UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

FEDERAL TRADE COMMISSION, Plaintiff, v. Midway Industries Limited Liability Company, *et al.*, Defendants.	**Case No. ____________** **FILED UNDER SEAL**

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR *EX PARTE* TEMPORARY RESTRAINING ORDER WITH ASSET FREEZE AND APPOINTMENT OF A TEMPORARY RECEIVER, AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

CASES

I. INTRODUCTION

Operating primarily from a nondescript location in Baltimore County, a tightly-linked group of companies have taken in millions of dollars by tricking, bluffing, and bullying nonprofits and businesses across the nation into paying exorbitant prices for unordered light bulbs and cleaning supplies. Hundreds of complaints reveal a relatively simple but persistent pattern of deceptive practices.

First, the scheme's telemarketers trick nonprofits and businesses (the consumers in this case) into providing an employee or volunteer's name and a shi an *ex parte* basis in light of a substantial risk of continued consumer injury, dissipation of assets, and destruction of evidence.

II. THE PARTIES

A.

since January 2011.[1] Through investigative efforts, we ha e e i d e n t i f i e d t

evidence shows that Midway Industries further occupies a unique central position among the corporate Defendants.

When Midway Industries has collected funds from consumer victims in its own name, it has deposited those funds into its operating account. The operating account, however, serves a broader repository purpose. Each of the other Operating Entites maintains a bank account, and the primary purpose of each of those accounts has been to serve as a collection point for consumer payments made payable to each respective Operating Entity. The consumer payments deposited into each such account regularly have been transferred into the Midway Industries operating account. Just as it is a central repository, the Midway Industries operating account also serves as a distributive point of origination for a variety of purposes, both to further the scheme and to line the individual Defendants' pockets. On the basis of this evidence, we refer to the Midway Industries operating account as the enterprise's central operating account.[16]

2. Commercial (Operating Entity)

Defendant Commercial Industries LLC ("Commercial") is a Maryland limited liability company with its principal place of business at 438 Main Street in Reisterstown.[17] From its organization in late 2008 until the summer of 2010, it was known as "State Electric & Power

LLC."[18]

agent and "owner" in Florida.[25] National has drawn numerous consumer complaints regarding deceptive telemarketing and unordered merchandise.[26]

4. State Power (Operating Entity)

Defendant Epstein formed Defendant State Power & Lighting LLC ("State Power") in 2008 as a Maryland limited liability company.[27] Its principal place of business is at 438 Main Street in Reisterstown.[28] It has drawn numerous consumer complaints regarding deceptive telemarketing and unordered merchandise.[29]

5. Standard Industries (Operating Entity)

Defendant Standard Industries LLC ("Standard Industries") is a Florida limited liability company formed in January 2011, with its principal place of business at 430 NE 5th Avenue, Delray Beach, Florida 33483.[30] Previously, however, Standard Industries operated as a Maryland entity, originally formed with its principal place of business at 438 Main Street in Reisterstown.[31] Defendant Epstein is Standard Industries' owner and registered agent, and has filed corporate paperwork for the current entity in Florida and for the former entity in

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[25] PX 1 (Vantusko) at ¶¶ 82-83, & Atts. B (BOA 009107), and D-3 (p. 359).

[26] PX 2 (Long) at Atts. A, E (pp. 37, 47), and J (pp. 94, 104, 121, 138, 140, 143); PX 7 (Declaration of Jon Phillips); PX 21 (Declaration of Todd Price).

[27] PX 1 (Vantusko) at ¶ 84, & Att. C-4 (p. 280).

[28] PX 1 (Vantusko) at ¶ 84, & Att. C-4 (p. 280)*; see also* PX 2 (Long) at Att. A.

[29] PX 2 (Long) at Atts. A, E (p. 49-50), & J (p. 133); PX 3 (Lewis); PX 4 (Declaration of Roland Ellies); PX 5 (Declaration of Michele Sprengnether); PX 17 (Ehret Dade); PX 22 (Declaration of Kathleen Noack Purvis).

[30] PX 1 (Vantusko) at ¶ 85, & Att. D-4 (p. 370); *see also* PX 2 (Long) at Att. A.

[31] PX 1 (Vantusko) at ¶¶ 85-87, & Att. C-5 (at p. 284).

Maryland.[32] Standard Industries has drawn numerous consumer complaints regarding deceptive telemarketing and unordered merchandise.[33]

The Delray Beach location appears to be a conventional commercial building, and has prominent signage marked “Standard Industries.”[34] In correspondence with consumers and on its website, however, Standard Industries lists only a Maryland post office box as its address.[35]

Uniquely among the Operating Entities other than Midway Industries, Standard Industries maintains two bank accounts.[36] Both accounts’ statements list Standard Industries’ address as 438 Main Street in Reisterstown.[37] One has no special title, deposited into the account have been transferred routinely into the Midway Industries central operating account.[40]

Based on bank records and other evidence, Standard Industries' payroll account appears to be used to pay telemarketers operating from Standard Industries' address in Delray Beach.[41] With the exception of one small transfer in 2011, however, the sole source of funds for the Standard Industries payroll account has been the Midway Industries operating account (not the other Standard Industries account).[42] Thus, while Standard Industries may appear to have its "own" employees, those employees have been paid entirely from the common pool of funds collected from consumer victims by all of the Operating Entities.

6. Essex (Operating Entity)

Defendant Essex Industries, LLC ("Essex") is a Maryland limited liability company formed in 2009.[43] Its organizing papers list a "c/o" address in Baltimore as its principal office,[44] but bank records reveal that its true headquarters is at 438 Main Street in Reisterstown.[45] Defendant Epstein opened a bank account for Essex and signed the signature card as the owner

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[40] PX 1 (Vantusko) at ¶¶ 38-45, & Att. B (BOA 009343-50).

[41] PX 1 (Vantusko) at ¶ 51.

[42] PX 1 (Vantusko) at ¶ 52.

[43] PX 1 (Vantusko) at ¶ 88.

[44] PX 1 (Vantusko) at ¶ 88.

[45] PX 1 (Vantusko) at ¶ 89, & Att. B.

and sole member.[46] Essex has drawn numerous consum recently changed to 438 Main Street in Reisterstown.[53] Although not named in Hansen's formal corporate filings, Defendant Epstein controls its bank account.[54] Hansen has drawn numerous consumer complaints regarding deceptive telemarketing and unordered merchandise.[55]

9. Environmental (Operating Entity)

Defendant Environmental Industries, LLC ("Environmental") is a Maryland limited liability company formed in 2011, with its principal place of business at 438 Main Street in Reisterstown.[56] Bank records show that Defendant Wallen is its president and controls its bank account.[57] Environmental has drawn numerous consumer complaints regarding deceptive telemarketing and unordered merchandise.[58]

10. Mid Atlantic (Operating Entity)

Defendant Mid Atlantic Industries LLC ("Mid Atlantic") is a Maryland limited liability company formed in March 2013, with its principal place of business at 438 Main Street in

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[53] Hansen's prior principal place of business was previously identified in corporate filings as 135 North Woodley Avenue, Reisterstown, Maryland 21136. Although this address may suggest that Hansen operated separately until recently from the remainder of the Operating Entities in Maryland, in fact the building that uses the 135 North Woodley address is around the corner from the 438 Main Street address – just another one of the small group of adjacent buildings from which the enterprise conducts its affairs. PX 1 (Vantusko) at ¶¶ 92, 131-32.

[54] PX 1 (Vantusko) at ¶ 93, & Att. B (BOA 006612).

[55] PX 2 (Long) at Atts. A, E (p. 32), & J (pp. 130, 132, 136); PX 14 (Declaration of Chase Munford); PX 15 (Declaration of Christine Rigdon); PX 16 (Declaration of Bruce Ford).

[56] PX 1 (Vantusko) at ¶ 94, & Att. C-9 (p. 305).

[57] PX 1 (Vantusko) at ¶ 95, & Att. B (BOA 001207).

[58] PX 2 (Long) at ¶¶ 39-41, & Atts. A, E (pp. 39-46), I (pp. 69-80, 84-85), and J (pp. 107, 108-114, 118, 123); PX 3 (Lewis), PX 5 (Sprengnether); PX 6 (Fraley); PX 7 (Phillips); PX8 (Hall); PX 9 (Haedrich); PX 18 (Whitcomb); PX 19 (Nadja Stratton); PX 22.

Reisterstown.[59] Bank records show that Defendant Wallen is its president and controls its bank account.[60] A March 2014 consumer complaint demonstrates that it has engaged in unlawful practices consistent with the practices of the other Operating Entities.[61]

11. Midway Management

Defendant Midway Management, LLC ("Midway Management") is a Florida limited liability company with its principal place of business at 430 NE 5th Avenue, Delray Beach, Florida 33483.[62] This is the same Florida address used by Standard Industries.[63] Defendant Epstein is the registered agent and owner of Midway Management.[64]

While the Operating Entities have direct interactions with consumers, Midway Management functions in the background as a cash conduit for the individual Defendants. The Defendants have used Midway Management to siphon funds from the enterprise using two methods.

First, money has moved from Midway Industries to Midway Management and to the individual Defendants by conventional transfers. Checks out of the Midway Management account in the fall of 2013, read in conjunction with bank statements, illustrate the conventional transfer mechanism. For example, on September 11, 2013, Wallen wrote a $71,904.23 check

[59] PX 1 (Vantusko) at ¶ 96, & Att. C-10 (p. 308).

[60] PX 1 (Vantusko) at ¶ 97, & Att. B (BOA 001560).

[61] PX 2 (Long) at ¶¶ 42-44, & Atts. A, and H (pp. 62-67).

[62] PX 1 (Vantusko) at ¶ 98, & Att. D-6 (pp. 388-390).

[63] PX 1 (Vantusko) at ¶¶ 85, 98.

[64] PX 1 (Vantusko) at ¶ 98.

12. B&E

evidence thus shows that B&E ostensibly has or recently had authority or control sufficient to offer up control of Midway Management (the cash-siphoning entity) as collateral for some obligation it ostensibly owes or owed to Epstein. Further cementing its connections to the enterprise, the new B&E's registration with the State of Maryland indicates that the "Nature of [its] Business in Maryland" is "sale of lighting related products."[80]

C. The Individual Defendants

As illustrated in the corporate and bank records, two individuals have taken places of particular prominence in the enterprise. Through control of the enterprise's corporate identities and funds, they have enriched themselves immensely.

1. Eric A. Epstein

Defendant Epstein has long been and continues to be a central figure in the enterprise. In February 2013, Defendant Wallen claimed in correspondence to the Maryland BBB that he "purchased the business" from Epstein,[81] but Epstein has continued to appear in corporate records filings and as an authorized signatory on multiple bank accounts.[82] Moreover, UCC forms filed in Maryland and Florida as recently as March 2014 closely associate Epstein with the enterprise.[83] On these forms, in which Wallen is the debtor and Midway Industries is the secured

[80] PX 1 (Vantusko) at Att. C-12 (p. 318).

[81] PX 2 (Long) at ¶ 23, & Att. D (p. 26).

[82] PX 1 (Vantusko) at ¶ ¶ 76-113.

[83] PX 1 (Vantusko) at ¶ 112-113, & Atts. E-2 (p. 411), & F (pp. 414-415).

The documentation for Midway Management's August 2013 loan perhaps most succinctly encapsulates the common enterprise. As collateral for the $3.5 million loan, Midway Management has pledged the equipment, inventory, and receivables of all ten Operating Entities.[90] The bank conditioned the loan on guaranties from all ten Operating Entities, as well as Wallen and Epstein personally, and has required ongoing detailed financial reporting by Epstein and Midway Industries.[91] These companies are inseparable.

Courts have long held in FTC enforcement cases that "[w]here one or more corporate entities operate in common enterprise, each may be held liable for the deceptive acts and practices of the others."

III. DEFENDANTS' PRACTICES

Hundreds of complaints from consumers across the nation (including Alaska and Hawaii) paint a consistent picture of Defendants' deceptive and unlawful practices.[92] Defendants' scheme, at its essence, employs waves of deceptive tactics surrounding the shipment of unordered goods.

A. Pre-Shipment Deception

Consumers complain about a variety of deceptive tactics that Defendants' telemarketers use during outbound cold calls.[93] In general, the calls fall into one or more of five varieties. The telemarketers routinely falsely state or imply that:

(1) the Operating Entity previously has done business with the consumer;[94]

(2) the telemarketer is calling to verify, confirm, or otherwise follow up on a previous duly made purchase or order;[95]

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[92] While some of the evidentiary materials submitted herewith incorporate hearsay, including numerous example records of consumer complaints concerning the scheme, these complaints are consistent with the testimonial declarations. The Supreme Court has established that "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). A district court may consider hearsay evidence in determining whether to grant a preliminary injunction. *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010) (citing *Camenisch* and so holding, and collecting numerous circuit and district court cases in accord); *see also United States ex rel. Taxpayers Against Fraud v. Link Flight Simulation Corp.*, 722 F. Supp. 1248, 1252 (D. Md. 1989). This principle can be no less applicable in the context of an application for a temporary restraining order to enforce federal law and to preserve the possibility of effective final relief.

(3) the telemarketer is offering a free sample, free catalog, or free gift;[96]

(4) the telemarketer is seeking the name and contact information of an employee for some purpose other than initiating a sales transaction;[97] or

(5) the telemarketer is merely calling to confirm a shipping or mailing address.[98]

The pattern of complaints indicates that Defendants' telemarketers have three primary purposes when cold-calling victims. First, the telemarketer is seeking an employee name, often of an employee associated with maintenance or janitorial duties. Second, the telemarketer needs an address. Third, the telemarketer wants to use an innocuous conversation to sow seeds that will later blossom into doubt.

B. Post-Shipment Deception

Following the telephone contact, the consumer receives a shipment of light bulbs or cleaning supplies.[99] Often, the shipment arrives with a "gift" of minimal value, such as a

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[95] PX 1 (Vantusko) at ¶ 16b; PX 2 (Long) at ¶ 12, & Att. B; PX 3 (Lewis); PX 4 (Ellies);

pocketknife or low-value gift card.[100]

victimized by one of the Operating Entities will find itself receiving unordered merchandise – and invoices – from other Operating Entities.[107]

Consumers' employees or volunteers who detect the scam routinely report difficulties when contacting the Operating Entities to question the invoices.[108] Trouble begins right away, as the telephone numbers that the Operating Entities list on their invoices ring at an answering service whose operators do not provide the consumer with any information about the shipment or supposed order, nor even basic information about the Operating Entity, such as an address to which returns may be directed.[109]

When they do speak with consumers, either because they are calling to demand payment or in those instances when they return consumers' calls, representatives of the Operating Entities invariably claim that the merchandise was ordered.[110] The representatives often claim that they have audio recordings of the supposed orders (although, when pressed, they do not provide copies or transcripts of them).[111] They also use bits of the outbound telemarketers' initial conversations to create confusion: for example, they claim that the consumer's employee who consented to receive a "gift" was obligating the consumer to pay for merchandise.[112] This tactic

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[107] PX 6 (Fraley) at ¶¶9, 12; PX 9 (Haedrich) at ¶¶ 3, 7; PX 19 (Stratton) at ¶¶ 9, 11; PX 5 (Sprengnether) at ¶¶ 3, 7, 8; PX 22 (Noack Purvis) at ¶¶ 3, 6, 12, 13.

[108] PX 12 (Moskowicz) at ¶ 8; PX 18 (Whitcomb) at ¶ 15.

[109] PX 7 (Phillips) at ¶¶ 7-9; PX 17 (Ehret Dade) at ¶ 8; PX 18 (Whitcomb) at ¶ 13; PX 19 (Stratton) at ¶ 12; PX 20 (Murdock) at ¶ 7.

[110] PX 3 (Lewis) at ¶ 13; PX 8 (Hall) at ¶ 10; PX 19 (Stratton) at ¶ 13; PX 21 (Price) at ¶ 8.

[111] PX 22 (Noack Purvis) at ¶¶ 24, 45; *see also* PX 2 (Long) at ¶¶ 31, 37 & Att. G (p. 59).

[112] PX 18 (Whitcomb) at ¶ 16.

faith and lawful practices. The Maryland BBB, however, has continued to observe the same pattern of deceptive sales tactics.[116]

The evidence shows that Defendants, despite ample notice and ongoing complaints, will not change their deceptive practices. A remarkable example of explicit notice came in a May 2013 letter to the Defendants from John Haedrich, president and administrator of a California nursing home victimized by the scheme. Haedrich pulled no punches, explaining to Defendants in vivid detail that he knows from personal experience in deceptive telemarketing, as a "boiler room" seller thirty years ago, exactly what the Defendants' practices are. As to the ramifications of those practices, Haedrich warned the Defendants:

> What will likely happen is that [law enforcement] will gather statistics on your activities and one day if they get enough complaints or you really [make someone angry] – maybe they will, … I dunno – indict you or seek an injunction.[117]

While the Haedrich letter stands out for its detail, it is fully consistent with numerous other consumer complaints that preceded it and followed it. Yet the Defendants' deceptive conduct has continued. Moreover, aside from the fact that the same pattern has continued

Manager at an Ohio homeless shelter. In the summer of 2013, Fraley complained to Commercial (an Operating Entity) about unordered light bulbs. On August 29, 2013, Commercial sent an email to Fraley agreeing to take back its most recent shipment. Then, in September, Environmental (another Operating Entity) shipped unordered cleaner to the shelter, and when challenged claimed that Fraley himself had ordered it … on August 29, 2013.[118] Another example of this unrepentant persistence is illustrated in the complaints submitted by Smith's Food & Drug Stores to the Maryland Attorney General. After Smith's in-house counsel complained about Essex and Commercial in separate 2011 letters, Commercial assured the Maryland Attorney General in a July 2011 note that Smith's had been "placed on a do not call list." In October 2012, though, Commercial sent a new invoice to Smith's for a supposed new shipment, initiating yet another round of conflict that was not resolved for months.[119]

Second, even as the complaints continue to pour in, the Defendants have busied themselves establishing *new* Operating Entities to continue and expand the same practices. In December 2012, Wallen met with representatives of the Maryland BBB to discuss problems with the Defendants' sales practices. Among other things, Wallen told the Maryland BBB representatives that the enterprise was no longer targeting churches. Not only was this claim untrue when it was made,[120] the Defendants dropped all pretense of such restraint when they

[118] PX 6 (Fraley) at pp. 12, 15.

[119] PX 1 (Vantusko) at ¶¶ 31-35, & Att. A.

[120] PX 2 (Long) at ¶ 25.

Defendants' connections to Midway Industries, venue lies in this District under 28 U.S.C. § 1391(b)(2), as a substantial part of the events giving rise to the claims in this case occurred in this District. Additionally, the FTC Act provides that, if the interests of justice require, any person may be "added as a party without regard to whether venue is otherwise proper in this district in which the suit is brought." 15 U.S.C. § 53(b).

V. DEFENDANTS' MISREPRESENTATIONS VIOLATE SECTION 5 OF THE FTC ACT (COUNT I)

A. A Misrepresentation is Deceptive under Section 5 if it Is Likely to Mislead Consumers Regarding a Material Fact

Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or deceptive acts or deliberately made implied claims are presumed material.[123] *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999); *In re Nat'l Credit Mgmt. Group, LLC,* 21 F. Supp.2d 424, 441 (D.N.J. 1998); *In re Thompson Medical Co.,* 104 F.T.C. 648, 788-89 (1984), *aff'd* 791 F.2d 189 (D.C. Cir. 1986).

The FTC is not required to show individual reliance on a defendant's misrepresentations or omissions. *Figgie Int'l*, 994 F.2d at 605 (recognizing that such a requirement "would thwart the effective prosecutions of large consumer redress actions and frustrate the statutory goals of [Section 13(b)]"); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991) (same). Rather, a presumption of actual reliance arises when a defendant made material misrepresentations, that were widely disseminated, and the consumer purchased the defendant's product. *Figgie*, 994 F.2d at 605-06; *Sec. Rare Coin*, 931 F.2d at 1316.

Moreover, defendants may not evade liability for their deceptive conduct by blaming consumers for being too trusting. As the Supreme Court has held:

> 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 others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. ***Laws are made to protect the trusting as well as the suspicious.*** The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception.

FTC v. Standard Education Soc., 302 U.S. 112, 116 (U.S. 1937) (emphasis added).

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[123] The FTC need not prove that Defendants' misrepresentations were made with an intent to defraud or deceive or were made in bad faith. *See, e.g. Removatron Int'l Corp. v. FTC,*

B. Defendants' Misrepresentations to Induce Payment Violate Section 5 of the FTC Act

Count I alleges that the Defendants have violated Section 5 by making misrepresentations to induce consumers to pay for unordered goods. As described above and in the accompanying evidentiary materials, Defendants, through telephone calls, invoices, packing slips, and the shipment of unordered light bulbs and cleaning supplies, have represented that the consumers ordered the goods that were shipped and/or billed to the consumers, that they have previously done business with the consumers, or that Defendants would send only a free sample, free gift, or free product catalog.

These representations are false, as consumers did not order the goods, the Defendants did not have a preexisting business relationship with the consumers, and instead of a free sample, gift, or catalog, the Defendants ship full orders (or multiple orders) of light bulbs or cleaning supplies for which they subsequently send invoices. These were express or deliberately made implied representations; they are therefore presumed material. Moreover, the materiality of these representations is beyond dispute in that consumers have actually paid the Defendants' invoices, generating millions of dollars in revenue for the Defendants.

VI. DEFENDANTS' TELEMARKETING PRACTICES VIOLATE THE TELEMARKETING SALES RULE (COUNTS II AND III)

The Telemarketing Sales Rule was originally promulgated in 1995 after Congress, in the Telemarketing Act, 15 U.S.C. §§ 6101-08, directed the FTC to establish regulations prohibiting deceptive and abusive practices in telemarketing. The amended TSR, which included the Do Not Call Registry, was promulgated in 2003.[124] The TSR prohibits a number of deceptive and

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[124] 68 Fed. Reg. 4580, 4669 (Jan. 29, 2003).

abusive acts and practices.[125] Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the TSR constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

The TSR generally exempts telemarketer calls to businesses from its scope, but there is a significant and specific exception applicable here. Telephone calls between a telemarketer and a business that involve the retail sale of nondurable office or cleaning supplies are subject to the TSR's prohibitions against deceptive and abusive telemarketing acts or practices. 16 C.F.R. § 310.6(b)(7). In its Statement of Basis and Purpose for the TSR, the Commission stated:

> [T]he Commission's enforcement experience against deceptive telemarketers indicates that office and cleaning supplies have been by far the most significant business-to-business problem area; such telemarketing falls within the Commission's definition of deceptive telemarketing acts or practices.

60 Fed. Reg. 43842, 43861 (Aug. 23, 1995).

Section 310.3(a)(4) of the TSR, 16 C.F.R. § 310.3(a)(4), prohibits sellers and telemarketers from making false or misleading statements to induce a consumer to pay for goods. **Count II** alleges that the Defendants have violated Section 310.3(a)(4) of the TSR by making false and misleading statements to induce payment for unordered light bulbs and cleaning supplies. This count covers statements in calls both before and after the shipment of unordered merchandise. Specifically, Defendants have represented that the consumer ordered the goods that were shipped and/or billed to the consumer, that they have previously done business with the consumer, or that Defendants would send only a free sample, free gift, or free product catalog. However, the consumer did not order the goods, the Defendants did not have a preexisting

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[125] 16 C.F.R. § 310.3 (deceptive practices); 16 C.F.R. § 310.4 (abusive practices).

business relationship with the consumer, and instead of a free sample, gift, or catalog, the Defendants actually shipped full orders (or multiple orders) of light bulbs or cleaning supplies and sent invoices.

Section 310.4(d)(2) of the TSR, 16 C.F.R. § 310.4(d)(2), requires telemarketers to clearly and conspicuously disclose to the person receiving the call that the purpose of the outbound call is to sell goods or services. **Count III** alleges that the Defendants have violated Section 310.4(d)(2) of the TSR by failing to disclose to consumers receiving their outbound cold calls that the purpose of their calls is to sell. When Defendants' telemarketers call consumers, they give false reasons for seeking to speak with a maintenance person, simply ask for a shipping address, state that someone has already placed an order, or state that they want to send the consumer something free. These statements do not disclose that the true purpose of the Defendants' calls is to sell goods.

VII. DEFENDANTS' PRACTICES OF SHIPPING AND BILLING FOR UNORDERED MERCHANDISE VIOLATE THE UNORDERED MERCHANDISE STATUTE AND SECTION 5 OF THE FTC ACT (COUNT IV)

The Unordered Merchandise Statute, 39 U.S.C. § 3009(a), prohibits sending unordered merchandise unless it is clearly and conspicuously marked as a free sample or is sent by a charitable organization soliciting contributions. Unordered merchandise is defined as "merchandise mailed without the prior expressed request or consent of the recipient." 39 U.S.C. § 3009(d). In combination with § 3009(a), subsection (c) of the Unordered Merchandise Statute, 39 U.S.C. § 3009(c), also prohibits sending bills or dunning communications for unordered goods. Although the statute uses forms of the word "mail," the FTC long ago explicitly stated that the standards of the Unordered Merchandise Statute apply regardless of whether materials are sent by U.S. Mail. 43 Fed. Reg. 4113 (Jan. 31, 1978); *see also UMG Recordings, Inc. v.*

Augusto, 558 F. Supp. 2d 1055, 1062 n.5 (C.D. Cal. 2008). Moreover, even if a consumer consents to an initial shipment, sending subsequent shipments and billing for those shipments is unlawful. *See Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1173-74 (1st Cir. 1973).

Count IV alleges that the Defendants have violated the Unordered Merchandise Statute, 39 U.S.C. § 3009, by shipping unordered light bulbs and cleaning products, and sending invoices for the unordered goods, without the express request or consent of the recipient. Under the terms of the Unordered Merchandise Statute, these practices are unlawful and violate the FTC Act *per se*.

VIII.

court's powers under the final proviso of § 13(b)…."). A case involving deceptive representations, such as this one, qualifies as a "proper case" under Section 13(b). *Ameridebt*, 373 F. Supp. 2d at 562.

Section 13(b) confers full equitable powers on this Court. *Ross*, 743 F.3d at 891. In addition to entering a permanent injunction, the Court may order the rescission of contracts, restitution, and/or disgorgement of ill-gotten gains. *Ameridebt*, 373 F. Supp. 2d at 562 (citing *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir 1997)). All preliminary equitable remedies are also available to the Court, including a preliminary injunction with ancillary relief. *Ameridebt*, 373 F. Supp. 2d at 562 (citing *FTC v. Gem Merch. Corp.,* 87 F.3d 466, 469 (11th Cir. 1996)).[126] When, as here, the public interest is implicated, exercise of this Court's equitable powers is particularly appropriate. *Ameridebt*, 373 F. Supp. 2d at 562 (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

Courts in this District have repeatedly exercised their authority to grant TROs with ancillary equitable relief in FTC fraud cases. *See, e.g., FTC v. Loma Int'l Bus. Grp, Inc.,* No. 1:11-cv-01483-MJG (D. Md. June 2, 2011) (ordering *ex parte* TRO with asset freeze, appointment of a temporary monitor, immediate access to business premises, and expedited discovery); *FTC v. Holiday Vacations Mktg Corp.*, No. 8-11-cv-01319-JFM (D. Md. May 16,

[126] The first part of Section 13(b) includes procedural and notice provisions applicable when the FTC seeks a preliminary injunction in support of an administrative proceeding, including a limit on the duration of a preliminary injunction. Those provisions are not relevant when, as here, the Commission has elected to seek a permanent injunction directly in district court under the "proper cases" language of the second proviso. *See Gem Merch.*, 87 F.3d at 468 n.3 (quoting "relevant part" of Section 13(b), excluding procedural and notice provisions applicable in connection with preliminary injunctions to support administrative proceedings); *see also Ross*, 743 F.3d at 890-91 (invocation of statutory language authorizing permanent injunctions permits full exercise of court's equitable authority, without limitation).

2011) (ordering

presumed." *Ameridebt*, 373 F. Supp. 2d at 563 (citing *FTC v. Affordable Media*, 179 F.3d 1228, 1233 (9th Cir. 1999) and *FTC v. Va. Homes Mfg. Corp.*, 509 F. Supp. 51, 54 (D. Md. 1981)); *see also United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 175 (9th Cir. 1987) (agency enforcing statute authorizing injunction "not required to show irreparable injury"). In addition, the FTC "'meets its burden on the 'likelihood of success' issue if it shows preliminarily, by affidavits or other proof, that it has a fair and tenable chance of ultimate success

Commission has presented ample evidence that it will likely succeed on the merits, and that the balance of the equities favors the requested injunctive relief.

C. The Individual Defendants Are Liable for Injunctive and Monetary Relief

In addition to the corporate Defendants, individual Defendants Wallen and Epstein are liable for injunctive and monetary relief for the corporate Defendants' unlawful practices. To obtain injunctive and monetary relief against an individual, the Commission must show that the individual "(1) participated directly in the deceptive practices or had authority to control those practices, and (2) had or should have had knowledge of the deceptive practices." *Ross*, 743 F.3d at 892. The knowledge element, however, need not rise to the level of subjective intent to defraud consumers. *Id*. Rather, the second prong is satisfied by a showing that the individual "had actual knowledge of the deceptive conduct, was recklessly indifferent to its deceptiveness, or had an awareness of a high probability of deceptiveness and intentionally avoided learning the truth." *Id*. In addition, the individual's degree of participation in business affairs, including

The Commission's evidence shows that Wallen and Epstein are each personally liable for both injunctive and monetary relief for the deceptive acts or practices of the corporate entities. Even if they have not personally participated in the unlawful activities of the Operating Entities, these individuals have had controlling authority in the enterprise. Similarly, regardless of whether they actually knew of specific instances of unlawful conduct, given all of the consumer complaints and communications by the Maryland BBB these individuals were either recklessly indifferent or willfully blind to the pervasive, ongoing conduct.

D. The Appointment of a Temporary Receiver is Warranted

Appointment of a temporary receiver is an appropriate equitable remedy where there is "fraud, or the imminent danger of property being lost, injured, diminished in value or squandered, and where legal remedies are inadequate." *Nat'l Credit Mgmt. Group*, 21 F. Supp.2d at 463 (quoting *Leone Indus. v. Associated Packaging, Inc.*, 795 F. Supp. 117, 120 (D.N.J. 1992)). A temporary receiver can preserve records and make an accounting that will assist in identifying the assets of the Defendants, determining the scope of the scheme, and identifying the victims. *See Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 463.

A receiver is necessary here because, as shown above, Defendants' business is permeated by fraud. A receiver would be able to secure multiple locations, as well as perform standard functions such as securing and finding assets[128] and taking possession of computers, documents, and other evidence of the Defendants' illegal practices. Moreover, a temporary receiver will be

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[128] The evidence indicates that Defendants have moved money derived from the unlawful conduct at issue here into various real estate entities affiliated with the Defendants through Defendant Epstein's ownership and control. PX 1 (Vantusko) at ¶ 54, & Att. B (BOA 001882, 011027, 011178, 011358. The proposed Order expressly includes those real estate entities within the scope of the receivership.

able to make a rapid determination as to whether the enterprise (or any of its elements) can operate lawfully. The FTC has identified certain possible candidates for appointment as receiver in the pleading entitled “Notice of Candidates for Temporary Receiver,” filed simultaneously with this memorandum.

The Commission also seeks provisions in the order to require Defendants and institutions that maintain records and assets under the control of the Defendants to disclose information and records concerning Defendants' assets and the identities of those individuals and entities acting in concert with Defendants. Such disclosures are necessary to ensure compliance with the asset freeze and transfer restrictions, and to ensure that the order is served as soon as possible on all appropriate persons and entities.

The proposed order also contains a provision prohibiting the Defendants from transferring any information about consumers who have been targets of the scheme to anyone else, unless required to do so by law. This provision is necessary to prevent Defendants from exploiting vulnerable consumers even more by selling information about them to others.

F. The Temporary Restraining Order Should Be Issued *Ex Parte*

The substantial risk of asset dissipation and document destruction in this case, coupled with Defendants' ongoing and evidently deliberate statutory violations, justifies *ex parte* relief. Federal Rule of Civil Procedure 65(b) permits this Court to enter *ex parte* orders upon a clear showing that "immediate and irreparable injury, loss, or damage will result" if notice is given. *Ex parte* orders are proper in cases where notice to the defendant would "render fruitless the further prosecution of the action." *In re Vuitton et Fils, S.A.*, 606 F.2d 1, 5 (2d Cir. 1979). Consumer fraud cases such as this one fit squarely into the narrow category of situations where *ex parte* relief is appropriate to make possible full and effective final relief.

As is set forth in the Certification of Counsel, notice to these Defendants would lead to irreparable injury. The individual Defendants have drawn extremely large sums out of this enterprise, while presiding over persistent deceptive and obfuscatory tactics in the face of numerous complaints and warnings. In addition to these aspects of these Defendants' behavior,