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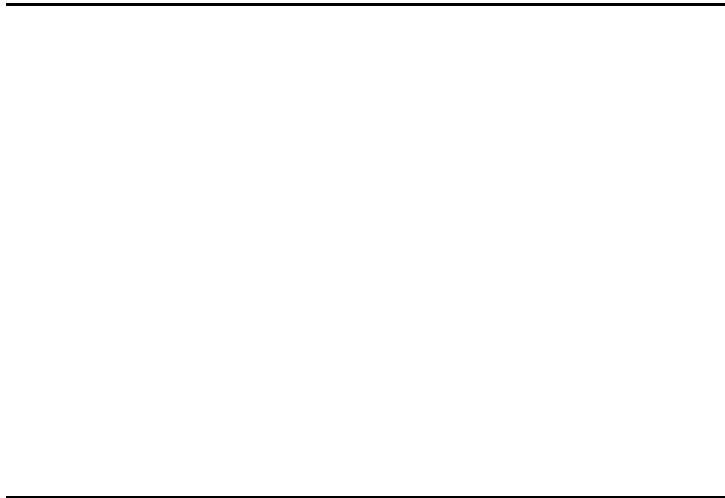


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I. INTRODUCTION

Preying on American consumers' concerns about gas prices and the nation's dependence on foreign oil, defendants Dutchman Enterprises, LLC ("Dutchman"), United Community Services of America, LLC ("UCSA"), and Dennis Lee ("Lee") are hawking the "Hydro Assist Fuel Cell" ("HAFC"), a purported "**Proven Gas Saving Technology**," priced at over \$1,000, that the defendants claim "**will likely double your gas mileage!**" PX11 at 3, 2 (emphases in original).¹ The defendants proclaim that the HAFC has improved gas mileage "by more than 300% in some instances," with increases of up to 261% "

¹ "PX" references in this memorandum refer to Plaintiff's Exhibits contained in the Volumes of Exhibits in Support of Plaintiff's *Ex Parte* Motion for Temporary Restraining Order filed contemporaneously with this memorandum.

Defendant Dutchman Enterprises, LLC

PX07 at 3-6 (Cal.); PX07A; PX07B at 2-8 (Alaska); PX07C at 2 (Idaho); PX07D at 10-14 (Ky.); PX07E at 2-8 (Maine); PX07F at 2-10 (N.M.); PX07G at 2-3 (Or.); PX07H at 2 (Vt.); PX07I at 2-8 (Wash.).² These actions have resulted in felony convictions against Lee, PX07 at 3-6 (Cal.),³ PX07D at 2-4 (Ky.), jail time for Lee, PX07 at 3-6 (Cal.), court orders banning Lee from advertising or selling products in at least three states, PX07C at 3 (Idaho), PX07E at 28 (Maine), PX07H at 12-13 (Vt.), orders enjoining Lee from making unsubstantiated claims in advertisements, PX07B at 10-11 (Alaska), PX07F at 11-12 (N.M.), PX07G at 8, 38 (Or.), PX07I at 10-11 (Wash.), and at least one court order finding Lee in violation of an earlier order. PX07I at 43-52 (Wash.);

² The above-cited law enforcement actions named defendant UCSA as a co-defendant or “d/b/a” of defendant Lee. *E.g.*, PX07B at 2 (Alaska); PX07C at 2 (Idaho); PX07D at 10 (Ky.); PX07E at 2 (Maine); PX07F at 2 (N.M.); PX07G at 2 (Or.); PX07H at 2 (Vt.); PX07I at 2 (Wash.).

³ Lee pled guilty to eight felony charges in the State of California, which charged him with criminal violations of the Seller’s Assisted Marketing Plan Act, CAL. CIV. CODE §§ 1812.201-22, as well as common law fraud in connection with his marketing of a heat pump that purportedly generated electricity. PX07 (Cal.); PX07A, *Lee v. Ventura County Sheriff’s Dept.*, No. 90-56368, 1992 U.S. App. LEXIS 7361 at *1 (9th Cir. 1992) (recounting facts of case and affirming dismissal of convict Lee’s lawsuit against state law enforcement personnel).

Notably, in their promotional materials, the defendants falsely deny that Lee was convicted of crimes in California. PX13 at 24 (“Having never been officially convicted . . . Dennis was illegally kidnapped by the State of California and put into prison”); *see* PX15 at 7:16 (“he was never actually even convicted”).

B. Jurisdiction and Venue

This Court has subject matter jurisdiction over the FTC's claims pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345. Personal jurisdiction over the defendants exists pursuant to the FTC Act's provision for nationwide service of process, 15 U.S.C. § 53(b). *See Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 369 (3d Cir. 2002); *Green v. William Mason & Co.*, 996 F. Supp. 394, 396 (D.N.J. 1998).

Additionally, venue is proper in the District of New Jersey. Under the FTC Act, an action may be brought where a corporation or person "resides or transacts business." 15 U.S.C. § 53(b). As noted above, all of the defendants do business in this district in Newfoundland, New Jersey, which is located in Passaic County.

III. DEFENDANTS' DECEPTIVE BUSINESS PRACTICES

A. Defendants Deceptively Market the Hydro Assist Fuel Cell.

1. The Defendants Represent that the Hydro Assist Fuel Cell Substantially Increases Vehicles' Gas Mileage, and that Scientific Tests Prove Their Claim.

The defendants promote and sell the Hydro Assist Fuel Cell or "HAFC" kit, and its parts, to American consumers nationwide via print advertisements, Internet websites, recorded video infomercials, and other means described below. *See, e.g.*, PX08; PX09; PX11; PX12; PX14B. According to the defendants, the HAFC is a combination of technologies featuring a fuel cell developed by Dutchman. PX11 at 4; PX11A at 6; PX15 at 5. The defendants claim the HAFC offers "Incredible Savings," fostering "Less Dependence on Foreign Oil." PX09; PX11 at 3. More specifically, as alleged in the Commission's Complaint and detailed below, the

defendants claim that the HAFC substantially increases vehicles' gas mileage, and that scientific tests prove that the HAFC substantially increases gas mileage.

a. Print Advertisements

Print advertisements for the defendants' product have appeared in *Newsweek* and

⁴ An Internet website registered to defendants Lee and UCSA, declarationofenergyindependence.com, displays substantially identical electronic versions of these ads online. PX01 ¶¶ 20, 24; PX13 at 10-12; PX16 at 3.

another purported gas-saving product, the Pre-Ignition Catalytic Converter (“PICC”), which “is still under development.” PX11 at 3, 8; PX11A at 4, 11.

Like the HAFC print ads, preignitioncc.com contains express claims that the HAFC substantially increases vehicles’ gas mileage, such as the following:

The HAFC system will likely double your gas mileage! The kit is ABSOLUTELY GUARANTEED to increase your gas mileage by at least 50%. There is a scientific procedure for testing the vehicle before and after the modification that will PROVE the effect the kit has on your mileage. We have actually improved mileage by more than 300% in some instances.

PX11 at 2; PX11A at 4 (emphasis in original). The website also contains a chart identifying nearly two dozen types of vehicles that have experienced substantial increases in gas mileage, ranging from 50% to 261%, due to the HAFC. An abbreviated version of this chart follows.

Sample of Documented Results with the Hydro Assist Fuel Cell

			MPG		
			Before	After	Savings
Toyota Corolla	1996	4 cyl	23	60	160%

c. Video Infomercials

On the Internet, the defendants also promote the HAFC in recorded video infomercials, such as the video recording marked as exhibit PX12 and transcribed in exhibit PX12A. PX01 ¶¶ 16, 17. In this video, defendant Lee presents himself as a “representative for Dutchman Enterprises,” PX01 ¶ 16, PX12A at 3:5-6, and echoes the mileage claims for the HAFC made in print and on Internet websites. Significantly, Lee represents to the public that “the HAFC alone can increase fuel economy by more than 50 percent, and in many cases, it is proven to even more than double your gas mileage.” PX12 at 2:26-2:36; PX12A at 4:19-21; *see also* PX12 at 30:28; PX12A at 24:20-22 (“yes, indeed, we have seen far greater than 50 percent increases in mileage”) (statement of defendant Lee).

d. Defendants’ Dealers

In addition to print advertisements, Internet websites, and infomercials, the

almost always double mileage One of our specialists did a 1998 Air [S]tream motor home and it went from 6.8 miles per gallon to 22 mpg!” PX15 at 4; *see id.* at 3 (“We currently have around a dozen cars with the HAFC . . . that have increased their mileage, on our scientific mileage test, of over one hundred miles per gallon!”). These claims appear on wingsofjoy.info, the site of an authorized dealer of the defendants’ product. PX15. In a telephone call placed to defendant Dutchman, Dutchman’s staff specifically referred wingsofjoy.info to the attention of an FTC investigator posing as a consumer seeking information about the HAFC. PX01 ¶ 32; PX19 at 9:22-10:6; *see infra* Section III.A.1.d (discussing phone calls).

“community of UCSA dealers”); PX13 at 5; PX15 at 6 (“dealers . . . are in line to distribute the HAFC kit nationwide”); *see also id.* at 7 (“Dutchman can assure you, that you will always be treated fairly and professionally by our distributors who

⁷ See PX01 ¶¶ 26, 30, 31 (describing taping procedure and recordings); PX03 ¶¶ 3, 6-7 (same); PX04 ¶¶ 3, 6-7 (same); PX18, PX19, PX21, PX22, PX24 (transcripts of recorded phone calls). Before making these calls, the investigators received HAFC price quotes and other promotional emails. PX01 ¶¶ 27-28; PX03 ¶ 4; PX04 ¶ 4. Copies of such emails accompany this filing. PX17; PX20; PX23.

just had it installed on a Volkswagen And we went from – this is highway miles – we went from 30 to 77, a little over 77.”); PX22 at 9:1-10:3 (claiming that testing proved that dealer’s vehicle “went 43.5 miles . . . on .56 gallons of gas”).

Notably, the HAFC’s purported gas mileage benefits do not come cheap. The defendants’ dealers have quoted prices of \$1,040, \$1,075, \$1,095, and \$1,175 for the HAFC. PX22 at 28:13; PX15 at 1; PX24 at 12:14-15; PX17 at 1.

2. The Defendants Represent How the Hydro Assist Fuel Cell Purportedly Increases Vehicles’ Gas Mileage.

In their promotional and instructional materials, the defendants describe the HAFC kit and offer a pseudo-scientific e

smaller molecules and help separate the compounds into simple elements so they burn more completely.” PX11 at 4; PX11A at 7; *see also* PX09 at 1, 2 (promoting “ionization to pre-treat the car’s fuel”); PX12A at 14:4-11 (same). Additionally, the HAFC kit also uses a fuel additive called a “covalizer,” which, the defendants claim, “breaks down the covalent bonds of the long chain gas molecules and helps ‘crack’ and vaporize your fuel.” PX11 at 4; *see* PX09 at 1-2; PX12A at 15:3-11.

Together, the defendants maintain, these technologies substantially increase gas mileage, “greatly decreas[ing] the amount of fuel needed.” PX09 at 1, 2; *see* PX14 at 3 (touting “combination of fuel economizing technologies”); PX11 at 4-5; PX11A at 7; PX13 at 7. With their technology, the defendants assert, consumers will be able to fix “the big fuel wasting combustion process” and “burn all the gasoline in [the] engine . . . instead of exhausting 70% of it into the air.” PX11 at 6, 8; PX11A at 8, 11; *see also* PX21 at 14:22-15:3. However, as discussed below, the defendants are marketing a product that cannot exist and function as claimed.

3. The Defendants’ Claims Are Contrary to Science.

The defendants’ claims for the HAFC violate basic laws of thermodynamics and well-established physical principles, and have no scientific basis. This is the conclusion of an independent, scientific evaluation of the defendants’ materials describing the HAFC, documented in the expert declaration filed herewith.

The FTC staff asked a distinguished physicist, William P. Halperin, Ph.D,

to determine whether the defendants' claims for the HAFC have a scientific basis. Dr. Halperin examined promotional and instructional materials for the HAFC, reviewed pertinent scientific literature, and ultimately produced an expert report, sworn under penalty of perjury, concluding that "the HAFC cannot improve fuel economy or gasoline mileage of a vehicle as described and as claimed." PX02 at 8. In his declaration, Dr. Halperin explains that the defendants' materials contain gross errors and misrepresentations of fact, and the HAFC kit cannot substantially increase gas mileage for numerous reas

the production of “water gas” necessarily results in a net loss of energy. *Id.* at 4-5 ¶ IV.B & App. 2; *id.* at 7. Producing “water gas” actually *reduces* the amount of energy available at the driver’s disposal.

Third, the defendants’ basic premise that “water gas” has “5X the potential energy of gasoline” is false. The energy content of gasoline is *much greater* than that of hydrogen, the fuel in “water gas.” *Id.* at 5 ¶ IV.C & App. 3. Indeed, the energy content in one liter of “water gas,” the amount purportedly produced by the HAFC in one minute, PX14 at 25, is actually equivalent to the energy content of 0.011 of a tablespoon of gasoline—an amount “negligible from an energy point of view.” PX02 at 10. Moreover, Dr. Halperin observes, the HAFC purportedly produces “water gas” at a rate far too small to have a substantial effect on fuel economy and gas mileage. *Id.* at 6 ¶ IV.E & App. 3.

Fourth, there is no scientific basis for the defendants’ claims that “six powerful magnets” in the HAFC kit “ionize the gasoline to produce smaller molecules and help separate the compounds into simple elements.” Practically speaking, magnets on Earth cannot ionize or realign molecules or otherwise alter the molecular structure of liquids, including gasoline. *Id.* at 5-6 ¶ IV.D. Indeed, Dr. Halperin notes, the most powerful ma

Fifth, there is no known basis for the defendants' claim that the "covalizer" fuel additive "breaks down the covalent bonds of the long chain gas molecules and helps 'crack' and vaporize your fuel." *Id.* App. 4. However, if the "covalizer" worked as the defendants claim, by breaking the bonds of gasoline molecules, Dr. Halperin notes that it actually would have a negative effect, *reducing* the chemical energy available in combustion. *Id.*

Lastly, the defendants' claim that the HAFC helps to "burn all the gasoline in your engine . . . instead of exhausting 70% of it into the air," advances another false premise. It is well-established that over 90% of the fuel in a conventional internal combustion engine is combusted. *Id.* at 6-7 ¶ IV.F-G & App. 3.

"The marketers' claims of increased economy are in violation of the basic laws of thermodynamics, and well-established physical principles." *Id.* at 8 ¶ V. As Dr. Halperin concludes, the HAFC kit cannot substantially increase gas mileage as the defendants claim. *Id.* Consequently, the defendants' claims for the HAFC kit are false and cannot be substantiated.

IV. ARGUMENT

In view of the defendants' ongoing, deceptive marketing of the HAFC kit, and defendant Lee's history of fraud and recidivism, the Commission respectfully requests the issuance of an *ex parte* Temporary Restraining Order with provisions for asset and document preservation, expedited discovery, and an order for the defendants to show cause why a Preliminary Injunction should not issue.

As discussed below, the Court has the authority to enter the relief sought;

⁸ 15 U.S.C. § 53(b); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *In re Nat'l Credit Mgmt.*, 21 F. Supp. 2d 424, 461-62 (D.N.J. 1998). A “proper case” is a case involving a violation of a law enforced by the FTC. *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982). This action is not brought under the first proviso of Section 13(b), which addresses the circumstances under which the FTC can seek preliminary relief before or during an administrative proceeding. *See id.* at 1110-11.

⁹ *See, e.g., FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-70 (11th Cir. 1996);

When, as here, the public interest is implicated, the Court’s equitable powers “assume an even broader and more flexible character than when only a private controversy is at stake.” *Gem Merch. Corp.*, 87 F.3d at 469 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Courts in the District of New Jersey have repeatedly exercised their authority to grant *ex parte* TROs with ancillary equitable relief in FTC fraud cases,¹¹ and as demonstrated below, the relief requested by the FTC is warranted in this case.

B. The Commission Has Met the Standard for Issuance of a Temporary Restraining Order and Preliminary Injunction.

In the Third Circuit, an agency of the United States government seeking injunctive relief authorized by statute need only show that: (1) probable cause exists to believe that the statute in question is being violated; and (2) absent relief, there is a reasonable likelihood of future violations. *United States v. Focht*, 882

Corp., 748 F.2d 1431, 1434 (11th Cir. 1984) (confirming that the FTC may request preliminary injunctions with ancillary equitable relief, including asset freezes, because the FTC Act did not restrict courts’ inherent equitable powers); *H.N. Singer, Inc.*, 668 F.2d at 1113 (holding that the FTC Act “gave the district court authority to grant any ancillary relief necessary to accomplish complete justice”); *In re Nat’l Credit Mgmt.*, 21 F. Supp. 2d at 462; *see infra* Section IV.C.

¹¹ *See, e.g.,* *FTC v. Rann*, No. 00-2792 (D.N.J. June 9, 2000); *FTC v. Screen Test USA, Inc.*, No. 99-2371 (D.N.J. May 24, 1999); *FTC v. McGowan*, No. 96-3227 (D.N.J. July 1, 1996); *FTC v. Sparta Chem*, No. 96-3228 (D.N.J. July 1, 1996); *FTC v. Car Checkers, Inc.*, No. 93-623 (D.N.J. Feb. 8, 1993); *FTC v. Fax Corp., Inc.*, No. 90-983 (D.N.J. Mar. 19, 1990); *FTC v. Engage-A-Car Servs., Inc.*, 1986 U.S. Dist. LEXIS 19976 (D.N.J. Sept. 24, 1986); *see also Sparta Chem*, No. 96-3228 (D.N.J. Nov. 13, 2007) (*ex parte* TRO issued in contempt action arising in FTC case).

F.2d 55, 57 (3d Cir. 1989); *In re Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 439-40.

Courts also consider the balance of equities and the public interest. 21 F. Supp. 2d at 440. Unlike private litigants, however, the FTC need not show irreparable harm; harm to the public interest is presumed in the absence of an injunction.¹² As set forth below, the Commission has met the standard for issuance of a TRO:

Probable cause exists to believe that the defendants are violating the FTC Act, these violations will likely continue unless the Court intervenes, and the public interest favors the issuance of the requested Order.

1. The FTC Has Demonstrated Probable Cause That the Defendants Are Violating Section 5 of the FTC Act.

Proving a statutory violation is similar to the traditional requirement of proving likelihood of success on the merits. *In re Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 440. In considering this factor, the Court “need only to find some chance of probable success on the merits.” *World Wide Factors*, 882 F.2d at 347.

Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a). It condemns as deceptive any material representation or omission that would likely mislead consumers acting reasonably

¹² *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999) (“the Commission need not show irreparable harm”); *see FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991); *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1343 (4th Cir. 1976); *In re Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 438-39 (“[I]rreparable injury must be presumed in a statutory enforcement action.”) (quotation omitted); *FTC v. Nat'l Invention Servs., Inc.*, No. 97-3459, 1997 WL 718492, at *3 (D.N.J. Aug. 11, 1997) (“‘irreparable injury’ . . . [is] presumed from the fact that a federal regulatory statute has apparently been violated”).

under the circumstances. *In re Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 441; *FTC v. Davison Assocs., Inc.*, 431 F. Supp. 2d 548, 559 (W.D. Pa. 2006).

The Court has probable cause to conclude that the defendants are violating Section 5 of the FTC Act. As described above, and evidenced in the exhibits to this filing, defendants Dutchman, UCSA, and Lee are marketing the HAFC with claims that the product substantially increases vehicles' gas mileage and has been proven to do so in "scientific highway tests." *E.g.*, PX11 at 2-4. These claims are false and cannot be substantiated; as Dr. Halperin explains in his expert report, the defendants' claims violate thermodynamic laws and physical principles, and have no scientific basis. PX02. As a matter of law, the defendants' false claims are material because they are express in nature, and are used to promote the purchase of the HAFC.¹³ These false claims are also likely to mislead consumers because, as a matter of law, consumers are entitled to rely on express claims and are under no obligation to doubt the veracity of the defendants' explicit gas mileage claims.¹⁴

¹³ A claim is considered material if it "involves information that is important to consumers and, hence, [is] likely to affect their choice of, or conduct regarding a product." *FTC v. Cyberspace.com, LLC*, 453 F. 3d 1196, 1201 (9th Cir. 2006). Express claims and implied claims used to induce the purchase of a product are presumed to be material. *Thompson Med. Co. v. FTC*, 104 F.T.C. 648, 816 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *see also Pantron I Corp.*, 33 F.3d at 1095-96; *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 604 (9th Cir. 1993); *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 688 n.11 (3d Cir. 1982) ("Once the Commission finds deception, it is normally allowed to infer materiality.").

¹⁴ *See FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) ("Consumer reliance on express claims is presumptively reasonable. It is reasonable to interpret

express statements as intending to say exactly what they say.”). The FTC does not have to prove actual reliance. *FTC v. Freecom Commc’ns*, 401 F.3d 1192, 1204 (10th Cir. 2005) (“the FTC need not prove scienter, reliance, or injury to establish a § 5 violation”); *Security Rare Coin*, 931 F.2d at 1316; *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976) (“the FTC has been sustained in finding that advertising is misleading even absent evidence of that actual effect on customers; the likelihood . . . of deception is the crite

¹⁵ Section I of the proposed Order would enjoin the defendants from marketing products with false or unsubstan

the right to persist in conduct that violates Federal or state law”). Indeed, the public’s interest in stopping the defendants’ false advertising campaign for the HAFC kit and preserving assets for a meaningful monetary remedy far outweighs the defendants’ desire to continue their deceptive advertising activities. “[Tqmm7(er se (75m)61

¹⁶ Sections II through VIII of the proposed Order contain provisions for the preservation of assets and records, the disclosure of the defendants’ financial status, the identification of their dealers, and expedited discovery to help identify and preserve property and evidence. The rest of the proposed Order provides for a preliminary injunction hearing and contains related procedural provisions.

Section III of the proposed TRO includes a provision directing banks and other financial institutions to freeze assets of the defendants in their custody or control. This Court has the authority to direct its order to third parties to preserve assets that are easily dissipated and may be difficult or impossible to trace. *See United States v. First Nat’l City Bank*, 379 U.S. 378, 385 (1965); *Reebok Int’l, Ltd. v. McLaughlin*, 49 F.3d 1387, 1391 (9th Cir. 1995); *Waffenschmidt v. Mackay*, 763 F.2d 711, 714 (5th Cir. 1985).

requested is similar to that ordered in prior FTC cases in the District of New Jersey. *See supra* note 11.

1. An Asset Preservation Order Is Necessary.

When a district court determines that the Commission is likely to prevail in a final determination on the merits, it has “a duty to ensure that . . . assets . . . [are] available to make restitution to the injured customers.” *World Travel Vacation Brokers, Inc.*, 861 F.2d at 1031. To help ensure the availability of assets, preserve the status quo, and guard against the dissipation and diversion of assets, the Court may issue an order freezing the defendants’ assets. Such an order is well within the Court’s authority. *See CFTC v. Am Metals Exch. Corp.*

¹⁷ Individual defendants are liable for corporate violations of the FTC Act if they participate in those acts, have a role in formulating the practices of the company resulting in those acts, or have the authority to control others' actions (such as by assuming the duties of a corporate officer) that they know or should

Moreover, Lee's personal history of fraud

¹⁸ The proposed TRO also contains a provision directing the defendants to preserve records and evidence. It is appropriate to enjoin defendants charged with deception from destroying evidence and doing so would place no significant burden on them. *See FTC v. Stout*, No. 99-5705, 1999 WL 34833240, *1 (D.N.J. Dec. 8, 1999); *see also SEC v. Unifund SAL*, 910 F.2d 1028, 1040 n.11 (2d Cir. 1990) (characterizing such orders as “innocuous”).

the public interest.¹⁹ Judges of this district have issued temporary injunctive orders authorizing expedited discovery and financial disclosures at the outset of numerous actions brought by the FTC under Section 5 of the FTC Act. *See* cases cited *supra* n.11; *see also Stout*, 1999 WL 34833240, at *3-4. Any hardship caused by the requested relief would be temporary, and is greatly outweighed by the public's interest in safeguarding evidence and assets procured through deception.

D. *Ex Parte* Relief Is Necessary and Proper.

The proposed *ex parte* TRO is necessary, and the Court has the authority to enter the requested Order without prior notice to the defendants, because the defendants have demonstrated a manifest disregard for the law and prior notice will likely result in the disappearance of assets procured through their illegal conduct.

Federal Rule of Civil Procedure 65 allows this Court to enter *ex parte* orders upon a clear showing that “immediate and irreparable injury, loss, or damage will result” if the defendants receive advance notice of a proposed order. FED. R. CIV. P. 65(b)(1)(A). Entry of an *ex parte* order is proper when there is a risk that defendants will dissipate or otherwise dispose of their property. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-79 (1974); *see American Can Co. v. Mansukhani*, 742 F.2d 314, 322 (7th Cir. 1984); *In re Vuitton et Fils, S.A.*, 606

¹⁹ *See Porter*, 328 U.S. at 398; *FSLIC v. Dixon*, 835 F.2d 554, 562 (5th Cir. 1987); *Federal Express Corp. v. Federal Expresso, Inc.*, 1997 U.S. Dist. LEXIS 19144, at *6 (N.D.N.Y. Nov. 24, 1997) (early discovery “will be appropriate in some cases, such as those involving requests for a preliminary injunction”) (quoting commentary to FED. R. CIV. P. 26(d)).

F.2d 1, 4-5 (2d Cir. 1979); *see also Vuitton v. White*, 945 F.2d 569, 571-72 (3d Cir. 1991) (citing *Vuitton*, 606 F.2d at 4-5, and *reversing* [eatton

²⁰ Additionally, Lee is promoting the HAFC on websites accessible throughout the United States, PX01 ¶ 23, which would appear to violate other, specific court orders banning him from advertising products in certain states. *See* PX07C at 3 (Idaho); PX07E at 28 (Maine); PX07H at 12-13 (Vt.).

²¹ UCSA and Dutchman likely are violating the state orders because they have knowledge of the orders as a matter of law through Lee, who is an officer of both firms, *Neiswonger*, 494 F. Supp. 2d at 1080 n.18, and they are participating with Lee in falsely promoting the HAFC as detailed *supra* Section III.A. *See generally* PX07B at 10 (Alaska) (decree binding Lee and those in concert with him); PX07I at 10 (Wash.) (same).

it is the FTC's experience that defendants engaged in deceptive marketing dissipate their assets and/or destroy records if given prior notice of a proposed TRO. *See* Pl.'s Rule 65 Cert. *passim*. Numerous courts have issued similar *ex parte* orders at the FTC's request to prevent such foreseeable, irreparable injury. *See supra* n.11. Granting *ex parte* relief renders it more difficult for defendants to conceal assets and deters them from disposing of property to frustrate the Court's ability to order full relief. The substantial risk of asset dissipation in this case, coupled with the defendants' ongoing law violations, justifies the issuance of the requested Order.

V. CONCLUSION

For the reasons delineated above, the Commission respectfully requests that the Court enter an *ex parte* Temporary Restraining Order and Show Cause Order, including provisions for expedited discovery and the preservation of assets and evidence, to halt the defendants' ongoing violations of the FTC Act and to protect the Court's ability to issue effective, final relief in this matter as it may deem appropriate.

Respectfully submitted,

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