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U.S. DISTRICT COURT
MIDDLE DISTRICT OF TN

United States District Court
Middle District of Tennessee
Nashville Division

Federal Trade Commission, and

State of Tennessee, *ex rel.*
Robert E. Cooper, Jr., Attorney General and Reporter,

Plaintiffs,

v.

United States Benefits, LLC, a limited liability company, also d/b/a United States Health, United Benefits of America, LLC, UBA, United Benefits, United Health Benefits, Health Care America, HCA, National Benefits of America, Insurance Specialty Group, and Adova Health,

Timothy Thomas, individually and as an officer of United States Benefits, LLC, also d/b/a United States Health, United Benefits of America, LLC, UBA, United Benefits, United Health Benefits, Health Care America, HCA, National Benefits of America, Insurance Specialty Group, and Adova Health,

Defendants, and

Kennan Dozier, also d/b/a Kennan Dozier Thomas, Accentuate Designs, and Accentuate Your Home, LLC,

Relief Defendant.

Case No. ____________

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

[FILED UNDER SEAL]

Table of Contents

I. Summary . . . 1

II. The Parties . . . 4
- A. Plaintiffs . . . 4
- B. Defendants . . . 5

III. Defendants' Unlawful Scheme . . . 6
- A. U.S. Benefits Calls Consumers in Need of Health Insurance . . . 6
- B. U.S. Benefits Representatives Make Material Misrepresentations that U.S. Benefits Sells Major Medical Health Insurance . . . 7
- C. U.S. Benefits Places Unwanted Phone Calls to Consumers . . . 13
  - 1. Required Oral Disclosure Violation . . . 13
  - 2. Prerecorded Messages Violation . . . 14
  - 3. Do Not Call Violation . . . 14
- D. U.S. Benefits' Business Practices Have Drawn Scrutiny from Local Media and the Tennessee Insurance Regulator . . . 14
- E. U.S. Benefits' Business Practices Have Caused Substantial Injury to Consumers . . . 16

IV. Timothy Thomas's Role in the Scheme . . . 16

V. Kennan Dozier's Role in the Scheme . . . 17

VI. Argument . . . 17
- A. This Court Has the Authority to Grant the Requested Relief . . . 17
- B. Defendants' Activities Warrant Issuance of a Temporary Restraining Order . . . 19
  - 1. The Commission Will Likely Succeed on the Merits Because Defendants Have Violated the FTC Act and TSR . . . 21
    - a. Liability for FTC Act Violation . . . 21
    - b. Liability for TSR Violations . . . 22
      - i. Do Not Call Violations . . . 22
      - ii. Misrepresenting Material Information . . . 23
      - iii. Failing to Make Required Oral Disclosures . . . 23
      - iv. Prerecorded Messages Violations . . . 23
  - 2. The State of Tennessee Will Also Likely Succeed on the Merits Because Defendants Have Violated the TCPA . . . 24
  - 3. Defendant Timothy Thomas Is Personally Liable for U.S. Benefits' Violations of the FTC Act, TSR, and TCPA . . . 24
    - a. Injunctive Relief . . . 24
    - b. Monetary Relief . . . 25

4. Relief Defendants Kennan Dozier Has No Legitimate Claim to U.S. Benefits' and Timothy Thomas's Ill-Gotten Gains 26
5. The Balance of Equities Calls for the Proposed Relief 27
C. The Proposed Temporary Restraining Order Should Be Entered *Ex Parte* 28
D. The Proposed Relief Is Necessary to Prevent the Likely Dissipation of Assets and Preserve Funds for the Possibility of Effective Final Relief for Consumers 28
1. The Court Should Freeze Defendants' Assets 29
2. The Court Should Appoint a Temporary Receiver 30
3. The Court Should Order Expedited Discovery and Prompt Access to Records 31

V. Conclusion 32

Table of Authorities

Case Law

Brungard v. Caprice Records, Inc., 608 S.W.2d 585 (Tenn. App. Ct. 1980) 24

Carroll v. Princess Anne, 393 U.S. 175 (1968) 28

CFTC v. Kimberlynn Creek Ranch, Inc., 276 F.3d 187 (4th Cir. 2002) 26

FTC v. 9107-4021 Quebec, Inc., No. 1:08CV1051-Nugent (N.D. Ohio April 25, 2008) 18

FTC v. 6554962 Canada, Inc., No. 08C-2309-Aspen (N.D. Ill. April 23, 2008) 18

FTC v. Affordable Media, LLC., 179 F.3d 1228 (9th Cir. 1999) 30

FTC v. Ameridebt, 343 F. Supp. 2d 451 (D. Md. 2004) 26

FTC v. Amy Travel Serv., Inc., 875 F.2d 564 (7th Cir. 1989) 18, 25, 29

FTC v. Bay Area Bus. Council, 423 F.3d 627 (7th Cir. 2005) 21

FTC v. Dixie Fin. Co., 695 F.2d 926 (5th Cir. 1983) 2

FTC v. Federal Data Service, Inc., No. 00-6462-CIV-Ferguson (S.D. Fla. April, 11, 2000) . . 19

FTC v. Five-Star Auto Club, 97 F. Supp 2d. 502 (S.D.N.Y. 2000) 21

FTC v. Freecom Commc'ns., Inc., 401 F.3d 1192 (10th Cir. 2005) 24

FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001) 20

FTC v. H.N. Singer, Inc., 668 F.2d 1107 (9th Cir. 1982) 18, 29

FTC v. Int'l Computer Concepts, Inc., No. 5:94CV1678, 1994 WL 730144 (N.D. Ohio Oct. 24, 1994) 19

FTC v. Laser Express, Ltd., No. 3-99-1135-Nixon (M.D. Tenn. Dec. 8, 1999) 19, 30

FTC v. Nat'l Testing Servs., LLC, No. 3:05-0613, 2005 WL 2000634 (M.D. Tenn. Aug. 18, 2005). 21

FTC v. NHS Systems, Inc., No. 08-cv-2215 (E.D. Pa. July 9, 2009) 18

FTC v. Platinum Health Plus, LLC, No. 05-22465 (S.D. Fla. Sept. 16, 2005) 2

FTC v. Publ'g Clearing House, Inc., 104 F.3d 1168 (9th Cir. 1998) 24, 25

FTC v. Renaissance Fine Arts, Ltd., No. 1:94CV0157, 1994 WL 543048 (N.D. Ohio Sept. 1, 1994). 18, 21

FTC v. Skybiz.com, 57 Fed. Appx. 374 (10th Cir. 2003) 30

FTC v. Stewart Fin. Co. Holdings, Inc., No 1:03-CV-2648-JTC (N.D. Ga. Nov. 3, 2005) 2

FTC v. STF Group, Inc., No. 03C-0977-Zagel (N.D. Ill. Feb. 10, 2003) 19

FTC v. Tashman, 318 F.3d 1273 (11th Cir. 2003) 21

FTC v. Thomsen-King & Co., 109 F.2d 516 (7th Cir. 1940) 27

FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431 (11th Cir. 1984) 18

FTC v Vaughn Mgmt., Inc., No. 3-89-0565-Higgins (M.D. Tenn. July 12, 1989) 19

FTC v. World Travel Vacation Brokers, 861 F.2d 1020 (7th Cir. 1988) 18, 19, 20, 27, 29

FTC v. World Wide Factors, Ltd., 882 F.2d 344 (9th Cir. 1989) 27

In re Vuitton et Fils, 606 F.2d 1 (2d Cir. 1979) 28

Kraft, Inc. v. FTC, 970 F.2d 311, 322 (7th Cir. 1992) 21

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 29

Rollins v. Metro. Life Ins. Co., 863 F.2d 1346 (7th Cir. 1988) 26

SEC v. Antar, 831 F. Supp. 380 (D.N.J. 1993) 26

SEC v. First Fin. Group, 645 F.2d 429 (5th Cir. 1981) 30

SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082 (2d Cir. 1972) 30

State v. Cross Country Bank, Inc., 703 N.W.2d 562 (Minn. Ct. App. 2005) 20

State v. Blue Hippo Funding, LLC, et al., No. CH-08-1979-1, Ch. Ct. of Tenn., 30th Jud. Dist., Shelby County, Part I (Feb. 4, 2009) 21

State v. Continental Distributing Co., No. 74892, Ch. Ct. of Tenn., 11th Jud. Dist., Hamilton County, Part I (Sept.1, 1994) 21

State v. Expyfi, LLC, *et al*., No. 07-3365, Cir. Ct. of Tenn., 20th Jud. Dist., Davidson County, Div. III (Nov. 21, 2007) 21

State v. Froehlig, et al., No. 33293, Cir. Ct. of Tenn., 21st Jud. Dist., Williamson County, Div. II (Mar. 2, 2007) 21

State v. Jones, et al., No. 08C3494, Cir. Ct. of Tenn., 20th Jud. Dist., Davidson County, Div. III (Sept. 18, 2009) 20

State v. Olomoshua, et al., No. 06C2912, Cir. Ct. of Tenn., 20th Jud. Dist., Davidson County, Div. III (Nov. 16, 2006) 21

State v. Patrick & Patrick, LLC, et al., No. CH-08-2130-2, Ch. Ct. of Tenn., 30th Jud. Dist.,

Shelby County, Part II (Jan. 13, 2009) 21

State v. Payton Abernathy, et al., No. 169384, Chan. Ct. of Tenn., 6th Jud. Dist.,
Knox County, Div. III (May 3, 2007) 21

State v. Sneed, No. 09C2025, Cir. Ct. of Tenn., 20th Jud. Dist.,
Davidson County, Div. V (July 17, 2009) 20

State v. Virula, No. 08C651, Cir. Ct. of Tenn., 20th Jud. Dist.,
Davidson County, Div. I (March18, 2008) 20

The Broadcast Team v. FTC, 429 F. Supp. 2d 1292 (M.D. Fla. 2006) 22

Tennessee Real Estate Comm'n v. Hamilton, No. 01A01-9707-CH-00320, 1998 WL 272788
(Tenn. Ct. App. May 22, 1998) 21

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982). 2

U.S. v. Diapulse Corp. of Am., 457 F.2d 25 (2d Cir. 1972). 27

Statutory Law

15 U.S.C. §§ 41-58 . . . . 4, 17

15 U.S.C. § 45(a) 4, 17

15 U.S.C. § 53(b) 18

16 C.F.R. § 310.2(bb). 22

16 C.F.R. § 310.3. 22

16 C.F.R. § 310.3(a)(2)(iii). 23

16 C.F.R. § 310.4(a). 22

16 C.F.R. § 310.4(b)(1)(iii)(B)(i) and (ii). 22

16 C.F.R. § 310.4(b)(1)(v)(A). 23

16 C.F.R. § 310.4(b)(1)(v)(B)(ii). 23

Tenn. Code Ann. § 47-18-101, *et seq*. 5

Tenn. Code Ann. § 47-18-108(a)(1). 19

Tenn. Code Ann. § 47-18-108(4). 19

Legislative History

S. Rep. No. 103-130 (1994) 28

Federal Rules of Civil Procedure

Fed. R. Civ. P. 65(b) 28

Fed. R. Civ. P. 1, 26(d), 34(b) 31

Tenn. R. Civ. P. 65. 19

I. Summary

Plaintiffs Federal Trade Commission and the State of Tennessee ask this Court to bring an immediate stop to a deceptive telemarketing scheme that sells bogus health insurance to consumers, including those with pre-existing medical conditions and those who have lost their employer-sponsored health insurance along with their jobs. Defendants, United States Benefits ("U.S. Benefits") and Timothy Thomas, have fleeced consumers in dire need of health insurance out of millions of dollars. In addition, they have harassed consumers with a multitude of unwanted phone calls that violate federal and state telemarketing laws. Thomas's wife, Relief Defendant Kennan Dozier, has received a substantial portion of the ill-gotten proceeds from U.S. Benefits' and Thomas's unlawful business practices. As a result, she has been unjustly enriched, and should have to disgorge her ill-gotten gains.

U.S. Benefits representatives call consumers who are looking to buy comprehensive health insurance that will pay for a substantial portion of the consumers' healthcare expenses. Using one of U.S. Benefits' assorted trade names, the representatives offer to sell the consumers the insurance for a one-time enrollment fee ranging from $100 to $500 and recurring monthly fees of $300 to $1,300. During the sales pitch, the representatives falsely claim, among other things, that insurance is provided by major insurance companies; that the monthly payments are "premiums"; and that the insurance provides broad medical coverage, including the costs of prescription drugs and dental and vision care. The representatives emphasize that the insurance is even available to consumers with pre-existing medical conditions and pressure consumers to purchase immediately. Relying on these representations, consumers purchase the so-called insurance.

After giving their credit card or bank account information to the Defendants, consumers receive written materials from benefits associations, informing them that they have purchased a discount medical benefits plan. The written materials disclose that the consumers have not purchased major medical health insurance. Instead, the company sold them memberships to benefits associations that offer nothing more than access to various, limited healthcare and nonhealthcare-related discounts of little to no value.[1] Unlike health insurance, the memberships do not pay for a significant share of the consumers healthcare expenses in return for the consumers' substantial payments to the benefits associations. When consumers have attempted to cancel the memberships and get refunds, U.S. Benefits has often ignored their pleas.

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[1] The McCarran-Ferguson Act generally prohibits the Commission from regulating activities that constitute "the business of insurance." *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). Under *Pireno*, an activity represents the "business of insurance" if: (1) it has the effect of transferring or spreading a policyholder's risk; (2) it is an integral part of the policy relationship between the insurer and the insured; and (3) it is limited to entities within the insurance industry. *Id.* at 129. Here, although Defendants are licensed to sell insurance in Tennessee, and the memberships allegedly offer limited death, dismemberment, and accident insurance benefits as an incidental part of the memberships' overall benefits (*see* Cooper Decl., Ex. 10, ¶¶ 3-6; *infra* note 32), Defendants' sale of their particular benefits association memberships does not constitute "the business of insurance" because the sale of such memberships does not meet the three *Pireno* criteria. *Cf. FTC v. Dixie Fin. Co.*, 695 F.2d 926, 930 (5th Cir. 1983) (upholding FTC jurisdiction over finance companies characterizing an insurance sale as a precondition to a credit extension); *FTC v. Stewart Fin. Co. Holdings, Inc.*, No 1:03-CV-2648-JTC (N.D. Ga. Nov. 3, 2005), *available at* http://www.ftc.gov/os/caselist/ca103cv2648.shtm (entering stipulated final judgment against companies selling accidental death and dismemberment insurance and car club memberships with consumer loans); *FTC v. Platinum Health Plus, LLC*, No. 05-22465 (S.D. Fla. Sept. 16, 2005), *available at* http://www.ftc.gov/os/caselist/0522465/0522465.shtm (entering consent decree against marketers of a medical discount program including insurance policies covering accidental death and dismemberment, and hospitalization due to accident). Moreover, Defendants have admitted to Tennessee insurance regulators that they do not sell insurance. *See infra* Section III.D. Finally, this case serves only to redress Defendants' deceptive and abusive sales acts or practices rather than regulate any purported insurance relationship. Thus, the Commission has subject matter jurisdiction over Defendants.

Along with deceiving consumers, U.S. Benefits has placed many abusive telemarketing calls, including calls to telephone numbers listed on the National Do Not Call Registry and calls containing prerecorded messages that violate the Telemarketing Sales Rule.

In early 2009, the Tennessee Department of Commerce and Insurance ("TDCI") began an investigation of Defendants' illegal business practices after Nashville media reported on the scheme. During the investigation, Defendant Thomas and numerous U.S. Benefits employees admitted that U.S. Benefits does not sell health insurance. The employees further admitted, among other things, that consumers were often lied to, and the employees described the company's sales pitch as "TAFT" – "Tell them Any F*cking Thing." But despite the TDCI's investigation, Defendants have not abated their unlawful activities; they have simply moved to a new location and resumed conducting business under a new trade name. In fact, a former U.S. Benefits employee who left the company just a few months ago has stated that U.S. Benefits continues its illegal business practices to this day.

Defendants' scheme has cost consumer dearly. In 2007 and 2008 alone, according to records that Thomas provided to the TDCI, U.S. Benefits made a total of approximately $4.5 million in revenue from the sale of benefits association memberships. During that time, Thomas transferred more than three million dollars of that money to his wife, Kennan Dozier, even though she does not participate in U.S. Benefits' business activities. Nearly 200 consumer complaints have been filed against the company concerning its illegal telemarketing practices. And the Better Business Bureau gave U.S. Benefits an "F-rating." The full extent of consumer injury remains untold.

Defendants' reaction to the TDCI investigation – changing their business name and

moving locations – and their transfer of funds to relief defendant Dozier call for immediate *ex parte* relief. As explained in the Commission's Rule 65(b) certification filed in conjunction with this motion, there is a significant risk that the Defendants and Relief Defendant will secrete assets, destroy documents or evade service if given notice of this motion and the requested temporary restraining order. To guard against these risks, which would severely impact the Court's ability to provide effective relief at the conclusion of this case, the Commission and State of Tenneessee request that the *ex parte* temporary restraining order, among other things, freeze Defendants' and the Relief Defendant's assets, appoint a receiver over the corporate defendant, authorize the Commission and State of Tennessee immediate access to Defendants' business premises, provide permit expedited asset discovery, and order the Defendants and Relief Defendants to preserve evidence.[2]

II. The Parties

A. Plaintiffs

Plaintiff FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The FTC is charged, among other things, with enforcement of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair and deceptive acts or practices in or affecting commerce. The FTC is also charged with enforcement of the

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[2] In support of their motion for a TRO and order to show cause, the Commission and State of Tennessee are filing 22 exhibits, which include, among other things, declarations from FTC investigator Martha Vera; Tennessee Department of Commerce and Insurance investigator Clayton Cooper; Dennis Paul Zebell, a former U.S. Benefits employee; and 10 consumers. References to declarations in this Memorandum include the declarant's last name, and the declaration's exhibit number and relevant paragraph number(s) [*e.g.*, Vera Decl., Ex. 1, ¶ 1]. References to exhibits other than declarations include the exhibit number and relevant page number(s) [*e.g.*, Ex. 19 at 1]. Pursuant to FTC policy, personal information has been redacted from the FTC's exhibits.

Telemarketing Act. Pursuant to the Telemarketing Act, the FTC promulgated and enforces the Telemarketing Sales Rule ("TSR"), which prohibits deceptive and abusive telemarketing acts or practices.

Plaintiff State of Tennessee is one of the fifty sovereign states of the United States. Robert E. Cooper, Jr., is the Attorney General and Reporter of the State of Tennessee ("Attorney General"), and has been duly appointed to serve as Attorney General by the Tennessee Supreme Court. The Attorney General brings this action in his official capacity and at the request of Mary Clement, the Director of the Division of Consumer Affairs of the Department of Commerce and Insurance, under the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101, *et seq.*

B. Defendants

Defendant U.S. Benefits is a limited liability company with its principal place of business at 1283 Murfreesboro Road, Suite 420, Nashville, TN 37217.[3] It is licensed to sell insurance in Tennessee.[4]

Defendant Timothy Thomas is the owner and chief executive officer of U.S. Benefits.[5] In that capacity, he has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of U.S. Benefits. He is also licensed to sell insurance in Tennessee.[6]

Relief Defendant Kennan Dozier is listed in U.S. Benefits' articles of organization as an

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[3] Zebell Decl., Ex. 11, ¶ 3. In early 2009, U.S. Benefits was operating from 301 Plus Park Boulevard, Suite 500, Nashville, Tennessee 37217 under the name United Benefits of America, LLC. Cooper Decl., Ex. 10, ¶¶ 3, 7; Ex. 1 at 2.

[4] Cooper Decl., Ex. 10, ¶¶ 3, 5.

[5] Ex. 1 at 2; Ex. 3 at 3; Cooper Decl., Ex. 10, ¶ 11.

[6] Cooper Decl., Ex. 10, ¶ 4.

owner, managing officer, and registered agent of U.S. Benefits.[7] She has received ill-gotten funds that are the proceeds of U.S. Benefits' unlawful acts or practices and has no legitimate claim to those funds. Dozier, too, is licensed to sell insurance in Tennessee.[8]

III. Defendants' Unlawful Scheme

A. U.S. Benefits Calls Consumers in Need of Health Insurance.

U.S. Benefits has called consumers whose contact information it has purchased from websites to which the consumers submitted requests for information on comprehensive health insurance plans or "major medical health insurance."[9] Major medical health insurance generally involves an arrangement between an insurance company and a consumer in which the insurance company agrees to pay a substantial portion of the healthcare expenses that the consumer might incur in exchange for payment from the consumer.[10] Many of the consumers whom U.S. Benefits calls do not have health insurance because they have lost their jobs or have been

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[7] Ex. 2 at 1, 2.

[8] Cooper Decl., Ex. 10, ¶ 6.

[9] Cooper Decl., Ex. 10, ¶ 19; Frappier Decl., Ex. 13, ¶¶ 3, 4; Gordinier Decl., Ex. 14, ¶¶ 2-5; Honzik Decl., Ex. 16, ¶¶ 2, 3; Shinen Decl., Ex. 18, ¶¶ 2, 3; Werts Decl., Ex. 21, ¶¶ 3, 4; Yancey Decl., Ex. 22, ¶¶ 2, 3. For example, a former U.S. Benefits employee said that U.S. Benefits has used consumer contact information that the company obtained from InsureMe.com. Zebell Decl., Ex. 11, ¶ 14. Consumers seeking information on health insurance provide their contact information to such websites with the expectation of obtaining information on major health insurance plans. Ex. 6 at 1, 2. The website does not, however, clearly and conspicuously disclose (1) that consumers will receive phone calls in response to their inquiries, (2) how many calls consumers will receive, or (3) what companies will call the consumers. *Id.* at 3-10.

[10] *See* ROBERT E. KEETON, INSURANCE LAW, § 1.2(a) (West Publs'g 1971); GEORGE J. COUCH, CYCLOPEDIA OF INSURANCE LAW, §§ 1:2; 1:3 (1984).

diagnosed with pre-existing medical conditions.[11]

B. U.S. Benefits Representatives Make Material Misrepresentations that U.S. Benefits Sells Major Medical Health Insurance.

During the calls, U.S. Benefits representatives tell consumers that they are calling from U.S. Benefits or one of the company's other trade names and state that the call is in response to the consumers' online requests for health insurance information.[12] They often ask the consumers for personal background information, such as the consumers' ages and occupations; whether the consumers have health insurance; and if they do not have insurance, the type of insurance they are looking for.[13]

Representatives claim that for a one-time enrollment fee ranging from approximately $100 to $500 and a monthly payment ranging from approximately $300 to $1,300, U.S. Benefits can offer an affordable insurance plan that provides wide-ranging medical coverage, including

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[11] Cooper Decl., Ex. 10, ¶ 34; Honzik Decl., Ex. 16, ¶ 3; Shinen Decl., Ex. 18, ¶ 3; Thuston Decl., Ex. 19, ¶ 3; Werts Decl., Ex. 21, ¶¶ 2, 4; Yancey Decl., Ex. 22, ¶ 2. On one of its websites, U.S. Benefits claimed that it "insure[s] the uninsured and many of the uninsurable." Ex. 3 at 5.

[12] Frappier Decl., Ex. 13, ¶ 4; Gordinier Decl., Ex. 14, ¶ 5; Grossman Decl., Ex. 15, ¶ 3; Honzik Decl., Ex. 16, ¶ 3; Riester Decl., Ex. 17, ¶ 3; Shinen Decl., Ex. 18, ¶ 3; Thuston Decl., Ex. 19, ¶ 3; Vazquez Decl., Ex. 20, ¶ 3; Werts Decl., Ex. 21, ¶ 4; Yancey Decl., Ex. 22, ¶ 3. Defendant Thomas told the TDCI during its investigation that since 2004, the company has had various names, including Health Care America, National Benefits of America, United Benefits of America, LLC, and Insurance Specialty Group. Cooper Decl., Ex. 10, ¶¶ 11, 20. According to a former employee, the company is currently using the name United States Health during sales calls. Zebell Decl., Ex. 11, ¶ 4.

[13] Cooper Decl., Ex. 10, ¶ 23; Gordinier Decl., Ex. 14, ¶ 5; Honzik Decl., Ex. 16, ¶ 4; Werts Decl., Ex. 21, ¶ 4; Yancey Decl., Ex. 22, ¶ 3.

prescription drug discounts and dental and vision care.[14] One consumer reported, for example, that a representative gave the following description of the plan:

> IAB Standard A Medical Coverage with no deductible and no waiting period except for surgery, which had a 30-day waiting period;
>
> Dental coverage for $1,000, which included two annual cleanings at no cost, 20% co-pay for other services such as fillings and a 50% co-pay on crowns;
>
> Vision benefits;
>
> Chiropractic services;
>
> Critical illness coverage of $10,000 for major illnesses;
>
> Accident medical coverage of $25,000 to pay for emergency room and medical care in case of an accident . . . .[15]

Representatives describe the plan as "insurance" and refer to the monthly payments that consumers must make as "premiums."[16] In addition, they claim that U.S. Benefits sells the plan on behalf of insurance companies, such as Blue Cross/Blue Shield.[17] They further state that the plan is available immediately even to people with pre-existing medical conditions.[18] And they

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[14] Frappier Decl., Ex. 13, ¶¶ 4, 6; Gordinier Decl., Ex. 14, ¶¶ 6-8; Honzik Decl., Ex. 16, ¶¶ 5-7; Shinen Decl., Ex. 18, ¶ 4; Thuston Decl., Ex. 19, ¶ 3; Werts Decl., Ex. 21, ¶ 5.

[15] Honzik Decl., Ex. 16, ¶ 6.

[16] Cooper Decl., Ex. 10, ¶¶ 44, 50a., 50c.; Gordinier Decl., Ex. 14, ¶ 9; Honzik Decl., Ex. 16, ¶¶ 5, 12; Shinen Decl., Ex. 18, ¶ 3; Thuston Decl., Ex. 19, ¶¶ 3, 7; Werts Decl., Ex. 21, ¶ 5.

[17] Cooper Decl., Ex. 10, ¶¶ 50c., 52c.; Gordinier Decl., Ex. 14, ¶ 7; Honzik Decl., Ex. 16, ¶ 5.

[18] Cooper Decl., Ex. 10, ¶¶ 39, 50e.; Gordinier Decl., Ex. 14, ¶ 6; Honzik Decl., Ex. 16, ¶ 5; Thuston Decl., Ex. 19, ¶ 3; Werts Decl., Ex. 21, ¶ 5.

even instruct consumers with health insurance to cancel their existing health insurance and replace it with U.S. Benefits' plan.[19] Representatives urge consumers to purchase the plan immediately because it is available only for a limited time.[20] If consumers ask for written information about the plan before buying it, representatives refuse and state that they are not allowed to provide such information.[21] One consumer described a representative's tone as "pushy."[22] Once consumers express interest in buying the plan, representatives transfer the call to other U.S. Benefits representatives who arrange the consumers' payment for the plan, and guide the consumers through a verification process that consists of a series of recorded yes-or-no questions to confirm that the consumers are interested in purchasing the plan.[23]

Representatives mislead consumers during the verification recording.[24] For example, a representative told one consumer during the recording to answer "yes" to all the verification questions "to avoid complications in completing the automated verification."[25] When the consumer asked if she was in fact buying health insurance, the representative replied that the plan

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[19] Cooper Decl., Ex. 10, ¶¶ 45, 52c.; Honzik Decl., Ex. 16, ¶ 9.

[20] Cooper Decl., Ex. 10, ¶¶ 30, 31, 39, 40, 47; Thuston Decl., Ex. 19, ¶ 3; Werts Decl., Ex. 21, ¶ 5.

[21] Cooper Decl., Ex. 10, ¶ 43.

[22] Werts Decl., Ex. 21, ¶ 5.

[23] Cooper Decl., Ex. 10, ¶¶ 25, 26, 29; Dalton Decl., Ex. 12, ¶¶ 6, 7; Frappier Decl., Ex. 13, ¶ 7; Gordinier Decl., Ex. 14, ¶ 10; Honzik Decl., Ex. 16, ¶¶ 8, 10; Thuston Decl., Ex. 19, ¶¶ 4, 5; Werts Decl., Ex. 21, ¶¶ 6, 7.

[24] Cooper Decl., Ex. 10, ¶¶ 50f., 50g.; Dalton Decl., Ex. 12, ¶¶ 6, 7; Gordinier Decl., Ex. 14, ¶ 10; Honzik Decl., Ex. 16, ¶¶ 11, 12; Thuston Decl., Ex. 19, ¶¶ 6, 7, 9.

[25] Honzik Decl., Ex. 16, ¶ 11.

was an "aggregated health insurance package that included major medical insurance."[26]

After U.S. Benefits obtains the consumers' billing information, consumers are unexpectedly charged by benefits associations, which send the consumers written information about the plan.[27] The information typically consists of membership booklets, membership identification cards, prescription drug discount cards, and association contact information.[28] When consumers carefully review the information, many of them discover that U.S. Benefits sold them benefits association memberships, instead of major medical health insurance, due to multiple statements in the information indicating that the memberships are not major medical health insurance.[29]

The memberships, in contrast to major medical health insurance, merely purport to provide consumers with access to various pre-negotiated discounts on healthcare and nonhealthcare-related services and products, death benefits, dismemberment benefits, limited accident benefits, identity theft protection, and legal assistance.[30] The discounts purportedly

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[26] *Id.* at 12.

[27] Dalton Decl., Ex. 12, ¶ 8; Frappier Decl., Ex. 13, ¶¶ 9, 10; Gordinier Decl., Ex. 14, ¶¶ 11, 13; Honzik Decl., Ex. 16, ¶ 18; Shinen Decl., Ex. 18, ¶ 6; Thuston Decl., Ex. 19, ¶¶ 8, 9; Werts Decl., Ex. 21, ¶ 8; Yancey Decl., Ex. 22, ¶¶ 6-8.

[28] Rodden Decl., Ex. 9 at 18-137; Frappier Decl., Ex. 13 at 5; Yancey Decl., Ex. 22 at 7.

[29] Ex. 9 at 22, 23, 60, 77, 79, 84, 87.

[30] Ex. 5 at 7-61. The death and dismemberment benefits and the limited accident benefits are allegedly offered through limited group insurance policies between the benefits associations and insurance companies that purportedly cover certain medical expenses that arise from certain events provided in the policies. *Id.* at 10, 15-18; Ex. 9 at 90. As Defendant Thomas and several U.S. Benefits employees admitted to the TDCI, these benefits association memberships are not insurance, and the purported insured benefits are merely an incidental part of the benefits association memberships. Cooper Decl., Ex. 10, ¶¶ 12, 14. And the policies are not major

apply to doctor's office visits and prescription drugs, through a network of providers with whom the associations have contracted.[31] The website for one benefits association contains numerous statements indicating that the memberships are not health insurance.[32] For example, the website says:

> This plan is NOT insurance. This plan does not make payments directly to the providers of medical services. The plan member is obligated to pay for all healthcare services but will receive a discount from those healthcare providers who have contracted with the discount plan organization. This plan provides discounts at certain healthcare providers for medical services.[33]

A website for one of the provider networks used by the benefits association makes similar claims: the website states that the network "is not an insurance company";[34] and it states further that "CONSUMER CARD DISCOUNT PROGRAMS ARE NOT INSURANCE NOR ARE THEY HEALTH PLANS."[35] (emphasis in original). Information on the website additionally indicates that the network, like the benefits association, is also not responsible for paying healthcare providers for consumers' medical expenses.[36] Moreover, although the website contains a list of providers who allegedly participate in the network, the list includes providers

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medical health insurance. Ex. 9 at 87.

[31] Ex. 5 at 2, 7, 43.

[32] *Id.* at 1-3, 10, 43, 54, 57-59.

[33] *Id.* at 2.

[34] Ex. 7 at 1.

[35] *Id.* at 9.

[36] *Id.* at 16 ("[The network]" does not have access to [patient] eligibility/benefit information and is not responsible for payment of claims.").

who do not, in fact, participate.[37]

Consequently, consumers have been unable to use the memberships like major medical health insurance to pay for their medical expenses, or receive significant discounts or savings on goods or services.[38] For instance, U.S. Benefits contacted one consumer who was searching for major medical health insurance for her and her family, including her son who was unable to get health insurance due to a pre-existing medical condition.[39] The consumer asked the U.S. Benefits representative during the sales pitch whether her son's hospital and doctor's office would accept the U.S. Benefit plan to pay for her and her family's medical expenses.[40] The representative told the consumer that those specific providers would accept the plan.[41] Relying on this representation, the consumer purchased the plan.[42] But when the consumer tried to use the plan at the providers, the providers would not accept the memberships.[43]

Another consumer who unsuspectingly purchased the memberships believing they were receiving comprehensive health insurance cancelled her existing health insurance and attempted to use the memberships to pay for surgery and medical tests based on her conversation with U.S.

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[37] Vera Decl., Ex. 8, ¶¶ 9, 10.

[38] Frappier Decl., Ex. 13, ¶¶ 11-13; Shinen Decl., Ex. 18, ¶¶ 8-10; Werts Decl., Ex. 21, ¶ 9; Yancey Decl., Ex. 22, ¶¶ 9-11.

[39] Werts Decl., Ex. 21, ¶ 4.

[40] *Id.* at ¶¶ 4, 5.

[41] *Id.* at ¶ 5.

[42] *Id.* at ¶ 6.

[43] *Id.* at ¶ 9.

Benefits representatives.[44] In both instances, the providers did not accept the memberships to pay for the services.[45] As a result, the consumer was unable to get actual health insurance and has not been able to get the medical assistance she needs because she cannot afford it.[46]

Ultimately, when consumers have contacted U.S. Benefits to complain, cancel their memberships, and seek refunds, the company has routinely ignored their requests.[47] Some consumers have received refunds after directly requesting them from the benefits associations or seeking the assistance of the Better Business Bureau or law enforcement agencies.[48]

C. U.S. Benefits Places Unwanted Phone Calls to Consumers.

1. Required Oral Disclosure Violation

Since December 1, 2008, when the Telemarketing Sales Rule ("TSR") was amended to require certain disclosures by telemarketers using prerecorded calls, U.S. Benefits has placed numerous prerecorded calls that fail to promptly disclose, in a clear and conspicuous manner, that the company is calling to sell benefits association memberships.[49] Indeed, because

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[44] Frappier Decl., Ex. 13, ¶¶ 8, 11, 12.

[45] *Id.* at ¶¶ 11, 12.

[46] *Id.* at ¶ 18.

[47] Frappier Decl., Ex. 13, ¶ 14, ; Gordinier Decl., Ex. 14, ¶ 15; Honzik Decl., Ex. 16, ¶¶ 14, 16; Shinen Decl., Ex. 18, ¶ 12; Thuston Decl., Ex. 19, ¶ 9; Werts Decl., Ex. 21, ¶ 10. Defendant Thomas told the TDCI that representatives are instructed to have no further contact with consumers after the sale. Cooper Decl., Ex. 10, ¶ 27.

[48] Frappier Decl., Ex. 13, ¶ 17; Honzik Decl., Ex. 16, ¶ 21; Shinen Decl., Ex. 18, ¶¶ 14-18; Thuston Decl., Ex. 19, ¶ 12; Werts Decl., Ex. 21, ¶ 10; Yancey Decl., Ex. 22, ¶ 14. Some consumers have received only a partial refund or no refund at all. Frappier Decl., Ex. 13, ¶ 17; Shinen Decl., Ex. 18, ¶ 18.

[49] Grossman Decl., Ex. 15, ¶ 3; Riester Decl., Ex. 17, ¶ 3; Vasquez Decl., Ex. 20, ¶ 3.

consumers provided their contact information on websites offering health insurance, consumers reasonably conclude that the prerecorded call is from an insurance company. Furthermore, the messages do not promptly disclose, in a clear and conspicuous manner, the names of the benefits associations on whose behalf U.S. Benefits is calling. One consumer, for example, received the following message:

> This call is from United States Health. You recently went online requesting information regarding health care benefits. Please press one to be connected to a representative that can share with you a new and exciting plan in your area.
>
> If you have already taken care of this need, please press two to be removed from our system, or you may call 1-800-303-3140.[50]

2. Prerecorded Messages Violation

As explained below, since September 1, 2009, the TSR has prohibited telemarketers from using prerecorded messages unless they have obtained an express, written agreement that evidences the willingness of the recipient to receive the calls by or on behalf of a specific seller. U.S. Benefits has blatantly violated this law.[51]

3. Do Not Call Violation

Since at least 2007, U.S. Benefits has placed numerous calls to consumers who have their phone numbers listed on the National Do Not Call Registry, without first establishing a business relationship with the consumers, or obtaining from them prior written authorization to place the

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[50] Rodden Decl., Ex. 9 at 142.

[51] Rodden Decl., Ex. 9, ¶ 5; Grossman Decl., Ex. 15, ¶ 3; Riester Decl., Ex. 17, ¶¶ 3, 4; Vasquez Decl., Ex. 20, ¶¶ 3, 5.

calls.[52] U.S. Benefits has even disregarded do-not-call requests that it received from consumers.[53]

D. U.S. Benefits' Business Practices Have Drawn Scrutiny from Local Media and the Tennessee Insurance Regulator.

In early 2009, U.S. Benefits' business practices has received the attention of Nashville media.[54] In one media exposé, a former U.S. Benefits employee and managers from the company described the sales pitch to an undercover reporter as "TAFT" – "Tell them Any F*cking Thing."[55] In the news report, U.S. Benefits managers explained "TAFT" further:

> [T]ell [consumers] today's [sic] the last day of open enrollment. We've only got so many approvals to get. . . .
>
> . . .
>
> We can't let [consumers] take an hour. We can't let them take a day. They buy now, or they pretty much come down with cancer by tomorrow. This is a do-or-die kind of thing.
>
> . . .
>
> We've done customers wrong. . .[w]e lose about 30 percent of our business in the first 30 days.[56]

Around time of the media coverage, the TDCI commenced an investigation of Defendants and their business practices.[57] During the investigation, Defendant Thomas and several U.S.

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[52] Rodden Decl., Ex. 9, ¶ 5; Grossman Decl., Ex. 15, ¶¶ 2, 3; Riester Decl., Ex. 17, ¶¶ 4, 5; Vasquez Decl., Ex. 20, ¶¶ 2, 4-6. Some consumers have received repeated calls from the company, despite requesting not to be called. Grossman Decl., Ex. 15, ¶ 3; Riester Decl., Ex. 17, ¶ 5; Vasquez Decl., Ex. 20, ¶¶ 2, 5, 6.

[53] Cooper Decl., Ex. 10, ¶ 53.

[54] Rodden Decl., Ex. 9, ¶ 8a.-e.

[55] *Id.* at 145.

[56] *Id.*

[57] Cooper Decl., Ex. 10, ¶ 2.

Benefits employees admitted that U.S. Benefits does not sell health insurance.[58] Furthermore, the employees admitted that consumers were often lied to and described U.S. Benefits' sales pitch to consumers as "TAFT."[59] In the midst of the investigation and continued media coverage, U.S. Benefits ceased operations temporarily, moved to another location in Nashville, and resumed business under a new trade name.[60]

E. U.S. Benefits' Business Practices Have Caused Substantial Injury to Consumers.

U.S. Benefits and Thomas have bilked consumers out of millions of dollars. For example, according to financial records they provided to the TDCI, U.S. Benefits and Thomas collected approximately $4,567,900 in revenue from the sale of benefits association memberships in 2007 and 2008.[61] Consumers have undoubtedly paid even more money to the benefits associations as a result of Defendants' lies. Almost 200 consumer complaints have been filed against the company concerning its deceptive sales practices and illegal phone calls.[62] And the Better Business Bureau gave U.S. Benefits an "F-rating."[63] According to a former U.S. Benefits

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[58] *Id.* at ¶¶ 12, 14.

[59] *Id.* at ¶¶ 39, 40, 42, 44, 46-48, 50a.-f., 54. Zebell Decl., Ex. 11, ¶¶ 21-23.

[60] Cooper Decl., Ex. 10, ¶ 3.

[61] Cooper Decl., Ex. 10, ¶¶ 15, 17.

[62] Rodden Decl., Ex. 9, ¶ 5. Consumers have also filed many similar complaints against benefits associations for whom U.S. Benefits has sold memberships and a provider network used by the associations. *Id.* at ¶ 6.

[63] Vera Decl., Ex. 8, ¶ 5.

employee who recently left the company, U.S. Benefits' illegal activities are ongoing.[64]

IV. Timothy Thomas's Role in the Scheme

Timothy Thomas admitted to the TDCI that he has personally participated in (1) entering into marketing agreements with benefits associations to sell their memberships; (2) creating the membership packages to be sold by U.S. Benefits representatives; (3) purchasing customer leads from insurance information websites; (4) receiving payments from benefits associations for U.S. Benefits' sale of their memberships; (5) participating in hiring, paying, and firing representatives; (6) overseeing sales practices, and (7) participating in reviewing and responding to customer complaints that U.S. Benefits received concerning misleading sales calls.[65] In addition, Thomas has also participated in, among other things, distributing customer leads to representatives, and informing representatives of sales incentives.[66]

V. Kennan Dozier's Role in the Scheme

Kennan Dozier is married to Timothy Thomas.[67] Thomas told the TDCI that Dozier does not own U.S. Benefits or participate in the company's business.[68] However, in 2007 and 2008, according to records that Thomas provided to the TDCI, Dozier received a total of approximately $3,931,236 in benefits association payments for U.S. Benefits' and Thomas's sale of

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[64] Zebell Decl., Ex. 11, ¶¶ 19-23.

[65] Cooper Decl., Ex. 10, ¶¶ 12, 13, 15-17, 19, 21, 22, 27.

[66] Cooper Decl., Ex. 10, ¶¶ 34, 43; Zebell Decl., Ex. 11, ¶¶ 3, 5, 9, 10, 15.

[67] Cooper Decl., Ex. 10, ¶ 6

[68] *Id.* at 11.

memberships.[69] Thomas told the TDCI that benefits association payments were "passed through" to Dozier because of his bankruptcy.[70]

VI. Argument

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

Plaintiff Federal Trade Commission is an independent agency of the United States Government created by statute and is charged with enforcing the Federal Trade Commission Act ("FTC Act"). 15 U.S.C. §§ 41-58. Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 45(a)(1), and Section 13(b) vests the Commission with authority to prevent such practices by, in relevant part, seeking injunctive relief in federal district court, 15 U.S.C. § 53(b). *See, e.g., FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1029 (7th Cir. 1988). Specifically, 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).[71]

In a Section 13(b) action for permanent injunction, such as this case, the Court is empowered to exercise the full breadth of its equitable authority, and accordingly, may impose

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[69] Cooper Decl., Ex. 10, ¶¶ 15, 18

[70] *Id.* at 15.

[71] Because the Commission proceeds here under the second proviso of Section 13(b), the conditions set forth in the first proviso of Section 13(b) for the issuance of preliminary injunctions in aid of administrative proceedings do not apply to this case. *See FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984) ("Congress did not limit the court's powers under the [second and] final proviso of § 13(b). . . ."); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982) (routine fraud cases may be brought under the second proviso, without being conditioned on the first proviso's requirement that the Commission institute an administrative proceeding).

such additional relief as is necessary to remedy any violation it finds. *See FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571 (7th Cir. 1989); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982); *FTC v. Renaissance Fine Arts, Ltd.*, No. 1:94CV0157, 1994 WL 543048, at *6 (N.D. Ohio Sept. 1, 1994). In addition, during the pendency of a permanent injunction suit under Section 13(b), the Court may employ its inherent equitable authority to grant a temporary restraining order, preliminary injunction, and such ancillary preliminary relief as is necessary to preserve the possibility of effective ultimate relief. *See FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984) (stating court's inherent equitable powers may be employed to issue a preliminary injunction, including a freeze of assets). This Court and other district courts have entered such orders, including in cases involving medical discount schemes.[72]

Section 108(a)(1) of the Tennessee Consumer Protection Act ("TCPA") authorizes the Attorney General to bring an action in the name of the State whenever there is reason to believe a party has engaged in, is engaging in, or is about to engage in any act or practice prohibited by the TCPA and where proceedings would be in the public interest. Tenn. Code Ann. § 47-18-108(a)(1). Section 47-18-108(4) of the TCPA authorizes the Court to "issue orders and

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[72] *See, e.g.*, *FTC v. NHS Systems, Inc.*, No. 08-cv-2215 (E.D. Pa. July 9, 2009) (injunction, asset freeze, and receiver); *FTC v. 9107-4021 Quebec, Inc.*, No. 1:08CV1051-Nugent (N.D. Ohio April 25, 2008) (injunction, asset freeze, and expedited discovery); *FTC v. 6554962 Canada, Inc.*, No. 08C-2309-Aspen (N.D. Ill. April 23, 2008) (injunction, asset freeze, and expedited discovery); *FTC v. STF Group, Inc.*, No. 03C-0977-Zagel (N.D. Ill. Feb. 10, 2003) (injunction, expedited discovery, and asset freeze); *FTC v. Laser Express, Ltd.*, No. 3-99-1135-Nixon (M.D. Tenn. Dec. 8, 1999) (injunction, asset freeze, receiver, and immediate access); *FTC v. Federal Data Service, Inc.*, No. 00-6462-CIV-Ferguson (S.D. Fla. April, 11, 2000) (injunction, asset freeze, receiver, immediate access); *FTC v. Vaughn Mgmt., Inc.*, No. 3-89-0565-Higgins (M.D. Tenn. July 12, 1989) (injunction, asset freeze, immediate access). Copies of these orders are contained in a volume of cases filed with the Commission's and State of Tennessee's exhibits.

injunctions to restrain and prevent violations of [the Act], and such orders and injunctions shall be issued without bond." This authorization sets forth special enforcement provisions in addition to the Court's existing authority to issue a temporary injunction under Tenn. R. Civ. P. 65.

B. Defendants' Activities Warrant Issuance of a Temporary Restraining Order.

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 Section 13(b). *World Travel*, 861 F.2d at 1028. In determining whether to grant a preliminary injunction under Section 13(b), a district court must (1) determine the likelihood that the Commission will ultimately succeed on the merits and (2) balance the equities. *Id.* at 1029; *FTC v. Int'l Computer Concepts, Inc.*, No. 5:94CV1678, 1994 WL 730144, *12 (N.D. Ohio Oct. 24, 1994). Congress intended this standard to depart from the traditional equity standard, determining that the traditional standard was not "appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief." *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001) (relying on H.R. Rep. No. 93-624, at 31 (1971)). Instead, the FTC is held to the "public interest" test when seeking injunctive relief. *Id.*

Under the "public interest" test, "it is not necessary for the Commission to demonstrate irreparable injury." *World Travel*, 861 F.2d at 1029. Moreover, 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.* 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 when 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. *Heinz*, 246 F.3d at 714 ("Section 13(b) provides for the grant of a preliminary injunction where such action would be in the public interest – as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits.").

In regulatory enactments such as the TCPA, there is a presumption that the public interest has been considered by the legislature. Thus, the court need not consider irreparable injury and the balance of hardships in determining whether to enter a temporary restraining order under the TCPA. *State v. Cross Country Bank, Inc.*, 703 N.W.2d 562, 572-74 (Minn. Ct. App. 2005). Tennessee courts have regularly issued statutory injunctions in consumer protection enforcement cases under the TCPA. *See State v. Jones, et al.*, No. 08C3494, Cir. Ct. of Tenn., 20th Jud. Dist., Davidson County, Div. III (Sept. 18, 2009); *State v. Sneed*, No. 09C2025, Cir. Ct. of Tenn., 20th Jud. Dist., Davidson County, Div. V (July 17, 2009); *State v. Blue Hippo Funding, LLC, et al.*, No. CH-08-1979-1, Ch. Ct. of Tenn., 30th Jud. Dist., Shelby County, Part I (Feb. 4, 2009); *State v. Patrick & Patrick, LLC, et al.*, No. CH-08-2130-2, Ch. Ct. of Tenn., 30th Jud. Dist., Shelby County, Part II (Jan. 13, 2009); *State v. Virula*, No. 08C651, Cir. Ct. of Tenn., 20th Jud. Dist., Davidson County, Div. I (Mar. 18, 2008); *State v. Expyfi, LLC, et al.*, No. 07-3365, Cir. Ct. of Tenn., 20th Jud. Dist., Davidson County, Div. III (Nov. 21, 2007); *State v. Payton Abernathy, et al.*, No. 169384, Chan. Ct. of Tenn., 6th Jud. Dist., Knox County, Div. III (May 3, 2007); *State v. Froehlig, et al.*, No. 33293, Cir. Ct. of Tenn., 21st Jud. Dist., Williamson County, Div. II (Mar. 2, 2007); *State v. Olomoshua, et al.*, No. 06C2912, Cir. Ct. of Tenn., 20th Jud. Dist., Davidson County, Div. III (Nov. 16, 2006); *Tennessee Real Estate Comm'n v. Hamilton*, No.

01A01-9707-CH-00320, 1998 WL 272788, at *4-6 (Tenn. Ct. App. May 22, 1998); *State v. Continental Distributing Co.*, No. 74892, Ch. Ct. of Tenn., 11th Jud. Dist., Hamilton County, Part I (Sept.1, 1994); *see also FTC v. Nat'l Testing Servs.*, LLC, No. 3:05-0613, 2005 WL 2000634 (M.D. Tenn. Aug. 18, 2005).

1. The Commission Will Likely Succeed on the Merits Because Defendants Have Violated the FTC Act and TSR.

Defendants have engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act and abusive acts or practices in violation of the TSR.

a. Liability for FTC Act Violation

Under Section 5(a) of the FTC Act, 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. *See, e.g., FTC v. Bay Area Bus. Council*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003); *Renaissance Fine Arts, Ltd.*, 1994 WL 543048, at *6. 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). Express claims are presumed to be material. *Id.* at 322. Moreover, it is reasonable for consumers to rely on express claims made by Defendants. *See, e.g., FTC v. Five-Star Auto Club*, 97 F. Supp 2d. 502, 528 (S.D.N.Y. 2000).

In this case, Defendants violate the FTC Act by expressly and implicitly misrepresenting that they sell major medical health insurance. Defendants have systematically lied about the true nature of the benefits association memberships. Consequently, when consumers purchase the

memberships, they believe that they are purchasing comprehensive health insurance that will pay a significant share of their healthcare expenses in return for the hundreds, if not thousands, of dollars they are charged by benefits associations. Yet, as Defendants themselves have admitted to Tennessee insurance regulators, and as the benefits associations have stated, the benefits association memberships are not, in fact, health insurance. The benefits associations simply operate like wholesale warehouse clubs, such as Costco or Sam's Club, in which members have access to discounted goods or services. Moreover, because the limited benefits that the memberships supposedly offer have not and will not meet consumers' comprehensive healthcare needs, the memberships cannot be construed as health insurance. Due to Defendants' deception, consumers do not learn this fact until after the benefits associations have already charged them. Thus, Defendants' misrepresentations are material in that they are likely to and do affect consumers' conduct.

b. Liability for TSR Violations

Under the TSR, "telemarketers" are liable for deceptive and abusive telemarketing conduct. 16 C.F.R. §§ 310.3; 310.4(a). The TSR defines a "telemarketer" as an entity that, "in connection with telemarketing, initiates or receives telephone calls to or from a customer." 16 C.F.R. § 310.2(bb). Because Defendants have initiated numerous calls to consumers, they are telemarketers liable for TSR violations. *See, e.g.*, *The Broadcast Team v. FTC*, 429 F. Supp. 2d 1292, 1295 (M.D. Fla. 2006).

i. Do Not Call Violations

Since October 17, 2003, the TSR has generally prohibited telemarketers from calling telephone numbers on the National Do Not Call Registry, unless the telemarketers or sellers have

an established business relationship with the consumers or have obtained prior written authorization from them to place such a call. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B)(i) and (ii). Consumer declarations and complaints obtained by the Commission indicate that Defendants have violated this provision many times.

ii. Misrepresenting Material Information

The TSR prohibits telemarketers from misrepresenting, directly or by implication, any material aspect of the performance, efficacy, nature, or central characteristics of the goods or services offered for sale. *See* 16 C.F.R. § 310.3(a)(2)(iii). Therefore, Defendants' misrepresentations that they sell major medical health insurance violate § 310.3(a)(2)(iii) of the TSR.

iii. Failing to Make Required Oral Disclosures

Since December 1, 2008, the TSR has also required telemarketers that initiate outbound telephone calls delivering prerecorded messages to promptly disclose, in a clear and conspicuous manner, among other things, (1) the identity of the seller and (2) the nature of the goods or services. *See* 16 C.F.R. § 310.4(b)(1)(v)(B)(ii). Defendants violate this provision because they or their telemarketers deliver prerecorded messages that fail to disclose, as prescribed by the Rule, that U.S. Benefits is calling to sell benefits association memberships, or the names of the benefits associations.

iv. Prerecorded Messages Violations

Since September 1, 2009, the TSR has prohibited calls that deliver a prerecorded message to induce the purchase of any good or service, unless the seller of the good or service has obtained from the recipients of the calls an express, written agreement that evidences the

willingness of the recipient to receive the calls by or on behalf of a specific seller. *See* 16 C.F.R. § 310.4(b)(1)(v)(A). The express agreement must include the recipient's telephone number and signature, must be obtained after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to such person, and must be obtained without requiring, either directly or indirectly, that the agreement be executed as a condition of purchasing any good or service. *Id.*

After September 1, 2009, U.S. Benefits has placed calls that deliver prerecorded messages to consumers who have not previously provided the benefits associations for whom U.S. Benefits is selling membership with an express, written agreement authorizing the calls. Consumer declarations and complaints obtained by the Commission indicate that Defendants have violated this provision many times.

2. The State of Tennessee Will Also Likely Succeed on the Merits Because Defendants Have Violated the TCPA.

Defendants' continuous misrepresentations that they sell major medical health insurance in order to trick consumers into purchasing benefits association memberships constitute unfair or deceptive practices in violation of the TCPA. Furthermore, because Defendant Thomas has had the authority to control U.S. Benefits, has had knowledge of its unlawful business practices, and has participated substantially in them, he is individually liable for U.S. Benefits' violation of the TCPA. *See Brungard v. Caprice Records, Inc.*, 608 S.W.2d 585, 590-91 (Tenn. App. Ct. 1980). Thus, Tennessee will likely succeed on the merits.

3. Defendant Timothy Thomas Is Personally Liable for U.S. Benefits' Violations of the FTC Act, TSR, and TCPA.

a. Injunctive Relief

Once the Commission establishes that a business entity has violated the FTC Act and TSR, an individual defendant behind that entity is personally liable for injunctive relief for the business entity's deceptive acts or practices if the individual defendant (1) participated directly in the wrongful practices or acts, or (2) had authority to control the business entity engaging in them. *FTC v. Freecom Commc'ns., Inc.*, 401 F.3d 1192, 1202-03 (10th Cir. 2005); *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1998). Authority to control the business entity can be evidenced by active involvement in business affairs and making corporate policies, including assuming the duties of a corporate officer. *FTC v. Amy Travel Servs., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989).

Thomas has had authority to control U.S. Benefits and has participated substantially in the company's unlawful acts and practices. He is an owner and officer of the company. And as he admitted to the TDCI during its investigation of U.S. Benefits, he has participated in virtually all aspects of conceiving, implementing, and maintaining the scheme. Thus, Thomas is liable for injunctive relief.

b. Monetary Relief

Likewise, Thomas is personally liable for monetary relief. An individual defendant is personally liable for monetary relief if he "had knowledge that [the company] or one of its agents engaged in dishonest or fraudulent conduct, that the misrepresentations were the type which a

reasonable and prudent person would rely, and that consumer injury resulted."[73] *Publ'g Clearing House, Inc.*, 104 F.3d at 1170. In the instant case, Thomas personally knew about U.S. Benefits unlawful business activities because he was interviewed by the TDCI during its investigation of the company and he participated in addressing consumer complaints. Additionally, Thomas knows of the financial spoils reaped by U.S. Benefits' illegal practices because he has received payment from benefits associations as a result of those practices. Therefore, Thomas is liable for monetary relief.

4. Relief Defendant Kennan Dozier Has No Legitimate Claim to U.S. Benefits' and Timothy Thomas's Ill-Gotten Gains.

Kennan Dozier is named as a relief defendant in this matter because she has received proceeds from Defendants' fraudulent activities and has no legitimate claim to those funds. Courts may impose equitable relief against those who have: (1) received ill-gotten funds; and (2) do not have a legitimate claim to those funds. *CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 192 (4th Cir. 2002) (federal courts may order equitable relief against a person not accused of wrongdoing in a securities enforcement action where that person received ill-gotten funds and did not have a legitimate claim to the funds); *FTC v. Ameridebt*, 343 F. Supp. 2d 451, 464 (D. Md. 2004) (Section 13(b) invests the court with equitable powers over "innocent persons" so as to accomplish such relief as disgorgement of unjust enrichment); *SEC v. Antar*, 831 F. Supp. 380, 402-03 (D.N.J. 1993) ("As between the nominal defendants and the victims of fraud, equity

[73] 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. *Amy Travel*, 875 F.2d at 574. The Commission does not need to show intent to defraud. *Amy Travel*, 875 F.2d at 573.

dictates that the rights of the victims should control.").

Disgorgement of the proceeds of unlawful activity held by a nonparty who has no legitimate claim to the funds may be ordered under the doctrines of constructive trust or unjust enrichment. *See Antar*, 831 F. Supp. at 402-03 (court found the nominal defendants liable as constructive trustees and subject to the doctrine of unjust enrichment); *Rollins v. Metro. Life Ins. Co.*, 863 F.2d 1346, 1354 (7th Cir. 1988) ("[A] constructive trust may be invoked even where the unjustly enriched person is completely blameless."). Under either doctrine, this Court is authorized to disgorge the millions of dollars that Dozier received from the Defendants' fraudulent scheme because she has no legitimate claim to those funds. Thus, she is a proper relief defendant.

5. The Balance of Public Equities Calls for the Proposed Relief.

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 interest in this case is compelling.

Vulnerable consumers who are desperately searching for dependable health insurance to protect them and their families against the risk of soaring healthcare costs have lost millions of dollars at the hands of Defendants. And consumers have been harrassed by Defendants' unwelcome phone calls. For these reasons, the public has both a strong interest in halting Defendants' scheme and in preserving the assets necessary to provide effective final relief to victims.

Defendants, by contrast, have no legitimate interest in continuing to deceive and harass consumers and engaging in conduct that violates federal and state laws. *See FTC v. World Wide*

Factors, Ltd., 882 F.2d 344, 347 (9th Cir. 1989) (upholding district court finding of "'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'"); *FTC v. Thomsen-King & Co.*, 109 F.2d 516, 519 (7th Cir. 1940) (a court of equity has no duty "to protect illegitimate profits or advance business which is conducted by unfair business methods"); *U.S. v. Diapulse Corp. of Am.*, 457 F.2d 25, 29 (2d Cir. 1972) (defendants "can have no vested interest in a business activity found to be illegal").

Without temporary and preliminary injunctive relief, it is unlikely that Defendants will cease violating the law. Indeed, even in the face of an active investigation by Tennessee insurance regulators and continued media coverage, Defendants have persisted in their unlawful activities. Accordingly, an injunction is required to ensure that Defendants' scheme does not continue while this case is pending. For these reasons, the public interest calls for the imposition of injunctive relief.

C. The Proposed Temporary Restraining Order Should Be Entered *Ex Parte.*

The Commission and State of Tennessee request that the proposed restraining order be entered *ex parte*. Congress has looked favorably on the availability of *ex parte* relief under the second proviso of Section 13(b) of the FTC Act: "Section 13 of the FTC Act authorizes the Commission to file suit to enjoin any violation of the FTC [Act]. The Commission can go to court *ex parte* to obtain an order freezing assets, and is also able to obtain consumer redress." S. Rep. No. 103-130 at 15-16 (1994). Federal Rule of Civil Procedure 65(b) permits this Court to enter *ex parte* orders upon a clear showing that "immediate and irreparable injury, loss, or damage will result" if notice is given. Proper circumstances for *ex parte* relief include situations

where notice would "render fruitless further prosecution of the action." *In re Vuitton et Fils*, 606 F.2d 1, 5 (2d Cir. 1979); *Carroll v. Princess Anne*, 393 U.S. 175, 180 (1968) ("There is a place in our jurisprudence for ex parte issuance without notice, of temporary restraining orders of short duration. . . ."). As is set forth in detail in the Commission's Rule 65(b) declaration of counsel, notice to defendants would cause irreparable injury. Defendants have shown such a disregard for the law that an *ex parte* temporary restraining order is necessary. Only through such an extraordinary measure can the Court prevent otherwise likely destruction of documents and secretion of assets – both of which would jeopardize the possibility of final effective relief for victims.

D. The Proposed Relief Is Necessary to Prevent the Likely Dissipation of Assets and Preserve Funds for the Possibility of Effective Final Relief for Consumers.

Once the Commission invokes the Court's equitable powers, the full breadth of the Court's authority is available, including the power to grant such additional preliminary relief as is necessary to preserve the possibility of providing effective final relief. *See World Travel*, 861 F.2d at 1026; *Amy Travel*, 875 F.2d at 571. Such ancillary relief may include an asset freeze to preserve assets for eventual restitution to victimized consumers and the appointment of a receiver to marshal and preserve assets. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (when the public interest is implicated, the court's equitable powers assume an even broader and more flexible character than when only a private controversy is at stake); *World Travel*, 861 F.2d at 1031.

1. The Court Should Freeze Defendants' Assets.

In addition to enjoining Defendants' unlawful conduct, Plaintiffs in this case seek

restitution for the victims of Defendants' fraud. To preserve the possibility for such relief, the Commission asks that the Court freeze Defendants' assets and order an immediate accounting to prevent concealment or dissipation of assets pending a final resolution.

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 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 also extend to individual assets. *Id.* (affirming freeze on individual assets); *Amy Travel*, 875 F.2d at 575, 576 (affirming district court order freezing assets); *H.N. Singer, Inc.*, 668 F.2d at 1113 (affirming district court's order freezing corporate and personal assets of defendants).

A freeze of Defendants' assets is appropriate here to preserve the status quo, ensure that funds do not disappear during the course of this action, and preserve Defendants' assets for consumer redress.[74] Defendants who have engaged in fraudulent violations may be considered likely to waste assets prior to resolution of the action. *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972). Here, Defendants' violations concern pervasive fraud that has garnered numerous consumer complaints and drawn scrutiny by Tennessee insurance regulators. An asset freeze is necessary both to ensure preservation of Defendants' assets and to prevent their assets from being used to further their unlawful scheme. Without an asset freeze, the

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[74] For these reasons, the foreign asset repatriation requested by Plaintiffs is likewise appropriate. *See FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1240 (9th Cir. 1999) ("Foreign trusts are often designed to assist [a defendant] in avoiding being held in contempt of a domestic court while only feigning compliance with the court's orders . . .").

dissipation and misuse of assets to continue their scheme is a distinct possibility.

2. The Court Should Appoint a Temporary Receiver.

The appointment of a receiver for U.S. Benefits is critical. In cases in which a corporate defendant, through its management, has defrauded members of the public, "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. *SEC v. First Fin. Group*, 645 F.2d 429, 438 (5th Cir. 1981). Courts routinely appoint temporary receivers for corporate defendants in FTC enforcement actions. *See, e.g., FTC v. Laser Express, Ltd.*, No. 3-99-1135-Nixon (M.D. Tenn. Dec. 8, 1999) (ordering receiver, injunctive relief, asset freeze, and immediate access); *FTC v. Skybiz.com*, 57 Fed. Appx. 374, 377 (10th Cir. 2003) (receiver appointed to assess documents and assets and to prevent any transfer, disposition, or dissipation of assets).

Appointment of a receiver is particularly appropriate here because Defendants' deceptive and abusive scheme demonstrates such an indifference to the law that Defendants may reasonably be expected to frustrate the Commission's and the State of Tennessee's law enforcement efforts by destroying evidence and concealing or dissipating assets. A receiver can monitor the use of Defendants' assets, marshal and preserve records, identify assets, determine the size and extent of the fraud, and identify additional consumers who were injured.

The Commission recommends that the Court appoint Robert Waldschmidt, as temporary receiver for U.S. Benefits. Mr. Waldschmidt qualifications are set forth in the Commission's Motion for Appointment of Receiver, filed separately with this Motion.

3. The Court Should Order Expedited Discovery and Prompt Access to Records.

In order to locate assets wrongfully obtained from defrauded consumers, the Commission respectfully requests that this Court permit expedited discovery, including immediate access to Defendants' business premises and records, and order financial reporting by Defendants.

District courts are authorized to depart from normal discovery procedures and fashion discovery by order to meet discovery needs in particular cases. Fed. R. Civ. P. 1, 26(d), 34(b). Moreover, the prompt and full disclosure of the scope and financial status of Defendants' business operations is necessary to ensure that the Court is fully advised regarding: (1) the full range and extent of Defendants' law violations; (2) the identities of injured consumers; (3) the total amount of consumer injury; and (4) the nature, extent and location of Defendants' assets. For these reasons, the proposed Order requires that Defendants produce certain financial records and information on short notice, and requires financial institutions served with the order to disclose whether they are holding any of Defendants' assets.

This requested relief is necessary to identify and preserve assets Defendants wrongfully obtained from consumers. Any hardship on Defendants caused by the relief sought would be temporary and is greatly outweighed by the public's interest in preserving evidence and assets obtained through Defendants' unlawful practices.

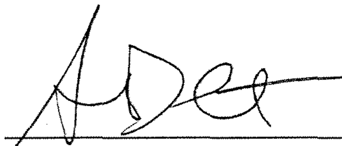
V. Conclusion

Defendants in this case have harmed consumers across America. If not restrained, they will continue to dupe consumers into thinking they are purchasing major medical health insurance, and pester consumers with unwanted phone calls. The Commission and State of

Tennessee have detailed how the scam works and submitted sufficient proof to support the relief requested. Accordingly, the Court should grant the motion and issue the TRO.

Dated: August 3, 2010.

Respectfully submitted,



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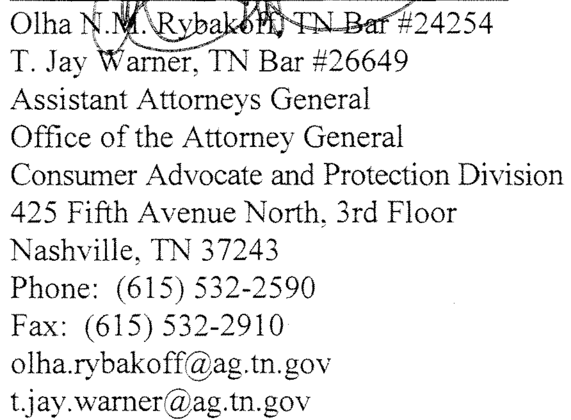

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