UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. S.J.A. SOCIETY, INC., doing business as Apex Marketing Group, Atlantic Service Corp., ASC, and Publishers Service, Thomas P. Johnson, individually, and as an officer and director of said corporation, and Thomas Alan Blair, d/b/a Advance Communications, individually, and as general manager of S.J.A. Society, Inc., Defendants.	Civ. No. Judge:

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER, ASSET FREEZE, APPOINTMENT OF RECEIVER, AND OTHER EQUITABLE RELIEF

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I. SUMMARY

Plaintiff Federal Trade Commission (“the FTC” or "Commission") brings this ex parte action to halt defendants' fraudulent telemarketing of magazine subscriptions using false promises of prizes and free magazines, and their abusive collection practices in violation of Section 5(a) of the Federal Trade Commission Act (“FTC Act"), 15 U.S.C. § 45(a), and the Telemarketing Sales Rule, 16 C.F.R. Part 310, and the Fair Debt Collections Practices Act ("FDCPA") 15 U.S.C. § 1692 et seq., respectively. Plaintiff also seeks an asset freeze, the appointment of a receiver, expedited discovery, and other equitable relief, including consumer redress.

Since 1988, defendants S.J.A. Society, Inc., Thomas P. Johnson, and Thomas Alan Blair, doing business as Apex Marketing Group, Atlantic Service Corp., ASC, and Publishers Service ("SJA"), have lured thousands of consumers to its fraudulent telemarketing scheme with false representations concerning its magazine offerings. Defendants' scheme begins with unsolicited telephone calls to consumers in which SJA’s telemarketers make a variety of false representations and claims to induce consumers to pay defendants hundreds of dollars for supposedly free magazines. First, SJA’s representatives falsely tell consumers they have won prizes or cash, or that they will receive free airline tickets. In fact, consumers do not win prizes or cash, and do not receive free airline tickets. Second, SJA telemarketers ask consumers to pay what they characterize as "shipping and handling" charges for supposedly "bonus" "prepaid" magazine subscriptions. In fact, consumers do not pay just shipping and handling charges, but become obligated to purchase magazine subscriptions from defendants at costs in excess of $250 and sometimes reaching nearly $900. Third, defendants falsely tell consumers they may cancel their magazine orders, when, in fact, defendants do not allow cancellations. Fourth, defendants claim that consumers are bound by multi-year contracts and are, therefore, obligated to pay defendants. Because of the Virginia statute of frauds, however, the "contracts” between SJA and consumers are unenforceable, and consumers have no contractual obligation to pay SJA.

Defendants also routinely violate the FDCPA. Consumers who do not pay defendants receive harassing telephone calls, letters, and threats of litigation. SJA relentlessly pursues payment by turning over alleged debts to purported third-party collection agencies. In fact, these debt collectors are defendants' employees. As part of their collection effort, defendants file Warrants in Debt [1] in the General District Court for Virginia Beach, regardless of where the consumers reside, falsely claiming that consumers have failed to meet contractual obligations. Defendants also mail consumers invalid Warrant in Debt forms that have not been issued by the Clerk of the Virginia Beach General District Court. This is a criminal violation of Virginia law. Va Code Ann. 18.2-213.

Because of the egregious nature of defendants' deceptive tactics, the Commission has commenced this action to halt defendants' illegal practices and remedy injuries caused by defendants' law violations. The Commission seeks an ex parte temporary restraining order ("TRO"): (1) enjoining the alleged unlawful practices; (2) appointing a temporary receiver; (3) freezing defendants' assets; (4) permitting expedited discovery; and (5) providing related equitable relief. Only an order including the requested relief will prevent the destruction of documents, preserve assets for consumer redress, and prevent further injury to consumers by immediately halting defendants' deceptive practices. Finally, the Commission seeks an order to show cause why a permanent receiver should not be appointed and why a preliminary injunction should not issue.

II. THE PARTIES

A. The Federal Trade Commission

Plaintiff is an independent agency of the United States government created by the FTC Act, 15 U.S.C. § 41 et seq. It is charged, inter alia, with enforcement of Section 5(a) of the FTC Act, 15 U.S.C.

[1] A Warrant in Debt is a standardized form provided by the Virginia General District Court and used by plaintiffs to initiate small claims actions.

§ 45(a), and the FDCPA, 15 U.S.C. § 1692 l. The Commission is also charged with enforcing Commission Rules, including the Telemarketing Sales Rule. 15 U.S.C. §§ 57b, 6102(c). The Commission is authorized by Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to initiate court proceedings to enjoin violations of the FTC Act and to secure such equitable relief as may be appropriate in each case. FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1434 (11th Cir. 1984); FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1111-13 (9th Cir. 1982). The Commission is authorized by Section 19(b) of the FTC Act, 15 U.S.C. § 57b(b), to commence court proceedings to enjoin violations of the Telemarketing Sales Rule and seek appropriate equitable relief.

B. The Corporate Defendants

S.J.A. Society, Inc. does business as Apex Marketing Group, Atlantic Service Corp., ASC, and Publishers Service. {Exs. 22-25.}[2] SJA was incorporated in Virginia on August 17, 1988 {Ex. 22.} Its corporate headquarters is located at 505 S. Independence Boulevard, Suite 103, Virginia Beach, VA 23452. In its most recent Dun & Bradstreet report, SJA claimed a net worth of approximately $2.5 million, and annual sales of over $2 million, as of December 31, 1995.

C. The Individual Defendants

Thomas P. Johnson ("Johnson") is the president and director of SJA. {Ex. 1, ¶ 3.} He performs all of the duties usually associated with a corporate president, and makes major day-to-day operating decisions. {Ex. 7, ¶ 3.} Thomas Alan Blair ("Blair") has been the general manager and supervisor of SJA, and also has done business telemarketing magazines under the name Advance Communications ("Advance"). Exs. 1, ¶¶ 3, 18 (Advance); 2, ¶¶ 4, 18 (Advance).

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[2] References to Plaintiff's Exhibits are designated "Ex." in this memo.

III. DEFENDANTS HAVE VIOLATED THE FTC ACT, THE TELEMARKETING SALES RULE, AND THE FDCPA

A. Defendants Violate Section 5 of the FTC Act by Falsely Representing That Consumers Have Won a Prize, Pay Only Shipping and Handling Charges, Can Cancel Their Subscriptions, and Are Bound by Legally Enforceable Contracts.

The declarations and other materials submitted to this Court (see Plaintiff's Exhibits in Support of Motion for TRO and Preliminary Injunction) demonstrate that defendants have repeatedly violated Section 5 of the FTC Act , which prohibits unfair or deceptive acts or practices in or affecting commerce, by making misrepresentations concerning their magazine subscriptions and the enforceability of their contracts.[3]

A deceptive act or practice is established if it is shown that defendants made a material representation or omission and that consumer injury resulted. FTC v. Jordan Ashley, 1994-1 Trade Cas. (CCH) ¶ 70,570, 72,096 (S.D. Fla. 1994). An act or practice is deceptive under Section 5 of the FTC Act if it is likely to mislead consumers acting reasonably under the circumstances about a material fact. Cliffdale Assocs., Inc., 103 F.T.C. 110, 164-65, appeal dismissed sub nom. Koven v. FTC, No. 84-5337 (11th Cir. 1984). See also Kraft, Inc. v. FTC, 970 F.2d 311, 314 (7th Cir. 1992); cert. denied, 507 U.S. 909 (1993); FTC v. Amy Travel Service, 874 F.2d 564, 573 (7th Cir. 1989), cert. denied, 493 U.S. 954 (1989); Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431 (9th Cir. 1986), cert. denied, 479 U.S. 828 (1986). A claim is likely to mislead if it is false. Thompson Medical Company, Inc., 104 FTC 648, 818-19 (1984), aff'd 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987).

Express claims or deliberately-made implied claims, likely to induce the purchase of a particular product or service, are presumed to be material.

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[3] Two of SJA's former employees, who worked at SJA in 1996 as telemarketers, have provided declarations. {Exs. 1 and 2.} These declarations confirm that defendants' initial sales pitch alone violates both Section 5 of the FTC Act and the Telemarketing Sales Rule, and the declarations generally substantiate much of the evidence contained in the consumer declarations. Additionally, a copy of defendants' sales script is found at Ex. 17, Attachment 4.

Thompson Medical Company, 104 F.T.C. at 816. See also Kraft, 970 F.2d at 322. Moreover, any representations concerning the price of a product or service are presumptively material. Removatron International Corp., 111 F.T.C. 206, 309 (1988), aff'd, 884 F.2d 1489 (1st Cir. 1989). Even without these presumptions, however, defendants' representations are clearly material because they go to the basic terms of the transaction and unquestionably influence consumer purchasing decisions. It is reasonable for consumers to interpret defendants' claims to mean exactly what they purport to mean. Thompson Medical at 788. Yet, defendants' representations are misleading because they are false. Therefore, they are deceptive in violation of Section 5(a) of the FTC Act.

1. Defendants misrepresent that consumers have won a prize or something of value.

Using fast-paced sales pitches and high-pressure tactics, defendants make a variety of misrepresentations to promote magazine sales. Defendants initially tell consumers they have won or are entitled to receive prizes, cash, free airline tickets, or coupons. Six of the 14 declarants whose declarations have been submitted as exhibits to the FTC's motion for a TRO state that defendants promised the declarants a prize during the sales pitch. {Exs. 9, ¶ 2; 3, ¶ 2; 13, ¶ 2; 5, ¶ 2; 20, ¶ 2; 11, ¶ 2.} Janis Ford, a former employee of the defendants, confirmed that prizes are an essential element of defendants' standard sales pitch. {Ex. 1, ¶ 12.} However, defendants do not provide consumers with prizes, cash, free airline tickets, or coupons. None of the declarants ever received a prize, cash, free airline tickets, or coupons.

Defendants' promise of prizes, cash, etc. is false and is a material inducement to purchase defendants' goods and services. Offering prizes has long been a technique to induce consumers to purchase goods and services. The prize offer, along with defendants' subsequent offer of "bonus" or "prepaid" magazines, are critical to the success of defendants' overall scheme, which is designed to induce consumers to pay money to defendants. Because the prize offer is express, it is presumptively material; because the offer is false, it is deceptive in violation of Section 5 of the FTC Act.

2. Defendants falsely tell consumers they will receive magazines, and only have to pay shipping and handling costs.

In addition to telling consumers they have won a prize, defendants' telemarketers also state that consumers will receive free magazines. Through statements such as "we'll be sending you some bonus magazines, but we're going to prepay them for you" (emphasis supplied), and "everything is taken care of on our end," defendants strongly imply that consumers will receive free magazines. Regardless of the exact terms used, there is no doubt that SJA's sales pitch is carefully crafted to convey the message that the magazines are free. In fact, six of the declarants state categorically that defendants specifically used the phrase "free magazines" in their sales pitch. {Exs. 8, ¶ 3; 11, ¶ ¶ 2,3; 12, ¶ ¶ 2,3; 14, ¶ ¶ 2,3; 16, ¶ ¶ 2,3; 21, ¶ 2.}

There is a catch to defendants' offer, however. After telling consumers they will receive free magazines, defendants ask consumers to pay the company's shipping and handling costs. According to the sales script, defendants tell consumers:

> There's just one small thing that we ask your help with, and that is the marketing, processing and handling cost. That's the only thing we ask you [sic] help with and that's just $2.65 a week.

{Ex. 17, Attachment 4.} The scripts and six of our declarants, {Exs. 8, ¶ 3; 11, ¶ 3; 12, ¶¶ 3,4; 14, ¶ 3; 16, ¶ 3; 21, ¶ 3}, confirm that callers are asked to "help out" the company by paying what SJA's describes as "shipping and handling" charges on the magazines. {Exs. 1, ¶ 7; 2, ¶ 8.} Defendants' telemarketers have quoted amounts ranging from $1.89 per week to $2.65 for these costs. { See e.g., Exs. 8, ¶ 4; 11, ¶ 3; 16, ¶ 3.}[4]

In actuality, defendants' magazine subscriptions are not free, and consumers do not pay just shipping and handling charges; they pay for the supposedly free magazines, and then some. Declarant

[4] Because the magazines are sent directly to consumers from the magazine publishers, defendants would not incur any shipping charges. Furthermore, magazine publishers include these costs in the subscription price.

Mona Zinn, for example, calculated just how much defendants charged for their free magazine subscriptions. Ms. Zinn agreed to receive only "Rolling Stone." Defendants then sent her a confirmation letter indicating she was to receive 26 issues of "Rolling Stone" (and also 12 issues of "Musician" and 10 issues of "American Health," neither of which she had ordered). The letter also informed her that the cost of the three magazine subscriptions was payable in seven monthly installments of $39.31 each, resulting in a total cost of $275.17. However, according to Ms. Zinn, the cost of undiscounted subscriptions to the magazines that are generally available is only $60.88. {Ex. 21, ¶ ¶ 3,7,7.} [5] Based on the foregoing, it is clear that consumers are not receiving free magazines and paying only "shipping and handling" charges as defendants claim, but, rather, are paying much more than the full cost of the magazine subscriptions.

Defendants' claim that consumers pay only shipping and handling charges is express, and, therefore, presumptively material. Furthermore, the claim is material because price claims are likely to influence a consumer's decision to accept an offer of goods or services. In light of defendants' numerous claims that consumers are being sent free magazines, it is reasonable for consumers to interpret defendants' representations that they need only pay what appear to be "nominal" shipping and handling charges as meaning just that. Since the express representations discussed above are false because consumers actually pay far more than mere shipping and handling expenses, they are inherently likely to mislead consumers, and are deceptive under Section 5 of the FTC Act.

3. Defendants misrepresent that consumers can cancel their subscriptions.

Defendants often misrepresent the company's cancellation policy. Some declarants state that during the initial sales call, telemarketers told them they could cancel at any time, { see e.g., Exs. 4, ¶ 4; 8, ¶ 5; 14, ¶ 3; 20, ¶ 3; 21, ¶ 3; see also 1, ¶ 8}, they could cancel at some point within three days, { see e.g., Ex. 8, ¶ 6}, or, in at least one case, they could cancel within three months of receiving their order

[5] See also Zinn Attachments 2, 3, and 4.

confirmation. {Ex.4, ¶ 4.} For example, declarant Cara Hill was told that she "could cancel at any time." {Ex. 14, ¶ 3.} Declarant Tracie Cunningham was told she "could cancel any time within the first three months." {Ex. 4, ¶ 4.} Declarant Meghan Bell was told that "as soon as [she] received the contract [she] would have three days to cancel the contract." {Ex. 8, ¶ 6.} Ms. Bell did not receive a copy of the Agreement until eight months after agreeing to receive magazines. She tried to cancel as soon as she got a copy of the Agreement, but was told it was too late. {Ex. 8, ¶ ¶ 12,13.}

Other declarants state the initial sales call was silent as to cancellation. { See e.g., Ex. 13, ¶ 3.}[6] The evidence indicates that defendants train their telemarketers to avoid responding to questions concerning cancellation. Former employee Christina Ward was instructed to respond to such questions by saying that the offer was such a good deal, no one would want to cancel. {Ex. 2, ¶ 13.} However, as demonstrated above, defendants' telemarketers often ignore that training.

Regardless of what defendants say or do not say concerning cancelling, defendants' policy is to allow no cancellations.[7] This policy, however, is directly contradictory to defendants' written "Agreement,"[8] which states in part: "It is our policy to allow our customers three business days after receiving this subscription order to change or cancel the order." {Ex. 11, Attachment 4}. Consumers who attempt to abide by the Agreement's terms and cancel within the three-day period, quickly discover that the company's true cancellation policy is "no cancellations are allowed." { See, e.g., Exs. 11, ¶¶ 7,8,11; 8, ¶ 12}. Many consumers report that they mailed the completed cancellation forms or called to request

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[6] Defendants' script does not mention SJA's cancellation policy. {Ex. 1, ¶ 14.}

[7] Magazine publishers generally allow cancellation at any time, and will refund the unused portion of the subscription. {Ex. 30.}

[8] Defendants appear to send this document only sporadically. Many consumers report that they never received this document and that the first written communication from defendants was a demand for payment {See, e.g., Ex. 6 }. This is particularly the case where consumers have attempted to cancel immediately. {See, e.g., Ex. 3, ¶¶ 7-10}.

cancellation immediately after receiving the Agreement, but their cancellation was rejected by the defendants. {See e.g., Ex.6, ¶ ¶ 6,7.} Defendants offer a number of excuses for refusing consumers' cancellation requests including that SJA had prepaid the magazines, { see e.g., Exs. 8, ¶ 13, Attachment 4; 4, ¶ 10}, the three days to cancel had expired, { see e.g., Ex. 6, ¶ 7}, or that the company had tape recordings of them agreeing to take the magazines. { See e.g., Exs. 4, ¶ 10; 5, ¶ 10; 16, ¶ 9; 11, ¶ 7; 12, ¶ 14}.[9]

Defendants' express claims regarding consumers' right to cancel are presumptively material. Even without this presumption, however, representations that purchasers may cancel the transaction are material because they purport to eliminate the risk inherent in the transaction, and, thus, are likely to influence reasonable consumers' purchasing decisions. Based on these representations, a consumer acting reasonably is entitled to believe that the transaction is completely "risk free." In fact, the transaction is anything but risk free. Therefore, the representations are deceptive and violate Section 5 of the FTC Act.

4. Defendants falsely represent that an enforceable contract exists between themselves and consumers.

Defendants routinely claim to have enforceable contracts with consumers, and use this fact as the basis for taking legal action against consumers if they do not pay defendants. Under Virginia law, no action on a contract that cannot be performed in one year may be maintained unless the contract is signed by the party to be charged, or his agent.[10] Nevertheless, defendants routinely fail to obtain consumers'

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[9] According to declarant Heather Ross, who listened to a purported tape recording of herself agreeing to order magazines, the voice on the tape was not hers. When she brought this to defendants' attention, they simply ignored her and said, "We have you on tape and you are going to pay." {Ex. 20, ¶ 7.} Other declarants who heard their purported tapes report that the tapes appeared to have been altered. {See e.g., Exs. 16, ¶ 9; 12, ¶¶ 15.}

[10] The statute reads, in pertinent part:

> **When written evidence required to maintain action.--** Unless a promise, contract, agreement, representation, assurance, or ratification, or

(continued...)

signatures on their contracts. Thirteen of our 14 declarants state that they neither signed, nor authorized anyone else to sign on their behalf, any contract or agreement to purchase magazines from defendants. { See Exs. 9, ¶ 4; 10, ¶ 8; 3, ¶ 10; 4, ¶ 5; 11, ¶ 11; 12, ¶ 5; 13, ¶¶ 3, 5; 14, ¶ 4; 16, ¶ 7; 5, ¶ 5; 20, ¶ 3; 21, ¶ 5.}

Although SJA does not obtain consumers' signatures on their contracts, the company aggressively insists that consumers owe money for magazines, that consumers entered into binding agreements, and that consumers cannot cancel their subscriptions. [11] For example, declarant Gerald Potts received a letter from the collections department of Apex Marketing in which he was told Apex had a legally binding contract with him. {Ex. 6, ¶ 11.} He received a subsequent letter from Strickland, Johnson, & Associates ("Strickland") threatening Mr. Potts with litigation. [12] {Id. at ¶ 12, Attachment 9.} However, Mr. Potts

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[10](...continued)

> some memorandum or note thereof, is in writing and signed by the party to be charged or his agent, no action shall be brought in any of the following cases:
> **8.** Upon an agreement that is not performed within a year . . . .

Section 11-2 Va. Code Ann.

[11] In support of its demands for payment, SJA often tells consumers that the company has a tape recording of the consumer agreeing to the transaction and that the consumers are, therefore, obligated to pay for the entire subscription package. Although the company does have a "verification" process in which consumers frequently are recontacted after their initial contact with the company supposedly to confirm that consumers agreed to the order, it is apparent from consumer complaints that SJA's verification process is not designed to ensure that consumers truly understand the terms and agree to the purchase, but to provide the company with a pretext for claiming that the consumer entered into a contract. In many cases, the purpose of the "verification" call is disguised by the fact that the call begins with a SJA "supervisor" asking the consumer about the performance of the first representative with whom the consumer spoke {See e.g, Exs. 1, ¶ 7; 4, ¶ 5; 11, ¶ 5.} The verification call is generally much shorter than the initial contact and the verifier may reiterate or confirm the earlier misrepresentations { See, e.g., Exs. 11, ¶ 5; 5, ¶ 6; 8, ¶ 7.} In some cases, SJA requests permission to tape record a portion of the verification call {see, e.g., Ex. 11, ¶ 5}, although many consumers report that SJA never informed them the call was being taped. {See e.g., Exs. 12, ¶ 14; 16, ¶ 6 .} In some cases where SJA has played the tape for consumers, those consumers report that the recording was incomplete, omitted key portions of the conversation, or failed to establish an agreement to purchase the subscriptions. { See, e.g., Exs. 3, ¶ 15; 20, ¶ 7; 4, ¶ 10; 12, ¶ 15; 16,¶ 9..}

[12] Defendants also threaten consumers with litigation by routinely mailing consumers Warrants in (continued...)

never signed a contract, nor did he authorize anyone else to do so. When Mr. Potts finally received a copy of the purported contract from defendants, he discovered that someone had signed his name without authorization.[13] {Id. at ¶ 4.}

State statutes of frauds are designed to prevent precisely the type of fraudulent business practices that defendants employ. Joseph E. Seagram & Sons, Inc. v. Shaffer, 310 F.2d 668, 673 (10th Cir. 1962) (object of the statute of frauds is to prevent fraud in the enforcement of obligations by requiring certain contracts be evidenced by a writing signed by the party to be charged). Because consumers are scheduled to receive magazines over a period of years, the contracts are not capable of being performed in one year. Thus, defendants' contracts are not legally enforceable in Virginia.[14] Defendants' representation to consumers that they are legally bound by contract with defendants is false, and inherently likely to mislead consumers.

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[12](...continued)
Debt. These Warrants, which purport to arise from actions on the alleged debt, contain dates and times for hearings scheduled before the General District Court in Virginia Beach. In many cases, however, the Warrants have not been issued by the General District Court as required by Virginia law. Such Warrants are, therefore, invalid. In fact, in Virginia, it is a criminal offense to mail such Warrants. "Any person who, for the purpose of collecting money, shall knowingly deliver, mail, send or otherwise use or cause to be used any paper or writing simulating or intended to simulate any warrant, process, writ, notice of execution lien or notice of motion for judgment shall be guilty of a Class 4 misdemeanor." Section 18.2-213 Va. Code Ann. Declarant Helen Atkinson, court clerk for the judges in the General District Court in Virginia Beach, specifically complained to defendant Johnson about SJA's illegally mailing such Warrants, told him that consumers had appeared in court for hearings that had never been scheduled, and told him the practice was against the law. {Ex. 7, ¶ 5.}

[13] Mr. Potts was not alone in his discovery that someone had signed his name to the contract. See, e.g., Ex.8,¶ 12. Indeed, a laymen's comparison of the signatures on the contracts reveals that many of the signatures are the same. Compare Ex. 6, Attachment 1, and Ex. 10, Attachment 2. The signature of defendant Johnson appears to be the same signature that is on many of the consumer contracts. Compare Exs. 23, 24, and 25.

[14] In addition to being unenforceable, there are many reasons why defendants' "contracts" are invalid, including consumers' lack of acceptance, the company's misrepresentations, mistake, and breach. But these reasons need not be addressed by the court in light of universal statute of frauds requirements, which mandate that contracts such as those that SJA claims exist be in writing and signed by the party against whom enforcement is sought.

These misrepresentations are material because they cause consumers to make monthly payments to defendants that the consumers are not legally obligated to make. Furthermore, in light of defendants' threats to take legal action if payment is not received and to forward the account to collection agencies or attorneys, consumers reasonably take at face value defendants' representations that an enforceable contract exists. For example, declarant LaDonna Hamilton said she finally paid defendants "to stop the harassment and because [she] was afraid of being taken to court." {Ex. 13, ¶ 13.} Defendants' representation that consumers are contractually obligated to make payments to defendants is deceptive in violation of Section 5 of the FTC Act.

B. Defendants Violate The Telemarketing Sales Rule By Misrepresenting Their Magazine Offer and Cancellation Policy, And By Debiting Consumers' Checking Accounts Without Authorization.

In the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6102(a) and (b), Congress directed the FTC to prescribe regulations prohibiting abusive telemarketing acts or practices. Accordingly, the Telemarketing Sales Rule, 16 C.F.R. Part 310, was promulgated by the FTC and became effective on December 31, 1995. (Ex. 30). Among other things, the Telemarketing Sales Rule prohibits telemarketers from making misrepresentations in the telephone sales of goods and services. Violations of the Telemarketing Sales Rule constitute violations of Section 5 of the FTC Act. 15 U.S.C. § 6102(c)

1. Defendants misrepresent their magazine offer and cancellation policy.

As discussed above, defendants violate Section 5 of the FTC Act by falsely representing that consumers win prizes, pay only shipping and handling charges on supposedly free magazines, and can cancel their subscriptions. This same conduct also violates the Telemarketing Sales Rule. [15] Making any false or misleading statement to induce any person to pay for goods or services violates Section 310.3(a)(4) of the Telemarketing Sales Rule, 16 C.F.R. § 310.3(a)(4).

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[15] Defendants' deceptive practices prior to December 31, 1995 violate only § 5 of the FTC Act because the Telemarketing Sales Rule was not in effect prior to that date.

As described in Section III.A.1 and 2, defendants' representations that consumers receive prizes, and that they pay only shipping and handling costs for free magazines are false. Because these express claims are used to induce consumers to make payments to defendants, they violate Section 310.3(a)(4) of the Telemarketing Sales Rule, 16 C.F.R. § 310.3(a)(4).

As discussed above (in Section III.A.3), defendants also misrepresent their cancellation policy. Making any misrepresentation of "any material aspect of the nature or terms of the seller's refund [or] cancellation" policy violates the Telemarketing Sales Rule. 16 C.F.R. § 310.3(a)(2)(iv). Even though defendants' telemarketers tell consumers they may cancel, and even though SJA's contract states that consumers have three days from receipt to cancel, defendants do not allow consumers to cancel. Defendants, therefore, violate Section 310.3(a)(2)(iv) of the Telemarketing Sales Rule, 16 C.F.R. § 310.3(a)(2)(iv).

Because defendants' actual cancellation policy is to allow no cancellations, the Telemarketing Sales Rule requires that this information be given to consumers prior to a customer paying for goods or services in a clear and conspicuous manner. If the seller has a policy of not making refunds or cancellations, it is a violation of Section 310.3(a)(1)(iii) of the Telemarketing Sales Rule to fail to disclose this. 16 C.F.R. § 310.3(a)(1)(iii). Furthermore, "if the seller or telemarketer makes a representation about a refund, [or] cancellation . . . policy, " it must also state "all material terms and conditions of such policy." 16 C.F.R. § 310.3(a)(1)(iii). As explained by one of defendants' former employees, defendants' telemarketers are to avoid saying anything to consumers about the company's cancellation policy. {Ex. 2,¶ 13.} This policy itself violates the Telemarketing Sales Rule. In addition, many of the telemarketers make representations about the ability to cancel anyway. { See e.g., Exs. 4, ¶ 4; 8, ¶ 5; 14, ¶ 3; 20, ¶ 3; 21, ¶ 3; see also 1, ¶ 8.} Having made a representation about cancellation, the Telemarketing Sales Rule requires defendants to disclose all of the material terms and conditions concerning cancellation, which

defendants do not do. Defendants, therefore, violate Section 310.3(a)(1)(iii) of the Telemarketing Sales Rule as well. 16 C.F.R. § 310.3(a)(1)(iii).

2. Defendants debit consumers' checking accounts without authorization.

Although defendants receive some payments by check, their principal method of payment is by direct debiting of consumers' checking accounts and charging consumers' credit cards. The Telemarketing Sales Rule requires telemarketers who debit consumers' checking accounts to have "express verifiable authorization." 16 C.F.R. § 310.3(a)(3). Under the Rule, verifiable authorization may be evidenced in any of three ways: 1) an express written authorization from the consumer (e.g., on a consumer's check); 2) written confirmation from the telemarketer containing certain specific information that is sent to consumers prior to debiting their account; or 3) express oral authorization that is taped and that contains six specific items of information: the date of the drafts, the amount of the drafts, the payor's name, the number of draft payments, a customer service number, and the date of the authorization. 16 C.F.R. § 310.3(a)(3)(ii).

Although defendants purport to use the third option of obtaining authorization, they do not disclose to consumers all of the required information prior to accessing the consumer's checking accounts. Eleven of our declarants were never told the total cost; {Exs. 8, ¶¶ 4,7; 9, ¶¶ 4,5; 4, ¶ 4; 16, ¶¶ 4,6; 11, ¶¶ 4,5; 12, ¶¶ 4,6; 13, ¶¶ 3,5; 14 ¶¶ 4,5; 5, ¶ 5; 6, ¶ 3; 21, ¶¶ 5,6}; eleven were never told the number of monthly payments; {Exs. 8, ¶¶ 4,7; 9, ¶¶ 4,5; 4, ¶ 4; 16, ¶¶ 4,6; 11, ¶¶ 4,5; 12, ¶¶ 4,6; 13, ¶¶ 3,5; 14, ¶¶ 4,5; 5, ¶ 5; 6, ¶ 3; 21 ¶¶ 5,6}; and seven were never told the name of the creditor. {Exs. 16, ¶¶ 4,6; 11, ¶ 5; 12, ¶¶ 4,6; 13, ¶ 5; 14, ¶¶ 4,5; 6, ¶ 3; 21, ¶¶ 5,6.} For example, declarant Wanda Drouillard states that defendants' telemarketer told her a follow-up telephone conversation was being recorded, but "never told [her] the total cost of the magazines, the number of monthly payments, or the identity of the company he worked for." {See e.g., Ex. 11, ¶ 5; see also Exs. 10, 3 (declarants never ordered anything.}

The Commission has determined that this information is important to consumers to protect them "from abuse of this increasingly popular payment method [demand drafts]," Statement of Basis and Purpose, 60 Fed. Reg. 43851 (Aug. 23, 1995), {Ex. 26.}, and that a seller's failure to promptly provide the information is a deceptive telemarketing practice. SJA's practice of debiting checking accounts without providing this information is unlawful. This practice causes significant economic injury to a substantial number of consumers, many of whom not only suffer directly at the hands of defendants but incur other financial costs, such as fees for bounced checks. In addition, some consumers are forced to close checking accounts or place stop payment orders on their accounts to keep SJA from accessing their funds. { See e.g., Ex. 6, ¶ 6 (checking account).} Therefore, defendants' debiting of consumers' checking accounts without first providing the information required by the Telemarketing Sales Rule violates Section 310.3(a)(3), 16 C.F.R. § 310.3(a)(3).

C. Defendants Violate The FDCPA By Engaging In Deceptive Debt Collection Practices.

In 1977, Congress enacted the Fair Debt Collection Practices Act in response to national concern over "the use of abusive, deceptive and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). The Purpose of the FDCPA is "to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors." S. Representative. No. 382, 95th Cong., 1st Sess. 1-2, reprinted in 1977 U.S. Code Cong. & Ad. News 1695,1696. The FDCPA sets forth a nonexclusive list of unlawful debt collection practices and provides for public enforcement by the FTC to enjoin further violations. Although defendants violate several provisions of the FDCPA, a single violation is sufficient to establish civil liability. Clomon v. Jackson, 988 F.2d 1314,1318 (2nd Cir. 1993); see 15 U.S.C. § 1692k (establishing liability for "any debt collector who fails to comply with any provision of this subchapter").

1. SJA is a debt collector and is, therefore, liable for violations of the FDCPA.

To hold SJA liable for FDCPA violations, the Court must first find that SJA is a debt collector under the FDCPA. Although the FDCPA applies primarily to debt collectors, under certain circumstances it also applies to creditors and others. The definition of "debt collector," § 803(6) of the FDCPA, includes "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." 15 U.S.C. § 1692a(6).

SJA attempts to collect its own debts using names such as Strickland, Johnson, & Associates; John Mathison; and Tate & Kirlin Associates, { See e.g., Exs. 3, ¶ 14, Attachment 2; 8, ¶ 14, Attachment 5; 4, ¶ 10}. It is, therefore, a debt collector for purposes of the FDCPA. [16]

2. Defendants engage in harassing telephone calls in violation of Section 805(a)(1) of the FDCPA.

Section 805(a)(1) prohibits debt collectors from communicating with consumers before 8:00 a.m. or after 9:00 p.m. 15 U.S.C. § 1692c(a)(1). Nevertheless, SJA's debt collectors routinely call consumers during those times. For example, declarant Tarji Pierre states she received a call from a Mr. Dole "with APEX" at 9:45 p.m. When that conversation ended, he called back ten minutes later, threatened Ms. Pierre, and said APEX would file a judgment against her. {Ex. 5, ¶¶ 16-17.} After those calls, Ms. Pierre received a number of telephone messages from a Mr. Colletti, who claimed to be working for an agency collecting on behalf of APEX. Ms. Pierre's answering machine records the time of any call. Some of the calls were made after 9 p.m. { Id. at ¶ 19. See also Exs. 5, ¶¶ 16,17 (calls after 9 p.m.); 6, ¶ 10 (calls after 9 p.m.); 13, ¶ 11 (calls before 8 a.m.)}. Defendants have, therefore, violated Section 805(a)(1) of the FDCPA. 15 U.S.C. § 1692e(a)(1).

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[16] SJA's collectors are located in the same office as SJA's other employees, and Postal Service records show that Strickland, Johnson, & Associates shares SJA's post office boxes. The post office boxes listed on Strickland, Johnson's correspondence, P.O. Box 61549 and 62461, were applied for by Atlantic Service Corp. Defendant Johnson signed for P.O. Box 62461. {Ex. 15, ¶ 4.} There is no corporate listing in Virginia for Strickland, Johnson. Id. at ¶ 6.

3. Defendants misrepresent that they are attorneys in violation of Section 807(3) of the FDCPA.

Section 807(3) prohibits "the false representation or implication that any individual is an attorney or that any communication is from an attorney." 15 U.S.C. 1692e(10). However, defendants' collectors often claim to be so. For example, declarant Tracie Cunningham was contacted by someone named Tom Davis who said he was an attorney with Tate & Kirlin Associates, and that he represented SJA. {Ex. 4, ¶ 10; see also Ex. 13, ¶ 12.} However, the Virginia Bar Association has no listing for either the law firm "Tate & Kirlin" or the correct Tom Davis.[17] {Ex. 15, ¶ 5.} The false representation that a lawyer is involved in an attempt to collect a debt may unjustifiably frighten an unsophisticated consumer into paying a debt that is not owed. United States v. National Financial Services, Inc., 98 F.3d 131, 139, (4th Cir. 1996), citing Masuda v. Thomas Richards & Company., 759 F.Supp. 1456,1459-61 (C.D. Cal. 1991). Therefore, defendants representations that they are attorneys or employed by attorneys is a violation of Section 807(3) of the FDCPA. 15 U.S.C. 1692e(3).

4. Defendants use false means to collect debts, and misrepresent that they are independent debt collectors in violation of Sections 807(10) and 807(14) of the FDCPA.

Section 807(10) of the FDCPA prohibits "the use of any false representation or deceptive means to collect any debt," and 807(14) prohibits "the use of any business, company, or organization name other than the true name of the debt collector's business." 15 U.S.C. 1692e(10) and (14). As described earlier, defendants falsely claim they have valid, enforceable contracts, and, therefore, have a legal basis for attempting to collect the alleged debt. However, as demonstrated previously, defendants' contracts are unenforceable and defendants' representations to the contrary are false. In conjunction with this misrepresentation, defendants send improperly-issued Warrants that list hearing dates and times, causing

[17] Two individuals named Tom Davis are registered with the Virginia Bar, but neither of them is in the Virginia Beach-Norfolk area. Both of these men have inactive status in Virginia. Neither Martindale Hubbell nor the Yellow Pages contain listings for attorney Tom Davis.

consumers to believe that legal action has actually been initiated against them. Because defendants do not have valid contracts, they have no basis for mailing such Warrants. Defendants also falsely represent that they are independent third-party debt collectors and use the names Strickland, Johnson, & Associates, and Tate & Kirlin to do so.

All of these misrepresentations are intended to deceive consumers and coerce payment. See National Financial Services, Inc., 98 F.3d 131 (prohibition against use of any false representation or deceptive means to collect debt).[18] Because the representations are false, they violate Section 807 of the FDCPA. 15 U.S.C. 1692e.

5. Defendants file lawsuits against consumers in distant forums in violation of Section 811 of the FDCPA.

It is a violation of section 811 of the FDCPA to bring any legal action on a debt against a consumer anywhere other than "the judicial district . . . in which such consumer signed the contract sued upon . . . or in which such consumer resides at the commencement of the action." 15 U.S.C. 1692i. Defendants practice has been to file Warrants in Debt in the Virginia Beach General District Court, regardless of where the alleged debtors resided. Declarant Helen Atkinson makes clear that SJA has filed Warrants in Debt against out-of-state residents. {Ex. 7, ¶ 8.} Such a practice violates Section 811 of the FDCPA, 15 U.S.C. § 1692i. See Scott v. Jones, 964 F.2d 314, 316 (4th Cir. 1992) (plaintiff, who resided in Lynchburg, Virginia, brought action against debt collector who had filed legal action against plaintiff in Richmond, Virginia. The Fourth Circuit found that venue in Richmond was improper under the FDCPA. Venue is proper where plaintiff resides).

[18] This recent Fourth Circuit case, involving the FTC and enforcement of the FDCPA, held, among other things, that debt collectors' notices falsely threatening legal action against debtors constituted use of a false representation or deceptive means to collect a debt in violation of § 807(10) of the FDCPA. 98 F.3d at 138-39.

IV. ARGUMENT

A. This Court Has the Authority to Grant the Relief Requested Under Sections 13(b) and 19 of the FTC Act.

This court has the authority to grant the requested relief pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and Rule 65 of the Federal Rules of Civil Procedure. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b) (second proviso), provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." Courts routinely hold that it is appropriate to invoke the remedies of Section 13(b) in cases such as this where there is evidence of persistent and ongoing fraud or deception. FTC v. World Travel Vacation Brokers, Inc. , 861 F.2d 1020, 1026-28 (7th Cir. 1988); FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1111 (9th Cir. 1982); FTC v. Kitco of Nevada, Inc., 612 F. Supp. 1282, 1291 (D. Minn. 1985).

Section 13(b) empowers courts to exercise the full breadth of their equitable authority:

> Congress, when it gave the district court authority to grant a permanent injunction against violations of any provisions of law enforced by the Commission, also gave the district court authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference.

FTC v.U.S. Oil & Gas, 748 F.2d 1431, 1434 (quoting H.N. Singer, 668 F.2d at 1113) ; see also FTC v. Amy Travel Svc., Inc., 875 F.2d at 571-72; FTC v. Southwest Sunsites, Inc., 665 F.2d 711, 718 (5th Cir.), cert. denied, 456 U.S. 973 (1982). Thus, this court may employ its inherent equitable authority under Section 13(b) to order remedies such as rescission of contracts and restitution. Further, the court may grant a temporary restraining order, a preliminary injunction, and additional preliminary relief necessary to preserve the possibility of final effective ultimate relief. Singer at 1111-1112. This preliminary relief may include an order freezing assets, expediting discovery, and appointing a receiver to ensure that assets are not dissipated and documents not destroyed. Id. at 1113; U.S. Oil & Gas, 748 F.2d at 1434 (affirming preliminary injunction, asset freeze and appointment of a receiver); FTC v. World Wide Factors, Ltd., 882

F.2d 344, 346-47 (9th Cir. 1989) (affirming asset freeze and appointment of a receiver). Section 19(b) of the FTC Act also authorizes this Court to grant relief as it finds necessary to redress injury to consumers resulting from violations of a Commission rule affecting unfair or deceptive practices. Congress has provided in the FTC Act that such relief may include, but should not be limited to, "rescission or reformation of contracts, the refund of money [and] return of property. . . ." 15 U.S.C. § 57b(b).

B. The Evidence Presented Justifies Entry Of A Temporary Restraining Order And A Preliminary Injunction.

Although courts in this circuit ordinarily follow a four-part test in considering the propriety of preliminary injunctive relief, Blackwelder Furniture Company. v. Selig Mfg. Company. , 550 F.2d 189, 196 (4th Cir. 1977), as a governmental agency bringing law enforcement actions, the FTC need only meet a two-step test to obtain its requested relief. The FTC need not satisfy the traditional equity standard of irreparable injury, which is presumed in a statutory enforcement action. "[B]ecause injunctive relief in this instance is rooted in statute, rather than equity, the standard against which relief is to be judged is the public interest; irreparable harm and inadequacy of legal remedies need not be shown." SEC v. Pinckney, 1995 No. 7:95-CV-122-BR-1 U.S.Dist. Lexis 17915 at *7 (E.D. N.C. Nov. 6, 1995). "The function of a court in deciding whether to issue an injunction authorized by a statute of the United States to enforce and implement Congressional policy is a different one from that of the court when weighing claims of two private litigants." Rum Creek Coal Sales, Inc. v. Caperton , 926 F.2d 353, 362, n.12 (4th Cir 1991). See also, FTC v. Food Town Store , 539 F.2d 1339 (4th Cir. 1976); FTC v. University Health, Inc. , 938 F.2d 1206, 1218 (11th Cir. 1991); Gresham v. Windrush Partners, Ltd. , 730 F.2d 1417, 1423 (11th Cir.), cert. denied, 469 U.S. 882 (1984); World Wide Factors , 882 F.2d at 347.

To grant preliminary relief under Section 13(b), a district court must (1) determine the likelihood that the FTC will ultimately succeed on the merits, and (2) balance the equities. [19] World Travel, 861 F.2d at 1029; World Wide Factors, 882 F.2d at 346. As stated above, unlike private litigants who seek restraining orders or preliminary injunctions, the Commission need not prove irreparable injury, which is presumed to exist in statutory enforcement actions. World Wide Factors, 882 F.2d at 347 (citing Odessa Union Warehouse Company-op, 833 F.2d at 175-76); FTC v. Elders Grain, Inc., 868 F.2d 901, 903 (7th Cir. 1989). Since the government seeks to protect the public, "the standards of the public interest not the requirements of private litigation, measure the propriety and need for injunctive relief." Hecht Company. v. Bowles, 321 U.S. at 331. In weighing the public and private equities in a statutory enforcement action, public equities receive greater weight. World Travel, 861 F.2d at 1029.

1. The Commission has demonstrated a likelihood of success on the merits because the evidence establishes that the defendants have violated Section 5 of the FTC Act, the Telemarketing Sales Rule, and the FDCPA.

As demonstrated above, the defendants have repeatedly violated Section 5 of the FTC Act, the Telemarketing Sales Rule, and the FDCPA. The evidence shows that defendants have made numerous material misrepresentations concerning all aspects of their business, and, therefore, there is a likelihood that the Commission will prevail on the merits of this action.

2. The individual defendants are liable for violating the FTC Act, the Telemarketing Sales Rule, and the FDCPA, and for consumer redress.[20]

An individual defendant is directly liable for his own violations of Section 5 of the FTC Act, the Telemarketing Sales Rule, and the FDCPA. An individual also is liable for a corporate defendants'

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[19] In the Fourth Circuit, it is not necessary to balance the equities. See FTC v. Virginia Homes Mfg. Corp. 509 F.Supp. 51, 59 (D.Md.) (citing Hecht Company. v. Bowles, 321 U.S. 321 (1944)), aff'd, 661 F.2d 920 (4th Cir. 1981) ("[n]o balancing of the equities is required or even permitted, in such circumstances").

[20] As stated earlier, we have not charged Blair with FDCPA violations.

violations of these laws if the Commission demonstrates that: (1) the corporate defendants violated the law; (2) the individual defendant participated directly in the wrongful practices or acts, or the individual defendant had authority to control the corporate defendants; and (3) the individual defendant had some knowledge of the wrongful acts or practices.[21] Amy Travel, 875 F.2d at 573. An individual may be held liable for a corporate defendants' violations of the FDCPA under the same test.[22]

It is appropriate to hold the individual defendants liable for SJA's deceptive acts and for providing restitution to consumers who have been injured by SJA's deceptive practices. The Commission has submitted substantial evidence showing that not only were defendants Johnson and Blair recklessly indifferent to the truth or falsity of the fraud perpetrated by the corporate defendant, they had actual knowledge of many of the deceptive practices. Johnson is president of SJA. (Exs. 23, 24, and 25.) An

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[21] To satisfy the knowledge requirement, the Commission need not demonstrate that the individual defendants possessed the intent to defraud. Amy Travel, 875 F.2d at 573-74. Nor must the Commission demonstrate that the defendants had actual knowledge of the misrepresentations -- reckless indifference to the truth or falsity of the representations, or an awareness of a high probability of fraud coupled with an intentional avoidance of the truth will suffice. FTC v. Kitco of Nevada, 612 F. Supp. at 1292. A defendant's participation in corporate affairs is probative of knowledge. FTC v. International Diamond Corp., 1983-2 Trade Cas. (CCH) ¶ 65,725 at 69,707 (N.D. Cal. 1983).

[22] In an FDCPA case in the Fourth Circuit, the district court found the president of the company liable for the corporate defendant's FDCPA violations, stating:

> Perhaps the most important reason to disregard MSF's [the corporate defendant] corporate form and impose personal liability on Costen [the individual defendant] is that it would be unfair to the plaintiffs and contrary to the purpose of the FDCPA to uphold MSF's corporate facade. . . . Costen apparently did not personally collect any debts. Nevertheless, he reaped substantial monetary gains from MSF's collections. Moreover, the undisputed facts compel the conclusion that Costen knew or should have known of MSF's violations of the FDCPA. He was at all times MSF's president and maintained his office on the corporate premises. . . .

West v. Costen, 558 F. Supp. 564 (W.D. Va. 1983). See also United States v. Trans Continental Affiliates et al., No. C-95-1627-JLQ (N.D. Cal. Jan 8, 1997) (Memorandum Opinion and Order Granting Plaintiff's Motion for Summary Judgment).

individual's status as a corporate officer gives rise to a presumption of control of a small closely-held corporation and liability for the corporation's wrongful acts. "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, 403 (D.C. Cir.), cert. denied, 414 U.S. 828 (1973).

Blair, although not a corporate officer, has been a general manager and claims to have authored the deceptive sales script used by SJA's telemarketers. {Ex. 1, ¶ 4.} Furthermore, Johnson and Blair could hardly claim ignorance of SJA's wrongdoing, given that the misrepresentations clearly reflect a corporate policy that is perpetuated by the individual defendants. Because of their corporate responsibilities, Johnson and Blair must know (and could hardly avoid knowing) about the vast numbers of consumers who seek refunds. Johnson and Blair also have been put on notice of SJA's questionable practices through the numerous complaint referrals by the Commonwealth Attorney's Office, and the Better Business Bureau. Johnson was also put on notice of some of SJA's deceptive practices by District Court Clerk Helen Atkinson who instructed him to cease mailing improperly-issued Warrants in Debt to both in-state and out-of-state consumers.

The misrepresentations and deceptive acts at issue in this case constitute the core of SJA's fraudulent operation. Thus, it is highly likely that Johnson and Blair, who have the authority to control SJA's business practices, also have the requisite degree of knowledge about the company's fraudulent business practices to hold both personally liable for restitution.

3. The balance of public equities tips decidedly in the Commission's favor.

Without the entry of the requested temporary and preliminary injunctive relief, defendants will continue to defraud and injure the public through their use of misleading representations and deceptive debt collection practices. The public interest, therefore, necessitates the proposed relief. By temporarily and preliminarily enjoining defendants' illegal practices, this Court will effectuate Congress' intent in enacting

Section 13(b). World Travel, 861 F.2d at 1028 (in enacting Section 13(b) Congress intended to serve the public interest by protecting consumers from the effects of deceptive trade practices "as quickly as possible"); see also Southwest Sunsites, 665 F.2d at 719.

A preliminary injunction is a particularly appropriate remedy where the Commission shows "some reasonable likelihood of future violations." CFTC v. Hunt, 591 F.2d 1211, 1220 (7th Cir.), cert. denied, 442 U.S. 921 (1979). Defendants' past misconduct is "highly suggestive of the likelihood of future violations," especially where there is a pattern of misrepresentations. Id. In this case, where the use of misrepresentations, unauthorized charges, and threats to consumers is so deliberate, the inference that defendants will continue to engage in such wrongful activity unless a TRO is issued against them is inescapable.

Giving due weight to the public interest, the balance of equities tips decidedly in the Commission's direction. 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). Any hardship that a TRO and asset freeze imposes on defendants is temporary and outweighed by the public interest in preserving available assets for redress. Defendants have systematically deceived consumers for years, and the scheme continues unabated. The deception should be halted immediately to prevent substantial further injury to the public.

C. An Ex Parte Asset Freeze, Temporary Receiver, Access to Defendants' Business Premises, And Expedited Discovery Are Necessary To Prevent Dissipation Of Funds And To Preserve Effective Relief.

1. An ex parte asset freeze should be entered against defendants.

The Commission's request for an ex parte asset freeze is warranted under the circumstances of this case. Where, as here, defendants' business operations are permeated by fraud, there is a strong likelihood that defendants will attempt to dissipate their assets or destroy documents during the pendency of the action. Mindful of this, courts in this circuit have ordered the ex parte freezing of assets where there is evidence of pervasive fraudulent activities, such as those found in this case. See, e.g., FTC v. David

Masuck, et al., Civil No. 2:930CV-182 (E.D. Va. March 3, 1993) (ex parte TRO with asset freeze and immediate access to premises); FTC v. William Taft, et al., Civil No. 04:97-0532-12 (D. S.C. March 7, 1997) (ex parte TRO with asset freeze, immediate access to premises, expedited discovery, and appointment of a receiver); FTC v. Garces, No. D91-2219-18 (D. S.C. July 31, 1991) (ex parte TRO with asset freeze, immediate access to premises and expedited discovery); FTC v. Global Patent Research Services, Inc., No. 96-676-A (E.D. Va. June 26, 1996) (ex parte TRO with asset freeze, immediate access to premises and expedited discovery); FTC v. Commercial Electrical Supply, Inc., No. WMN 96-1892 (D. Md. June 26, 1996) (ex parte TRO with asset freeze, appointment of receiver, immediate access to premises and expedited discovery); FTC v. Nwaigwe, No. HAR-96-2690 (D. Md. Aug. 28, 1996) (ex parte TRO with asset freeze, immediate access to mail drop [no business premises in existence] and expedited discovery); FTC v. Independence Medical, Inc., No 2-95-1581-18 (D. S.C. May 22, 1995) (ex parte TRO with asset freeze, appointment of receiver, immediate access to premises and expedited discovery); FTC v. Silver Shots, Inc., No. S-95-2003 (D.Md. July 11, 1995) (ex parte TRO with asset freeze, appointment of receiver, and expedited discovery); see also SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1105-6 (2d Cir. 1972); SEC v. R.J. Allen & Assoc., Inc., 386 F. Supp. 866, 881 (S.D. Fla. 1974); FSLIC v. Sahni, 868 F.2d 1096, 1097 (9th Cir. 1989).

Defendants' assets should be frozen to preserve the possibility of restitution to the victims of their deceptive scheme. The Fourth Circuit has held that such an order is proper, even if some assets might not be the fruit of wrongdoing, upon "a showing of fraud, mismanagement, or other reason to believe that, absent a freeze order, the assets would be depleted or would otherwise become unavailable." Kemp v. Peterson, 940 F.2d 110, 113-14 (4th Cir. 1991). As the Eleventh Circuit stated, "[a] request for equitable relief invokes the district court's inherent equitable powers to order preliminary relief, including an asset freeze, in order to assure the availability of permanent relief." Levi Strauss & Company. v. Sunrise Int'l Trading, Inc., 51 F.3d 982, 987 (11th Cir. 1995). Indeed, the court may impose an asset freeze where the

mere possibility of dissipating assets exists. FSLIC v. Sahni, 868 F.2d at 1097 (holding that the District Court's requirements of a showing of a likelihood of asset dissipation was too strict a standard); FSLIC v. Quinn, 711 F. Supp. 366, 379 (N.D. Ohio 1989). Without an asset freeze, it is highly likely that defendants would dissipate their ill-gotten gains and leave defrauded consumers in the lurch.

Any hardship on defendants caused by the appointment of a receiver, freezing of assets, and the related equitable relief sought here is temporary and outweighed by the public equities. The overriding public interest is in preserving available assets to provide redress to deceived consumers and to prevent further injury.

2. A receiver is necessary to protect the public and injured consumers.

The appointment of a receiver will prevent the defendants from using SJA as the vehicle for their fraudulent practices. As the former Fifth Circuit recognized:

> The district court's exercise of its equity power in this respect is particularly necessary in instances in which the corporate defendant, through its management, has defrauded members of the investing public; in such cases, it is likely that, in the absence of the appointment of a receiver to maintain the status quo, the corporate assets will be subject to diversion and waste to the detriment of those who were induced to invest in the corporate scheme and for whose benefit, in some measure, the SEC injunctive action was brought.

SEC v. First Fin. Group of Tex., 645 F.2d 429, 438 (5th Cir. May 1981); see also U.S. Oil & Gas, 748 F.2d at 1432 (holding that appointment of receiver and asset freeze was appropriate in case where defendants deceptively telemarketed interests in oil and gas leases); R.J. Allen & Assocs., 386 F. Supp. at 878 ("`[A] receiver is permissible and appropriate where necessary to protect the public interest and where it is obvious, as here, that those who have inflected [sic] serious detriment in the past must be ousted."'); SEC v. Keller Corp., 323 F.2d 397, 403 (7th Cir. 1963) ("[I]t is hardly conceivable that the trial court should have permitted those who were enjoined from fraudulent misconduct to continue in control of [the corporate defendant's] affairs for the benefit of those shown to have been defrauded"); and In re

McGaughey, 24 F.3d 904, 907 (7th Cir. 1994) ("The appointment of a receiver is an especially appropriate remedy in cases involving fraud and the possible dissipation of assets since the primary consideration in determining whether to appoint a receiver is the necessity to protect, conserve and administer the property pending final disposition of a suit").

It is clear that the individual defendants must be ousted from control of the corporation to protect consumers who have been injured by the defendants' activities. They are directly responsible for the fraud at issue. The Commission has recommended that the Court appoint Frank J. Santoro, Esq., as the receiver for the corporate defendant. Mr. Santoro's qualifications to serve as receiver are discussed in the pleading entitled "Plaintiff's Recommendation for Temporary Receiver," filed simultaneously with this memorandum.

3. Expedited discovery is necessary to locate assets wrongfully obtained and to prepare for a preliminary injunction hearing.

To locate assets wrongfully obtained from consumers and to prepare for a preliminary injunction hearing in this matter, the Commission seeks leave of Court to engage in expedited discovery. The Commission specifically seeks permission to conduct depositions upon 48 hours' notice, and to issue subpoenas for production of documents, and to serve interrogatories and admissions on three days' notice. District courts may depart from normal discovery procedures and fashion discovery by order to meet discovery needs in particular cases. Fed. R. Civ. P. 1, 26(b), 34(b). Such a discovery order reflects the Court's broad and flexible authority in equity to grant preliminary emergency relief in cases involving the public interest. See Porter v. Warner Holding Company., 328 U.S. 395, 398, 90 L.Ed. 1332, 66 S.Ct. 1086 (1946); FSLIC v. Dixon, 835 F.2d 554, 562 (5th Cir. 1987).

The proposed order also requires the defendants to produce certain financial records and information on short notice, and requires financial institutions and other third parties served with the order to disclose whether they are holding any of the defendants' assets. These requirements, ancillary to the

requested injunctive relief, will protect the effectiveness of the Court's asset freeze and receivership. These measures are appropriate to enable the Commission to establish the nature and extent of defendants' assets and the existence and location of documents relevant to this case.

4. The Temporary Restraining Order with asset freeze and order appointing a receiver should be issued ex parte and without notice.

Under federal law, "ex parte temporary restraining orders should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." Granny Goose Foods, Inc. v. Teamsters , 415 U.S. 423, 439, 39 L.Ed.2d 435, 94 S.Ct. 1113 (1974). The ex parte relief that we request, including a TRO, an asset freeze, and appointment of a receiver has been granted in many Commission actions, including a similar case involving magazine sales. FTC v. H.G. Kuykendall Jr. et al. Civ No 96-388-M (W.D. Ok. May 24, 1996) {Ex. 29}. See also FTC v. United Consumer Services, Inc. , Civ. No. 94-CV-3164-CAM (N.D. Ga. Nov. 30, 1994); FTC v. U.S. Hotline, Inc. , Civ. No. 93-C-444B (C.D. Utah May 11, 1993); FTC v. Mark Thomas Ellis, et al. , Civ. No. 96-114-LHM (C.D. Cal. Feb. 12, 1996); FTC v. Goddard Rarities, Inc. , Civ. No. 93-4602JMI (C.D. Cal. August 3, 1993); FTC v. Wilcox , No. 93-6913-Civ-Roettger (S.D. Fla. Oct 25, 1993); FTC v. Jordan Ashley, Inc. , No. 93-2257-Civ-Nesbitt (S.D. Fla. Nov. 16, 1993); FTC v. Metropolitan Communications Corp ., No. 94 CIV 0142 (S.D. N.Y. Jan. 11, 1994). See also cases cited generally at 25.

A TRO may be granted without notice if it appears irreparable injury will result if notice is given, and the applicant certifies to the court in writing the reasons why notice should not be given. Fed R. Civ. P. 65(b). Absent an ex parte asset freeze and appointment of a temporary receiver, irreparable injury may result due to defendants' dissipation or concealment of assets, and the destruction of documents. See Certification and Declaration of George Brent Mickum IV in Support of Ex Parte Applications, pp. 2-6. Should defendants dissipate their assets or destroy documents identifying injured consumers, any ultimate

resolution in favor of the Commission would be incomplete, as there would be no way to provide meaningful relief if the defendants have no funds available, or if victims of the defendants' scam cannot be identified. This threat of irreparable harm meets the standard under Rule 65(b) for issuance of preliminary relief on an ex parte basis without notice. See Cenergy Corp. v. Bryson Oil & Gas P.L.C. , 657 F. Supp. 867, 870 (D. Nev. 1987) ("[I]t appears proper to enter the TRO without notice, for giving notice itself may defeat the very purpose for the TRO."). Entering the TRO ex parte and without notice is also justified because it affords this Court the ability to provide full and effective relief for defrauded consumers by preserving the status quo pending a hearing on the preliminary injunction.

V. CONCLUSION

For the foregoing reasons, Plaintiff Federal Trade Commission requests that this Court issue the requested ex parte temporary restraining order.

Respectfully submitted,

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