

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Civ. _____

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

PAIRSYS, INC,
a New York Corporation,

TIYA BHATTACHARYA,
individually and as an officer of Pairsys, Inc.,

and

UTTAM SAHA,
individually and as an officer of Pairsys, Inc.,

Defendants.

1:14-cv-1192 TJM/CFH

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED

SEP 30 2014

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ALBANY

**PLAINTIFF FEDERAL TRADE COMMISSION'S
MEMORANDUM OF LAW IN SUPPORT OF ITS *EX PARTE*
MOTION FOR A TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION WITH OTHER EQUITABLE RELIEF**

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I. INTRODUCTION¹

Plaintiff Federal Trade Commission (“FTC” or “Commission”) seeks an *ex parte* temporary restraining order to bring an immediate halt to an unlawful deceptive telemarketing scheme that has ensnared consumers and tricked them into allowing Defendants to gain remote access into their home computers and into paying Defendants for unnecessary services. The FTC also requests that the court enter a show cause order to show why a Preliminary Injunction should not issue.

Defendants trick the consumers into believing they are dealing with a well-recognized company like Microsoft. Defendants then scare consumers into believing that they have they have detected security or performance issues on consumers’ computers, including viruses, spyware, or system errors, regardless of the actual state of the consumers’ computers. Defendants sell consumers illusory long-term “security” or “technical support” services and perform unnecessary “repairs,” typically charging consumers approximately \$149 to \$249 for these services, but sometimes charging more.

Because Defendants operate a business permeated by fraud that exists solely to swindle unsuspecting consumers, the Commission seeks a temporary restraining order that freezes assets and preserves evidence. Defendants’ ongoing widespread illegal conduct that has affected thousands of consumers, and history of transferring assets overseas, demonstrate their propensity to violate the law and the likelihood they would dissipate or conceal assets or destroy documents if given advance notice of this lawsuit. Accordingly, the FTC asks that the Court issue the

¹ The FTC submits twenty declarations in support of this motion, with attachments thereto. Plaintiff’s declarations are marked with the Exhibit and page number. Declarations are cited with the Exhibit number followed by the declarants’ name in parentheses followed by the paragraph number or page and line numbers or both.

requested temporary restraining order on an *ex parte* basis. This relief is critical to bringing a halt to Defendants' deception, and to protecting Defendants' assets for possible consumer redress pending final resolution of this matter.

II. THE PARTIES

A. Plaintiff

The FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC also enforces the Telemarketing Act, 15 U.S.C. §§ 6101-6108, as amended. Pursuant to the Telemarketing Act, the FTC promulgated and enforces the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, which prohibits deceptive and abusive telemarketing acts or practices. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act and the TSR, and to secure such equitable relief as may be appropriate in each case, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies. *See* 15 U.S.C. § 53(b); 15 U.S.C. § 56(a)(2); 15 U.S.C. § 57b; 15 U.S.C. § 6102(c); and 15 U.S.C. § 6105(b).

B. Defendants

Corporate Defendant Pairsys, Inc. (“Pairsys”), is a New York corporation with its principal place of business at 1621 Central Avenue, Albany, New York.² Pairsys deceptively markets and sells computer security and technical support services to consumers in the United States and other English-speaking countries, including to consumers in New York.³

Defendant Uttam Saha (“Saha”) is Chairman and President of Pairsys. He resides in Slingerlands, New York.⁴

Defendant Tiya Bhattacharya (“Bhattacharya”) is the Chief Executive Officer of Pairsys and also resides in Slingerlands, New York.⁵

III. STATEMENT OF FACTS

This section explains: (1) Defendants’ deceptive business practices; (2) role of each Defendant in this scam; (3) consumer injury caused by Defendants; and (4) Defendants’ attempts to conceal their unlawful activities.

A. Defendants’ Deceptive Business Practices

Since at least February 2012, Defendants have been defrauding consumers, many of whom are seniors, through a deceptive computer technical support scheme. Defendants’ telemarketers often cold-call consumers, claiming they are from or affiliated with a well-known company, such as Microsoft.⁶ Some consumers also go onto the Internet looking for computer

² Ex. 1 (Liggins), ¶32.

³ *See supra* the text and cites at footnotes 6-8, and 11-14.

⁴ Ex. 1 (Liggins), ¶31 and p.27

⁵ Ex. 1 (Liggins), p.23.

⁶ Ex. 3 (D. Davis), p.6, ll.6-7, 14-15; Ex. 5 (Desmond-Brown), ¶3 and p.6, ll.8-10 and p.7, ll. 6-11; Ex. 12 (C. Leach), ¶3 and p.6, ll.16-18 and p.42, l.24 – p.43, l.6; Ex. 13 (P. Leach), ¶3 and p.7, ll.6-7 and p.9, ll.6-8; Ex. 14 (McLean), ¶3 and p.7, ll.8-14 and p.9, ll.8-12; Ex. 15 (Nelson), ¶3 and p.7, ll.13-16 and p.8, ll.24-25.

technical support.⁷ They find a telephone number for what they believe is Microsoft or some other well-known company or someone authorized by Microsoft or another well-known company.⁸ The consumers then call that number and reach Defendants.⁹

Defendants' schemes are similar to those challenged in recent cases brought by the FTC in the Second Circuit.¹⁰ Defendants earn the trust of consumers by misleading the consumers that Defendants are from or affiliated with well-recognized companies such as Microsoft or Facebook.¹¹ After Defendants convince consumers that they are dealing with a reputable company, Defendants scare consumers into believing that they have viruses or other malware on their computers.¹² Consumers then grant Defendants remote access to their computers.¹³ After gaining remote access, Defendants run a local scan on the consumers' computers, and then

⁷ Ex. 4 (J. Davis), ¶ 3; Ex. 6 (Ellis), ¶ 2; Ex. 7 (Franco), ¶ 3; Ex. 10 (Johnson), ¶ 4; Ex. 11 (Kelly), ¶ 3.

⁸ Ex. 6 (Ellis), ¶ 2; Ex. 7 (Franco), ¶ 3; Ex. 8 (Gault), ¶¶ 2-3; Ex. 10 (Johnson), ¶ 5; Ex. 11 (Kelly), ¶¶ 3-4.

⁹ Ex. 6 (Ellis Dec.), ¶¶ 3, 6, 8; Ex. 7 (Franco), ¶ 7 and pp.5-6; Ex. 8 (Gault), ¶¶ 4-5; Ex. 10 (Johnson), ¶ 6; Ex. 11 (Kelly), ¶ 4.

¹⁰ *FTC v. Pecon Software Ltd., et al.*, Civ. No. 12-7186 (S.D.N.Y. 2012); *FTC v. Marczak et al.*, Civ. No. 12-7192 (S.D.N.Y. 2012); *FTC v. PCCare247 Inc. et al.*, Civ. No. 12-7189 (S.D.N.Y. 2012); *FTC v. Finmaestros, LLC et al.*, Civ. No. 12-7195 (S.D.N.Y. 2012); *FTC v. Lakshmi Infosoul Services Pvt. Ltd. et al.*, Civ. No. 12-7191 (S.D.N.Y. 2012); and *FTC v. Zeal IT Solutions Pvt. Ltd. et al.*, Civ. No. 12-7188 (S.D.N.Y. 2012).

¹¹ See *supra* footnotes 6-9; Ex. 4 (J. Davis), ¶¶ 5-9, 19; Ex. 9 (Haverkamp), ¶ 4; Ex. 10 (Johnson), ¶ 8; Ex. 16 (Nitkin), ¶ 4; Ex. 19 (Clark), ¶¶ 2-4.

¹² Ex. 3 (D. Davis), p.6, l.14 – p.8, l.3 and p.13, l.18 – p.27, l.15; Ex. 5 (Desmond-Brown), p.6, ll.17-23 and p.14, ll.1-25; Ex. 6 (Ellis), ¶ 4; Ex. 8 (Gault), ¶ 6; Ex. 12 (C. Leach), p.6, l.24 – p.7, l.24 and p.21, l.17 – p.22, l.13; Ex. 13 (P. Leach), ¶ 4 and p.8, ll. 8-13; Ex. 14 (McLean), ¶ 5 and p.7, l.17 – p.8, l.13; Ex. 16 (Nelson), p.8, l.23 – p.9, l.15 and p.15, l.11 – p.24, l.3.

¹³ Ex. 3 (D. Davis), p.32, ll.1-21; Ex. 4 (J. Davis), ¶¶ 11-12; Ex. 5 (Desmond-Brown), p.17, l.19 – p.19, l.24; Ex. 6 (Ellis), ¶ 4; Ex. 7 (Franco), ¶ 3; Ex. 8 (Gault), ¶ 6; Ex. 9 (Haverkamp), ¶ 6; Ex. 10 (Johnson), ¶ 6; Ex. 11 (Kelly), ¶ 5; Ex. 13 (P. Leach), p.25, ll.13-25; Ex. 14 (McLean), p.30, ll.4-15; Ex. 15 (Nelson), p.24, ll.5-11; Ex. 15 (Nitkin), ¶ 7.

persuade consumers that their computers have many errors and vulnerabilities, whether or not any errors or vulnerabilities, in fact, exist on the consumers' computers.¹⁴

1. The Rundll32.exe ploy

Defendants continue their deception by focusing the consumers' attention on a list of innocuous files, emphasizing the risk these files supposedly pose, and stressing the urgent need for the consumer to buy Defendants' products and services to prevent the computer from crashing.¹⁵ For example, sometimes, Defendants bring consumers' attention to a discovered "error" with rundll32.exe and/or consumers' network firewalls.¹⁶ Defendants show consumers a popup that they claim indicates that consumers' network firewalls have crashed.¹⁷ Partially visible in the command prompt (the window with white text on a black background) is the command "Rundll32.exe found network firewall crashed."¹⁸ The Defendants' claim that the popup is indicative of an error is false and deceptive.¹⁹ A screenshot of a sample image shown to consumers appears below:²⁰

¹⁴ Ex. 3 (D. Davis), p.35, l.1 – p.40, l.21; Ex. 5 (Desmond-Brown), p.20, ll.1-24; Ex. 6 (Ellis), ¶4; Ex. 7 (Franco), ¶¶3-4; Ex. 10 (Johnson), ¶7; Ex. 11 (Kelly), ¶¶6-7; Ex. 12 (C. Leach), p.24, l.9 – p.27, l.18; Ex. 13 (P. Leach), p.25, l.20 – p.30, l.20; Ex. 14 (McLean), p.35, l.5 – p.37, l.4; Ex. 15 (Nelson), p.37, ll.9-11 and p.38, ll.18-21 and p.40, ll.20-21; Ex. 16 (Nitkin), ¶8.

¹⁵ Ex. 3, (D. Davis), p.38, l.20 – p.43, l.3; Ex. 5 (Desmond-Brown), p.4, ll.17-23, p. 18, ll.18-24; Ex. 7, (Franco), ¶¶3,4; Ex. 12 (C. Leach), p.30, l.7 – p.35, l.6; Ex. 13 (P. Leach), p.30, l.13 – p.34, l.5; Ex. 14 (McLean), p.34, l.16-p. 41, l.19; Ex. 15 (Nelson), p. 36, l.16 – p.46, l.16; Ex. 18 (Skoudis), pages 4-13.

¹⁶ Ex. 3, (D. Davis), p.33, l.8 – p.34, l.9; Ex. 5 (Desmond-Brown), p.25, l.15-p.31, l.1; Ex. 12 (C. Leach), p.37, l.18 – p.38, l.5; Ex. 13 (P. Leach), p.30, l.11 – p.31, l.21; Ex. 14 (McLean), p.34, l.16-p. 41, l.19; Ex. 15 (Nelson), p. 36, l.16 – p.46, l.16; Ex. 18 (Skoudis), pages 9-13.

¹⁷ Ex. 18 (Skoudis), pp. 9-13.

¹⁸ Ex. 18 (Skoudis), pp. 9-13.

¹⁹ Ex. 18 (Skoudis), pp. 9-13.

²⁰ The text in the pop-up box is "There was a problem starting found. The specified module could not be found."



Defendants show consumers this screen image and others to mislead consumers that they require Defendants' services because the consumers' computer systems are slow, infected, and corrupted.²¹ These claims are baseless, and the screen images shown to mislead consumers do not indicate the presence of viruses or malware.²² Defendants mislead consumers who do not understand these messages' technical significance into believing that their computers are severely compromised.²³

²¹ Ex. 2 (Kraemer), p. 21, 1.8 – p.25, 1.6; Ex. 3 (D. Davis), p.33, 1.8 – p.35, 1.24; Ex. 5 (Desmond-Brown), p.25, 1.15-p.28, 1.4; Ex. 12 (C. Leach), p.30, 1.7 – p.35, 1.1; Ex. 13 (P. Leach), p.30, 1.7 – p.35, 1.1; Ex. 14 (McLean), p.34, 1.25-p.44, 1.11; Ex. 15 (Nelson), p.36, 1.13-p.37, 1.22; Ex. 18 (Skoudis), pp. 9-13.

²² Ex. 18 (Skoudis), p. 13.

²³ For example, during an undercover call conducted by the Commission, Defendants represented their scan of the FTC's undercover computer had detected a problem in an executable file and that the computer's network firewall had crashed. In contrast, the Commission's expert confirmed that the executable file, which was a normal part of the Windows operating system, was in pristine condition and the firewall had not crashed. Instead, the expert concluded that the error message displayed by Defendants' scan was simply generated by them to convince the consumer, i.e. the undercover investigator, that there were problems with the computer. Ex. 2 (Kraemer).

2. The Event Viewer scheme

Another tactic Defendants employ to convince consumers that their computers are, in fact, infected is to direct them to a program on their computer called the Event Viewer.²⁴ The Event Viewer is a log of the various activities that occur during a computer's operation.²⁵ The number of events and their categorized severity in the Event Viewer do not necessarily indicate any underlying issues with a Windows system.²⁶ Nevertheless, Defendants alarm consumers by directing their attention to such events.²⁷

3. The Sale

After using such misleading means, Defendants sell consumers illusory long-term “security” or “technical support” services and perform unnecessary “repairs. Defendants typically charge consumers approximately \$149 to \$249 for these services, but sometimes charge as much as \$600.²⁸ Defendants warn consumers about the harm that will come to their computers because of the issues that Defendants claim are present on consumers' computers.²⁹ Afterwards, Defendants assert that the packages consumers purchase include repair and maintenance protection programs.³⁰ However, in reality, Defendants charge for completely

²⁴ Ex. 3 (D. Davis), p.7, l.17 – p.16, l.15; Ex. 5 (Desmond-Brown), p. 10, l.2 – p.13, l.17; Ex. 14 (McLean), p.13, ll.5-14; Ex. 15 (Nelson), p.8, l.12 – p.14, l.14.

²⁵ Ex. 18 (Skoudis), pp.3-4.

²⁶ Ex. 18 (Skoudis), pp.3-4.

²⁷ Ex. 3 (D. Davis), p.7, l.17 – p.16, l.15; Ex. 5 (Desmond-Brown), p. 10, l.2 – p.13, l.17; (McLean), p.9, l.25-p.15, l.24; Ex. 15 (Nelson), p.8, l.12 – p.14, l.14.

²⁸ Ex. 3, (D. Davis), p.40, l.21 – p.49, l.6; Ex. 6 (Ellis), ¶4; Ex. 7 (Franco), ¶5; Ex. 8 (Gault), ¶¶9-10; Ex. 14 (McLean), p.43, ll.14-22; Ex. 15 (Nelson), p. 43, l.13 – p.46, l.4; Ex. 16 (Nitkin), ¶¶5-6, 11; Ex. 17 (BBB), ¶8.

²⁹ Ex. 14 (McLean), p.33, l.18 – p.34, l.4.

³⁰ Ex. 2 (Kraemer), ; Ex. 18 (Skoudis),

unnecessary repairs and warranty programs as well as the installation of programs that are often otherwise available for free.³¹

B. The Role of Defendants

1. Pairsys

Pairsys, which was incorporated in New York on February 3, 2012,³² is a telemarketer and seller of computer technical support services.³³ It does business in Albany, New York, and reports also doing business using the name A1PCCARE.³⁴ It markets computer technical support services to consumers throughout the United States and in other English-speaking countries.³⁵ It has employee telemarketers and technical support staff based in India.³⁶ Bank records reflect large transfers from Pairsys to accounts in India³⁷ and show that Pairsys generated revenues of approximately \$2.5 million since February 2012.³⁸

2. Uttam Saha

Saha owns and controls Pairsys. Saha is the Chairman of Pairsys and is an authorized signatory on the company's financial accounts.³⁹ He signs corporate documents as Owner/Officer and President.⁴⁰ He and Pairsys are the registered owners of domain names used by Pairsys to conduct business.⁴¹

³¹ Ex. 18 (Skoudis),

³² Ex. 1 (Liggins), ¶32.

³³ Ex. 17 (BBB), ¶ 8.

³⁴ Ex. 6 (Ellis), p.8; Ex. 17 (BBB), ¶ 11.

³⁵ Ex. 17 (BBB), ¶ 8 and Attachment A.

³⁶ Ex. 2 (Kraemer), ; Ex. 17 (BBB), ¶ 12.

³⁷ Ex. 1 (Liggins), ¶9.

³⁸ Ex. 1 (Liggins), ¶9 .

³⁹ Ex. 1 (Liggins), ¶¶10-15.

⁴⁰ Ex. 1 (Liggins), ¶ 31.

⁴¹ Ex. 1 (Liggins), ¶26.

3. **Tiya Bhattacharya**

Bhattacharya runs the company along with Saha. She is an authorized signatory on Pairsys' bank accounts.⁴² She has signed at least one financial account document as Pairsys' Chief Executive Officer.⁴³ She is also the registered owner of the Pairsys.com domain name.⁴⁴

C. Consumer Injury

Defendants have used at least six domains and at least six phone numbers to perpetrate the scam.⁴⁵ According to domestic bank records, Defendants have taken in \$2,410,626 from May 2012 through June 2014.⁴⁶

IV. ARGUMENT

The FTC seeks an *ex parte* TRO halting Defendants' ongoing violations of the FTC Act and the TSR. The FTC requests that the Court enjoin Defendants from their ongoing violations of the law, freeze Defendants' assets to preserve them for restitution to victims, grant the FTC immediate access to Defendants' business premises, allow the FTC access to Defendants' records, and appoint a temporary receiver. As set forth below, and supported by the FTC's exhibits, the evidence strongly supports entry of the proposed TRO.

A. This Court has Subject Matter Jurisdiction

Because this case is brought by the FTC to enforce provisions of the FTC Act, this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1337(a) (commerce regulations), and 28 U.S.C. § 1345 (United States as plaintiff). The FTC

⁴² Ex. 1 (Liggins), ¶¶10-15.

⁴³ Ex. 1 (Liggins), ¶13.

⁴⁴ Ex. 1 (Liggins), ¶24

⁴⁵ Ex. 1 (Liggins), ¶¶25-26.

⁴⁶ Ex. 1 (Liggins), ¶9 and p.11.

Act empowers the FTC to bring suit to enjoin “unfair or deceptive acts or practices.” 15 U.S.C. § 45(a)(1).

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

This Court has the power to grant the requested relief under Sections 13(b) and 19 of the FTC Act. Where, as here, Defendants have violated the FTC Act by engaging in deceptive practices, Section 13(b) of the FTC Act authorizes district courts to grant permanent injunctive relief. *See* 15 U.S.C. § 53(b). The authority to grant permanent injunctive relief necessarily “carries with it the full range of equitable remedies,” including the authority “to grant ancillary equitable relief.” *FTC v. Bronson Partners, LLC*, 654 F. 3d 359, 365 (2d. Cir. 2011). Ancillary equitable relief includes the authority to enter a temporary restraining order and other preliminary relief designed to preserve the possibility of effective final relief. *See FTC v. U.S. Oil and Gas Corp.*, 748 F. 2d 1431, 1434 (11th Cir. 1984). Moreover, the power to grant ancillary equitable relief includes the power to freeze assets that are located in banks outside the United States. *See Gucci America v. Weixing*, No. 10-cv-4974, 2011 WL 6156936 at *4 (S.D.N.Y. Aug 23, 2011) (court’s equitable authority included the power to freeze defendant’s funds in foreign banks). District courts in the Second Circuit have routinely granted the sort of “ancillary equitable relief” that is requested here, including *ex parte* relief with an asset freeze, immediate access to the business premises, appointing a temporary receiver, and financial reports.⁴⁷

⁴⁷ *See, e.g., FTC v. Navestad*, No. 09-6329, 2010 WL 743899 (W.D.N.Y. 2010) (granting *ex parte* TRO prohibiting violations of the FTC Act, suspending websites, freezing assets, preserving records, requiring financial disclosures, repatriating foreign assets, appointing temporary receiver, and granting immediate access); *FTC v. Edge Solution, Inc.* No. 07-4087 (E.D.N.Y. Oct 12, 2007) (granting temporary restraining order prohibiting misrepresentations, suspending websites, freezing assets, prohibiting dissemination of customer lists, repatriating foreign assets, granting immediate access, authorizing expedited discovery, requiring financial reports, preserving records, and appointing temporary receiver); *FTC v. Med. Billers Network*,

A second basis to provide preliminary relief is Section 19 of the FTC Act, 15 U.S.C. § 57b. Section 19 grants the Court jurisdiction to order relief necessary to redress injury to consumers from Defendants' violations of the TSR. 15 U.S.C. § 57b(a)(1)(b). The court's authority to grant equitable relief under Section 19 of the FTC Act, 15 U.S.C. § 57b, includes the authority to grant preliminary injunctive relief.⁴⁸

Inc., No. 05-2014 (S.D.N.Y. Feb. 18, 2005) (granting temporary restraining order enjoining deception, requiring financial reporting, preserving records, and authorizing limited discovery); *FTC v. CHK Trading Corp.*, No. 04-8686 (S.D.N.Y. Nov. 10, 2004) (granting preliminary injunction enjoining deceptive conduct, preserving records, requiring financial reporting, and authorizing expedited discovery); *FTC v. Epixtar Corp.*, No. 03-8511 (S.D.N.Y. Oct. 29, 2003) (granting *ex parte* TRO prohibiting misrepresentations, prohibiting dissemination of customer lists, freezing assets, retaining records, repatriating assets, granting immediate access, authorizing expedited discovery, requiring financial reporting, and appointing temporary receiver); *FTC v. No. 9068-8425 Quebec, Inc.*, 2002 WL 31082950 (N.D.N.Y. 2002) (granting *ex parte* TRO prohibiting misrepresentations, preserving records, and freezing assets); *FTC v. Guzetta.*, No. 01-2335 (E.D.N.Y. April 17, 2001) (granting *ex parte* TRO prohibiting violations of the FTC Act, freezing assets, requiring financial reporting, preserving financial records, granting immediate access, and authorizing expedited discovery); *FTC v. Five Star Auto Club, Inc.*, No. 99-1693 (S.D.N.Y. Mar. 8 1999) (granting *ex parte* TRO enjoining misrepresentations, appointing temporary receiver, granting access to business records, freezing assets, repatriating foreign assets, requiring financial statements, and preserving records). These orders are included in Volume V of Plaintiff's exhibits.

⁴⁸ *FTC v. Career Info. Servs., Inc.*, No. 1:96-cv-1464, 1996 U.S. Dist. LEXIS 21207, at *10 (N.D. Ga. June 21, 1996) (citing *Singer*, 668 F.2d at 1110-12).

C. The Evidence Justifies Entry of a Temporary Restraining Order and a Preliminary Injunction

In the Second Circuit, in order to grant preliminary injunctive relief under the FTC Act, the district court must: (1) determine that the FTC has a “fair and tenable chance of ultimate success on the merits,” and (2) balance the equities. *FTC v. Verity Int’l*, 124 F. Supp. 2d 193, 199 (S.D.N.Y. 2000) (citing *United States v. Sun & Sand Imps., Ltd.*, 725 F.2d 184, 188 (2d Cir. 1984)), *aff’d*, 443 F.3d 48, 63 (2d Cir. 2006). When the FTC acts to prevent violations of federal law, it proceeds “not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest.” *See SEC v. Mgmt. Dynamics, Inc.*, 515 F. 2d 801, 808-09 (2d Cir. 1975). As such, the FTC is not required to show irreparable harm. *Verity Int’l*, 124 F. Supp.2d at 199.

1. The FTC has Demonstrated a Fair and Tenable Chance of Ultimate Success on the Merits

a) The FTC has Demonstrated a Fair and Tenable Chance of Ultimate Success on the Merits that Defendants Violated Section 5(a) of the FTC Act

Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a). In order to show that Defendants violated Section 5 of the FTC Act, the FTC must establish: (1) a representation, omission, or practice, (2) that is likely to mislead consumers acting reasonably under the circumstances, and (3) that the representation is material. *FTC v. Verity Int’l*, 443 F.3d 48, 63 (2d Cir. 2006). The FTC is not required to show that Defendants acted “with the intent to deceive; it is enough that the representation or practices were likely to mislead consumers acting reasonably.” *Id.* A misrepresentation is material if it “involves information that is important to. . . consumer’s choice of or conduct regarding a product.” *FTC v. Bronson Partners, LLC*, 564 F. Supp. 2d 119, 135 (D. Conn. 2008), *aff’d*, 654 F. 3d 359 (2d. Cir. 2011). Express claims are presumed to be material. *Id.* The FTC is also not

required to prove reliance by each consumer misled by the defendants. *FTC v. Figgie Int'l*, 994 F.2d 595, 605 (9th Cir. 1993). Rather, a “presumption of actual reliance arises once the Commission has proved that the defendants made material misrepresentations, that were widely disseminated, and that consumers purchased the defendant’s products.” *Id.*

As explained above, Defendants make two misrepresentations. First, Defendants misrepresent to consumers that they are from or are calling on behalf of a well-recognized company such as Microsoft.⁴⁹ This representation is false; no such affiliations existed.⁵⁰ This false representation was likely to mislead consumers, and in fact, did so.⁵¹

Second, Defendants mislead consumers to believe that they require Defendants’ services because the consumers’ computer systems are slow, infected, and corrupted. These claims are baseless. The screen images and messages Defendants show to mislead consumers do not indicate the presence of viruses or malware. Defendants mislead consumers who do not understand these messages’ technical significance into believing that their computers are severely compromised. After duping consumers into paying for unnecessary “repairs,” and illusory long-term maintenance services, Defendants claim to have fixed the consumers’ computers.

Defendants go to great lengths to trick consumers into believing that their computers are infected with viruses, malware, or system corruption. For example, Defendants persuade

⁴⁹ Ex. 3 (D. Davis), p.4, ll.6-10; Ex. 4 (J. Davis), ¶ 5; Ex. 5 (Desmond-Brown), ¶3, p.5, l.1-13 and p.8, l. 1-7; Ex. 6 (Ellis), ¶¶2-4; Ex. 7 (Franco), ¶3; Ex. 8 (Gault), ¶¶3-4; Ex. 9 (Haverkamp), ¶4; Ex. 10 (Johnson), ¶6; Ex. 11 (Kelly), ¶4; Ex. 12 (C. Leach), ¶3, p.4, ll.16-19 and p.40, l.24 – p.41, l.4; Ex. 13 (P. Leach), ¶3 and p.4, ll.6-7 and p.6, ll.4-9; Ex. 14 (McLean), ¶3 and p.6, ll.8-15; Ex. 15 (Nelson), ¶3 and p.4, ll.13-16; Ex. 16 (Nitkin), ¶4.

⁵⁰ Ex. 19 (Clark), ¶5; Ex. 20 (Yaokum), ¶7.

⁵¹ Ex. 4 (J. Davis), ¶ 20; Ex. 5 (Desmond-Brown), ¶5; Ex. 6 (Ellis), ¶11; Ex. 7 (Franco), ¶10; Ex. 8 (Gault), ¶18; Ex. 9 (Haverkamp), ¶9; Ex. 10 (Johnson), ¶18; Ex. 11 (Kelly), ¶16; Ex. 12 (C. Leach), ¶5; Ex. 13 (P. Leach), ¶7; Ex. 14 (McLean), ¶10; Ex. 15 (Nelson), ¶7; Ex. 16 (Nitkin), ¶12.

consumers their computers are infected with viruses using means such as local scans and the Event Viewer to convince consumers that the innocuous results or messages are cause for alarm.⁵² Given this level of trickery and the number of consumers who have purchased their products, Defendants' claims are likely to mislead reasonable consumers.

Finally, Defendants' representations are material. Both representations are presumed to be material because they are express claims. *Bronson Partners, LLC*, 564 F. Supp. 2d at 135; *see also In re Thompson Med. Co.*, 104 F.T.C. 648, 818-19 (1984) *aff'd* 791 F.2d 189 (D.C. Cir. 1986).

In addition, consumers state that they would not have purchased Defendants' services but for Defendants' claim that they were affiliated with a well-recognized company like Microsoft.⁵³ Moreover Defendants' claims that consumers computers were seriously compromised were obviously important to their decision to purchase Defendants' services that would purportedly remedy that problem.⁵⁴

b) The FTC has Demonstrated a Likelihood of Success on the Merits that Defendants have Violated the Telemarketing Sales Rule

Defendants have repeatedly violated the TSR by: (1) making false or misleading statements to induce consumers to purchase their computer security or technical support services; and (2) failing to pay the required fee to access the National Do Not Call Registry. Each violation is discussed in turn.

⁵² *See supra* footnotes 14-27.

⁵³ *See supra* footnote 51.

⁵⁴ Ex. 5 (Desmond-Brown), ¶4; Ex. 6 (Ellis), ¶11; Ex. 7 (Franco), ¶4; Ex. 8 (Gault), ¶10; Ex. 9 (Haverkamp), ¶9; Ex. 10 (Johnson), ¶7; Ex. 11 (Kelly), ¶16; Ex. 14 (McLean), ¶5.

i. Defendants Made False or Misleading Statements to Induce Persons to Pay for Goods and Services

The TSR prohibits any seller or telemarketer from making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution. 16 C.F.R. § 310.3(a)(4). Defendants are sellers or telemarketers engaged in telemarketing as defined by the TSR since they arrange for the sale of goods or services, or initiate or cause telemarketers to initiate outbound telephone calls. 16 C.F.R. § 310.2(aa), (cc), and (dd). As explained above, Defendants have falsely claimed that they are from, affiliated with, or calling on behalf of a well-recognized company such as Microsoft. Defendants have also falsely claimed that they have detected security or performance issues on consumers' computers, including viruses, spyware, or system errors. Defendants made these claims to induce consumers to purchase computer security or technical support services. Therefore, Defendants violated the TSR by making false claims to induce the purchase of goods or services.

ii. Defendants Failed to Pay the Required Fees to Access the National Do Not Call Registry

Under the TSR, sellers and telemarketers are prohibited from calling any telephone number within a given area code unless the seller on whose behalf the call is made has paid the annual fee for access to the telephone numbers within that area code that are included in the National Do Not Call Registry. 16 C.F.R. § 310.8. Defendants have not paid the required fee to access the National Do Not Call Registry prior to making their calls.⁵⁵ Therefore, Defendants violated the law by making calls prior to paying the required fee.

2. The Balance of Equities Mandates Preliminary Injunctive Relief

“[W]hen a district court balances the hardships of the public interest against a private

⁵⁵ Ex. 1 (Liggins), ¶8.

interest, the public interest should receive greater weight.” *FTC v. World Wide Factors*, 882 F.2d 344, 347 (9th Cir. 1989); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988). The public has a compelling interest in halting Defendants’ unlawful and injurious conduct and preserving the status quo. By contrast, ceasing their illegal conduct and complying with the law is not a burden on Defendants. Defendants “can have no vested interest in a business activity found to be illegal.” *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 29 (2d Cir. 1972) (internal quotations and citations omitted). In addition, it is likely that only the entry of the requested temporary and preliminary injunctive relief will prevent Defendants from continuing to deceive and harm the public during the pendency of this litigation.⁵⁶

3. The Individual Defendants are Liable

The individual defendants are also liable for the deceptive practices of Pairsys. Once the Commission has established corporate liability for deceptive acts or practices, the individual defendants may be held individually liable when the Commission can show that they (1) participated in the acts or had authority to control the corporate defendant and (2) knew of the acts or practices. *FTC v. Medical Billers Network, Inc.*, 543 F. Supp.2d 283, 320 (S.D.N.Y. 2008) (citing *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 574 (7th Cir.1989)). The knowledge requirement is satisfied by “actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.” *Medical Billers Network, Inc.*, 543 F. Supp.2d at 320; see also *Amy Travel*, 875 F.2d at 574. Furthermore, an individual’s

⁵⁶ See Declaration of Counsel Pursuant to FED. R. CIV. P. 65(b) in Support of *Ex Parte* Temporary Restraining Order filed concurrently with this Motion.

degree of participation in business affairs is “probative of knowledge.” *Amy Travel*, 875 at 573-74; *Medical Billers Network, Inc.*, 543 F. Supp.2d 283 at 320.

The individual defendants have authority to control Corporate Defendant. Among other things, the individual defendants have held positions of authority within Corporate Defendant. For example, Defendant Saha is the chairman and president of the company⁵⁷ and Defendant Bhattacharya is the chief executive officer of the company.⁵⁸ They have also each acted as signatories on corporate financial accounts and registered Corporate Defendant’s domains.⁵⁹

There is also reason to believe that the requisite knowledge for individual liability exists. Defendant Saha personally responds to consumer complaints. The Better Business Bureau (“BBB”) in New York notifies Saha of complaints filed against Pairsys, and Saha responds to those complaints.⁶⁰ The complaints describe the deceptive business practices.⁶¹ Also, as to both the individual defendants, knowledge can be inferred from the closely-held nature of the business and its egregious practices. “A heavy burden of exculpation rests on the chief executive and primary shareholder of a closely held corporation whose stock-in-trade is overreaching and deception.” *Standard Educators, Inc. v. FTC*, 475 F.2d 401 at 403 (D.C. Cir. 1973).

D. The Scope of the Proposed *Ex Parte* Temporary Restraining Order is Appropriate in Light of Defendants’ Conduct

As the evidence has shown, the FTC will likely ultimately succeed in proving that Defendants are engaging in deceptive practices in violation of the FTC Act and are violating the TSR, and the balance of equities strongly favors the public interest and equities. Preliminary injunctive relief is thus warranted. Federal Rule of Civil Procedure 65(b) permits this Court to

⁵⁷ Ex. 1 (Liggins), ¶¶14, 15, 31.

⁵⁸ Ex. 1 (Liggins), ¶13.

⁵⁹ Ex. 1 (Liggins), ¶¶10-15, 24, 26.

⁶⁰ Ex. 17 (BBB), ¶8 and, for example, pp.9-10.

⁶¹ Ex. 17 (BBB), ¶8 and, for example, pp.5 and 12.

grant a temporary restraining order on an *ex parte* basis if there is a clear showing that “immediate and irreparable injury, loss, or damage will result” if notice is given. FED. R. CIV. P. 65(b); *See also In re Vuitton et Fils*, 606 F.2d 1, 4-5 (2d Cir. 1979).

For two years, Defendants have been engaged in a scheme that has victimized thousands of consumers. This conduct alone supports the inference that Defendants will continue their illegal conduct absent court order. *See Management Dynamics, Inc.*, 515 F. 2d at 890 (“the commission of past illegal conduct is highly suggestive of the likelihood of future violations”). As set forth in detail in the Rule 65(b) Declaration of Counsel, notice to Defendants would cause irreparable injury as to the Commission’s ability to provide redress to consumers.⁶² Only through an *ex parte* TRO can the court prevent the otherwise likely secreting of assets and destruction of documents- both of which would jeopardize the possibility of final effective relief for consumers. District courts in this circuit have routinely granted the FTC’s requests for *ex parte* relief in cases of deceptive practices.⁶³

The FTC requests injunctive relief of three general types. As explained below, each type of preliminary relief is necessary to protect consumers and to preserve the Court’s ability to grant complete relief.

1. The Court Should Stop Defendants’ Ongoing Scam

First, the FTC seeks preliminary relief designed to stop Defendants’ ongoing violations of the FTC Act and the TSR. The proposed temporary restraining order includes provisions enjoining Defendants from continuing their scam. Additionally, because Defendants rely on phone numbers, seemingly legitimate websites, and off-shore telemarketers to lure consumers

⁶² *See Declaration of Counsel Pursuant to FED.R.CIV. 65(b)(1) (B) In Support of Ex Parte Temporary Restraining Order filed concurrently with this Motion.*

⁶³ *See supra* footnote 47.

into their schemes and process payments from consumers, the TRO also includes provisions directing telephone carriers and webhosting companies to disable Defendants' telephone numbers and websites. Such TRO provisions have been included in appropriate FTC cases in the past, including on an *ex parte* basis. *See, e.g., FTC v. Navestad*, No. 09-6329, 2010 WL 743899 (W.D.N.Y. 2010) (granting *ex parte* TRO which in part enjoined Defendants from violating the FTC Act and suspended Defendant's websites); *FTC v. Edge Solution, Inc.* No. 07-4087 (E.D.N.Y. Oct 12, 2007) (granting TRO which, in part, enjoined Defendants from violating the FTC and suspended Defendants' websites); *FTC v. Career Hotline*, No. 09-1483 (M.D. FL. Sept. 8, 2009)(court ordered in its preliminary injunction the disconnection of Defendants' phone numbers).

2. The Court Should Freeze Defendants' Assets in Order to Preserve the Possibility of Providing Restitution to Defendants' Victims

Second, the FTC seeks preliminary relief designed to help ensure the possibility of providing restitution to the victims of Defendants' scam. As explained above, and in the Rule 65(b) Declaration of Counsel, Defendants have already transferred approximately \$900,000 to India.⁶⁴ The proposed temporary restraining order includes provisions that would freeze Defendants' assets. The proposed order also includes provisions requiring Defendants to provide a financial accounting disclosure so that the FTC may better identify Defendants' assets. Additionally, the proposed order includes provisions requiring Defendants to repatriate foreign assets, and preventing them from taking steps that would preclude the repatriation of those assets. These types of TRO provisions have been included in appropriate FTC cases in the past, including on an *ex parte* basis. *See, e.g., FTC v. CHK Trading Corp.*, No. 04-8686 (S.D.N.Y.

⁶⁴ *See* Declaration of Counsel Pursuant to FED.R.CIV. 65(b)(1) (B) In Support of *Ex Parte* Temporary Restraining Order filed concurrently with this Motion.

Nov. 10, 2004) (requiring financial reporting); *FTC v. Epixtar Corp.*, No. 03-8511 (S.D.N.Y. Oct. 29, 2003) (*ex parte* order freezing assets and requiring financial reporting); *FTC v. No. 9068-8425 Quebec, Inc.*, 2002 WL 31082950 (N.D.N.Y. 2002) (*ex parte* order freezing assets); *FTC v. Five Star Auto*, No. 99-16933 (Mar. 8 1999) (*ex parte* TRO freezing assets requiring financial statements and repatriating foreign assets).⁶⁵

3. The Court Should Order the Preservation and Production of Defendants' Business Records and Allow for an Immediate Access to Defendants' Business Premises

Third, the FTC seeks preliminary relief designed to provide access to Defendants' records before those records can be destroyed. Defendants' deception is pervasive and ongoing. They continued their unlawful conduct even after being shown time and again by consumers and the BBB alike the clear evidence of their deception.

As explained more fully in the Rule 65(b) Declaration of Counsel, in the FTC's experience, it is likely that Defendants will take steps to destroy documents that relate to their scam. The proposed order includes a provision allowing immediate access to Defendants' business premises so Plaintiff can copy and preserve Defendants' documents. The proposed order also includes a provision requiring Defendants to preserve records of their business activities. Again, these provisions have been included in FTC cases in the past, including on an *ex parte* basis. *See, e.g., FTC v. Med. Billers Network, Inc.*, No. 05-2014 (S.D.N.Y. Feb. 18, 2005) (preserving records and authorizing expedited discovery); *FTC v. Epixtar Corp.*, No. 03-8511 (S.D.N.Y. Oct. 29, 2003) (*ex parte order* requiring Defendants to retain records; granting immediate access and authorizing expedited discovery); *FTC v. Five Star Auto*, No. 99-1693

⁶⁵ These orders are in Volume V of Plaintiff's Exhibits.

(S.D.N.Y. Mar. 8 1999) (*ex parte* order granting access to business records and preserving records).⁶⁶

The Commission seeks this relief to ensure that Defendants do not destroy documents relating to their scam and so that the FTC can locate assets and additional evidence. Absent this relief, the FTC's efforts to obtain full and effective relief will be hampered.

4. The Court Should Appoint a Temporary Receiver

As another measure to maintain the status quo, Plaintiff seeks appointment of a temporary receiver who will locate and preserve assets and records of Corporate Defendant to obviate the threat of destruction, dissipation, or secretion. A temporary receiver is necessary because, as shown above, the business of Defendants is permeated by trickery and deceit. Furthermore, computer records and assets can be destroyed or concealed literally at the touch of a button, unless a third party has possession of the business. Also, during the pendency of the temporary restraining order, a temporary receiver will be in a position to prevent further deceptive business practices.

V. CONCLUSION

Defendants do not operate a legitimate business. Defendants mislead consumers into believing Defendants are affiliated with a well-recognized company, and that they have detected security or performance issues on consumers' computers, including viruses, spyware, or system errors, regardless of the actual state of the consumers' computers. Defendants then sell consumers illusory long-term "security" or "technical support" services and perform unnecessary "repairs." In order to put an end to these unlawful practices and preserve the status quo, the FTC

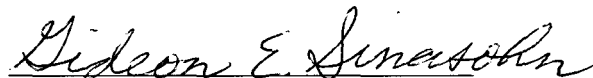
⁶⁶ These orders are in Volume V of Plaintiff's Exhibits.

requests that this Court grant the FTC's motion for an *ex parte* TRO and ancillary equitable relief and enter a show cause order to show why a Preliminary Injunction should not issue.

Respectfully submitted,

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