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CLERK US DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

FEDERAL TRADE COMMISSION,  
  
Plaintiff,  
  
v.  
  
TRIANGLE MEDIA  
CORPORATION, a Delaware  
corporation, also doing business as  
Triangle CRM, Phenom Health, Beauty  
and Truth, and E-Cigs, *et al.*,  
  
Defendants.

Case No.: [Case No.] **'18CV1388 BEN NLS**  
  
Memorandum of Points and  
Authorities in Support of Plaintiff's *Ex*  
*Parte* Motion for Temporary  
Restraining Order with Asset Freeze,  
Appointment of a Receiver, Other  
Equitable Relief, and Order to Show  
Cause Why a Preliminary Injunction  
Should Not Issue

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1 **I. Introduction**

2 The Federal Trade Commission asks this Court to halt an online marketing  
3 scheme that deceptively promotes “risk-free” trial offers to dupe unsuspecting  
4 consumers into enrolling in costly continuity plans for Defendants’ skin care  
5 products, electronic cigarettes, and dietary supplements. Although consumers  
6 authorize the payment of only a nominal shipping and handling charge,  
7 Defendants instead charge them up to \$200 each month for regular shipments of  
8 products they did not order or want. Defendants have reaped more than \$30  
9 million from these unlawful marketing practices, which violate the Federal Trade  
10 Commission Act (the “FTC Act”), the Restore Online Shoppers’ Confidence Act  
11 (“ROSCA”), the Electronic Fund Transfer Act (“EFTA”), and Regulation E.  
12

13 Defendants market their “risk free” trials on a series of nearly identical  
14 websites, representing that consumers must pay only a minimal shipping and  
15 handling fee (typically \$4.95) to receive the one-month trial. In ordering the trial,  
16 consumers are asked to provide their credit or debit card information, purportedly  
17 to pay the shipping and handling fee. Defendants represent that the product itself  
18 does not cost anything and, further, that the shipping and handling fee represents  
19 the “Total” cost of the trial. Thus, consumers who order one of Defendants’ trials  
20 understand that they will receive a single shipment of one product and will be  
21 charged just a single, nominal shipping and handling fee.  
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1           However, a short time later, Defendants charge consumers the full price of  
2 the “trial” product, up to \$98.71. Defendants also enroll consumers in a continuity  
3 plan, under which consumers receive additional shipments of the product each  
4 month and are charged the full price of those products. Thus, consumers who  
5 authorized only a one-time charge of \$4.95 end up paying an additional \$98.71 the  
6 first month, and then a similar amount in subsequent months until the consumer is  
7 able to cancel.  
8

9  
10           To make matters worse, Defendants then deceive consumers into ordering a  
11 trial of a second product by misrepresenting on subsequent pages of their websites  
12 that the consumer’s order of the first trial product is not yet complete. When  
13 consumers click the box that purportedly will complete their order, however, they  
14 are signed up for an additional “trial” (for which they will ultimately pay full price)  
15 and yet another monthly continuity plan.  
16  
17

18           In sum, the “risk free” trial for which the consumer authorized only a \$4.95  
19 charge often results in charges of more than \$200 in the first month alone. Even  
20 consumers who discover these unauthorized charges and seek refunds often find  
21 that they are unable to get their money back because of Defendants’ restrictive  
22 refund policies. Not surprisingly, consumers have filed hundreds of complaints  
23 about Defendants’ practices with the Better Business Bureau.  
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1 Attempting to evade detection by law enforcement, Defendants use an ever-  
2 changing network of websites and shell entities to operate their scheme.  
3 Defendants establish payment processing accounts in the shell entities' names,  
4 which are used to collect the unauthorized charges. The unauthorized charges are  
5 then transferred from the shell entities to Defendants, who in turn regularly send  
6 the bulk of the proceeds out of the country.  
7

8  
9 Plaintiff's evidence of Defendants' illegal practices is overwhelming. It  
10 includes screenshots of Defendants' deceptive advertisements, emails, and  
11 websites; third-party records showing the structure of Defendants' enterprise;  
12 sworn statements from 9 victimized consumers and complaints from hundreds of  
13 others; and a sworn declaration from an FTC investigator.  
14

15  
16 The FTC brings its motion for a temporary restraining order ("TRO") *ex*  
17 *parte* to bring a halt to Defendants' illegal practices, to freeze their assets, and to  
18 have a temporary receiver appointed over the business. Defendants' widespread  
19 pattern of deception, unauthorized charges to consumers' accounts, offshore  
20 transfers of assets, use of shell companies to disguise their identity, and other  
21 efforts to evade responsibility for their conduct all strongly suggest that they would  
22 hide or dissipate assets if they received notice of this action. The requested relief  
23 is necessary and appropriate to preserve the Court's ability to provide effective  
24 final relief, including eventual restitution to the victims.  
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1 **II. Defendants’ Illegal Business Practices**<sup>1</sup>

2 Defendants entire business model is based upon deception. Defendants lure  
3 consumers into providing their billing information with false promises of a “risk  
4 free” trial for which consumers purportedly will pay only a nominal shipping and  
5 handling fee. But Defendants fail to disclose that the consumer’s account will  
6 ultimately be charged the full price for the product not once, but monthly until the  
7 consumer cancels. In this way, Defendants essentially have stolen more than \$30  
8 million from consumers.  
9  
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12 **A. Defendants’ Deceptive Trial Offers**

13 Defendants advertise through banner ads, emails, blog posts, Facebook  
14 advertising, and pop-up “customer satisfaction” surveys,<sup>2</sup> offering consumers a  
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26 <sup>1</sup> The FTC has filed an Appendix of Declarations in Support of Plaintiff’s *Ex*  
27 *Parte* Motion for Temporary Restraining Order with Asset Freeze, Appointment of  
28 a Receiver, Other Equitable Relief, and Order to Show Cause Why a Preliminary  
Injunction Should Not Issue (“Appx.”).

1 “risk free” trial of one of their products.<sup>3</sup> These advertisements claim that  
2 consumers can receive the trial for just the cost of shipping and handling, typically  
3 \$4.95.<sup>4</sup>  
4

5 Consumers who click on these advertisements are taken to Defendants’  
6 websites.<sup>5</sup> There, Defendants prominently offer a “RISK FREE” trial of the  
7  
8

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9  
10 <sup>2</sup> Declaration of Douglas M. McKenney (“McKenney Dec.”), Plaintiff’s  
11 Exhibit (“PX”) 10, Appx. at 165, ¶ 10 & Attachment (“Att.”) H, at 260-64; Appx.  
12 at 175, ¶ 37 & Att. I, at 304; Appx. at 183, ¶ 62 & Att. J, at 325-26; Appx. at 189,  
13 ¶ 79 & Att. K, at 353; Appx. at 197, ¶ 102 & Att. M, at 382-94; Appx. at 200, ¶¶  
14 108 and 109 & Att. N, at 404-22; Appx. at 202, ¶¶ 114 - 116 & Att. O, at 439-62;  
15 Appx. at 204, ¶¶ 122 and 123 & Att. P, at 487-496; Declaration of Jennifer Clark  
16 (“Clark Dec.”), PX 1, Appx. at 4, ¶ 2; Declaration of Theresa Fabbriante  
17 (“Fabbriante Dec.”), PX 2, Appx. at 22, ¶ 2; Declaration of Susan Landreau  
18 (“Landreau Dec.”), PX 3, Appx. at 30, ¶ 2; Declaration of Nancy Lawhorn  
19 (“Lawhorn Dec.”), PX 4, Appx. at 64, ¶ 2; Declaration of Larry Mack (“Mack  
20 Dec.”), PX 5, Appx. at 86, ¶ 2; Declaration of Jerry McCallum (“McCallum  
21 Dec.”), PX 6, Appx. at 96, ¶ 2; Declaration of Janet Pollard (“Pollard Dec.”), PX 7,  
22 Appx. at 113-14, ¶¶ 2-7; Declaration of Shawn Ulmer (“Ulmer Dec.”), PX 8,  
23 Appx. at 136, ¶ 2; Declaration of John McCraner (“McCraner Dec.”), PX 9, Appx.  
24 at 147, ¶ 2.

25 <sup>3</sup> The products Defendants market in this way include skin care products (e.g.,  
26 “Erase Repair H/A” and “Wrinkle Rewind”), electronic cigarettes (e.g., “Pro  
27 Vapor”), and dietary supplements (e.g., “Cerebral X,” “TestXCore,” and “Garcinia  
28 Clean XT”).

<sup>4</sup> McKenney Dec., PX 10, Appx. at 183, ¶ 62 & Att. J, at 325-26; Appx. at  
200, ¶¶ 108 and 109 & Att. N, at 404-22; Appx. at 202, ¶¶ 114 - 116 & Att. O, at  
439-62; Appx. at 204, ¶¶ 122 and 123 & Att. P, at 487-496; Clark Dec., PX 1,  
Appx. at 4, ¶ 3; Fabbriante Dec., PX 2, Appx. at 22, ¶ 2; Landreau Dec., PX 3,  
Appx. at 30, ¶ 2; Lawhorn Dec., PX 4, Appx. at 64, ¶ 2; Mack Dec., PX 5, Appx.  
at 86, ¶ 2; McCallum Dec., PX 6, Appx. at 96, ¶ 2; Pollard Dec., PX 7, Appx. at  
114, ¶ 6; Ulmer Dec., PX 8, Appx. at 136, ¶ 2; McCraner Dec., PX 9, Appx. at  
147, ¶ 3.

1 designated product.<sup>6</sup> The websites attempt to create a sense of urgency by  
2 representing that supplies are limited and that consumers need to act quickly. For  
3 example, the websites use language such as:  
4

- 5 • Warning: Due to extremely high demand, there is limited supply of  
6 [PRODUCT] in stock as of [today's date]. HURRY!
- 7 • ONLY [X] NUMBER OF TRIALS AVAILABLE NOW!
- 8 • ATTENTION: Due to high demand from recent media coverage we  
9 can no longer guarantee supply. As of [TODAY'S DATE] we  
10 currently have product in-stock and will ship within 24 hours of  
11 purchase.<sup>7</sup>

12 The websites also prominently display the logos of news organizations and  
13 magazines such as CBS News, NBC, Fox News, CNN, Marie Claire, Vogue, and  
14

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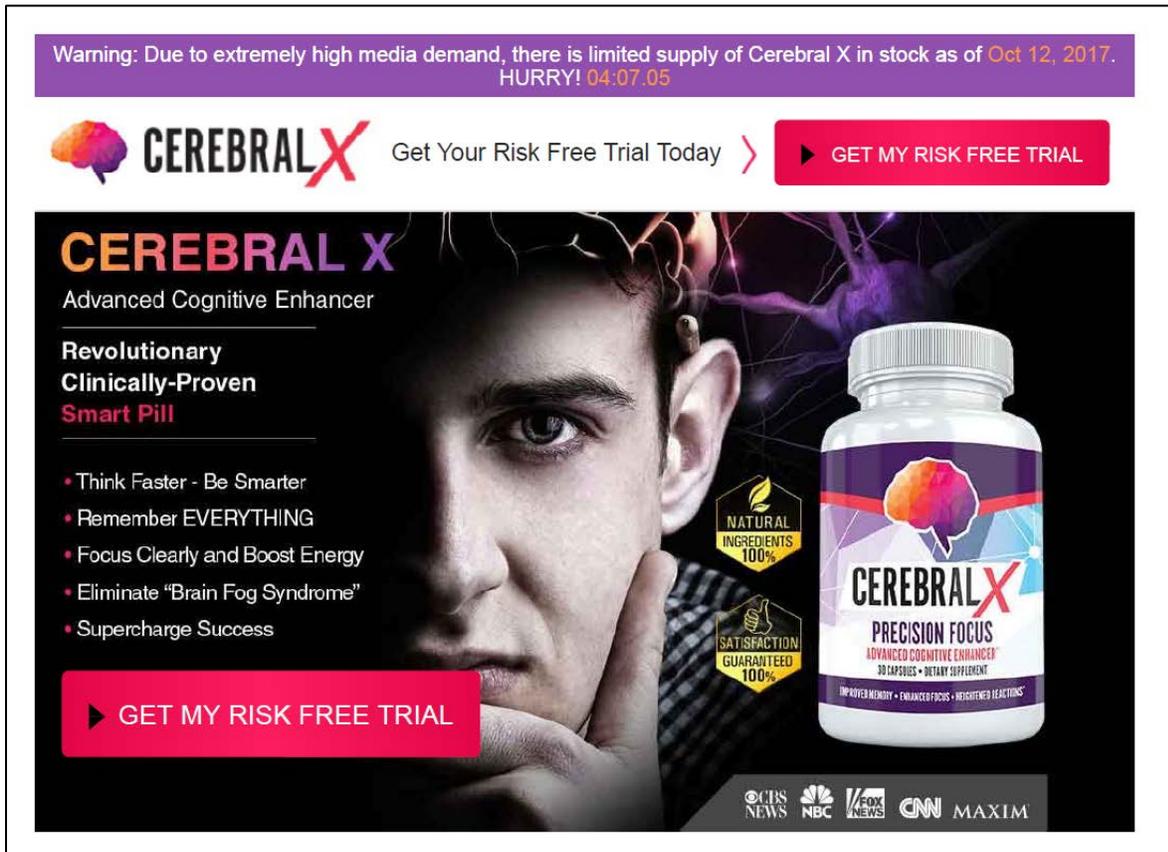
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20 <sup>5</sup> McKenney Dec., PX 10, Appx. at 166-67, ¶¶ 14 and 15 & Att. H, at 265-  
21 277; Appx. at 175-76, ¶¶ 38 and 30 & Att. I, at 305-311; Appx. at 183-84, ¶¶ 63  
22 and 64 & Att. J, at 327-30; Appx. at 189-90, ¶¶ 80 and 81 & Att. K, at 357-59;  
23 Appx. at 198-99, ¶¶ 103 and 104 & Att. M, at 399-400; Appx. at 200-01, ¶ 110 &  
24 Att. N, at 423-32; Appx. at 203, ¶ 117 & Att. O, at 463-80; Appx. at 205-06,  
25 ¶¶ 124 and 125 & Att. P, at 497-503; Clark Dec., PX 1, Appx. at 4, ¶¶ 4 and 5.

26 <sup>6</sup> McKenney Dec., PX 10, Appx. at 166-67, ¶ 15 & Att. H, at 265-67; Appx.  
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at 200-01, ¶ 110 & Att. N, at 423-32; Appx. at 203, ¶ 117 & Att. O, at 463-480;  
Appx. at 205-06, ¶ 125 & Att. P, at 497-503.

<sup>7</sup> *Id.*; Clark Dec., PX 1, Appx. at 4, ¶¶ 4 and 5.

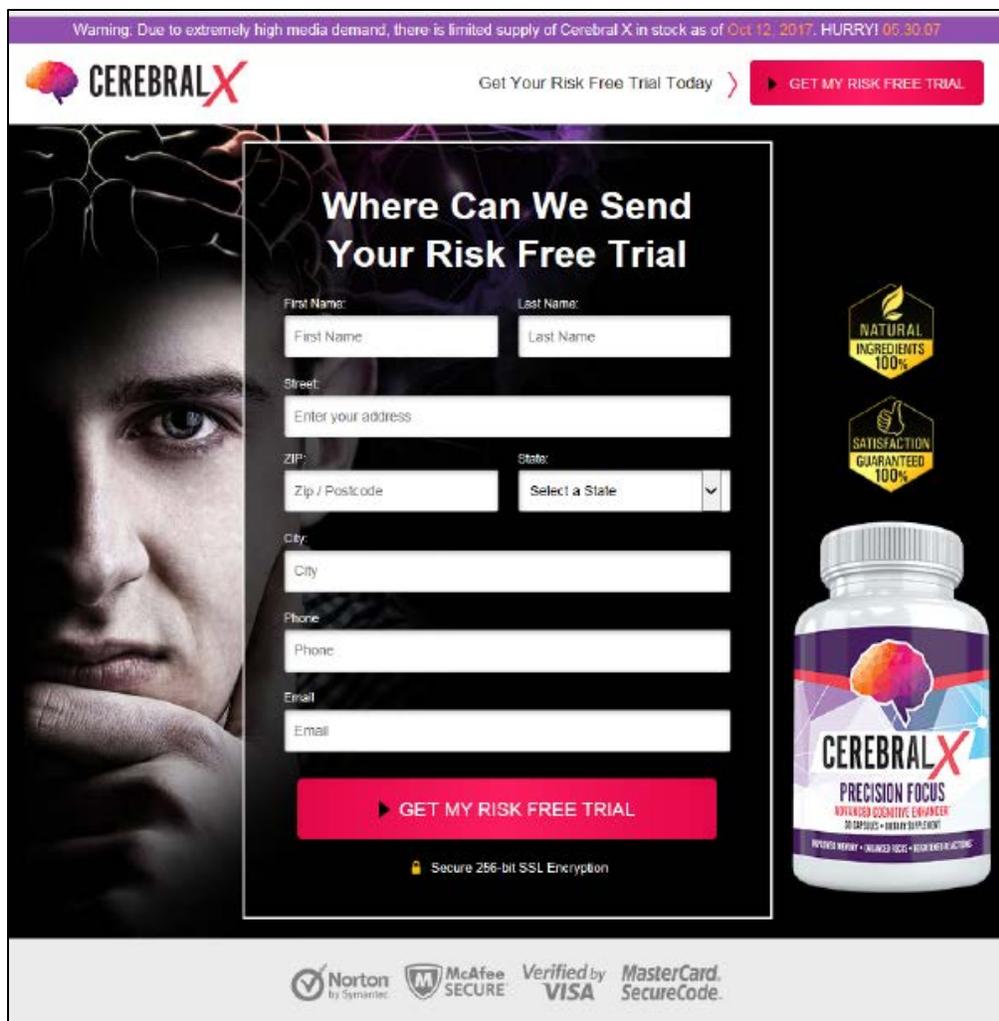
1 Cosmopolitan suggesting that these products have been featured on those outlets  
2 and in those magazines.<sup>8</sup>

3 For example, the screen shot below depicts Defendants’ website for  
4 “Cerebral X,” offering a “risk-free” trial but indicating that consumers should  
5 “HURRY!” because “there is a limited supply.”  
6



22 Consumers who are interested in receiving the trial are then asked to provide  
23 their name, address, telephone number, and email address, as shown in the  
24 screenshot below:<sup>9</sup>

26 <sup>8</sup> McKenny Dec., PX 10, Appx. at 166-67, ¶ 15 & Att. H, at 265; Appx. at  
27 200-01, ¶110 & Att. N, at 423-31; Appx. at 203, ¶ 117 & Att. O, at 463-64; Appx.  
28 at 205-06, ¶ 125 & Att. P, at 497.



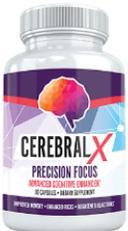
Once consumers enter their personal information and click “Get My Risk Free Trial,” they are directed to Defendants’ payment page. This page requests consumers’ debit or credit card information to cover the nominal shipping and

<sup>9</sup> McKenney Dec., PX 10, Appx. at 166-67, ¶ 15 & Att. H, at 265-67; Appx. at 176, ¶ 39 & Att. I, at 305-311; Appx. at 184, ¶ 64 & Att. J, at 327-30; Appx. at 189-90, ¶ 81 & Att. K, 357-59; Appx. at 198-99, ¶ 104 & Att. M, at 395-98; Appx. at 200-01, ¶ 110 & Att. N, at 423-32; Appx. at 203, ¶ 117 & Att. O, at 463-480; Appx. at 205-06, ¶ 125 & Att. P, at 497-503.; Clark Dec., PX 1, Appx. 4, ¶ 4.

1 handling charge, in this example a charge of \$4.95.<sup>10</sup> Significantly, the payment  
2 page prominently states that the “Total” cost is just \$4.95.<sup>11</sup>

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**CEREBRAL X**

Product	Price
	<b>1 Bottle of Cerebral X</b> <b>TRIAL</b> Order your 30 day supply today!
Shipping:	\$4.95
<b>Total</b>	<b>\$4.95</b>

Yes, add Protect Package™ for \$2.95 to my order.

**FedEx Express** **UPS** **UNITED STATES POSTAL SERVICE®**

Your order is due to arrive on **Oct 14, 2017**.

256 Bit SSL 24 Hour Encrypted Transactions 100% SECURE CHECKOUT & LOGIN

VeriSign Secured HACKER SAFE McAfee SECURE

**FINAL STEP: PAYMENT INFORMATION**

VISA MASTERCARD DISCOVER

Billing Address Same As Shipping

Credit Card#: [input field]

Expiry Date: Jan (1) 2017

CVV: [input field] CVV is the last 3 digits on the back of your card.

**▶ GET MY RISK FREE TRIAL**

Secure 256-bit SSL Encryption

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By placing an order you will be enrolled in our membership program. This program will charge \$ 4.95 today and \$ 94.71 for your trial full-size product on the 15th day if you do not call to cancel the membership. You will receive a full-size bottle of the product for \$ 94.71 (S&H included) every 30 days thereafter until you cancel. You can cancel or modify your membership anytime by calling +1-888-993-5460. Open 24 hours a day, 7 days a week. Product ships in 1-3 business days.

22 <sup>10</sup> McKenney Dec., PX 10, Appx. at 167, ¶ 16 & Att. H 278-79; Appx. at 176-  
23 77, ¶ 40 & Att. I, at 312; Appx. at 184, ¶ 65 & Att. J, at 334, 190-91, ¶ 82 & Att.  
24 K, at 360; Appx. at 196, ¶ 100 & Att. L, at 380; Appx. at 199, ¶ 105 & Att. M, at  
25 401-02; Appx. at 201-02, ¶ 111 & Att. N, at 433-37; Appx. at 204, ¶ 119 & Att. O,  
26 at 483-485; Appx. at 206, ¶ 126 & Att. P, at 507-08; Clark Dec., PX 1, Appx. at 4,  
27 ¶ 5; Fabbriante Dec., PX 2, Appx. at 22, ¶ 2; Landreau Dec., PX 3, Appx. at 30,  
28 ¶ 3; Lawhorn Dec., PX 4, Appx. at 64, ¶ 3; Mack Dec., PX 5, Appx. at 86, ¶ 3;  
Pollard Dec., PX 7, Appx. at 114, ¶ 6; Ulmer Dec., PX 8, Appx. at 136, ¶ 2.

<sup>11</sup> *Id.*; Clark Dec., PX 1, Appx. at 4, ¶ 5.

1           Unfortunately, consumers who enter their billing information and click  
2 “GET MY RISK FREE TRIAL” on this page do not merely receive a one-month  
3 supply for just the shipping cost of \$4.95.<sup>12</sup> Instead, approximately 15 days later,  
4 Defendants charge consumers the full price of the trial product – which ranges  
5 from \$84.71 to as much as \$98.71.<sup>13</sup> Defendants also enroll consumers in a  
6 continuity program,<sup>14</sup> under which Defendants send consumers additional  
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11 <sup>12</sup> Unless they uncheck a pre-checked box appearing under the bright yellow  
12 “Total” on the payments screen, consumers also will be charged an additional  
13 \$2.95 for something called “Protect Package,” which purports to provide shipping  
14 insurance. McKenney Dec., PX 10, Appx. at 167, ¶ 16 & Att. H, at 278-279;  
15 Appx. at 176-77, ¶ 40 & Att. I, at 312; Appx. at 184-85, ¶ 65 & Att. J, at 334;  
16 Appx. at 190-91, ¶ 82 & Att. K, at 360; Appx. at 196-97, ¶ 100 & Att. L, at 379-  
17 80; Appx. at 199, ¶ 105 & Att. M, at 401-02; Appx. at 201-02, ¶ 111 & Att. N, at  
18 435-37; Appx. at 204, ¶ 119 & Att. O, at 483-85; Appx. at 206, ¶ 126 & Att. P at  
19 507-08; Landreau Dec., PX 3, Appx. at 32-33, ¶¶ 13, 15; Ulmer Dec., PX 8, Appx.  
20 at 136, ¶ 2.

21 <sup>13</sup> McKenney Dec., PX 10, Appx. at 167, ¶ 16 & Att. H, at 278-279; Appx. at  
22 176-77, ¶ 40 & Att. I, at 312; Appx. at 180, ¶ 53; Appx. at 184-85, ¶ 65 & Att. J, at  
23 334; Appx. at 190-91, ¶ 82 & Att. K, at 360; Appx. at 196-97, ¶ 100 & Att. L, at  
24 379-80; Appx. at 199, ¶ 105 & Att. M, at 401-02; Appx. at 201-02, ¶ 111 & Att. N,  
25 at 435-37; Appx. at 204, ¶ 119 & Att. O, at 483-85; Appx. at 206, ¶ 126 & Att. P at  
26 507-08; Clark Dec., PX 1, Appx. at 5, ¶ 7; Fabbriante Dec., PX 2, Appx. at 22,  
27 ¶ 5; Landreau Dec., PX 3, Appx. at 31, ¶ 6; Lawhorn Dec., PX 4, Appx. at 64, ¶ 5;  
28 Mack Dec., PX 5, Appx. at 87, ¶ 8.

<sup>14</sup> McKenney Dec., PX 10, Appx. at 167, ¶ 16 & Att. H, at 278-279; Appx. at  
176-77, ¶ 40 & Att. I, at 312; Appx. at 184-85, ¶ 65 & Att. J, at 334; Appx. at 190-  
191, ¶ 82 & Att. K, at 360; Appx. at 196-97, ¶ 100 & Att. L, at 379-80; Appx. at  
199, ¶ 105 & Att. M, at 401-02; Appx. at 201-02, ¶ 111 & Att. N, at 435-37; Appx.  
at 204, ¶ 119 & Att. O, at 483-85; Appx. at 206, ¶ 126 & Att. P at 507-08; Clark  
Dec., PX 1, Appx. at 5, ¶ 8; Lawhorn Dec., PX 4, Appx. at 64, ¶ 5; Mack Dec., PX  
5, Appx. at 87, ¶ 6; Ulmer Dec., PX 8, Appx. at 136, ¶ 3.

1 shipments of the product each month and charge their accounts the full price of  
2 each product shipped.<sup>15</sup>

3 In contrast to Defendants’ bold claims that their trials are “RISK FREE,” in  
4 high demand, of limited supply, or low-cost, Defendants disclose the charge for the  
5 trial product and the continuity program only in barely legible faint gray text at the  
6 bottom of the payment page, well below where consumers enter their billing  
7 information and click the “GET MY RISK FREE TRIAL” button.<sup>16</sup> For example,  
8  
9 in the image above, that block of faint gray text reads in pertinent part:  
10  
11

12 By placing an order you will be enrolled in our membership  
13 program. This program will charge \$4.95 today and \$84.71 for  
14 your trial full-size product on the 15<sup>th</sup> day if you do not call to  
15 cancel the membership. You will receive a full-size bottle of  
16 the product for \$84.71 (S&H included) every 30 days thereafter  
17 until you cancel.  
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20 <sup>15</sup> McKenney Dec., PX 10, Appx. at 167, ¶ 16 & Att. H, at 278-279; Appx. at  
21 176-77, ¶ 40 & Att. I, at 312; Appx. at 184-85, ¶ 65 & Att. J, at 334; Appx. at 190-  
22 91, ¶ 82 & Att. K, at 360; Appx. at 196-97, ¶ 100 & Att. L, at 379-80; Appx. at  
23 199, ¶ 105 & Att. M, at 401-02; Appx. at 201-02, ¶ 111 & Att. N, at 435-37; Appx.  
24 at 204, ¶ 119 & Att. O, at 483-85; Appx. at 206, ¶ 126 & Att. P at 507-08;  
Lawhorn Dec., PX 4, Appx. at 64, ¶ 5; Mack Dec., PX 5, Appx. at 87, ¶ 6; Ulmer  
Dec., PX 8, Appx. at 136, ¶ 3.

25 <sup>16</sup> McKenney Dec., PX 10, Appx. at 167, ¶ 16 & Att. H, at 278-279; Appx. at  
26 176-77, ¶ 40 & Att. I, at 312; Appx. at 184-85, ¶ 65 & Att. J, at 334; Appx. at 190-  
27 91, ¶ 82 & Att. K, at 360; Appx. at 196-97, ¶ 100 & Att. L, at 379-80; Appx. at  
28 199, ¶ 105 & Att. M, at 401-02; Appx. at 201-02, ¶ 111 & Att. N, at 435-37; Appx.  
at 204, ¶ 119 & Att. O, at 483-85; Appx. at 206, ¶ 126 & Att. P at 507-08.

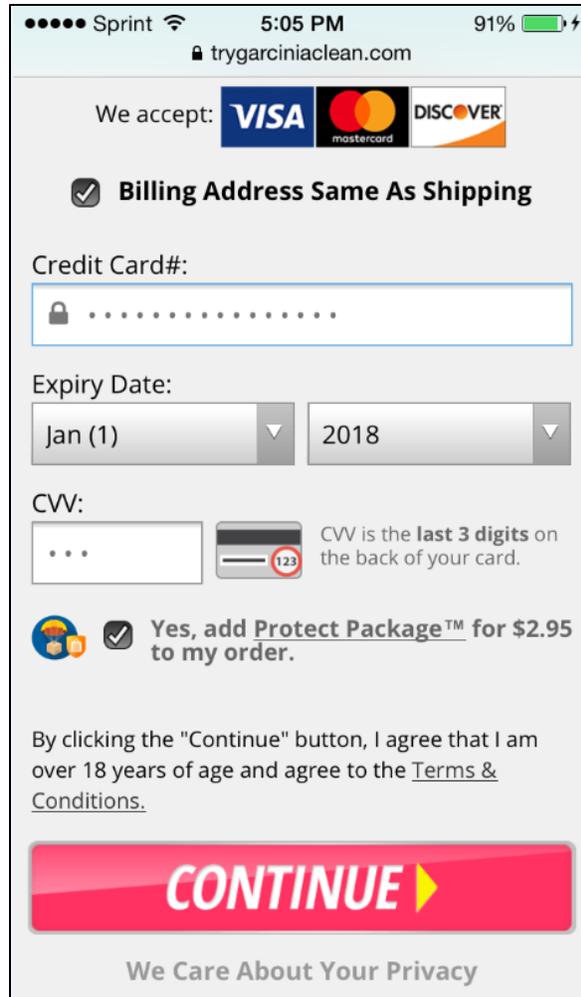
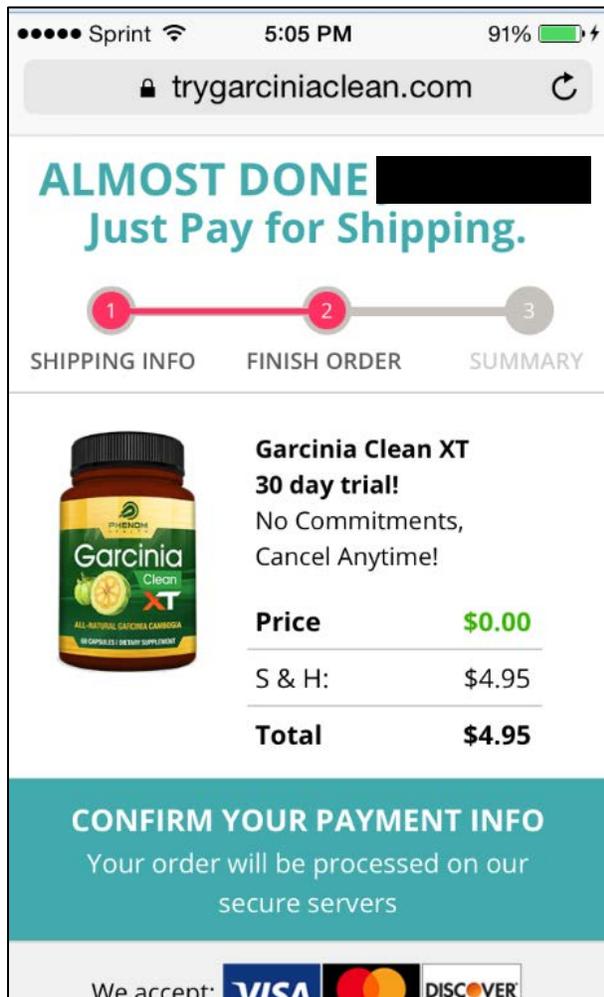
1 This text is the smallest, least prominent, and least distinct font on the  
2 payment page. As a result, consumers do not even see these disclosures, let alone  
3 read them.<sup>17</sup>  
4

5 Significantly, moreover, the disclosures are not visible at all to consumers  
6 who order the trial product on a mobile device. As demonstrated in the figure  
7 below, the payments page often occupies the entire screen of a mobile device,  
8 meaning that consumers would have to scroll down below the “Continue” button  
9 before they would encounter Defendants’ disclosures.<sup>18</sup>  
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20 <sup>17</sup> Clark Dec., PX 1, Appx. at 6, ¶¶ 12 and 13 (“At no point during my  
21 purchase did I see a notice that said I would be charged the full purchase price of  
22 the product if I did not cancel within a certain number of days. At no point during  
23 my purchase did I see a notice that said I was enrolling in a subscription service for  
24 the product.”); Landreau Dec., PX 3, Appx. at 30, ¶ 4 (“Before placing my order, I  
25 did not see any disclaimer stating that I would be charged any amount in addition  
26 to the \$4.95 shipping.”); Ulmer Dec., PX 8, Appx. at 137, ¶ 8-9 (“At no point  
27 during my initial order did I see a notice telling me that I would be charged the full  
28 purchase price of the product if I did not cancel within a certain number days. At  
no point during my purchase did I see a notice telling me that I was enrolling in a  
subscription service for the product.”).

<sup>18</sup> McKenney Dec., PX 10, Appx. at 201-02, ¶ 11 & Att. N, at 435-36.



**B. Defendants’ Deceptive Order Completion Pages**

Consumers who submit their payment information and click the “GET MY RISK FREE TRIAL” or “CONTINUE” button are not taken to an order confirmation page. Instead, consumers are taken to a page that says: “Wait! Your Order Is Not Complete!” As shown on the screenshot below, this page often includes an image of a coupon for a free trial of an additional product, which even

1 includes “free shipping.” Below the coupon is a brightly colored button labeled  
2 “COMPLETE CHECKOUT.”<sup>19</sup>

The screenshot shows a checkout page for Cerebral X. At the top left, the text reads "CEREBRAL X Advanced Cognitive Enhancer". At the top right, it says "Internet Exclusive Offer Available to USA Residents Only" with a small American flag icon. Below this is a red banner that says "Wait! Your Order is Not Complete!". Underneath the banner, a message states: "We want to offer you a free Vitamood+ trial bottle because we're so confident that when paired together with Cerebral X you'll see unparalleled results! There's no reason to feel blue. Add Vitamood+ to your order." The main promotional area features a bottle of Vitamood+ with a "SPECIAL" red ribbon. To the right of the bottle, it says "Hurry Limited Supplies Available" and "BOOST YOUR MOOD! VITAMOOD+". Below this, three bullet points list benefits: "+ INCREASES FEELINGS OF POSITIVITY & OPTIMISM", "+ SUPPORTS EMOTIONAL HEALTH", and "+ ENCOURAGES BALANCED BRAIN CHEMISTRY". A call to action says "Add your FREE TRIAL bottle Free Shipping Included!". Below the promotion is a red button labeled "COMPLETE CHECKOUT". Underneath the button are logos for "MasterCard. Verified by SecureCode." and "VISA". A horizontal line separates this from a section with two radio button options: "Yes, add Protect Package™ for \$6.95 to my order." (which is selected) and "No, I don't want to improve my mood." Below these options are logos for various security and shipping services: "PRIVACY VERIFIED", "CERTIFIED BY TRUST GUARD", "SECURITY VERIFIED", "BUSINESS VERIFIED", "VISA", "DISCOVER", "FedEx Express", "ups", and "UNITED STATES POSTAL SERVICE®". A "Shop Online with Confidence" badge is also present. At the bottom of the page, there are links for "Terms & Conditions", "Privacy Policy", and "Contact Us", along with the copyright notice "© 2017 Vitx Mood Plus".

19 McKenney Dec., PX 10, Appx. at 168-69, ¶ 19 & Att. H, at 280-283; Appx. at 177-78, ¶¶ 42 and 4 & Att. I, at 313-316; Appx. at 185-86, ¶ 67 and 68 & Att. J, at 335-40; Appx. at 191, ¶ 84 & Att. K, at 361-68.

1 Defendants' prominent claim on this page that consumers' orders are not  
2 complete is false. By entering their billing information and clicking the button on  
3 the payments page, consumers have in fact completed their order of the initial trial  
4 product, and they will receive that trial regardless of what they do on this page.<sup>20</sup>  
5 Rather than completing their checkout, clicking the "COMPLETE CHECKOUT"  
6 button results in consumers being shipped an additional product – in the example  
7 above, Vitamood+.<sup>21</sup> Defendants then charge consumers the full price of this  
8 product – nearly \$80 – 18 days later.<sup>22</sup> Defendants also enroll consumers in a  
9 second continuity program that includes monthly shipments of, and charges for, the  
10 second product.<sup>23</sup>  
11  
12  
13  
14

15 As with their initial "risk free" trials, Defendants inadequately disclose these  
16 important terms. They do so only in tiny, faint font, far from the brightly colored  
17 "COMPLETE CHECKOUT" button.<sup>24</sup> For example, in the image above, the  
18 miniscule disclosure at the bottom of the image reads in pertinent part:  
19  
20  
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22 <sup>20</sup> As shown in the image above, this additional product also carries with it its own  
23 pre-selected "Protect Package" fee of \$6.95. Consumers will be charged this  
24 additional fee unless they uncheck the pre-checked box. McKenney Dec., PX 10,  
25 Appx. at 168-69, ¶ 19 & Att. H, at 280-283; Appx. at 177-78, ¶43 & Att. I, at 313;  
Appx. at 186, ¶ 68 & Att. J, at 335.

26 <sup>21</sup> McKenney Dec., PX 10, Appx. at 168-69, ¶ 19 & Att. H, at 280-83.

27 <sup>22</sup> *Id.*

28 <sup>23</sup> *Id.*

<sup>24</sup> *Id.*

1 By placing an order you will be enrolled in our membership program.  
2 This program will charge \$0.00 today and \$ 79.31 for your trial full-  
3 size product on the 18th day if you do not call to cancel the  
4 membership. You will receive a full-size bottle of the product for \$  
5 79.31 (S&H included) every 30 days thereafter until you cancel.<sup>25</sup>

6 Consumers are unlikely to see these inadequately disclosed terms, and thus  
7 do not understand that, when they click “COMPLETE CHECKOUT,” Defendants  
8 will send and bill them for an additional product.<sup>26</sup> The only way consumers can  
9 avoid the additional charges would be to find, understand, and click on another  
10 tiny, faint hyperlink that in the image above states, “No, I don’t want to improve  
11 my mood.”<sup>27</sup> But because consumers do not understand that they will receive and  
12 be charged for an additional product, they would have no reason to click this link.  
13 Regardless of whether consumers find and click this link or click to “COMPLETE  
14 CHECKOUT,” Defendants redirect them to a series of web pages that make  
15 similar deceptive offers of additional products.<sup>28</sup>

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22 <sup>25</sup> *Id.*

23 <sup>26</sup> *Id.*; Lawhorn Dec., PX 4, Appx. at 64, ¶ 5.

24 <sup>27</sup> McKenney Dec., PX 10, Appx. at 168-69, ¶ 19 & Att. H, at 280-283; Appx.  
25 at 177-78, ¶¶ 42 and 43 & Att. I, at 313-316; Appx. at 185-86, ¶ 67 and 68 & Att.  
26 J, at 335-40; Appx. at 191, ¶ 84 & Att. K, at 361-68.

27 <sup>28</sup> *Id.* Appx. at 169-70, ¶ 21-23 & Att. H, at 284-290; Appx. at 177-78, ¶¶ 43-  
28 46 & Att. I, at 313-316; Appx. at 185-86, ¶ 68-71 & Att. J, at 335-40; Appx. at  
192, ¶ 86 & Att. K, at 361-68.

1                   **C. Defendants’ Restrictive Cancellation and Refund Practices**

2                   Consumers typically discover Defendants’ deception only after they receive  
3 the unordered products and their accounts have been charged.<sup>29</sup> They then have  
4 difficulty canceling and avoiding further charges.<sup>30</sup> Those who call or email  
5 Defendants often have difficulty reaching Defendants’ customer service  
6 representatives, despite attempting to contact Defendants numerous times.<sup>31</sup>  
7  
8 Consumers who do reach a customer service representative to request cancellation  
9 report that they often continue to receive and be charged for shipments of  
10 Defendants’ products even after cancelling.<sup>32</sup>  
11

12  
13                   Defendants also make it extremely difficult for consumers to obtain refunds.  
14 If consumers seek a refund more than 30 days after ordering the “free trial,” they  
15 are denied a refund because such requests must be made within 30 days.<sup>33</sup> Where  
16 the refund period has not lapsed, Defendants tell consumers they can only get a full  
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22 <sup>29</sup> Clark Dec., PX 1, Appx. at 5, ¶¶ 6 and 7; Landreau Dec., PX 3, Appx. at 30-  
23 31, ¶¶ 5 and 6; Mack Dec., PX 5, Appx. at 87, ¶ 6 ; McCallum Dec., PX 6, Appx.  
24 at 97-98, ¶¶ 5 and 6.

25 <sup>30</sup> Fabbri Dec., PX 2, Appx. at 22, ¶¶ 4-5 ; Landreau Dec., PX 3, Appx. at  
26 31, ¶ 6; Mack Dec., PX 5, Appx. at 87, ¶ 8.

27 <sup>31</sup> Pollard Dec., PX 7, Appx. at 115, ¶ 11.

28 <sup>32</sup> McKenney Dec., PX 10, Appx. at 179-80, ¶ 51-53.

<sup>33</sup> Mack Dec., PX 5, Appx. at 9, ¶ 9 (consumer offered half refund only for  
more recent of two bottles).

1 refund if they return the trial product at their own expense.<sup>34</sup> But even if  
2 consumers return the trial product within the refund period, they often are denied a  
3 refund because Defendants purport to have never received the product.<sup>35</sup>  
4

5         Once Defendants have denied them a refund, many consumers attempt to get  
6 their money back by initiating chargebacks, otherwise disputing charges with their  
7 credit card companies or cancelling the credit card or other billing account  
8 altogether to avoid further unauthorized charges.<sup>36</sup> Other consumers complain to  
9 the BBB or a government agency, which often prompts Defendants to issue a  
10 refund, even if one had been denied previously.<sup>37</sup> Even in those instances,  
11 however, Defendants frequently refund only the monthly continuity program  
12 charges and refuse to issue refunds for the initial trial.<sup>38</sup>  
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18 <sup>34</sup> Fabbri Dec., PX 2, Appx. at 23, ¶ 7; Landreau Dec., PX 3, Appx. at 31-  
19 32, ¶¶ 8, 12; Pollard Dec., PX 7, Appx. at 115, ¶ 12.

20 <sup>35</sup> McCraner Dec., PX 9, Appx. 150-51, ¶¶ 9 and 10. Defendants also refuse to  
21 refund consumers the shipping and handling charges or inadequately disclosed  
22 “package protection” fees associated with their trials, even when the consumer  
23 cancels before any product is actually shipped. Ulmer Dec., PX 8, Appx. at 136-  
24 37, ¶¶ 5-9; Landreau Dec., PX 3, Appx. at 32, ¶ 11.

25 <sup>36</sup> Mack Dec., PX 5, Appx. at 88-89, ¶ 11; Pollard Dec., PX 7, Appx. at 117,  
26 ¶¶ 18-19.

27 <sup>37</sup> Fabbri Dec., PX 2, Appx. at 23, ¶¶ 9-10; Landreau Dec., PX 3, Appx.  
28 at 33, ¶¶ 14-15; Ulmer Dec., PX 8, Appx. at 137, ¶ 6-8.

<sup>38</sup> Landreau Dec., PX 3, Appx. at 33, ¶ 16; Lawhorn Dec., PX 4, Appx. at 65-  
66, ¶ 8, 14; Mack Dec., PX 5, Appx. at 88-89, ¶ 11; Ulmer Dec., PX 8, Appx. at  
137, ¶ 10.

1 Not surprisingly, hundreds of consumers have complained to the BBB about  
2 defendants' deceptive practices.<sup>39</sup>

### 3 **III. Defendants**

4 Defendant **Brian Phillips** controls this enterprise, operating it through  
5 Defendants **Triangle Media Corporation, Hardwire Interactive Inc.**, and a  
6 series of shell companies, including Defendant **Jasper Rain Marketing LLC**.  
7 Triangle Media and Hardwire Interactive control the websites where Defendants  
8 deceptively market their trial offers.<sup>40</sup> Defendants charge consumers for the trials  
9 and continuity plan shipments through one of Phillips's many shell companies and  
10 then ultimately funnel the proceeds back to Triangle Media, which is the hub of  
11 this enterprise.<sup>41</sup>

12 For example, consumers who order the trials are charged using payment  
13 processing accounts set up in the names of one of the shell companies.<sup>42</sup> The  
14 payments are deposited into the shell's checking account, which is controlled by  
15

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21 <sup>39</sup> McKenney Dec., PX 10, Appx. at 227, ¶¶ 157-161; Fabbricante Dec., PX 2,  
22 Appx. at 23, ¶ 9; Landreau Dec., PX 3, Appx. at 32, ¶ 13; Mack Dec., PX 5, Appx.  
23 at 89, ¶ 12; Ulmer Dec., PX 8, Appx. at 114, ¶ 7.

24 <sup>40</sup> On behalf of Hardwire Interactive, Triangle Media has registered the various  
25 websites where Defendants market and sell their deceptive trial offers, often under  
26 their brand names Phenom Health, Beauty and Truth, and E-Cigs. McKenney  
27 Dec., PX 10, Appx. at 210-13, ¶¶ 132-134.

28 <sup>41</sup> McKenney Dec., PX 10, Appx. at 171, ¶ 27; Appx. at 214-16, ¶¶ 136-38;  
Appx. at 219-20, ¶¶ 144-47.

<sup>42</sup> McKenney Dec., PX 10, Appx. 171, ¶ 27; Appx. at 214-16, ¶¶ 136-38.

1 Phillips.<sup>43</sup> He then transfers the proceeds from the shell companies to Defendant  
2 Triangle Media.<sup>44</sup> Triangle Media then pays the operation’s expenses, including  
3 customer service, phone numbers, and other expenses incurred by Phillips.<sup>45</sup> In  
4 addition to collecting consumer payments, Triangle Media also receives substantial  
5 sums from Defendant Hardwire Interactive before transferring tens of millions of  
6 dollars offshore.<sup>46</sup>  
7  
8

9 A classic common enterprise exists among Defendants Triangle Media,  
10 Hardwire Interactive, and Jasper Rain, all of whom, as described above, engage in  
11 a common scheme under Phillip’s control. “Where one or more corporate entities  
12 operate as a common enterprise, each may be held liable for the deceptive acts and  
13 practices of the others.” *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993,  
14 1011 (N.D. Ind. 2000), *aff’d* 312 F.3d 259 (7th Cir. 2002); *see also* *FTC v. John*  
15 *Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1082 (C.D. Cal. 2013) (quoting  
16 *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964) (when individuals  
17 transact business through a “maze of interrelated companies,” the whole enterprise  
18 is liable as a joint enterprise)); *FTC v. J.K. Publ’ns, Inc.*, 99 F. Supp. 2d 1176,  
19 1202 (C.D. Cal. 2000). A common enterprise can be demonstrated by the  
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25 <sup>43</sup> *Id.*, Appx. 216-19, ¶¶ 139-143; Appx. at 219-20, ¶¶ 144-47.

26 <sup>44</sup> *Id.*, Appx. 219-20, ¶¶ 144-47; Appx. 220-23, ¶¶ 148-152.

27 <sup>45</sup> *Id.*, Appx. 220-23, ¶¶ 148-152.

28 <sup>46</sup> *Id.*, Appx. 220-23, ¶¶ 150 and 151.

1 existence of a maze of interrelated companies, the commingling of corporate funds,  
2 unified advertising, and sharing of resources and staff. *J.K. Publ'ns*, 99 F. Supp.  
3 2d at 1202.

4  
5 Here, the Defendant companies commingle funds,<sup>47</sup> share common  
6 personnel and customer service operations,<sup>48</sup> are commonly controlled,<sup>49</sup> and  
7 engage in a common scheme.<sup>50</sup> Although Defendants' shell companies, including  
8 Jasper Rain, list mail drops as their business addresses,<sup>51</sup> they are actually operated  
9 by Triangle Media from Triangle Media's business locations.<sup>52</sup> The principals of  
10 Hardwire Interactive and Jasper Rain are employees of Triangle Media.<sup>53</sup> As a  
11 result, the entities are jointly and severally liable for the conduct of the enterprise.  
12  
13

#### 14 **IV. Argument**

15  
16 Defendants' deceptive scheme violates Section 5(a) of the FTC Act, 15  
17 U.S.C. § 45(a), Section 4 of ROSCA, 15 U.S.C. § 8403, Section 907(a) of the  
18 Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693e(a), and Section  
19 1005.10(b) of Regulation E, 12 C.F.R. § 1005.10(b). To prevent any further injury  
20  
21

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22 <sup>47</sup> McKenney Dec., PX 10, Appx. at 216-23, ¶¶ 139-152.

23 <sup>48</sup> *Id.*, Appx. at 207-13, ¶¶ 127-135; Appx. at 223-24, ¶ 153.

24 <sup>49</sup> *Id.*, Appx. at 214-22, ¶¶ 136-152

25 <sup>50</sup> *Id.*, Appx. at 207-27, ¶¶ 127-156.

26 <sup>51</sup> *Id.*, Appx. at 224-26, ¶ 154.

27 <sup>52</sup> *Id.*, Appx. at 207-27, ¶¶ 127-156.

28 <sup>53</sup> *Id.*, Appx. at 163, ¶¶ 6 and 7; Appx. at 164, ¶¶ 9 and 10; Appx. at 224,  
¶ 153.

1 to consumers, the FTC asks that the Court issue *ex parte* the proposed TRO. This  
2 order would enjoin Defendants’ ongoing law violations and would provide other  
3 equitable relief designed to preserve the Court’s ability to provide restitution to  
4 victims at the conclusion of the case.  
5

6 **A. This Court Has the Power to Grant the Requested Relief**

7  
8 Section 13(b) of the FTC Act authorizes the Commission to seek, and this  
9 Court to issue, temporary, preliminary, and permanent injunctions. 15 U.S.C.  
10 § 53(b). Once the Commission invokes the court’s equitable powers, the full  
11 breadth of the court’s authority is available, including the power to grant such  
12 ancillary final relief as an asset freeze to preserve assets for eventual restitution to  
13 victims. *FTC v. Pantron I Corp.*, 33 F. 3d 1088, 1102 (9th Cir. 1994); *FTC v. H.N.*  
14 *Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982). Federal courts in this district  
15 and elsewhere have routinely granted *ex parte* TROs with asset freezes in FTC  
16 cases,<sup>54</sup> including in FTC cases brought against online rebilling schemes like  
17 Defendants’ operation.<sup>55</sup>  
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22 <sup>54</sup> See e.g., *FTC v. Membership Servs., Inc.*, 01-cv1868 (S.D. Cal. Oct. 17,  
23 2001); *FTC v. National Art Pubs. & Distribs., Inc.*, CV-94-0518 (S.D. Cal. Apr. 5,  
24 1994); *FTC v. Pac. Med. Clinics*, CV-90-1277 (S.D. Cal. Sept. 19, 1990); *FTC v.*  
25 *Properties Int’l*, CV-90-756 (S.D. Cal. June 6, 1990). In addition to the Southern  
26 District of California, other districts in the Ninth Circuit routinely grant *ex parte*  
27 TROs like the one proposed here. See, e.g., *FTC v. AI DocPrep Inc.*, CV-17-  
28 07044 (C.D. Cal. Sept. 28, 2017); *FTC v. Alliance Document Prep.*, CV-17-7048  
(C.D. Cal. Sept. 28, 2017); *FTC v. M&T Fin. Group*, CV-17-6855 (C.D. Cal. Sept.  
19, 2017); *FTC v. Good Ebusiness, LLC*, CV-16-1048-ODW (C.D. Cal. Feb. 16,

1           **B.     The FTC Meets the Standard for Issuance of a Temporary**  
2           **Restraining Order**

3           A temporary restraining order is appropriate once the FTC shows (1) a  
4 likelihood of success on the merits and (2) that the equities weigh in the FTC’s  
5 favor. *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999) (citing  
6 *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984)). Unlike  
7 private litigants, the FTC need not prove irreparable harm. *See id.*; *FTC v. World*  
8 *Wide Factors, Ltd.*, 882 F.2d 344, 346 (9th Cir. 1989). As demonstrated below,  
9 the FTC has demonstrated that it will succeed on the merits of its claims and that  
10 the balance of the equities favors injunctive relief.  
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14           **1.     The FTC is Likely to Succeed on the Merits**

15           To demonstrate that it is likely to succeed on the merits, the FTC need only  
16 present evidence that it has “some chance of probable success.” *World Wide*  
17 *Factors*, 882 F.3d at 347 (citation omitted). Here, the overwhelming evidence  
18 shows that: (1) Defendants engage in unfair and deceptive practices that violate  
19 Section 5(a) of the FTC Act; (2) Defendants make unauthorized charges on  
20  
21

22 2016); *FTC v. Telestar Consulting, Inc.*, CV-16-555-SJO (SSx) (C.D. Cal. Feb. 1,  
23 2016); *FTC v. BAM Fin., LLC*, SACV15-01672 (C.D. Cal. Oct. 21, 2015); *FTC v.*  
24 *Sale Slash, LLC*, SACV15-3107 (C.D. Cal. Apr. 27, 2015); *FTC v. Wealth*  
25 *Educators, LLC*, SACV15-2357 (C.D. Cal. Apr. 6, 2015); *FTC v. Grant Connect,*  
*LLC*, No. 09-01349 (D. Nev. July 28, 2009).

26 <sup>55</sup> *See, e.g., FTC v. RevMountain, LLC*, 17-cv-02000-APG-GWF (D. Nev. July  
27 24, 2017) (*ex parte* TRO in ROSCA case); *FTC v. Bunzai Media Group, Inc.*, No.  
28 CV15-C4527-GW (PLAx) (C.D. Cal. June 15, 2015) (same); *FTC v. Health*  
*Formulas, LLC*, No. 2:14-cv-01649 (D. Nev. Oct. 9, 2014) (same).

1 consumers' credit and debit cards in violation of ROSCA; and (3) Defendants  
2 make unauthorized deductions from consumers' bank accounts in violation of  
3 EFTA and Regulation E. The evidence also shows that Defendant Phillips is  
4 individually liable for these practices. Accordingly, the FTC is likely to succeed  
5 on the merits of its claims.  
6

7  
8 **a. Defendants Are Violating the FTC Act**

9 Defendants' online marketing practices violate Section 5(a) of the FTC Act,  
10 which prohibits "unfair or deceptive acts or practices in or affecting commerce."  
11 15 U.S.C. § 45(a). Defendants' practices are both deceptive and unfair.  
12

13 **i. Defendants' Practices Are Deceptive Under the**  
14 **FTC Act**

15 An act or practice is deceptive if it involves a material misrepresentation or  
16 omission that is likely to mislead consumers acting reasonably under the  
17 circumstances. *See FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1199 (9th Cir.  
18 2006); *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001); *Pantron I*, 33 F.3d at 1095.  
19 A representation or omission is material if it "involves information that is likely to  
20 affect a consumer's choice of, or conduct regarding, a product or service."  
21 *Cyberspace.com*, 453 F.3d at 1201 (quoting deception standard set forth in *In re*  
22 *Cliffdale Assocs.*, 103 F.T.C. 110, 164-65 (1984)). Express claims, or deliberately  
23 made implied claims, used to induce the purchase of a particular product or service  
24 are presumed to be material. *Pantron I*, 33 F.3d at 1096.  
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1 In determining whether a practice is likely to mislead consumers acting  
2 reasonably, the Court determines the overall “net impression” that Defendants’  
3 representations make upon consumers. *Cyberspace.com*, 453 F.3d at 1200. Fine-  
4 print disclosures do not overcome a deceptive net impression. *See*  
5 *Cyberspace.com*, No. C00-1806L, 2002 U.S. Dist. LEXIS 25564, \*8-9 (W.D.  
6 Wash. July 10, 2002) (holding that a fine print disclosure was inadequate to escape  
7 liability), *aff’d*, 453 F.3d at 1200 (collecting cases where deception found because  
8 fine print disclosures were inadequate). Consumer reliance upon express claims is  
9 presumptively reasonable. *FTC v. Five-Star Audio Club, Inc.*, 97 F. Supp. 2d 502,  
10 528 (S.D.N.Y. 2000) (citation omitted).  
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15 Here, Defendants have materially misled consumers about their “risk free”  
16 trials in at least three ways. First, Defendants misrepresent the price of the trial  
17 offer. Defendants falsely state that the consumer will only pay for shipping and  
18 handling, typically \$4.95, to receive a trial of Defendants’ product. In reality,  
19 Defendants’ charge consumers the full price, up to \$98.71, for a 30-day supply of  
20 the product. This express representation is presumed to be material because it  
21 influenced the consumer’s decision to order a trial of Defendants’ product. *FTC*  
22 *Policy Statement on Deception*, 103 F.T.C. 175, 182 (1983); *Kraft, Inc. v. FTC*,  
23 970 F.2d 311, 322 (7th Cir. 1992).  
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1 Second, Defendants misrepresent to consumers who have ordered a trial of  
2 Defendants' product that the order is not complete until they click a "COMPLETE  
3 ORDER" button or take further action. In fact, the consumer's order is already  
4 complete before they click the "COMPLETE ORDER" button. This  
5 misrepresentation causes consumers to unwittingly order an additional product, to  
6 thereby incur additional charges, and be enrolled in yet another continuity  
7 program.  
8

9  
10 Third, Defendants fail to adequately disclose several material terms of their  
11 purported "trial offer" including: (1) the total cost of the product; (2) that  
12 consumers will be charged the full cost of the trial product after 15 days; (3) that  
13 the consumer is automatically enrolled in a continuity program; and (4) the total  
14 cost of the continuity program and the frequency and duration of the recurring  
15 charges.  
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19 **ii. Defendants Also Violate the FTC Act by**  
20 **Unfairly Billing Consumers Without**  
21 **Authorization**

22 An act or practice is unfair if it causes, or is likely to cause, substantial  
23 injury to consumers that is not reasonably avoidable and is not outweighed by  
24 countervailing benefits to consumers or competition. *FTC v. Neovi*, 604 F.3d  
25 1150, 1153 (9th Cir. 2010). Substantial injury may consist of "small harm to a  
26 large number of people" or "a significant risk of concrete harm." *Id.* at 1157.  
27  
28

1 Courts routinely find substantial injury where a defendant has billed consumers for  
2 charges they did not authorize. *See e.g., Neovi*, 604 F.3d at 1157; *FTC v. Ideal*  
3 *Fin. Sols.*, No: 2:13-cv-00143-JAD-GWF, 2015 U.S. Dist. LEXIS 86348, at \*30  
4 (D. Nev. June 29, 2015) (“[T]aking consumers’ funds without authorization causes  
5 substantial injury, even when the amount taken is relatively small.”).

6  
7 Here, hundreds of consumers have complained about Defendants’  
8 unauthorized charges ranging from \$2.95 to \$98.71.<sup>56</sup> This fact alone proves  
9 substantial injury. *See, e.g., FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1115 (S.D.  
10 Cal. 2008) (substantial injury resulted from unauthorized charges to tens of  
11 thousands of customers), *aff’d*, 604 F.3d 1150 (9th Cir. 2010); *FTC v. Windward*  
12 *Mktg.*, No. 1:96-CV-615F, 1997 U.S. Dist. LEXIS 17114, at \*31 (N.D. Ga. Sep.  
13 30, 1997) (harm to large number of consumers sufficient to establish substantial  
14 injury). And “the time spent pursuing refunds constitutes additional injury” to  
15 consumers. *FTC v. Amazon.com, Inc.*, No. C14-1038-JCC, 2016 U.S. Dist. LEXIS  
16 55569, at \*17 (W.D. Wash. April 26, 2016).

17  
18 Further, the injury was not reasonably avoidable. Injury is not reasonably  
19 avoidable unless consumers have a “free and informed choice” to avoid the harm.  
20 *Neovi*, 604 F.3d at 1158. Where, as here, consumers have been billed for charges  
21 they did not authorize, courts regularly find that consumers did not have a choice

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28 <sup>56</sup> McKenney Dec., PX 10, Appx. at 227, ¶¶ 157-61.

1 to avoid the injury before it occurred. *See e.g., Neovi*, 598 F. Supp. 2d at 1116;  
2 *FTC v. Inc21.com*, 745 F. Supp. 2d 975, 1004 (N.D. Cal. 2010) (“As other courts  
3 have wisely concluded, the burden should not be placed on defrauded customers to  
4 avoid charges that were never authorized to begin with.”).

6 Finally, unauthorized billing does not produce any offsetting benefits to  
7 consumers or competition that outweigh the consumer injury. *See, e.g., Amazon*,  
8 2016 U.S. Dist. LEXIS 55569, at \*22 (in unauthorized billing case, “cost–benefit  
9 prong . . . easily satisfied”); *Inc21.com*, 745 F. Supp. 2d at 1004 (“[I]t cannot be  
10 said that defendants’ ‘customers’ benefitted at all from services that they never  
11 agreed to purchase, didn’t know were being provided to them, and never wanted in  
12 the first place.”). The cost of Defendants’ practice of charging consumers without  
13 authorization, on the other hand, is significant and concrete: monetary loss to  
14 consumers in the millions of dollars.

18  
19 **b. Defendants’ Undisclosed, Unauthorized Charges**  
20 **Violate ROSCA**

21 Defendants’ billing practices also violate ROSCA. ROSCA prohibits  
22 charging consumers for goods or services sold online through a negative option  
23 feature like Defendants’ continuity plans, unless the seller meets certain  
24 conditions. Specifically, section 4 of ROSCA, 15 U.S.C. § 8403, requires that the  
25 seller (1) clearly and conspicuously disclose all material terms of the transaction  
26 before obtaining the consumer’s billing information, (2) obtain the consumer’s  
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1 express informed consent before making the charge, and (3) provide a simple  
2 mechanism to stop recurring charges.

3           Defendants violate ROSCA in three ways. First, Defendants fail to disclose  
4 clearly and conspicuously the material terms of their continuity plans before  
5 obtaining consumers' billing information. Instead, their terms, as another court in  
6 this Circuit described similarly inadequate disclosures, "are either buried in fine  
7 print on the payment page . . . or are stated in Terms and Conditions documents  
8 that consumers are not required to read." *See FTC v. Health Formulas, LLC*, No.  
9 2:14-cv-01649, 2015 U.S. Dist. LEXIS 59387, at \*48 (D. Nev. May 6, 2015); *cf.*  
10 *Barrer v. Chase Bank United States, N.A.*, 566 F.3d 883, 892 (9th Cir. 2009)  
11 ("clear and conspicuous disclosures" are disclosures that a reasonable consumer  
12 "would notice and understand").

13           Second, Defendants routinely charge consumers' accounts on a monthly  
14 basis as part of a continuity plan without obtaining their express informed consent.  
15 Because Defendants have not disclosed to consumers the material terms of their  
16 offers, they do not obtain consumers' express informed consent before charging  
17 them. *Health Formulas, LLC*, No. 2:14-cv-01649, 2015 U.S. Dist. LEXIS 59387,  
18 at \*48. Moreover, after violating ROSCA in connection with the initial "trial"  
19 offer, Defendants violate it again by failing to obtain express informed consent to  
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1 the additional charges resulting from Defendants’ deceptive order completion  
2 page.

3 Third, Defendants fail to provide a simple mechanism for cancelling the  
4 continuity plan.<sup>57</sup> See *Health Formulas, LLC*, 2015 U.S. Dist. LEXIS 59387 at  
5 \*49. Even when consumers do figure out the process to cancel, they report  
6 difficulty in reaching Defendants’ representatives, and are charged even after they  
7 have cancelled.<sup>58</sup>

8  
9  
10 **c. Defendants’ Unauthorized Debits also Violate the**  
11 **Electronic Fund Transfer Act and Regulation E**

12 The EFTA and its implementing Regulation E regulate the circumstances  
13 under which a merchant may make regularly recurring debits from a consumer’s  
14 bank account. EFTA and Regulation E require that before a merchant may make  
15 such recurring debits, it must obtain a written authorization signed or similarly  
16 authenticated by the consumer. 15 U.S.C. § 1693e(a); 12 C.F.R. § 205.10(b). For  
17 an authorization to be valid, the terms of the preauthorization transfer must be  
18 “clear and readily understandable” and the authorization “should evidence the  
19 consumer’s identity and assent to the authorization.” *Consumer Financial*  
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22

23  
24 <sup>57</sup> McKenney Dec., PX 10, Appx. at 172-174, ¶¶ 30-35; Appx. at 179-182,  
¶¶ 51- 59; Appx. at 194-96, ¶¶ 93-97.

25 <sup>58</sup> *Id.*; Clark Dec., PX 1, Appx. at 5-6, ¶¶ 7-11; Fabbriante Dec., PX 2, Appx.  
26 at 22-23, ¶¶ 3-10; Lawhorn Dec., PX 4, Appx. at 64-66, ¶¶ 6-13; Mack Dec., PX 5,  
27 Appx. 87-89, ¶¶ 8-11; McCallum Dec., PX 6, Appx. at 98-99, ¶¶ 7-9; Pollard Dec.,  
28 PX 7, Appx. 115-16, ¶¶ 10-15; Ulmer Dec., PX 8, Appx. at 136-37, ¶¶ 4-5;  
McCraner Dec., PX 9, Appx. 148-51, ¶¶ 5-10.

1 *Protection Board's Official Staff Commentary to Regulation E*, 12 C.F.R. Part 205,  
2 Supp. I, ¶ 10(b), comments (5) & (6). Moreover, a copy of the authorization must  
3 be provided to the consumer. 15 U.S.C. § 1693e(a); 12 C.F.R. § 205.10(b). These  
4 protections ensure that consumers' consent to recurring debits will be knowing and  
5 informed. A consumer's rights under EFTA cannot be waived. 15 U.S.C. § 1693l.

6  
7 Defendants' business practices fail to comply with EFTA. Because  
8 Defendants do not adequately disclose the terms of their continuity plan and that  
9 consumers will be charged monthly, consumers did not knowingly authorize  
10 Defendants to make recurring debits from their bank accounts.<sup>59</sup> Moreover,  
11 consumers do not receive a copy of any purported authorization for debits to their  
12 bank accounts.<sup>60</sup>

## 13 **2. The Balance of Equities Strongly Favors Injunctive Relief**

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17 Once the FTC has shown a likelihood of success on the merits, the Court  
18 must balance the equities, giving far greater weight to the public interest than any  
19 of Defendants' private concerns. *See Affordable Media*, 179 F.3d at 1236; *World*  
20 *Wide Factors*, 882 F.2d at 347. Here, there is a strong public interest in stopping  
21 Defendants' deceptive scheme and preserving assets for a meaningful monetary

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24 <sup>59</sup> McKenney Dec., PX 10, Appx. at 167, ¶ 16 & Att. H, at 278-279; Appx. at  
25 176-77, ¶ 40 & Att. I, at 312; Appx. at 184-85, ¶ 65 & Att. J, at 334; Appx. at 190-  
26 91, ¶ 82 & Att. K, at 360; Appx. at 196-97, ¶ 100 & Att. L, at 379-80; Appx. at  
27 199, ¶ 105 & Att. M, at 401-02; Appx. at 201-02, ¶ 111 & Att. N, at 435-37; Appx.  
28 at 204, ¶ 119 & Att. O, at 483-85; Appx. at 206, ¶ 126 & Att. P at 507-08.

<sup>60</sup> *Id.*

1 remedy for consumers. Defendants, in contrast, have no legitimate interest in  
2 continuing to deceive consumers, and compliance with the law is hardly an  
3 unreasonable burden. *See World Wide Factors*, 882 F.2d at 347 (“[T]here is no  
4 oppressive hardship to defendants in requiring them to comply with the FTC Act,  
5 refrain from fraudulent representation or preserve their assets from dissipation or  
6 concealment.”).

### 9           **3. Defendant Phillips is Individually Liable for Defendants’** 10           **Practices**

11           Defendant Phillips is individually responsible for Defendants’ illegal  
12 activity. Once the FTC establishes corporate liability, an individual may be held  
13 jointly and severally liable under the FTC Act where he (1) participated directly in  
14 or had some measure of control over a corporation’s deceptive practices, and  
15 (2) knew or should have known of the deceptive practices. *FTC v. Stefanichik*, 559  
16 F.3d 924, 931 (9th Cir. 2009). Authority to control can arise from “active  
17 participation in corporate affairs, including assuming the duties of a corporate  
18 officer.” *FTC v. Amy Travel Serv. Inc.*, 875 F.2d 564, 573 (7th Cir. 1989).

19 Likewise, the FTC can show that an individual knew or should have known of  
20 corporate defendants’ activities if the individual was a principal owner or officer,  
21 controlled the business’s finances, or oversaw its activities. *Amy Travel*, 875 F.2d  
22 at 574-75; *see Affordable Media*, 179 F.3d at 1234 (“The extent of an individual’s  
23 involvement in a fraudulent scheme alone is sufficient to establish the requisite  
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1 knowledge for personal restitutionary liability.”). The FTC is not required to  
2 demonstrate subjective intent to defraud. *FTC v. Publ’g Clearing House*, 104 F.3d  
3 1168, 1171 (9th Cir. 1997).

4  
5 Here, Phillips runs Defendants’ deceptive scheme. He is the sole officer of  
6 Triangle Media.<sup>61</sup> He is a signatory on dozens of bank accounts related to the  
7 scheme, including those that are nominally held by the shell companies,<sup>62</sup> and is  
8 listed on the applications for several merchant processing accounts to bill  
9 consumers’ credit and debit cards.<sup>63</sup> He also registered and paid for the website  
10 used to track Defendants’ illegal marketing tactics.<sup>64</sup> Courts routinely find  
11 individual liability in such circumstances. *See FTC v. DiscountMetalBrokers, Inc.*,  
12 No. 2:16-cv-2112-ODW(JC), 2017 U.S. Dist. LEXIS 164878, at \*14-15 (Oct. 4,  
13 2017); *FTC v. Mortg. Relief Advocates*, No. CV-14-5434-MWF (AGRx), 2015  
14 U.S. Dist. LEXIS 18609, at \*17 (C.D. Cal. July 1, 2015).

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19 **C. The Scope of the Proposed Temporary Restraining Order is**  
20 **Necessary and Appropriate**

21 The evidence shows that the FTC is likely to succeed in showing that  
22 Defendants violated the law, and the balance of the equities weighs in the FTC’s  
23 favor. The FTC therefore requests that the Court issue a TRO that prohibits future  
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26 <sup>61</sup> McKenney Dec., PX 10, Appx. at 162, ¶¶ 4 and 5.

27 <sup>62</sup> *Id.*, Appx. at 216-20, ¶¶ 139-47.

28 <sup>63</sup> *Id.*, Appx. at 214-16, ¶¶ 136-38.

<sup>64</sup> McKenney Dec., PX 10, Appx. at 213, ¶ 135.

1 law violations,<sup>65</sup> preserves assets for eventual restitution to victims, and imposes a  
2 temporary receivership over the corporate defendants.<sup>66</sup> Such an order is well  
3 within the Court’s authority.  
4

5 Courts have authority under 15 U.S.C. § 53(b) to impose an asset freeze to  
6 preserve the possibility of providing restitution to victimized consumers. *See, e.g.,*  
7 *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112-13 (9th Cir. 1982); *FTC v. Gem*  
8 *Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996); *World Wide Factors*, 882 F.2d at  
9 347; *FTC v. Am. Nat’l Cellular, Inc.*, 810 F.2d 1511, 1514 (9th Cir. 1987) (FTC’s  
10 power to petition for injunctive relief and asset freeze “well established”). An  
11 asset freeze is appropriate here given the deceptive nature of Defendants’ scheme  
12 and the magnitude of financial injury. *See, e.g., SEC v. Manor Nursing Ctrs., Inc.*,  
13 458 F.2d 1082, 1106 (2d Cir. 1972) (“Because of the fraudulent nature of  
14 appellants’ violations, the court could not be assured that appellants would not  
15 waste their assets prior to refunding public investors money.”).  
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20 Defendants have taken tens of millions of dollars from consumers and  
21 already have moved some of those funds offshore. Defendant Hardwire Interactive  
22 is based in the British Virgin Islands and holds its accounts offshore. Triangle  
23 Media also has already transferred millions of dollars in proceeds from the scheme  
24  
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26 <sup>65</sup> Specifically, the requested conduct prohibitions in the proposed TRO require  
27 only that the Defendants comply with the FTC Act, ROSCA, and the EFTA and  
28 Regulation E.

<sup>66</sup> The FTC has filed a proposed TRO concurrently with this application.

1 to Canada.<sup>67</sup> Thus, in the absence of an asset freeze, there is a very real risk that  
2 Defendants will move additional funds offshore, thereby threatening the Court’s  
3 ability to provide eventual restitution to victims.  
4

5 The appointment of a temporary receiver for the Corporate Defendants is  
6 also appropriate. “The district court’s exercise of its equity power in this respect is  
7 particularly necessary in instances in which the corporate defendant, through its  
8 management, has defrauded members of the investing public,” *SEC v. First Fin.*  
9 *Group*, 645 F.2d 429, 438 (5th Cir. 1981). *See In the Matter of McGaughey*, 24  
10 F.3d 904, 907 (7th Cir. 1994) (appointment of receiver is “an especially  
11 appropriate remedy in cases involving fraud and the possible dissipation of  
12 assets”); *see also FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir.  
13 1984). Here, where there is overwhelming evidence that Defendants are engaged  
14 in widespread deception, a receiver could help assess the extent of the fraud,  
15 prepare an accounting, and make an independent report of Defendants’ activities to  
16 the Court. Additionally, a receiver could prevent the destruction of documents and  
17 the dissipation of assets while the case is pending.  
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23 **D. The Temporary Restraining Order Should be Issued *Ex Parte* to**  
24 **Preserve the Court’s Ability to Fashion Meaningful Relief**

25 The requested TRO should be issued *ex parte* to prevent Defendants from  
26 dissipating assets or destroying evidence. *Ex parte* relief is appropriate when  
27

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28 <sup>67</sup> McKenney Dec., PX 10, Appx. at 221, ¶ 150.

1 immediate and irreparable injury, loss, or damage will occur before the defendants  
2 can be heard in opposition. *See* Fed. R. Civ. P. 65(b); *Reno Air Racing Ass’n, Inc.*  
3 *v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006). Courts have routinely granted  
4 the FTC’s requests for *ex parte* TROs in Section 13(b) cases like this one.<sup>68</sup>  
5

6 Here, immediate and irreparable injury will likely result if notice is provided  
7 to Defendants.<sup>69</sup> Given the fraudulent nature of their scheme and strength of the  
8 evidence establishing their liability, Defendants would have every incentive to  
9 dissipate assets and destroy inculpatory evidence if given prior notice of the FTC’s  
10 motion. Indeed, Defendants’ use of multiple shell entities, and Defendant Phillips’  
11 efforts to conceal his association with those entities, demonstrate Defendants’  
12 attempts to evade detection. And Defendants have already transferred tens of  
13 millions of dollars out of the country.<sup>70</sup> For all these reasons, *ex parte* relief is both  
14 appropriate and necessary.  
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21 <sup>68</sup> *See supra* notes 54 and 55.

22 <sup>69</sup> The FTC’s experience has shown that, upon discovery of legal action, many  
23 defendants withdraw funds, destroy vital documents, and flee. *See* Certification  
24 and Declaration of Plaintiff’s Counsel Pursuant to Federal Rule of Civil Procedure  
25 65(b) in Support of Plaintiff’s *Ex Parte* Motion for Temporary Restraining Order  
26 and *Ex Parte* Application to Temporarily Seal Case File. Indeed, When previously  
27 contacted by the BBB regarding one of their shell entities, Defendants promptly  
28 dissolved the entity and continued doing business under a new name. McKenney  
Dec., PX 10, Appx. at 226-27, ¶ 155 and 156 & Att. Y and Z, at 600-611.

<sup>70</sup> McKenney Dec., PX 10, Appx. at 221, ¶ 150.

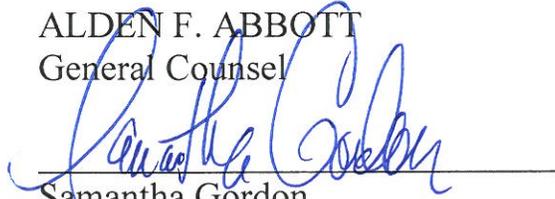
1 **V. Conclusion**

2 For the reasons set forth above, the FTC respectfully requests that the Court  
3 enter the proposed TRO and require that Defendants show cause why a preliminary  
4 injunction should not issue.  
5

6  
7 Dated: June 25, 2018

Respectfully submitted,

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