

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK**

_____)	
FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No.
)	
1306506 ONTARIO LIMITED, a Canadian)	
Corporation;)	
)	
T.S.I. SERVICE CORP., a Nevada Corporation;)	
)	
VINNY BUBIC, individually and as a director and)	
officer of 1306506 Ontario Limited and T.S.I.)	
Service Corp.; and)	PLAINTIFF’S MEMORANDUM OF
)	POINTS AND AUTHORITIES IN
ERROL ALEXANDER, individually and as a)	SUPPORT OF ITS MOTION FOR
director and officer of 1306506 Ontario Limited)	AN <i>EX PARTE</i> TEMPORARY
and T.S.I. Service Corp.;)	RESTRAINING ORDER AND
)	OTHER RELIEF
Defendants.)	
_____)	

I. INTRODUCTION

This case involves an enterprise centered in Canada that calls U.S. consumers to sell them essentially worthless protection for their credit cards. Although this protection purports to shield consumers against unauthorized or fraudulent charges on cards, the irony is that it is the defendants themselves that make illegal charges on the consumers’ cards, usually totaling \$199 or more. The Federal Trade Commission (“Commission” or “FTC”) asks this Court to take action on an *ex parte* basis to bring an immediate end to these illegal claims and preserve assets so that funds will be available for restitution to victims.

Although there are related corporate entities and credit card processors in the United States, TSI is centered in Toronto, Ontario. It telephones consumers throughout the U.S. to encourage them to purchase credit card protection at a cost of between \$199 and \$299 – charges that are then billed to consumers’ credit cards. During these calls TSI typically claims that consumers may be liable for thousands of dollars in charges if their credit card numbers are stolen or used inappropriately. This central claim is wholly untrue. Under federal law a consumer’s maximum liability for a card that is stolen or used without authorization is \$50. Thus there is no reason to purchase the “protection services” TSI offers.

TSI’s telemarketers use several deceptive ploys. In some cases they pretend to be calling from Visa or MasterCard, and after tricking consumers into revealing their card numbers proceed to charge them with no authorization whatsoever. In other cases they make a variety of false claims about the supposed need for such a program, affirmatively asserting (falsely) that the consumer is liable if their number is stolen. These sales pitches are often embellished with “true” stories of other consumers that have been defrauded out of thousands of dollars because of fraud and who had to pay the card companies themselves because they lacked credit card protection of the type offered by TSI.

However, it is TSI itself that makes unauthorized charges or deceptive claims to defraud consumers across the United States. There is no question that it is fraudulent to place charges on consumers’ credit cards without their authorization. It is also an illegal deceptive practice to misrepresent the potential losses consumers could suffer if their credit cards are lost or stolen. Thus these practices violate Section 5(a) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(a), and the FTC’s Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310.

The FTC asks this Court to bring these deceptive activities to an end and to freeze defendants' assets to ensure that they do not disappear. Because TSI's practices are so plainly unlawful, the FTC asks the Court to bring an immediate halt to those practices by issuing an *ex parte* temporary restraining order ("TRO") stopping deceptive claims, freezing defendants' assets, and ordering defendants to repatriate those assets that have been transferred outside the United States.¹

II. THE PARTIES

A. Plaintiff

The Federal Trade Commission is the United States government agency principally responsible for enforcement of federal consumer protection laws. The FTC is an independent agency of the United States government created by statute. 15 U.S.C. §§ 41 *et seq.* The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which declares "unfair or deceptive acts or practices" in or affecting commerce to be unlawful. The FTC also enforces the TSR, 16 C.F.R. Part 310, which prohibits false and misleading statements during telemarketing calls. Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, authorize the FTC to initiate proceedings in federal district court to enjoin violations of the FTC Act as well as the TSR, to obtain redress for injured parties, and to secure appropriate equitable relief.

¹ This action is one of several actions being filed by the FTC across the United States in a coordinated effort to crack down on companies that deceptively telemarket credit card protection.

B. Defendants

Defendants' enterprise, TSI, operates under two corporate names, 1306506 Ontario Limited² and T.S.I. Service Corp.,³ and transacts business under several other names, including TSI, TSI Financial Services, TSI Services, TSI Security, and TeleConsultant Service International/TSI.⁴ Defendant 1306506 Ontario Limited is a Canadian corporation, incorporated in Ontario, Canada in July 1998.⁵ Its office and principal place of business is the headquarters for the telemarketing enterprise which is located at 286 A Danforth Avenue, Toronto, Ontario, Canada, M4K 1N6.⁶ The enterprise's telemarketers call U.S. consumers from boiler rooms

² See PX 20, Krause Decl. Att. A (corporate documents filed with the Ontario Ministry of Consumer and Commercial Relations).

³ See PX 19, Carpenter Decl. Att. A (corporate documents filed with the Nevada Secretary of State).

⁴ Defendants use various names in their business dealings, including (1) TSI, *see, e.g.*, PX 1, Simon Decl. ¶ 3; PX 2, Jelinek Decl. ¶ 3; PX 3, Reed Decl. ¶ 3; PX 4, Steele Decl. ¶ 3; PX 6, Reiff Decl. ¶ 3; PX 10, Kocher Decl. ¶¶ 4, 8, 9; PX 13, Sullivan Decl. ¶ 3; PX 18, Atkins Decl. ¶¶ 3, 7, 9, 13; PX 19, Carpenter Decl. Att. B (transcript of undercover call to TSI's toll-free number in which telephone answered "TSI Customer Service"); (2) TSI Financial Services, *see, e.g.*, PX 5, Bussell Decl. ¶ 3; PX 6, Reiff Att. D; PX 12, Jonczyk Decl. ¶ 3; (3) TSI Services, *see, e.g.*, PX 4, Steele Att. B; PX 6, Reiff Att. F; PX 9, Grafton Decl. ¶ 3, Att. B & C, PX 19, Carpenter Decl. Att. B (transcript of undercover call in which representative stated company incorporated as "TSI Services"); (4) TSI Security, *see, e.g.*, PX 7, Totaro Decl. ¶ 6; PX 8, Blum Decl. ¶ 3; and (5) TeleConsultant Service International/TSI, *see, e.g.*, PX 19, Carpenter Decl. Att. B (transcript of undercover call in which representative stated company used to be called "TeleConsultant Services International"); PX 20, Krause Decl. Att. B (Ontario business name registrations).

⁵ See PX 20, Krause Decl. Att. A (Ontario corporate documents).

⁶ See PX 20, Krause Decl. Atts. A, B (Ontario corporate documents), & Att. D (TSI's maildrop application with Toronto address); *see also* PX 19, Carpenter Declaration, Att. B (transcript of undercover call in which representative stated that the corporate headquarters were located in Toronto).

located in Toronto.⁷ Defendant T.S.I. Service Corp. is a Nevada corporation incorporated in February 1999 and has a registered address in Boulder City, Nevada.⁸ While TSI is incorporated in Nevada, it does not appear to have a physical location in the United States. TSI uses a mailbox at a maildrop location in Buffalo, New York, and seems to rely on a third-party company in Florida for some customer service functions.⁹

The TSI enterprise is owned and operated by two individuals: Vinny Bubic and Errol Alexander. Defendant Vinny Bubic is a director, officer, secretary, and treasurer of 1306506 Ontario Limited in Ontario and she is the secretary of T.S.I. Service Corp. in Nevada.¹⁰ Defendant Errol Alexander is a director, officer, and president of 1306506 Ontario Limited and he is the president of T.S.I. Service Corp.¹¹

⁷ Numerous consumers report looking at their caller identification displays or using the *69 service on their telephones after receiving TSI's telemarketing calls and learning that the calls came from phone numbers with an area code of 416, the area code for the Toronto area. *See, e.g.*, PX 11, Ludwig Decl. ¶ 7 (caller id display); PX 13, Sullivan Decl. ¶ 5 (*69 service); PX 14, Lawrence Decl. ¶ 16 (*69 service); PX 15, Messina Decl. ¶ 3 (caller id display); PX 16, Ramsdell Decl. ¶¶ 4, 8, 12 (caller id display); and PX 17, Sanders Decl. ¶ 3 (caller id display).

⁸ *See* PX 19, Carpenter Decl. Att. A (Nevada corporate documents).

⁹ *See* PX 20, Krause Decl. Att. D (TSI's Buffalo mailbox application). TSI sometimes asserts that it has an office in Florida, *see* PX 18, Atkins Decl. ¶ 12, PX 21, Carpenter Decl. Att. B (transcript of undercover call stating TSI's fraud office is in Florida), PX 6, Reiff Decl. Att. F (TSI brochure with "Fraud Department" address in Casselberry, Florida). However, it appears that while TSI may use a third party company in Florida called "NTS" to answer its fraud line, it does not have an actual office there. *See* PX 20, Krause Decl. ¶¶ 6-7, & Att. E.

¹⁰ *See* PX 20, Krause Decl. Att. A (Ontario corporate documents); PX 21, Carpenter Decl. Att. A (Nevada corporate documents).

¹¹ *See* PX 20, Krause Decl. Att. A (Ontario corporate documents); PX 21, Carpenter Decl. Att. A (Nevada corporate documents).

III. DEFENDANTS' DECEPTIVE BUSINESS PRACTICES

TSI engages in two main types of deceptive practices in its telemarketing to United States consumers. First, TSI misrepresents the need for its product and consumers' potential liability for unauthorized charges on their credit cards. Second, TSI charges consumers' credit cards for its credit card protection program without consumers' authorization.

A. TSI's Deceptive Telemarketing Scheme

Since at least the fall of 1998,¹² TSI has called U.S. consumers, mainly senior citizens, to sell its credit card protection program at a cost of \$199 to \$299 per consumer.¹³ At the outset of these calls, TSI's telemarketers typically attempt to lure consumers into listening to their pitch by stating or suggesting that they are affiliated with consumers' legitimate credit card issuers. Some of TSI's telemarketers boldly state that they are calling from the consumer's credit card issuer, e.g., VISA, about the consumer's card.¹⁴ Consumers holding VISA cards, or other credit cards, have no reason to doubt the telemarketers' affiliations and, in fact, believe that the telemarketer is legitimate.¹⁵ Other TSI telemarketers imply they have some affiliation with consumers' card

¹² See PX 9, Grafton Decl. ¶ 3 (TSI Services called in September 1998); see also PX 20, Krause Decl. Atts. A & B (Ontario corporate documents showing that Bubic and Alexander incorporated 1306506 Ontario Limited in July 1998 and registered a partnership called TeleConsultant Service Int- T S I in September 1997).

¹³ See, e.g., PX 1- PX 10, PX 13 (consumers charged or told by the telemarketers that the cost of the program would be between \$199 and \$279); see also PX 19 Carpenter Decl. Att. B (transcript of undercover call stating that program cost \$299).

¹⁴ See, e.g., PX 7, Totaro Decl. ¶ 3 (caller stated calling from "VISA"); PX 14, Lawrence Decl. ¶ 4 (caller stated calling from VISA International); PX 16, Ramsdell Decl. ¶ 3 (same), ¶ 7 (caller identified himself as "a security officer with Visa").

¹⁵ See, e.g., PX 7, Totaro Decl. ¶ 3.

issuers by stating that they are with “Credit Card Security-TSI,”¹⁶ the “Security Office for the [B]anks of North America,”¹⁷ or they are calling to offer “Visa credit card insurance.”¹⁸

1. TSI’s Telemarketers Falsely Represent the Need For Credit Card Protection

During the calls, TSI’s telemarketers often tell consumers that credit card protection is required or needed on their credit cards. While feigning association with consumers’ credit card issuers, the telemarketers sometimes state that the purpose of the call is to update or inform the consumer of a “change” regarding their credit card.¹⁹ Some of the telemarketers state that they are calling to inform customers of a new toll-free telephone number for credit card customer services.²⁰ Eventually, consumers are usually told they will be billed for this “change.”²¹ When a consumer asks questions, refuses to give out his or her credit card information, or attempts to decline the charge, the telemarketers often become belligerent or hang up on consumers.²² Some of the telemarketers then state that the new protection or security is required and consumers have

¹⁶ See PX 11, Ludwig Decl. ¶ 3.

¹⁷ See PX 15, Messina Decl. ¶ 3.

¹⁸ See PX 18, Atkins Decl. ¶ 4.

¹⁹ See, e.g., PX 4, Steele Decl. ¶ 3, (needed information “to bring [consumer’s] credit card ‘up to date’”); PX 7, Totaro Decl. ¶ 3 (“VISA had changed its method of billing”).

²⁰ See, e.g., PX 14, Lawrence Decl. ¶ 4 (given TSI’s phone number for “VISA card disputes”); PX 16, Ramsdell Decl. ¶¶ 3, 10 (given TSI’s phone number as a “new toll-free number for Visa customer services”).

²¹ See, e.g., PX4, Steele Decl. ¶ 4; PX 7, Totaro Decl. ¶¶ 4-5.

²² See, e.g., PX 11, Ludwig Decl. ¶ 5 (caller became “very upset and belligerent”); PX 14, Lawrence Decl. ¶ 5 (caller became angry and hung up).

no choice.²³ According to one telemarketer, “everyone must have this security, even the president.”²⁴ Some consumers who resist the charges are told their cards will be canceled or they will only have limited use of their cards.²⁵

In most cases, regardless of whether the telemarketers claim affiliation with consumers’ credit card issuers or not, TSI’s telemarketers claim that credit card protection is necessary because consumers face unlimited liability for unauthorized use of their credit cards. Some of TSI’s telemarketers directly state that without TSI’s protection program consumers are liable for all unauthorized charges on their credit cards.²⁶ These telemarketers rely on consumers’ limited knowledge of the federal protections for unauthorized credit card use. Even when a consumer confronts the TSI representative with the knowledge that a consumer would only be responsible for \$50 at the most if there was a fraudulent charge on her card, the telemarketer tells the consumer that she is wrong and if she does not report unauthorized charges within 48 hours of when they are made, she will be responsible for paying all of the fraudulent charges, even in

²³ See, e.g., PX 15, Messina Decl. ¶ 5 (told new law required security sticker and code).

²⁴ PX 7, Totaro Decl. ¶ 5.

²⁵ See, e.g., PX 11, Ludwig Decl. ¶ 5 (caller threatened to cancel consumer’s credit cards); PX 15, Messina Decl. ¶¶ 5, 9 (caller stated consumer would only have limited use of her credit card).

²⁶ PX 15, Messina Decl. ¶ 4 (caller stated that without the insurance “I would be responsible for any and all unauthorized charges to my credit card account”); PX 17, Sanders Decl. ¶ 3 (caller stated that “if someone used my credit card without my permission and I did not report the charges within a few days, I would have to pay for all of the charges even though I had not give[n] permission”); PX 18, Atkins Decl. ¶ 5 (caller insisted that if the consumer did not report unauthorized charges within 48 hours of when they were made, she would be responsible for those charges).

excess of \$50.²⁷ In many other instances, the TSI telemarketers strongly suggest that consumers are liable for all unauthorized charges by stating that TSI's program will protect them from having to pay for unauthorized charges on their credit cards.²⁸

TSI's telemarketers fuel the misrepresentation that consumers need credit card protection by describing examples of consumers having their card numbers lost or stolen and being stuck with paying thousands of dollars in unauthorized charges.²⁹ For instance, in January 2000, a TSI telemarketer told David Reed, a 64-year-old consumer in who lives in Kentucky, that credit card fraud was "on the rise." He stated that his own mother in Mississippi had purchased credit card insurance and within one month of her purchase she had saved between \$300 and \$400. According to the telemarketer, his mother did not have to pay several unauthorized charges

²⁷ See, PX 18, Atkins Decl. ¶ 5.

²⁸ See PX 3, Reed Decl. ¶ 3 (insurance would protect consumer from "having to pay any unauthorized charges"); PX 5, Bussell Decl. ¶ 3 (telemarketer explained "that if someone got [consumer's] credit card and charged a lot of purchases on it, this insurance would protect [her] from having to pay for the charges"); PX 6, Reiff Decl. ¶ 3 ("protection was needed so that [consumer] would not have to pay for any unauthorized charges that might appear on [her] credit card"); PX 8, Blum Decl. ¶ 4 ("with TSI's insurance, [consumer] would not have to pay for ... unauthorized charges ... no matter how high the amount"); PX 9, Grafton Decl. ¶ 4 (TSI's credit card security would protect consumer "from having to pay any unauthorized charges to [his] credit card account in the event that [his] credit card was either lost or stolen"); PX 12, Jonczyk Decl. ¶ 4 (caller offered "a chance to protect [consumer] from having to pay if someone used [her] credit cards without [her] permission"); PX 13, Sullivan Decl. ¶ 3 (caller offered "credit card protection so that no one would be able to make unauthorized charges on [her] credit card).

²⁹ While it is doubtful that TSI actually provides any services to its consumers, the FTC has been unable to locate any consumer who actually attempted to use TSI's program. TSI consumers identified by the FTC realized that they had been scammed long before they would have used the alleged service.

placed on her cards because she had credit card insurance.³⁰ Another telemarketer told a consumer a story of a “poor old lady” on a limited income in the consumer’s hometown who had to pay \$3,000 charged to her card without her permission from a business in Taiwan.³¹ Some of the telemarketers even present the telemarketing call as a public service announcement, stating that they are calling consumers to “get the word out” about the increase in credit card fraud.³² All of these statements are designed to convince consumers that they face unlimited liability for unauthorized charges in the event that their cards are lost or stolen. Because TSI misrepresents the need for its protection, consumers agree to purchase the program.³³

2. TSI Charges Consumers Without Authorization

Some of the aggressive TSI telemarketers merely work to get consumers’ credit card numbers and charge them for TSI’s program, even without the consumers’ consent. These telemarketers attempt to trick consumers into providing their credit card numbers for the purposes of charging them.³⁴ For example, they state that they merely need the consumers’ credit

³⁰ PX 3, Reed Decl. ¶ 3.

³¹ PX 17, Sanders Decl. ¶ 3.

³² *See, e.g.* PX 6, Reiff Decl. ¶ 3 (caller stated “protection was necessary because of the increased levels of credit card fraud”); PX 11, Ludwig Decl. ¶ 3 (caller suggested this was “a public service type call and her company was trying to get the word out about credit card fraud”); PX 5, Bussell Decl. ¶ 3 (caller stated that “he would sleep better at night knowing that [she] had purchased TSI’s credit card insurance”).

³³ *See, e.g.*, PX 9, Grafton Decl. ¶ 4, PX 4, Steele Decl. ¶ 3.

³⁴ *See, e.g.*, PX 3, Reed Decl. ¶ 5 (caller read off consumer’s VISA card numbers); PX 7, Totaro Decl. ¶ 3 (caller read off first four numbers of consumer’s credit card and asked consumer to verify remaining numbers); PX 11, Ludwig Decl. ¶ 4 (caller asked consumer to bring credit cards to the telephone to “verify the information on them”); PX 15, Messina Decl. ¶ 9 (caller
(continued...))

card numbers to “verify” the information. TSI’s telemarketers often use the false assertion that they are affiliated with consumers’ credit card issuers to get consumers to give out their card numbers, sometimes suggesting that they already know the consumers’ credit card information.³⁵ Some callers read off a few of the digits of the consumer’s credit card and ask the consumer to verify the remaining numbers.³⁶ Even when consumers tell TSI’s telemarketers that they do not want to purchase anything and they do not authorize any charges, TSI bills them for its credit card loss protection program after getting the consumers’ credit card numbers.³⁷

3. TSI’s Telemarketing Scheme Maximizes Its Chances To Collect From Consumers Despite Its Deception

Once a consumer is charged by TSI, TSI’s scheme makes it likely that TSI will collect payment from the consumer despite its deceptive conduct during the telemarketing calls. First, it

³⁴(...continued)

asked consumer which credit card she owned, MasterCard or VISA and asked consumer to get her credit card and turn the card over); PX 16, Ramsdell Decl. ¶ 11 (caller requested “for verification purposes” expiration date on consumer’s credit cards); PX 17, Sanders Decl. ¶ 4 (caller stated four numbers which were supposed to be the first numbers of the consumer’s card).

³⁵ *See, e.g.*, PX 7, Totaro Decl. ¶ 3 (after caller read off first four digits of consumer’s credit card number, consumer verified the remaining numbers because “[she] believed what [the caller] was telling [her] and that he was affiliated with [her] VISA credit card provider”); *see also* PX 16, Ramsdell Decl. ¶ 11 (caller who suggested she was from VISA acted as if she already had consumer’s credit card numbers and expiration dates); PX 11, Ludwig Decl. ¶ 4 (consumer thought that caller who stated she was from “Credit Card Security-TSI” and wanted to verify his credit card information was with his credit card provider).

³⁶ *See, e.g.*, PX 1, Simon Decl. ¶¶ 4, 5, 6, & 11 (charged without her consent after caller read off first four numbers of her card and she verified the remaining numbers); PX 2, Jelinek Decl. ¶¶ 4, 5 & 6 (same).

³⁷ *See, e.g.*, PX 1, Simon Decl. ¶¶ 4, 5, 6, & 11 (charged without her consent despite her statements that she did not want the program); PX 2, Jelinek Decl. ¶¶ 4, 5 & 6 (same); *see also* PX 5, Bussell Decl. ¶ 4 (does not recall authorizing charge); PX 6, Reiff Decl. ¶ 4 (same).

is often difficult for consumers to identify TSI's charges on their credit card billing statements because TSI's charges appear under the names of third parties who process TSI's sales.³⁸ Those consumers able to identify the charges usually do so because they realize that it occurred around the time of the telemarketing call and/or is for the amount stated during the TSI telemarketing call.³⁹ Consumers who contact TSI's third party agents about the charges for TSI are told to contact TSI directly about obtaining refunds.⁴⁰

Consumers who attempt to contact TSI at its telephone number or address, rarely, if ever, receive refunds from TSI.⁴¹ Some savvy consumers were able to avoid TSI charges on their credit cards by contacting their credit card issuers immediately following TSI's calls and having their account numbers changed or requesting that the credit card issuer reject any charges by TSI.⁴² Other consumers have obtained chargebacks on their credit card accounts by contacting

³⁸ *See, e.g.*, PX 1, Simon Decl. Att. B (charge appeared as "COMPAID"); PX 2, Jelinek Decl. Att A (charge appeared as "AMERICAN CARD REGISTRY"); PX 4, Steele Decl. Att. A (charge appeared as "CGSI"); PX 6, Reiff Decl. Att. C (same); PX 5, Bussell Decl. Att. A (charge appeared as "VACATION LINK CENTRES LTD"); *see also* PX 9, Grafton Decl. ¶ 4 & Att. A (charge appeared as "Tel-A-Sell Marketing").

³⁹ *See, e.g.*, PX 1, Simon Decl. ¶ 11, PX 4, Steele Decl. ¶ 5, PX 5, Bussell Decl. ¶ 6.

⁴⁰ *See e.g.*, PX 6, Reiff Decl. ¶¶ 11-12 & Att. D (letter from CGSI stating that it acted as TSI's billing agent and directing consumer to write TSI at its Buffalo address); PX 4, Steele Decl. ¶ 11-12 (company called Coast to Coast that sent TSI's materials to consumer told consumer to call TSI at its toll-free number about his refund).

⁴¹ *See, e.g.*, PX 4, Steele Decl. ¶¶ 9-15 (no refund despite contacting TSI and getting told to call CGSI); PX 6, Reiff Decl. ¶¶ 11-14, 17-19 (no refund despite attempts to contact company). *See also* PX 10, Kocher Decl. ¶¶ 10-12 (consumer received credit, possibly a refund, after getting card provider involved and contacting company); PX 9, Grafton Decl. ¶¶ 6-17 (despite TSI's representations that a refund would issue, consumer forced to dispute charge with card provider).

⁴² *See, e.g.*, PX 3, Reed Decl. ¶¶ 12-13; PX 7, Totaro Decl. ¶ 7; PX 8, Blum Decl. ¶ 8.

their card issuers after receiving the statements with the charges for TSI's program.⁴³

Unfortunately, other consumers are stuck paying the charges that result from TSI's calls.⁴⁴

Similarly, hundreds or thousands of consumers probably pay their credit card bills containing TSI charges, unaware that they have been billed by TSI or one of its billing agents.

B. TSI's Representations Are False

TSI's representations to consumers during the telemarketing calls and in the subsequent bills its sends are not true. Consumers do not face unlimited liability for unauthorized charges on their credit cards and consumers who do not authorize the charges during the telemarketing calls do not owe defendants money.

Consumers do not face unlimited liability for unauthorized credit card charges and TSI's telemarketers' warnings as to the amounts a consumer could get stuck paying for unauthorized charges are simply false. Under Section 226.12(b) of Regulation Z, 12 C.F.R. § 226.12(b), and Section 133 of the Truth in Lending Act, 15 U.S.C. § 1643, a consumer cannot be held liable for more than \$50 for any unauthorized charges to a credit card account.⁴⁵ In fact, if the consumer's

⁴³ See, e.g., PX 1, Simon Decl. ¶¶ 12, 14 (disputed charge and received chargeback); PX 2, Jelinek Decl. ¶ 7 (disputed charge and apparently received chargeback); PX 5, Bussell Decl. ¶¶ 5-9 (disputed charge and apparently received chargeback); PX 9, Grafton Decl. ¶¶ 16-17 (disputed charge and matter "resolved in [consumer's] favor"); See also PX 10, Kocher Decl. ¶¶ 10-12 (consumer received credit, perhaps refund, after getting credit card provider involved).

⁴⁴ See, e.g., PX 4, Steele Decl. ¶ 15; PX 6, Reiff Decl. ¶ 19.

⁴⁵ Contrary to some of TSI's telemarketers' assertions, the law does not require consumers to report the loss or theft of their credit cards within 48 hours. See Section 226.12(b) of Regulation Z, 12 C.F.R. § 226.12(b); see also Federal Reserve Board Official Staff Commentary 12(b)(3)-3, 12 C.F.R. § 226.12(b)(3)-3 (stating that the written-notification and time-limit requirements pertaining to billing error-resolutions do not effect Section 226.12 protections). Thus, TSI's claims that consumers have a short time limit for reporting credit card loss are false.

actual credit card is not presented at the time of the transaction, such as during a telephone purchase, consumers cannot even be held liable for the \$50.⁴⁶ Because of these regulations, consumers do not need unlimited protection from credit card loss as offered by TSI. Thus, TSI's telemarketers' statements during the telephone calls are deceptive representations aimed at getting consumers to agree to a program that they do not need.

Indeed, the written materials sent to one consumer after being charged for TSI's program even admit that consumers do not face unlimited liability for unauthorized credit card use.⁴⁷ One brochure states "Federal law provides that your liability for unauthorized use of your credit cards will not exceed \$50 per card and your debit card liability will not exceed \$500 per card."⁴⁸

Another brochure explains that under TSI's program, ". . . you are covered for any liability (up to \$50 per Credit Card and \$500 per ATM Card) for which the card issuer holds you responsible."⁴⁹

In addition, despite the subsequent charges placed by TSI, consumers who do not give authorization to TSI's telemarketers to charge their credit cards do not owe defendants money. TSI bills these consumers as if they had agreed to the program, apparently hoping that consumers will pay the charge because they do not notice it or think that they somehow agreed to the charge

⁴⁶ See Federal Reserve Board Official Staff Commentary 12(b)(2)(iii)-3, 12 C.F.R. § 226.12(b)(2)(iii)-3. Further, many VISA credit card issuers do not hold consumers liable for the \$50 even when the actual card has been presented. See PX 21, Hutchison Decl. ¶ 20.

⁴⁷ TSI refuses to send these materials to consumers until after they purchase the program. See PX 19, Carpenter Decl. Att. B.

⁴⁸ PX 6, Reiff Decl. ¶ 6 & Att. A (materials received by TSI consumer describing a membership in a discount club run by a third-party company called "Coast to Coast" and which includes a credit card registration program).

⁴⁹ PX 6, Reiff Decl. ¶ 16, Att. F (materials received by consumer from TSI).

because they verified their credit card number. These deceptive billing practices also lead to some consumers paying the unauthorized charges even if they know it is unauthorized because they do not know how to dispute the charge or they give up trying to get a refund given all the difficulties involved.

Further, TSI's telemarketers' representations that they are affiliated with consumers' credit card issuers are also false. TSI is not related to VISA as asserted in the telemarketing calls⁵⁰ and, in fact, the telephone number given during the telemarketing calls is for TSI, not VISA as asserted by some TSI callers.⁵¹ The false assertion of affiliation with credit card issuers is just one more deceptive link in TSI's fraudulent scheme.

IV. LEGAL ARGUMENT

TSI's business practices are plainly deceptive and thus violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the TSR, 16 C.F.R. Part 310. In order to protect the public from additional fraudulent and deceptive telemarketing calls we request that the Court enter appropriate injunctive relief and take measures to prevent assets from disappearing during the course of this proceeding. We respectfully submit that the facts present in this matter fully warrant exercise of the Court's equitable authority on behalf of the public.

A. This Court Has Authority to Grant the Requested Relief

The Commission brings this action under Section 13(b) of the FTC Act, which provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a

⁵⁰ See PX 21, Hutchison Decl. ¶ 19.

⁵¹ See PX 19, Carpenter Decl. Att. B (called 800-314-0244 and reached TSI); *see also* PX 14, Lawrence Decl. ¶ 4 (given 800-314-0244 as number for VISA credit card disputes); PX 16, Ramsdell Decl. ¶¶ 3, 10 (given 800-314-0244 as number for VISA customer service).

permanent injunction." 15 U.S.C. § 53(b). A "proper case" includes any matter involving a violation of a law enforced by the FTC. *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 260 (E.D.N.Y. 1998); see *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083, 131 L.Ed.2d 722, 115 S.Ct. 1794 (1995); *FTC v. Mylan Laboratories, Inc.*, 62 F. Supp. 2d 25, 36 (D.D.C. 1999).

The authority to issue a permanent injunction under Section 13(b) also empowers this Court to exercise the full breadth of its equitable powers. It is well-established that because Section 13(b) gives a court authority to grant a permanent injunction, the statute also gives authority "to grant any ancillary relief necessary to accomplish complete justice because [Congress] did not limit that traditional equitable power explicitly or by necessary and inescapable inference." *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982); see also *Pantron I*, 33 F.3d at 1102; *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 533 (S.D.N.Y. 2000). This authority includes the power to order restitution and rescission of contracts. *FTC v. Febre*, 128 F. 3d 530, 534 (7th Cir. 1997); see *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-15 (8th Cir. 1991); *Singer*, 668 F.2d at 1113.

Section 19 of the FTC Act also authorizes the court to grant such equitable relief as it deems necessary to redress injury to consumers resulting from violations of a Commission rule affecting unfair and deceptive practices. Congress has provided in Section 19 that such relief may include, but should not be limited to, "rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages . . ." 15 U.S.C. § 57b(b).

During the pendency of a permanent injunction action under Section 13(b), a district court may also employ its inherent equitable authority to grant appropriate provisional remedies to

insure that any final relief is complete and meaningful. *FTC v. World Travel Vacation Brokers, Inc.* 861 F.2d 1020, 1026 (7th Cir. 1988); *Singer*, 668 F.2d at 1113. It is well-established that courts have the authority to issue provisional relief on an *ex parte* basis. Federal courts throughout New York have granted *ex parte* provisional relief including other equitable relief necessary to preserve assets and records, such as asset freezes, financial disclosures, appointment of receivers, and repatriation of assets held outside the United States.⁵²

B. The Evidence Presented Justifies Entry of Appropriate Equitable Relief

1. The Applicable Standard

Section 13(b) of the FTC Act, authorizes the issuance of a temporary restraining order or a preliminary injunction "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."

15 U.S.C. § 53(b). When a federal agency brings an action to enforce a statute, it is acting to prevent violations of federal law and, therefore, it brings the action "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing" the law.

See SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975). In contrast to private litigation, the burden of proving irreparable injury is presumed from the alleged violation

⁵² *See, e.g., FTC v. Navestar D.M., Inc.*, No. 20-CV-6269T (W.D.N.Y. June 12, 2000) (J. Telesca) (*ex parte* TRO, asset freeze, appointment of a temporary receiver, repatriation of assets in foreign countries, required completed financial statements, and expedited discovery); *FTC v. Five-Star Auto Club, Inc.*, No. 99 Civ 1693 (S.D.N.Y. Mar. 8, 1999) (J. McMahon) (*ex parte* TRO, appointment of a receiver, asset freeze, repatriation of assets and documents in foreign countries, and required completion of financial statements); *see also New York v. Financial Services Network, USA*, 930 F. Supp. 865 (W.D.N.Y. 1996) (J. Telesca) (*ex parte* TRO, asset freeze, allowed access to defendants' business premises, required completed financial statements and identification of bank accounts); *FTC v. Micom Corp.*, No. 96-0472, 1997 WL 226232, 1997-1 Trade Cases ¶ 71,753 (S.D.N.Y. 1997) (*ex parte* TRO). *See generally, In re Vuitton et Fils S.A.*, 606 F.2d 1, 3-4 (2d Cir. 1979) (discussion of when *ex parte* order should issue).

of law, and need not be proven in an FTC action. *FTC v. World Wide Factors, Ltd.*, 882 F. 2d 344, 346-47 (9th Cir. 1989); *World Travel Vacation Brokers*, 861 F. 2d at 1029; *see SEC v. Unifund SAL*, 910 F.2d 1028, 1036-37 (2d Cir. 1990).

Therefore, to obtain preliminary injunctive relief, the FTC must show (1) the likelihood of its ultimate success on the merits and (2) that the balance of equities weighs in its favor. *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999); *World Travel Vacation Brokers*, 861 F. 2d at 1029; *see FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1090 (S.D.N.Y. 1977); *see also Unifund SAL*, 910 F.2d at 1036-37; *United States v. Siemens Corp.*, 621 F. 2d 499, 505 (2d Cir. 1980). In addition, when balancing the hardships of the public interest against a private interest, the public interest, which includes economic effects for consumers and effective relief for the FTC, should receive greater weight. *Affordable Media*, 179 F. 3d at 1236; *World Travel Vacation Brokers*, 861 F.2d at 1029. The FTC easily meets this standard here.

2. The Commission Has Demonstrated a Likelihood of Success on the Merits

(i) Defendants have violated Section 5(a) of the FTC Act

To establish that defendants engaged in deceptive acts or practices in violation of Section 5 of the FTC Act, the FTC must demonstrate: (1) a representation, omission, or practice; (2) that is likely to mislead consumers acting reasonably under the circumstances; and (3) that the representation, omission, or practice is material. *Five-Star*, 97 F. Supp. at 526 (*citing In re Cliffdale Associates*, 103 F.T.C. 110, 164-65 (1984)); *see Pantron I*, 33 F.3d at 1095; *Minuteman*, 53 F. Supp. 2d at 258. The FTC need not prove that defendants made the misrepresentations with an intent to defraud or deceive. *Five-Star*, 97 F. Supp. 2d at 526.

Misrepresentations of material facts made to induce the purchase of goods or services

violate Section 5(a). *World Travel Vacation Brokers*, 861 F. 2d at 1029; *FTC v. Kitco of Nevada*, 612 F. Supp. 1282, 1291 (D. Minn. 1985). Express or implied claims can be deceptive and there is no “loophole” for those who merely imply their deceptive claims. *FTC v. Figgie Int'l., Inc.*, 994 F.2d 595, 604 (9th Cir. 1993), *cert. denied*, 510 U.S. 110, 127 L.Ed 2d 373, 114 S.Ct. 1056 (1994). Even if the claims are not false in themselves, an omission of material information can also be a violation. *World Travel Vacation Brokers*, 861 F. 2d at 1029. The Court considers the “overall net impression” of the representations. *FTC v. U.S. Sales Corp.*, 785 F. Supp. 737, 745 (N.D. Ill. 1992); *see Five-Star*, 97 F. Supp. 2d at 528. Even where a defendant makes disclaimers, the disclaimers are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and leave an accurate impression. *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989).

Moreover, the FTC need not show that individual consumers relied on the misrepresentation or omission. *Five-Star*, 97 F. Supp. 2d at 530. Rather, reliance is presumed once the FTC demonstrates that the misrepresentation or omission was of a type upon which a reasonable person would rely, that the misrepresentation was widely disseminated, and that consumers purchased defendants’ products. *Security Rare Coin & Bullion*, 931 F. 2d at 1316; *World Travel Vacation Brokers*, 861 F.2d at 1029; *see also Figgie Int'l*, 994 F. 2d at 605-06.

The FTC has presented strong evidence to demonstrate that defendants have violated Section 5(a) of the FTC Act. TSI consistently makes material misrepresentations regarding consumers’ liability for unauthorized credit card use and the need for credit card protection. Certainly, the net impression of the telemarketers’ statements leaves consumers with false impressions. Any disclaimers inserted into defendants’ written materials sent to consumers after

the charges are simply too late to correct the false representations made during the telemarketing calls. Likewise, defendants' practice of charging consumers for TSI's program without their authorization is also deceptive. *See, e.g., FTC v. Career Assistance Planning, Inc.*, No. 1:96-CV-2187, 1997 U.S. Dist. LEXIS 17191, 1997-2 Trade Cas. (CCH) ¶ 71,948 (N.D. Ga. Sept. 19, 1997) (charging consumers' credit cards and bank accounts without authorization violates Section 5); *FTC v. GTP Marketing, Inc.*, No. 4-90-123-K, 1990 WL 54788, 1990-1 Trade Cas. (CCH) ¶ 68,959 (N.D. Tex. Mar. 15, 1990) (granting preliminary injunctive relief where the FTC had a substantial likelihood of establishing that defendants charged consumers who provided credit card information only for verification purposes). Such conduct falsely represents to consumers that they owe defendants money, when in fact, they do not, and is part of TSI's fraudulent scheme to get consumers to pay for TSI's protection program even though they do not want or need it.

(ii) Defendants have violated the TSR

Section 310.3(a)(4) of the TSR, 16 C.F.R. § 310.3(a)(4), prohibits telemarketers and sellers from “[m]aking a false or misleading statement to induce any person to pay for goods or services.” Defendants are “sellers” or “telemarketers” engaged in “telemarketing” as those terms are defined in the TSR, 16 C.F.R. §§ 310.2(r), (t), and (u). Pursuant to Section 3(c) of the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), violations of the TSR constitute unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

The FTC has submitted strong evidence that defendants violated the TSR. TSI falsely represents to consumers that they need credit card protection and that they agreed to purchase

TSI's program when in fact they did not. These false and misleading representations are a part of TSI's scheme to induce consumers to pay money to TSI and they violate Section 310.3(a)(4) of the TSR, as well as, Section 5(a) of the FTC Act.

3. Defendants Bubic and Alexander Are Personally Liable for the Deception in this Matter

To hold an individual defendant liable under the FTC Act, the FTC must establish: (1) that the individual participated directly in the wrongful acts or practices or that the individual had the authority to control the corporate defendants; and (2) that the individual had some knowledge of the acts or practices. *Five-Star*, 97 F. Supp. 2d at 535 (citing *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 573 (7th Cir. 1989), *cert. denied*, 493 U.S. 954, 107 L.Ed.2d 352, 110 S.Ct. 366 (1989)). Authority to control a business can be established by showing active involvement with the business affairs and the making of corporate policy, including the assumption of the duties of a corporate officer. *Minuteman*, 53 F. Supp. 2d at 259 (quoting *Amy Travel*, 875 F.2d at 573). *See also Five-Star*, 97 F. Supp. 2d at 535. To hold an individual liable for restitution, the FTC must show that the individual had or should have had some knowledge or awareness of the misrepresentation. *Five-Star*, 97 F. Supp. 2d at 535. This may be fulfilled by showing that the individual had “actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.” *Id.* at 535 (quoting *Amy Travel*, 875 F.2d at 574).

Bubic and Alexander are the sole owners and officers of TSI and they have both signed important business documents for the enterprise. Both Bubic and Alexander personally signed the

incorporation documents to form 1306506 Ontario Limited.⁵³ They are the only two individuals listed as officers of the company on the Ontario corporate documents, on the T.S.I. Service Corp. documents filed with the Nevada Secretary of State, and on TSI's application for its maildrop in Buffalo.⁵⁴ In addition, Bubic personally signed one of the corporate documents filed in Nevada, she signed the application for TSI's maildrop, and she provided her personal identification in support of the maildrop application.⁵⁵ Alexander authorized the registrations of the company's business names in Ontario.⁵⁶ The FTC has presented sufficient evidence as to the liability of these two individuals to justify granting the relief requested.

4. The Balance of Equities Warrants the Requested Injunctive Relief

The public equities in this case overwhelmingly warrant preliminary and ancillary injunctive relief. As mentioned, when balancing the hardships of the public interest against a private interest under Section 13(b), the Court should give greater weight to the public interest. *Affordable Media*, 179 F. 3d at 1236; *World Wide Factors*, 882 F.2d at 347. The proposed TRO and preliminary injunction would prohibit defendants from making any more false or deceptive statements in their business operations. Moreover, the prohibitions on future conduct contained in the proposed TRO would work no hardship on defendants, as they have no right to engage in

⁵³ See PX 20, Krause Decl. Att. A (Ontario corporate documents).

⁵⁴ See PX 20, Krause Decl. Att. A, B (Ontario corporate documents) & Att .D (TSI's mailbox application), PX 19, Carpenter Decl. Att. A (Nevada corporate documents).

⁵⁵ See PX 19, Carpenter Decl. Att. A (Nevada corporate documents); PX 20, Krause Decl. Att. D (TSI's mailbox application).

⁵⁶ See PX 20, Krause Decl. Att. B (Ontario Business Names Reports for the general partnership of TeleConsultant Service INT- T S I and for the business name of TeleConsultant Service International/TSI).

practices that violate federal law. *See World Wide Factors*, 882 F.2d at 347; *see also United States v. Diapulse Corp. of America*, 457 F.2d 25, 29 (2d Cir. 1972).

5. Defendants' Assets Should Be Frozen

As part of the permanent remedy in this case, the FTC seeks restitution for the many consumers that defendants have defrauded. The economic harm caused by defendants is substantial and it is likely that defendants will be liable for thousands of dollars in consumer redress if the FTC prevails. To ensure the possibility of such relief by preventing the concealment or dissipation of assets and business records pending final disposition of this matter, the FTC seeks a freeze of defendants' assets held in the United States.⁵⁷

The need to preserve assets for possible redress to consumers justifies granting an asset freeze to prevent the dissipation of assets. *See Singer*, 668 F.2d at 1112. The standard for granting an asset freeze requires that a plaintiff show a likelihood of success on the merits and a “possibility” of dissipation. *FSLIC v. Sahni*, 868 F. 2d 1096, 1097 (9th Cir. 1989). The fraudulent nature of defendants' violations itself raises questions about defendants' inclination to preserve assets. *See SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972). As the court stated in *FTC v. Equifin Int'l, Inc.*, No. 97-4526, 1997 U.S. Dist. LEXIS 10288 at *49 (C.D. Cal. 1997):

The nature of the telemarketing business is such that Defendants and their assets

⁵⁷ While it is likely that a significant portion of defendants' assets are physically located in Canada (or in the Cayman Islands, Channel Islands, or other offshore accounts), a freeze on U.S. assets is crucial since defendants rely on third party credit card processors who deposit the funds from TSI's sales into U.S. bank accounts. *See* PX 21, Hutchison Decl. ¶¶ 14-16. In addition, Canadian telemarketers typically use U.S. bank accounts as a transfer point for money obtained from U.S. consumers. *See, e.g., FTC v. Windermere Big Win Int'l, Inc.*, No. 98 C 8066, 1999 U.S. Dist. LEXIS 12259 (N.D. Ill. Aug. 5, 1999).

could easily vanish at a moments notice (and Defendants could just as easily set up operations at another location under a different name).

The nature of defendants' telemarketing activities demonstrates the strong need for preservation of their assets until this matter is fully resolved by the Court.⁵⁸

6. Expedited Discovery Is Necessary to Locate Assets Wrongfully Obtained from Victims

The FTC also requests that defendants be ordered to produce certain financial information on short notice, and that financial institutions and other third parties provided with a copy of the TRO be ordered to disclose whether they are holding any of defendants' assets, and to freeze any such assets. These requirements, ancillary to the requested injunctive relief, will protect the effectiveness of the Court's asset freeze. These measures are appropriate to enable the FTC to establish the nature and extent of defendants' assets and the existence and location of additional financial documents relevant to this case, particularly with regard to the third party processors that defendants use to process credit card sales.

Finally, to assist in determining the location and nature of assets wrongfully obtained from consumers and defendants' business documents, the FTC seeks leave of the Court to engage in expedited discovery relating to defendants' assets. *See, e.g., Federal Express Corp. v. Federal Expresso, Inc.*, No. 97-CV-1219, 1997 U.S. Dist. LEXIS 19144 at *6 (N.D.N.Y. Nov. 24, 1997)

⁵⁸ Inasmuch as the asset freeze sought by the FTC is limited to assets held in the United States, the FTC also seeks an order requiring that defendants repatriate assets held abroad. The proposed TRO would require defendants to return all documents and assets that have been transferred out of the U.S. Such relief is necessary in this case to properly preserve assets. Courts have required repatriation in FTC actions. *See, e.g., Navestar DM, Inc.*, No. 20-CV-6269T (W.D.N.Y. June 12, 2000) (J. Telesca) (*ex parte* TRO, including repatriation of assets in foreign countries); *Five-Star Auto Club, Inc.*, No. 99 Civ 1693 (S.D.N.Y. Mar. 8, 1999) (J. McMahon) (*ex parte* TRO, including repatriation of assets and documents in foreign countries).

(early discovery “will be appropriate in some cases, such as those involving requests for a preliminary injunction.”) (*quoting* Fed. R. Civ. P. Commentary to Rule 26(d)). 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 Singer*, 668 F.2d at 1112-1114.

V. CONCLUSION

Defendants have caused and are likely to continue to cause great injury to consumers through their false and misleading practices, in violation of Section 5(a) of the FTC Act and the TSR. The FTC respectfully urges that this Court issue the proposed *ex parte* TRO enjoining defendants’ conduct, freezing assets, requiring repatriation of assets to the United States, permitting expedited discovery, and ordering defendants to show cause why a preliminary injunction should not issue. The proposed relief will ensure that defendants’ deceptive activities stop and help ensure the possibility of effective final relief for defrauded consumers.

Respectfully submitted,

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