused of wrongdoing where that person “(1) has received ill-gotten funds; and (2) does not

¹²⁷ Four of the FTC’s declarants did not notice the unauthorized charges until more than a year had passed. PX1 ¶¶ 2-3; PX4 ¶ 2; PX5 ¶ 2; PX9 ¶ 2.

have a legitimate claim to those funds.” *CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 191 (4th Cir. 2002); *see SEC v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998) (“[T]he broad equitable powers of the federal courts can be employed to recover ill gotten gains for the benefit of the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong.”); *FTC v. Ameridebt, Inc.*, 343 F. Supp. 2d 451, 464 (D. Md. 2004) (applying *Kimberlynn Creek* to FTC action). Courts refer to such persons as “relief” or “nominal” defendants. *See Colello*, 139 F.3d at 675-76, *Kimberlynn Creek*, 276 F.3d at 191-92.

Defendants transferred the substantial proceeds of Defendants’ illegal activity to Bibliologic, thus allowing the assets to be maintained in the name of someone other than Defendants. There is no indication that Bibliologic has any legitimate claim to the assets. Indeed, the only thing that Bibliologic has done with them is transfer some of them back to Defendant Emerica Media and Defendant Steven Sann’s legal counsel. The FTC is therefore likely to succeed on the merits of its disgorgement claim against Relief Defendant Bibliologic.¹²⁸ *See Inc21.com*,

¹²⁸ Relief Defendant Bibliologic’s purported nonprofit status does not preclude the Commission from pursuing disgorgement of the ill-gotten assets in its possession. In *Kimberlynn Creek*, the relief defendants argued that the district court did not have jurisdiction over the CFTC’s claim for disgorgement because the CFTC did not allege that they had violated the Commodity Exchange Act, 7 U.S.C. § 13a-1. *Kimberlynn Creek*, 276 F.3d at 190. According to the relief defendants, the Act did not “provide subject matter jurisdiction over claims against individuals who have not violated the CEA.” *Id.* The Fourth Circuit rejected the relief defendants’ claim:

745 F. Supp. 2d at 1009 (granting summary judgment against relief defendant who had “no involvement in defendants’ business operations”).

C. The Balancing of the Equities Weighs in Favor of Provisional Relief.

In balancing the equities, the Court may take into account the private equities but should give the public interest greater consideration. *Affordable Media*, 179 F.3d at 1236; *see FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984) (“Although private equities may be considered, public equities receive *far greater weight*.”) (emphasis added). Defendants orchestrated a \$70 million cramming scheme. Absent an injunction, Defendants will remain free to continue to injure consumers. *See FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 723 (5th Cir. 1982) (finding “a large-scale systematic scheme tainted by fraudulent and deceptive practices” gives rise to the “reasonable expectation of continued violations”).

The Commission’s interests in protecting consumers, enforcing the law, and preserving Defendants’ assets for consumer redress plainly outweigh any interest

Because a nominal defendant has no ownership interest in the funds at issue, once the district court has acquired subject matter jurisdiction over the litigation regarding the conduct that produced the funds, it is not necessary for the court to separately obtain subject matter jurisdiction over the claim to the funds held by the nominal defendant; rather the nominal defendant is joined “purely as a means of facilitating collection.”

Id. at 191-92 (quoting *Colello*, 139 F.3d at 676).

Defendants may have in continuing their fraud or dissipating assets. *See FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) (“[T]here is 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”). An injunction is therefore appropriate.

D. The Individual Defendants Are Personally Liable for Injunctive and Monetary Relief

Under the FTC Act, an individual is liable and subject to injunctive relief for the acts of a corporate defendant if the individual participated directly in the unlawful activities or had the authority to control the defendant. *FTC v. Publ’g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997). “Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer.” *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989). Moreover, an individual is personally liable for monetary relief if he “had actual knowledge of material misrepresentations, [was] recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth.” *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1138-39 (9th Cir. 2010).

Here, the Individual Defendants have authority to control the Corporate

Defendants, *see* Parts III.B above, *and* knowledge of their unlawful activities. *See* Part III.A above. The Individual Defendants responded to complaints, issued refunds, prepared action plans, were repeatedly terminated by LECs, settled the Vermont proceeding, defended a class action alleging cramming, and negotiated a voice mail services agreement premised on a negligibly low usage rate. Given their involvement with the Corporate Defendants, even if the Individual Defendants did not have actual knowledge of the illegal activities, such knowledge should be imputed to them. *Gem Merch.*, 87 F.3d at 467-68; *FTC v. Global Mktg. Group, Inc.*, 594 F. Supp. 2d 1281, 1289 (M.D. Fla. 2008).

E. The Corporate Defendants Are Liable as a Common Enterprise.

The Individual Defendants controlled and operated all the closely held Corporate Defendants. The Corporate Defendants are therefore jointly and severally liable as a common enterprise. “Where one or more corporate entities operate in a common enterprise, each may be held liable for the deceptive acts and practices of the others,” without regard to their corporate identities or affiliations. *FTC v. Bay Area Bus. Council, Inc.*, No. 02-C-5762, 2004 WL 769388, at *12 (N.D. Ill. Apr. 9, 2004), *aff’d*, 423 F.3d 627 (7th Cir. 2005). Factors courts consider to determine the existence of a “common enterprise” include whether ostensibly separate corporations are under common control or share employees, officers, and office space; whether corporate entities deal at arms-length; whether

corporate entities have their own substantive business; and whether there is a commingling of corporate assets. *See id.*

The eight Corporate Defendants whose names appeared on consumers' bills differ in name only. Together they repeatedly violated the FTC Act by engaging in the exact same illegal behavior, all while under the control of the Individual Defendants. The Corporate Defendants' business was conducted through Defendant Emerica Media, with each Individual Defendant playing a critical role. Their bank accounts all have the same signatories (Steven and Nathan Sann), and funds were routinely transferred from one Corporate Defendant to another. Identical letters were submitted to the FCC on behalf of different Corporate Defendants, and identical action plans for the LECs were submitted on behalf of different Corporate Defendants. The Corporate Defendants each have the same registered agent in Las Vegas and use the same commercial mail receiving agency in Missoula. The Corporate Defendants have all taken part in the same scam under the Individual Defendants' control, and each is responsible for the unlawful activities of the others. *Bay Area Business Council*, 2004 WL 769388, at *12; *see SEC v. Elliot*, 953 F.2d 1560, 1565 n.1 (11th Cir. 1992).

F. The Relief Requested Is Necessary to Prevent Consumer Injury and Preserve Assets for Effective Final Relief.

The proposed preliminary injunction would, first, enjoin Defendants from

engaging in LEC billing. The FTC Act explicitly authorizes the court to issue injunctions to prevent violations of the Act. 15 U.S.C. § 53(b). Such an injunction is appropriate here given the risk of harm to consumers.¹²⁹ *See World Wide Factors*, 882 F.2d at 347.

Second, the injunction would freeze the assets of each Defendant and Relief Defendant Bibliologic, to preserve the Court's ability to grant effective final relief, including possible redress or disgorgement. This Court's power to order such relief flows from its equitable grant of authority under Section 13(b). *Affordable Media*, 179 F.3d at 1232; *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 1113-14 (9th Cir. 1982). "A party seeking an asset freeze must show a likelihood of dissipation of the claimed assets, or other inability to recover monetary damages, if relief is

¹²⁹ Defendants' aggregators, BSG, ILD, and Transaction Clearing, all say they are no longer processing charges on behalf of Defendants. However, "[i]t is settled that an action for an injunction does not become moot merely because the conduct complained of was terminated, if there is a possibility of recurrence, since otherwise the Defendants would be free to return to (their) old ways." *Allee v. Medrano*, 416 U.S. 802, 810 (1974); *accord Singer*, 668 F.2d at 1113 (affirming injunction and asset freeze issued after defendants ceased operations); *FTC v. American Standard Credit Sys.*, 874 F. Supp. 1080, 1087 (C.D. Cal. 1994) (granting injunction where termination by VISA had stopped defendants' deceptive credit card marketing); *see also Affordable Media*, 179 F.3d at 1237 (even voluntary cessation of practices does not moot preliminary injunction where asset freeze and repatriation is sought to redress consumers); *Fedders v. FTC*, 529 F.2d 1398, 1403 (2d Cir. 1976) ("[T]he fact that [defendant] may have discontinued the offending practice before the Commission issued the complaint in this case, however, does not bar a cease-and-desist order, where the public interest otherwise requires it.").

Moreover, while the FTC has no evidence of ongoing cramming, Defendants have previously attempted to move consumers from one Corporate Defendant to another to continue billing when terminated by a LEC. *See* PX 12 ¶¶ 33(d), 38(1), Atts. 28, 32 (pp. 528, 686). Absent injunctive relief from this Court, Defendants remain free to create a new entity and then commence billing through that entity.

not granted.” *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009). Where a defendant’s business is permeated with fraud, the court may conclude that the defendant will likely dissipate or conceal assets while the action is pending. *World Travel*, 861 F.2d at 1031; *see also SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734 (11th Cir. 2005) (affirming preliminary injunction freezing assets allegedly obtained through fraud). An asset freeze is particularly appropriate where funds bilked from consumers are diverted to third parties (such as Bibliologic) to try to put them beyond the government’s reach. *Affordable Media*, 179 F.3d at 1236-37.

Finally, the ancillary provisions in the proposed injunction, including the requirement of an accounting, will enable the FTC to locate and secure assets wrongfully obtained from defrauded consumers, and allow the FTC to monitor Defendants’ compliance with the Court’s order. *See Gem Merch.*, 87 F.3d at 469 (when public interest is involved, the Court’s “equitable powers assume an even broader and more flexible character than when only a private controversy is at stake”) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

V. CONCLUSION

Defendants have orchestrated a massive cramming operation and engaged in widespread unfair and deceptive acts in violation of the FTC Act. Comprehensive, immediate, and extraordinary relief is necessary to prevent further consumer harm and preserve the possibility of effective final relief. Accordingly, the FTC requests

that the Court grant the FTC's motion for a preliminary injunction.

Dated: January 8, 2013

Respectfully submitted,

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that the total word count of the body of the foregoing brief, as calculated by WordPerfect, is 8,626 words. When footnotes are excluded, the word count is 5,833.

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