

06-61429

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CIV-ALTONAGA  
MAGISTRATE JUDGE  
TURNOFF

Case No. \_\_\_\_\_ -Civ- \_\_\_\_\_

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

JUAN MATOS, individually and  
doing business as QTX,  
and BELINDA CURE,

Defendants.

FILED BY \_\_\_\_\_  
2006 SEP 21 PM 12:21  
CLARENCE S. [unclear]  
S.D. OF FLORIDA

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
ITS MOTION FOR TEMPORARY RESTRAINING ORDER AND OTHER EQUITABLE  
RELIEF AND ORDER FOR DEFENDANT TO SHOW CAUSE WHY A  
PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

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## I. INTRODUCTION

Plaintiff, the Federal Trade Commission (“FTC”), brings this action pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b) and 57b, and Section 6(b) of the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. § 6105(b), to a halt a telemarketing scheme designed to defraud consumers seeking work-at-home business opportunities. Defendant Juan Matos, doing business under the name QTX, and Defendant Belinda Cure target Hispanic consumers by promoting their illicit work-at-home business opportunities through Spanish advertisements printed in various Spanish-language newspapers and magazines. QTX’s telemarketers lure consumers into paying a deposit fee by promising lucrative work assembling crafts at home for pay. QTX promises to provide all the materials to consumers for assembling decorative items – in this case, small houses made of beads (“bead houses”) – and to send a courier to consumers’ houses once a week to pick up these items. Defendants promise consumers \$25 cash for each bead house and state that consumers’ potential earnings will be \$500 a week.

In fact, consumers who pay the deposit fee – usually \$110 – do not receive the promised earnings. Indeed, QTX does not send the materials necessary to assemble the promised number of bead houses. Instead, consumers receive materials sufficient to assemble only one such item as a sample that must be sent back to QTX for “approval” before consumers are permitted to assemble more bead houses. Furthermore, the instructions accompanying the materials for the single sample are virtually unintelligible. In the few cases where consumers are actually able to assemble a sample bead house (only after many hours of work) and send it to QTX for approval, QTX rejects the sample, ignores their calls, or does not send them any further assembling work.

To put an immediate stop to Defendants’ illegal activities and preserve assets for redress, the FTC seeks a temporary restraining order enjoining Defendants from engaging in the fraudulent marketing and sale of work-at-home business opportunities and ordering ancillary equitable relief, including (1) an accounting; (2) preservation of documents; (3) expedited discovery; and (4) an order to show cause why a preliminary injunction should not issue. These measures are necessary to prevent further injury pending a preliminary injunction hearing.

## II. THE FEDERAL TRADE COMMISSION

The **Federal Trade Commission** (“FTC”) is an independent agency of the United States created by the FTC Act, 15 U.S.C. § 41 et seq. The FTC enforces, among other statutory provisions, Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts and practices in or affecting commerce. The FTC also enforces the Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310 as amended, promulgated pursuant to the Telemarketing Act, 15 U.S.C. § 6101 et seq. As described in detail below, Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b), 57b, authorize the FTC, through its own attorneys, to initiate United States District Court proceedings in proper cases to seek permanent relief to enjoin violations of the FTC Act and the TSR and to secure such equitable relief as may be appropriate in each case, including consumer redress. See, e.g., FTC v. Gem Merchandising Corp., 87 F.3d 466, 468 (11<sup>th</sup> Cir. 1996).

## III. STATEMENT OF FACTS

### A. The Defendants

**Juan Matos** (“Matos”) does business under the fictitious business name **QTX**, which purports to sell work-at-home opportunities.<sup>1</sup> (Tab A Exh. 1.) Records on file with the Florida Department of State indicate that Matos registered the QTX-assumed business name on September 19, 2005. (Tab A Exh. 1.) Although the registration lists 736 Don Quixote Ave, Apt. B, Orlando, Florida as both the business address and Matos’ home address (Tab A Exh. 1), QTX sends and receives its mail from a commercial mail receiving agency located at 1835 E. Hallandale Beach Boulevard, #657, Hallandale, Florida 33009.<sup>2</sup> (Tab A Exh. 3; Tab C Exh. 2.) Mail for QTX is also being delivered to 1408 Brickell Bay Drive, Apt. 610, Miami, FL 33131.

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<sup>1</sup> The evidence supporting the FTC’s Motion for Temporary Restraining Order is contained in “Exhibits in Support of the FTC’s Motion for Temporary Restraining Order.” References to the evidence in this Memorandum will appear as “Tab [letter] at [exhibit, paragraph and/or page number]. Where applicable, the FTC cites to translations into English of declarations written in Spanish or transcriptions of conversations in Spanish (which precede the original declarations), rather than to the original Spanish-language document.

<sup>2</sup> According to consumer complaints, QTX has also used a private mailbox at 3936 South Semoran Blvd., Suite 380, Orlando, FL 32822. (Tab D Exh. 3.)



(Tab A ¶ 12.) **Belinda Cure** (“Cure”) filled out the Application for Delivery of Mail Through Agent for QTX for this private mailbox in March 2006.<sup>3</sup> (Tab A Exh. 3.) She provided a driver’s license and other photo identification for this application. (Tab A Exh. 4.) When requesting this mailbox for QTX, she signed in the space designated for an officer of the company and listed both her home and QTX’s business address as 1770 79 Street Causeway #D212, Sunny Isles, Florida 33141. (Tab A, Exh. 3.) Cure sends packages and receives mail for QTX from the Hallandale mail drop. (Tab A ¶ 10.) Cure lives in a residential building at 1408 Brickell Bay Drive, Apt. 610, Miami, FL 33131, the other address where QTX is currently receiving mail. (Tab A ¶ 12.)

**B. Defendants’ Deceptive Business Practices<sup>4</sup>**

Since at least December 2005, Defendants have been selling work-at-home business opportunities to consumers nationwide, specifically targeting Hispanic consumers. (Tab A ¶ 6; Tab B ¶ 2.) The ads (translated into English) typically include the following:

WORK FROM YOUR HOME. Earn \$500 per week assembling products. No exp. necessary. 321-234-1508.<sup>5</sup>

(Tab C Exh. 1; Tab D Exh. 1.) These ads appear in local and national Spanish newspapers and provide a telephone number for consumers to call for further information. (Tab A Exh. 2; Tab C Exh. 1; Tab D Exh.1.)

When consumers call the numbers in the ads, they are directed to leave a message. (Tab A ¶ 21 Exh. 5.) Subsequently, they receive a return phone call from Spanish-speaking personnel who explain that QTX’s work-at-home opportunities involve home-assembly of crafts for special

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<sup>3</sup> Records also show that Cure also obtained two other private mailboxes at the same location. (Tab A ¶ 10.)

<sup>4</sup> The facts described below were confirmed by the FTC’s undercover investigation of QTX, which included a lengthy call by an FTC investigator, posing as a consumer, with a QTX representative, and subsequent purchase of materials by the FTC’s investigator. The details of that undercover call, and of the FTC’s investigation, are set out in the Declaration of Ronald Lewis, which is filed herewith. Tab A.

<sup>5</sup> The Spanish original reads: TRABAJE DESDE SU CASA. Gane 500 semanales ensamblando productos. No exp. necesario. 321-234-1508. (Tab C Exh. 1; Tab D Exh. 1.)

occasions, including weddings, quinceañeras (“sweet fifteens”), Mother’s Day, Father’s Day, Valentines’ Day, First Communion, and birthdays. (Tab A Exh. 6 at 2-3; Tab B ¶ 4; Tab C ¶ 4; Tab D ¶ 4.) In these calls, the company represents that consumers should be able to produce approximately five crafts per day, and that the company will pick up these products weekly (Tab A Exh. 6 at 3), at which time the company will pay the consumers \$25 for each such product, (Tab C ¶ 6; Tab D ¶ 4), or \$50 for every two such products. (Tab A Exh. 6 at 6.) QTX’s telemarketers assure consumers that normally workers will be able to earn \$500 per week assembling these products (Tab A Exh. 6 at 6; Tab B ¶ 7) and that dedicated workers will receive considerably more money. (Tab A Exh. 6 at 6.)

The defendants’ telemarketers state that QTX will provide them with all of the necessary materials and instructions to assemble the particular craft. (Tab A Exh. 6 at 3.) Moreover, both the advertisements and the telemarketers represent that no experience is necessary to perform the required work. (Tab A Exh. 2; Tab C Exh. 1; Tab D Exh. 1.)

Significantly, QTX tells consumers that in order to obtain the materials to begin work, they must first pay \$110. (Tab A Exh. 6 at 7; Tab B ¶ 5; Tab C ¶ 5; Tab D ¶ 5.) The telemarketers explain that QTX will ship the materials to the consumer, cash on delivery (“COD”). (Tab A Exh. 6 at 7.) In order to obtain the materials COD, consumers must first obtain a money order and contact QTX with the number for the money order. (Tab A Exh. 6 at 7.) Consumers are told that starting with the second week that they assemble their first ten units, their money will be returned to them. (Tab A Exh. 6 at 7.)

After being notified of the number for the money order, QTX sends a box of materials and instructions to consumers via United States Postal Service Priority Mail from the Hallandale mail receiving agency. (Tab A Exh. 8.) In addition to instructions, which are in all known cases for a bead house, the box contains a roll of plastic string, up to three small packages of beads, and glue. (Tab A Exh. 9; Tab B ¶ 9; Tab C ¶ 9; Tab D ¶ 12.)

QTX’s written instructions indicate that consumers must complete and obtain approval of assembled sample before they can work for the company. (Tab A Exh. 10.) Typically, this is the

first time QTX informs them of the requirement of a sample. (Tab A Exh. 6; Tab B ¶ 10; Tab C ¶ 11.)<sup>6</sup>

In addition, QTX's instructions are lengthy, complex, and ambiguous. They are incomplete and fail to explain how certain materials are to be used in assembling the crafts. They contain small illustrations that lack sufficient detail. (Tab A Exh. 10.) In sum, to the ordinary consumer, they are virtually unintelligible, highlighting that this purported money-marketing opportunity is a sham. Contrary to QTX's claim that no experience is necessary, an average-skilled person cannot easily assemble the products. The bead houses involve miniature and delicate work, requiring, among other tasks, sewing and knotting tiny beads together with pieces of string. (Tab A Exh. 10.) One consumer reported that he and several members of his family attempted for three days – without success – to assemble one of these products. (Tab B ¶ 11) Another consumer complained that the instructions failed to tell her how to assemble the roof<sup>7</sup> or how to use the glue supplied with the materials. (Tab C ¶ 12.)

In order to realize the promised income of \$500 per week, a consumer would have to assemble at least twenty (20) crafts per week. In order to receive any payment for their work, consumers are required to assemble at least ten (10) such crafts. (Tab A Exh. 6 at 3.) Based on the consumers' experiences (see Tabs B, C and D), and an objective reading of the instructions, (Tab A Exh. 10), this simply is not possible.

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<sup>6</sup> The instructions state:

PARE. LEA ESTO PRIMERO. Recuerde que primero tiene que hacernos solo 1 muestra y enviarnosla, asi sabremos que usted esta haciendo su trabajo de acuerdo a nuestro control de calidad. Estamos ansiosos por recibir su muestra. Exito! (Translation: STOP. READ THIS FIRST. Remember that you must first do 1 sample for us and send it to us. This is how we will know that you are doing your work in accordance with our quality control. We are looking forward to receiving your sample. Success!) (Tab A Exh. 10; Tab C Exh. 6; Tab D Exh. 6.)

<sup>7</sup> This may have been due to an omission of the last page of the instructions, which refer to the roof assembly. Nevertheless, the company did not supply the needed instructions to this consumer despite her complaints about the missing instructions. (Tab C ¶ 13.)

Furthermore, Defendants provide no assistance to consumers who complain to QTX about the deficiencies in the instructions and tell them, in essence, that it is their problem. (Tab B ¶ 13; Tab C ¶ 13.). When consumers who are actually able to assemble the products in whole or in part send the samples to QTX, company representatives either reject the samples, claiming they fail to meet the company's specifications, deny receiving packages, or repeatedly deflect the consumers' phone calls, stating that the products are being reviewed by a supervisor and that they will be contacted in the near future. (Tab C ¶¶ 15-18; Tab D ¶¶ 17-23.) Similarly, when consumers call to complain, request a refund, or request payment for assembled products, they often cannot reach anyone, are put off by company representatives, or told that payment is forthcoming. (Tab C ¶¶ 15-18; Tab D ¶¶ 17-23.) No known consumers actually made any money assembling products for QTX, (Tab B ¶15; Tab D ¶¶ 22-23), and the FTC is aware of only one consumer who received her deposit back. (Tab C ¶ 21 Exh. 7.) However, this refund was not provided until her complaint to the Attorney General of Illinois was forwarded to QTX. (Tab C Exhs. 6 and 7.)

QTX buttresses its fraudulent representations about the simplicity of the work and the certainty of substantial income by assuring consumers that it is a legitimate and viable operation. It tells consumers that has been in business for over ten years (Tab A Exh. 6 at 2), which is unlikely given that it registered a fictitious name only in September 2005 (Tab A Exh. 1); and that it works across the United States and has representatives in every state who are in charge of picking up completed products and paying consumers for their work (Tab A Exh. 6 at 5), which is likewise improbable given that no consumers have actually received any payment for their work. Finally, it makes the egregious misrepresentation to consumers that it is "registered with the federal office of the government." (Tab A Exh. 6 at 5.)

QTX's fraud is not only effective, but pervasive. From approximately November 2005 to the present, it received at least 24,000 calls from virtually every corner of the country. (Tab A ¶¶ 18-20.) Hispanic consumers nationwide are paying from their limited funds based upon a promise of earnings that will never be realized.

#### IV. DEFENDANTS HAVE VIOLATED SECTION 5 OF THE FTC ACT AND THE TELEMARKETING SALES RULE

Misrepresentations or omissions of material facts made to induce the purchase of goods or services constitute unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act. See, e.g., FTC v. Amy Travel Service, Inc., 875 F.2d 564, 573 (7<sup>th</sup> Cir.), cert. denied, 493 U.S. 954 (1989); FTC v. SlimAmerica, Inc., 77 F. Supp.2d 1263, 1272 (S.D. Fla. 1999). An act or practice is deceptive under Section 5(a) if it involves a material representation or omission that is likely to mislead consumers, acting reasonably under the circumstances, to their detriment. FTC v. Tashman, 318 F.3d 1273, 1277 (11<sup>th</sup> Cir. 2003); Kraft, Inc. v. FTC, 970 F.2d 311, 314 (7<sup>th</sup> Cir. 1992), cert. denied 507 U.S. 909 (1993). Express and deliberate claims are presumed material.<sup>8</sup> SlimAmerica, 77 F. Supp. 2d at 1272; Thompson Medical Co., 104 F.T.C. 648, 788-89 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987).

##### A. **Count One: Defendants Have Violated Section 5(a) Of The FTC Act By Misrepresenting That Consumers Are Likely To Earn a Substantial Level Of Earnings**

As previously discussed, see supra Section III, through their telemarketing operation, Defendants expressly state that consumers are likely to earn a substantial level of earnings assembling products at home for QTX. Defendants' advertisements state that consumers can earn \$500 per week. (Tab A ¶ 5; Tab B ¶ 2; Tab C Exh. 1; Tab D Exh. 1.) This representation is reinforced by Defendants' telemarketers, who tell consumers that they will earn \$25 per craft assembled, and that they should be able to assemble a minimum of five per day and make at least \$500 per week. (Tab A at Exh. 6; Tab B ¶¶ 4, 7; Tab C ¶ 6; Tab D ¶ 3-4.) QTX's representation of substantial earnings is central to the transaction and material because consumers would not contact the company in the first instance were it not for this explicit representation of substantial earnings. As noted in Section III, this representation is false. Defendants have misled consumers into paying \$110 to QTX with a promise of substantial earnings, and yet not one consumer has

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<sup>8</sup> The FTC need not prove that Defendants' misrepresentations were made with an intent to defraud or deceive, or were made in bad faith. See, e.g., FTC v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1029 (7<sup>th</sup> Cir. 1988); Removatron Int'l Corp. v. FTC, 884 F.2d 1489, 1495 (1<sup>st</sup> Cir. 1989).

made any money. (Tab A Exh. 6; Tab B; Tab C; Tab D.) Thus, Defendants have violated Section 5 of the FTC Act as alleged in Count One of the Complaint.

**B. Count Two: Defendants Have Violated Section 5(a) Of The FTC Act By Failing To Disclose The Requirement That Consumers Must Provide A Sample Of Their Work Before Receiving Materials Necessary To Earn \$500 Per Week**

As previously discussed, see supra Section III, through their telemarketing operation, Defendants expressly tell consumers that they will send product assembling materials to consumers and pick up completed products. (Tab A Exh. 6 at 3.) Typically, however, QTX does not – until it has received \$110 from consumers – inform consumers that they are required to complete a sample product and send it to QTX for approval. (Tab A Exh. 6; Tab B ¶ 10; Tab C ¶ 11.) Ultimately, QTX either rejects the consumers' samples, or cuts off communication with the consumers, failing to send any money or further materials. (Tab B ¶ ¶ 12-15; Tab C ¶ ¶ 14-15; Tab D ¶ ¶ 15-23.) This omission is material and central to the transaction because no reasonable consumer would invest \$110 knowing that a sample was required and that would routinely be rejected. (See, e.g., Tabs B, C, and D.) Thus, Defendants have violated Section 5 of the FTC Act as alleged in Count Two of the Complaint.

**C. Count Three: Defendants Have Violated Section 310.3(a)(2)(iii) Of The Telemarketing Sales Rule By Misrepresenting Material Aspects Of The Performance, Efficacy, Nature, Or Central Characteristics Of Goods Or Services<sup>9</sup>**

Section 310.3(a)(2)(iii) of the Telemarketing Sales Rule, 16 C.F.R. § 310.3(a)(2)(iii), provides that it is unlawful for a telemarketer or seller to misrepresent any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer. As described above, see supra Section III, Defendants have represented that consumers who pay QTX a fee will obtain from QTX both work and materials to perform the work. Defendants also represent that consumers who pay QTX a fee are likely to receive a substantial level of earnings – \$500 per week – assembling products at home for QTX. These representations are false, however. See supra Section IV.A.1-2. QTX does not provide consumers with the promised materials and work, and few, if any, consumers are likely to earn a substantial level of earnings assembling products at home for QTX. Further, these representations are material aspects of the performance, efficacy, nature, and central characteristics of the work-at-home business opportunity that Defendants are selling. Thus, Defendants have violated Section 310.3(a)(2)(iii) of the TSR as alleged in Count Three of the Complaint.

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<sup>9</sup> In 1994, Congress directed the FTC to prescribe rules prohibiting abusive and deceptive telemarketing acts or practices pursuant to the Telemarketing Act, 15 U.S.C. § 6101 *et seq.* On August 16, 1995, the FTC adopted the TSR, 16 C.F.R. Part 310, which became effective on December 31, 1995. On January 29, 2003, the FTC amended the TSR by issuing a Statement of Basis and Purpose and the final amended TSR. 68 Fed. Reg. 4580, 4669. Except for specific provisions not alleged in this action, the amended TSR became effective March 31, 2003.

Prior to its amendment, the TSR exempted from the scope of the TSR telephone calls initiated by a customer in response to an advertisement through any media, other than direct mail solicitations, except for certain specified types of transactions not relevant here. 16 C.F.R. § 310.6(e). The amended TSR modified Section 310.6(e) (now renumbered as Section 310.6(b)(5)) to exclude from this exemption telephone calls initiated by a customer in response to an advertisement relating to business opportunities other than business arrangements covered by the Franchise Rule, 16 C.F.R. Part 436. 16 C.F.R. § 310.6(b)(5). The Franchise Rule is inapplicable here.

## V. LEGAL ARGUMENT

### A. This Court Has The Authority To Grant The Requested Relief

This Court has the authority to grant preliminary and permanent relief pursuant to the second proviso of Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which states that “in proper cases the FTC may seek, and, after proper proof, the court may issue, a permanent injunction” against violations of “any provision of law enforced by the Federal Trade Commission.” 15 U.S.C. § 53(b). A common fraud case such as this one qualifies as a “proper case” under Section 13(b). See, e.g., World Travel Vacation Brokers, 861 F.2d at 1028; FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1111 (9<sup>th</sup> Cir. 1992).<sup>10</sup>

Section 13(b) empowers courts to exercise the full breadth of their equitable authority. U.S. Oil & Gas, 748 F.2d at 1434. In addition to entering a permanent injunction, the Court may order the rescission of contracts, restitution, and/or disgorgement of ill-gotten gains. Gem Merchandising, 87 F.3d at 468-70; FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1314-15 (8<sup>th</sup> Cir. 1991); Amy Travel, 875 F.2d at 571-72. All preliminary equitable remedies are also available to the Court, including a preliminary injunction with an asset freeze and other ancillary relief. Gem Merchandising, 87 F.3d at 469; FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1434 (11<sup>th</sup> Cir. 1984); see also FTC v. World Wide Factors, Ltd., 882 F.2d 344, 346-47 (9<sup>th</sup> Cir. 1989). When, as here, the public interest is implicated, this Court’s equitable powers “assume an even broader and more flexible character than when only a private controversy is at stake.” Gem Merchandising, 87 F.3d at 469 (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)).

In addition, Section 19(b) of the FTC Act, 15 U.S.C. § 57b, authorizes this Court to grant relief as it finds necessary to redress injury to consumers resulting from violations of a trade regulation rule, including the TSR. Congress provided that such relief may include, but should not be limited to, “rescission or reformation of contracts, the refund of money [and] return of property. . . .” Id. § 57b(b).

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<sup>10</sup> A “proper case” includes any matter involving a violation of a law that the FTC enforces. Singer, 668 F.2d at 1113.



**B. The FTC Meets The Standard For Granting A Government Agency's Request For A Temporary Restraining Order And Preliminary Injunction**

Because the FTC acts as “a statutory guardian charged with safeguarding the public interest,” the standard for preliminary injunctive relief under Section 13(b) differs from that typically applied to private litigants. SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975). In the Eleventh Circuit, courts consider two factors in determining whether to grant a preliminary injunction under Section 13(b) of the FTC Act: (1) the likelihood that the FTC ultimately will succeed on the merits; and (2) the balance of the equities. FTC v. University Health, Inc., 938 F.2d 1206, 1217 (11<sup>th</sup> Cir. 1991). As set forth below, the FTC has amply demonstrated that it will ultimately succeed on the merits of its claims and that the balance of equities favors injunctive relief.

**1. The FTC Has Demonstrated Its Likelihood To Succeed On The Merits**

Generally, the FTC “meets its burden on the likelihood of success issue if it shows preliminarily, by affidavit or other proof, that it has a fair and tenable chance of ultimate success on the merits.” FTC v. Beatrice Foods Co., 587 F.2d 1225, 1229 (D.C. Cir. 1978). This can be shown “by a prima facie showing of illegality.” FTC v. GTP Marketing, Inc., 1990-1 Trade Cas. (CCH) ¶ 68,959 at 63,150 (N.D. Tex., March 15, 1990). Misrepresentations or omissions of material facts made to induce the purchase of goods or services constitute unfair or deceptive acts or practices in violation of Section 5(a) of the FTC Act. See, e.g., Amy Travel, 875 F.2d at 573; FTC v. SlimAmerica, Inc., 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999), appeal docketed, No. 99-12574-BB (11<sup>th</sup> Cir. Jul. 26, 1999). A representation or omission is material if it is the kind usually relied upon by a reasonably prudent person. SlimAmerica, 77 F. Supp. 2d at 1272; FTC v. Jordan Ashley, Inc., 1994-1 Trade Cas. (CCH) ¶ 70,570 at 72,096 (S.D. Fla. Apr. 5, 1994).<sup>11</sup>

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<sup>11</sup> The FTC need not prove reliance by each purchaser misled by Defendants. McGregor v. Chierico, 206 F.3d 1378, 1388 (11<sup>th</sup> Cir. 2000); SlimAmerica, 77 F. Supp. 2d at 1275. “Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of [Section 13(b)].” FTC v. Figgie Int'l, Inc., 994 F.2d 595, 605 (9<sup>th</sup> Cir. 1993), cert. denied, 510 U.S. 1110 (1994) (citations omitted). Rather, a “presumption of actual reliance arises once the FTC has

(continued...)

Express and deliberate claims are presumed material. SlimAmerica, 77 F. Supp. 2d at 1272; FTC v. Wilcox, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995). Moreover, the FTC can prove its claims through a small number of injured consumers, from which a court can infer a pattern or practice of deceptive behavior.<sup>12</sup> Security Rare Coin, 931 F.2d at 1316; Amy Travel, 875 F.2d at 573; FTC v. National Business Consultants, 781 F. Supp. 1136, 1141-42 (E.D. La. 1991).

As demonstrated above, see supra Sections III and IV, Defendants have repeatedly violated Section 5 of the FTC Act and the TSR.<sup>13</sup> They are engaged in a blatant, orchestrated scheme to defraud consumers. Through their advertisements and telemarketers, Defendants falsely represent that consumers who pay QTX a fee are likely to earn a substantial level of earnings – \$500 per week – assembling products at home. Further, Defendants falsely represent that they will provide assembling materials and pick up completed projects from consumers; however they fail to disclose that they first require an assembled sample product before they will provide materials and pick up and pay for completed projects. Finally, after consumers provide

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<sup>11</sup>(...continued)

proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product.” Id. at 605-6; see also SlimAmerica, 77 F. Supp. 2d at 1275.

<sup>12</sup> “Frequently numerous consumers are exposed to the same dubious practice by the same seller so that proof of the prevalence of the practice to one consumer would provide proof for all.” FTC v. International Diamond, 1983-2 Trade Cas. (CCH) ¶ 65,725 at 69,709 (N.D. Cal. 1983). See also FTC v. Jordan Ashley, Inc., 1994-1 Trade Cas. (CCH) ¶ 70,570 at 72,094, 72095-96, 72,099 (S.D. Fla. 1994) (in a case involving approximately 900 franchises/distributorships, the FTC proved income and sales misrepresentations and received \$9,165,567 in consumer redress based on the testimony of 4 witnesses “whose experiences with Defendant is characteristic of those who purchased Defendant’s business opportunities.”); FTC v. Kitco of Nevada, Inc., 612 F. Supp. 1282, 1293-94 (D. Minn. 1985) (FTC proved its case through the testimony of eight consumers in a plastic products business opportunity scheme).

<sup>13</sup> Although QTX reluctantly issued at least one refund to a persistent consumer who complained to a third party, the fact that a company issues refunds is “neither a cure for deception nor a remedy for consumer injury.” SlimAmerica, 77 F. Supp. 2d at 1272. Moreover, “the existence of some ‘satisfied’ customers is not a defense to FTC Act liability.” Id. At 1273 (citing Basic Books, Inc. v. FTC, 276 F.2d 718, 721 (7<sup>th</sup> Cir. 1960)).

samples, QTX either rejects them or repeatedly puts off consumers' calls regarding approval of their samples.

Therefore, the FTC's evidence demonstrates that Defendants have misrepresented material facts in violation of Section 5 of the FTC Act and the TSR. Accordingly, the FTC has demonstrated a strong likelihood of success on the merits of its claims.

## **2. Defendants Are Liable For Injunctive And Monetary Relief**

To obtain an injunction against an individual, the FTC must show that the individual either had the authority to control the unlawful activities or participated directly in them. See FTC v. Affordable Media, 179 F.3d 1228, 1234 (9<sup>th</sup> Cir. 1999); Gem Merchandising, 87 F.3d at 470; Amy Travel, 875 F.2d at 573-74; SlimAmerica, 77 F. Supp. 2d at 1276. Authority to control can be evidenced by "active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer." Amy Travel, 875 F.2d at 573.

An individual may be held liable for monetary redress if the individual had, or should have had, knowledge or awareness of the deceptive practices. Affordable Media, 179 F.3d at 1231; Gem Merchandising, 87 F.3d at 470; Amy Travel, 875 F.2d at 574; SlimAmerica, 77 F. Supp. 2d at 1276. This knowledge element, however, need not rise to the level of subjective intent to defraud consumers. Affordable Media, 179 F.3d at 1234; Amy Travel, 875 F.2d 574; SlimAmerica, 77 F. Supp. 2d at 1276. Instead, the FTC need only demonstrate that the individual had actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such representations, or an awareness of a high probability of fraud coupled with the intentional avoidance of the truth. Affordable Media, 179 F.2d at 1234; Amy Travel, 875 F.2d at 574; SlimAmerica, 77 F. Supp. 2d at 1276. The defendant's "degree of participation in business affairs is probative of his knowledge." Amy Travel, 875 F.2d at 574. As discussed above, see supra Section III.A, both Defendant Matos and Defendant Cure are the perpetrators and direct participants of this illicit scheme. Matos established the fictitious business and maintains and is billed for all phone numbers associated with the business. Cure obtained a mailbox for the company and uses it to mail packages to and receive mail from consumers. Both Matos and Cure are apparently owners and/or managers of QTX, and as such, are jointly and severably liable for the violations of the FTC Act and TSR described above. Preliminary relief, therefore, is

appropriate against both Defendants to preserve the Court's ability to impose permanent injunctive relief.

### 3. The Equities Weigh In Favor Of Granting Injunctive Relief

In balancing the equities between the parties, the public equities must be given far greater weight. Affordable Media, 179 F.3d at 1236 (“Obviously, the public interest in preserving illicit proceeds . . . for restitution to the victims is great”); World Travel Vacation Brokers, 861 F.2d at 1030. Where, as here, Defendants “can have no vested interest in a business activity found to be illegal,” United States v. Diapulse Corp. of Am., 457 F.2d 25, 29 (2d Cir. 1972) (internal quotations and citations omitted), a balance of equities tips decidedly toward granting the requested relief. See also CFTC v. British American Commodity Options Corp., 560 F.2d 135, 143 (2d Cir. 1977) (quoting FTC v. Thomsen-King & Co., 109 F.2d 516, 519 (7<sup>th</sup> Cir. 1940)) (“[a] court of equity is under no duty ‘to protect illegitimate profits or advance business which is conducted illegally’”).

The temporary and preliminary relief sought here would enjoin Defendants' deceptive practices. Defendants prey on thousands of consumers through their misrepresentations regarding work-at-home business opportunities. Granting such relief also is necessary because Defendants' conduct indicates that they will likely continue to deceive the public. SEC v. R.J. Allen & Assoc., Inc., 386 F. Supp. 866, 877 (S.D. Fla. 1974) (past misconduct suggests likelihood of future violations); CFTC v. Hunt, 591 F.2d 1211, 1220 (7<sup>th</sup> Cir.), cert. denied, 442 U.S. 921 (1979). Absent the relief sought here, Defendant's illegal conduct will continue unabated, with foreseeable ongoing consumer injury.

In contrast, the private equities in this case are not compelling. Compliance with the law is hardly an unreasonable burden. See World Wide Factors, 882 F.2d at 347 (stating “there is no oppressive hardship to Defendants in requiring them to comply with the FTC Act, refrain from fraudulent representation or preserve their assets from dissipation or concealment.”). Because the injunction will preclude only harmful, illegal behavior, the public equities supporting the proposed injunctive relief outweigh any burden imposed by such relief on Defendant. See, e.g., National Soc'y of Prof. Eng'rs. v. United States, 435 U.S. 679, 697 (1978).

**C. An Accounting and Document Preservation Are Necessary To Preserve The Possibility Of Final Effective Relief**

As part of the final recovery in this case, the FTC seeks redress for the consumers who have likely lost a significant amount of money in the purchase of Defendants' work-at-home business opportunities and disgorgement of ill-gotten gains.<sup>14</sup> To ascertain the extent of public injury caused by Defendants, the FTC requests that this Court require Defendants to retain all business and financial records and produce an accounting of the revenue, profits, and other information regarding their services. An accounting of Defendants' assets and an order preserving documents is necessary to identify Defendants' assets, calculate the amount of Defendants' proceeds from their illegal marketing activities, and fully determine the size and extent of the injuries. At this juncture, the FTC does not seek an asset freeze or restriction to maintain the status quo. However, to preserve the potential for a monetary remedy, the FTC does request an order requiring Defendants to provide an accounting and to retain their business and financial records.

To this end, the FTC seeks an immediate accounting of Defendant's assets. The FTC also requests that the Court order Defendants to complete and return to the FTC a financial statement in the form attached to the proposed TRO. An accounting and financial statement will increase the likelihood of determining existing assets that may be used as redress to consumers in a final determination of this matter. See, e.g., SEC v. Bankers Alliance Corp., 881 F. Supp. 673 (D.D.C. 1995) (ordering accounting); SEC v. Parkersburg Wireless LLC, 156 F.R.D. 529

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<sup>14</sup> The FTC routinely obtains consumer redress, including disgorgement, when courts find that defendants have violated the FTC Act. See e.g., FTC v. Gem Merchandising Corp., 87 F.3d 466, 470 (held that disgorgement was appropriate to "deprive wrong-doer of his ill-gotten gain" collected through illegal telemarketing practices) (citation omitted); See also FTC v. Pantron I Corp., 33 F.3d 1088, 1103 (9<sup>th</sup> Cir. 1994) (ordering payment of monetary relief to the extent of defendant's unjust enrichment from false advertising claims). See also FTC v. Mylan Laboratories, Inc., 62 F.Supp. 2d. 25, 37 (D.D.C. 1999) (upholding FTC's authority to seek disgorgement as a remedy in district court).

(D.D.C. 1994) (same). The temporary relief sought here is similar to or less restrictive than that ordered in numerous prior actions in this district.<sup>15</sup>

#### **D. Expedited Discovery Is Necessary**

The FTC seeks leave of Court for limited expedited discovery to locate assets wrongfully obtained from consumers, to preserve documentary evidence, and to monitor compliance with the TRO. District courts are authorized to depart from normal discovery procedures and fashion discovery to meet discovery needs in particular cases. Federal Rules of Civil Procedure 26(d), 33(a), and 34(b) authorize the Court to alter the standard provisions, including applicable time frames, that govern depositions and production of documents. This type of discovery order reflects the Court's broad and flexible authority in equity to grant preliminary emergency relief in cases involving the public interest. See Warner Holding, 328 U.S. at 398; FSLIC v. Dixon, 835 F.2d 554, 562 (5<sup>th</sup> 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)); Benham Jewelry Corp. v. Aron Basha Corp., 1997 U.S. Dist. LEXIS 15957, at \*58 (S.D.N.Y. July 18, 1997) (courts have broad powers to grant expedited discovery).

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<sup>15</sup> See, e.g., FTC v. Sun Ray Trading, Inc., No. 05-20402-CIV-Seitz (S.D. Fla. 2005); FTC v. Vinyard Enterprises, Inc., No. 03-23291-CIV-Altonaga (S.D. Fla. 2003); FTC v. Federal Data Service, No. 00-6462-CIV-Ferguson (S.D. Fla. 2000); FTC v. MegaKing, Inc., No. 00-00513-CIV-Lenard (S.D. Fla. 2000); FTC v. National Scholarship Foundation, Inc., No. 97-8836-CIV-Ferguson (S.D. Fla. 1997); FTC v. National Grant Foundation, Inc., No. 97-7339-CIV-Lenard (S.D. Fla. 1997); FTC v. Slim America, Inc., No. 97-6072-CIV-Ferguson (S.D. Fla. 1997); FTC v. Urso, 97-2680-CIV-Ungaro-Benages (S.D. Fla. 1997); FTC v. Innovative Telemedia, Inc., No. 96-8140-CIV-Ferguson (S.D. Fla. 1996); FTC v. College Assistance Services, Inc., No. 96-6996-CIV-Highsmith (S.D. Fla. 1996); FTC v. Student Assistance Services, Inc., No. 96-6995-CIV-Roettger (S.D. Fla. 1996); FTC v. DECO Consulting Co., No. 96-3459-CIV-Nesbitt (S.D. Fla. 1996); FTC v. Comtel, No. 96-3134-CIV-Atkins (S.D. Fla. 1996); FTC v. Chierico, No. 96-1754-CIV-Moore (S.D. Fla. 1996).

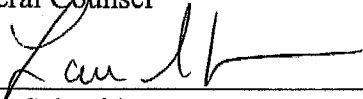
#### IV. CONCLUSION

Defendants' deceptive practices have caused substantial injury to consumers, and this injury will only expand absent the Court's intervention. Accordingly, the FTC requests that this Court issue the proposed temporary restraining order, order requiring accounting, document preservation, and permitting expedited discovery, and order to show cause why a preliminary injunction should not issue.

Dated: September 21, 2006

Respectfully submitted,

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