registered in his name since July 1994. (Ex. 11 at 386). DFS offered and sold FCC license investments and services until approximately April 1995, when defendants began using Bell's name to do business. See note 5, supra. DFS has also failed to comply with the California Telephonic Sellers Act. (Ex. 11 at 278). Defendant Berman is also a Bell salesperson, and has made numerous misrepresentations to consumers and undercover investigators. See page 23-24, supra.

III. STATEMENT OF FACTS

A. The Paging Industry

Paging businesses sell services that enable their customers to communicate with each other and members of the public through various radio frequencies. Paging carriers provide their customers small battery-operated devices known as pagers that receive messages transmitted by radio signals over a specific geographic service area. (Ex. 15 at 593). Parties seeking to provide such telecommunications services must first apply to the FCC --- which regulates the use of radio frequencies throughout the United States --- for permission to transmit radio signals. This permission takes the form of a *license* for transmission along a specific radio frequency for a period of years. (Ex. 15 at 593; Ex. 18 at 615).

Several different types of frequencies are licensed for the provision of paging services. The FCC has specifically assigned several frequencies in the 929 megahertz ("MHz"), 931 MHz, and 454 MHz range for the provision of paging services. (Ex. 15 at 594, 602; Ex. 18 at 615). Paging carriers predominantly use

these frequencies to provide paging services to the general public. (Ex. 15 at 593-94).

Licenses issued by the FCC grant the licensee either "shared" or "exclusive" use of a paging frequency for a specific service area. (Ex. 15 at 593-94; Ex. 18 at 615). Some 929 MHz frequencies are issued on a shared basis, which means that a virtually unlimited number of individuals or companies may acquire the right to use the same portion of the radio spectrum within a defined service area. (Ex. 15 at 594; Ex. 18 at 615). The remaining paging frequencies are issued on an "exclusive" basis, which means that the licensee has the sole authority to use its portion of a frequency in a given market. (Ex. 15 at 594; Ex. 18 at 615). To obtain a license, an applicant must submit a simple FCC Form 600 along with a nominal filing fee to cover processing costs at the FCC.[7] (Ex. 15 at 594; Ex. 18 at 615). Form 600 requires the longitude and latitude of the tower sites from which the applicant intends to transmit radio signals. In most instances, the applicant need not conduct or include engineering studies, site analyses, environmental impact studies, and terrain studies in order to complete a paging license application. (Ex. 15 at 594; Ex. 18 at 615).

A licensee must begin providing paging service to the public within one year of being awarded a license, or the FCC will revoke the license. 47 C.F.R. §§90.167, 22.511; (see also Ex. 18 at 617). The FCC expressly prohibits individuals and entities

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[7] The FCC application fee a paging license is $45 for a 929 MHz shared frequency and $265 for a 931 MHz or a 454 exclusive MHz frequency. (Ex. 18 at 615).

from obtaining, or even attempting to obtain, licenses for the purpose of speculation or profitable resale. 47 C.F.R. §§90.153(d), 22.137(d), 22.139; (see also Ex. 18 at 617). A licensee is required to use the license only for the purpose of providing telecommunication services.

B. Defendants' Marketing Practices

Defendants telemarket application preparation services for paging licenses in the 929 shared, and 931 and 454 MHz exclusive, frequency bandwidths.[8] (E.g., Ex. 1 at 1; Ex. 3 at 27; Ex. 14 at 519). Defendants typically "cold call" consumers, and represent that they will prepare and submit applications for valuable paging licenses to the FCC for fees averaging from $1,580 to $2,900 per license. (Ex. 3 at 27; Ex. 4 at 30; Ex. 6 at 104; Ex. 8 at 157; Ex. 12 at 393; Ex. 1 at 1). If a consumer shows interest during Bell's initial sales pitch, the company sends the consumer written promotional materials, often by Federal Express. (Ex. 4 at 30; Ex. 5 at 64; Ex. 6 at 104; Ex. 9 at 175; Ex. 11 at

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[8] Defendants have also sold investments in partnerships to develop Specialized Mobile Radio ("SMR") systems, which also require licenses issued by the FCC. (Ex. 18 at 618). One of defendants' customers believed she was investing in a partnership to acquire paging licenses, but actually appears to have invested in something called the "Golden Denver 220 MHZ [SMR] Partnership." (Ex. 8 at 158-89; Ex. 13 at 461). Defendants' promotional materials also reference an Orlando, Florida partnership. (Ex. 14 at 519). The sale of these partnership interests appears to be a minor part of defendants' business. Defendants sent the above-mentioned consumer a letter stating that she was one of only six members of the Denver partnership. (Ex. 8 at 173). A Bell telemarketer also told an undercover Commission investigator that Bell stopped applying for SMR licenses after the FCC froze the SMR licensing process. (Ex. 11 at 354-55).

277; Ex. 12 at 388-89; Ex. 14 at 477). Bell telemarketers persistently follow up with additional phone calls, often urging consumers to apply for several licenses. (Ex. 3 at 29; Ex. 4 at 30; Ex. 5 at 64; Ex. 8 at 158).

Bell telemarketers create a sense of urgency in their sales pitches, telling consumers that they will no longer be able to obtain licenses through Bell in a few days. (Ex. 11 at 367; Ex. 12 at 394; Ex. 5 at 64). Bell has continued to solicit other consumers and undercover investigators well after the purported "cut off" dates, however. (Ex. 3 at 27; Ex. 5 at 64; Ex. 6 at 107). Salespeople assure consumers that Bell will use its expertise to apply for licenses for valuable markets (Ex. 4 at 30; Ex. 11 at 346; Ex. 12 at 399), and promise to assist consumers with marketing the licenses they obtain free of charge. (Ex. 2 at 26; Ex. 14 at 517). Bell encourages consumers who decide to invest in licenses to send the requisite application fees by bank wire (Ex. 2 at 11; Ex. 10 at 247). Bell then applies to the FCC for paging licenses on the consumer's behalf. (Ex. 6 at 105).

Consumers typically hear little from Bell after sending in their money, except when Bell telemarketers "reload" them, or try to get them to invest in *more* licenses through the company. (Ex. 1 at 2; Ex. 6 at 107; Ex. 8 at 159). When consumers contact Bell to check on the status of their license applications, they have a difficult time reaching their sales representatives, or they are told to be patient and not worry. (Ex. 1 at 2; Ex. 2 at 7-8; Ex. 4 at 31; Ex. 6 at 106). A Bell representative even told one consumer who complained to the Better Business Bureau ("BBB")

about Bell's unresponsiveness that the company would refuse to help him obtain his licenses unless he signed a letter to the BBB stating he was satisfied with Bell's services. (Ex. 6 at 106-07).

Only one of the consumers who have executed declarations for the Commission has actually received any licenses. (Ex. 1 at 3; Ex. 4 at 31; Ex. 6 at 108; Ex. 7 at 156; Ex. 8 at 159-60).[9] This consumer has not received **any** offers to buy or lease his licenses -- indeed, he states that paging carrier representatives "practically laughed" at him when he tried to sell his licenses. (Ex. 2 at 8). This consumer will lose his licenses -- and his entire investment -- unless he begins to provide paging services by February 1996. (Ex. 2 at 8).

C. How Defendants Defraud The Public

In their telemarketing sales pitches and in their written promotional materials, defendants blatantly misrepresent the nature and profit potential of the paging license investments they promote, as charged in paragraphs fifteen to eighteen of the Commission's complaint, and as set forth below.

1. Defendants Misrepresent That Their Customers Are Likely To Earn Substantial Income Or Profit By Leasing Or Selling Licenses Obtained Through Defendants' Application Services

Defendants claim that large paging companies will clamor to

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[9] A Bell telemarketer told one Bell consumer that the Bell "Confirmation Certificates" she received were equivalent to actual FCC licenses -- another falsity. (Ex. 8 at 159-60).

lease or buy paging licenses from defendants' customers. Bell telemarketers state that consumers will earn from $300 to $20,000 a month by leasing their licenses to existing paging companies. (Ex. 11 at 331 [$300 a month]; Ex. 7 at 155-56 [$1500 a month]; Ex. 5 at 63 [$3000 a month]; Ex. 8 at 157 [$4000 a month]; Ex. 2 at 5 [$10,000 to $20,000 a month]). They also tell consumers they will be able to sell their licenses to paging carriers for $10,000 to as much as $60,000 each. (Ex. 2 at 28 [$10,000 to $12,000]; Ex. 10 at 219 [$15,000 to $20,000]; Ex. 1 at 1 [$20,000]; Ex. 2 at 5 [$20,000 to $60,000]).

In taped sales pitches, Bell salespeople, including defendant Berman, projected that license investments would triple within eight months to a year (Ex. 10 at 219); or realize a two- or a three-to-one return. (Ex. 9 at 174; Ex. 11 at 331; Ex. 12 at 400). Bell's written promotional materials feature a chart captioned "Potential Revenue $.50 Per Pager/Month," which shows "Annual Revenue" ranging from $8000 to nearly $12,000. (Ex. 2 at 1; Ex. 4 at 61; Ex. 5 at 73). Consumers are told that they can expect profits within 6 to 24 months of receiving a license. (Ex. 4 at 31; Ex. 10 at 219; Ex. 12 at 401).

These claims are false: consumers, rather than reaping handsome profits, are unlikely to see *any* income or profit from their investments. First, paging carriers do not "lease" licenses for unconstructed, inoperational paging systems -- according to the Commission's expert, such a practice is foreign to the paging industry. (Ex. 15 at 596). Indeed, four of the largest U.S. paging companies have provided sworn declarations stating that they have ***never*** leased unconstructed paging

licenses, and have no plans to do so in the future. (Ex. 16 at 610-11; Ex. 17 at 613; Ex. 19 at 630; Ex. 20 at 632-33).

The licenses defendants promote also have virtually no resale value. The Commission's expert and paging carriers state that carriers virtually *never* buy paging licenses from other licensees, unless they are associated with up-and-running systems. (Ex. 15 at 596; Ex. 17 at 612; Ex. 19 at 630; Ex. 20 at 632-33). Rather, paging carriers that need to expand their services geographically do so by applying for additional FCC licenses themselves, acquiring *developed* communications systems, entering into service arrangements with other established paging carriers, or upgrading their own technology. (Ex. 15 at 596; Ex. 20 at 633).

Paging carriers particularly have no reason to buy "shared" licenses from Bell's customers, as they have stated in sworn declarations. (Ex. 16 at 610; Ex. 17 at 612; Ex. 19 at 630; Ex. 20 at 632-33). Since there are an *unlimited* number of shared paging frequencies for any given market, paging carriers can obtain all of the shared spectrum they need from the FCC directly, and for minimal cost -- indeed, for much less than Bell charges its customers. (Ex. 15 at 596-97; Ex. 18 at 616). A representative of one paging carrier thus tells consumers who try to sell shared paging licenses that their licenses are "worthless." (Ex. 17 at 612; see also Ex. 16 at 610). As noted above, one defrauded consumer stated that paging company representatives "practically laughed" at him when he tried to sell the shared licenses he obtained through Bell. (Ex. 2 at 7). *Defendant Berman himself* even described shared licenses as

"worthless" while promoting exclusive paging licenses in one taped sales pitch -- even though he pitched shared licenses as "very attractive license[s] in the industry" in another taped sales call. (Compare Ex. 11 at 330, with Ex. 14 at 584).

Similarly, paging businesses and the Commission's paging expert agree that "exclusive" paging licenses alone, without corresponding paging systems, almost always have minimal, if any, resale value. (Ex. 15 at 597; Ex. 17 at 612; Ex. 19 at 630; Ex. 20 at 633). The only exclusive licenses with *any* potential investment value are licenses for large metropolitan areas, according to paging expert Elliott Hamilton. (Ex. 15 at 597). Paging carriers confirm that they might be interested in acquiring exclusive licenses for large metropolitan areas only. (Ex. 17 at 612-613).

Yet the FCC had received all possible applications for exclusive paging licenses for the nation's mid-sized and large markets by late 1994. (Ex. 18 at 618). The FCC is unlikely to grant applications filed after 1994 for these areas. (Ex. 18 at 618). Thus, if defendants have pitched consumers on license application services for such a "top market" license, the consumer will not receive a license at all.[10] Some of defendants' customers may receive exclusive licenses for smaller markets -- but there is nothing to prevent paging companies from applying to the FCC for licenses in those markets themselves. (Ex. 15 at 594; Ex. 18 at 617). And, as discussed, paging

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[10] Indeed, many consumers have not received the exclusive licenses they were promised, see p. 10, supra, and will likely have nothing to resell or lease.

companies have declared that they are unlikely to have any interest in acquiring such licenses from other licensees. (Ex. 17 at 613; Ex. 19 at 640; Ex. 20 at 633). The end result is that the licenses defendants' customers receive -- if they receive anything -- are highly unlikely to have *any* investment value.

2. Defendants Misrepresent That Their Customers Will Derive Income Or Profit From Licenses Obtained Through Defendants' Application Services Without Constructing A Paging System Themselves

Paging licenses, as mere authorizations to provide paging services to the public, produce no revenue on their own. The *services* that paging carriers provide to their customers generate profits --- and such services require the construction of expensive paging systems.

Defendants, however, tell consumers that they need not concern themselves with constructing such systems because paging companies will construct or finance the construction as part of their leasing or purchasing arrangements. (Ex. 1 at 1-2; Ex. 5 at 64; Ex. 6 at 105; Ex. 7 at 156). One telemarketer claimed that the license defendants promote are:

> in such high demand that once you get the license, then these other companies, they will basically take an assignment of the license from you. They'll built it out and put it into operation and that's how you make money. . . . . because Page Net and these big companies will put it in operation and then they pay

you like a royalty. (Ex. 11 at 358-59).[11]

In one taped sales call, defendant Berman stressed that an investment in paging licenses through Bell was "passive":

> Ms. Stoller: "Am I going to be running a business?"
>
> Mr. Berman: "No, Ma'am. It's passive. It would be managed by one of the other companies."
>
> Ms. Stoller: "Well, how much would that cost me?"
>
> Mr. Berman: "Nothing."

(Ex. 14 at 502; see also, Ex. 14 at 501, 576, and 583).

Unfortunately for the victims of defendants' scheme, however, paging carriers do *not* build or finance paging systems of other licensees, as they have stated in sworn declarations. (Ex. 15 at 596; Ex. 16 at 610-11; Ex. 17 at 613; Ex. 19 at 630). In fact, the passive sale or lease deals defendants pledge to arrange for consumers are in all likelihood ***illegal***, and would expose to consumers to adverse FCC action, including license revocation. FCC rules *prohibit* individuals from obtaining or attempting to obtain paging licenses for profitable speculation instead of providing paging services to the public. 47 C.F.R. §§90.153(d), 22.137(d), 22.139. (See also Ex. 18 at 618). In other words, the FCC prohibits "trafficking" in paging licenses, and requires licensees to build and operate paging systems *themselves* within one year of receiving their license. Id. Failure to do so results in automatic revocation of the license.

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[11] The claim about PageNet, a major paging carrier, is an outright lie: PageNet's legal counsel has stated in a sworn declaration that she does not recall PageNet *ever* purchasing or leasing an unconstructed shared or exclusive paging license of the type promoted by defendants that was not part of an acquisition of an existing paging system. (Ex. 20 at 632-33).

§§47 C.F.R. 90.167, 22.511. (See also Ex. 18 at 618). The FCC also may prohibit the licensee from assigning or transferring his or her license if it was obtained for speculative purposes. 47 C.F.R. 90.153(d); 22.137(d); 22.139. (See also Ex. 18 at 618).

Since consumers will be unable to lease or sell their licenses, they must construct a costly paging system for each license they hold to derive any income. (Ex. 15 at 595). Initial equipment costs for a start up paging system are $100,000 according to the Commission's expert, and annual operating costs would easily exceed another $100,000 for the first several years -- leaving negative cash flows for many years. (Ex. 15 at 595). None of the consumers providing declarations in this case have stated that they ever had any intent of providing paging service to the public themselves, much less had any plan to spend substantial additional sums just to keep their initial "investment" alive. (E.g., Ex. 1 at 2; Ex. 4 at 30-31; Ex. 6 at 105; Ex. 8 at 157). Rather than an excellent passive investment, defendants have sold consumers a host of expensive burdens for which they did not bargain.

3. Defendants Misrepresent That No Entity Or Individual May Obtain Multiple Paging Licenses Directly From The FCC For Use In A Given Geographic Area

Crucial to defendants' scheme is the false representation that established paging companies are prohibited by law from acquiring more than one paging license in any given geographic area. Defendants claim paging operators therefore must buy or lease licenses from other licensees, since they cannot obtain any

more themselves. (Ex. 1 at 1; Ex. 5 at 63; Ex. 7 at 155; Ex. 9 at 175; Ex. 10 at 222; Ex. 11 at 281; Ex. 12 at 397).

In fact, there is **no** such restriction on the number of licenses a paging business may obtain, according to the FCC. (Ex. 18 at 617). The Commission's expert and paging carrier representatives confirm that paging operators can, and do, own and operate more than one license per geographic area. (Ex. 15 at 594; Ex. 16 at 611; Ex. 17 at 613-14; Ex. 19 at 631; Ex. 20 at 633). In short, defendants' claim that such an "anti-monopoly" restriction exists is a blatant fabrication designed to create a false sense of demand for the licenses they promote.

4. Defendants Misrepresent That An Investment In Defendants' License Application Services Is An Excellent Investment That Is Likely to Generate Substantial Profits

At the heart of defendants' scam is their claim that the licenses they promote are excellent investments -- a government-backed opportunity for small investors to reap handsome profits. (E.g., Ex. 3 at 28 [paging companies would be "beating down my door" for licenses]; Ex. 9 at 174 ["no safer opportunity with a better rate of return"]; Ex. 10 at 214 ["safe as a savings bond"]. Defendant Berman described such licenses as a "bonanza" and a "giveaway." (Ex. 14 at 580). As one Bell salesperson explained:

> [W]e put you in a position to take advantage of and get involved in the information superhighway. Okay. This is a business opportunity that not just me or my company, but almost all major financial publications

> have repeatedly referred to as the best business opportunity, period. . . . [L]et me tell you, I know of no better, safer risk-reward business opportunity available.

(Ex. 14 at 490-91). Defendants underscore their claims by sending consumers copies of news articles about the information superhighway and its successful entrepreneurs. (Ex. 2 at 18-25; Ex. 4 at 49-55; Ex. 5 at 79-87; Ex. 6 at 117-123; Ex. 9 at 203-213).

In fact, as shown above, the paging licenses defendants promote are not excellent investments likely to generate substantial profits for defendants' customers. Contrary to defendants' false representations, paging carriers are unlikely to lease or buy the licenses consumers pay defendants thousands of dollars to obtain. Section III.C.1., supra. Therefore, to realize any income from their investments, and comply with FCC regulations, consumers will have to construct and operate paging systems themselves. Section III.C.2, supra. As demonstrated, the consumers defrauded by defendants are in no position to spend hundreds of thousands of dollars ***more*** constructing and operating a paging business -- only to lose money for the first several years of operations. Even if consumers were to finance construction of a paging system, they would face intense competition from capital-rich and well established paging carriers in virtually every major paging market in the country (Ex. 15 at 598-600). The bottom line is that consumers are all but certain to lose their licenses, and their entire investments.

IV. ARGUMENT

A. This Court Has Authority To Grant The Requested Relief

The Commission brings this action under the second proviso of Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which states that "in proper cases the Commission may seek, and, after proper proof, the court may issue, a permanent injunction."[12] The Commission may seek a permanent injunction against violations of "any provision of law enforced by the Federal Trade Commission." 15 U.S.C. § 53(b); see FTC v. Evans Products Co., 775 F.2d 1084, 1087 (9th Cir. 1985). A routine fraud case such as this one, replete with misrepresentations of material facts in violation of Section 5(a) of the FTC Act, qualifies as a "proper case" for injunctive relief under Section 13(b). FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1111 (9th Cir. 1982).

In a Section 13(b) action, the Court may exercise the full breadth of its equitable authority. As the Ninth Circuit in Singer held:

> Congress, when it gave the district court authority [in Section 13(b)] to grant a permanent injunction against violations of any provisions of law enforced by the Commission, also gave the district court authority to

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[12] 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. FTC v. H.N. Singer, 668 F.2d at 1111 (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); 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)").

grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference.

Singer at 1113. Thus, under Section 13(b), the Court may order remedies such as rescission of contracts and restitution, and whatever additional temporary or preliminary relief is necessary to preserve the possibility of final effective final relief. Id. at 1112. This preliminary relief may include an order freezing assets, an order permitting expedited discovery, and an order appointing a receiver to ensure that assets are protected from dissipation. See, e.g., Singer at 1113-1114; FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1432 (11th Cir. 1984).[13]

B. The Commission Has Made The Showing Required For Issuance Of A Temporary Restraining Order And Preliminary Injunction

The Commission has made the showing required for issuance of temporary and preliminary injunctive relief against defendants' deceptive acts and practices. In order to obtain a preliminary

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[13] In fact, in many previous routine Section 13(b) cases, courts in this district have entered ex parte temporary restraining orders granting the full panoply of relief requested here. See, e.g., FTC v. American Fortune 900, Inc., Civ. No. 96-305 RAP (RNBx) (C.D. Cal. Jan. 17, 1996); FTC v. Satellite Broadcasting Corporation, SACV 95-336 LHM (EEx) (C.D. Cal. April 18, 1995); FTC v. Turcal, Inc., Civ No. 94-1398 AWT (Jgx) (C.D. Cal. Mar. 3, 1994); FTC v. Goddard Rarities, Inc., Civ. No. 93-4602 JMI (C.D. Cal. Aug. 4, 1993); FTC v. World Wide Classics, Inc., Civ. No. 92-3363 TJH (EEX) (C.D. Cal. June 4, 1992); FTC v. Morgan Whitney Trading Group, Inc., Civ. No. 90-4887 RSWL (Sx) (C.D. Cal. Sept. 12, 1990); FTC v. Newport Gems, Inc., Civ. No. 90-2001R (C.D. Ca. April 25, 1990); FTC v. Magui Publishers, Inc., Civ. No. 89-3818 RSWL (GX) (C.D. Cal. June 26, 1989); FTC v. Schoolhouse Coins, Inc., Civ. No. 87-05415 KN (TX) (C.D. Cal. Aug. 7, 1987).

injunction, traditionally, the movant must show that: (1) it is likely to succeed on the merits, (2) there is a possibility of irreparable harm, (3) the balance of hardships weighs in its favor, and (4) issuance of the requested relief will advance the public interest. Miller v. California Medical Ctr. ("Miller"), 19 F.3d 449, 456 (9th Cir. 1994). Where the government moves for injunctive relief in a statutory enforcement action, however, it need now show irreparable injury if it shows a likelihood of success on the merits. Miller, 19 F.3d at 459. Thus, where the Commission moves for a preliminary injunction to stop violations of the FTC Act, and shows a likelihood of success on the merits, "[h]arm to the public interest is presumed." FTC v. World Wide Factors, Ltd. ("World Wide Factors"), 882 F.2d 344, 346 (9th Cir. 1989).

When the Commission brings suit to enforce the FTC Act, it is acting to prevent violations of federal law and, therefore, proceeds "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the . . . laws." SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975). Thus, in weighing the public and private equities, the public interest should receive greater weight. World Wide Factors, Ltd., 882 F.2d at 347 (citing FTC v. Warner Communications, Inc., 742 F.2d 1156, 1165 (9th Cir. 1984)). This is particularly true where the evidence demonstrates that a defendant's business is rooted in deception, for a "court of equity is under no duty 'to protect illegitimate profits or advance business which is conducted [illegally].'" CFTC v. British American Commodity Options Corp., 560 F.2d 135,

143 (2d Cir. 1977), cert. denied, 438 U.S. 905 (1978) (quoting FTC v. Thomsen-King & Co., 109 F.2d 516, 519 (7th Cir. 1940)).

1. The Commission Has Shown A Substantial Likelihood Of Success On The Merits

a. Defendants' Misrepresentations Violate The FTC Act

Misrepresentations or omissions of material facts made to induce the purchase of goods or services constitute deceptive acts or practices that violate Section 5(a) of the FTC Act. FTC v. World Travel Vacation Brokers, 861 F.2d 1020, 1029 (7th Cir. 1988); FTC v. Kitco of Nevada, Inc., ("Kitco"), 612 F. Supp. 1282, 1291 (D. Minn. 1985); see also Resort Car Rental System v. FTC, 518 F.2d 962, 964 (9th Cir.), cert. denied, 423 U.S. 827 (1975). Thus, misrepresentations about the essential characteristics or profit potential of investments violate Section 5(a). See, e.g., Goodman v. FTC, 244 F.2d 584, 599 (9th Cir. 1957); Kitco, 612 F. Supp. at 1292.

The Commission's extensive evidence in this case, outlined in Sections III.C.1-4. above, shows that defendants' sales pitches and written promotional materials are replete with misrepresentations. As demonstrated, defendants' central promotional claims: 1) that consumers are likely to earn substantial profit by selling or leasing the paging licenses they obtain through defendants' services to paging businesses, 2) that consumers are likely to earn profit without developing paging systems themselves, 3) that paging carriers are restricted from obtaining more than one license per geographic area from the FCC, and 4) that the licenses defendants promote are excellent

investments -- are all false.

The Commission's evidence thus demonstrates that defendants have plainly and repeatedly misrepresented material facts in violation of Section 5. The Commission has shown a strong likelihood of success on the merits, and is therefore entitled to the preliminary relief requested. World Wide Factors Ltd., 882 F.2d at 346.

b. Individual Defendants Justus And Berman Are Also Liable

Individual defendants Justus and Berman are key perpetrators of this fraudulent scheme and are individually liable for the violations of the FTC Act described above. To obtain an injunction against an individual, the Commission must show that the individual either participated in the unlawful acts of the corporate defendant or that he or she played a role in directing, controlling, or formulating the unlawful acts. FTC v. NCH, Inc., 1995-2 Trade Cases (CCH) 71,114 at 75,351 (D. Nev. 1995); FTC v. American Std. Credit Sys., Inc., 874 F. Supp. 1080, 1089 (C.D. Cal. 1994). Similarly, an individual may be liable for monetary redress under the FTC Act for corporate practices if the Commission proves that the individual had actual or constructive knowledge of the deception, and either participated in the deceptive acts or had authority to control them. See., e.g., FTC v. Amy Travel Serv., Inc., 875 F.2d 563, 573-75 (7th Cir.), cert. denied, 493 U.S. 954 (1989) (citation omitted).[14]

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[14] In the Ninth Circuit, the Commission may not even be required to show knowledge or any kind of scienter to obtain redress from an individual. See FTC v. Pantron I Corp., 33 F.3d

Defendant Justus is Bell's president, chief executive officer, chief financial officer, and sole director. (Ex. 11 at 385). Justus also personally participates in Bell's deception by soliciting consumers through written promotional letters and telephone conversations. (Ex. 2 at 26; Ex. 6 at 153; Ex. 8 at 159). Defendant Berman is the owner of Discount Filing Services, the outfit through which defendants operated their scam until they began using defendant Bell's name to do business. (Ex. 11 at 386). Berman also acts as a Bell salesperson, and has himself made numerous misrepresentations to undercover investigators in taped sales pitches. (E.g., Ex. 11 at 281, 331; Ex. 12 at 397, 400; Ex. 14 at 502, 584). In short, both Justus and Berman participate in the unlawful conduct outlined above, and as managerial personnel, both are in a position to know about and control the rampant fraud.

c. Fine Print Disclaimers Cannot Excuse Defendants' Fraudulent Scheme

Defendants cannot excuse their fraud by inserting risk disclosures among the many promotional materials they provide consumers. (E.g., Ex. 5 at 100-03).[15] It is settled law that

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1088, 1103 (9th Cir. 1994).

[15] Bell telemarketers frequently dismiss the risk disclosures during their sales pitches. (Ex. 1 at 2). One Bell telemarketer told an undercover agent that she did not need to read the disclosure before investing, adding "You just sign on the bottom." (Ex. 10 at 259). According to the telemarketer, "all [risk disclosures] say the same thing, and you have to stick it in by law." (Ex. 10 at 257). Moreover, one 75 year old consumer declarant did not even receive Bell's disclosures until *after* she had invested. (Ex. 8 at 158, 167).

defendants cannot use such disclaimers to exonerate or legitimize their fraudulent activity. See In re Rexplore, Inc. Securities Litigation, 671 F. Supp. 679, 683-85 (N.D. Cal. 1987); CFTC v. U.S. Metals Depository, 468 F. Supp. 1149, 1161 (S.D.N.Y. 1979). See also Chrysler Corp. V. FTC, 561 F.2d 357, 363 (D.C. Cir. 1977); SEC v. Comcoa Ltd., 855 F. Supp. 1258, 1262 (S.D. Fla. 1994) ("when considering [defendant's] scheme in its entirety, the Court gives little deference, if any, to these carefully crafted 'exculpatory clauses' inserted in the agreements").

Rather, the Court must consider the net impression that defendants' representations have had on consumers. See FTC v. Atlantex Associates, 1987-2 Trade Cas. (CCH) 67,788 at 59,254 (S.D. Fla. 1987), aff'd, 872 F.2d 966 (11th Cir. 1989); see also Southwest Sunsites, Inc., 106 F.T.C. 39 (1985), aff'd, 785 F.2d 1431 (9th Cir. 1986), cert. denied, 479 U.S. 828 (1986). When so considered by this standard, defendants' efforts to "cover their tracks" through such disclaimers are plainly ineffective.[16]

2. The Balance Of Public Equities Mandates Preliminary Relief

The public equities in this case mandate the proposed injunctive relief. The Commission has presented substantial evidence showing that defendants are engaged in a widespread, fraudulent scheme to sell applications for FCC licenses. The

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[16] Neither can defendant Berman cure his fraud by stating that paging license investments are "speculative," or mentioning that there is "a potential for risk" during his sales pitches. (Ex. 14 at 498; Ex. 12 at 393). These vague caveats in no way excuse Berman's numerous and blatant misrepresentations. See p. 23-24, supra.

injury to consumers is large -- defendants have taken in more than $4.5 million dollars through their scheme, and, as explained above, it is likely that consumers will lose all of their investments as a result of defendants' deceit. The Court must halt defendants' deception to prevent further injury to the public.

The proposed temporary injunctive relief is narrowly drafted to restrain defendants from further violations of Section 5 of the FTC Act in the specific ways in which they have violated it. The proposed relief would plainly serve the public interest by stopping the deception perpetrated by defendants and preventing further harm to consumers. See, e.g., National Society of Professional Engineers v. United States, 435 U.S. 679, 697 (1978).

C. An Asset Freeze, Temporary Receiver For Defendant Bell, Immediate Access To Defendant Bell's Offices, And Expedited Discovery Are Necessary To Prevent Dissipation Of Assets And To Preserve The Possibility Of Effective Final Relief For Consumers

Defendants have illegally obtained millions of dollars through their deceptive practices. Where, as here, defendants' business operations are permeated by fraud, there is a strong likelihood that they will attempt to dissipate or conceal their assets during the pendency of the action. See, e.g., SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1106 (2d Cir. 1972); SEC v. R.J. Allen & Associates, Inc., 386 F. Supp. 866, 881 (S.D. Fla. 1974). Mindful of this likelihood, courts in this district have ordered the freezing of assets, appointment of receivers, and other ancillary relief, including expedited discovery and

access to defendants' business premises, in circumstances similar to those found here. See note 13, supra (citing numerous instances where Courts in this District have granted such relief).

As part of the final remedy in this case, the Commission seeks monetary redress for the consumers defendants have defrauded. Defendants' assets must therefore be frozen to preserve the possibility of restitution to the victims of their scheme. See Singer, 668 F.2d at 1113 (asset freeze appropriate when Commission objective is "to obtain restitution of moneys fraudulently obtained"). The Court may impose an asset freeze when there is a mere possibility of asset dissipation. FSLIC v. Sahni, 868 F.2d 1096, 1097 (9th Cir. 1989) (district court holding that required a showing of "likelihood" of asset dissipation placed an undue burden on the FSLIC). Without an asset freeze, there is a substantial risk that what remains of the proceeds of defendants' unlawful conduct will be dissipated or concealed, causing irreparable injury to the Court's ability to grant effective final relief to injured consumers.

The appointment of a temporary receiver is also necessary to maintain the status quo and prevent the destruction of documents and secretion of assets during the pendency of this proceeding. See, e.g., FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1432 (11th Cir. 1984) (appointment of receiver in §13(b) action held proper when defendants were fraudulent telemarketers); CFTC v. Co Petro Marketing Group, Inc., 680 F.2d 573, 582 n.16 (9th Cir. 1982) (appointment of receiver held proper because the illegal conduct was carefully planned, tightly

controlled, and systematically carried out, thus creating a reasonable likelihood of future violations).[17]

The individual perpetrators of this fraud cannot be trusted to operate defendant Bell honestly. Only a receiver will be able to marshal and safeguard corporate assets, determine the size and extent of defendants' fraud, and identify consumers injured by defendants' practices. The Commission recommends that the Court appoint Frank Sweeney as the receiver for the corporate defendant Bell. See Plaintiff's Memorandum Recommending Frank Sweeney as Temporary Receiver.

The Commission also seeks leave of Court to expedite discovery for the immediate purpose of locating defendants' assets and records. Specifically, the Commission seeks permission on 48 hours notice to conduct depositions and to request production of documents for the limited purposes of identifying and securing assets and business records. The Commission also seeks an order granting its staff immediate access to relevant documents at defendant Bell's offices. The Court may grant such relief under its equitable authority to order such ancillary relief as is needed to accomplish a just result in this proceeding. Singer, 668 F.2d at 1133, and courts in this district have granted such relief to the Commission is several similar cases. See note 13, supra. Such immediate

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[17] See also SEC v. Bowler, 427 F.2d 190, 197-98 (4th Cir. 1970) (a prima facie showing of fraud and mismanagement, absent insolvency, is sufficient basis for appointment of receiver); SEC v. Capitol Counselors, Inc., 332 F. Supp. 291, 304 (S.D.N.Y. 1971) (receiver appointed "to prevent diversion or waste of assets to the detriment of those for whose benefit, in some measure, this injunctive action is brought").

access is needed to protect evidence against destruction and to determine (1) the full scope of defendants' wrongdoing, (2) the identities of injured consumers, (3) the total amount of consumer injury, (4) and the location of defendants' assets.

Any hardship the relief sought here imposes on defendants is outweighed by the public equities. Although the requested relief "may disrupt defendants' business activities, this court is under no obligation to recognize this equity in the continued operation of the business because the business is permeated with deception designed to harm the public." FTC v. Silueta Distributors, Inc., 1994 Dist. LEXIS 10095, *1 (N.D. Cal. 1994). The overriding public interest is in preserving available assets for return to defrauded consumers.

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

The substantial risk of immediate asset dissipation and document destruction, coupled with defendants' ongoing illegal conduct, establishes "immediate and irreparable injury, loss, or damage" justifying *ex parte* relief pursuant to Rule 65(b) of the Federal Rules of Civil Procedure.[18] As demonstrated, defendants are engaged in a patently fraudulent telemarketing scheme

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[18] Congress has looked favorably on the availability of *ex parte* relief under Section 13(b) of the FTC Act. In passing the Federal Trade Commission Act Amendments of 1994, the Senate observed: "Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC [Act]. The FTC can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress." S. Rep. No. 130, 103rd Cong., 2d Sess. 15-16, *reprinted in* 1994 U.S. Code Cong. & Admin. News 1776, 1790-91.

exposing them to various civil and criminal sanctions, and thus have every incentive to secrete recoverable assets and destroy inculpatory documents if given notice of the Commission's action. Defendants have also flouted the laws of the State of California by failing to register as a telephonic seller and post a required $100,000 bond with the California Department of Justice, exposing them to additional penalties. (Ex. 11 at 278)[19] They simply cannot be trusted to preserve the status quo absent ex parte relief. The Commission's past experiences have shown that defendants engaged in similar schemes will withdraw funds from bank accounts and move or shred documents upon discovery of impending action by the Commission. See Certificate of Plaintiff's Counsel in Support of Ex Parte Application ¶7. (citing numerous instances of such conduct).

Courts in this District have therefore repeatedly granted the Commission ex parte relief in Section 13(b) cases similar to the one described herein. See note 13, supra. "Boiler room" fraud cases such as this one fit squarely into the narrow category of situations where ex parte relief is appropriate:

> The ex parte temporary restraining order is indispensable to the commencement of an action when it is the sole method of preserving a state of affairs in which the court can provide final relief. Immediate action is vital when imminent

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[19] Failure by a telephonic seller to file the required registration may be punishable with a prison term of up to a year and a fine of up to $10,000. Cal. Bus. & Prof. Code § 17511.9. Furthermore, the same penalties obtain for any person who "directly or indirectly employs any device, scheme, or artifice to deceive in connection with the offer or sale by any telephonic seller." Id.