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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION and PEOPLE OF THE STATE OF NEW YORK, Plaintiffs, v. TRANS-ASIAN COMMUNICATIONS, INC., RAJ TELEKOM, INC., TRANS AMERICAN SYSTEMS, INC., and RAJESH KALRA, Defendants.	)	CIVIL ACTION NO.

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER WITH ASSET FREEZE AND OTHER EQUITABLE RELIEF

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I. INTRODUCTION

Plaintiffs Federal Trade Commission and the People of the State of New York bring this case seeking preliminary and permanent injunctive relief against defendants Trans-Asian Communications, Inc., Raj Telekom, Inc., and Trans American Systems, Inc., and their principal, defendant Rajesh Kalra, who are issuers of prepaid phone cards. Defendants have engaged in a course of deceptive conduct in the sale of their phone cards that has injured a substantial number of consumers and distributors of their cards, in violation of federal and state law.

A prepaid phone card generally embodies a right to exchange the card's monetary value for telephone calling time, often at specified rates. As the card is used, the purchased amount of time is debited by a centralized database. To use a prepaid calling card the caller dials a specified toll-free number. He or she then is prompted to enter a Personal Identification Number ("PIN"), after which a voice response system-generated statement of the remaining value of the card is given. The caller then enters the number to be called and the call is placed. The card holder is typically given a warning when one minute of calling time remains.

The prepaid phone card industry was first introduced in the United States in 1992, and is the fastest growing segment of the telecommunications industry. Ex. A ¶ 4 & Att. 1. Since 1992 the amount of cards sold and corresponding dollar sales have grown in astounding proportions. In terms of sales, 15 million cards were sold in 1993, 200 million cards were sold in 1995, and 500 million cards are projected to be sold in the year 2000. *Id.* Corresponding dollar sales were $75 million in 1993, $1 billion in 1995, and a projected $4 billion in 2000. *Id.* Several factors drive this huge demand for phone cards: (1) three million households lack telephones; (2) the cards offer a relatively simple and effective means of budgeting long distance calling; (3) the cards are convenient and secure (losses being limited to the remaining value of the card); (4) use of prepaid phone cards typically is less costly than use of either coin deposit or credit card calling; and (5) the systems typically include user-friendly prompts in multiple languages. Ex. A ¶ 5 & Att. 1. The predominant users of prepaid phone cards are immigrants, low income persons, prison inmates, armed services personnel, and college students. *Id.*

In the present case, defendants marketed their prepaid phone cards, "Trans-Asian," "Raj Telekom," and "Raj Telenet" to the Indian-American community nationally by placing advertisements in newspapers which serve that community. Defendants through their advertisements promised consumers and distributors low calling rates to India and the ability to make calls 24 hours a day. Many consumers, however, found that defendants' phone cards never worked or ceased working even though time remained on the card. Other consumers found that they could not make calls because defendants' access numbers were continually busy. Still others were charged for time in excess of time actually used, for calls that were not connected or completed, or when they had not even attempted a call.

These deceptive acts and practices violated Section 5 of the Federal Trade Commission Act, ("FTC Act"), 15 U.S.C. § 45, Section 63(12) of the Executive Law of the State of New York ("Executive Law") and Section 349 of Article 22-A of the General Business Law of the State of New York ("GBL"). The Federal Trade Commission and the People of the State of New York bring this action pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), Section 63(12) of the Executive Law, and Section 349 of the GBL, respectively, seeking a temporary restraining order and preliminary and permanent injunctions to prohibit defendants from prospectively making misrepresentations in the sale of their prepaid phone cards.[1] The Federal Trade Commission and the People of the State of New York also request that this Court exercise its equitable powers and impose a freeze on the assets of both the corporate and individual defendants to ensure that funds remain available for consumer redress and appoint a receiver to liquidate the companies and marshal assets and evidence pivotal to the prosecution of this case. Plaintiffs request that the Court act now to protect consumers from further losses which would surely result should defendants continue their sale of prepaid phone cards.

II. STATEMENT OF FACTS

A. THE PARTIES

1. Plaintiffs

Plaintiff, the **Federal Trade Commission** ("Commission"), is an independent agency of the United States government created by the FTC Act, 15 U.S.C. §§ 41, *et seq*. The Commission is charged with, among other things, enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. It 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. *See, e.g.*, *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1111-13 (9th Cir. 1982).

Plaintiffs, the **People of the State of New York** ("NYAG"), bring this action by their chief legal officer, the Attorney General of the State of New York, Dennis C. Vacco. Pursuant to

[1] It is uncertain whether the defendants are presently advertising or selling prepaid phone cards. As discussed *infra* in Sections III. B. and C., defendant Kalra's Computer Training Institute (also known as "Career Vision") is occupying the offices of the corporate defendants and other premises nearby, where defendant Kalra recently sold phone cards under the trade name of Vision USA. *See* Ex. B; Ex. C ¶¶ 14, 22-25 & Att. 4.

Executive Law § 63(12) and GBL Article 22-A,[2] the NYAG is authorized to initiate court proceedings to enjoin repeated or persistent fraudulent or illegal conduct and to secure such relief, including injunctive relief, restitution, penalties, and costs, as may be appropriate in each case.

2. Defendants

Defendant **Trans-Asian Communications, Inc.** ("Trans-Asian") is a New York corporation that has sold prepaid phone cards to the public. *See* Ex. D. Trans-Asian maintained its office at 1170 Broadway, Suite 707, New York, NY 10001.

Defendant **Raj Telekom, Inc.** ("Raj Telekom") is incorporated in Delaware and also conducted business from 1170 Broadway, New York, NY 10001, but in Suite 1208. The Delaware corporation, which operated out of 1170 Broadway, Suite 707, New York, NY 10001, uses a fictitious name in New York: "Raj Telenet." *See* Ex. E.

Defendant **Trans American Systems, Inc.** ("Trans American") is a California corporation (s*ee* Ex. F.) which also operated out of 1170 Broadway, Suite 1208, New York, NY 10001.

Defendant **Rajesh Kalra, M.D.** ("Kalra") is the manager and principal officer and owner[3] of the corporate defendants. In March 1996, defendant Kalra executed a "Letter of Agency" and credit application as Trans-Asian's president and 100% owner. *See* Ex. G. Kalra signed both Raj Telekom's New York "Articles of Incorporation" and the "Application for Authority to Do Business," as corporate president. Ex. E. In addition, he is the registered agent for Trans

[2]GBL § 349 is part of GBL Article 22-A.

[3]Defendant Kalra appeared to have a silent partner in Trans-Asian, Satish Kumar, M.D. (also known as Satish Arora). Dr. Kumar did not take an active role in the business. Ex. H ¶ 4. A May 1997 Dun & Bradstreet report now indicates that Satish Arora is president of defendant Trans-Asian and defendant Kalra, the vice president. Ex. I.

American. Ex. F. Kalra is employed as a gastroenterologist at the Bronx Veterans Administration Hospital and maintains a private medical practice in Manhattan, around the corner from the corporate defendants' Broadway offices.

B. DEFENDANTS' FRAUDULENT BUSINESS PRACTICES

Defendants Trans-Asian, Raj Telekom, Trans American, and Kalra have marketed and sold prepaid phone cards to consumers and distributors directly through advertisements in national Indian newspapers, such as *India Abroad* and *News-India Times*, their World Wide Web site, and through wholesale distributors and retail outlets for a period of at least two years.[4] Defendants targeted their prepaid phone cards to Indian-American consumers, who have been described as a "fast growing and extremely lucrative segment" of the United States telecommunications market. Tanya Anand, *Telephone Wars Through Competition To Win A Piece Of The Indian Pie*, The Ethnic NewsWatch, India Worldwide, March 31, 1996, at 1. The corporate defendants' advertisements were substantially the same and utilized at least 24 different "800" or "888" telephone numbers for order fulfillment, toll-free access, and customer service. Defendant Kalra boasted of a sales volume of $1 million per month in 1995 and $2 million per month in 1996 and claimed to have sales agents in every state, with more than 500 outlets across the country. *See* Ex. J at 3.

Defendants' typical newspaper advertisement stated: "**CALL INDIA 39 CENTS per minute** (few restrictions apply)." Ex. K (emphasis in original). In addition, many of defendants' advertisements solicited the interest of wholesale distributors and retail outlets in purchasing/

[4]Defendant Kalra's last known advertisement for prepaid phone cards was in February 1997 using the name Vision USA. *See* Ex. B. It is uncertain whether his current business involves the marketing and sale of prepaid phone cards.

reselling defendants' prepaid phone cards. Consumers who purchased directly from the company were required to purchase at least one card with a face value of $100; consumers purchasing from distributors often could purchase cards with a face value as low as $25. Distributors provided consumers with either a slip of paper containing a PIN and a toll-free access number, or an actual phone card bearing the respective company's name and containing toll-free access numbers and customer service numbers to be used when placing calls. *See, e.g.,* Ex. W Att. 1.

When a consumer or distributor called the defendants to inquire about the purchase of prepaid phone cards, a representative reiterated the advertised claims of inexpensive per minute rates for calls to India. Cards were paid for in advance, typically by check or wire transfer; no cards were "activated" until after payments had cleared. Consumers and distributors were told that their cards would be reduced in value at the advertised per minute rates and only for calls made. Consumers and distributors were also told that if they had problems with the card, they could call the company and receive credit. As discussed in detail below, and as analyzed in the accompanying complaint analysis chart, defendants' representations were false and deceptive in all respects. Ex. L Att. 1. Indeed, since at least the fall of 1995, defendants persistently failed to provide consumers and distributors with the item they advertised and for which they paid--a phone card which could be used at any time to call India at a specified, prepaid low cost per minute.

1. Defendants Misrepresented that Purchasers of Their Prepaid Phone Cards Would, Promptly after Defendants' Receipt of Payment, Receive Cards Enabling Consumers to Make Prepaid Calls to India from the United States. (Complaint ¶ 27).

a. **No PIN**[5]

When defendants' representatives initially spoke with prospective purchasers, they told the purchasers to send payment in full by check or wire transfer and to call defendants a week or two after their payment cleared in order to obtain their cards or PINs. In fact, despite having paid in full, many consumers never received cards or PINs from defendants. Declarant Arshed Mughal's experience is typical. Ex. M. Mr. Mughal ordered a phone card by telephone, agreeing to send defendants a $100 check via fax. Defendants represented that Mr. Mughal would receive his card within one week. Mr. Mughal sent the check as agreed. Defendants promptly "cashed" it, by converting it to a draft against Mr. Mughal's checking account. Mr. Mughal, however, never received the promised phone card, despite repeated calls and letters to defendants. Ex. M ¶¶ 4-8. Likewise, another declarant, Jehan Sanmugaraja, reported that although defendants had posted a $105 charge to his VISA card, he did not receive the promised PIN until months later, and then only as a result of pressure exerted by the Better Business Bureau and his credit card issuer. Ex. N ¶¶ 5-7. The experiences of Mr. Mughal and Mr. Sanmugaraja are echoed by those of numerous other complainants. *See, e.g.*, Exs. O & P.

b. **PIN Never Worked**

In many other instances, complainants indicated that although they received their cards, they were never able to place international calls with the PINs they were given. For example, declarants Malathi Sn, Karen Feldman, Kocherlakota Krishna, M.D., and Vimla Desai each purchased $100 cards directly from Trans-Asian. Exs. Q, R, S, & T. Each received a new PIN,

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[5]The subtitles in bold type refer to categories in the complaint analysis chart, Ex. L Att. 1, which analyzes the various deceptions reported by 170 consumers to various law enforcement and other agencies from 1995 through 1996.

only to discover that it was invalid, and thus, useless. Despite repeated efforts, none of these consumers were able to obtain a replacement PIN or a refund. Like the consumers who received no PIN, these consumers received no benefit from their purchases.

c. **PIN Stopped Working**

A substantial number of consumers obtained PINs that worked initially but then inexplicably stopped working, even where substantial calling time remained on the card. For example, declarant Raja Mutyala reported that in May 1996, he was repeatedly unable to reach defendants' "800" access number to use any of the ten cards he had purchased from defendants for $800. Ex. U. On complaining to defendant Kalra, Mr. Mutyala and his wife were given five replacement cards together with a new, working "800" access number. The day after Mr. Mutyala received the five replacement cards, a Trans-Asian employee contacted him and offered to sell him 65 $100 cards for $5,000. Mr. Mutyala purchased the cards for use by his extended family. After just three days of use, the 65 PINs stopped working. Likewise, the five replacement cards that the Mutyalas had received from Trans-Asian just a week earlier also stopped working, and the Mutyalas were never able to recoup their losses totaling approximately $5,500.

Another declarant, Hasmukhbhai Patel, a retail distributor of Trans-Asian cards, purchased $2,000 worth of PINs from defendants. Ex. V. A few days after selling many of them, he learned from his customers that their PIN numbers had stopped working. Mr. Patel complained to the NYAG. Shortly thereafter, defendants sent Mr. Patel $2,000 worth of replacement cards. Mr. Patel sold six cards and kept one for himself. After a few days, however, the replacement cards ceased to work. Not only were many of Mr. Patel's customers shortchanged, he lost approximately $1,500 in unsold PIN inventory, because he would not risk reselling his remaining stock of defendants' cards.

2. Defendants Misrepresented that Purchasers of Their Prepaid Phone Cards Would Receive Toll-Free Access Numbers Enabling Consumers to Make Prepaid Calls to India from the United States. (Complaint ¶ 28).[6]

Defendants purported to provide consumers with 24-hour toll-free access numbers which, when reached, would allow users to key in their PINs and complete their calls. Getting through to these access numbers was the only way for calls to be completed. Many consumers were never able to get through on defendants' toll-free numbers because these lines were constantly busy or were disconnected. For example, Cindy Kapadia, an FTC employee, test purchased a Raj Telekom phone card and spent countless hours at different times of day and night attempting to get through, without success, to defendants' toll-free access number. Ex. W ¶¶ 4-9. Likewise, declarant Bhagwati Goenka and customers of declarant Hasmukhbhai Patel were consistently unable to access the toll-free numbers. Ex. X ¶ 10; Ex. V ¶ 4.

According to David Tobin, an industry expert, when consumers are chronically unable to get through to the access numbers, it is usually an indication that the system cannot adequately handle all the calls coming through it. Ex. A ¶ 9. In other words, defendants sold more cards than their systems were able to accommodate. Consequently, consumers were left with unusable, worthless cards. Beginning in 1995, defendants received significant numbers of complaints about this problem. However, defendants continued to sell their phone cards into 1997 without addressing any of the above-described problems.

[6]This allegation corresponds to the category "No System Access" on the complaint analysis chart. Ex. L Att. 1.

3. Defendants Misrepresented that Their Prepaid Phone Cards Would Be Reduced in Value Only for Minutes of Connect Time. (Complaint ¶ 29).[7]

Defendants falsely represented to consumers and distributors that their prepaid phone cards would be reduced in value only for completed calls. In fact, a large number of complainants reported that defendants reduced the value of their cards for calls that were not completed (*e.g.*, where the destination number went unanswered or rang busy) or where consumers had not made any calls. For example, declarant Vasudevan Parthasarthy reported that time was consistently deducted from his card whenever he entered his PIN, even though he was not connected to his destination. Ex. Y ¶ 3. In addition, time was deducted from his card when the line he was calling was busy. *Id.* Likewise, declarant Dinesh Rego stated that his cards were frequently reduced in value for calls that had not been completed. Ex. Z ¶¶ 5, 11 & Att 1. Declarant Surajit Mukhopadyay reported that approximately $77 was deducted from his card when it was not in use. Ex. AA ¶ 4.

4. Defendants Reduced the Value of Consumers' and Distributors' Prepaid Phone Cards More Rapidly than at the Advertised per Minute Rates. (Complaint ¶ 30).[8]

Defendants represented to consumers and distributors that their prepaid phone cards would be reduced in value only at the advertised per minute rates. A substantial number of complainants, however, reported that defendants overcharged them for completed calls. These consumers timed many of their calls, and, in so doing, confirmed their suspicions that they were

[7]This allegation corresponds to the category "Non-Connect Billing" on the complaint analysis chart. Ex. L Att. 1.

[8]This allegation corresponds to the category "Shorted Value" on the complaint analysis chart. Ex. L Att. 1.

not provided with calling time at the advertised per minute rates. For example, declarant Tilak Lal and his wife purchased a card from defendants in early 1996, and while using it began to suspect that they were being shorted. Ex. BB ¶ 4. They purchased a second card from defendants but decided to time all calls made using that card. The Lals then made a single call to India. It was a 15 minute call for which the Lals should have been charged 59 cents per minute, or $8.85. Ex. BB ¶ 6. Instead, their card was reduced from its $100 initial value to 29 cents. *Id.* The Lals repeatedly called Trans-Asian's customer service for assistance. They were put on hold for prolonged periods of time, falsely promised that "Mr. Raj" would get back to them, and hung up on. Ex. BB ¶ 7. Neither the Lals' calls, nor their letters to "Mr. Raj," resulted in any redress for their $91 loss. Ex. BB ¶ 10; *see also* Ex. Z ¶ 16.

5. Defendants Failed to Provide Refunds or Viable Replacement Phone Cards in Exchange for Non-Functioning Cards. (Complaint ¶ 31).

Defendants persistently failed and refused to keep their representations made in advertisements, contracts, and sales calls, that they would provide dissatisfied purchasers with refunds, replacements, or credit. In fact, numerous consumers and distributors, all of whom paid for their cards in advance, were denied refunds or replacements for non-working phone cards or other losses. *E.g.,* Ex. U ¶ 22; Ex. Q ¶¶ 15-16; Ex. BB ¶¶ 8, 10; Ex. Z ¶¶ 15-17; Ex. CC ¶ 6; Ex. DD ¶¶ 8-15. Indeed, numerous consumers and distributors expressly reported that defendants failed to replace unusable cards or compensate them for their losses. The failure to provide refunds continued even after defendants advertised nationally that they would refund money or replace non-working cards. Ex. EE; *see also* Exs. V, T, & Q. The overwhelming evidence demonstrates that consumers and distributors were denied replacement cards unless they agreed to make substantial additional purchases from defendants. Ex. U ¶¶ 17, 21.

6. In Connection with the Marketing and Distribution of Their Prepaid Phone Cards, Defendants Provided Wholesale Distributors and Retail Outlets with Pre-printed Posters and Nationwide Newspaper Advertisements Naming Their Retail Outlets, So as to Disseminate Defendants' False and Deceptive Advertising Claims to Consumers. (Complaint ¶ 33).

Defendants solicited wholesale distributors and retail outlets by offering opportunities to "EARN UP TO $100,000 A YEAR WITHOUT LEAVING YOUR HOME." *See* Ex. FF. In soliciting wholesale distributors and retail outlets, defendants conveyed to them the deceptive claims that are the subject of this action. In determining whether or not to purchase defendants' cards for resale, wholesale distributors and retail outlets relied on those claims. These distributors, in turn, relying on defendants' claims, disseminated these deceptive claims to consumers. The offering of these business opportunities and the maintenance of its distribution system are activities separate and distinct from defendants' sale of prepaid phone cards. For example, distributor Jay Shah owns the Kitab Bookstore in Iselin, New Jersey where declarant Vimla Desai bought her Raj Telekom phone cards. *See* Exs. T & CC. Mr. Shah's declaration reveals that, in early 1996, he displayed a poster for Raj Telekom on the door of his store, bearing a picture of the Raj Telekom phone card and the statement: "Raj Telekom; Call India for 59¢." Ex. CC ¶ 2. Mr. Shah obtained the poster from Mr. Pujra, a representative from defendants' New Jersey office, who visited the Kitab Bookstore periodically and provided Mr. Shah with phone cards, as well as point-of-sale promotional materials, displayed for consumers to see. Ex. CC ¶¶ 2, 4.

Wholesale distributor Raj Gandhi purchased Trans-Asian phone cards in large volume (approximately $200,000 worth per month) for resale to smaller distributors. Ex. GG ¶¶ 1, 3. According to Mr. Gandhi, defendant Kalra created and disseminated posters to be used as point-of-sale materials for Raj Telekom phone cards. Ex. GG ¶ 7.[9]

III. ARGUMENT

A. JURISDICTION

The Federal Trade Commission Act empowers the Commission to prevent "unfair or deceptive acts or practices in or affecting commerce" by "persons, partnerships or corporations," 15 U.S.C. § 45(a)(2). In enforcing the Commission's broad mandate to prevent deceptive advertising, courts give great weight to the Commission's "pragmatic judgment" in this area. *FTC v. Colgate-Palmolive Co*., 380 U.S. 374, 385 (1965).

While the FTC Act contains an exemption for "common carriers," defendants here can find no refuge from their obligation to refrain from "deceptive practices" in that exemption. For one thing, defendants' phone card activities do not make them exempt "common carrier[s] subject to the Acts to regulate commerce," including the Communications Act of 1934 and its amendatory Acts. 15 U.S.C. § 44. Moreover, even assuming, *arguendo*, that defendant corporations are "common carriers," the Commission can exercise jurisdiction over their advertising and promotional representations to [prospective] distributors and consumers--the subject matter of

[9]In December 1995, Mr. Gandhi purportedly purchased an "exclusive" New Jersey Trans-Asian franchise for the price of $2,995. Ex. GG ¶ 8. However, although Mr. Gandhi paid the purchase price, Trans-Asian continued to sell phone cards to many other distributors in New Jersey and Mr. Gandhi's franchise fee was never refunded to him. Ex. GG ¶¶ 9-11.

this suit--because the making of these representations is not "common carrier" activity. *See* Section III. A. 2. below.

1. Defendant Corporations are Not "Common Carriers."

The Communications Act of 1934, as amended, empowers the Federal Communications Commission ("FCC") to regulate every common carrier engaged in interstate or foreign communications. *See generally* 47 U.S.C. §§ 151 *et seq* (1996). The Act defines "common carrier," in relevant part, as "any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio . . . ." 47 U.S.C. § 153(10).[10]

The Commission is unaware of any case in which the FCC or a court has decided whether the issuance or sale of prepaid phone card services is common carriage under the Communications Act.[11] Certainly, enlargement of the "common carrier" exemption to cover the offering of prepaid phone cards would not "square" with the historical purpose and regulatory structure of telecommunications carrier regulation. *See Crosse-Blackwell v. FTC*, 262 F.2d 600 (4th Cir. 1958).[12]

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[10]Defendants have not obtained Certificates of Public Convenience as required by New York State Public Service Law § 99(1), and are therefore not common carriers under New York law.

[11]In *In re Time Machine, Inc.*, 11 F.C.C.R. 1186 (Oct. 26, 1995) (Kathleen Wallman, Chief, Common Carrier Bureau), the FCC assumed, *arguendo*, that a prepaid phone card issuer, was, as it contended, a “resale carrier” for purposes of considering the issuer’s claim that state regulation was preempted by FCC regulation of resale carriers, but then rejected the phone card issuer’s claim of preemption.

[12]In *Crosse-Blackwell*, the court, considering a similar FTC Act exemption pertaining to persons subject to regulation under the Packers and Stockyards Act of 1921, upheld the Commission’s jurisdiction over a canner of soups. Despite the literal wording of the Packers and Stockyards Act, the court refused to find that the canner was a "packer" because the activities of (continued...)

The Communications Act of 1934 was adopted in large part to protect the public from abuses of power by "a near-monopoly industry."[13] By contrast, the recent emergence and phenomenal sales growth of prepaid phone cards is not indicative of "near-monopoly," but of the emergence and phenomenal growth of competition in telecommunications-related markets. Indeed, prepaid phone cards can be issued by almost anyone: neither telecommunications experience nor investment in infrastructure nor corporate name recognition and related reputational interest is required; they often are sold at retail outlets as a near-commodity item, generating little if any customer loyalty; and rapid issuer entry, exit, and reentry is quite practicable. Rather than abuse of near-monopoly, the danger to be addressed is that prepaid phone card marketing holds innumerable opportunities for quick-buck artists who can flood retail outlets with "cheap" phone cards and then "pull the plug," leaving hundreds of thousands of purchasers holding worthless pieces of plastic (or paper). *See* Ex. A ¶ 8. Common carrier regulation is not focused on combatting consumer fraud. Further, its processes--which, for example, do not contemplate *ex parte* investigations in support of TRO and preliminary injunction filings--are ill-suited to the prepaid phone card market.[14]

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[12](...continued)
the canner stood far removed from the historical purpose of that act, and because a literal interpretation of the exemption in Section 5 of the FTC Act would be "plainly at variance with the policy of the legislation as a whole." *Id.* at 606 (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922)).

[13]*Clarification of the Commission's Authority to Forbear From Tariff Requirements for Non-Dominant Communications Carriers and New Authority to Prohibit Tariff Filings by Non-Dominant Carriers*, 1986 FCC LEXIS 3588, at 9; *see also* 78 Cong. Rec. 8822 (1934) (statement of Sen. Dill analyzing telephone monopoly).

[14]*See generally* 47 U.S.C. §§ 151 *et seq.* (1996).

Accordingly, the FTC can exercise jurisdiction over defendants because the marketing of prepaid phone cards does not render them "common carriers" within the exemption to the Commission's enforcement power.

2. In Any Event, Defendants' Challenged Conduct is Not Common Carrier Activity.

Even if defendants argue that they are engaged in some form of common carriage, that issue need not be decided here, for the FTC can exercise jurisdiction over their non-common carrier activities. *See FTC v. Massachusetts Furniture and Piano Movers Assoc.*, 102 F.T.C. 1176, 1213 & n.7 (1983), in which the Commission stated that the availability of the exemption does not turn on whether the actor is or is not a common carrier, but on whether the activity in question is "common carrier" activity.[15]

In fact, a contrary interpretation would constitute a serious departure from the analytical approach long taken by the courts in interpreting the definition of "common carrier" under the Communications Act itself. *See National Ass'n of Regulatory Util. Comm'rs v. FCC,* 533 F.2d 601, 608 (D.C. Cir. 1976) ("it has long been held that 'a common carrier is such by virtue of his occupation,' that is[,] by the actual activities he carries on. Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others").[16]

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[15]On appeal, the First Circuit agreed that the FTC had jurisdiction over the respondent but reversed and remanded on other grounds. *Massachusetts Furniture and Piano Movers Associates v. FTC,* 773 F.2d 391 (1985) (requiring reconsideration of state action immunity defense). *But cf. FTC v. Miller*, 549 F.2d 452 (7th Cir. 1977), which the Commission discussed in *Massachusetts Furniture*.

[16]Congress adopted the same activity-based approach in adding the related definition of

(continued...)

The Commission's complaint in this case asks this Court to halt the dissemination of false advertisements and other promotional representations made by defendants to lure prospective distributors and consumers to purchase defendants' prepaid phone cards. Such advertising cannot possibly be characterized as common carrier activity.

This conclusion is supported by recent court decisions permitting private plaintiffs to proceed against defendant carriers that were alleged to have violated state or common law by misrepresenting or failing to disclose charges in their advertising materials, despite arguments by such defendants that such claims were preempted by FCC "common carrier" rate regulation. *See, e.g.*, *Marcus v. AT&T*, 938 F. Supp. 1158, 1171-72 (S.D.N.Y. 1996); *Gelb v. AT&T*, 813 F. Supp. 1022, 1032 (S.D.N.Y. 1993) (carrier's allegedly deceptive representation that calling card was "free," when surcharges on use were imposed)*; Weinberg v. Sprint Corp.*, 165 F.R.D. 431, 439-40 (D.N.J. 1996) (carrier's allegedly deceptive failure to disclose rounding of connect time to next full minute); *DeCastro v. AWACS, Inc.*, 935 F. Supp. 541, 550, *appeal dismissed*, 940 F. Supp. 692 (D.N.J. 1996) (carrier's allegedly deceptive failure to disclose billing for non-connect time and rounding of connect time to next full minute).[17]

[16](...continued)
"telecommunications carrier" to the Communications Act last year. *See* 47 U.S.C. § 153(44), *as added by* the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("A telecommunications carrier shall be treated as a common carrier under this chapter [i.e., the Communications Act, as amended] *only to the extent it is engaged in providing telecommunications services*") (emphasis added); § 153(43) ("telecommunications" means the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information sent and received.").

[17]In reaching these conclusions, the courts have had recourse to a portion of the Communications Act that provides: "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter
(continued...)

Most recently, a court declined to find a federal question arising under the Communications Act where the plaintiff sought damages on grounds that the defendant phone card issuer allegedly failed to adequately disclose certain information (*i.e.*, the card's expiration date). *Lipcon v. Sprint Corp.,* 962 F. Supp. 1490 (S.D. Fla. 1997) (no removal to federal court required). In reaching that conclusion, the court noted that the plaintiff's claim of inadequate disclosure in no way implicated the provision of the underlying long-distance service, or the common carrier rates regulated by the FCC. *Id.* at 1493-94.

In allowing these and similar actions to proceed, the courts appear to have concluded that the practices being challenged--carrier dissemination of deceptive advertising or failures to disclose material information--were other than "common carrier" activities within the meaning of the Communications Act. For example, in *Gelb* the court noted that "[p]laintiff's claims assail defendant AT & T's advertising practices. The alleged fraud in this case does not directly relate to the jurisdiction of the FCC . . . . Nothing in the FCC's calling card tariff approval deals with the issue of defendant AT & T's advertising practices." 813 F. Supp. at 1030.

Similarly, in *Weinberg*, the court observed that "the interests plaintiff seeks to vindicate are not protected by the [Communications Act]" and that the "state law causes of action prohibit conduct [*i.e.*, advertising practices] distinct from that regulated by the Communications Act, and the duties Sprint is alleged to have breached are separate from those owed under the Act." 165 F.R.D. at 438 and 440, respectively. The court in *DeCastro* likewise permitted plaintiff's

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[17](...continued)
are in addition to such remedies. 47 U.S.C. § 414. *See, e.g.*, *Weinberg*, 165 F.R.D. at 439. Congress created this "savings clause" expressly to preserve causes of action for breaches of duties that do not exist under the Act.

claims to go forward, noting that they "center around Comcast's alleged failure to disclose a particular billing practice; they do not challenge the billing practice . . . ." 935 F. Supp. at 550.

As in the cases cited, the Commission here challenges only defendants' advertising practices, not any alleged "common carrier activities." Thus, for example, the complaint charges defendants with having falsely represented, expressly or by implication, that they would reduce the value of consumers' prepaid phone cards only for connect time (Complaint ¶ 29), which is precisely the type of conduct that *Marcus, Gelb, Weinberg,* and *DeCastro* suggest falls beyond the scope of "common carrier" activities regulated by the FCC. Moreover, insofar as defendants used deceptive advertisements and promotions to establish a large, multi-tiered distribution system -- to the detriment of both the distributors who relied on defendants' representations and the consumers to whom the distributors repeated those misrepresentations -- defendants' conduct is even further removed from "common carrier activity." *See* Ex. J; Ex. FF; & Ex. GG ¶¶ 1, 3, 7; *see also* Ex. C ¶ 2.

In sum, the Commission can exercise jurisdiction over defendants' deceptive advertising practices both because defendants are not common carriers subject to the Communications Act and because, in any event, their challenged advertising practices are not "common carrier" activity.

3. This Court Has Supplemental Jurisdiction over the State Law Claims.

The Judicial Improvements Act of 1990, granted the federal district courts "supplemental jurisdiction." 28 U.S.C. § 1367 ("Section 1367"). Section 1367 provides that, except in certain enumerated instances[18]--

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
> 28 U.S.C. § 1367(a) (1993).

This statute codifies the doctrines of pendent and ancillary jurisdiction. *Carlucci v. United States*, 793 F. Supp. 482, 484 (S.D.N.Y. 1992). In addition, it "explicitly grant[s] [to the district courts] pendent party jurisdiction," a position which the Supreme Court had previously rejected in *Finley v. United States*.[19] *See id*. at 484-85; *see also* 28 U.S.C.A. § 1367, Siegel, *Practice Commentary, The 1990 Adoption of § 1367, Codifying "Supplemental" Jurisdiction*, at 831-32 (West 1993).

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[18]Section 1367 precludes federal courts from exercising supplemental jurisdiction where: (1) a federal statute expressly provides otherwise; and (2) the court's original jurisdiction is based "solely" upon diversity of citizenship under 28 U.S.C. § 1332 and exercising supplemental jurisdiction would violate Section 1332's requirement of complete diversity. Furthermore, Section 1367 provides that a federal district court may decline to exercise subject matter jurisdiction over a related non-federal claim when: (1) the state claim presents a novel or complex state law issue; (2) the state claim substantially predominates over the claim(s) for which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction; or (4) in exceptional circumstances where there are compelling reasons for declining jurisdiction.

[19]490 U.S. 545 (1989). In *Finley*, the Supreme Court held that the Federal Torts Claims Act did not allow for the exercise of pendent party jurisdiction over additional parties as to whom there was no independent basis for federal jurisdiction. *Id*. Section 1367 was Congress' response to the *Finley* decision. 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* 2d § 3523 at 62 (2d ed. Supp. 1997).

This Congressional grant of jurisdiction to the federal courts is a broad grant of jurisdiction. *See Hetchkop v. Gundolt Carpet Workroom, Inc.*, 841 F. Supp. 113, 115 (S.D.N.Y. 1994).

Section 1367 empowers federal courts to exercise supplemental jurisdiction "to the limits Article III of the Constitution permits." 13B Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters 2d* § 3567.3 at 53 (2d ed. Supp. 1997). Although "the statute is silent as to what comprises the constitutional limits of the power of the federal courts," 13 Wright, Miller & Cooper § 3523 at 62, it clearly includes any state claim which derives from a "common nucleus of operative fact,"*United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), or which is sufficiently related to the federal claim upon which original jurisdiction is based, such that the state claims are part of the same case or controversy under Article III of the Constitution. *See Promisel v. First American Artificial Flowers*, 943 F.2d 251, 254 (2d Cir. 1991), *cert. denied*, 502 U.S. 1060 (1992); *Mueller v. Long Island Railroad*, 1997 WL 189123 (S.D.N.Y. Apr. 17, 1997); *Harris v. Rivera*, 921 F. Supp. 1058, 1061 (S.D.N.Y. 1995); *see also* 13 Wright, Miller & Cooper § 3523 at 62. A federal court's exercise of supplemental jurisdiction over state law claims, "while not automatic, is a favored and normal course of action." *Promisel*, 943 F.2d at 254; *Arwana Mills Co. v. United Tech. Corp.*, 795 F. Supp. 1238, 1248 (D. Conn. 1992); *Carlucci*, 793 F. Supp. at 485.

In the instant case, the NYAG seeks to serve as co-plaintiff with the FTC and join state consumer protection claims with the federal claims brought under the FTC Act. While there appear to be no reported cases in which the federal government and a state government have utilized Section 1367 to act as co-plaintiffs, Section 1367(a) expressly confers such jurisdiction upon this Court to permit the requested joinder. 28 U.S.C. § 1367(a); *see Mueller*, 1997 WL

189123, at *2, n.1; *Arnold v. Kimberly Quality Care Nursing Service*, 762 F. Supp. 1182, 1185 (M.D. Pa. 1991) (court held that language of Section 1367 was broad enough to include a pendent party plaintiff named in the original complaint who had no federal claim against the defendants and whose state claim against defendants derived from plaintiff's state claims, not her federal claim).

The state claims which the NYAG has interposed in this action arise from the same nucleus of operative facts which are the basis of the FTC's case against the defendants. The NYAG and FTC are asserting almost identical causes of action in that the acts proscribed by the FTC Act are likewise proscribed by New York Executive Law § 63(12) and GBL § 349. In fact, GBL § 349 was originally "based on Section 5 of the [FTC Act]." Givens, GBL § 349, *Practice Commentaries*, at 565 (1988). Furthermore, both the federal and state statutes prohibit deceptive acts and practices and both the federal and state statutes are aimed at protecting consumers from fraud. *See id.*

Additionally, in this case the federal and state law claims have been interposed against the same defendants and, as noted above, involve substantially the same conduct. "Because all of the claims seek to vindicate a wrong arising out of the same course of conduct, the exercise of supplemental jurisdiction over the corresponding state claims [is] proper." *Sriram v. Preferred Income Fund III Ltd.*, 22 F.3d 498 (2d Cir. 1994). Section 1367 clearly contemplates that the court has supplemental jurisdiction over the state law claims where all the parties and all the claims are part of the same case or controversy. *Jerry Kubecka, Inc. v. Avellino*, 898 F. Supp. 963, 972 (E.D.N.Y. 1995).

Finally, permitting the FTC and the NYAG to serve as co-plaintiffs and join the federal and state claims together clearly promotes "judicial economy, convenience and fairness to the litigants" and would ensure the consumer public the most efficient resolution of their claims. *Harris v. Rivera,* 921 F. Supp. at 1061 (quoting *Promisel,* 943 F.2d 251). To require the FTC and the NYAG to bring simultaneous parallel proceedings in federal and state courts against the same defendants for the same conduct is antithetical to this Court's pronouncement that "[d]uplicative litigation at multiple levels of government involving the same facts are contrary to the objective of the Supplemental Jurisdiction Act and the public interest." *Chambers v. Capital Cities/ABC*, 851 F. Supp. 543, 545 (S.D.N.Y. 1994). Further, allowing the FTC and the NYAG to proceed in a single litigation permits the defendants to defend closely related claims in a single forum.

In conclusion, because the joinder of the state claims and federal claims in this case is within the ambit of the types of claims Section 1367 embraces, the NYAG should be permitted to serve as co-plaintiff with the FTC and raise those state claims which are concomitant with the FTC's federal claims. The interests in this case weigh in favor of the exercise of supplemental jurisdiction.

B. THIS COURT HAS THE AUTHORITY TO GRANT THE REQUESTED RELIEF UNDER FEDERAL LAW.

The Commission brings this action under the second proviso of Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which provides, "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." A routine fraud case such as this, replete with misrepresentations of material facts in violation of Section 5 of the FTC Act, clearly qualifies as a "proper case" under Section 13(b). *See, e.g., FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 571 (7th Cir. 1989); *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1111-13 (9th Cir. 1982). Moreover, invocation of Section 13(b) remedies is particularly appropriate in cases where there is evidence of persistent, ongoing fraud. *FTC v. United States Oil & Gas Corp.,* 748 F.2d 1431, 1433-34 (11th Cir. 1984) (per curiam).

It is a well established principle that "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960); *see SEC v. Materia*, 745 F.2d 197, 200 (2d Cir. 1984). Relying on this principle, appellate courts have broadly interpreted the second proviso of Section 13(b) as authorizing all equitable remedies, preliminary and final, in district courts cases involving violations of law enforced by the Commission. *Singer,* 668 F.2d at 1113; *FTC v. World Travel Vacation Brokers, Inc.,* 861 F.2d 1020, 1026 (7th Cir. 1988); *see also United States Oil & Gas Corp.,* 748 F.2d at 1434.

This broad interpretation is consistent with the traditional rule of statutory construction which provides, "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *United States Oil & Gas Corp.*, 748 F.2d at 1434, *citing Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Under this rule of construction, the district court's express authority under Section 13(b) to grant a permanent injunction against violations of laws enforced by the Commission should be construed as implicitly conferring the authority to also issue a preliminary injunction, as well as any other necessary ancillary relief. *United States Oil & Gas*

Corp., 748 F.2d at 1434 (holding that the district court had inherent power of a court of equity to grant a preliminary injunction as relief ancillary to the express statutory authority to issue a permanent injunction under Section 13(b) of the FTC Act).[20] The sum of jurisprudential experience in the enforcement of federal law definitively establishes the broad authority of a district court to exercise its full equity jurisdiction.

[20]Other relief considered ancillary, and therefore implicitly authorized under the second proviso of Section 13(b) includes, but is not limited to, preliminary injunctions, asset freezes, restitution and/or disgorgement, and the appointment of receivers. *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346-47 (9th Cir. 1989) (affirming order freezing assets); *United States Oil & Gas Corp.*, 748 F.2d, at 1432-1435 (affirming order freezing assets and appointing a receiver); *Singer*, 668 F.2d, at 1111-13 (affirming order appointing a receiver, freezing corporate and personal assets and enjoining violations of the Act); *World Travel Vacation Brokers*, 861 F.2d at 1026 *citing FTC v. Virginia Homes Mfg. Corp.*, 509 F. Supp. 51, 55 & n. 2 (D.Md. 1981) (authorizing ancillary equitable relief pursuant to permanent injunction proviso of Section 13(b)), *aff'd*, 661 F.2d 920 (4th Cir. 1981); *FTC v. Security Rare Coin & Bullion*, 931 F.2d 1312, 1316 (7th Cir. 1989) (affirming the monetary equivalent of rescission); *Commodity Futures Trading Commission v. American Board of Trade*, 803 F.2d 1242, 1251-52 (2d Cir. 1986) (affirming order to disgorge).

1. This Case Meets the Requisite Standard for Issue of a Temporary Restraining Order and a Preliminary Injunction.

a. Standard for Relief

The test to determine whether preliminary injunctive relief is appropriate in Section 13(b) cases differs from that typically applied to private litigants. *FTC v. Lancaster Colony Corp.,* 434 F. Supp. 1088, 1090 (S.D.N.Y. 1977). The test applied in the Second Circuit to determine whether a temporary restraining order ("TRO") and/or a preliminary injunction should be issued is the "public interest test." *World Travel Vacation Brokers,* 861 F.2d at 1028-29; *Lancaster Colony Corp.,* 434 F. Supp. at 1090. Under the "public interest test" the Commission need not demonstrate irreparable injury. *World Travel Vacation Brokers*, 861 F.2d at 1028-29. "Rather, in determining whether to grant a preliminary injunction under Section 13(b), a court must 1) determine the likelihood that the Commission will ultimately succeed on the merits, and 2) balance the equities of private and public interests, affording a greater weight to public equities." *Id.* at 1029, (*citing FTC v. Warner Communications, Inc.,* 742 F.2d 1156, 1160 (9th Cir. 1984) (per curiam)); *see also* Cong. Rep. No. 624, 93d Cong., 1st Sess. 11 (1973), *reprinted in* 1973 U.S.C.A.N. 2417, 2533; *World Wide Factors,* 882 F.2d at 346; *but see, FTC v. Evans Products Co.,* 775 F.2d 1084, 1088 (9th Cir. 1985).

The requisite showing for the first prong of this test depends on whether the requested relief preserves or alters the status quo. When a government agency seeks to enjoin conduct (*e.g*., future law violations), the agency is seeking a mandatory provision of relief altering the status quo, and, as such, it must make a "clear" or "substantial" showing of the likelihood of success on the merits. *SEC v. Unifund SAL,* 910 F.2d 1028, 1040 (1990). Conversely, when seeking only prohibitory relief, such as an asset freeze or the preservation of records, the agency is not required to satisfy this higher standard because such provisions merely preserve the status quo. *Id. at* 1041; *cf., Tom Doherty Associates, Inc. v. Saban Entertainment, Inc.,* 60 F.3d 27, 33-34 (2d Cir. 1995).[21] If the court finds the first prong of the test is satisfied, the court must then balance the equities to determine the propriety of preliminary injunctive relief. In doing so, harm to the public interest is presumed. *World Wide Factors,* 882 F.2d at 346-47.

In this instance, the Commission seeks to enforce the law and thus safeguard the public interest. Therefore, the standards of private litigation, particularly the need to demonstrate irreparable injury, do not apply to this request for preliminary injunctive relief. *See generally Lancaster Colony Corp.,* 434 F. Supp. at 1090; *World Wide Factors,* 882 F.2d at 346 (presuming irreparable injury); *World Travel Vacation Brokers,* 861 F.2d at 1028-29. In this case the proposed temporary restraining order, asset freeze and temporary receiver sought would serve to preserve the status quo. Defendants' persistent acts of deception in violation of Section 5, as well as the substantial likelihood that the corporate defendants will resurface and resume these actions, support this request for relief.

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[21]Although the Second Circuit has not set forth a dispositive rule on the requisite level of showing for the first prong of the public interest test, the court's treatment of Section 21(d) of the Securities and Exchange Act, 15 U.S.C. § 78u(d) ("SEC Act") in issuing injunctive relief is considered analogous to the treatment of Section 13(b) of the FTC Act. In *Unifund SAL,* the court found that the evidence was sufficient to issue preliminary injunctive relief pursuant to Section 21(d) of the SEC Act, 15 U.S.C. § 78u(d). In relevant part the SEC Act provides that "[W]henever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter [then] it may in its discretion bring an action [to] enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order [shall be] granted." Relief granted by the Second Circuit pursuant to the SEC Act is similar in scope to relief granted in the cases cited in the text pursuant to Section 13(b) of the FTC Act. *Unifund SAL,* 910 F.2d 1028.

b. The Commission is Likely to Succeed on the Merits Since Substantial Evidence Shows that Defendants Have Violated and Will Continue to Violate the FTC Act.

(1) Defendants' Misrepresentations Violate the FTC Act.

Misrepresentations or omissions of material facts, made for the purpose of inducing purchases of products or services, constitute unfair or deceptive acts or practices prohibited by Section 5(a) of the FTC Act, 15 U.S.C. § 45 (a). *See, e.g., World Travel Vacation Brokers,* 861 F.2d at 1029; *FTC v. Atlantex Associates,* 1987-2 Trade Cas. (CCH) ¶ 67,788 at 59,252-54 (S.D. Fla. 1987), *aff'd,* 872 F.2d 966 (11th Cir. 1989); *FTC v. Kitco of Nevada, Inc.,* 612 F. Supp. 1282, 1291-92 (D. Minn. 1985). The misrepresentation or omission must be likely to mislead persons acting reasonably under the circumstances. *FTC v. Pantron I Corp.,* 33 F.3d 1088, 1095 (9th Cir. 1994), *cert. denied,* 115 S. Ct. 1794 (1995); *World Travel Vacation Brokers,* 861 F.2d at 1029. However, the Commission need not prove bad faith or an intent to deceive on the part of defendants, nor show actual deception since "[i]t is the capacity to deceive which is important." *Thiret v. FTC,* 512 F.2d 176, 180 (10th Cir. 1975).

In this case, there is no question that defendants misrepresented their ability to provide phone cards to consumers which could be used at any time to call India at a specified, prepaid low rate, and that such misrepresentations were material. This is precisely the kind of information that a consumer would reasonably rely on in deciding whether to purchase defendants' or another issuer's prepaid phone cards.

The material false representations made by defendants to consumers and distributors in their advertisements constituted deceptive acts or practices under Section 5 of the FTC Act. *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 387 (1965); *National Trade Publication Service, Inc. v.*

FTC, 300 F.2d 790, 792 (8th Cir. 1962); *Kitco*, 612 F. Supp. 1282, 1291 (D.Minn. 1985). It has been repeatedly held a violation of Section 5 to misrepresent goods or services in just the way that defendants have done. *See Colgate-Palmolive*, 380 U.S. at 387; *National Trade Publication Service,* 300 F.2d at 792; *Kitco,* 612 F. Supp at 1291.

In addition to the other requirements for obtaining a preliminary injunction, courts have considered the likelihood of recurrence of a violation of law in deciding whether to grant injunctive relief. Where, as here, defendants have engaged in an on-going scheme over a period of more than two years and under different names, there is a substantial likelihood of recurrence. Even where a defendant has ceased operating, as here, courts have inferred a substantial likelihood of recurrence and granted the requested relief. *See FTC v. Robert Febere*, No. 94 C 3625, 1996 U.S. Dist. LEXIS 9487, at *24 (E.D. Ill. July 3, 1996) (inferring a strong likelihood of recurrence despite closure of defendant's business); *Commodities Futures Trading Commission v. American Board of Trade,* 803 F.2d at 1251 (inferring a strong likelihood of recurrence from defendant's past illegal conduct); *FTC v. Engage-A-Car Services, Inc.*, No. 86-3758, slip op at 33 (D.N.J. Dec. 18, 1986) (inferring a likelihood of recurrence from defendant's violations of Section 5). This risk of recurrence is another factor which weighs in favor of the court's issuing an injunction. If not enjoined, the defendants will surely persist in engaging in deceptive practices.

(2) The Individual Defendant is Liable.

To obtain an injunction against an individual, the Commission must prove only that violations of the FTC Act occurred, and that the individual either directly participated in the acts at issue or had some measure of control over those acts. *FTC v. Standard Education Society*, 302 U.S. 112 (1937). Individual defendant Kalra, the president or vice president, manager, and shareholder of the corporate defendants, is responsible for having deceived and defrauded consumers. As the president and sole managing officer of the corporate defendants, defendant Kalra at all times had clear authority to control the conduct of the corporate employees. The evidence adduced shows that defendant Kalra entered into agreements on behalf of the companies, indicating that at all times he has exercised authority over the corporate defendants. Ex. G. Defendant Kalra also identified himself as the companies' president to a detective associated with the Staten Island District Attorney's Office and held himself out to the New York City Better Business Bureau as the president of defendants Trans-Asian and Raj Telekom. Exs. H & HH. According to the evidence provided by numerous consumers and distributors, defendant Kalra dealt directly with consumers (*see, e.g.,* Ex. U ¶¶ 10-11; Ex. X ¶ 16); negotiated and entered into sales agreements with distributors (*see, e.g.,* Ex. C ¶¶ 11-12; Ex. GG ¶¶ 8-10); and was repeatedly identified by corporate employees as the only person with authority to provide injured consumers or distributors with refunds or replacement phone cards (*see, e.g.,* Ex. Z ¶ 8; Ex. AA ¶ 5). According to distributor Raj Gandhi, defendant Kalra was well aware that from at least 1996, there were numerous problems with the service provided to purchasers of defendants' phone cards, including the fact that access lines were constantly busy. Ex. GG ¶¶ 18-20.[22] Clearly, defendant Kalra controlled the corporate defendants' day-to-day business dealings, meriting injunctive and other relief against him personally.

[22]Shortly after he learned of these problems with defendants' phone cards, Mr. Gandhi ceased selling them.

To bring an immediate halt to deceptive trade practices and to preserve the availability of effective final relief, the district court should issue a TRO. Fed.R.Civ.P. 65(b); *see In the matter of Vuitton et Fils S.A.*, 606 F.2d 1, 3-4 (2d Cir. 1979). Courts in this circuit have repeatedly granted TROs to the Commission under Section 13(b). *See FTC v. Minuteman Press International, Inc.*, No. 93-CIV-2496 (E.D.N.Y. Feb. 4, 1997); *FTC v. Student Aid, Inc.*, No. 96-CIV-6548 (S.D.N.Y. 1996); *FTC v. Micom Corp.,* 1997-1 Trade Cas. (CCH) ¶ 71,753 (S.D.N.Y. 1997); *FTC v. Metropolitan Communications Corp.*, 1995-2 Trade Cas. (CCH) ¶ 71,183 (S.D.N.Y. 1995); *FTC v. Federal Coin Repository, Inc.*, 1993-2 Trade Cas. (CCH) ¶ 70,324 (E.D.N.Y. Aug. 9, 1993).

c. The Balance of Equities Clearly Weighs in Favor of the Proposed Provisional Injunctive Relief.

If a court finds that the Commission is likely to succeed on the merits, the court must then balance the equities to determine the propriety of preliminary injunctive relief. In doing so, irreparable harm need not be shown and harm to the public interest is presumed. *World Wide Factors,* 882 F.2d at 346 (citing *United States v. Odessa Union Warehouse Co-op.*, 833 F.2d 172, 176 (9th Cir. 1987)).[23]

[23]This application of the public interest standard conforms to its application to various federal statutes by this circuit and others. *See, e.g., Unifund SAL,* 910 F.2d at 1035-36 (no need to demonstrate irreparable injury under Securities Exchange Act); *United States v. Siemens Corp.,* 621 F.2d 499, 505-6 (2d Cir. 1980) (federal government not required to show irreparable injury under federal antitrust statutes); *United States v. William Savran & Assoc.,* 755 F. Supp. 1165, 1178 (E.D.N.Y. 1991) (federal government need not show irreparable injury under mail fraud statutes); *see also Odessa Union Warehouse Co-op.,* 833 F.2d at 175-6 (no irreparable injury requirement under the Food, Drug & Cosmetic Act); *United States v. Cappetto,* 502 F.2d 1351, 1358-9 (7th Cir. 1974) (no irreparable injury requirement under RICO).

Balancing the equities in this case reveals that preliminary injunctive relief is clearly warranted. Since 1995, defendants have continually and persistently violated Section 5 of the FTC Act. The Commission's evidence convincingly demonstrates that defendants' deceptive practices do not stand alone as isolated occurrences, but rather coalesce into a pattern of conduct that furthers a fraudulent enterprise. Defendants' deceptive practices continued unabated until August and September 1996, when defendant Kalra closed the defendant corporations' New York offices, changed his business and home phone numbers and attempted to disappear. Ex. H ¶¶ 4, 7. After he was tracked down by a detective for the Staten Island District Attorney, defendant Kalra reopened the defendants' corporate offices in late September or early October, where he continued to deceive and defraud consumers and distributors until at least February 1997. Interviewed by Dun & Bradstreet in April 1997, defendant Kalra stated that he intended to reopen Trans-Asian at an undisclosed New York location in June 1997. Ex. I. In February 1997, defendant Kalra nationally advertised prepaid phone cards under the trade name Vision USA, using advertisements that were remarkably similar to those used by the corporate defendants. Ex. II.

Although there is no clear evidence that defendants are presently advertising or selling prepaid phone cards, defendant Kalra is still conducting business using the trade name of Vision USA. Further defendant Kalra is currently operating Computer Training Institute out of the former premises of Trans-Asian. *See* Ex. C ¶¶ 22-24; Ex. JJ.[24] Further, should the corporate

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[24]Even if defendants have ceased their current business practices, injunctive relief would still be necessary. An injunction is justified when there is a "cognizable danger of recurrent violation," *United States v. W. T. Grant Co.,* 345 U.S. 629, 633 (1945) or "some reasonable likelihood of future violations." *Commodities Futures Trading Commission v. CoPetro*

(continued...)

defendants again reopen or defendant Kalra once again promote and sell prepaid phone cards under any company name or d/b/a, consumers will likely suffer new harm absent injunctive relief halting defendants' deceptive business practices.

If, in fact, defendants are no longer selling prepaid phone cards, the preliminary relief sought will not cause them any hardship. If, on the other hand, defendants are selling prepaid phone cards, there can simply be "no oppressive hardship to defendants in requiring them to comply with the FTC Act." *World Wide Factors,* 882 F.2d at 346-347; *e.g., FTC v. Sage Seminars, Inc.,*1995-2 Trade Cas. (CCH) ¶ 71,256, at 76,116. Defendants plainly have no right to persist in conduct that violates federal and state law.

Moreover, the TRO, asset freeze, and temporary receiver are needed to prevent the destruction of documents and the dissipation of assets which could be used for consumer redress. The proposed TRO would preserve the status quo for a limited period of time. The TRO's conduct provisions are narrowly drafted to prevent further violations of Section 5 of the FTC Act by defendants in the specific ways in which they have violated it -- and are necessary to prevent defendants from victimizing additional consumers. Injunctions are appropriate upon a showing of reasonable likelihood that illegal conduct will be repeated. *SEC v. Materia,* 745 F.2d at 200; *SEC v. Grossman,* 887 F. Supp. 649, 659-660 (S.D.N.Y. 1995). As stated in *World Wide Factors,* 882 F.2d at 347, "there is no oppressive hardship to defendants in requiring them to comply with the FTC Act, [or] refrain from fraudulent representations." Thus the public equities supporting

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[24](...continued)
Marketing Group, Inc., 502 F. Supp. 806, 818 (C.D. Cal. 1980), *aff'd*, 680 F.2d 573, 582 n. 16 (9th Cir. 1982); *City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289 n.10 (1982); *Odessa Union Warehouse Co-op.,* 833 F.2d at 176; *Armster v. U.S. District Court,* 806 F.2d 1347, 1357 (9th Cir. 1986).

the proposed preliminary injunctive relief far outweigh any burden imposed on defendants by such relief. As described further below, the proposed order would also impose a temporary freeze on assets which could be used for consumer redress.[25]

2. This Case Meets the Requisite Standard for Relief Under New York State Law.

a. Executive Law § 63(12)

The NYAG brings this action pursuant to Executive Law § 63(12), which authorizes the Attorney General to bring an action[26] against any person or business that engages in repeated or persistent fraud or illegality. As set forth in detail above, the evidence amassed by the NYAG and the FTC in this case overwhelmingly demonstrates that defendants engaged in both repeated and persistent fraudulent and illegal conduct.

The term "fraud" acquires special meaning within the context of Executive Law § 63(12). It is broadly defined in the statute as "any device, scheme or artifice to defraud, any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contract provision."

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[25]It is more than foreseeable that consumer injury exceeds defendants' assets. If the FTC prevails, defendants will be liable for the monetary equivalent of rescission. *See Kitco,* 612 F. Supp. at 1292. The court in *World Wide Factors,* 882 F.2d at 347, considered the fact that the consumers may have been entitled to restitution, and that the claim for restitution may have exceeded the defendants' assets, to weigh in favor of granting injunctive relief. The proposed TRO sets up a mechanism whereby the individual defendants may apply to the court for funds to pay reasonable expenses.

[26]Executive Law § 63(12) permits the NYAG to apply for relief to the New York State Supreme Court. As set forth *supra* at Section III. A. 3, the state claims are before this federal district court under 28 U.S.C. § 1367.

The judicial interpretation of fraud is equally broad, going beyond common law fraud. In *People v. Federated Radio Corp.*, 244 N.Y. 33, 38-39 (1926), the New York State Court of Appeals wrote:

> In a broad sense the term [fraud] includes all deceitful practices contrary to the plain rules of common honesty. . . . The words "fraud" or "fraudulent practice" in this connection should, therefore, be given a wide meaning so as to include all acts, although not originating in any actual evil design or contrivance to perpetrate fraud or injury upon others which do by their tendency to deceive or mislead the purchasing public come within the purpose of the law.

Numerous cases discussing the definition of fraud under Executive Law § 63(12) adopted the rule of *Federated Radio*. *See, e.g., People v. Apple Health and Sports Clubs, Ltd.*, 206 A.D.2d 266, 267 (1st Dep't 1994), *appeal dismissed in part and denied in part*, 84 N.Y.2d 1004 (1994); *Lefkowitz v. Bull Investment Group*, 46 A.D.2d 25, 28 (3d Dep't 1974), *appeal denied*, 35 N.Y.2d 647 (1975).

The repeated or persistent violation of any federal, state, or local law constitutes "illegality" within the meaning of Executive Law § 63(12). *See, e.g., State v. Ford Motor Co.*, 136 A.D.2d 154 (3d Dep't 1988), *aff'd*, 74 N.Y.2d 495 (1989) (violations of the New York Lemon Law); *People v. Empyre Inground Pools, Inc.*, 227 A.D.2d 731 (3d Dep't 1996) (violations of the home improvement law); *People v. Concert Connection Ltd.*, 211 A.D.2d 310 (2d Dep't), *appeal dismissed*, 86 N.Y.2d 837 (1995) (violations of the Arts and Cultural Affairs Law). As detailed in the Facts section *supra* at Section II. B., defendants repeatedly and persistently engaged in illegal acts in violation of Executive Law § 63(12) by violating both federal and New York State laws.

b. General Business Law § 349

The NYAG also brings this action pursuant to GBL § 349 which makes deceptive acts and practices unlawful in the state of New York. The meaning of deception under GBL § 349 is accorded parallel construction to that of fraud under Executive Law § 63(12). *State v. Colorado State Christian College*, 76 Misc. 2d 50, 54 (Sup. Ct. N.Y. Co. 1973).

c. Relief Under Executive Law § 63(12) and GBL § 349

Injunctive relief is routinely granted in actions under Executive Law § 63(12) and GBL § 349. Executive Law § 63(12) explicitly authorizes the court to grant injunctive relief for repeated or persistent fraudulent or illegal conduct. Likewise, GBL § 349(b) authorizes such relief for deceptive acts and practices. The scope of the relief granted is addressed to the discretion to the court and is to be broadly fashioned so as to achieve the remedial purposes of these statutes. *See People v. Apple Health*, 206 A.D.2d at 266; *People v. Helena VIP Personal Introduction Service Inc.*, 199 A.D.2d 186; *State v. Scottish-American Association, Inc.*, 52 A.D.2d 528 (1st Dep't), *appeal dismissed*, 39 N.Y.2d 1057 (1976).

Even when a seller has ceased a deceptive practice, a request for injunctive relief is not moot. *State v. Midland Equities of New York, Inc.*, 117 Misc. 2d 203, 206-207 (Sup. Ct. N.Y. Co. 1982); *People v. Therapeutic Hypnosis, Inc.*, 83 Misc. 2d 1068, 1070 (Sup. Ct. Albany Co. 1975), (citing *Lefkowitz v. E.F.G. Baby Products, Inc.*, 40 A.D.2d 364, 367 (3d Dep't 1973)). *See also State v. Bevis Indus., Inc.*, 63 Misc. 2d 1088, 1092 (Sup. Ct. N.Y. Co. 1970) (even if all past complaints have been resolved, respondents may be enjoined from committing future violations). Voluntary discontinuance of improper activity is no assurance that such activity will not be resumed. *State v. Person*, 75 Misc. 2d 252, 253 (Sup. Ct. N.Y. Co. 1973). Clearly, defendants should be enjoined from all of the conduct which violates Executive Law § 63(12), GBL § 349, and Section 5 of the FTC Act.

In addition, Executive Law § 63(12) and GBL § 349 expressly authorize the court to order restitution and damages for consumers injured by defendants' fraudulent and illegal conduct. Indeed, Executive Law § 63(12) gives the court broad authority to establish procedures for restitution, including the mechanics of identification, notice, and distribution. *Helena VIP*, 199 A.D.2d 186 (1st Dep't 1993); *State v. Ford Motor Co.*, 136 A.D.2d at 154; *State v. Midland Equities*, 117 Misc. 2d at 209.

Pursuant to GBL § 350-d, the court is also authorized to award a $500 penalty for each violation of GBL § 349. In the instant case, since defendants engaged in multiple violations of GBL § 349, the court should impose the maximum penalty under the law. *People v. Allied Marketing Group*, 220 A.D.2d 370 (1st Dep't 1995); *Helena VIP*, 199 A.D.2d at 186; *State v. Hotel Waldorf Astoria Corp.,* 67 Misc. 2d 90 (Sup. Ct. N.Y. Co. 1971).

Finally, C.P.L.R. § 8303(a)(6) provides that the court may award the NYAG $2,000 in costs against each defendant in a proceeding brought pursuant to Executive Law § 63(12). Courts routinely grant these costs. *See, e.g., State v. Daro Chartours, Inc.*, 72 A.D.2d 872, 873 (3d Dep't 1979); *State v. Midland Equities*, 117 Misc. 2d at 208; *Hotel Waldorf-Astoria,* 67 Misc. 2d at 92.

C. AN ASSET FREEZE, A LIQUIDATING RECEIVER, AND EXPEDITED ASSET DISCOVERY ARE NECESSARY TO PRESERVE THE STATUS QUO AND THE POSSIBILITY OF EFFECTIVE FINAL RELIEF FOR CONSUMERS.

Defendants' assets should immediately be frozen to protect their ultimate availability for consumer redress in this case. As part of the final remedy in this case, the Commission seeks the monetary equivalent of rescission and restitution for consumers injured through unfair and deceptive trade practices, *see, e.g., Kitco,* 612 F. Supp. at 1292, and disgorgement of defendants' profits accrued through violations of federal law to deter future violations. A freeze of the individual and corporate defendants' assets is essential to prevent the dissipation of these assets during the course of the litigation. Appointment of a receiver for the corporate defendants is also necessary to maintain the status quo and prevent the destruction of documents or computer files and the concealment of assets during the pendency of this litigation.

1. The Standards for Granting an Asset Freeze are Satisfied.

An asset freeze in a law enforcement action maintains the status quo and is ancillary to the remedies that could be ordered in the event violations are established at trial. *Unifund SAL,* 910 F.2d at 1040; *see also SEC v. American Board of Trade,* 830 F.2d 431, 438 (2d Cir. 1987); *International Controls Corp. v. Vesco,* 490 F.2d 1334, 1347 (2d. Cir.), *cert. denied*, 417 U.S. 932, (1974); *Singer,* 668 F.2d at 1112-13. Once a court has determined that the Government has demonstrated a likelihood of success, and has balanced the equities in favor of the public interest, the court is free to fashion any injunctive relief that seeks only to maintain the status quo, *without* a more substantial showing of likely success. *Unifund SAL,* 910 F.2d at 1037, 1039-41. Particularly in cases where defendants are jointly and severally liable for illicit conduct, all assets, whether or not traceable to illegality, may be frozen. *SEC v. Grossman*, 887 F. Supp. 649, 661 (S.D.N.Y. 1995); *SEC v. Tome*, 638 F. Supp. 596, 627 (S.D.N.Y. 1986), *aff'd*, 833 F.2d 1086 (2d. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988).

In this case, the Commission has provided evidence of fraud well in excess of this standard for obtaining an asset freeze. Where, as here, business operations are permeated by fraud, there is necessarily a strong likelihood that assets will be dissipated or concealed during legal proceedings. *SEC v. American Board of Trade*, 830 F.2d at 439; *SEC v. Manor Nursing Centers*, 458 F.2d 1082, 1106 (2d Cir. 1972). Such dissipation or concealment would irreparably injure the Commission's ability to obtain relief if the assets remaining are insufficient to satisfy a final judgment granting monetary relief for consumers. Mindful of this, numerous courts have frozen assets and appointed receivers on the basis of pervasive fraudulent activities of the sort found here.[27] Indeed, the court may impose an asset freeze where the mere *possibility* of dissipating assets exists. *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989); *FSLIC v. Quinn*, 711 F. Supp. 366, 379 (N.D. Ohio 1989).[28]

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[27]*See, e.g.*, *FTC v. World Wide Factors*, 882 F.2d at 344; *Amy Travel Service, Inc.*, 875 F.2d at 571; *FSLIC v. Dixon*, 835 F.2d 554 (5th Cir. 1987); *FTC v. United States Oil & Gas Corp.*, 748 F.2d 1431; *Singer*, 668 F.2d at 1112-3. In fact, such relief may be ordered *solely* on the basis of pervasive fraudulent activities of the sort found in this case. *See, e.g.,Commodity Futures Trading Commission v. American Board of Trade*, 803 F.2d 1242, 1251 (2d Cir. 1986); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972).

[28]In *Sahni*, the Ninth Circuit reversed a district court's denial of an asset freeze where the district court required a showing of a likelihood of dissipation. The court held that "[s]o long as the district court continued to believe that FSLIC was likely to succeed on the merits, the court should only have required FSLIC to show a *possibility* of dissipation of assets." Requiring a showing of "likelihood" of dissipation "placed an unnecessarily heavy burden on FSLIC." *Sahni*, 868 F.2d at 1097.

An asset freeze is appropriate where it protects the availability of final monetary relief. The Commission's evidence presents a strong, indeed substantial, showing that the individual defendant Kalra will be found liable for final equitable monetary relief in this case, so a freeze upon his assets is justified. In order to include an individual defendant's assets for relief, the Commission must demonstrate his liability for monetary relief (such as redress and disgorgement of profits) under Sections 5 and 13(b) of the FTC Act, and that he had both (1) knowledge, and (2) direct participation in, or the authority to control, the corporate practices. *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 573-74 (7th Cir. 1989), *cert. denied*, 493 U.S. 954, 110 S. Ct. 366, 107 L. Ed. 2d 352 (1989); *Atlantex Asso*ciates, 1987-2 Trade Cas. ¶ 67,788 at 59,255; *FTC v. International Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,725, at 69,706-08 (N.D. Cal. 1983).[29] The requisite level of knowledge may be proved by showing the defendant had actual knowledge of the deception, reckless indifference to the truth or falsity of the misrepresentations, or an awareness of a high probability of fraud coupled with an intentional avoidance of the truth. *FTC v. Pantron I*, 33 F.3d at 1103; *Amy Travel Service, Inc.*, 875 F.2d at 574 (quoting *Kitco*, 612 F. Supp. at 1292); *International Diamond*, 1983-2 Trade Cas. at 69,707; *FTC v. Lloyd Sharp*, 782 F. Supp. 1445, 1450 (D. Nev. 1991). As set forth in Section III. B. 1. b., *supra*, there is overwhelming evidence that defendant Kalra, as president and manager, controlled the operation of defendants Trans-Asian, Raj Telekom, and Trans American. Given these facts, defendant Kalra knew or should have known that the corporate defendants were engaged in fraud, and thus he should be held personally liable. *See Pantron I*, 33 F.3d at 1103-04.

[29]In contrast, corporate liability for monetary relief is established upon proof that the FTC Act has been violated by corporate agents. *See, e.g., FTC v. Winstead Hosiery*, 258 U.S. 483, 494 (1922); *Goodman v. FTC*, 244 F.2d 584, 592 (9th Cir. 1957).

2. The Standards for Appointing a Receiver and Granting Other Ancillary Relief are Satisfied.

The Commission and the NYAG have moved for an order appointing a temporary receiver[30] and prohibiting the destruction of documents.[31] These provisions will preserve the status quo by securing and preserving corporate assets and records, if any remain, during the pendency of this litigation. Appointment of a receiver is within the equitable jurisdiction of the district court in cases brought by federal government agencies. *See, e.g., Commodity Futures Trading Commission v. The American Board of Trade, Inc.,* 803 F.2d 1242, 1248 (2d Cir. 1986); *Manor Nursing Centers, Inc.,* 458 F.2d 1082, 1102-05 (2d Cir. 1972) (appointment of a receiver and freezing of assets); *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307-8 (2d Cir.), *cert denied*, 404 U.S. 1005 (1971) (finding the appointment of a receiver within a court's ancillary equitable powers and authorizing disgorgement of profits); *SEC v. Capitol Counselors, Inc.,* 332 F. Supp. 291, 304 (S.D.N.Y. 1971) (receiver appointed "to prevent diversion or waste of assets to the detriment of those for whose benefit, in some measure, this injunctive action is brought").

Appointment of a receiver is critical to maintain the status quo during this litigation. First, a receiver will marshal and safeguard the corporate assets, determine what has happened to the money defendants obtained from consumers, and assess whether corporate assets have been

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[30]A receiver is traditionally appointed to operate a business; here the evidence appears to show that the corporate defendants are no longer operating although they are not officially dissolved. Accordingly, the Commission and the NYAG are seeking the appointment of a "liquidating" receiver to locate, marshal, and assess the corporate assets, wherever they may be located.

[31]The Commission and the NYAG also seek leave of the Court to expedite discovery, specifically to conduct depositions on 48 hours notice and to request the production of documents on 5 days notice, during the pendency of the TRO.

wrongfully converted to the personal use of the individual defendant or others.[32] The receiver can objectively determine for the court the scope and nature of defendants' sales. Second, the provisions in the proposed order concerning expedited discovery and preservation of corporate records are necessary to identify the defendants' assets, to fully determine the size and extent of the fraud, and to identify additional consumers and distributors injured by defendants' practices.

IV. CONCLUSION

Defendants in this action have operated a fraudulent marketing operation that has victimized numerous consumers and distributors. Swift action is necessary to forestall defendants' deceptive practices and to preserve the availability of final relief for injured consumers and distributors, pending a hearing on preliminary injunctive relief. Accordingly, the

[32]The order contemplates the obvious need for an accounting to aid the receiver in carrying out these tasks. It falls within the equitable powers of the court to order an accounting where, as here, the "accounts between the parties are of such a complicated nature that they can be satisfactorily unraveled only by a court of equity." *Donovan v. United States Postal Service,* 530 F. Supp. 894, 900-01 (D.D.C. 1981) (quoting Harlan, J., concurring in *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 478, 480 (1962)). *See also World Wide Factors,* 882 F.2d at 348.

Commission and the NYAG respectfully request that the proposed restraining order be granted in all respects.

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Respectfully submitted,

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