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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FEDERAL TRADE COMMISSION)	
)	
and)	
)	
STATE OF NEW JERSEY	)	Hon.
	)	Civil Action No.
Plaintiffs,)	
)	
v.	)	MEMORANDUM OF LAW IN
	)	SUPPORT OF PLAINTIFF'S MOTION
NATIONAL SCHOLASTIC SOCIETY, INC.	)	FOR AN <u>EX PARTE</u> TEMPORARY
a New Jersey Corporation; also d/b/a	)	RESTRAINING ORDER AND
University Society Publishers Periodicals	)	ORDER FREEZING ASSETS,
	)	APPOINTING TEMPORARY
and	)	EXAMINER, EXPEDITING
	)	DISCOVERY, AND ORDERING
DAVID C. BEASLEY, JR., individually and as an	)	DEFENDANTS TO SHOW CAUSE
officer of National Scholastic Society, Inc.	)	WHY A PRELIMINARY
	)	INJUNCTION SHOULD NOT ISSUE
Defendants.)	
)	

TABLE OF CONTENTS

I.	SUMMARY	1
II.	THE PARTIES	4
	A. Plaintiffs.....	4
	1. Federal Trade Commission.....	4
	2. State of New Jersey.....	4
	B. <u>Defendants</u>	5
	1. The Corporate Defendant, National Scholastic Society, Inc., d/b/a University Society Publishers Periodicals (“NSS?”).....	5
	2. The Individual Defendant, David C. Beasley, Jr.....	5
IV.	ARGUMENT	6
	A. <u>Defendants Have Violated Section 5 of the FTC Act</u>	6
	1. Defendants have violated Section 5 of the FTC Act by misrepresenting that they would use consumers’ credit card information for a purpose other than billing charges to that account or misrepresenting that they would not bill charges to the consumers’ account unless authorized in writing.....	7
	2. Defendants have violated Section 5 of the FTC Act by failing to disclose to consumers the material costs and conditions associated with receiving the “free” grocery coupons.....	8
	B. Defendants have Violated the <u>Telemarketing Sales Rule (“TSR”)</u>	9
	1. Defendants have violated the TSR by not disclosing to consumers their odds of winning a prize in the sweepstakes or how those odds are calculated.....	9
	2. Defendants have violated the TSR by failing to disclose the costs and conditions to receive the grocery coupons.....	10
	3. Defendants’ failure to disclose their policy of not permitting cancellations or refunds violates the TSR.....	11

C.	The Individual Defendant Is Liable for Violating <u>Section 5 and for Consumer Redress</u>	12
D.	<u>This Court Has the Authority To Grant the Relief Requested</u>	13
	1. Sections 13(b) and 19b(a) of the FTC Act authorize this Court to grant the relief requested.....	13
E.	Compelling Evidence of Defendants’ Fraudulent Telemarketing Scheme Mandates Entry of a Temporary <u>Restraining Order and Preliminary Injunction</u>	14
F.	An <u>Ex Parte</u> Order Freezing Assets and Ordering Expedited <u>Discovery are Necessary to Preserve Effective Relief</u>	16
	1. <u>Ex parte</u> relief is necessary to preserve assets and evidence.....	16
	2. An Order freezing University Society Publishers Periodicals’	

TABLE OF AUTHORITIES

CASES

<u>CFTC v. American Metals Exch. Corp.</u> 991 F.2d 71 (3d Cir. 1993).....	14
<u>Cliffdale Assocs., Inc.</u> 103 F.T.C. 110 (1984).....	6, 8
<u>FTC v. Academic Guidance Servs., Inc.</u> No. 92-3001 (AET)(D.N.J. 1992).....	16, 19
<u>FTC v. Amy Travel Serv., Inc.</u> 875 F.2d 564, 573 (7th Cir.), cert. denied, 493 U.S. 954 (1989).....	6, 12, 13, 18
<u>FTC v. Car Checkers of Am., Inc.</u> No. 93-623 (MLP)(D.N.J. 1993).....	16, 19
<u>FTC v. Engage-A-Car Servs., Inc.</u> No. 86-3758 (D. N.J. 1986).....	16, 19
<u>FTC v. Fax Corp. of Am., Inc.</u> No. 90-983 (HLS)(D.N.J. 1990).....	16, 19
<u>FTC v. H.N. Singer, Inc.</u> 668 F.2d 1107, 1109-13 (9th Cir. 1982).....	13, 14
<u>FTC v. Jordan Ashley, Inc.</u> 1994-1 Trade Cas. (CCH) ¶ 70,570 (S.D. Fla. Apr. 5, 1995).....	12
<u>FTC v. Kitco of Nevada, Inc.</u> 612 F. Supp. 1282 (D. Minn. 1985).....	12
<u>FTC v. Michael P. McGowan</u> Civil Action No. 963227 (AMW)(D.N.J. July 1, 1996).....	16, 19
<u>FTC v. Oak Tree Numismatics Inc.</u> No. 91-1626 (D.N.J. 1991).....	16, 19
<u>FTC v. Pantron I Corp.</u> 33 F.3d 1088 (9th Cir. 1994).....	6, 7
<u>See FTC v. Sparta Chem, Inc.</u> Civil Action No. 963228 (AMW)(D.N.J. July 1, 1996).....	16, 19
<u>FTC v. Standard Educ. Soc’y.</u> 302 U.S. 112, 116 (1937).....	6
<u>FTC v. U.S. Oil & Gas Corp.</u> 748 F.2d 1431, 1434 (11th Cir. 1984).....	13, 14
<u>FTC v. World Travel Vacation Brokers, Inc.</u> 861 F.2d 1020 (7th Cir. 1988).....	6, 12, 15, 18
<u>FTC v. World Wide Factors, Ltd.</u> 882 F.2d 344, 346-47 (9th Cir. 1989).....	14
<u>Government of Virgin Islands Dept. of Construction v. Virgin Islands Paving Corp.</u>	

714 F.2d 283 (3d Cir. 1986).....	14
<u>International Control Corp. v. Vesco</u> 490 F.2d 1334, 1347 (2d Cir.), <u>cert. denied</u> , 417 U.S. 932 (1984).....	18
<u>SEC v. Manor Nursing Ctrs., Inc.</u> , 458 F.2d 1082, 1106 (2d Cir. 1972).....	18
<u>Southwest Sunsites, Inc. v. FTC</u> 785 F.2d 1431 (9th Cir. 1986).....	6
<u>Standard Educators, Inc. v. FTC</u> 475 F.2d 401, 403 (D.C.Cir.), <u>cert. denied</u> , 414 U.S. 828 (1973).....	12
<u>Thompson Medical Co. Inc.</u> , 104 F.T.C. 648 (1984), <u>aff'd</u> , 791 F.2d 189 (D.C. Cir. 1986) <u>cert. denied</u> , 479 U.S. 1086 (1987).....	7, 8
<u>U.S. v. Diapulse Corp.</u> , 475 F.2d 25, 29 (2d Cir. 1972).....	15

STATUTES AND RULES

Federal Trade Commission Act, 15 U.S.C. § 411 <u>et. seq</u>	passim
Telemarketing Fraud and Abuse Prevention Act, 15 U.S.C. § 6103.....	passim
Telemarketing Sales Rule, 16 C.F.R. Part 310.....	passim
Fed. R. Civ. P. 53.....	18
Fed. R. Civ. P. 65(b).....	16

I. SUMMARY

Through a nationwide telemarketing scheme, defendants obtain consumers' credit card numbers through misrepresentations and bill unauthorized charges to their credit card accounts and induce consumers to purchase magazine subscriptions through material omissions of fact. Each of those misrepresentations and omissions constitute violations of Section 5 of the Federal Trade Commission Act, ("FTC Act"), 15 U.S.C. § 45.

Defendants "open the door" to their fraudulent telemarketing scheme by sending consumers a post card, that states, "[w]e have been trying to reach you! It's real important that you call toll-free . . ."

(E.g.

card accounts. (Exhs. 12, ¶ 5-6; 14, ¶ 3; 18, ¶ 10, 14; 20, ¶ 11-12; 23, ¶ 5-9; 25, ¶ 6-7). Among the lies that defendants tell consumers to persuade them to divulge their credit card account information: defendants need the consumer's credit card account information to give the

withdrawn her authorization to charge her credit card. She called defendants the same day and told the representative that she had not changed her method of payment, but had canceled her subscription. (Exh. 22, ¶¶ 12-17). Despite her repeated instructions to cancel, and defendants' own admission that they were not authorized to charge her credit card account, defendants charged Ms. Whalen's credit card account four payments totaling over \$100. One of these charges was posted over a week after defendants' letter admitting they had no authorization to charge her credit card account; the other three occurred over a month after this letter. (Exh. 22, ¶¶ 19, 21-26).

Finally, while defendants begin their solicitation by telling consumers that defendants have entered them into a sweepstakes with a grand prize of \$25,000, defendants unlawfully fail to disclose to consumers their odds of winning or how such odds are calculated -- odds which might be as high as 1 in 300 million. (Exhs. 16, ¶¶ 6, 9, 11, 12; 17, ¶¶ 4, 9, 13, 16; 18, ¶¶ 4, 5, 10, 11; 19, ¶¶ 3, 6, 8, 10, 12, 13; 20, ¶¶ 4-5, 9, 11, 12; 22, ¶¶ 4,-10; 25, ¶¶ 4, 7, 11; 30; 31; 32; 54, p. 433).

Defendants' various lies and omissions violate Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), which prohibits false and deceptive acts and practices in commerce, and the Telemarketing Sales Rule, 16 C.F.R. Part 310, a disclosure rule designed to eradicate fraudulent telemarketing. Therefore, plaintiffs seek ex parte Temporary Restraining Order ("TRO"): (1) halting the illegal practices; (2) freezing the assets of University Society Publishers Periodicals, the d/b/a of National Scholastic Society, Inc.; (3) appointing an examiner; (4) permitting expedited discovery; and (5) providing equitable relief. In conjunction with this

Motion, the plaintiffs request that the Court order defendants to show cause why a preliminary injunction, containing relief similar to that provided by the proposed TRO, should not be issued.

II. THE PARTIES

A. Plaintiffs

1. Federal Trade Commission

The Federal Trade Commission ("FTC" or "Commission") is an independent agency of the United States Government created by the FTC Act, 15 U.S.C. § ~~4~~41 seq. The Commission is charged, inter alia, with enforcing Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Congress directed the Commission to promulgate the Telemarketing Sales Rule, 16 C.F.R. Part 310, under the Telemarketing Fraud and Abuse Prevention Act, 15 U.S.C. § ~~610~~61 seq. The Commission is authorized by Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to initiate court proceedings to enjoin violations of the FTC Act or any other provision of law enforced by the Commission, and to secure appropriate equitable relief. The Commission is also authorized by Section 19b (a) of the FTC Act, 15 U.S.C. § 57b (a), to commence a civil action to secure such relief as the Court finds necessary to redress injury to consumers resulting from a violation of the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, or any other Commission rule respecting unfair and deceptive practices.

2. State of New Jersey

The State of New Jersey is empowered by Section 6103 of the Telemarketing Fraud and Abuse Prevention Act, 15 U.S.C. § 6103, to bring actions in federal district court whenever it has reason to believe that the inte

threatened or adversely affected because any person has engaged in or is engaging in a pattern or practice that violates the Telemarketing Sales Rule. The State of New Jersey may seek to enjoin such telemarketing, enforce compliance with the TSR, obtain damages, restitution, other compensation for its residents and further relief as the Court deems necessary. 15 U.S.C. § 6103.

B. Defendants

1. The Corporate Defendant, National Scholastic Society, Inc., also d/b/a University Society Publishers Periodicals (“NSS”)

NSS is a New Jersey corporation with its principal place of business at 145 N. Turnpike, Ramsey, New Jersey. (Exhs. 1; 3, p. 1). NSS was incorporated in 1989, and sells educational aids, such as reference books and periodicals. (Exhs. 3, p. 3, 4, p. 1). NSS uses the d/b/a University Society Publishers Periodicals (“USPP”) for telemarketing magazine subscriptions. (E.g., Exhs. 3 p. 1; 13, p. 8; 14, p. 6).

2. The Individual Defendant, David C. Beasley, Jr.

David C. Beasley, Jr., is the president of NSS. (Exhs. 3, p.4; 4, p. 1). As president of NSS, he has entered into contracts (Exh. 6, p. 7), signed checks (Exh. 8), applied for membership in the Better Business Bureau (“BBB”) and completed questionnaires for the BBB (Exhs. 3, p. 4; 7, p. 2). Moreover, as president of NSS, Beasley has received over 100 complaints concerning the telemarketing sales practices of USPP, filed with the BBB and state law enforcement agencies (Exhs. 50, 51, 52), represented USPP before the BBB regarding consumer complaints the BBB received concerning defendants telemarketing practices (Exh. 9; 10), and was personally notified by the BBB of a fraudulent tactic that defendants were using to obtain consumers credit card account information. (Exh. 9, p. 4). Beasley also wrote to state law enforcement agencies on behalf of USPP. (Exh. 4; 11, pp. 2-3).

IV. ARGUMENT

A. Defendants Have Violated Section 5 of the FTC Act.

Section 5 of the FTC Act, 15 U.S.C. § 45, declares unlawful unfair or deceptive acts and practices. An act or practice is deceptive if, “first, there is a representation, omission, or practice, that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission or practice is material.’Cliffdale Assocs., Inc. 103 F.T.C. 110, 165 (1984); FTC v. World Travel Vacation Brokers, Inc. 861 F.2d 1020, 1029 (7th Cir. 1988) FTC v. Amy Travel Serv., Inc. 875 F.2d 564, 573 (7th Cir.) cert denied 493 U.S. 954 (1989). A misrepresentation or omission is material if it is “important to consumers and, hence, likely to affect their choice of, or conduct, regarding a product. Consumers are thus likely to suffer injury from a material misrepresentation.’Cliffdale Assocs. 103 F.T.C. at 165; World Travel Vacation Brokers, 861 F.2d at 1029; Southwest Sunsites, Inc. v. FTC 785 F.2d 1431, 1435 (9th Cir. 1986). Moreover, express claims or deliberately made implied claims used to induce the purchase of a product or service are presumed material, as are misrepresentations concerning the price of a product or service. World Travel Vacation Brokers 861 F.2d at 1029; Thompson Medical 104 F.T.C. at 817.

In determining whether a consumer acted reasonably, the Court must bear in mind that the FTC Act was not enacted to protect experts, and “the fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive other less experienced.’FTC v. Standard Educ. Soc. 302 U.S. 112, 116 (1937). Moreover, it is presumptively reasonable for consumers to interpret express claims to mean exactly what they purport to mean. FTC v. Pantron I Corp. 33 F.3d 1088, 1096 n.21 (9th

Cir. 1994); Thompson Medical Co. Inc. 104 F.T.C. 648, 788-89 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987).

1. Defendants have violated Section 5 of the FTC Act by misrepresenting that they would use consumers' credit card information for a purpose other than billing charges to that account or misrepresenting that they would not bill charges to the consumers' account unless authorized in writing.

Defendants obtain consumers' credit card account information by misrepresenting their intended use for that information. (Exhs. 12, ¶ 5-6; 14, ¶ 3; 18, ¶ 10, 14; 20, ¶ 11-12, 17; 23, ¶ 5-9; 25, ¶ 6-10). Defendants tell consumers that they need their credit card account information in order to give them discounts if they later decide to purchase, verify their identities, or send them information. (Exh. 20, ¶ 11-12; 23, ¶ 8-9; 25, ¶ 6-7, 9-10). Likewise, defendants misrepresent that they will not bill charges to the consumers' credit card account unless the consumers authorize such charges in writing. (Exhs. 12, ¶ 5; 18, ¶¶ 10, 14; 20, ¶¶ 11-12, 17; 23, ¶¶ 5, 8-11). Defendants nonetheless bill unauthorized charges to the consumers' credit card accounts. (Exhs. 12, ¶ 8; 18, ¶ 10, 18; 19, ¶ 14-17).

It is reasonable for consumers to interpret these express misrepresentations as meaning exactly what they purport to mean on their face: defendants need the consumers' credit card information for some reason other than to bill charges to their account. Pantron I Corp., 33 F.3d at 1096 n.21; Thompson Medical, 104 F.T.C. at 788-89, 792 n.6. Defendants' express misrepresentations concerning their intended use of the consumers' credit card account information certainly affected the consumers' decision to divulge their credit card information; thus defendants' misrepresentations are material. World Travel Vacation Brokers, 861 F.2d at 1029;

presumed material. Thompson Medical, 104 F.T.C. at 816; Cliffdale Associates, 103 F.T.C. at

168. Consumer harm resulted when defendants billed unauthorized charges to the consumers' credit card accounts.

2. Defendants have violated Section 5 of the FTC Act by failing to disclose to consumers the material costs and conditions associated with receiving the grocery coupons.

Defendants customarily tell consumers that if they purchase a magazine subscription, consumers will receive several free gifts, including grocery coupons worth \$50 (Exhs. 13, ¶¶ 5-7; 16, ¶ 3; 17, ¶ 5; 18, ¶ 6; 20, ¶ 4). Defendants do not disclose to consumers the numerous strings attached to their receiving these free gifts, including that the consumers must complete and mail at their own expense fifty forms -- each one separately with a self-addressed stamped envelope and a processing fee of \$1.60 (Exhs. 13, ¶¶ 7-11, 18; 16, ¶¶ 7, 10, 11, 13; 17, ¶¶ 7, 10, 14, 16; 18, ¶¶ 6-7, 10, 12; 20, ¶¶ 6, 8-15). In fact, the scripts used by defendants do not contain these disclosures. (Exhs. 30; 31; 32). That consumers must pay over \$100 and complete and mail fifty forms is information that would affect the consumers' decision whether to purchase the magazine subscription, and is thus material. Cliffdale Assocs., 103 F.T.C. at 165. Defendants' omission of this information thus constitutes a violation of Section 5 of the FTC Act.

B. Defendants have Violated the Telemarketing Sales Rule ("TSR")

1. Defendants have violated the TSR by not disclosing to consumers their odds of winning a prize in the sweepstakes or how those odds are calculated.

In order to “dispel the illusion that the consumer has been specially selected” to participate in a prize promotion, the TSR requires that telemarketers disclose clearly and conspicuously the odds of the consumer being able to win a prize or the factors used in calculating such odds before the consumer pays for the goods or services that are the subject of the offer. Telemarketing Sales Rule’s Statement of Basis and Purpose 60 Fed. Reg. 43842, 43846 (Aug. 23, 1995); 16 C.F.R. § 310.3(a)(1)(iv). Thus, this provision of the TSR is aimed at the very practice defendants use to entice consumers: creating the illusion that the consumers have been “specially selected.” The TSR requires that this disclosure occur prior to consumers paying for the goods that are the subject of the sales

2. Defendants have violated the TSR by failing to disclose the costs and conditions to receive the grocery coupons.

Section 310.3(a)(1)(iii) of the TSR requires the telemarketer to disclose all “material restrictions, limitations, or conditions to purchase, receive, or use the good or services that are the subject of the sales offer.” 16 C.F.R. § 310.3(a)(1)(ii). This disclosure must occur before the consumer pays for the goods or services. Defendants promise consumers that if they purchase a magazine subscription, they will also receive grocery coupons worth \$500. (Exhs. 13, ¶¶ 5-7; 16, ¶ 3; 17, ¶ 5; 18, ¶ 6; 20, ¶ 4). Defendants, however, do not tell consumers that in order to receive the coupons consumers must complete 50 forms and pay \$107 in postage and processing fees. (Exhs. 13, ¶¶ 7-11, 18; 16, ¶¶ 3, 7, 10-13; 17, ¶¶ 5, 7, 10, 14, 16; 18, ¶¶ 6-7, 10, 12; 20, ¶¶ 4, 6, 8-15). In fact, the scripts used by defendants to guide their telemarketers in delivering their pitch do not include these disclosures. (Exhs. 30; 31; 32). Consumers do not learn of these material conditions until they receive the 50 forms – long after they provide their credit card information to defendants’ telemarketers and their credit card accounts are charged for the magazine subscription. (Exh. 13, ¶ 18) Thus, defendants’ telemarketing scheme routinely violates Section 310(a)(1)(ii) of the TSR.

3. Defendants’ failure to disclose their policy of not permitting cancellations or refunds violates the TSR.

Because telemarketing sales occur without direct contact between the consumer and seller, and the consumer has no opportunity to examine the goods offered at the time of sale, it is vital that telemarketers disclose that a sale is final. Telemarketing Sales Rule’s Statement of Basis and Purpose 60 Fed. Reg. 43842, 43847 (Aug. 23, 1995). Thus, where a seller has a policy of not making refunds, cancellations, exchanges, or repurchases, Section 310.3(a)(1)(iii) of the TSR, 16 U.S.C. § 310.3(a)(1)(iii), requires the telemarketer to clearly and conspicuously disclose this to the consumer before the consumer pays for the goods or services. Plaintiffs’ evidence demonstrates that defendants do not permit cancellations. (Exhs. 12, ¶¶ 9-11; 14, ¶¶ 6-11; 15, ¶¶ 6-8; 16, ¶¶ 14-16; 18, ¶¶ 14-16; 21, ¶¶ 4-11; 22, ¶¶ 12-26). Plaintiffs’ evidence in support of this Motion demonstrates that many consumers tried to cancel their subscriptions within three days of

agreeing to purchase the subscription, some the same day, and defendants would not permit them to cancel. (Id.). Plaintiffs' evidence also demonstrates that defendants never told these consumers that defendants do not permit cancellations.Id.) Thus, defendants' failure to disclose their "no-return" policy constitutes yet another violation of the TSR.

C. The Individual Defendant Is Liable for Violating Section 5 and for Consumer Redress

An individual is liable for corporate acts and consumer redress when: (1) the corporate defendants violated the FTC Act; (2) the individual defendant participated directly in the wrongful practices or acts or the individual defendant had the authority to control the corporate defendants; and (3) the individual defendant had some knowledge of the wrongful acts or practices.E.g., FTC v. Amy Travel Serv., Inc., 875 F.2d at 573.

Plaintiffs' evidence demonstrates that the corporate defendants violated the FTC Act. Likewise, plaintiffs' evidence shows that defendant Beasley had the authority to control the corporate defendants. As president of the corporate defendant, Beasley entered into contracts, signed correspondence, and signed checks.¹ Moreover, since the corporate defendant is a closely held corporation, Beasley's status as its president gives rise to a presumption of control.Standard

¹ E.g., Amy Travel Serv., 875 F.2d at 574 (finding officer had authority to control where he developed new business, controlled finances and developed sales scripts); FTC v. Jordan Ashley, Inc., 1994-1 Trade Cas. (CCH) ¶ 70,570, at p. 72,097 (S.D. Fla. Apr. 5, 1995) (finding authority to control based upon corporate officer's active involvement in operations); FTC v. Kitco of Nevada, Inc., 612 F. Supp. 1282, 1293 (D. Minn. 1985) (holding president had authority to control because he signed checks, hired personnel, developed promotional material and entered into contracts on the corporation's behalf).

Educators, Inc. v. FTC, 475 F.2d 401, 403 (D.C.Cir.), cert. denied, 414 U.S. 828 (1973). Finally, plaintiffs' evidence demonstrates that Beasley had the requisite knowledge to be held individually liable for the violations of Section 5 and for consumer redress.

This knowledge element is satisfied by showing actual knowledge of 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. Amy Travel Serv., 875 F.2d at 573. Undoubtedly, Beasley had knowledge of the illegal acts of the corporate defendant. Plaintiffs have reviewed 179 consumer complaints concerning the defendants' telemarketing practices. (Exh. 26). As president of the corporate defendant, Beasley himself received over 100 of these complaints. Of the 179 consumer complaints, 157 were from consumers who purchased a magazine subscription or were charged for a magazine subscription without their authorization: 27 of these consumers, or 17%, allege that defendants misrepresented that they would not bill charges to the consumers' credit card account; 31 consumers, or 20%, alleged that defendants failed to disclose their policy of not permitting cancellations or refunds; 138 consumers, or 88%, alleged that defendants would not permit them to cancel their subscription. (Exhs. 26; 50; 51; 52). Defendant Beasley thus had actual knowledge of the illegal conduct that forms the basis of plaintiffs' complaint in this action.

D. This Court Has the Authority To Grant the Relief Requested

1. Sections 13(b) and 19b(a) of the FTC Act authorize this Court to grant the relief requested.

Section 13(b) of the FTC Act, 15 U.S.C. § 5(b) (second proviso), provides that "in proper cases, the Commission may seek, and after proper proof, the court may issue, a permanent

E. Compelling Evidence of Defendants' Fraudulent Telemarketing Scheme Mandates Entry of a Temporary Restraining Order and Preliminary Injunction

In determining whether to grant a preliminary injunction under Section 13(b), the court must (1) determine the likelihood that the FTC will ultimately succeed on the merits and (2) balance the equities. World Travel Vacation Brokers 861 F.2d at 1028-29; World Wide Factors 882 F.2d at 346. The Commission does not need to prove irreparable injury, as such injury is presumed to exist in statutory enforcement actions. See CFTC v. American Metals Exch. Corp. 991 F.2d 71, 73-74 n.3 (3d Cir. 1993) (applying "public interest" standard). Government of Virgin Islands Dept. of Construction v. Virgin Islands Paving Corp. 714 F.2d 283, 286 (3d Cir. 1986) (applying statutory "public interest standard"). The legislative history of Section 13(b) demonstrates that Congress understood Section 13(b) to codify this preexisting standard applicable to all injunctive actions by the government to enforce remedial statutes:

The intent is to maintain the statutory or "public interest" standard which is now applicable, and not to impose the traditional "equity" standard of irreparable damage, probability of success on the merits, and that the balance of the equities favors the petitioner. This latter standard derives from common law and is appropriate for litigation for private parties. It is not, however, appropriate for the

Likewise, the balance of the equities tips decidedly in the plaintiffs' favor. Without entry of the proposed temporary and preliminary injunctive relief, defendants will continue to obtain credit card account information through misrepresentations and bill unauthorized charges to those accounts and sell magazine subscriptions through material omissions, thereby causing substantial harm to the public interest. By enjoining defendants' illegal practices, this Court will effectuate Congress' intent in enacting Section 13(b): to protect consumers from the effects of unfair trade practices "as quickly as possible." World Travel Vacation Brokers, 861 F.2d at 1028. Similarly, preserving assets for redress outweighs any temporary hardship caused by the TRO and asset freeze, especially because defendants' "can have no vested interest in a business activity found to be illegal." U.S. v. Diapulse Corp., 475 F.2d 25, 29 (2d Cir. 1972).

F. An Ex Parte Order Freezing Assets and Ordering Expedited Discovery are Necessary to Preserve Effective Relief

1. Ex parte relief is necessary to preserve assets and evidence.

A court may enter a temporary restraining order without notice to the opposing party where it appears that "immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition." Fed. R. Civ. P. 65(b). Defendants have systematically defrauded consumers throughout the United States despite repeated warnings from the BBB and state law enforcement agencies. Such activity is a strong indicator that immediate and irreparable injury will occur absent the Court's ex parte entry of the proposed relief. Moreover, Courts in this district have ordered the ex parte freezing of assets, and other ancillary relief under similar circumstances of persistent fraud. See FTC v. Sparta Chem, Inc., Civil Action No. 963228 (AMW)(D.N.J. July 1, 1996) ex parte temporary restraining

order with asset freeze, appointment of a receiver, immediate access to business premises and expedited discovery) FTC v. Michael P. McGowan Civil Action No. 963227 (AMW)(D.N.J. July 1, 1996) ex parte temporary restraining order with asset freeze, appointment of a receiver, immediate access to business premises and expedited discovery FTC v. Car Checkers of Am., Inc., Civil Action No. 93623 (MLP)(D.N.J. Feb. 8, 1993) ex parte temporary restraining order with asset freeze, immediate access to business premises and expedited discovery FTC v. Academic Guidance Servs., Inc. Civil Action No. 923001 (AET) (D.N.J. July 16, 1992) ex parte temporary restraining order with asset freeze, immediate access to business premises and expedited discovery) FTC v. Oak Tree Numismatics, Inc. Civil Action No. 911626 (NHP)(D.N.J. April 18, 1991) ex parte temporary restraining order with asset freeze, appointment of a receiver, immediate access to business premises and expedited discovery FTC v. Fax Corp. of Am., Inc. Civil Action No. 90983 (HLS)(D.N.J. March 19, 1990) ex parte temporary restraining order with asset freeze, immediate access to business premises and expedited discovery) FTC v. Engage A-Car, Inc., Civil Action No. 863758 (D.N.J. Sept. 24, 1986) (ex parte temporary restraining order with asset freeze and an accounting).

2. An Order freezing University Society Publishers Periodicals' assets is necessary to ensure defendants do not dissipate assets.

Plaintiffs seek a narrowly tailored asset freeze to cover only those assets owned and controlled by University Society Publishers Periodicals, the d/b/a/ used by National Scholastic Society, Inc. Plaintiffs are not asking the court to freeze the assets of National Scholastic Society, Inc. Plaintiffs' evidence indicates that National Scholastic Society, Inc., has a legitimate component to its business that is commingled with the fraudulent telemarketing operation. For example, both share the same address and officers (Exhs. 3; 9, p. 2; 10, p. 3), both share at least

one telephone and facsimile number (Exhs. 9, p. 2; 10, p. 3), their BBB membership is in the name “National Scholastic Society, Inc., d/b/a University Society Publishers Periodicals” (Exhs. 3; 7), and was paid for with a check drawn on a bank account in the name National Scholastic Society, Inc. (Exh. 8). By requesting a limited asset freeze, plaintiffs’ seek to balance the interests of consumers who have been defrauded by the defendants’ fraudulent telemarketing activity, against the interests of those third parties -- employees and creditors -- that have dealt in good faith with the defendants’ legitimate business component.

The d/b/a/, University Society Publishers Periodicals is permeated by fraud. Where business operations are permeated by fraud, there is a strong likelihood that assets may be dissipated during the pendency of the legal proceedings; thus an asset freeze is necessary to ensure that the court can award effective final relief at the conclusion of the proceedings. E.g., International Control Corp. v. Vesco 490 F.2d 1334, 1347 (2d Cir.) cert. denied, 417 U.S. 932 (1984); SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1106 (2d Cir. 1972) see supra pages 16-17 (citing cases where Courts in this district have ordered ex parte asset freeze). Moreover, defendants have shown that they do not willingly return money to consumers. Thus, it is

the corporate defendant -- even after being put on notice that defendants' activities were considered potentially fraudulent by the BBB and by state law enforcement agencies.

3. An Order appointing an examiner is justified.

Defendants have chosen to operate a fraudulent telemarketing scheme as a d/b/a of a legitimate business. Similarly, defendants have commingled some of the operations of the fraudulent d/b/a and the legitimate business. An examiner appointed pursuant to the Court's general equity authority and Fed. R. Civ. P. 53, is necessary to determine to what extent defendants have commingled the operations and assets of the legitimate business component with those of its fraudulent telemarketing operation. As an agent of the Court, the examiner will be able to determine whether and to what extent defendants have commingled the assets and operations of their legitimate business operation with those of the fraudulent telemarketing operation. Such an analysis will protect the legitimate enterprise, and also the effectuation of an asset freeze.²

4. Expedited discovery is necessary to ensure the Court can order effective final relief.

Defendants possess evidence important to plaintiffs' cause of action. Given the accelerated nature of plaintiffs' action, expedited discovery is warranted.

V. CONCLUSION

For the foregoing reasons, plaintiffs, Federal Trade Commission and the State of New

Respectfully Submitted,

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