

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

FEDERAL TRADE COMMISSION, and	)	
	)	
STATE OF FLORIDA, OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF LEGAL AFFAIRS,	)	
	)	
Plaintiffs,	)	Case No. 15cv5781
	)	Judge Feinerman
	)	Magistrate Judge Gilbert
v.	)	
	)	
LIFEWATCH INC., a New York corporation, also d/b/a LIFEWATCH USA and MEDICAL ALARM SYSTEMS, and	)	
	)	
EVAN SIRLIN, individually and as an officer or manager of Lifewatch Inc.,	)	
	)	
Defendants.	)	
	)	

**MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

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Lifewatch, Inc., markets medical alert devices to elderly consumers throughout the country using third-party telemarketers that blast illegal robocalls and engage in deceptive telemarketing practices. Lifewatch is responsible for millions of prerecorded robocalls, which often make the completely false claim that consumers can receive a medical alert device for free because someone close to the consumer already purchased or recommended the device for them. Frequently, the robocalls describe the system as being endorsed by major organizations like the American Heart Association, American Diabetes Association, National Institute on Aging, AARP, American Red Cross, and a variety of other organizations – none of which actual

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connections – daily. Every one of these connected calls violated one or more provisions of the Telemarketing Sales Rule, 16 C.F.R. Part 310, the FTC rule aimed at combating deceptive and abusive telemarketing practices. These violations are separate and apart from the deceptive claims or misrepresentations made in the prerecorded messages and subsequent telemarketing pitch.

This





the company it is today.<sup>4</sup> Unfortunately, most if not all of its sales come from blatantly illegal tactics.

Plaintiffs have submitted overwhelming evidence demonstrating both Lifewatch's abusive telemarketing practices and its widespread deceptive telemarketing practices. Either basis

and a base unit about the size of an answering machine, connected to a telephone line. The systems are intended for the elderly and disabled, and marketed as a way to allow them to continue to live safely in their homes, instead of moving to a nursing home or other assisted living facility. In case of an emergency, the consumer can simply press a button on the pendant and be connected to a call center. The medical alert devices themselves are often provided at no cost, but require consumers to pay a monthly monitoring fee.

Lifewatch relies heavily on telemarketing to sell its medical alert device.<sup>8</sup> These telemarketing campaigns have two components – a robocall, followed by a live telemarketing call. All aspects of Lifewatch’s campaigns are illegal.

#### **A. Lifewatch’s Abusive Telemarketing Practices**

Lifewatch is responsible for the transmission of hundreds of millions of robocalls.<sup>9</sup> In 2012 and 2013, just one of Lifewatch’s telemarketers was itself responsible for sending out at least 800,000 robocalls that were answered by a person or answering machine each day.<sup>10</sup> These robocalls are *per se* violations of the TSR.

Lifewatch’s telemarketing campaigns routinely violate other provisions of the TSR as well. For example, consumers complain that Lifewatch contacts them incessantly, regardless

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<sup>8</sup> PX 16, Kane Dec. ¶ 3 & Att. A at 6 (Lifewatch paid Worldwide \$15,741, 518.50 between March 2012 and December 2013); *see also* PX 14, Hilgar Dec. ¶ 11 (all of the telemarketing conducted by Worldwide and its related entities was on behalf of Lifewatch); PX 15, Settecase Dec. ¶ 6 (Worldwide telemarketing was exclusively outbound robocalls).

<sup>9</sup> Since the robocall messages never identify Lifewatch as the seller – an independent violation of the TSR, 16 C.F.R. § 310.4(b)(1)(v)(B)(ii) – it is impossible to determine exactly how many consumers have complained to the FTC about Defendants’ telemarketing calls. But from 2012 to present, more than 90,000 consumers have complained about “medical alert” robocalls. PX 1, Menjivar Dec. ¶ 53. Consumers specifically complained about Lifewatch 665 times. *Id.* ¶ 54; *see also id.* ¶ 41r, Att. XX at 20 (telemarketing manager states the “main PBX server that generates the call” makes around 10,000 calls a day) & 24.

<sup>10</sup> PX 15, Settecase Dec. ¶¶ 5 & 7 (Worldwide sent out nearly two millions calls each day).

of whether they are on the National Do Not Call Registry.<sup>11</sup> This includes a great number of elderly consumers who complain of being harassed by Lifewatch's calls,<sup>12</sup> many of whom signed up for the Do Not Call list specifically to avoid these types of scams.<sup>13</sup> Similarly, consumers continue to be harassed by these calls even after pressing the number specified in the robocall messages to be taken off of Lifewatch's calling list.<sup>14</sup> Consumers who stay on

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<sup>11</sup> PX 7, Cuomo ¶ 5, Att. A at 16-17; PX 17, Bangasser Dec. ¶¶ 3-5; PX 21, Bliss Dec. ¶¶ 3-6; PX 27, Clawson Dec. ¶¶ 8-

the line and directly ask live operators to stop calling also continue receiving calls.<sup>15</sup> Nor can consumers screen these calls by looking at their Caller ID. Lifewatch's telemarketers transmit phony Caller ID information ("spoofing"), misrepresenting the caller and masking the origin of the call.<sup>16</sup> Defendants also never transmit or disclose their company name, instead using a slew of fake names that cannot be traced back to them.<sup>17</sup>

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## **B. Lifewatch’s Deceptive Telemarketing Practices**

Not only is the delivery mechanism of Lifewatch’s calls illegal, but the substance of the telemarketing calls are also rife with misrepresentations designed to trick consumers into agreeing to monthly charges. From robocalls that imply that friends or family already have purchased Lifewatch’s service for the consumer, or that the service is endorsed by prominent national organizations, to live telemarketers that reinforce these misrepresentations and introduce others, many consumers are pressured to sign up for Lifewatch’s service when they otherwise would not have.

### **1. Lifewatch’s Deceptive Robocalls**

Lifewatch’s recorded messages are crafted to appeal to the vulnerabilities of their target market, the elderly and disabled.<sup>18</sup> Many prey on the fears of older consumers,

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after providing payment information), ¶ 39b, Att. X at 4 (“Senior Assistance Program”), 22 (“Senior Alert Care”) & 12-22 (representative refuses to provide company’s address, tells consumer only get information after providing payment information), ¶ 39c, Att. Y at 4 (“Senior Medical Alert Systems”), ¶ 39d, Att. Z at 4 (“Senior Life Support Assistance Program”), ¶ 40a, Att. AA at 4 (“Life Alert System”), ¶ 40d, Att. DD at 14 (“Medical Alarms USA”), ¶ 40e, Att. EE at 5 (“Senior Life Support”), ¶ 40f, Att. FF at 15 (“Endless Medical Alert”), ¶ 41a, Att. GG at 11 (“Senior Life Support”), ¶ 41b, Att. HH at 4 (“Senior Life Support”), ¶ 41d, Att. JJ at 10-11 (“Medical Alert,” “Senior Life Support Assistance Program”), ¶ 41g, Att. MM at 4 (“Senior Life Support”) & 6 (“Med Alert”), ¶ 41k, Att. QQ at 4 (“Senior Life Support”) & 5 (“Senior Life Support Assistance Program”), ¶ 41l, Att. RR at 8 (“Senior Life Savings”) & 16 (“Senior Life Savers”), ¶ 41m, Att. SS at 6 (representative admits company recently changed name from “Senior Life Support” to “Senior Life Savers”), ¶ 41n, Att. TT at 7 (“Senior Life Savers”), ¶ 41q, Att. WW at 4 (“Senior Life Saver assistance program”), ¶ 41r, Att. XX at 7, 9 &

warning of “a significant rise in the number of senior citizens suffering death and serious life-threatening injuries from a delay in response times for medical emergencies, fires, burglaries or even a simply fall,” or claiming that “[e]very year, it is estimated that over 30 percent of the senior population accidentally falls.”<sup>19</sup> Others are recorded to sound like a live person is on the line, supposedly from “the shipping department,” complete with the inclusion of “uhs,” pauses, and shuffling of papers.<sup>20</sup> In fact, many consumers never realize they are listening to a recording, or only realize it after getting the same call several times.<sup>21</sup>

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real person, not a telemarketer, calling from a legitimate business ready to deliver a pre-purchased device.”); PX 22, Bourn







monthly charge for the service, however, is not revealed until later in the call. Consumers also are often again told the system is free because a friend, family member, or acquaintance purchased it for them,<sup>34</sup> or because someone referred them.<sup>35</sup>

Consumers must frequently ask who exactly referred them for the device, however, because Lifewatch's telemarketers have a response at the ready: "[F]or security and privacy reasons my screen does not say who referred you, the only information I have is that you were referred to us either by a friend, family member or maybe someone you know, and because you were referred, the system is completely free to you."<sup>36</sup> Of course, the truth is that no one has referred consumers for the medical alert system.<sup>37</sup> This is simply a ruse to convince people to give up their billing information.

In a further effort to bolster its legitimacy, Lifewatch also repeats the false robocall claims that its device is endorsed by several prominent organizations. In a welcome package

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Money Group script), Att. UU (Total Security Vision script), Att. CCC (Alertlink script), Att. HHH (Live Response Agent script), Att. NNN (Elite Information Systems script), Att. OOO (same), WWW (Live Agent Response script) & Att. BBBB (American Innovative Concepts script); PX 66, Lancaster Dec. ¶ 4, Ex. A; PX 69, Stenger Dec. ¶ 5, Att. A; *see also* PX 1, Menjivar Dec. ¶ 39a, Att. W at 5, ¶ 39b, Att. X at 5, ¶ 39c, Att. Y at 5 ("valued at over \$475" and free shipping/activation), ¶ 39d, Att. Z at 5, ¶ 40a, Att. AA at 5, ¶ 40e, Att. EE at 6, ¶ 40f, Att. FF at 5, ¶ 41a, Att. GG at 4, ¶ 41t, Att. ZZ at 5, ¶ 41u, Att. AAA at 5, & ¶ 41w, Att. CCC at 5; PX 5, Bradley Dec. ¶ 5, Att. D at 4; PX 35, Gates Dec. ¶ 4 (told shipping and equipment was free); PX 50, Mey Dec. ¶ 18; PX 68, Shultz Dec. ¶ 12, Ex. A at 1; PX 61, Wagler Dec. ¶ 4; PX 72, Levine Dec. ¶¶ 4-6, Exs. B at 1, C at 1 & D at 1.

<sup>34</sup> PX 22, Bourne Dec. ¶ 4; PX 24, Carson Dec. ¶ 4; PX 25, Cattie Dec. ¶ 3 ("I repeated that I did not want a medical alert device, but the man told me that the person giving the gift would lose their money if I did not accept . . ."); PX 29, D'Addario Dec. ¶¶ 5-7; PX 30, Daniel Dec. ¶ 3 (thought it was a Mother's Day gift); PX 36, Girard17( )-12(g)5(i)-12(f)7(t)v002 Tc -0.002 Tw (at)6(X)1( 2)3(e D)1(ec.75( d)10( G)(X)-2( )ji5( )-16(a)( dm)6()-4(i)3 G)(X)

that Lifewatch distributes to its telemarketers, Lifewatch touts that its system has “been recommended by the American Diabetes Association, and the National Institute of Aging [sic] along with many hospitals and healthcare organizations.”<sup>38</sup> Likewise, Lifewatch has claimed endorsements by the American Heart Association, the American Red Cross, and AARP.<sup>39</sup> Lifewatch’s telemarketers, in addition to making the specific endorsements claim, also routinely brag that the “device is trusted by thousands of hospitals and more than 65,000 health care professionals.”<sup>40</sup> In reality, Lifewatch has not been endorsed by the American Diabetes Association,<sup>41</sup> the American Heart Association,<sup>42</sup> the National Institute on Aging,<sup>43</sup>

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<sup>38</sup> PX 4, Velez Dec. Att. B (script from Lifewatch USA Call Center Welcome Package provided to Florida Department of Agriculture and Consumer Services by Lifewatch), Att. L (script provided by U.S. Digest), Att. KK (script from Payless Solutions Enterprise) & Att. RR (script from Lifewatch USA Call Center Welcome Package provided by Personal Security Shopper).

<sup>39</sup> PX 47, McCourt ¶ 8 (telemarketer mentioned American Heart Association); PX 55, Primm ¶ 5 (American Heart Association); *see also* PX 1, Menjivar Dec. Att. A at 1 (Arcagen inbound script listing American Heart Association, American Diabetes Association, and National Institute of Aging); PX 4, Velez Dec. Att. K at 1 (US Digest script stating recommended by American Diabetes Association), Att. Q at 1 (Direct Agent Response script mentioning AARP, American Red Cross, National Institute of Aging), Att. GGG (Live Response Agent script listing American Diabetes Association), Att. HHH at 1 (Live Response Agent script listing American Heart Association, American Diabetes Association, and National Institute of Aging), Att. NNN at 1 (Worldwide Telemarketers’ script listing American Heart Association, American Diabetes Association, and National Institute of Aging), Att. RRR at 1 (Worldwide Telemarketers’ script listing American Heart Association and American diabetes Association) & Att. WWW at 1 (Live Agent Response Inbound script listing American Heart Association, American Diabetes Association, National Institute of Aging).

<sup>40</sup> PX 1, Menjivar Dec. Att. A at 1 (Arcagen inbound script); PX 4, Velez Dec. Att. Q at 1 (Direct Agent Response script), Att. T at 1 (Senior Medical Alert script), Att. GG at 1 (Oasis Money Group script), Att. II at 1 (Payless Solutions script), Att. KK at 1 (Payless Solutions Enterprise script), Att. MM at 1 (Miranda Money Group script), Att. UU at 1 (Total Security Vision script), Att. XX at 1 (Alertlink script), Att. CCC at 1 (Alertlink script), Att. OOO at 1 (Elite Information script), Att. WWW at 1 (Live Agent Response “Inbound” Script), Att. ZZZ at 1 (Arcagen script) & BBBB at 1 (American Innovative script); *see also* PX 67, Rowells Dec. Att. A at 1 (“Our device is trusted by thousands of hospitals and more than 65,000 healthcare professionals.”); PX 72, Levine Dec. ¶¶ 4-5, Exs. B at 2, C at 2; PX 35, Gates Dec. ¶ 5; PX 66, Lancaster Dec. ¶ 4, Att. A; PX 68, Shultz Dec, ¶ 12 & Ex. A; PX 69, Stenger Dec. ¶ 5, Att. A.

Transcripts of calls between Lifewatch’s telemarketers and consumers (and Plaintiffs’ investigators) are replete with this misrepresentation as well. *See* PX 2, France Dec. Att. A at 5 (trusted by more than 65,000 health care professionals); PX 3, Tyndall Dec. Att. A at 5 (“our device is actually trusted by thousands of hospitals and 65,000 health care professionals”) & Att. B at 5 (recommended by 65,000 health care professionals); PX 5, Bradley Dec. ¶ 5, Att. D at 4; PX 1, Menjivar

or AARP.<sup>44</sup> Indeed, these organizations have received so many complaints about

prompts consumers to complain.<sup>48</sup> Lifewatch was aware of the false activation claim being made by its telemarketers, and contemplated instructing those telemarketers to take this claim out of their script.<sup>49</sup> But, in just the last few months, Lifewatch itself submitted a script still containing this language to the Florida agency responsible for licensing telemarketers.<sup>50</sup> Lifewatch now claims it has refunded all consumers who have not plugged in and activated their systems (and therefore are likely unaware that Lifewatch is charging them a monthly

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then when you are financially ready to pay for it, ma'am, you can plug it in and that's when the activation fee starts to do [sic].").

<sup>48</sup> PX 65, Amberson Dec. ¶ 21 ("Almost every day we also heard from customers who would demand cancellations because of confusion over billing issues. Specifically, customers would complain about being billed the monthly monitoring fee before they had received or activated the medical alert systems. Based on what they had been told during the initial sales calls, they thought they would not be billed until they actually received and plugged in the system."); PX 7, Cuomo Dec. ¶ 5, Att. A at 1 (mom paid over \$2000 for unused service), 9 (paid monthly fee for several months for unused service), 11-12 (father paid over \$130 for unused service), 19 (mother paid monthly fee for over a year for unused service), 31 (sister paid for seven months of fees for unused service), 34 (father paid monthly fee for several months of unused service), 36 (mother billed over \$400 for unused service), 38 (elderly parents paid approximately \$700 for unused service); PX 1, Menjivar Dec. Att. B at 1 ("Agent told customer's daughter she could activate the system months down the road and would not be charged."), 2 ("was told I don't pay until I receive it"), 34 ("Customer was told by Rep that she did not have to pay anything until after she tried out the system."), & 35 ("Rep told consumer that she didn't have to pay today only when activated"); *see also* PX 5, Bradley Dec. ¶ 5, Att. D at 1 & 10 (billed same day as call); PX 1, Menjivar Dec. ¶ 41f, Att. LL at 7 (after being told in initial call billing cycle doesn't begin until

fee).<sup>51</sup> This is not true, however, as consumers continue to complain of Lifewatch's unexpected charges.<sup>52</sup>

Consumers who are reluctant to hand over their credit card or banking information are aggressively pressured to agree to the fee. Often, as with the robocall messages, the telemarketers promise consumers valuable bonuses such as free grocery coupons or

they resist, they are implored to “just try out the system, at least for the first two months. If you feel like it’s for you, you keep it. If you don’t, you’re more than welcome to ship it back to us with no problem, okay...All you do is put the label on there and ship it back to us.”<sup>55</sup>

Disclosures that consumers will need to return the system to cancel are only made, if at all, at the very end of the call, after the consumers have already agreed to order the device and provided their payment information.<sup>56</sup> And even then, they frequently are promised that Lifewatch will pay for the return shipping.<sup>57</sup> In fact, consumers must return the devices to

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5, Att. D at 5; PX 6, Smith Dec. ¶ 6; PX 50, Mey Dec. ¶ 18 (told no contract); PX 67, Rowells Dec., Att. A at 2 (“There are absolutely NO contracts. You can cancel at any time with no cancellation fees.”).

<sup>55</sup> PX 1, Menjivar Dec. ¶ 41d, Att. JJ at 16; *see also*, PX 2, France Dec. Att. A at 8-9 (“the only thing that you will be agreeing to today is just to try out the system for a month”) & Att. F at 7 (“if you choose after that first month that you don’t want to use it anymore, you just simply put it all back in the box, send it back and you would no longer have any charge”); PX 1, Menjivar Dec. ¶ 40e, Att. EE at 12, ¶ 41h, Att. NN at 6, ¶ 41j, Att. PP at 8-9 (“Would you like to go ahead and test out this system for one month, and if you’re not satisfied, send it back, completely free of charge.”), ¶ 41t, Att. ZZ at 7-8 & ¶ 41w, Att. CCC at 7.

<sup>56</sup> PX 4, Velez Dec. Att. L at 7-8 (Lifewatch script); *see also* PX 34, Felker Dec. ¶ 8 (“I was not told during the initial sales call that I would have to pay to ship the devices back.”); PX 62, Westerbrook Dec. ¶ 8 (“They never told me during the original sales call that I would have to pay to ship the equipment back to get the charges to stop.”); PX 5, Bradley Dec. ¶ 5, Att. D at 5 (return policy never disclosed during call); PX 1, Menjivar Dec. ¶ 40a, Att. AA at 14, ¶ 40d, Att. DD at 17-19 (representative admits disclosure confuses people), ¶ 41f, Att. FF (never told about obligation to send back system during sales call), ¶ 41a, Att. GG at 5 (never told need to ship

Lifewatch at their own cost in order to cancel the service.<sup>58</sup> Lifewatch is well aware that these claims are being made on its behalf.<sup>59</sup>

At the conclusion of the telemarketing call, consumers are walked through a verification process, where the telemarketers quickly recite Lifewatch's terms and conditions and prompt consumers to agree to the charges.<sup>60</sup> Recently, perhaps in a last ditch attempt to comply with the law, Lifewatch has begun a verification process by having its telemarketers

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<sup>58</sup> PX 7, Cuomo Dec. ¶ 5, Att. A at 1-3 (Lifewatch refused to cancel account of woman with dementia because son cannot find device to return it; demanding \$475 as alternative), 7 (consumer could not afford to pay return postage); 9 (consumer never received device, but told must return it or pay \$475 to cancel service), 12 (father with dementia continued to be charged until son was able to visit and search for device), 21-25 (mother never agreed to service or received device, but told must return it or pay \$475 to cancel service), 19 (POA for sister who sought refund told "she had the device for that time and it did not matter that she did not activate or sign a contract"), 34 (cannot find device supposedly sent to elderly father, but told must return it or pay \$425 to stop monthly charges), & 39 (Lifewatch claimed it did not receive returned device, continued billing); *see also* PX 34, Felker Dec. ¶ 8 ("The representatives told me that I could only cancel our account with the company if I sent back the two devices at my own expense. I was not told during the initial sales call that I would have to pay to ship the devices back."); PX 46, Lifshitz Dec. ¶ 6 ("He also said that [Lifewatch] would only cancel my account after I mailed the device back at my own expense. I had previously been told that there would be no cost to returning the device."); PX 56, Rench Dec. ¶ 7 (consumer told he was responsible for paying return shipping until consumer threatened to "trash the device"); PX 1, Menjivar Dec. ¶ 41c, Att. II at 5-12 ("as long as you keep the equipment, you're continuously going to be charged"), ¶ 41i, Att. OO at 8 (if do not return device, charged \$475) & ¶ 41s, Att. YY at 4-5.

<sup>59</sup> PX 7, Cuomo Dec. ¶¶ 3, 5 & Att. A (sampling of BBB complaints sent to Lifewatch, which include cancellation issues); PX 1, Menjivar Dec. Att. N at 2 (transcript produced by Lifewatch in which telemarketer promises consumer "but if you don't want it, you can ship it back at no cost . . . you can ship it back with no problem and no cost") & Att. B at 26 (email from Lifewatch to its telemarketer noting a "large increase" in requests for pre-paid return labels and reminding the telemarketer that Lifewatch does not send out return labels); *see also id.* ¶ 41s, Att. YY at 5-6 (consumer telling Lifewatch employee she was told during telemarketing call the device was free).

<sup>60</sup> *See* PX 5, Bradley Dec. ¶ 5, Att. D at 8-9; *see also* PX 1, Menjivar Dec. ¶ 39d, Att. Z at 14-20, ¶ 40a, Att. AA at 13-16; ¶ 40d, Att. DD at 18-20, ¶ 40e, Att. EE at 20-25, ¶ 40f, Att. FF at 15-20, ¶ 41a, Att. GG at 9-13, ¶ 41b, Att. HH, ¶ 41d, Att. JJ at 14-19, ¶ 41e, Att. KK at 5-9, ¶ 41f, Att. LL at 4-7, ¶ 41g, Att. MM at 6-7. Telemarketers often times will record verifications to have a "clean" recording to provide to banks and other financial institutions should a consumer dispute the charge. These verifications typically only capture the end of the telemarketing call. *See, e.g.*, PX 65, Amberson Dec. ¶ 13 (explaining how the verification process worked for the Worldwide Telemarketers); *see also* PX 7, Cuomo Dec. ¶ 5, Att. A at 3, 13, 29, 32, 36 & 38 (Lifewatch using verifications to defend company against BBB complaints).



transfer the calls directly to Lifewatch itself, during which consumers are asked to repeat their billing information and agree to the monthly billing cycle.<sup>61</sup>

**C. Lifewatch's Relationship with Telemarketers**

Lifewatch has continued its practices, in the face of enforcement actions and civil lawsuits, apparently based on a misguided belief that it has structured its relationships with telemarketers in such a way as to insulate itself from liability. Lifewatch has relied on more than fifty telemarketers to sell its medical alert device, including the Worldwide Telemarketers who were shut down by Plaintiffs in 2014, and other Lifewatch telemarketers which have been sanctioned by reS(f)-10-1(s)-5wcoch telem6-( c)-14uedrorLi -6(f)-.002 Tc -0l-5( i)-6(n8e4(a



sellers are engaged in telemarketing,<sup>69</sup> yet its employees have been able to identify Lifewatch's telemarketers when pressed by consumers.<sup>70</sup> Indeed, the reverse is true too – Lifewatch's telemarketers will sometimes reveal that they are working for Lifewatch when pressured by consumers.<sup>71</sup> Furthermore, overwhelming evidence demonstrates that Lifewatch is a

admitted that he is unapologetically aware of the robocalling done on Lifewatch's behalf.<sup>74</sup> Furthermore, Lifewatch's frequent claim that its telemarketers are merely securing "leads" on a non-exclusive basis is simply not true. In reality, the telemarketers work exclusively for Lifewatch.<sup>75</sup> Moreover, when legal action has been taken against various Lifewatch telemarketers, Lifewatch has simply continued to do business with the same people at the same location but under the façade of a different corporate name.<sup>76</sup>

The Worldwide Telemarketers sued by Plaintiffs in 2014, and other third parties, confirm that Lifewatch knew, and controlled, what the telemarketers were doing.<sup>77</sup> The

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<sup>74</sup> PX 13, Gross Dec. ¶¶ 9-

Worldwide Telemarketers only used scripts pr



Purchase Agreements still gave Lifewatch sufficient power to monitor and control what the telemarketers said, and to terminate the contracts if the telemarketers were violating the law.<sup>87</sup> The Ninth Circuit affirmed the district court’s decision, succinctly concluding that “ample evidence supports the inference that LifeWatch directs, induces, is aware of, and can control the infringing telemarketing.”<sup>88</sup>

## **II. ARGUMENT**

Defendants’ business practices violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), multiple provisions of the Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310, and Section 501.204 of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), Chapter 501, Part II, Florida Statutes (2014). To prevent any further injury to innocent consumers, the FTC and State of Florida ask that the Court issue their proposed PI to enjoin Defendants’ ongoing law violations.

### **A. This Court Has the Authority to Grant the Requested Relief.**

The FTC Act provides that “in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” 15 U.S.C. § 53(b). Once the Commission invokes the federal court’s equitable powers, the full breadth of the court’s authority is available, including the power to grant such ancillary final relief as rescission of contracts and restitution. *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989). The court may also enter a

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<sup>87</sup> *Life Alert Emergency Response, Inc. v. Lifewatch, Inc.*, 601 Fed. Appx. at 472, 2015 U.S. App. LEXIS 1760, at \*4 (9th Cir. Feb. 4, 2015); *see also*, PX 7, Cuomo Dec. ¶ 5, Att. A at 17 (in response to BBB complaint: “As soon as we became aware of [consumer’s] Complaint as to what this particular Sales Agency was doing..., we cut them off. We will no longer do business with them.”); PX 6, Smith ¶ 9 (Lifewatch COO indicates company stops working with telemarketers who act illegitimately).

<sup>88</sup> *Life Alert Emergency Response*, 601 Fed. Appx. at 472, 2015 U.S. App. LEXIS 1760, at \*3.

temporary restraining order, a preliminary injunction, and whatever additional preliminary relief is necessary to preserve the possibility of providing effective final relief. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988);



**C.**

Cir. 1956); *FTC v. Washington Data Resources*, 856 F. Supp. 2d 1247, 1272 (M.D. Fla.

2012); *FTC v. Think Achievement*, 144 F. Supp. 2d 993, 1010

These claims are material because they explain why consumers pay money to Defendants.<sup>90</sup>

requests conveyed to Defendants or their telemarketers.<sup>92</sup> The Worldwide Telemarketers alone generated 800-900,000 such violations per day for the two years they called on behalf of Lifewatch.<sup>93</sup>

**TSR Section 310.4(a)(8)** requires sellers or telemarketers to transmit the telephone number and name of the telemarketer or seller to any caller identification service in use by a recipient of a telemarketing call. 16 C.F.R. § 310.4(a)(8). Defendants or their telemarketers transmit fake telephone numbers and names to consumers' Caller ID services, in clear violation of the TSR.<sup>94</sup>

**TSR Section 310.4(b)(1)(v)(A)** bans robocalls unless the seller or marketer has consumers' express agreement, in writing, to receive such calls. 16 C.F.R. § 310.4(b)(1)(v)(A). Defendants have no such permission and their robocalls are flatly prohibited.<sup>95</sup>

**TSR Sections 310.4(b)(1)(v)(B)(ii) & (d)** mandate that calls delivering prerecorded messages disclose "truthfully, promptly, and in a clear and conspicuous manner" the identity of the seller, that the purpose of the call is to sell goods or services, and the nature of the goods or services. 16 C.F.R. § 310.4(b)(1)(v)(B)(ii). Defendants' robocalls use fake

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<sup>92</sup> See *supra* nn. 11 & 14-15.

<sup>93</sup> PX 15, Settecase Dec. ¶ 7.

<sup>94</sup> PX 31, deLoca Dec. ¶ 5 (caller ID identified robocall displayed Katonah-Lewisboro School District name and telephone number); PX 39, Grigorian Dec. ¶ 7 (called number back, notified number not in service); PX 41, James Dec. ¶ 3; PX 43, Jones Dec. ¶ 6 (called number back, notified number not in service); PX 51, Miller Dec. ¶ 3 (caller ID showed "FIA Card Serv"); PX 54, Pierce Dec. ¶¶ 8 & 9 ("Walmart"); PX 63, Whaley Dec. ¶ 3 ("Bank of America"); PX 1, Menjivar Dec. ¶ 40c, Att. CC at 9 (call number back and "the number is no good"). The numbers that show up on consumers' caller IDs intentionally include local area codes because "consumers are more likely to answer telephone calls made from a local number." PX 15, Settecase Dec. ¶ 8. Consumers are indeed fooled by such manipulations of the caller IDs. PX 29, D'Addario Dec. ¶ 7; see also PX 17, Bangasser Dec. ¶ 6 (appeared to be local number); PX 22, Bourne Dec. ¶ 4 (same); PX 24, Carson Dec. ¶ 3 (same); PX 37, Gordon Dec. ¶ 6 (same); PX 38, Green Dec. ¶ 4 (same); PX 54, Pierce Dec. ¶¶ 4 & 8 (same).

<sup>95</sup> See, e.g., PX 1, Menjivar ¶ 40b, Att. BB at 8 & 12 (makes request to Lifewatch employee to be put on telemarketing DNC list), ¶ 40c, Att. at 4, 7, 11 & 14 (continues receiving telemarketing calls; asks again to be put on DNC list), ¶

company names and do not disclose that they are selling a medical alert system.<sup>96</sup> Similarly, Lifewatch's telemarketers universally violate 16 C.F.R. § 310.4(d), which requires telemarketers to make the same disclosures during all outbound telephone solicitations.<sup>97</sup>

### 3. Lifewatch is Liable for the Conduct of Its Telemarketers.

As a legal matter, Lifewatch is directly liable for the deceptive claims made by, and tactics of, the telemarketers it has employed. The telemarketers are Lifewatch's agents, and Lifewatch is therefore responsible for their deceptive acts and practices. *See, e.g., FTC v. Stefanchik*, 559 F.3d 924, 930 (9th Cir. 2009) (defendant liable for misrepresentations of agent it hired to market wealth building program); *Standard Distributions, Inc. v. FTC*, 211 F.2d 7, 13 (2nd Cir. 1954) (defendant liable for sales agents' misrepresentations); *FTC v. Publishers Bus. Servs., Inc.*, 821 F. Supp. 2d 2305, 1223 (D. Nev. 2010) (principal liable for misrepresentations of its agents within scope of agents' actual or apparent authority); *FTC v. LeanSpa, LLC*, No. 3:11-CV-1715, 2015 WL 1004240, at \*11-13 (D. Conn. March 5, 2015) (principal liable for misrepresentations of third-party affiliate marketers when principal's employees knew affiliates were making misrepresentations, principal hired affiliates, and principal had authority to review affiliates' tactics); *FTC v. Inc21.com Corp.*, 688 F. Supp. 2d

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<sup>96</sup>PX 1, Menjivar ¶ 39a, Att. W at 4 (claim "no cost to you whatsoever"), ¶ 39b, Att. X at 4 (no name and offer "free emergency medical alert" device), ¶ 39c, Att. Y at 4 (offers free medical alert system), ¶ 39d, Att. Z at 4 (claims federal government providing free medical alert system), ¶ 40a, Att. AA at 4 ("the Life Alert System"), ¶ 40d, Att. DD at 4 (fail to disclose name during recording and indicate device is free), ¶ 40e, Att. EE at 4 (same), ¶ 40f, Att. FF at 4 (same), ¶ 41a, Att. GG at 4 (same), ¶ 41d, Att. JJ at 4 (same), ¶ 41h, Att. NN at 4 (same), ¶ 41i, Att. at 4 (same), ¶ 41n, Att. TT at 4 (same), ¶ 41q, Att. WW at 4 (same), ¶ 41t, Att. ZZ at 4 (same), ¶ 41u, Att. AAA at 4 (same); PX 5, Bradley Dec. ¶ 5, Att. D at 3 (fail to disclose name and indicate device is free); PX 31, deLoca Dec. ¶¶ 4, 8 (no name disclosed), ¶ 16 ("Life Alarm"), ¶¶ 18-20 (no name disclosed and indicate device is free); PX 50, Mey Dec. ¶¶ 36-42 (fail to disclose name during recording and indicate device is free).

<sup>97</sup> *See supra* nn. 17 & 33; *see also* PX 14, Hilgar Dec. ¶ 6 ("The telemarketers also were not allowed to disclose Lifewatch's name during telemarketing calls.").





General, dozens of private plaintiffs, and Life Alert have all sued Lifewatch over the robocalls initiated by its telemarketers. Moreover, Plaintiffs have submitted overwhelming evidence demonstrating that Defendants are not only keenly aware that its telemarketers are making misrepresentations and engaging in abusive telemarketing practices, but also that they exercise actual control over their telemarketers.<sup>100</sup>

Despite this knowledge, there is virtually no evidence that Lifewatch has made any serious effort to curb the illegal activities of its telemarketers. Instead, Lifewatch's reaction to any formal action being taken against its telemarketers appears to be nothing more than taking steps to further hide its own involvement.<sup>101</sup>

#### **4. Lifewatch Has Assisted and Facilitated TSR Violations.**

Alternatively, even if Lifewatch were not directly liable for the deceptive and abusive practices of its telemarketers, it is liable under the TSR's assisting and facilitating provision. Under § 310.3(b) of the TSR, it is a deceptive telemarketing act or practice and a violation of the TSR "for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice" that is deceptive or abusive under the TSR. 16 C.F.R. § 310.3(b).

Lifewatch has certainly provided its telemarketers with substantial assistance and support. Indeed, if Lifewatch did not offer and agree to pay the telemarketers, bill the

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<sup>100</sup> See *supra* Section I.C, and accompanying notes.

<sup>101</sup> As discussed above, after Indiana filed its suit, Lifewatch simply restructured its contracts with telemarketers from "Telemarketing Agreements" to "Purchase Agreements." See PX 1, Menjivar Dec. Att. R at 1 (Marketing Services Agreement with Platinum Marketing Group dated Oct. 25, 2012), Att. S at 1 (Purchase Agreement with Payless Solutions dated March 18, 2014), Att. T at 1 (Purchase Agreement with Life One Wireless dated May 1, 2013) & Att. U at 1 (Purchase Agreement with QCSS dated March 26, 2014).





corporate officer.” *World Media Brokers*, 415 F.3d at 764 (citing *Amy Travel*, 875 F.2d at 573). The knowledge requirement is satisfied by a showing that the defendant (1) had actual knowledge of the deceptive acts or practices, (2) was recklessly indifferent to the truth or falsity of the representations, or (3) had an awareness of a high probability of fraud coupled with an intentional avoidance of the truth. *Id.*; *Bay Area*, 423 F.3d at 636; *Amy Travel*, 875 F.2d at 573. An individual’s “degree of participation in business affairs is probative of knowledge.” *Id.* at 574. The Commission need not prove subjective intent to defraud. *See id.* To avoid liability, an individual defendant must do “‘everything in his power’ to assure compliance with the law.” *World Travel*, 861 F.2d at 1031 (quoting *U.S. v. Johnson*, 542

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Telemarketers.<sup>109</sup> Finally, Sirlin

### III. CONCLUSION

Plaintiffs have demonstrated that Defendants are engaged in widespread illegal telemarketing campaigns, and ask that the Court enter the proposed Preliminary Injunction.

Respectfully Submitted,

JONATHAN E. NUECHTERLEIN  
General Counsel

Dated: July 6, 2015

s/David A. O'Toole  
DAVID A. O'TOOLE  
MARISSA J. REICH  
ROZINA C. BHIMANI  
Federal Trade Commission, Midwest Region  
55 West Monroe Street, Suite 1825  
Chicago, Illinois 60603  
Telephone: (312) 960-5634  
Facsimile: (312) 960-5600

Attorneys for Plaintiff  
FEDERAL TRADE COMMISSION

PAMELA JO BONDI  
Attorney General  
State of Florida

Dated: July 6, 2015

s/Denise Beamer  
DENISE BEAMER  
Assistant Attorney General  
Florida Bar # 69369  
Office of the Attorney General  
Consumer Protection Division  
135 W. Central Blvd., Suite 1000  
Orlando, Florida 32801  
Telephone: (407) 245-0833  
Facsimile: (407) 245-0365

Attorney for Plaintiff  
STATE OF FLORIDA  
OFFICE OF THE ATTORNEY GENERAL

**CERTIFICATE OF SERVICE**

I, David A. O'Toole, hereby certify that on July 6, 2015, I electronically filed **PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**, with the Court using the CM/ECF system, which will automatically send copies to any attorney of record in the case. In addition, I provided a courtesy copy by electronic mail to:

Patrick J. Cotter,