

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

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	Civ.No. 09 C 2927
)	Judge Grady
TRANSCONTINENTAL WARRANTY,)	
INC., a Delaware corporation,)	
)	
CHRISTOPHER D. COWART)	
)	
Defendants.)	

**PLAINTIFF FEDERAL TRADE COMMISSION’S MEMORANDUM
IN SUPPORT OF ITS MOTION FOR A TEMPORARY RESTRAINING
ORDER WITH ASSET FREEZE AND THE APPOINTMENT OF A RECEIVER**

I. INTRODUCTION

This action has been brought to stop the deceptive and abusive tactics of a seller of purported extended automobile “warranties,” which lies about who it is and what it sells, and brazenly violates a panoply of federal laws in virtually every one of the millions of telemarketing calls it makes each week. Defendants target consumers for fraudulent sales of automobile service contracts through deceptive mailings, direct telemarketing calls, and “robocalls”– the mass transmission of prerecorded telemarketing calls. Regardless of the medium, defendants mislead consumers to believe that defendants are, or directly affiliated with, either the manufacturer or dealer of the consumers’ automobile. Often, defendants’ telemarketers baldly claim to be calling from the manufacturer of the consumer’s automobile. Defendants also assert that the expiration of the consumers’ original vehicle warranty is imminent and that their product is an extension of the original manufacturer’s warranty, regardless of the status of the consumer’s warranty or whether the consumer even owns an automobile.

Defendants, however, are not affiliated with the consumer’s vehicle manufacturer or dealership, have no information as to the status of the consumer’s original warranty, and do not sell extensions of the original manufacturer’s warranty. It is only after defendants’ telemarketers

obtain the consumer's payment that the consumer receives an introductory packet of information about the vehicle service contract provided by a third-party service contract vendor. Consumers then discover that defendants are not affiliated with their car manufacturer or dealership and that the warranties are laden with conditions and restrictions. Tens of thousands of consumers nationwide have paid more than ten million dollars in the last two years for extended vehicle service contracts that they otherwise would not want or need.

At the same time, millions of consumers have been harassed by defendants' telemarketing scheme. Defendants' robocall consumers regardless of whether their telephone numbers are registered on the National Do Not Call Registry, or even if they have specifically asked defendants to stop the calling. Consumers receive defendants' robocalls on their home, work, and cell phones, sometimes several times a day. Not even businesses, government offices, or 911 dispatchers are immune from defendants' prerecorded calls. Tens of thousands of these victims have filed complaints with the FTC regarding these practices.¹

Defendants operate their scheme in blatant violation of Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), and numerous provisions of the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310. Defendants' misrepresentations violate both Section 5(a) and the TSR. In addition, defendants violate the TSR by flatly ignoring the requirement that their prerecorded calls disclose "promptly, and in a clear and conspicuous manner" the identity of the seller, the purpose of the telemarketing call, and the nature of the goods or services, by calling telephone numbers listed on the National Do Not Call Registry, ignoring consumers' do not call requests, using fake or "spoofed" caller ID information, and abandoning calls, all of which are practices specifically prohibited by the TSR.

The evidence of defendants' law violations is overwhelming. This evidence includes declarations from consumers victimized by defendants' scheme, a declaration from a former employee detailing defendants' deceptive business practices, defendants' telemarketing scripts, and evidence showing their widespread violations of the TSR. Taken together, this evidence

¹ Concurrently with the filing of this lawsuit, the FTC is bringing a related action against Voice Touch, Inc., one of defendants' voice broadcasting companies, Network Foundations LLC, and their owners, James A. Dunne, Maureen E. Dunne, and Damien Kohlfeld, seeking relief similar to the relief the Commission seeks in this case. *FTC v. Voice Touch, Inc., et al.*, No. 09 C 2929. A motion to have the cases reassigned as related cases, of even date, has also been filed.

reveals an enterprise utterly permeated with fraud, leaving no doubt that the Commission is likely to succeed in showing that defendants are violating the FTC Act and the TSR. As a result, we ask the Court to issue a temporary restraining order that includes a freeze of defendants' assets, expedited discovery, and the appointment of a temporary receiver over the corporate defendant.² The requested relief is necessary to prevent continued injury to consumers, the destruction of evidence, and the dissipation of assets, thereby preserving the Court's ability to provide effective final relief.

II. DEFENDANTS

Defendants are a corporation and its President and CEO Christopher D. Cowart. The corporate Defendant, Transcontinental Warranty, Inc., is a Delaware corporation with its headquarters in Fort Lauderdale, Florida.³ It was incorporated in May 17, 2007, by Christopher D. Cowart. It previously used the name Transamerica Warranty, Inc., and recently registered a fictitious name in Florida, Guaranteemycar.com.⁴ Although Transcontinental's registered address is in Fort Lauderdale, it uses a P.O. Box in Pompano Beach, Florida, when corresponding with consumers.⁵

III. DEFENDANTS' ILLEGAL CONDUCT

Since at least 2007, defendants have operated a scam selling motor vehicle service contracts, which they characterize as "extended automobile warranties," to consumers throughout the United States. Defendants' scheme is designed to convince potential customers (1) that defendants either are, or are working on behalf of, the manufacturer or dealer of the

² Unlike similar cases filed by the FTC, the FTC has not requested *ex parte* relief in this case, nor has it sought to have the record temporarily sealed. In the course of the investigation resulting in today's filing of the *Voice Touch* case, the *Voice Touch* defendants became aware of the investigation. An attorney for one or more of the *Voice Touch* defendants subsequently contacted the FTC. Several weeks later, an attorney representing defendants in this action contacted the FTC, offering to assist the FTC in its investigation of *Voice Touch*. In light of these contacts, the FTC is providing notice of its motions to the various defendants in both actions.

³ PX 2, Menjivar Dec. ¶¶ 4(d) & 6.

⁴ PX 2, Menjivar Dec. ¶ 4(f).

⁵ PX 13, Dempsey Dec. Att. G; PX 15, Hauser Dec. Att. B; PX 16, Kane Dec. Att. C; PX 20, Weegar Dec. ¶ 9.

customer's vehicle, (2) that the consumer's original automobile warranty is about to expire, and (3) that defendants are selling extensions of the consumers' original vehicle warranty. All too often, defendants' scheme succeeds, resulting in consumers purchasing extended service contracts that they otherwise would not want or do not need.

A. Defendants Violate the FTC Act

1. Defendants' Deceptive Sales Calls and Mailings

Defendants' entire sales pitch is rife with misrepresentations and outright lies. Defendants rely on a variety of methods to initially contact consumers. But whether consumers are initially contacted by robocall, direct telemarketing calls, or direct mail, the claims are the same. Consumers are led to believe that defendants are, or work for, the manufacturer or dealer of the consumer's automobile and that the consumer's warranty is expiring or has expired. Defendants' intent is to create a false sense of urgency that their offer for the extended warranty will expire if they do not act immediately.

The key component of Transcontinental's telemarketing campaign involves robocalls. When consumers answer a robocall, they hear a brief prerecorded message warning them that their automobile warranty is about to expire. It then instructs consumers to "press one" to speak to a warranty specialist.⁶ When consumers "press one," the calls are transferred to a live representative at one of Transcontinental's call centers.⁷ Because these calls state that the consumer's vehicle warranty is expiring, the message falsely indicates that the caller is associated with the consumer's automobile dealer or manufacturer. The prerecorded messages also warn consumers that they must "extend coverage before it is too late," conveying to consumers that their dealership or manufacturer is contacting them to avoid a gap in coverage.⁸

⁶ PX 8, Ames Dec. ¶ 4; PX 10, Ciaburri Dec. ¶ 5; PX 11, Davis Dec. ¶ 3; PX 13, Dempsey Dec. ¶ 16; PX 17, O'Brien Dec. ¶ 5; PX 18, Potter Dec. ¶¶ 5, 7; PX 20, Springer Dec. ¶ 9; PX 20, Weegar ¶ 9.

⁷ PX 3, Israel Dec. ¶¶ 5, 10.

⁸ Defendants do not sell "warranties" at all, but "service contracts," as those terms are defined in the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(6), (7), and (8). By definition, a warranty is provided by the original supplier of a consumer product and only at the time the product is sold. A "service contract" means a contract in writing to perform, over a fixed period of time, services relating to the maintenance or repair (or both) of a consumer product. Referring to their product as a "warranty" is designed to reinforce the notion that defendants are connected to the manufacturer of the consumer's

Defendants also mail postcards to consumers with messages that are designed to mislead them into believing that their original warrantor is contacting them about their warranty. While these postcards include Transcontinental's company name and return address on the upper-left hand corner, they state the make, model, and year of the consumer's car in large bold print, along with a vehicle "owner ID no." These postcards repeatedly invite consumers to "renew" their warranty and state that the consumers' vehicle warranty will expire or may have recently expired.⁹

Defendants' sales are all made over the telephone by defendants' call center sales agents, whether the initial contact is a robocall, postcard, or direct outbound telemarketing call. These calls reinforce the initial deceptive claims. Defendants' telemarketing scripts instruct the telemarketers to use a generic name, "Warranty Service Center," and describe themselves as "warranty specialists" during the calls.¹⁰ The telemarketers ask consumers for the year, model, and mileage of the consumer's car, and then say, "Please allow me to put you on hold while I pull up your information . . . Even though we have not heard from you and before we close out your file, we give you one last courtesy [sic] call to extend your warranty or reinstate it." Of course, defendants have no information or file to look up. Everything they say is designed to reinforce the impression that defendants are affiliated with the consumer's automobile dealership or manufacturer. In fact, telemarketers "confirm" that their records show the consumer's original vehicle warranty is about to expire, even when the consumer lies and claims to own a non-existent car.¹¹ Not surprisingly, consumers whose warranties are far from expiration, or long past expiration, are still told that their warranties are about to expire.¹² While these scripts themselves are misleading, defendants' telemarketers frequently go beyond the scripts to deceive

automobile.

⁹ PX 2, Menjivar Dec. ¶¶ 34, 37, & 39.

¹⁰ PX 2, Menjivar Dec. ¶ 30 & Att. U, pp. 41, 43, 45, 47, 50, 52, & 56; PX 3, Israel Dec. Att. B; PX 8, Ames Dec. ¶ 7; PX 11, Davis Dec. ¶ 14.

¹¹ PX 11, Davis Dec. ¶ 9; PX 18, Potter Dec. ¶ 7

¹² PX 8, Ames Dec. ¶¶ 9, 11; PX 10, Ciaburri Dec. ¶ 6; PX 11, Davis Dec. ¶ 3; PX 12, Dabrowski Dec. ¶ 5; PX 17, O'Brien Dec. ¶ 6; PX 20, Springer Dec. ¶ 7; PX 20, Weegar Dec. ¶ 7.

consumers, often expressly stating that they work for the consumer's automobile manufacturer or dealership.¹³ Transcontinental's training manual states that if asked the question, "Who Are You?", telemarketers are to respond: "We are *the Warranty Service Center*. We provide warranty services for _____ (Ford, GMC, Honda, Toyota, Nissan, etc.) throughout the United States and Canada."¹⁴ Similarly, defendants' telemarketer who trains new employees, referred to himself as an "administrator" for the consumer's automobile manufacturer during a telemarketing call.¹⁵ Defendants' telemarketers who are unwilling to lie about their affiliation are instructed to simply hang up on any consumer who asks them the name of their firm,¹⁶ or face termination.¹⁷

The experience of Stephanie O'Brien is illustrative. In February 2009, O'Brien received a phone call on her home telephone, which is on the Registry.¹⁸ When she answered the telephone, a recorded message played indicating that this was her "final notice" and that her warranty was expiring. The message told her to 'press 1' to speak to a representative. The representative expressly told her that "he was from Toyota" and that they had been calling her for the past 90 days to inform her that her car warranty was "about to expire."¹⁹ He told her that it was her final notice to renew her "car warranty" and that she "needed to renew now" because she "would not get another chance to do so." Feeling pressured, O'Brien accepted the offer. Only after she subsequently tried to cancel her warranty and received the run-around from Transcontinental, did she call Toyota and discover that defendants were not affiliated with the

¹³ PX 3, Israel Dec. ¶ 15; PX 8, Ames Dec. ¶ 7.; PX 17, O'Brien Dec. ¶¶ 6, 7.

¹⁴ PX 2, Menjivar Dec. ¶ 30 & Att. U, p. 50.

¹⁵ PX 3, Israel Dec. ¶ 15.

¹⁶ PX 3, Israel Dec. ¶ 13; PX 15, Hauser Dec. ¶ 13; PX 11, Davis Dec. ¶ 9, PX 17, O'Brien Dec. ¶ 13; PX 18, Potter Dec. ¶ 8.

¹⁷ PX 3, Israel Dec. ¶¶ 13, 15.

¹⁸ PX 17, O'Brien Dec. ¶¶ 3, 5.

¹⁹ PX 17, O'Brien Dec. ¶ 7.

manufacturer.²⁰

2. The Extended Service Contracts

Although defendants claim to sell extended “warranties” to consumers, what they actually sell are extended service contracts, administered by third-party vendors and financed by other third-parties.²¹ In fact, defendants have no relationship with any manufacturer or dealer.²² During the course of the sales pitch, defendants’ telemarketers frequently provide a synopsis of what will be covered under the “warranty,” but never provide a copy of the contract until after payment has been made.²³ The service contracts cost up to \$3,000, and most consumers agree to pay about \$450 as a down payment and the balance in monthly payments.

The first time most consumers learn that the “warranty” is actually a service agreement, which is not connected to their original warranty or automobile manufacturer, is when they receive an introductory packet including the vehicle service contract and a payment schedule with a financing company if the consumer agreed to finance the “warranty.” When consumers receive this packet, they also learn that the warranties are laden with conditions and restrictions, unlike their original manufacturer’s warranty or the “bumper-to-bumper coverage” they were promised.²⁴ In many cases, although the sales pitch is predicated on the supposed imminent expiration of the consumer’s original warranty and consumers are told that they are purchasing “sign and drive” warranties, the coverage does not begin until 30-60 days later.²⁵ For consumers whose original manufacturer warranty is still in effect, the extended service contracts expressly disclaim any coverage.²⁶

²⁰ PX 17, O’Brien Dec. ¶¶ 12, 18.

²¹ PX 3, Israel Dec. ¶ 7 & Att. C; PX 8, Ames Dec. ¶ 12 & Att. A; PX 13, Dempsey Dec. Att. A; PX 16, Kane Dec. Att. A.

²² PX 3, Israel Dec. ¶ 7 & Att. C; PX 15, Hauser Dec. ¶ 8; PX 17, O’Brien Dec. ¶ 18.

²³ PX 3, Israel Dec. ¶ 23; PX 15, Hauser Dec. ¶¶ 5-8; PX 16, Kane Dec. ¶¶ 5-8.

²⁴ PX 8, Ames Dec. ¶¶ 8, 13; PX 15, Hauser Dec. ¶ 8; PX 16, Kane Dec. ¶¶ 9-10 & Att. A.

²⁵ PX 3, Israel Dec. ¶ 22; PX 17, O’Brien Dec. Att. C, p. 4.

²⁶ PX 8, Ames Dec. ¶ 13; & Att. A; PX 16, Kane Dec. Att. A; PX 17, O’Brien Dec. Att. C, pp. 9 & 24.

B. Defendants Violate the TSR

The illegal practices do not begin or end with the false claims that are designed to induce consumers to purchase or pay for the vehicle service contracts. Defendants' random dialing practices inundate consumers with unwanted calls in direct violation of numerous provisions of the TSR, particularly do-not-call regulations. In particular, defendants (1) blast their messages to consumers indiscriminately, without regard to whether the consumers are registered with the National Do Not Call Registry or made specific requests that defendants cease the calls, (2) fail to connect consumers to live sales representatives promptly, (3) hide behind false caller ID information to conceal their blatant disregard of the Registry, and (4) do not promptly make the required disclosures in their prerecorded messages. Moreover, neither defendants nor their voice broadcasting companies have paid the required annual fee for access to telephone numbers listed on the Registry.²⁷

Defendants spare no one when blasting their recordings to consumers. Untold numbers of consumers on the Registry have received repeated prerecorded telemarketing calls on behalf of Transcontinental and outbound calls by defendants' live telemarketers.²⁸ Moreover, consumers' specific do-not-call requests are ignored.²⁹ In the week that a former employee worked at Transcontinental, he estimates that 99 of every 100 consumers he spoke to did not want to purchase the "warranty," but instead demanded that they be removed from the company's calling list.³⁰ Defendants, however, instructed him and other telemarketers to immediately hang up on such consumers, as defendants' motto, which was displayed all over the

²⁷ The TSR requires the seller, either directly or through another person, to pay an annual fee for access to a given area code before a telemarketer can initiate calls on the seller's behalf to any person within that area code. 16 C.F.R. § 310.8(b). Though Transcontinental has registered as an organization with the Registry, defendants have not accessed any area codes. One of their voice broadcasting companies, Voice Touch, has registered and accessed five area codes, the number it may access for free. But it has initiated calls outside of those area codes on behalf of defendants. 16 C.F.R. § 310.8(c).

²⁸ PX 8, Ames Dec. ¶¶ 3-4; PX 10, Ciaburri Dec. ¶¶ 3,12; PX 11, Davis Dec. ¶ 7; PX 13, Dempsey Dec. ¶¶ 3, 16; PX 15, Hauser Dec. ¶¶ 3-4; PX 17, O'Brien Dec. ¶¶ 3,5; PX 19, Potter Dec. ¶¶ 3, 5-6; PX 20, Springer Dec. ¶¶ 3,5,9; PX 20, Weegar Dec. ¶¶ 3-5.

²⁹ PX 3, Israel Dec. ¶ 11, 12.

³⁰ PX 3, Israel Dec. ¶ 18.

premises, was “Hang Up. Next.”³¹ In none of these cases was the consumer’s information recorded or kept for an internal do-not-call list.³²

Defendants also engage in other wholesale violations of the TSR. For example, defendants’ robocalls are never transferred to a live representative within two seconds of the call recipient’s completed greeting.³³ Similarly, because defendants know that they are engaging in illegal activity by ignoring the do not call laws, defendants transmit phony caller ID information, known as “spoofing,” making it impossible for consumers to determine the origin of a call.³⁴ When consumers have attempted to dial the numbers that appear on recipient’s caller ID display, invariably the number is either out-of-service or they receive a busy signal.³⁵ Moreover, neither defendants nor their voice broadcasting companies’ transmit or disclose their company name to enable consumers to identify the identity of the caller. By hiding behind false caller ID information, defendants frustrate consumers’ efforts to lodge complaints with law enforcement against defendants. For this precise reason, defendants train its sales representatives to not disclose their employer’s name, but instead give consumers a generic company name like “Warranty Services.”³⁶

³¹ PX 3, Israel Dec. ¶ 11.

³² PX 3, Israel Dec. ¶¶ 11, 12.

³³ An outbound call is abandoned if a consumer answers and is not connected to an in-person sales representative within two seconds of the person’s completed greeting. 16 C.F.R. 310.4(b)(1)(iv). The Commission has previously announced a non-enforcement policy against companies that have an established business relationship with the consumer to whom prerecorded calls are sent and meet other criteria. 71 Fed. Reg. 77,634 (Dec. 27, 2006). Here, the non-enforcement policy does not apply since defendants did not make the challenged prerecorded calls pursuant to an existing business relationship.

³⁴ Telemarketers are prohibited from “failing to transmit . . . the telephone number . . . to any caller identification service in use by a recipient of a telemarketing call.” 16 C.F.R. § 310.4(a)(7).

³⁵ PX 10, Ciaburri Dec. ¶ 7; PX 12, Dabrowski Dec. ¶ 6; PX 13, Dempsey Dec. ¶ 16; PX 20, Springer Dec. ¶ 8; PX 21, Weegar Dec. ¶ 8.

³⁶ As of December 1, 2008, telephone calls that deliver prerecorded messages must, among other things, promptly disclose: a) the identity of the seller; b) that the purpose of the call is to sell goods or services; and c) the nature of the goods or services. 16 C.F.R. § 310.4(b)(1)(v)(B). These are the same disclosures required by Section 310.4(d) of the TSR, 16 C.F.R. § 310.4(d), which Transcontinental also violates.

IV. LEGAL ARGUMENT

Defendants have bilked millions of dollars from U.S. consumers with their deceptive business practices, which clearly violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and multiple provisions of the TSR, 16 C.F.R. Part 310. To prevent any further injury to innocent consumers, the Commission seeks a temporary restraining order and a preliminary injunction prohibiting defendants' ongoing deceptive practices. The Commission also asks that the Court freeze defendants' assets, both corporate and personal, to preserve them for restitution to victims, and the appointment of a receiver to both preserve assets and manage the affairs of this enterprise. The Court has full authority to enter the requested relief, which is strongly supported by the evidence.

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

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). The practice of defrauding consumers by misrepresenting or omitting material facts in violation of Section 5(a) of the FTC Act presents a "proper case" for injunctive relief under 15 U.S.C. § 53(b). *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir. 1988). 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.), *cert. denied*, 493 U.S. 954 (1989). The court may also enter a temporary restraining order, a preliminary injunction, and whatever additional preliminary relief is necessary to preserve the possibility of providing effective final relief. *World Travel*, 861 F.2d at 1026; *see also Amy Travel*, 875 F.2d at 571. Such ancillary relief may include a freeze of defendants' assets to preserve them for eventual restitution to victims, and the appointment of a receiver. *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432-34 (11th Cir. 1984); *see also World Travel*, 861 F.2d at 1031; *FTC v. Am. Nat'l Cellular, Inc.*, 810 F.2d 1511, 1512, 1514 (9th Cir. 1987).

The FTC is empowered to enforce the TSR with the same functions and powers as the FTC Act. *See* 15 U.S.C. § 6105(b). Courts are authorized to enter any relief necessary to redress injury to consumers caused by the TSR violation, including the "rescission or

reformation of contracts [and] the refund of money or return of property.” 15 U.S.C. § 57b(a)(1) & (b).

B. The FTC Meets the Applicable Standard for Injunctive Relief

To grant preliminary injunctive relief in an FTC Act case, the district court must “(1) determine the likelihood that the Commission will ultimately succeed on the merits and (2) balance the equities.” *World Travel*, 861 F.2d at 1029 (quoting *FTC v. Warner Commc’ns, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984)). Under this “public interest” test, “it is not necessary for the FTC to demonstrate irreparable injury.” *Id.* Unlike a private litigant, who generally must show a strong or substantial likelihood of success on the merits, the Commission need only make the statutory showing of a likelihood of ultimate success. *Id.* And when the court balances the equities, the public interest “must receive far greater weight” than any private concerns. *Id.* Preliminary injunctive relief is therefore appropriate if the Commission shows a likelihood of success on the merits and that a balancing of the equities, giving greater weight to the public interest, favors such relief.

C. The FTC has Demonstrated a Likelihood of Success on the Merits

1. Defendants are Violating the FTC Act and the TSR

There is no doubt that defendants’ activities qualify as deceptive acts or practices under Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). An act or practice is deceptive if it involves a material misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances. *FTC v. Bay Area Bus. Council*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. World Media Brokers*, 415 F.3d 758, 763 (7th Cir. 2005); *World Travel*, 861 F.2d at 1029. The materiality requirement is satisfied if the misrepresentation or omission involves information that is likely to affect a consumer’s choice of, or conduct regarding, a product or service. *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993) In deciding whether particular statements are deceptive, courts must look to the “overall net impression” of consumers. *See id.*

The same conduct that violates the FTC Act violates the TSR. The TSR prohibits sellers and telemarketers from (1) making a false or misleading statement to induce any person to pay for goods or services, (2) misrepresenting any material aspects of the goods or services for sale, and (3) misrepresenting their affiliation with any person or entity. 16 C.F.R. § 310.3(a)(4), 16

C.F.R. § 310.3(a)(2)(iii), 16 C.F.R. § 310.3(a)(2)(vii).³⁷

In this case, defendants violate the FTC Act and the TSR by making a series of false claims that are designed to induce consumers to purchase or to pay for vehicle service contracts. As described above, defendants misrepresent that they are affiliated with the manufacturer or dealer of the consumer's automobile and that the consumer's warranty is about to expire. Defendants further misrepresent that what they is selling is an extension of the consumer's original warranty. The Commission's sworn consumer declarations demonstrate that these misrepresentations often succeed in misleading consumers to purchase vehicle service contracts that they otherwise would not want or need. The misrepresentations are clearly material, in that they are likely to and do affect consumers' conduct.

As described above, defendants' conduct also violates a series of specific provisions in the TSR. In addition to prohibiting misrepresentations and material omissions, the TSR imposes requirements that apply to specified practices. Defendants violate § 310.4(b)(1)(iii)(B) of the TSR by calling consumers on the Registry, and § 310.4(b)(1)(iii)(A) of the TSR by calling consumers who have previously told Transcontinental not to call them. Defendants also violate § 310.8 of the TSR, which requires a seller, either directly or through another person, to pay an annual fee for access to a given area code before a telemarketer can initiate calls on the seller's behalf to any person within that area code. Defendants have not paid the required annual fee for access to telephone numbers listed on the Registry. Defendants also violate § 310.4(b)(1)(iv) of the TSR by "abandoning" calls, which is defined as not connecting a call to a sales representative within two seconds of the recipient's completed greeting. Defendants fail to transmit their actual name and telephone number to consumers, by masking or "spoofing" the caller ID information, in violation of § 310.4(a)(7) of the TSR. Finally, defendants violate Section 310.4(d) of the TSR, 16 C.F.R. § 310.4(d), by failing to disclose promptly and in a clear and conspicuous manner (1) the identity of the seller, (2) the purpose of the telemarketing call, which is to sell goods or services, and (3) the nature of the goods or services. By failing to make the same disclosures in their prerecorded messages in calls placed after December 1, 2008, Transcontinental has been violating § 310.4(b)(1)(v)(B)(ii) of the TSR.

³⁷ Defendants qualify as "sellers" or "telemarketers" as defined by the Rule and are engaged in "telemarketing" as defined in the Rule. 16 C.F.R. § 310.2(r), (t), and (u).

2. The Equities Tip Decidedly in the Commission's Favor

Once the Commission has shown a likelihood of success on the merits, the Court must balance the equities, assigning greater weight to the public interest than to any of defendants' private concerns. *World Travel*, 861 F.2d at 1029. The public equities in this case are compelling, as the public has a strong interest in halting the deceptive scheme, and in preserving the assets necessary to provide effective final relief to victims. *See FTC v. Sabal*, 32 F. Supp. 2d 1004, 1009 (N.D. Ill. 1998). Defendants, by contrast, have no legitimate interest in continuing to deceive U.S. consumers and persisting with conduct that violates federal law. *See Sabal*, 32 F. Supp. 2d at 1009. An injunction is therefore required to ensure that defendants' scheme does not continue while the case is pending.

3. Christopher Cowart is Individually Liable Under the FTC Act

Defendant Christopher Cowart is responsible for the deceptive practices of the corporation he controls, and he therefore should be subject to the temporary restraining order and an asset freeze. An individual defendant may be held liable for injunctive relief and monetary restitution under the FTC Act if the Court finds that (1) that he participated directly in or had some measure of control over a corporation's deceptive practices and (2) that he had actual or constructive knowledge of the practices. *World Media Brokers*, 415 F.3d at 764; *Bay Area Bus. Council*, 423 F.3d at 636. Authority to control may be evidenced by "active involvement in the corporate affairs, including assuming the duties of a 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 Bus. Council*, 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.* The Commission does not need to prove subjective intent to defraud. *Id.* The evidence shows that the FTC is likely to prevail in establishing that Cowart's actions meet the standard for holding him individually liable. Cowart's position as the President and CEO of the corporate defendant establishes his ability to control corporate acts and practices. *See, e.g., World Media Brokers*, 415 F.3d at 764-65 (corporate officer "hard-pressed to establish that he lacked authority or control" over corporate

entity); *Amy Travel*, 875 F.2d at 574. Moreover, Cowart actively participates in the deceptive acts and practices of Transcontinental. He has an office directly adjacent to Transcontinental's main telemarketing room.³⁸ Consumers have, on occasion, talked directly to Cowart about refund issues.³⁹ Cowart has demonstrated that he knows of allegations that Transcontinental violates do-not-call laws.⁴⁰ Moreover, Cowart signed the paperwork necessary to set up Transcontinental's mail drop in Pompano Beach, Florida in September 2007.⁴¹ A former employee also reported that Cowart advised him as to the best way to sell the warranties.⁴² Given this type of active participation in the business, there can be little doubt that Cowart has sufficient knowledge to be held individually liable, including for restitution.

D. An Asset Freeze is Necessary to Preserve Assets for Effective Consumer Redress

Part of the relief sought by the FTC in this case is restitution to consumers who were defrauded by defendants' misrepresentations. To preserve the possibility for such relief, the Commission seeks a freeze of defendants' assets and an immediate accounting to prevent concealment or dissipation of assets pending a final resolution of this litigation.

An asset freeze is appropriate once the Court determines that the Commission is likely to prevail on the merits and that restitution would be an appropriate final remedy. *See World Travel*, 861 F.2d at 1031 & n.9. In the words of the Seventh Circuit, the district court at that juncture has "a duty to ensure that the assets of the corporate defendants [are] available to make restitution to injured consumers." *Id.* at 1031. In a case such as this, where the Commission is likely to succeed in showing that a corporate officer is individually liable for the payment of restitution, the freeze should extend to individual assets as well. *Id.* (affirming freeze on individual assets). This Court has authority to order a party to "freeze" property under its control, whether the property is within or outside the United States. *U.S. v. First Nat'l City*

³⁸ PX 3, Israel Dec. ¶ 24.

³⁹ PX 16, Kane Dec. ¶ 16.

⁴⁰ PX 2, Menjivar Dec. ¶ 39 & Att. X.

⁴¹ PX 2, Menjivar Dec. ¶ 9 & Att. K.

⁴² PX 3, Israel Dec. ¶ 24.

Bank, 379 U.S. 378, 384 (1965). Such an order is necessary and appropriate here to ensure the possibility of effective final relief.

E. Appointment of a Receiver is Necessary to Ensure Effective Relief

The appointment of a temporary receiver over the corporate defendant is necessary to preserve the potential for a complete remedy. Such an appointment is particularly appropriate where defendants' pervasive fraud presents the likelihood of continued misconduct. If defendants are allowed to remain in control of their business, it is likely that evidence will be destroyed and the fruits of their fraud will be dissipated. By taking custody of the business, a neutral receiver would prevent further harm to consumers and prevent destruction or concealment of assets and records without disrupting any legitimate business activity. At the same time, a temporary receiver would be helpful to the court in assessing the extent of defendants' fraud, tracing the proceeds of that fraud, preparing an accounting, and making an independent report of defendants' activities to the Court.

V. CONCLUSION

Defendants have caused and are likely to continue to cause substantial injury to the public through their violations of the FTC Act and the TSR. The Commission respectfully requests that the Court issue the proposed TRO to protect the public from further harm and to help ensure the possibility of effective final relief for defrauded consumers.⁴³

Respectfully submitted,

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⁴³ The FTC has submitted a proposed Temporary Restraining Order with its papers.