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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,)	CASE NO. CV-98-9260-MMM (CWx)
Plaintiff,)	
vs.)	ORDER GRANTING PLAINTIFF'S
ARLINGTON PRESS, INC., d/b/a)	APPLICATION FOR PRELIMINARY
CONSUMER DATA SERVICE, a)	INJUNCTION
California corporation; and DAVID T.)	
UMHOLTZ, individually and as an officer)	
of the corporation; and WENDY J.)	
FOSTER, individually and as an officer of)	
the corporation,)	
Defendants.)	

The Federal Trade Commission brings this action under § 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), against Arlington Press, Inc., and that company's principals, David Umholtz and Wendy Foster. It seeks preliminary injunctive relief, under Rule 65 of the Federal Rules of Civil Procedure, prohibiting defendants from engaging in unfair or deceptive acts and practices in violation of § 5(a) of the FTCA, 15 U.S.C. § 45(a). The Commission also alleges violations of the Telemarketing Sales Rule, 16 C.F.R. § 310.3. The court having considered the pleadings, declarations, exhibits, and memoranda filed in support thereof, finds that a preliminary

1 injunction should issue in this case, extending the terms of the temporary restraining order issued
2 by this court on November 18, 1998.

3
4 **I.**

5 **INTRODUCTION**

6 This matter first came before the court on plaintiff Federal Trade Commission's ("FTC")
7 Emergency Motion for a Temporary Restraining Order and Preliminary Injunction filed on
8 November 18, 1998. The FTC's application and complaint alleged that defendants were engaged
9 in deceptive telemarketing practices in violation of the Federal Trade Commission Act ("FTC Act"),
10 15 U.S.C. § 45(a). The court granted plaintiff's Motion for a Temporary Restraining Order, and
11 scheduled a December 3, 1998 hearing on an Order to Cause re Preliminary Injunction. The hearing
12 was subsequently continued by stipulation to December 10, 1998, then to December 21, 1998, and
13 finally to January 11, 1999. At the hearing on January 11, the court heard live testimony from two
14 witnesses who had provided declarations. In order to consider this testimony and the arguments of
15 counsel, the court continued the temporary restraining order in effect until January 18, 1999 and
16 indicated that it would issue its order regarding the application for preliminary injunction on that
17 date.

18
19 **II.**

20 **FACTUAL BACKGROUND**

21 Defendant Arlington Press, Inc. ("Arlington") is a California corporation that conducts
22 business under name "Consumer Data Service." (Pl.'s Ex. 33 at 792-93, 796.) Arlington's principal
23 place of business is in Santa Barbara, California.¹ Defendants David T. Umholtz and Wendy Foster
24

25 ¹Defendants did not file a memorandum of points and authorities opposing the FTC's
26 application. Instead, their opposition consists of exhibits and declarations purporting to refute
27 certain of the FTC's claims. Much of the FTC's proof and many of its allegations, however, are
28 uncontested. Where disputed facts and characterizations of defendants' conduct exist, they are
noted.

1 are owners, officers and directors of Arlington. (*Id.* at 802.) Since about May 1996, defendants
2 have advertised and marketed “how to” guides and lists concerning auctions of government seized
3 cars, home foreclosure sales, and at-home and government employment, to consumers throughout
4 the United States. (Complaint, ¶9.) Since it commenced business, Arlington has disseminated over
5 five hundred million flyers through direct mailings sent to consumers by coupon companies, and
6 placed advertisements in newspapers. (Def.’s Exs. 2-4.) **A. Arlington’s Advertisements**

7 **1. Government Seized Car Auction Guides And Lists**

8 The Arlington advertisement entitled “SEIZED CARS FROM \$200” and prominently depicts
9 a photographs of a late-model Ford Mustang and the following text:

10 “For Current Local Listings, Call Toll Free 7 Days 1-800-883-0819 ext. A-7228
11 ● DEA ● FBI ● SHERIFF ● U.S. MARSHAL ● IRS ● U.S. CUSTOMS ●
12 STEREOS ● VCR’S ● CARS ● BOATS ● TRUCKS ● 4X4’S ● JEWELRY ●
13 COMPUTERS ● LIVE STOCK ● FARM EQUIPMENT ● OVER 1 MILLION
14 CARS SOLD EVERY MONTH! ●” (Def.’s Ex. 22, at 113; Receiver’s Report, Ex.
15 “C.”)

16 **2. Home Foreclosure Sale Guides And Lists**

17 One Arlington advertisement entitled “GOV’T FORECLOSED HOMES” depicts a house
18 with a white picket fence with the words “YOUR AREA” written diagonally across it. (Plaintiff’s
19 Ex. 1 at 11; Parsons Decl., Att. “A.”) The advertisement reads:

20 “For Current Local Listings Call: **1-800-883-0819 ext. H9034**
21 NO MONEY DOWN ● MUST BE SOLD ● *BUY FOR PENNIES ON THE DOLLAR* ● 100% GOV’T
22 FINANCING FROM VA ● HUD ● FDIC ● RECD ● SBA ● IRS ● GSA *THOUSANDS OF HOMES*
23 *SOLD EACH MONTH*
24 **TOLL FREE 7 DAYS ● CALL NOW”**

25 (*Id.*; see also Def.’s Ex. 22 at 113; Receiver’s Report, Ex. “C.”)

26 Arlington also ran ads in the classified section of newspapers that stated:
27 “**GOVERNMENT FORECLOSED HOMES** for pennies on \$1. Delinquent Tax,
28 Repo’s, REO’s. Your area. Toll free 1-800-218-9000 Ext. H-5139 for current

1 listings.” (Def.’s Ex. 13 at 61.)

2 **3. Employment Guides & Lists**

3 Arlington ran ads in the employment classified sections of newspapers, that stated:

4 “ATTENTION! TYPIST/PC USERS. Steady work. Full-time/Part-
5 time \$45,000 per year earnings potential. Call toll free 1 800 883 0819
6 ext T-400” (Def.’s Ex. 17 at 88.)

7 Other ads read:

8 “\$1000 POSSIBLE TYPING Part-time. At Home. Toll Free 1-800-
9 218-9000 Ext. T-5139 for listings.” (*Id.*)

10 Still others read:

11 “GOVERNMENT JOBS

12 Now Hiring in your area. \$16,000 - \$68,000. Call toll
13 free 1-800-883-0819, ext. J-124” (Def.’s Ex. 20, at 101.)

14 **B. Arlington’s Products And Services**

15 **1. Auction Guides And Lists**

16 Defendants have lodged with the court sample copies of the Guides and Listings that
17 Arlington sold. Each set contains two books, a “how to” “Guide” and a directory of “Listings.” The
18 soft bound book entitled “Consumer’s Guide to Government Auctions” (“Auction Guide”) has cover
19 photographs of a house with a white picket fence, an antique automobile, a yacht, an airplane, cash,
20 a convertible Jaguar XKE, jewelry, a sport utility vehicle, and a motorboat. Some of the information
21 and advice contained in the book is obvious (“Never overbid” or “Remember to buy low!”). By far
22 the greater part of the information, however, is detailed instruction on how different types of
23 auctions are conducted, descriptions of how the auctions conducted by various organizations differ,
24 the types of property that are typically sold, definitions of auction terminology, etc. The Auction
25 Guide also contains various checklists.

26 The book entitled “Consumer’s Listings of Government Auctions” (“Auction Listings”) has
27 the same nine photographs on the cover. It is arranged by state, and identifies, for listed cities, the
28 auctioneers or agencies holding auctions, their telephone numbers, and a brief description of the type

1 of property they typically sell (e.g., “vehicles” or “real estate”) or a cross-reference to the Auction
2 Guide, where a longer list of typical items can be found.

3 **2. Home Foreclosure Sale Guides And Lists**

4 The publication entitled “Home Buyer’s Guide to Foreclosed Real Estate” (“Foreclosure
5 Guide”) has a cover photograph of a tree-lined residential street. Like the Auction Guide, the
6 Foreclosure Guide contains both obvious and non-obvious information that might be useful to
7 persons seeking to purchase homes at foreclosure sales. It also contains checklists and forms.

8 The publication entitled “Home Buyer’s Listings of Foreclosed Real Estate” is organized by
9 state. It lists foreclosed properties purportedly available for sale by street address and city. For each
10 property, the Guide lists an asking price, a brief description (such as “single family residence” or “3
11 bedroom”), a “contact” (which in most instances is nothing more informative than “property
12 management”), the selling agency (such as “HUD” or “Freddie Mac”), and a telephone number for
13 the agency.

14 **3. Employment Guides And Lists**

15 The publication entitled “Careers 2000 Guide” (“Career Guide”) has a cover photograph of
16 six one hundred dollar bills. Like the Auction and Foreclosure Guides, the Career Guide contains
17 both obvious and non-obvious information that could be useful to persons seeking jobs. It contains
18 general information and advice regarding different types of careers and entrepreneurial
19 opportunities. It also contains sample ads and résumé terms.

20 The publication entitled “Careers 2000 Listings” (“Career Listings”) is organized by state,
21 and lists employment offices, providing the agency name, address and phone number. The book also
22 lists the U.S. Department of Labor and Veterans Administration offices, Fortune 500 companies,
23 franchisors, trade organizations, trade schools, and alternative distribution firms (e.g., Mary Kay
24 Cosmetics, Amway, etc.).

25 **C. Telemarketing Sales Scripts**

26 When the Receiver assumed control of Arlington, he obtained copies of a series of
27 telemarketing scripts that were attached to the walls of the cubicles where the Arlington
28 telemarketers had worked. (Chris Sweeney Decl., ¶ 4.) Copies of these scripts have been filed with

1 the court.² (*Id.*)

2 **1. Auction Script**

3 This script directs the telemarketer to inform callers, before telling them they will be charged,
4 that they will “be receiving listings of all the government public and private auctions that are
5 available in your area. Auctions are held up to 6 times per month. You’ll get catalogues in the mail
6 telling you where and when the auctions are taking place and what items are available at them.” The
7 script does not inform callers that they will have to contact the government agencies in order to
8 receive the referenced mailings. At the conclusion of the conversation, the telemarketer is direct to
9 tell the caller to “[b]e sure to put the effort into using this for at least 90 days.” (*Id.*)

10 If the telemarketer encounters resistance, they are to use a script entitled “Auction Objection
11 Responses.” Among the statements that this script suggests the telemarketers make are the
12 following: “Oh, they just sold a ‘93 Toyota Camry for a thousand dollars, they do that all the time
13 . . .” and “Oh, they just sold a ‘95 F150 pickup with 7,300 miles on it for only \$2,700.” that These
14 statements strongly suggest that it is possible to purchase good quality vehicles for a fraction of their
15 fair market value price.

16 Another portion of the “Objection Responses” script suggests the following response to
17 questions concerning refunds or money-back guarantees: “We realize you didn’t call here to get your
18 money back. You called to get a car/home. The beauty of the program is that you’ll continue to get
19 free updates from the agencies listed in the guide until you find the car/home you’re looking for.”
20 (*Id.*, Att. “K.”)

21 **2. Home Foreclosure Script**

22 This script directs the telemarketer to inform callers that the “listings [provided in the Guide]
23 will have the physical street address, negotiable asking price and the contact name and number of
24 the agent who is taking care of the property.” Callers are also told that “[m]any of these homes have
25 an asking price of 40-60% below the market value.” They are advised that they will receive an
26 additional guide: “Along with the foreclosures you’ll receive information on the government sales
27

28 ²They include a Billing Script, a Bank Draft script, separate scripts for each of Arlington Press’ products, and scripts to assist the telemarketers in overcoming customer objections.

1 and auctions where you'll find additional real estate for even less. . . . It's the other half of the
2 package. You'll get a discount, so your total is \$117.90. Write that down." Arlington also provided
3 its telemarketers with a script for overcoming common objections made by those calling about the
4 Foreclosure Guide, entitled "Home Objection Responses."

5 **3. Employment Scripts**

6 Two different telemarketing scripts address Arlington's Job Guides for at-home typing and
7 government jobs. Callers are told that Arlington will "send out information for all Federal, State,
8 City and County *positions* that are currently available" (emphasis added). Arlington also provided
9 its telemarketers with a script for overcoming common objections made by those calling about the
10 Career Guide. That script is entitled "Job Objection Responses."

11 **D. Returns And Refunds**

12 Defendants have filed a 449-page compendium listing all refunds made to customers between
13 August 13, 1996 and August 19, 1998.³ (Def.'s Ex. 30.) While, as noted above, Arlington's script
14 directed its telemarketers to deflect questions concerning its refund policy, the evidence suggests that
15 in practice, the telemarketers told callers they could get a refund at any time. (See Nickerson Decl.
16 at 890:6-7.) When customers sought to return items, however, they were told that they could not
17 get a refund until after they had worked with the program for ninety days. Even after the ninety days
18 had passed, they were told that they had to meet other conditions and secure the consent of a
19 consumer research assistant before they could return the guides and recover their money. (See, e.g.,
20 Elrod Decl., ¶ 18; Center Decl., ¶ 18; Coomes Decl., ¶ 11; Dobbins Decl., ¶ 26; Fern Decl., ¶ 30;
21 Figueiredo Decl., ¶ 12; Garza Decl., ¶ 14; Heck Decl., ¶ 21.)

22 **E. FTC's Investigation and Complaint**

23 FTC investigator Eric Nickerson placed two calls to Arlington in October 1998. (Nickerson
24 Decl., ¶¶ 3 and 11; Pl.'s Ex. 34.) Nickerson recorded both of the calls, and had transcriptions
25 prepared. (*Id.* at 879.) In the first call, Nickerson spoke with an operator who identified himself as
26 "Aaron." (*Id.* at 885:19.) Aaron informed Nickerson that at the government auctions, "vehicles two
27

28 ³ This document should have been filed under seal because it contains the names and credit
card numbers of Arlington customers.

1 to four years of age are auctioned off, on average, for \$1,500 [and that v]ehicles that are five years
2 of age and older start at about \$200 and go up.” (*Id.* at 881:10-13.) Aaron represented that the cars
3 were “actually about 80 percent off their market value.” (*Id.* at 881:15-16.) He told Nickerson there
4 would be “between four and six auctions per month in Denver” and that Nickerson would receive
5 directly from the auction agencies “a listing in the mail about a week before each auction starts” that
6 “tells the time and location of the auction, also what is selling.” (*Id.* at 882:9-17.) Describing the
7 Foreclosure Listings, Aaron informed Nickerson that it includes “the name and number of the
8 government agent that shows it to you.” (*Id.* at 883:11-12.) At one point, Aaron represented that
9 Arlington offered a one-year guarantee, and that if Nickerson “use[d] the program for 90 days and
10 he wasn’t successful “after 90 days, [Arlington would] issue a refund.” (*Id.* at 884:11-16.) Later
11 in the conversation, however, he stated that Nickerson could “get a refund any time up to the year
12 from the day you ordered.” (*Id.* at 890:6-7.) While Aaron informed Nickerson that the program cost
13 was \$59, he did not mention shipping and handling and, after Nickerson inquired about another
14 program and Aaron said he would send both, he did not indicate what additional amount would be
15 charged.

16 The second call Nickerson placed to Arlington was handled by “Dorian.” On this occasion,
17 Nickerson inquired about the at-home typing program, and asked whether “these are companies that
18 currently need some typing done.” (*Id.* at 899:5-7.) Dorian answered, “Yeah.” (*Id.*) Dorian told
19 Nickerson “there is plenty of work; especially in a city the size of Denver, you’re going to have a
20 lot to choose from.” (*Id.* at 898:22-24.) Dorian also described the auction program to Nickerson,
21 who expressed interest in it. Dorian told him he would “go ahead and send that out to you,” and told
22 Nickerson, “we sold four — just to give you an example — don’t expect to get a purchase like this
23 off the bat, but this is one of our best examples. Okay? We sold four laptop computers for \$100.”
24 (*Id.* at 906:12-19.) Dorian informed Nickerson of the \$59 registration fee, but not advise him that
25 the price of two programs would be \$117.90, or that he would be charged for shipping and handling.
26 Rather, Dorian told Nickerson “Go ahead and write down my name and right below that write down
27 11790 . . . 11790, and my agent number below that, is 1127.” (*Id.* at 907:11-15.) Dorian assured
28 Nickerson that Arlington “guarantee[d] [its] service, of course,” and did not indicate that there were

1 any limitations on the guarantee. (*Id.* at 901:19.) The FTC has also filed the declarations
2 of nineteen consumers who describe their conversations with Arlington telemarketers. Like
3 Nickerson's, each of these declarations details various statements made by an Arlington
4 representative concerning the likelihood that the consumer could acquire a good quality car or home
5 below market value, that he or she would receive information about specific at-home typing
6 positions or government jobs then available, and that his or her money would be refunded if he or
7 she were not satisfied. The declarations also describe charges made to credit cards or bank accounts
8 for programs that were not discussed during the telephone call or for programs that the telemarketer
9 offered to send without disclosing that there would be an additional fee. (See Pl.'s Exs. 1 -19.)

10 For the last five months Arlington was in operation, Jessica Lovett worked full time randomly
11 monitoring telemarketing calls. (Lovett Decl., ¶ 4.) Lovett made a note on a form "whenever a
12 telemarketer provided information to a consumer that was inconsistent with the scripts the
13 telemarketers were to use in describing each of Arlington's four programs." (*Id.*, ¶ 8.) Lovett
14 estimates that "[o]f the approximately 100 calls [she] monitored on a daily basis, [she] . . . noted
15 some type of misrepresentation in approximately 20 to 30 of the calls." (*Id.*) Lovett describes
16 "Arlington's policy with respect to these misrepresentations as follows: the first time a
17 misrepresentation was noted, the telemarketer was to be verbally counseled; the second time a
18 misrepresentation was noted, the telemarketer was to receive a written warning; and the third time
19 a misrepresentation was noted, the telemarketer was to be terminated." (*Id.*, ¶ 9.) According to
20 Lovett, however, this policy was not strictly followed. (*Id.*, ¶ 10.) She asserts that "[e]ven after three
21 or more reported misrepresentations, Arlington supervisors would continue to warn telemarketers
22 rather than terminate their employment, depending upon the volume of their sales." (*Id.*)

23 Based on this information, the FTC filed a complaint seeking preliminary and permanent
24 injunctive relief, and such other equitable relief as is necessary to "avert the likelihood of consumer
25 injury during the pendency of this action and to preserve the possibility of effective final relief."
26 Among the forms of relief prayed for are rescission, restitution, and disgorgement of profits.

27 **F. First Report of Receiver**

28 Temporary Receiver Frank Sweeney filed a First Report of Receiver on December 18, 1998.

1 (“Receiver’s Report”). Aided by law enforcement, on November 20, 1998 Sweeney took control
2 of Arlington. (*Id.* at 2:4-7.) Sweeney spoke with 39 employees who were present on his first visit,
3 and informed them that he would contact them when, and if, the business resumed operations. (*Id.*
4 at 2:14-18.) He then caused the locks to be changed, and conducted an inventory of the business
5 (see *id.*, Ex. “B”), including an inventory of an off-site storage facility where Arlington’s
6 publications are stored. (*Id.* at 3:7-13.) Sweeney also contacted the California Attorney General’s
7 office and learned that Arlington does not have a telemarketing license, and that a \$100,000 bond
8 must be posted to obtain one.⁴

9 Sweeney’s review of Arlington’s sales records disclosed that it began operations in April
10 1996, and recorded approximately \$11,000,000 in sales revenue from approximately 127,000
11 customers before its closure. (*Id.* at 4:20-21.) The company’s price list shows that publications sold
12 for \$59.95, plus \$8.95 shipping and handling. (*Id.*, Ex. “C.”) During the same period, the records
13 show that refunds of approximately \$1,400,000 were paid to approximately 15,000 customers. (*Id.*
14 at 4:23-25.) After bringing the accounting records current, Sweeney determined that Arlington has
15 liabilities of \$371,000 and liquid assets of \$125,268.41, only about \$30,000 of which is
16 unencumbered and available to operate the business. (*Id.* at 4:3-5:23.)

17 Sweeney reports that the FTC takes the position that flyers Arlington currently has in
18 circulation violate the telemarketing law. (*Id.* at 3:28.) Consequently, he reports, “[n]either George
19 Umholtz [father of both David Umholtz and Wendy Foster] nor [he] could come up with a method
20 by which we could cure the apparent problem caused by the use of the flyers to generate sales. (*Id.*
21 at 4:1-2.) Given this fact, the assets/liabilities picture, and the fact that a telemarketing license may
22 be required, Sweeney reports that if he is appointed permanent receiver, he will close the premises,
23 terminate telephone service, return leased equipment, sell the furniture and equipment, and abandon
24 the premises. Thereafter, he proposes to distribute any remaining funds to creditors. (*Id.* at 3:24-
25 4:17, 7:17-24.)

26 **G. Arlington’s Response To The Order To Show Cause And Report Of Receiver**

27
28 ⁴In Sweeney’s view, such a license may be required if the houses or cars presented in
Arlington’s publications are deemed to be investment opportunities. (*Id.* at 3:21-22 and n. 1, 4.)

1 Defendants Arlington, Umholtz and Foster have filed declarations and exhibits in response
2 to the court's Order to Show Cause, but have not submitted a Memorandum of Points and
3 Authorities synthesizing their legal position. Defendants also filed a Response to First Report of
4 Receiver, which contests certain of Frank Sweeney's findings. (Def.'s Response to First Report of
5 Receiver.) Defendants contend, for example, that Arlington does not need a telemarketing license
6 because the publications are not presented as investment opportunities. (*Id.* at 4:1-2.) They also
7 contest Sweeney's statement that neither he nor George Umholtz could come up with a method by
8 which to cure the problem that sales were being generated by flyers that the FTC believes violate
9 the law. (*Id.* at 2:6-9.) Defendants argue that changes in the sales scripts could cure any deficiencies
10 in the ads. They suggest, for example, that the phrases "pennies on the dollar" and "cars from \$200"
11 could be clarified. (*Id.* at 2:18-3:16.) Finally, defendants have supplied a 1998 profit and loss
12 statement for Arlington, and fault Sweeney for failing to provide one to the court. (*Id.*, Ex. "1.")

13 **1. Declaration of Defendant David Umholtz**

14 In his declaration, David Umholtz details some of his purportedly successful efforts to have
15 advertisers and the Santa Barbara Better Business Bureau review and approve of Arlington's
16 advertisements and sales methods. (Umholtz Decl., ¶¶ 7-9, 11-13.) He explains that Arlington's
17 "ads were always submitted to potential advertisers for pre-approval" and that it was Arlington's
18 "understanding that the advertisers were reviewing [the] ads to insure that they met Truth in
19 Advertising Guidelines." (*Id.*, ¶ 17.) Umholtz contends that the phrases "Pennies on the dollar" and
20 "Seized cars from \$200" were "never brought up as an issue [by the advertisers] because the term
21 'pennies on the dollar' simply means bargain or some percentage of 100." (*Id.*) He notes that
22 Arlington does "not say 'Seized cars *for* \$200' [and that] 'Seized cars *from* \$200' . . . is designed
23 to show a range which says you can get cars from \$200 and up." (*Id.*)

24 Regarding the company's practices, Umholtz states:

25 "All of our operators are trained and monitored to ensure that our
26 products are not misrepresented to the consumer. They are required
27 to read the scripts verbatim. It is corporate policy that if an operator
28 is caught misleading a customer in any way, they are warned verbally,

1 in writing, and/or terminated on the spot.” (Umholtz Decl., ¶ 21.)

2 According to Umholtz, telemarketer Dorian Aquino was “terminated on the spot in October 1998
3 when one of our monitors observed him not quoting the total price clearly and sending out a second
4 program without the customer’s authorization.” (*Id.*)

5 In his supplemental declaration, Umholtz proffers numerous exhibits constituting Arlington’s
6 customer files for the nineteen FTC consumer declarants. These printouts reflect the dates that the
7 customers called Arlington telemarketers, describe the complaints made, and when refunds were
8 issued. (Def.’s Exs. 31-49.) Umholtz characterizes some of the complaints made by these customers
9 as “communication problems,” “misunderstandings,” or “miscommunications” between
10 telemarketers and sometimes “confused” consumers. (Umholtz Supp. Decl., ¶¶ 4, 5, 6, 7, 9, 12, 15,
11 20, 22.) In other instances, he blames the telemarketers, who he states were disciplined or
12 terminated.

13 **2. Other Declarations**

14 Wendy Foster’s initial and supplemental declarations explain the efforts she undertook to
15 research and verify the information contained in Arlington’s publications. Foster contends, with
16 citations to exhibits such as government publications, that the information contained in Arlington’s
17 Guides and advertising statements such as “pennies on the dollar” and “cars from \$200” are not
18 misleading. Foster also states that the impact of the court’s temporary restraining order has been
19 “both tragic and profound.” (Foster Decl., ¶ 22.) Foster recounts that she is a single mother of four,
20 and that her income has been cut off, her bank accounts frozen, and her ability to use her credit cards
21 impaired. (*Id.*, ¶¶ 1-2.)

22 Leah Hughes, a telemarketer who worked at Arlington during Lovett’s tenure, has filed a
23 declaration stating:

24 “[Floor Manager] Stacey Padilla always ran a very clean operation. It
25 was my understanding three strikes and you are out. She would first
26 give you a verbal warning. If you committed the same offense again,
27 you were then given a written warning that you signed. If it continued
28 for a third time, then your employment with the company was

1 terminated.” (Hughes Decl. at 1:10-15.)

2 Julie Irvine, also an Arlington employee, declares that one of her responsibilities is “to
3 oversee the monitoring of every sales agent.” Irvine states that she does not tolerate
4 misrepresentation, and that “[a]ny employee caught using dirty sales tactics is immediately
5 dismissed.” (Irvine Decl., 1:10-13.) She also indicates that “a large part of [her] duties [as sales
6 supervisor] are the constant monitoring of each employee.” In this respect, she says, “[e]ach
7 operator is to strictly follow a script and any wavering from that is reprimanded and corrected
8 immediately.” (*Id.* at 1:14-18.)

9 In her declaration, floor manager Stacy Padilla asserts that Arlington “address[es] every
10 customer complaint immediately and none [is] ever avoided.” (Padilla Decl., 1:21-22.) Padilla also
11 represents that “[n]inety percent of our customers are successful in using our programs. That is a
12 fact.” (*Id.* at 1:23-24.)

13 **3. Testimony At Evidentiary Hearing**

14 At the hearing on the order to show cause, the court heard live testimony from Jessica Lovett
15 and Julie Irvine. This testimony amplified on and clarified the statements contained in their
16 respective declarations respecting Arlington’s monitoring of telemarketers’ calls and disciplining
17 of employees for misrepresentations. It did not raise new matters of substance.

1 **III.**

2 **DISCUSSION**

3 **A. Legal Standard for Preliminary Injunction**

4 Under § 13(b) of the FTC Act, the court is authorized to issue a preliminary injunction to
5 restrain violations of the FTC Act. 15 USC § 53(b)(2). “Upon a proper showing that, weighing the
6 equities and considering the Commission’s likelihood of ultimate success, such action would be in
7 the public interest, and after notice to the defendant, a temporary restraining order or a preliminary
8 injunction may be granted without bond.” *Id.* “Harm to the public interest is presumed.” *Id.*;
9 *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 175-76 (9th Cir. 1987). See also
10 *Miller v. California Pacific Medical Ctr.*, 19 F.3d 449, 459 (9th Cir. 1994) (“In statutory
11 enforcement cases where the government has met the ‘probability of success’ prong of the
12 preliminary injunction test, we presume it has met the ‘possibility of irreparable injury’ prong
13 because the passage of the statute is itself an implied finding by Congress that violations will harm
14 the public”).⁵

15 Section 13(b) gives federal courts broad authority to fashion appropriate equitable remedies
16 for violations of the FTC Act. *FTC v. Pantron I Corporation*, 33 F.3d 1088, 1102 (9th Cir. 1994).
17 See *FTC v. HN Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (the authority granted under 13(b)
18 is not limited to the power to issue an injunction, but includes the “authority to grant any ancillary
19 relief necessary to accomplish complete justice”).

20 **1. Likelihood of Ultimate Success on the Merits**

21 **(a) Federal Trade Commission Act**

22 Section 5 of the FTCA, 15 U.S.C. § 45(a)(1), forbids “[u]nfair methods of competition in or
23 affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” To
24 establish that an act or practice is deceptive, the FTC must establish that: (1) a reasonably prudent
25 person would rely on the deceptive advertisements, practices or representations; (2) the

26
27 ⁵ “[I]n statutory enforcement cases where the government can make only a ‘colorable
28 evidentiary showing’ of a violation, the court must consider the possibility of irreparable injury.
[Citation.] This is in keeping with our normal sliding scale standard of injunctive relief.” *Miller*,
supra.

1 advertisements, practices or representations were widely disseminated; and (3) consumers purchased
2 the product. See *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1435 (9th Cir.), cert. denied, 479
3 U.S. 828 (1986); *Thompson Medical Co., Inc. v. FTC*, 104 F.T.C. 648 (1984), aff'd, 791 F.2d 189
4 (D.C.Cir.1986), cert. denied, 479 U.S. 1086 (1987); *FTC v. Patriot Alcohol Testers, Inc.*, 798
5 F.Supp. 851, 855 (D.Mass. 1992); *FTC v. Kitco of Nevada, Inc.*, 612 F.Supp. 1282, 1293
6 (D.Minn.1985). Once the FTC has satisfied this burden, defendants must prove that consumers did
7 not rely on the representations to avoid liability. *FTC v. World Travel Vacation Brokers*, 861 F.2d
8 1020, 1029 (7th Cir. 1988).

9 Defendants do not contend that Arlington's advertisements, practices or representations were
10 not widely disseminated. Nor do they allege that consumers did not purchase their products.
11 Accordingly, the only issues that must be addressed are whether defendants engaged in unfair or
12 deceptive acts or practices, including deceptive advertisements, sales practices, or representations,
13 and whether a reasonably prudent person would have relied upon those advertisements or
14 representations.

15 The FTC must show that defendants' claims are deceptive, i.e., that they "likely would
16 mislead consumers, acting reasonably, to their detriment." *Id.* See also *FTC v. U.S. Sales Corp.*,
17 785 F.Supp. 737, 744 (N.D.Ill.1992). Even if even literally true, a representation will be found to
18 be deceptive and in violation of Section 5 of the FTCA if its net impression is likely to mislead
19 consumers. See *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1154 (9th Cir.1984), cert. denied, 470
20 U.S. 1084 (1985); *Pantron, supra*, 33 F.3d at 1095 ("The test for a violation of Section 5 of the
21 FTCA is whether the representations are likely to deceive consumers"), cert. denied, 115 S.Ct. 1794
22 (1995). Moreover, even if an advertisement does not contain falsehoods, the omission of material
23 information may violate section 5. See *Sterling Drug, supra*, 741 F.2d at 1154; *Katharine Gibbs*
24 *School (Inc.) v. FTC*, 612 F.2d 658, 665 (2d Cir.1979).

25 The FTC must show probable, not merely possible, deception to prove a violation of section
26 5 of the FTC Act. See *Southwest Sunsites, supra*, 785 F.2d at 1436. Here, the FTC contends that
27 the combination of Arlington's advertisements and the sales message delivered by its telemarketers
28 (both scripted and unscripted) misled reasonable consumers to their detriment. To evaluate this

1 contention, the court must consider the advertisements, sales scripts, and deviations from the script,
2 and compare the net effect of these with the products that Arlington sold.

3 Even when delivered verbatim, each of the sales scripts contains misrepresentations and
4 statement that are likely to mislead consumers. According to the script, consumers interested in the
5 Auction Guide are to be told that they will gain access to items “discounted up to 90% below the
6 market value. Cars and trucks that are three years old can sell below \$900, vehicles over five years
7 old can sell as low as \$50.” Coupled with Arlington’s flyer, which depicts an attractive vehicle in
8 good condition, these representations are likely to mislead a reasonable consumer to believe that
9 relatively new, good quality cars can be purchased for extremely small sums of money. In reality,
10 this is not the case.

11 Moreover, consumers are told that they will “get catalogues in the mail telling [them] where
12 and when the auctions are taking place and what items are available at them.” In contrast to this
13 representation, those who order the Guide receive a list of entities that conduct auctions, and
14 information concerning the types of items those entities typically sell.

15 Similarly, consumers seeking the Foreclosure Guide are to be told that “[m]any of these
16 homes have an asking price of 40-60% below the market value,” and that the listing will have “the
17 contact name and number of the agent who is taking care of the property.” The term “many”
18 suggests that buyers will typically be able to purchase real estate at foreclosure sales for half market
19 value. The FTC has presented evidence that this is not the case, and defendants do not contest the
20 validity of this evidence. Furthermore, purchasers discover that the information in the Guide
21 concerning the “agent. . . taking care of the property” is usually no more specific than “HUD” or
22 “Fannie Mae.” No individual names or phone numbers are provided.

23 The script for selling the Career Guides states that the purchaser will receive information for
24 “positions that are currently available” or businesses currently seeking help. Instead, they receive
25 listings of employment agencies or general information concerning the type of businesses that may
26 have a need for home typists. Moreover, while the telemarketers promise that consumers will
27 receive the names of contact persons for the relevant businesses, the Guides direct them to local
28 telephone directories for current telephone numbers and addresses.

1 As delivered, the message frequently includes additional misrepresentations. (Lovett Decl.,
2 ¶ 8.) Particularly as respects Arlington’s refund policy, telemarketers embellish the scripts to give
3 the impression that consumers can return the Guides and receive a refund within ninety days after
4 purchase. This is not true. Moreover, the telemarketers do not disclose the conditions that Arlington
5 places on refunding their money. They do not tell consumers, for example, that they will have to
6 secure the consent of a consumer research assistant to the refund, or that they will have to provide
7 proof that they have contacted the listed government agencies or attended auctions.

8 The court finds that the net combined effect of these communications is to mislead reasonable
9 consumers, who are likely to rely to their detriment on the misrepresentations, omissions and
10 exaggerated claims Arlington makes. For this reason, the court finds that the FTC is likely to prevail
11 on its claim that Arlington’s sales practices violate the Act. See *FTC v. Febre*, 1996 WL 396117,
12 * 2 (N.D. Ill. 1996) (“Even though the advertisements did not guarantee the stated level of earnings,
13 they made express claims regarding the earnings potential of the programs. Such express claims are
14 presumed to be material, i.e., likely to affect a consumer’s choice or conduct regarding a product,
15 and, within reason, to mean what they say.”); *In re Amway*, 93 FTC 618, 729-32 (1979) (statement
16 that a participant could “develop an income of as much as \$1,000 per month” and use of \$200
17 income per month for discussion violated § 5(a) despite disclaimer that some would earn more and
18 some would earn less because neither a substantial nor appreciable number of consumers regularly
19 achieved those earnings); *National Dynamics Corp. v. FTC*, 82 FTC 488, 563-65 (1973), denied in
20 part and remanded in part, 492 F.2d 1333 (2d Cir.1974), on remand, 85 FTC 1052 (1975) (claim that
21 one can earn \$12,000 per year found deceptive).

22 (b) Telemarketing Sales Rule

23 The Telemarketing Sales Rule (“Sales Rule”), promulgated by the FTC pursuant to 15 U.S.C.
24 § 6102(a)(1), proscribes “deceptive telemarketing acts or practices” and requires that telemarketers⁶

26 ⁶The Sales Rule defines as a telemarketer as “any person who, in connection with
27 telemarketing, initiates or receives telephone calls to or from a customer.” Telemarketing is “a
28 plan, program, or campaign which is conducted to induce the purchase of goods or services by
use of one or more telephones and which involves more than one interstate telephone call. . . .”
16 C.F.R. § 310.2(t)-(u).

1 disclose certain material information “in a clear and conspicuous manner” before a customer pays
2 for goods or services offered. See 16 C.F.R. § 310.3(a)(1). The Sales Rule requires clear and
3 conspicuous disclosure, *inter alia*, of:

4 “(i) The total costs to purchase, receive, or use, and the quantity of,
5 any goods or services that are the subject of the sales offer;

6 (ii) All material restrictions, limitations, or conditions to purchase,
7 receive, or use the goods or services that are the subject of the sales
8 offer;

9 (iii) If the seller has a policy of not making refunds, cancellations,
10 exchanges, or repurchases, a statement informing the customer that
11 this is the seller’s policy; or, if the seller or telemarketer makes a
12 representation about a refund, cancellation, exchange, or repurchase
13 policy, a statement of all material terms and conditions of such
14 policy.” 16 C.F.R. § 310.3(a)(1)(i)-(iii).

15 In addition, under the Sales Rule, telemarketers are proscribed from “[m]aking a false or misleading
16 statement to induce any person to pay for goods or services.” 16 C.F.R. § 310.3(a)(4).⁷

17 The court has “jurisdiction to grant such relief as [it] finds necessary to redress injury to
18 consumers or other persons, partnerships, and corporations resulting from the rule violation or the
19 unfair or deceptive act or practice, as the case may be.” 15 U.S.C. § 57b(b). “Such relief may
20 include, but shall not be limited to, rescission or reformation of contracts, the refund of money or
21 return of property, the payment of damages, and public notification respecting the rule violation or
22 the unfair or deceptive act or practice.” *Id.*

23 For the reasons detailed above, the court finds that the FTC is likely to prove that Arlington’s
24 telemarketers made false and misleading statements to consumers in order to induce them to
25 purchase its products. The FTC also argues that defendants violated 16 C.F.R. § 310.3(a)(1) by
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28 ⁷The FTC does not allege violations of 16 C.F.R. § 310.3(a)(2)(i)-(iv), under which
telemarketers are proscribed from misrepresenting, directly or by implication, the same
information they are required to disclose under § 310.3(a)(1)(i)-(iii).

1 failing to disclose in a clear and conspicuous manner the total costs of goods and services actually
2 being charged, and the terms of the refund policy. Many of the FTC’s declarants assert that they
3 were charged amounts different than what they were quoted. Nickerson was quoted prices for a
4 single item without shipping and handling, but charged for two. While there was a cryptic reference
5 to the total amount of the sale, it was never stated in a clear and conspicuous manner. Moreover,
6 a review of the sales scripts reveals that customers were not informed of Arlington’s refund policy
7 until *after* they made their purchase, in violation of the Sales Rule. For all these reasons, the court
8 finds that the FTC is likely to prevail on the merits of this claim as well.

9 **(c) Liability of Umholtz And Foster**

10 Under § 5 of the FTCA, liability for the acts of a corporation can be imposed on an individual
11 who either (1) directly participated in the conduct violating the statute; (2) played a part in
12 controlling, directing or formulating the relevant policies and practices of the company; or (3) had
13 the authority to control the actions of other individuals combined with actual or constructive
14 knowledge that those individuals were committing misrepresentations. See *FTC v. Publishing*
15 *Clearing House, Inc.*, 104 F.3d 1168, 1170, as amended, 1997 U.S.App.LEXIS 6698 (9th Cir. 1997);
16 *In re National Credit Management Group, L.L.C.*, 21 F.Supp.2d 424, ----, 1998 WL 241768, * 34
17 (D.N.J. 1998). Here, Umholtz and Foster are Arlington’s owners, officers and directors. This is a
18 sufficient basis upon which to conclude that the FTC will be able to demonstrate that they are
19 personally liable for Arlington’s violations of the relevant Acts. See *FTC v. Amy Travel Services,*
20 *Inc.*, 875 F.2d 564, 573 (7th Cir.), cert. denied, 493 U.S. 954 (1989).

21 **2. Weighing of the Equities**

22 “When the Commission demonstrates a likelihood of ultimate success, a countershooting of
23 private equities alone does not justify denial of a preliminary injunction.” *FTC v. Warner*
24 *Communications, Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984). Indeed, while private equities may be
25 considered, public equities receive far greater weight. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072,
26 1083 (D.C.Cir.1981). “Public equities may include ‘beneficial economic effects and pro-competitive
27 advantages for consumers.’” *Warner Communications, supra*.

28 Defendants have invested over two years and substantial funds in Arlington. The individual

1 defendants rely upon the business for income.⁸ They argue that, if the court concludes there is a
2 likelihood the FTC will prove violations of the FTCA and Telemarketing Sales Rule, it should
3 nonetheless refuse to enter the injunctive order the FTC proposes because it is too broad and is
4 unnecessary to remedy harm to consumers.

5 The FTC’s proposed order not only enjoins defendants from making misrepresentations
6 concerning the products they sell and from violating the Telemarketing Sales Rule, but also freezes
7 defendants’ assets for all uses except the payment of reasonable, usual and necessary living
8 expenses. Additionally, the order proposes the permanent appointment of a receiver who will
9 assume full control of Arlington’s business.⁹ This scope of relief, defendants contend, amounts to
10 a pre-judgment attachment, and inappropriately presumes they will ultimately be found liable of the
11 acts alleged in the FTC’s complaint.

12 This latter argument overlooks the fact that injunctive relief is premised upon a finding that
13 the FTC is likely to prevail on the merits of its claim. Indeed, in statutory enforcement actions, all
14 that is necessary to support an injunctive order is a finding of “some chance of probable success.”
15 See *FTC v. World Wide Factors*, 882 F.2d 344, 347 (9th Cir. 1989) (quoting *Odessa, supra*, 833
16 F.2d at 176). Here, the court has concluded that the FTC is likely to prove its claim that defendants
17 violated the FTCA and the Telemarketing Sales Rule. Thus, injunctive relief is appropriate under
18 section 13(b) of the FTC Act.

19 This section authorizes the FTC to “bring an immediate halt to unfair or deceptive acts or
20 practices when to do so would be in the public interest.” *Singer, supra*, 668 F.2d at 1111. While
21 defendants argue that a change in their advertisements and scripts would achieve the same result,
22 the court cannot conclude that this is so on the record presently before it. First, it is unclear that
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24 ⁸As for third parties, Arlington has had as many as one hundred employees, but the
25 turnover rate appears to be high and the length of tenure short. It is unlikely that any employees,
26 especially the college students, had or have long term plans to stay.

27 ⁹Both an asset freeze and appointment of a receiver are recognized forms of relief. See
28 *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989) (freezing assets to prevent dissipation); *FTC*
v. American National Cellular, 810 F.2d 1511, 1512-14 (9th Cir. 1987) (appointment of
receiver); *World Travel, supra*, 861 F.2d at 1031 (asset freeze).

1 defendants have the assets necessary to effect such a change and ensure compliance by their
2 telemarketers. Given the evidence of probable misrepresentations by defendants in the past, and the
3 evidence concerning the difficulties inherent in policing individual telemarketers' conversations, any
4 such arrangement would require direct and constant oversight by a court-appointed receiver. This
5 would be an expensive proposition, and the receiver's report to the court indicates that the business
6 has minimal unencumbered assets available. The receiver's report also casts doubt on defendants'
7 ability to purge existing advertising from the marketplace. For all these reasons, the court finds that
8 enjoining ongoing business by Arlington is necessary to protect the consuming public and ensure
9 that it is not subjected to unfair or deceptive practices.

10 As respects defendants' contention that the form of injunctive relief sought amounts to an
11 attachment, this argument has previously been rejected by the courts. See *Singer, supra*, 668 F.2d
12 at 1112. The *Singer* court stated:

13 "Rescission is an old equitable remedy and the district court has power
14 to issue a preliminary injunction to preserve the status quo in order to
15 protect the possibility of the equitable remedy. While it is true that the
16 asset freeze has an effect comparable to that of an attachment, it is not
17 an attachment. . . . [¶] Because the authority to issue a preliminary
18 injunction rests upon the authority to give final relief, the authority to
19 freeze assets by a preliminary injunction must rest upon the authority
20 to give a form of final relief to which the asset freeze is an appropriate
21 provisional remedy. The Commission says that the preliminary
22 injunction is necessary to preserve the possibility of rescission of
23 contracts and restitution of money obtained by fraud. . . . Hence, there
24 is a basis for the order freezing assets." *Id.*

25 The FTC's argument is the same in the present case. It asserts that a freeze is necessary to preserve
26 assets and provide redress to consumers in the event it succeeds in proving its claims. In fact, the
27 need to preserve assets in this case is great, since it appears that there may not be sufficient funds
28 to make restitution should the FTC prevail. The receiver's report estimates that approximately

1 127,000 consumers purchased product from Arlington. Of these, 15,000 have received refunds.
2 Thus, there may be as many as 112,000 consumers entitled to approximately \$60 each, or a total of
3 some \$6.7 million. At the hearing, defendants represented that the business had been operating at
4 a loss. Thus, there is a risk that further business operations will serve only to dissipate additional
5 assets. Defendants contend that the injunction, including the asset freeze, will destroy their business.
6 It appears, however, that the business is not healthy in any event. The prospect of further
7 deterioration must be weighed against the need to preserve such assets as there are so that they will
8 be available, if needed, to compensate consumers. Under the circumstances, the court finds that the
9 proper balancing of these interests requires that an injunction issue in the form requested by the
10 FTC. See *Singer, supra*, 668 F.2d at 1113.

11 In short, the benefit in protecting consumers against potentially fraudulent activity, and
12 securing for those who may have already been injured some form of redress, outweighs the harm that
13 may be suffered by individuals associated with the business. The equities, therefore, favor the FTC
14 and the public interest it represents.

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IV.

CONCLUSION

For the foregoing reasons, the court concludes that a preliminary injunction should issue in this case, extending the terms of the temporary restraining order issued by the court on November 18, 1998.

DATED: January 18, 1999

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE