

Seal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA



FEDERAL TRADE COMMISSION,

Plaintiff,

v.

CENTRO NATURAL CORP, a corporation,
SUMORE, L.L.C., a limited liability company,
CAROLINA ORELLANA,
DAMIAN BIONDI, JAVIER SUMBRE, and
JESSICA ANZOLA,

Defendants, and

BIONORE INC., a corporation,

Relief Defendant.

Filed Under Seal

Case No **14-23879**

CIV-ALTONAGA

**EX PARTE MOTION FOR A TEMPORARY RESTRAINING ORDER
AND FOR AN ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION
SHOULD NOT ISSUE, AND A MEMORANDUM OF LAW IN SUPPORT THEREOF**

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF FACTS	2
	A. <u>Defendants Use Deception, Intimidation, and Harassment to Pressure Consumers Into Settling Fake Debts</u>	2
	B. <u>Defendants Cause Consumers to Pay for Unwanted Goods</u>	6
III.	THE DEFENDANTS	6
	A. <u>The Corporate Defendants</u>	6
	B. <u>The Individual Defendants</u>	7
	C. <u>The Relief Defendant</u>	9
IV.	ARGUMENT	10
	C. <u>This Court has the Authority to Grant the Requested Relief</u>	10
	D. <u>A Temporary Restraining Order is Appropriate and Necessary</u>	10
	1. <u>The FTC is Likely to Succeed on the Merits</u>	11
	a. <u>Defendants Have Violated Section 5(a) of the FTC Act (Count I)</u>	11
	b. <u>Defendants Have Violated Section 807 of the FDCPA (Count II)</u>	12
	c. <u>Defendants Have Violated the TSR (Counts III-VII)</u>	13
	d. <u>The Individual Defendants are Liable for the Unlawful Conduct</u>	14
	e. <u>Relief Defendant Bionore is Liable for the Ill-Gotten Gains it Received from Defendants (Count VIII)</u>	15
	2. <u>The Equities Tip Decidedly in the Public's Favor</u>	16
	E. <u>The Proposed TRO is Appropriate</u>	17
V.	SERVICE OF THE PLEADINGS AND THE TRO	19
VI.	CONCLUSION	20

TABLE OF AUTHORITIES

Cases

<i>AT&T Broadband v. Tech Commc 'n, Inc.</i> , 381 F.3d 1309 (11th Cir. 2004).....	10
<i>FTC v. 1st Guaranty Mortgage Corp.</i> , No. 09-cv-61840, 2011 U.S. Dist. LEXIS 38152, (S.D. Fla. Mar. 30, 2011).....	14
<i>FTC v. 7051620 Canada, Inc.</i> , No. 1:14-cv-22132 (S.D. Fla. June 12, 2014)	17
<i>FTC v. Affordable Media</i> , 179 F.3d 1228 (9th Cir. 1999)	15
<i>FTC v. Amy Travel Service</i> , 875 F.2d 564 (7th Cir. 1989)	14, 15, 16
<i>FTC v. Bay Area Bus. Council</i> , 423 F.3d 627 (7th Cir. 2005).....	14
<i>FTC v. Commerce Planet, Inc.</i> , 878 F. Supp. 2d 1048 (C.D. Cal. 2012).....	9
<i>FTC v. FMC Counseling Servs, Inc.</i> , No. 0:14-cv-61545 (S.D. Fla. July 7, 2014)	17
<i>FTC v. FTN Promo., Inc.</i> , No. 8:07-CV-1279, 2008 WL 821937 (M.D. Fla. March 26, 2008)	15
<i>FTC v. Gem Merch. Corp.</i> , 87 F.3d 466 (11th Cir. 1996)	10, 14, 17
<i>FTC v. Grant Connect, LLC</i> , 827 F. Supp. 2d 1199 (D. Nev. 2011)	9
<i>FTC v. Holiday Enterp.</i> , 2008 U.S. Dist. LEXIS 35858 (N.D. Ga. Feb. 5, 2008).....	16
<i>FTC v. IAB Marketing Associates, LP</i> , No. 0:12-cv-61830 (S.D. Fla. Sept. 18, 2012).....	17
<i>FTC v. IAB Marketing Associates, LP</i> , No. 0:12-cv-61830 (S.D. Fla. Dec. 27, 2012).....	17, 18
<i>FTC v. IAB Mktg. Assocs. LP</i> , 746 F.3d 1228 (11th Cir. Fla. 2014).....	10, 11, 15, 17
<i>FTC v. IAB Mktg. Assocs., LP</i> , 972 F. Supp. 2d 1307 (S.D. Fla. 2013)	10
<i>FTC v. Inc21.com Corp.</i> , 745 F. Supp. 2d 975 (N.D. Cal. 2010), <i>aff'd</i> 475 Fed. Appx. 106 (9th Cir. Cal. 2012)	16
<i>FTC v. Instant Response Sys., LLC</i> , No. 113-cv-00976 (E.D.N.Y. Feb. 25, 2013)	19
<i>FTC v. Jordan Ashley</i> , No. 93-2257, 1994 U.S. Dist. LEXIS 7494 (S.D. Fla. Apr. 5, 1994)	15
<i>FTC v. People Credit First, LLC</i> , 244 Fed. Appx. 942 (11th Cir. 2011).....	11
<i>FTC v. Premier Precious Metals, Inc.</i> , No. 0:12-cv-60504 (S.D. Fla. Mar. 20, 2012)	18

<i>FTC v. Prime Legal Plans LLC</i> , No. 0:12-cv-61872 (S.D. Fla. Sept. 24, 2012)	17
<i>FTC v. RCA Credit Servs., LLC</i> , 727 F. Supp. 2d 1320 (M.D. Fla. 2010).....	11
<i>FTC v. Shopper Systems, LLC</i> , No. 0:12-cv-23919 (S.D. Fla. Oct. 31, 2012).....	17
<i>FTC v. Southeast Trust, LLC</i> , No. 12-cv-62441 (S.D. Fla. Dec. 11, 2012).....	17
<i>FTC v. Strano</i> , 528 Fed. Appx. 47(2d Cir. 2013)	18
<i>FTC v. Think Achievement Corp.</i> , 144 F. Supp. 2d 1013 (N.D. Ind. 2000).....	16
<i>FTC v. U.S. Mortgage Funding, Inc.</i> , No. 11-CV-80155 (S.D. Fla. Feb. 20, 2011)	18
<i>FTC v. U.S. Oil & Gas Corp.</i> , 748 F.2d 1431 (11th Cir. 1984).....	10, 18
<i>FTC v. Univ. Health, Inc.</i> , 938 F.2d 1206, 1217 (11th Cir. 1991).....	10, 11
<i>FTC v. USA Bevs., Inc.</i> , No. 05-cv-61682, 2005 U.S. Dist. LEXIS 39075 (S.D. Fla. Dec. 5, 2005)	11, 16, 18
<i>FTC v. USA Fin., LLC</i> , 415 Fed. Appx. 970 (11th Cir. Feb. 25, 2011)	14, 15
<i>FTC v. Wilcox</i> , 926 F. Supp. 1091 (S.D. Fla. 1995)	14
<i>FTC v. World Travel Vacation Brokers, Inc.</i> , 861 F.2d 1020 (7th Cir. 1988).....	11, 16
<i>FTC v. World Wide Factors, Ltd.</i> , 882 F.2d 344 (9th Cir. 1989).....	11, 16
<i>FTC v. Your Yellow Pages, Inc.</i> , No. 1:14-cv-22129 (S.D. Fla. June 12, 2014).....	17
<i>FTC v. Transnet Wireless Corp.</i> , 506 F. Supp. 2d 1247 (S.D. Fla. 2007)	11, 16
<i>LeBlanc v. Unifund CCR Partners</i> , 601 F.3d 1185 (11th Cir. 2010).....	12
<i>Leone Indus. v. Assoc. Packaging, Inc.</i> , 795 F. Supp. 117 (D.N.J. 1992)	18
<i>SEC v. Banner Fund Int'l</i> , 211 F.3d 602 (D.C. Cir. 2000)	16
<i>SEC v. Cavanagh</i> , 155 F.3d 129 (2d Cir. 1988).....	18
<i>SEC v. Colello</i> , 139 F.3d 674 (9th Cir. 1998)	16
<i>SEC v. First Fin. Group</i> , 645 F.2d 429 (5th Cir. 1981)	18
<i>SEC v. Hut toe</i> , 1996 U.S. Dist. LEXIS 17166 (D.D.C. 1996).....	19
<i>SEC v. Universal Consulting Res., LLC</i> , 201 U.S. Dist. LEXIS 128469 (D. Colo. 2010)	19

Statutes

15 U.S.C. § 1692 12

15 U.S.C. § 53(b) 10

Rules

16 C.F.R. § 310 13

I. INTRODUCTION

The Federal Trade Commission (“FTC”) respectfully requests that the Court bring to an immediate halt defendants’ fraudulent telemarketing scheme that preys on Spanish-speaking consumers across the country. Defendants falsely hold themselves out as court or government officials, lawyers, or their agents, and demand that consumers pay money to “settle” debts that consumers do not owe and to pay for products consumers do not seek or want.¹ The supposed debts are entirely bogus, but defendants threaten consumers with harsh consequences, such as arrest and legal actions, if consumers fail to make the large payments that defendants demand. For example, defendants left the following voice-message (as translated from Spanish) for one of their many consumer victims:

[T]his is Carla Villa, calling from Supreme Court Number 11, of the City of Tallahassee, State of Florida, in the Spanish area. The reason for my call is to inform you about an approved claim against you . . . Said claim has already been filed also before the Record and Fraud Court of your state . . . For this reason, we are contacting you from the conciliation area of this Supreme Court, to verify if you will decide to proceed with the claim or if you wish to reach some kind of solution. I remind you that we will be sending the corresponding report to the Record and Fraud area of the federal government and also another copy will be sent to the Immigration office area, which has already started an evaluation of your residence here in the United States. Please contact us for more information otherwise, you will be summoned and will have to answer, and it has a minimum penalty of USD 3,970.²

¹ The FTC submits 3 volumes of exhibits in support of this Motion, including, among others: (1) sworn declarations from consumer victims; (2) voice-messages that defendants left on consumer victims’ telephones; (3) recordings of undercover calls between FTC investigators and defendants; and (4) documentary evidence that the FTC received from, among others, the U.S. Postal Inspector Service, the Florida Office of the Attorney General, the Supreme Court of Florida Deputy Marshal, financial institutions, and the Better Business Bureau. References to exhibits appear as “Px. [number].” The exhibit volumes have been Bates numbered consecutively beginning with FTC-CNC-000001. Declarations are cited as “[name] Dec.,” and, where appropriate, include citations to specific paragraphs (“¶”) and pertinent attachments (“Att. [letter]”).

² Px. 1 Declaration of Solanly Mendez (“Mendez Dec.”) ¶ 9 Att. C. Ms. Mendez received this voicemail in February 2014. *Id.* at ¶ 9.

Defendants' deceptive and abusive acts and practices violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a); Section 807 of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692i; and the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310.

Defendants have injured thousands of consumers and continue to injure additional consumers on a daily basis. To protect consumers and preserve assets for potential redress to defendants' victims, the FTC seeks a temporary restraining order ("TRO") that: enjoins defendants' unlawful conduct; freezes their assets and the assets of the relief defendant; appoints a temporary receiver over the corporate defendants; permits the FTC and the temporary receiver immediate access to defendants' business premises and records; requires defendants and the relief defendant to fully disclose their assets; allows limited expedited discovery; and imposes limited temporary travel restrictions on the individual defendants. The FTC also requests that the Court order defendants and the relief defendant to show cause why a preliminary injunction should not issue against them.

II. STATEMENT OF FACTS

A. Defendants Use Deception, Intimidation, and Harassment to Pressure Consumers Into Settling Fake Debts

Since at least 2011, defendants have used deception, intimidation, and harassment to pressure consumers into settling purported debts and to pay for goods consumers have not sought or wanted. Defendants contact consumers by telephone. Their scheme targets Spanish-speaking consumers and they primarily address consumers in Spanish.³

Defendants regularly misrepresent themselves to consumers as – or as calling on behalf of –

³ See Px. 1 Mendez Dec. ¶ 9 Att. C and Px. 2 Declaration of Eloina Castro ("Castro Dec.") ¶ 4 Att. A (voicemails received from defendants in Spanish); Px. 13 Declaration I of Manuela Esparza ("Esparza I Dec.") ¶ 6 (describing defendants answering undercover calls in Spanish); Px. 14 Declaration II of Manuela Esparza ("Esparza II Dec.") ¶ 4 (describing multiple consumer complaints being made in Spanish). All but one of the consumer declarations filed in support of this Motion were given by consumers who speak primarily or exclusively Spanish and who provided their testimony in Spanish. See Pxs. 2-7.

court officials, government officials, or lawyers.⁴ They tell consumers that they are calling about debts consumers allegedly failed to pay, or regarding claims or legal actions relating to such debts.⁵ Defendants routinely represent to consumers that the alleged debts – often ranging from \$3,000 to \$9,000 – and associated lawsuits or claims stem from charges for goods the consumers purchased, often years prior, from a third party.⁶

Defendants claim that consumers must pay defendants in order to settle the alleged debts.⁷ The payments that defendants demand typically range from \$300 to \$500.⁸ In all or most instances, however, consumers do not owe the alleged debts that defendants claim consumers owe, and the

⁴ Px. 14 Esparza II Dec. ¶¶ 13-14 (consumers report defendants state they are calling on behalf of the following: the State of Florida Fraud and Records, the Federal Courthouse, the Federal Court in Miami, State of Florida Court No. 44, the Florida Supreme Court, the Tallahassee Supreme Court and the Supreme Court No.11 and consumers report that defendants have used more than 25 different attorney names in their calls).

⁵ *Id.* at ¶ 13. *See, e.g.*, Px. 13 Esparza I Dec. ¶¶ 6-7 Att. A FTC-CNC-000384-385 (from undercover Call No. 1: “Mrs. Eloina Castro is being sued for fraud and damages because she previously purchased a pair of leggings in black. . . she will have to appear in front of the Fraud and Record Supreme Court in her state. . . and unfortunately be fined \$3970 for intent to scam”); Px. 1 Mendez Dec. ¶ 3 (“[Defendants’ representatives] told me that they were calling from the Supreme Court of Tallahassee because there was a civil demand against me for lack of payment on a product that I had refused to pay back in 2011.”); Px. 2 Castro Dec. ¶ 4 (“[Defendants’ representative] told me that she was calling me from Supreme Court number 11 in the city of Tallahassee in the state of Florida for a lawsuit that the company Centro Natural Corp had filed against me for \$3,970.”); Px. 3 Declaration of Constantino Quiñones (“Quiñones Dec.”) ¶ 3 (“[Defendants’ representative] told me that she was calling me because I had not appeared in court for \$5,000 a lawsuit against me.”); Px. 4 Declaration of Trinidad Acosta (“Acosta Dec.”) ¶ 3 (“. . . a woman called me saying she was a lawyer in Texas and that she was calling me because I had a lawsuit against me in that state. She said I owed money for a purchase. . . She said if I did not pay, they were going to arrest me and I would have to go to court. She said I had to pay \$1,500. . .”); Px. 5 Declaration of Melvín Rivera (“Rivera Dec.”) ¶ 3 (“. . . I received a call on my cell phone from [defendants’ representative who] asked me in an accusatory manner why I had not appeared in court two weeks prior for a lawsuit against me for \$3,000, for a product I had bought called Fortalex and had not paid for.”); Px. 6 Declaration of Maria Juarez (“Juarez Dec.”) ¶ 5 (“. . . [defendants’ representative] told me there was a lawsuit against me for not complying with the contract where I had agree to receive products. . . She told me that I now had a debt of \$4,000.”); Px. 7 Declaration of Maria Torres (“Torres Dec.”) ¶ 5 (“[Defendants’ representative] said that he was to inform me that there was a lawsuit against me because I had ordered a product. . . and now I had a debt of \$3,000.”)

⁶ *See id.*

⁷ Px. 1 Mendez Dec. ¶ 5; Px. 2 Castro Dec. ¶ 7; Px. 3 Quiñones Dec. ¶ 8; Px. 4 Acosta Dec. ¶¶ 3-4; Px. 5 Rivera Dec. ¶ 4; Px. 6 Juarez Dec. ¶ 9; Px. 7 Torres Dec. ¶¶ 6-7.

⁸ *Id.*

lawsuits or claims that defendants reference do not exist.⁹

Defendants often pressure consumers to “settle” the alleged debts by paying defendants for products,¹⁰ but they routinely fail to identify what goods they will ship to consumers who agree to “settle.”¹¹ The defendants threaten consumers with dire consequences – such as arrest, referral to law enforcement, or lawsuits – if consumers fail to make the demanded payments.¹² For example, defendants left the following voice-message in Spanish, translated below into English, for one of their many consumer victims:

[T]his is Carla Villa, calling from Supreme Court Number 11, of the City of Tallahassee, State of Florida, in the Spanish area. The reason for my call is to inform you about an approved claim against you . . . Said claim has already been filed also before the Record and Fraud Court of your state . . . For this reason, we are contacting you from the conciliation area of this Supreme Court, to verify if you will decide to proceed with the claim or if you wish to reach some kind of solution. I remind you that we will be sending the corresponding report to the Record and Fraud area of the federal government and also another copy will be sent to the Immigration office area, which has already started an evaluation of your residence here in the United States. Please contact us for more information otherwise, you will be summoned and will have to answer, and it has a minimum penalty of USD 3,970.¹³

Defendants used similar threats and misrepresentations during a recent call in which an

⁹ Px. 1 Mendez Dec. ¶ 3; Px. 2 Castro Dec. ¶ 9; Px. 3 Quiñones Dec. ¶¶ 2, 15; Px. 4 Acosta Dec. ¶¶ 2, 4; Px. 5 Rivera Dec. ¶¶ 2, 6; Px. 6 Juarez Dec. ¶¶ 3, 18; Px. 7 Torres Dec. ¶ 3.

¹⁰ Px. 1 Mendez Dec. ¶ 5; Px. 3 Quiñones Dec. ¶ 10; Px. 5 Rivera Dec. ¶ 4; Px. 6 Juarez Dec. ¶ 9; Px. 7 Torres Dec. ¶ 7.

¹¹ Px. 3 Quiñones Dec. ¶ 10; Px. 5 Rivera Dec. ¶ 4; Px. 6 Juarez Dec. ¶ 10.

¹² Px. 1 Mendez Dec. ¶ 4 (threatened to report consumer to immigration authorities and other government agencies); Px. 3 Quiñones Dec. ¶ 11 (threatened to send a law officer to consumer’s house to arrest him); Px. 4 Acosta Dec. ¶¶ 6, 8 (threatened consumer that if she did not pay she would have to go to court and possibly to jail and that she would be reported to immigration); Px. 6 Juarez Dec. ¶ 17 (threatened consumer with arrest and threatened consumer’s immigration status).

¹³ Px. 1 Mendez Dec. ¶ 9 Att. C. The text of the original message in Spanish is included in Attachment C to the Mendez Dec. at FTC-CNC-000016-17. Defendants also left a similar voicemail for Eloina Castro. Px. 2 Castro Dec. ¶ 4 Att. A. at FTC-CNC-000039.

undercover FTC investigator posed as the niece of Eloina Castro, one of defendants' victims:

Company Rep: "Supreme Court in Spanish, good morning. . ."

Company Rep: "Well, I'm going to explain it to you. Mrs. Eloina Castro is being sued for fraud and damages because she previously purchased a pair of leggings in black. . . She has received the first delivery of the product and has paid for it correctly, but when the second delivery was made she did not pay for it. This is why said company has started this legal action against her with three exhibits of strong evidence. . . The first option that she has is wait, because in 24 to 48 hours she'll receive notice of the citation at her home indicating that she will have to appear in front of the Fraud and Record Supreme Court in her state. Confirm all of the information with the attorney and unfortunately be fined \$3,970 for intent to scam, commit fraud and for costs and damages. . .

Company Rep: "The second option which is given to her is to reach a settlement with the company, dismissing the lawsuit. . . by making a one-time payment today and dismissing the lawsuit and receiving the necessary paperwork. . . Mrs. Eloina would be responsible for the details, which are the costs for the inconvenience of the lawsuit, the costs of the products and the taxes and a minimum amount of \$499."¹⁴

Defendants regularly harass consumers with repeated telephone calls,¹⁵ and have initiated calls to consumers who previously told defendants that they do not wish to receive calls made by or on behalf of defendants.¹⁶ In some instances, defendants use abusive or profane language.¹⁷ Defendants have initiated numerous unlawful outbound calls to telephone numbers on the National Do Not Call Registry (the "Registry").¹⁸ They have also called telephone numbers in various area

¹⁴ Px. 13 Esparza I Dec. ¶¶ 6-7 Att. A at FTC-CNC-000383-386.

¹⁵ Px. 1 Mendez Dec. ¶¶ 9, 11; Px. 3 Quiñones Dec. ¶¶ 13-14; Px. 4 Acosta Dec. ¶ 6; Px. 5 Rivera Dec. ¶ 5, 6; Px. 6 Juarez Dec. ¶ 17; Px. 7 Torres Dec. ¶ 11.

¹⁶ Px. 4 Acosta Dec. ¶¶ 4, 6; Px. 5 Rivera Dec. ¶ 5.

¹⁷ Px. 4 Acosta Dec. ¶ 8.

¹⁸ Px. 29 Declaration of Patricia Blystone ("Blystone Dec.") ¶ 29 (identifying 114,571 calls originating from defendants to telephone numbers that were registered on the Do Not Call Registry). *See also* Px. 28 Declaration of Ami Dziekan ("Dziekan Dec.") ¶ 3 (describing receipt of call data from Investigator Manuela Esparza and sending data to Ms. Blystone for analysis); Px. 14 Esparza II Dec. ¶¶ 50-52 (describing receipt of call records from Vonage, linking the phone numbers to defendants, and sending data to Ms. Dziekan for analysis).

codes without first paying the annual fee for access to the telephone numbers within such area codes that are included in the Registry.¹⁹

B. Defendants Cause Consumers to Pay for Unwanted Goods

Unbeknownst to many of the consumers that defendants target, defendants do not have the right or ability to execute their egregious threats.²⁰ Thus, many consumers yield to defendants' unlawful payment demands because they are afraid of the threatened repercussions of failing to pay and/or in order to stop defendants' harassing and abusive calls.²¹ Defendants often direct consumers to send their payments to one of defendants' Post Office Boxes.²² Defendants routinely send "settling" consumers a box of goods, thus deceptively causing consumers to pay for goods consumers do not seek and/or want to purchase from defendants.²³ Since 2011, defendants have bilked consumers out of at least three million dollars.²⁴

III. THE DEFENDANTS

A. The Corporate Defendants

The Statement of Facts above, pages 2-6, and the voluminous evidence it summarizes provide a detailed account of the fraudulent scheme the FTC requests the Court to halt. The

¹⁹ Px. 14 Esparza II Dec. ¶¶ 55-58.

²⁰ Defendants are not licensed debt collectors (Px. 13 Esparza I Dec. ¶ 18) nor are they lawyers or affiliated with any court or government agency. Px. 14 Esparza II Dec. ¶ 14. Moreover, debt collectors – even those who, unlike defendants, are licensed – are barred from making such threats. *See* FDCPA § 807, 15 U.S.C. §1692e.

²¹ Defendants have received a minimum of 10,000 money orders from consumers. Px. 14 Esparza II Dec. ¶¶ 42, 46. Examples of the money orders collected by defendants are included in Px. 16 at FTC-CNC-000739-747, 000765 -773; Px. 17 at FTC-CNC-000811-813; and Px. 18 at FTC-CNC-000836-839. *See also*, Px. 1 Mendez Dec. ¶¶ 4-6.

²² Px. 1 Mendez Dec. ¶ 6; Px. 13 Esparza I Dec. ¶¶ 10, 14. *See also* examples of the money orders collected by defendants included in Px. 16 at FTC-CNC-000739-747, 000765 -773; Px. 17 at FTC-CNC-000811-813; and Px. 18 at FTC-CNC-000836-839 listing company P.O. Box addresses.

²³ Px. 1 Mendez Dec. ¶ 7; Px. 13 Esparza I Dec. ¶ 14. Defendants regularly ship their consumer victims a box with goods, which are often purported health or beauty goods. Px. 14 Esparza II Dec. ¶ 27 Att. E at FTC-CNC-000682-697 (snapshot of defendants' mailings, including product descriptions).

²⁴ Px. 14 Esparza II Dec. ¶¶ 42-47.

individual defendants have executed the scheme through at least two companies, Centro Natural Corp (“Centro Natural”) and Sumore, L.L.C. (“Sumore”). These companies have made the unlawful telephone calls and transactions at issue and collected the hefty payments that defendants bilked from consumers.²⁵ In 2011 and 2012, Sumore was the main company through which the scheme was executed.²⁶ Since early 2013, the scheme has been executed primarily through Centro Natural.²⁷

Centro Natural is a Florida corporation with a registered business address of 5220 South University Drive, Suite C-102, Davie, Florida 33328,²⁸ and also conducts business from an address linked to Sumore: 1001 N. Federal HWY Suite 319, Hallandale, FL 33009.²⁹

Sumore is or was during the relevant period a Florida limited liability company with a registered business address of 2404 NE 9th Street, Hallandale, Florida 33009.³⁰ It conducted business from additional Florida addresses, including 1001 N. Federal HWY Suite 319, Hallandale FL 33009.³¹

B. The Individual Defendants

Carolina Orellana is or was during the relevant period a principal and founding member of Centro Natural and Sumore.³² She is or was a founding member, a manager, and registered agent of

²⁵ Px. 14 Esparza II Dec. ¶¶ 42-47, 50-53.

²⁶ *Id.* at ¶ 10 and Table 1.

²⁷ *Id.* at ¶ 11 and Table 1.

²⁸ *Id.* at ¶ 30 and Px. 23.

²⁹ Px. 14 Esparza II Dec. at ¶ 25(ii) Att. D at FTC-CNC-000676.

³⁰ *Id.* at ¶ 29(b) and Px. 22. The FTC does not know, at this point, whether Sumore is still active. Corporate filings suggest that it was formally dissolved in February 2013. *Id.* at ¶ 29(c) and Px. 22. Even if Sumore is in fact dissolved, Florida law permits proceedings against dissolved corporations. Fla. Stat. § 607.1405(2)(e); *see also* Fla. Stat. § 607.1407(3) (permitting filing of suit within four years of dissolution).

³¹ Px. 14 Esparza II Dec. ¶ 29(c) and Px. 22 at FTC-CNC-000925.

³² Px. 14 Esparza II Dec. ¶¶ 29(a), 30(a) and Pxs. 22-23.

Sumore, and a signatory to at least one of its bank accounts.³³ Orellana is the sole officer of Centro Natural, bearing the title of President,³⁴ and a signatory for at least one of its bank accounts.³⁵ She is also the owner of a Post Office Box for Centro Natural.³⁶ Orellana is, or was during the relevant period, an officer of relief defendant Bionore.³⁷ Orellana is a citizen of Argentina and evidence suggests she may reside there.³⁸

Damian Biondi exercises control over Centro Natural's illegal gains. He is a signatory for Centro Natural's bank account and has authorized, during the relevant period, payments and transfers on behalf of Centro Natural, including initiating over \$900,000 in international wire transfers.³⁹ Biondi is, or was during the relevant period, an officer of Bionore.⁴⁰ He is a citizen of Argentina and evidence suggests he may reside there.⁴¹

Javier Sumbre is a founding member of Sumore and, among other things, handled matters relating to the company's finances and the payments that it bilked from consumers.⁴² He opened and managed credit and merchant accounts for Sumore,⁴³ and received chargeback notifications

³³ Px. 14 Esparza II Dec. ¶¶ 29(a)-(c), 34 and Px. 22.

³⁴ Px. 14 Esparza II Dec. ¶ 30 and Px. 23.

³⁵ Px. 14 Esparza II Dec. ¶ 34.

³⁶ *Id.* at ¶ 25(iii).

³⁷ *Id.* at ¶ 31(a) and Px. 24.

³⁸ In the original corporate filing for Sumore, Orellana provided an Argentinian address. Px. 22 at FTC-CNC-000937. Subsequent corporate filings only list corporate business addresses for her. Px. 22 at FTC-CNC-000925, 928-929. In documents she provided to Citbank to open an account for Centro Natural, Orellana listed a Buenos Aires address, provided a copy of an Argentinian passport, and stated that she is a non-resident alien. Px. 16 at FTC-CNC-000758-759.

³⁹ Px. 14 Esparza II Dec. ¶ 36; Px. 30 Declaration of Thomas Van Wazer ("Van Wazer Dec.") ¶ 9 Att. C. *See also* Px. 16 at FTC-CNC-000774-779 (examples of Centro Natural international wire transfers authorized by defendant Biondi).

⁴⁰ Px. 14 Esparza II Dec. ¶ 31(a) and Px. 24.

⁴¹ Px. 16 at FTC-CNC-000759.

⁴² Px. 14 Esparza II Dec. ¶¶ 29(a), 34 and Px. 22.

⁴³ Px. 14 Esparza II Dec. ¶¶ 32, 34 and Px. 15 at FTC-CNC-000699, 710-715; Px. 16 at FTC-CNC-000789-
(footnote continues ...)

regarding Sumore's merchant account from the merchant bank.⁴⁴ He also opened a corporate checking account for Sumore and authorized numerous payments and transfers from that account, including international transfers.⁴⁵ Sumbre opened a Post Office Box in the name of Sumore that was active through at least December 2012.⁴⁶ He is a resident of this district.⁴⁷

Jessica Anzola is, or was a principal, manager, and registered agent of Sumore and assumed these roles during and throughout the height of Sumore's fraud.⁴⁸ She is, or was during the relevant period, a signatory to Sumore's bank accounts.⁴⁹ She is a resident of this district.⁵⁰

C. The Relief Defendant

Bionore Inc. ("Bionore") is a Florida corporation with a registered business address of 2401 SW 56 Terrace, West Park, Florida 33023.⁵¹ Defendants Orellana and Biondi have controlled and managed Bionore,⁵² and corporate bank statements for Bionore's account are sent to the same address that has received Centro Natural corporate bank statements and Sumore corporate bank

(... continued footnote)

790.

⁴⁴ Px. 15 at FTC-CNC-000700-709. A chargeback is the reversal of a prior outbound transfer of funds from a consumer's bank account, line of credit, or credit card. A chargeback typically results from a consumer's dispute of a merchant's charge, and the card associations (*i.e.*, Visa and MasterCard) view high chargeback rates as indicia of fraud. *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1075 (C.D. Cal. 2012); *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1222 (D. Nev. 2011).

⁴⁵ Px. 16 at FTC-CNC-000737-738 (Sumore corporate account signatories); FTC-CNC-000780-784 (examples of Sumore international wire transfers authorized by defendant Sumbre).

⁴⁶ Px. 14 Esparza II Dec. Att. D at FTC-CNC-000675.

⁴⁷ Px. 15 at FTC-CNC-000710.

⁴⁸ Px. 14 Esparza II Dec. ¶ 29(b) and Px. 22.

⁴⁹ Px. 14 Esparza II Dec. at ¶ 34.

⁵⁰ Px. 22 at FTC-CNC-000930.

⁵¹ Px. 14 Esparza II Dec. ¶ 31(a)-(b) and Px. 24.

⁵² *Id.*

statements.⁵³ Bionore has received from the corporate defendants funds that can be traced directly to defendants' unlawful acts or practices.⁵⁴ It has provided no service or other consideration to the corporate defendants in exchange for these assets.

IV. ARGUMENT

The FTC respectfully requests that the Court halt defendants' ongoing fraudulent scheme. The proposed TRO filed with this Motion is narrowly tailored to protect consumers by enjoining defendants' unlawful conduct, preserving assets for potential redress to defendants' victims, and preventing defendants from destroying or tampering with evidence.

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

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes this Court to order preliminary and permanent injunctive relief enjoining violations of Section 5 of the FTC Act and "any ancillary relief necessary to accomplish complete justice."⁵⁵ The Court may also enter a TRO, or other preliminary relief, to preserve the possibility of providing effective final relief.⁵⁶ Such ancillary relief may include, among other means, an asset freeze to preserve assets for restitution to victims, the appointment of a temporary receiver, and immediate access to defendants' business premises.⁵⁷

B. A Temporary Restraining Order is Appropriate and Necessary

In considering a TRO or preliminary injunction under Section 13(b) of the FTC Act, courts (1) determine the likelihood that the FTC will ultimately succeed on the merits and (2) balance the equities.⁵⁸ In balancing the equities, "the public interest should receive greater weight" than any

⁵³ Px. 14 Esparza II Dec. ¶¶ 34, 41.

⁵⁴ Px. 30 Van Wazer Dec. ¶ 18 Att. K (Bionore received at least \$170,000 from Sumore between February 2011 and November 2012).

⁵⁵ *AT&T Broadband v. Tech Comm'n, Inc.*, 381 F.3d 1309, 1316 (11th Cir. 2004); *FTC v. IAB Mktg. Assocs., LP*, 972 F. Supp. 2d 1307, 1313 (S.D. Fla. 2013).

⁵⁶ *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-69 (11th Cir. 1996); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984).

⁵⁷ *U.S. Oil & Gas*, 748 F.2d at 1432; *AT&T Broadband*, 381 F.3d at 1316.

⁵⁸ *FTC v. IAB Mktg. Assocs. LP*, 746 F.3d 1228, 1232 (11th Cir. Fla. 2014); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1217 (11th Cir. 1991).

private interest.⁵⁹ The FTC need *not* prove irreparable injury, which is presumed.⁶⁰ The application of the above-noted factors to the facts of this case warrants the issuance of a TRO and requiring defendants and Bionore to show cause why the Court should not issue a preliminary injunction against them.

1. The FTC is Likely to Succeed on the Merits

The evidence attached to this Motion demonstrates that defendants have violated Section 5(a) of the FTC Act, Section 807 of the FDCPA, and multiple provisions of the TSR.

a. Defendants Have Violated Section 5(a) of the FTC Act (Count I)

Section 5(a) prohibits “unfair or deceptive acts or practices.” 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.⁶¹ Courts consider the overall “net impression” that the misrepresentation or omission creates.⁶² Express claims, or deliberately made implied claims, used to induce payments for products or services are presumed to be material.⁶³ The FTC need *not* prove actual reliance by consumers to establish materiality.⁶⁴

As demonstrated in the Statement of Facts, pages 2-6, the evidence shows that defendants have made the following material misrepresentations, expressly or by implication, to their victims:

- (1) the consumer is delinquent on a debt that defendants have the authority to collect;

⁵⁹ *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988); *FTC v. USA Bevs., Inc.*, No. 05-cv-61682, 2005 U.S. Dist. LEXIS 39075, *21-22 (S.D. Fla. Dec. 5, 2005).

⁶⁰ *Univ. Health, Inc.*, 938 F.2d at 1218; *IAB Mktg.*, 746 F.3d at 1232.

⁶¹ *FTC v. People Credit First, LLC*, 244 Fed. Appx. 942, 944 (11th Cir. 2011) (following *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003)).

⁶² *FTC v. RCA Credit Servs., LLC*, 727 F. Supp. 2d 1320, 1329 (M.D. Fla. 2010) (citing *FTC v. Stefanichik*, 559 F.3d 924, 928 (9th Cir. 2009)). “A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures.” *Id.* (quoting *FTC v. Cyberspace.Com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006)).

⁶³ *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1266 (S.D. Fla. 2007) (“Express claims, or deliberately made implied claims, used to induce the purchase of a particular product or service are presumed to be material.”); *RCA Credit Servs.*, 727 F. Supp. 2d at 1329 (citing *Tashman*, 318 F.3d at 1277); *FTC v. SlimAmerica, Inc.*, 77 F. Supp.2d 1263, 1272 (S.D. Fla. 1999).

⁶⁴ *Transnet Wireless Corp.*, 506 F. Supp. 2d at 1266-67.

- (2) the consumer has a legal obligation to pay defendants in order to settle the debt;
- (3) defendants are affiliated with government entities, including courts and law enforcement agencies;
- (4) defendants are attorneys or are associated with a law firm;
- (5) the consumer will be arrested or reported to law enforcement agencies for failing to pay defendants to satisfy the debt; and
- (6) a legal action has been filed or is about to be filed against the consumer for failure to satisfy the debt.

Such misrepresentations are presumed to be material as defendants used them to extract payments from their victims.⁶⁵ Moreover, these claims are likely to mislead consumers. The attached consumer declarations, complaints that consumer victims filed with law enforcement agencies and the Better Business Bureau, and defendants' business records, demonstrate that defendants' misrepresentations have, in fact, induced consumers to make hefty payments to defendants.⁶⁶ Thus, the FTC is likely to succeed in proving that defendants have violated Section 5(a) of the FTC Act.

b. Defendants Have Violated Section 807 of the FDCPA (Count II)

Section 807 prohibits the use of "any false, deceptive, or misleading representation or means in connection with the collection of any debt."⁶⁷ To ensure that the FDCPA "protects all consumers, the gullible as well as the shrewd," courts use the "least sophisticated consumer" standard in determining whether a representation or means violate Section 807.⁶⁸

As demonstrated in the Statement of Facts, pages 2-6, the evidence shows that defendants

⁶⁵ See, *supra*, nn. 4-7, pp. 2-3 and accompanying text.

⁶⁶ Px. 14 Esparza II Dec. ¶¶ 3-7, 12-15 and Pxs. 8-12.

⁶⁷ 15 U.S.C. § 1692e. Defendants are "debt collectors" as the term is defined in FDCPA § 803(6), 15 U.S.C. § 1692a(6) – "[A]ny person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debt, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."

⁶⁸ *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1194 (11th Cir. 2010) (citations omitted).

have made a slew of misrepresentations to consumers about purported debts and the steps the defendants would take to collect on the debt in violation of the FDCPA. These include:

(1) falsely representing that the defendants are affiliated with the United States or any State, including government law enforcement agencies, in violation of Section 807(1);

(2) falsely representing the character, amount, or legal status of a debt, in violation of Section 807(2);

(3) falsely representing or implying that the defendants are attorneys or that the defendants' communications are from an attorney, in violation of Section 807(3);

(4) falsely representing or implying that non-payment of a debt will result in the arrest of a person, when such action is not lawful, in violation of Section 807(4);

(5) threatening to take action that is not lawful or that defendants do not intend to take, such as reporting consumers to law enforcement agencies for failing to pay defendants to settle debts or initiating a lawsuit, in violation of Section 807(5);

(6) falsely representing or implying that a consumer has committed any crime or other conduct in order to disgrace the consumer, in violation of Section 807(7); and

(7) using a false representation or deceptive means to collect or attempt to collect a debt, in violation of Section 807(10).

Thus, the FTC is likely to succeed in proving that defendants violated Section 807 of the FDCPA.

c. Defendants Have Violated the TSR (Counts III-VII)

The TSR prohibits deceptive and abusive telemarketing acts or practices by telemarketers and sellers.⁶⁹ As demonstrated in the Statement of Facts, pages 2-6, the evidence shows that

⁶⁹ Defendants are “sellers” or “telemarketers” engaged in “telemarketing” as those terms are defined in the TSR, 16 C.F.R. §§ 310.2. A “seller” is any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration. 16 C.F.R. § 310.2 (aa). A “telemarketer” is any person, who in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor. 16 C.F.R. § 310.2 (cc). The TSR defines telemarketing as any “plan, program, or campaign which is conducted to induce the purchase of goods or services. . . by use of one or more telephones and which involves more than one interstate telephone call. 16 C.F.R. § 310.2 (dd).

defendants have committed the following TSR violations. First, as shown above, the defendants have misrepresented, directly or by implication, their affiliation with any person or government entity, in violation of Section 310.3(a)(2)(vii). In addition, they have engaged in abusive telemarketing acts or practices including threats, intimidation or the use of profane or obscene language, in violation of Section 310.4(b)(1)(iii)(B). Many consumers have asked to be removed from the defendants' calling lists, but the defendants have continued to initiate, or cause others to initiate, telephone calls to them, in violation of Section 310.4(b)(1)(iii)(A). Furthermore, some consumers never wanted to receive telemarketing calls in the first instance and listed their numbers on the National Do Not Call Registry. The defendants have nevertheless placed calls to these individuals, in violation of Section 310.4(b)(1)(iii)(B). And finally, the defendants have failed even to comply with the most basic obligations every telemarketer must abide by – they have initiated telephone calls to numbers on the Registry without paying the required fee for access to such numbers, in violation of Section 310.8. Thus, the FTC is likely to succeed in proving that defendants have violated the TSR.

d. The Individual Defendants are Liable for the Unlawful Conduct

An individual defendant is liable for injunctive and monetary relief under the FTC Act if the Court finds (1) that the individual participated directly in or had some measure of control over a company's unlawful conduct and (2) that the individual had actual or constructive knowledge of the unlawful conduct.⁷⁰ "Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer."⁷¹ Bank signatory authority or acquiring services on behalf of a corporation also evidences

⁷⁰ *Gem Merch.*, 87 F.3d at 470; *FTC v. USA Fin., LLC*, 415 Fed. Appx. 970, 974-75 (11th Cir. 2011); *World Media Brokers*, 415 F.3d at 764; *FTC v. Bay Area Bus. Council*, 423 F.3d 627, 636 (7th Cir. 2005); *FTC v. 1st Guaranty Mortgage Corp.*, No. 09-cv-61840, 2011 U.S. Dist. LEXIS 38152, *52 (S.D. Fla. Mar. 30, 2011).

⁷¹ *FTC v. Wilcox*, 926 F. Supp. 1091, 1104 (S.D. Fla. 1995) (quoting *FTC v. Amy Travel Service*, 875 F.2d 564, 572 (7th Cir.), cert. denied, 493 U.S. 954, 110 S.Ct. 366, 107 L.Ed.2d 352 (1989).); see also *Transnet* (footnote continues ...)

authority to control.⁷²

The knowledge element does *not* require the FTC to prove subjective intent to defraud.⁷³ The FTC need only demonstrate that the individual had actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such representations, or an awareness of a high probability of deception, coupled with the intentional avoidance of the truth.⁷⁴ In addition, participation in corporate affairs is probative of knowledge.⁷⁵

Section III.B, pages 7-9, details the role of each individual defendant in the scheme. The individuals' executive and/or managerial positions in Centro Natural and/or Sumore, and the affirmative steps they have taken to implement the scheme, show that they each have participated in this scheme and controlled the entities through which it has been executed. Through their respective roles in the closely held corporate defendants, the individual defendants also have gained knowledge of the violations at issue. Thus, the FTC will likely succeed in proving that the individual defendants are liable for the unlawful conduct at issue.

(... continued footnote)

Wireless Corp., 506 F. Supp.2d at 1270 (“An individual’s status as a corporate officer gives rise to a presumption of ability to control small, closely-held corporation.”); *IAB Mktg.*, 746 F.3d at 1233.

⁷² *FTC v. USA Fin., LLC*, 415 Fed. Appx. 970, 974-75 (11th Cir. 2011).

⁷³ *USA Fin., LLC*, 415 Fed. Appx. at 974 (11th Cir. 2011) (citing *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1368 (11th Cir. 1988)); *FTC v. FTN Promo., Inc.*, No. 8:07-CV-1279, 2008 WL 821937, *2 (M.D. Fla. Mar. 26, 2008); *FTC v. Jordan Ashley*, No. 93-2257, 1994 U.S. Dist. LEXIS 7494, *11 (S.D. Fla. Apr. 5, 1994).

⁷⁴ *Id.*

⁷⁵ *FTC v. Affordable Media*, 179 F.3d 1228, 1234-35 (9th Cir. 1999); *Amy Travel*, 875 F.2d at 573; *IAB Mktg.*, 746 F.3d at 1233.

e. Relief Defendant Bionore is Liable for the Ill-Gotten Gains it Received from Defendants (Count VIII)

Under the FTC Act, disgorgement from a relief defendant is available where (1) the relief defendant has received ill-gotten gains and (2) does not have a legitimate claim to those gains.⁷⁶ The appropriate remedy is an equitable monetary judgment equivalent to the amount of ill-gotten gains that the relief defendant received.⁷⁷ As demonstrated in Section III.C (page 10), the evidence shows that Bionore netted at least \$170,000 from the corporate defendants, and that it provided no service or consideration to the corporate defendants in exchange for these funds. Thus, the FTC will likely succeed in proving that Bionore is liable for the ill-gotten gains it received gratuitously from the corporate defendants.

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

“[W]hen a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight.”⁷⁸ The public interest in this case is obvious and compelling – halting defendants’ unlawful and injurious conduct and preserving assets that may be used for restitution to their victims. Defendants, by contrast, have no legitimate interest in continuing to defraud consumers.⁷⁹

In sum, because the evidence demonstrates that the FTC is likely to succeed on the merits,

⁷⁶ *Transnet Wireless Corp.*, 506 F. Supp. 2d at 1273; *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998); *FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1009 (N.D. Cal. 2010), *aff’d* 475 Fed. Appx. 106 (9th Cir. Cal. 2012); *FTC v. Holiday Enterp.*, 2008 U.S. Dist. LEXIS 35858, *31 (N.D. Ga. Feb. 5, 2008); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1020-22 (N.D. Ind. 2000).

⁷⁷ *See, e.g., Transnet Wireless Corp.*, 506 F. Supp. 2d at 1273 (relief defendant liable for amount received from fraudulent operation); *SEC v. Banner Fund Int’l*, 211 F.3d 602, 617 (D.C. Cir. 2000) (“disgorgement is an equitable obligation to return a sum equal to the amount wrongfully obtained, rather than a requirement to replevin a specific asset . . .”).

⁷⁸ *World Wide Factors*, 882 F.2d at 347; *World Travel Vacation Brokers*, 861 F.2d at 1029; *USA Bevs.*, No. 05-61682, 2005 U.S. Dist. LEXIS 39075, at *15.

⁷⁹ *See World Wide Factors*, 882 F.2d at 347 (“no oppressive hardship to defendants in requiring them to comply with the FTC Act, refrain from fraudulent representation or preserve their assets from dissipation or concealment.”).

and the equities tip decidedly in the public's favor, the requested TRO is warranted.

C. The Proposed TRO is Appropriate

The FTC filed this action *ex parte* in order to stop defendants' fraudulent conduct and to pursue restitution for their victims. If defendants receive advance warning of this enforcement action, there is a substantial risk that they will dissipate assets or destroy evidence, which will frustrate the Court's ability to grant the final relief that consumers deserve.⁸⁰ Accordingly, the proposed TRO includes the following narrowly tailored measures: (1) an injunction halting defendants' unlawful conduct; (2) a temporary freeze on the assets of defendants and Bionore; (3) a temporary receiver over the corporate defendants to marshal and preserve their assets, manage their business affairs, and ascertain whether they engage in any lawful, profitable activity; (4) permission to the FTC and the temporary receiver to immediately access the premises and records of the corporate defendants, and the records of Bionore; (5) a requirement that defendants and Bionore fully disclose all their assets; (6) limited expedited discovery; and (7) limited temporary travel restrictions over the individual defendants.

The requested TRO is particularly necessary and appropriate because of the fraudulent nature of defendants' scheme, their ties to foreign countries, and the transfer of substantial ill-gotten gains to foreign countries.⁸¹ The Eleventh Circuit has repeatedly upheld the authority of district courts to order an asset freeze to preserve the possibility of consumer redress,⁸² and the Southern District of Florida has frozen defendants' assets in numerous FTC enforcement actions.⁸³ As the

⁸⁰ See Certification Of Federal Trade Commission Counsel Dotan Weinman Pursuant To Fed. R. Civ. P. 65(B) filed contemporaneously at ¶¶ 9-13.

⁸¹ See, *supra*, nn. 38-39, 41, 45 and accompanying text.

⁸² See, e.g., *IAB Marketing*, 746 F.3d at 1234; *Gem Merch. Corp.*, 87 F.3d at 469.

⁸³ See, e.g., *FTC v. FMC Counseling Servs, Inc.*, No. 0:14-cv-61545 (S.D. Fla. July 7, 2014); *FTC v. 7051620 Canada, Inc.*, No. 1:14-cv-22132 (S.D. Fla. June 12, 2014); *FTC v. Your Yellow Pages, Inc.*, No. 1:14-cv-22129 (S.D. Fla. June 12, 2014); *FTC v. Southeast Trust, LLC*, No. 12-cv-62441 (S.D. Fla. Dec. 11, 2012).
(footnote continues ...)

FTC is likely to succeed in showing that the individual defendants and Bionore are liable for monetary relief, the asset freeze should extend to their assets as well.⁸⁴

The appointment of a temporary receiver is necessary and appropriate when, as here, there is “imminent danger of property being lost, injured, diminished in value or squandered, and where legal remedies are inadequate.”⁸⁵ Where corporate defendants and their managers and officers have been engaged in deception, “it is likely that in the absence of the appointment of a receiver to maintain the *status quo*, the corporate assets will be subject to diversion and waste” to the detriment of the fraud’s victims.⁸⁶ The temporary receiver will help prevent defendants from disposing of ill-gotten funds by identifying, securing and controlling the use of the corporate defendants’ assets, as well as marshaling and preserving their records. The temporary receiver may also assist in determining the full extent of the fraud and identify additional victims.

Limited expedited discovery is necessary and appropriate, among other reasons, to determine immediately whether other companies or individuals have been involved in, or benefited from, the unlawful scheme. Given the scheme’s fraudulent nature, it is possible that yet-to-be-identified perpetrators have implemented measures to conceal their involvement in the scheme and, absent expedited discovery, would destroy evidence or dissipate assets.

(... continued footnote)

2012); *FTC v. Shopper Systems, LLC*, No. 0:12-cv-23919 (S.D. Fla. Oct. 31, 2012); *FTC v. Prime Legal Plans LLC*, No. 0:12-cv-61872 (S.D. Fla. Sept. 24, 2012); *FTC v. IAB Marketing Associates, LP*, No. 0:12-cv-61830 (S.D. Fla. Sept. 18, 2012); *FTC v. Premier Precious Metals, Inc.*, No. 0:12-cv-60504 (S.D. Fla. Mar. 20, 2012); *FTC v. U.S. Mortgage Funding, Inc.*, No. 11-CV-80155 (S.D. Fla. Feb. 20, 2011).

⁸⁴ *FTC v. Strano*, 528 Fed. Appx. 47, 48-52 (2d Cir. 2013); *World Travel*, 861 F.2d at 1031; *Gem Merch.*, 87 F.3d 466; *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1988); *FTC v. IAB Marketing Associates, LP*, No. 0:12-cv-61830, *3 (S.D. Fla. Dec. 27, 2012).

⁸⁵ *Leone Indus. v. Assoc. Packaging, Inc.*, 795 F. Supp. 117, 120 (D.N.J. 1992).

⁸⁶ *SEC v. First Fin. Group*, 645 F.2d 429, 438 (5th Cir. 1981); see also *U.S. Oil & Gas Corp.*, 748 F.2d at 1432 (affirming preliminary injunction that imposed an asset freeze and appointing a receiver); *USA Bevs.*, No. 05-61682, 2005 U.S. Dist. LEXIS 39075, at * 22-23 (“Appointing a receiver for [the corporate defendant] is essential to ensure that [it] complies with the [court’s order], and to prevent the destruction of evidence and the concealment or dissipation of assets.”).

Finally, limited temporary travel restrictions over the individual defendants are also necessary and appropriate. At least two of the individual defendants are citizens of foreign countries and their businesses – including the corporate defendants– have routinely transferred ill-gotten gains offshore.⁸⁷ Accordingly, there is a significant risk that the individual defendants could leave the country before the FTC and the temporary receiver could enforce the asset freeze and financial accounting provisions of the proposed TRO, which would frustrate the Court’s ability to provide effective final relief to consumer victims. An order requiring that the individual defendants surrender their passports temporarily is necessary to protect against this risk and would not subject them to undue hardship.⁸⁸

V. SERVICE OF THE PLEADINGS AND THE TRO

The evidence suggests that at least two individual defendants, Orellana and Biondi, are residents of Argentina.⁸⁹ As Argentina is a signatory to the Hague Convention, the FTC will attempt to serve any defendant residing there through the Central Authority in Argentina. However, the FTC notes that it can often take several months for the Central Authority to execute service. Such delay may frustrate the Court’s ability to halt defendants’ unlawful scheme and secure relief to their victims. Thus, the FTC has also arranged to serve defendants living abroad through a private process server. The FTC will also attempt to serve any individual defendant living abroad through the individual’s email address, social media account, and through U.S. Mail. The FTC requests that the Court authorize such alternative means of service, as the Court is authorized to do under Fed. R. Civ. Pro. 4(e)(3).

⁸⁷ See, *supra*, nn. 38-39, 41, 45 and accompanying text.

⁸⁸ See, e.g., *FTC v. Instant Response Sys., LLC*, No. 113-cv-00976 (E.D.N.Y. Feb. 25, 2013) (requiring defendant to surrender passport until order compliance); *SEC v. Universal Consulting Res., LLC*, 201 U.S. Dist. LEXIS 128469, *4-5, *18 (D. Colo. 2010) (same); *SEC v. Hut toe*, 1996 U.S. Dist. LEXIS 17166, *16 (D.D.C. 1996) (same).

⁸⁹ See, *supra*, nn. 38, 41 and accompanying text.

VI. CONCLUSION

In order to halt immediately defendants' fraudulent scheme and protect consumers, the FTC respectfully requests that the Court issue the proposed TRO and order defendants and Bionore to show cause why a preliminary injunction should not issue against them.

Dated: October 20, 2014

Respectfully submitted,

/s/ Dotan Weinman

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