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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

**DUTCHMAN ENTERPRISES, LLC;
UNITED COMMUNITY SERVICES
OF AMERICA, INC., also doing
business as UCSA DEALERS GROUP,
LLC; and DENNIS LEE;**

Defendants.

Civ. No. 2:09-141 (FSH-MAS)

Hearing Date: May 28, 2009

**PLAINTIFF FEDERAL TRADE COMMISSION'S
SUPPLEMENTAL BRIEF AND CERTIFICATIONS
IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION**

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Plaintiff, Federal Trade Commission (“FTC” or “Commission”), pursuant to the Court’s Order of May 14, 2009 (#53), respectfully submits its Supplemental Brief and Certifications in Support of its Motion for a Preliminary Injunction.

BACKGROUND

The Commission filed its Complaint on January 12, 2009, seeking injunctive and monetary relief against Dutchman Enterprises, LLC ("Dutchman"), United Community Services of America, Inc. ("UCSA"), and Dennis Lee ("Lee") for their ongoing, deceptive marketing of the Hydro Assist Fuel Cell ("HAFC") kit to buyers nationwide. The Complaint charges the defendants with promoting the HAFC kit with false and unsubstantiated claims that the product causes a substantial increase in gas mileage, and false claims that the HAFC kit has been scientifically proven to increase mileage between 50% and 261%. Compl. ¶¶ 14-17 (#1).

In filing this action, the Commission asked the Court to issue a Temporary Restraining Order ("TRO") to halt the defendants' violations of the FTC Act and to preserve the Court's ability to order monetary relief, and a Preliminary Injunction ("PI") extending that relief. TRO Mot. (#3). On January 14th, the Honorable Faith S. Hochberg, U.S.D.J., found probable cause that the defendants were violating the FTC Act and found that there was good cause to issue the TRO with an asset freeze on an *ex parte* basis due to the defendants' ongoing violations and record of fraud. The Court issued the requested TRO and directed the defendants to appear at a PI hearing before the Honorable Michael A. Shipp, U.S.M.J. TRO (#5).

After the Court issued the TRO, the defendants repeatedly violated the TRO by continuing to market the HAFC kit with prohibited claims that the HAFC kit

causes a substantial increase in gas mileage, and has been scientifically proven to do so, in violation of TRO ¶¶ I.A and I.B; by failing to submit financial disclosure forms in violation of TRO ¶ V; and by failing to identify dealers of the HAFC kit in violation of TRO ¶ VII. These violations continued even after this Court gave the defendants funds to retain outside counsel, and were still occurring as of the date of the PI hearing. Pl.'s Reply Mem., Ex. A, Burton Decl. ¶¶ 9-11 (#29/29-1).

On February 11th, following a hearing, the Honorable Michael A. Shipp issued a Report and Recommendation ("Report") recommending the denial of the FTC's motion. Report (#37). On February 18th, the FTC moved for a new hearing due to audibility issues with the recording of the hearing. The defendants sought to rehabilitate the recording, but these efforts did not produce a recording capable of true transcription. Notice (#51). The Court ordered a new hearing for May 28th.

DISCUSSION

The Court has ample probable cause to conclude that the defendants have deceptively marketed the HAFC kit in violation of the FTC Act and that a PI order is appropriate. Both the evidence presented earlier in this case and the additional evidence submitted with this brief—including consumer affidavits, scientific test results, and the report of a leading automotive engineer—shows that the defendants have deceptively marketed the HAFC kit and that preliminary relief is warranted.

I. Applicable Legal Standards

A. Standard for Preliminary Injunction

As a law enforcement agency seeking injunctive relief authorized by statute,

11, 1997).² Deception may be proven by showing that the claim at issue is false, or that the defendants did not possess a reasonable basis for the claim when they made it. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994); *FTC v. Direct Mkt'g Concepts*, 569 F. Supp. 2d 285, 299 & n.6 (D. Mass. 2008).

When an advertiser makes a specific claim that scientific tests prove that a product works, the advertiser must possess such proof.³ “Defendants have the burden of establishing what substantiation they relied on for their product claims.” *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 959 (N.D. Ill. 2006). While the Commission must show that the defendants’ substantiation is inadequate, it “need not conduct or present clinical studies showing that the product does not work as claimed.” *Id.*

The FTC need only prove violations of Section 5(a) of the FTC Act by a preponderance of the evidence; it is not required to present irrefragable proof. *FTC v. Davison Assocs., Inc.*, 431 F. Supp. 2d 548, 554 (W.D. Pa. 2006); *FTC v. Check Enforcement*

than not.”” *In re OCA, Inc.*, 551 F.3d 359, 372 n.41 (5th Cir. 2008).

II. The Record Evidence Shows that Preliminary Injunctive Relief Is Appropriate.

The FTC has adduced proof sufficient to establish, by a preponderance of the evidence, that the defendants have deceptively marketed the HAFC kit in violation of Section 5(a) the FTC Act and that preliminary injunctive relief is appropriate. In particular, in its previous filings, the FTC has demonstrated that the defendants have falsely marketed the HAFC kit as a product that causes substantial increases in gas mileage, citing anecdotal, unscientific reports. Further, the FTC has relied on the defendants’ recent misconduct, not merely their past record, to show that the

Lee), when in reality, gasoline has much more energy than hydrogen. PX02 at 5 ¶ IV.C & App. 3. The defendants also falsely claim that the HAFC kit “burn[s] all the gasoline in your engine . . . instead of exhausting 70% of it into the air,” PX11 at 8, when, in fact, over 90% of the fuel in a conventional internal combustion engine is combusted. PX02 at 6-7 ¶ IV.F-G & App. 3. They also lie to the public in claiming that “six powerful magnets” in their kit “ionize the gasoline to produce smaller molecules and help separate the compounds into simple elements,” PX11 at 4, when in truth, magnets simply cannot ionize or alter the molecular structure of liquids, including gasoline. PX02 at 5-6 ¶ IV.D; *see also* Defs.’ Br., Ex. D, Holler Aff’d at 3 ([#5](#)) (conceding that “magnets cannot alter the molecular structure of gasoline, nor can [they] ‘ionize’ . . . the fuel.”).⁴ As the above examples illustrate, the defendants’ marketing of the HAFC kit is permeated with deception.

After the FTC presented these and other facts, the defendants “shifted gears” and advanced a previously-unpublicized and equally false theory for their claims. Under this theory, the HAFC kit purportedly increases gas mileage substantially not by increasing combustion efficiency (*i.e.*, the extent to which a vehicle burns

⁴ The defendants acknowledged that the above-cited claim was false, but did not remove it from their promotional materials. Pl.’s Reply Mem., Ex. A, Burton Decl. ¶ 10 & Attach. D (#29-1/#29-5). Also, notably, the defendants admit that several of the above steps take place *before* fuel enters a car’s engine. PX11 at 5 (stating that HAFC kit “vaporize[s] and ionize[s] the fuel before mixing with oxygen and hydrogen inside the engine”); PX13 at 7 (“magnets ionize [gasoline] to help vaporize the gas before it is mixed with the water gas that is injected into the air intake”). Accordingly, expertise specifically relating to internal combustion engines is not necessary to debunk these claims.

the defendants made the challenged claims; the defendants expressly claim that the HAFC kit causes a substantial increase in gas mileage, and has been proven to do so.⁷ Hence, the first element of the charged violations is established. Also, there is no real dispute that the defendants express claims are material. As a matter of law, express claims and claims used to induce the purchase of a product are material.⁸ Hence, the second element of the violations is established. Further, there is no real dispute that consumers reasonably rely on the defendants' claims. Consumer reliance on express claims is presumptively reasonable.⁹ Hence, the sole issue in dispute at present is whether the defendants' claims are false or unsubstantiated. The voluminous evidence summarized above shows that the defendants' advertised claims are both false and unsubstantiated. The defendants thus have engaged in deceptive commerce in violation of the FTC Act.

⁷ Report at 8; *see also* PX13 at 4 (“

B. The Record Evidence Shows that the Defendants Are Likely to Persist in Violating the FTC Act and that the Public Interest Favors Preliminary Injunctive Relief.

As the Court's Report noted, "Defendant Lee has a checkered past and the similarities between prior offenses and the current allegations are striking." Report at 12. However, the FTC has not rested solely on Mr. Lee's "rap sheet" to show that there is a reasonable likelihood of future violations. The FTC has cited three other, salient factors: First, the defendants engaged in numerous violations of the Court's TRO in this matter. *See supra* page 2. Second, by promoting the HAFC kit with false and unsubstantiated claims, the defendants are violating not only the FTC Act but several state court orders prohibiting them from making such claims. PX07B at 10-11 (Alaska); PX07G at 8, 38 (Or.); PX07I at 10-11 (Wash.). Third, the defendants have promoted the HAFC kit on websites accessible throughout the country, PX01 ¶ 23, thereby violating court orders banning them from advertising products in several states. *See* PX07C at 3 (Idaho); PX07E at 28 (Maine); PX07H at 12-13 (Vt.). The defendants' repeated violations of the TRO and numerous state court injunctions shows that the defendants simply will not abide by the law, absent preliminary injunctive relief from a federal court.

In balancing the equities, public equities are entitled to far greater weight. Report at 12 (quotations omitted). Whether they sell products to wholesale or retail purchasers, the defendants deceptively market the HAFC kit to the detriment of the

public.¹⁰ There is no oppressive hardship to defendants in requiring them to stop this activity. *Nat'l Credit Mgm't*, 21 F. Supp. 2d at 460 (“Defendants do not have the right to persist in conduct that violates Federal or state law.”); *Thompson Med. Co.*, 791 F.2d at 195 (“The FTC has a mandate to assure that advertising is not false and misleading. Allowing firms to continue such advertising because to stop would hurt the firm’s economic interests is obviously not part of the calculus of interests Congress intended the FTC to consider.”).

III. Additional Evidence Submitted with this Filing Further Confirms that the Defendants Have Deceptively Marketed the HAFC Kit and that Preliminary Injunctive Relief is Appropriate.

In addition to the evidence previously presented, there are further grounds to issue a Preliminary Injunction at this time due to the emergence of: (1) numerous complaining consumers whom the defendants previously suggested were satisfied buyers; (2) the adverse opinion of a scientist previously cited by the defendants, who rejects the defendants’ claims and their counsel’s comparison of the HAFC kit to another device; and (3) physical, scientific dynamometer testing of the HAFC kit, which conclusively confirms that the product does not substantially increase gas mileage. This evidence addresses each of the issues identified in the Court’s Report and further demonstrates that the requested PI order is well-warranted.

¹⁰ The defendants sell the HAFC kit to dealers, and these buyers are entitled to protection from deceptive practices. The term “consumer” in the FTC Act, 15 U.S.C. §§ 41 *et seq.*, does not exclude businesses that buy products for commercial purposes. S. REP. NO. 93-151 at 27 (1973) (discussing term and stating, “[t]he use of the word ‘consumer’ . . . is to be read in its broadest sense”).

Aggrieved Consumers. First, since the unsealing of this case, numerous aggrieved consumers have come forward to challenge the defendants' claims for the HAFC kit and to demand relief from the defendants' deceptive marketing scam. Significantly, these consumers are not merely purchasers of the HAFC kit; many of them are, in fact, the *very same people* whose names appeared on the "orange test" reports (or "Mileage Test Calculation" forms) filed by the defendants in this case as proof for their claims. The defendants brazenly used these consumers' names in arguing that testing proves their claims. However, many of these consumers have come forward to swear, under oath, that they never received *any* substantial gas mileage increase with the HAFC kit. In most cases, they received no increase in gas mileage whatsoever, despite spending thousands of dollars and many hours in purchasing the HAFC kit, having it installed by a certified installer, and diligently trying to get the product to work. The declarations of these defrauded consumers vividly illustrate the real impact of the defendants' scam and plainly attest to the need for preliminary injunctive relief, including an asset freeze to preserve funds that the Commission intends to locate for effective redress to consumer victims. Sworn declarations from numerous consumers whose names appeared in the defendants' previous filings are attached hereto as **Exhibit A**.

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Commission has obtained the results of physical, scientific testing, in the form of dynamometer tests of the HAFC kit, confirming that the product cannot and does not substantially increase gas mileage. These physical tests were performed by an independent automotive testing facility in New Jersey, Compliance and Research Services, Inc., which has been recognized by the U.S. Environmental Protection Agency. The tests show that a vehicle that obtained gas mileage of 34-35 miles per gallon before the installation of the HAFC kit also received gas mileage of 34-35 miles per gallon after the installation of the kit. Hence, there is now additional, physical proof that the HAFC kit does not perform as the defendants claim. The certified dynamometer test results for the HAFC kit are attached as **Exhibit B**.¹²

The Automotive Engineer Cited by the Defendants Rejects Their Claims.

Third, since the initial Preliminary Injunction hearing in this case, the FTC has learned that the automotive engineer and scientist whom the defendants cited at the February 5th

However, Dr. Heywood firmly rejects the defendants' claims for the HAFC kit and their suggestion that a device developed at MIT, the plasmatron, bears any material similarity to the HAFC kit. After the February 5th hearing, the FTC contacted Dr. Heywood and provided him with the affidavits and material filed by the defendants in this case, the technical specifications and other materials for the HAFC kit filed by the FTC, and the test results for the HAFC kit. Applying his expertise in the field of automotive engines, fuels, and engineering, Dr. Heywood concurs that the defendants' claims for the HAFC kit are false and unsubstantiated by any scientific testing. He rejects the defendants' "orange test" results and their claims that the HAFC kit purportedly substantially increases gas mileage. In short, Dr. Heywood confirms that the defendants' marketing of the HAFC kit is a scam. Dr. Heywood has produced a detailed expert report to assist the Court, attached as **Exhibit C**.¹³

Further Detailed Criticism of Defendants' "Orange Tests" and HAFC Theory. Additionally, the FTC's initial expert witness, Dr. Halperin, an expert in experimental technique, has further analyzed the defendants' "orange test" protocol and their new theory concerning how the HAFC purportedly increases mileage. Dr. Halperin has produced a supplemental expert report identifying many grave flaws in the "orange test" that render it unscientific and unreliable. He has also produced a supplemental expert report reviewing scientific literature on the use of hydrogen, verifying that there is no scientific evidence that the HAFC kit or any

¹³ In addition to the testimony of its initial expert witness, Dr. Halperin, the FTC intends to present the testimony of Dr. Heywood at the May 28th hearing.

device producing hydrogen at the same rate as the HAFC kit can have a substantial effect on gas mileage. These materials, attached as **Exhibit D**, further confirm that the defendants' tests and their claims for the HAFC kit are invalid.

IV. The FTC's Motion for Preliminary Injunctive Relief Is Not Moot.

The defendants have argued to FTC counsel that this case is moot because the defendants have sold their interests in ~~MCID~~[c -el tr 0 j/GS1 0i62/MCive0b244sru7009 Tc

CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing document and its attachments were served by operation of the Court's electronic case filing system upon the following:

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