

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

FEDERAL TRADE COMMISSION,)
)
)
Plaintiff,)
)
v.)
)
CREAGHAN A. HARRY,)
)
individually and doing business as)
HITECH MARKETING,)
SCIENTIFIC LIFE NUTRITION and)
REJUVENATION HEALTH CORP.)
)
Defendant.)

Case No. **04C 4790**

JUDGE MANNING

MAGISTRATE JUDGE KEYS

**MEMORANDUM SUPPORTING PLAINTIFF'S *EX PARTE*
MOTION FOR TEMPORARY RESTRAINING ORDER WITH
ASSET FREEZE, OTHER EQUITABLE RELIEF, AND ORDER TO
SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

I. INTRODUCTION

The FTC brings this action to stop Defendant's deceptive marketing and sale of bogus "human growth hormone" products on Internet Web sites via a deluge of illegal junk e-mail or "spam." Defendant directly profits from the sale of bottles of "Supreme Formula HGH" and "Youthful Vigor HGH," which are advertised and sold for \$80 on numerous Web sites. The Web sites claim that the products will cause an array of positive physical and cognitive effects on the body, thereby stopping or reversing signs of aging. Declarations from two medical experts, however, demonstrate that Defendant's product claims are wholly unfounded and that the products have no discernable effect on the body. Defendant's false product claims have already defrauded thousands of consumers out of hundreds of thousands of dollars.

To direct potential customers to his Web sites, Defendant utilizes massive amounts of spam. Consumers have forwarded tens of thousands of spam messages advertising Defendant's

products to the FTC. The e-mail messages violate central provisions of the recently enacted federal e-mail law, Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM”), 15 U.S.C. § 7701, *et seq.* Specifically, the e-mail messages: (1) disguise their source; (2) fail to provide a clear and conspicuous mechanism for consumers to opt-out from further e-mail; and (3) fail to provide a physical postal address in the message text.

The FTC respectfully moves this Court for a temporary restraining order to bring Defendant’s harmful practices to a swift end. The FTC brings this motion *ex parte* to obtain a temporary freeze of Defendant’s assets in order to preserve the possibility of redress for victimized consumers who bought Defendant’s products. Defendant has taken great strides to cloak the responsibility for his illegal practices, utilizing different names, foreign addresses, anonymous Web sites and spam, and an overseas bank account. Defendant’s pattern of fraud, as well as his avid attempts to conceal his identity, indicate that he is likely to hide assets if he receives advance notice of this action.

II. DEFENDANT

Defendant Creaghan A. Harry is an individual who resides in Florida. (PX 1 ¶ 39, Att.V.) Following the money trail reveals that Defendant is actively participating in and directly profiting from the sale of various “human growth hormone” products sold over the Internet. Defendant paid a California company to manufacture one such product – “Supreme Formula HGH” (*see* PX 1 ¶¶ 21(e)-(i), 22-24, Atts. I pp. 11-15, J, K p. 5, L), and he paid another company in South Dakota to provide customer order fulfillment and credit card processing for sales of the product (*id.* ¶¶ 20(e), 22-24, Atts. H p. 1-2, J, K p. 5, L). Defendant has additionally paid a company in Ohio to provide customer order fulfillment for his nearly identical “Youthful Vigor HGH” product. (*See id.* ¶ 22-24, 37(b), Atts. L p. 4, U p. 13.) Proceeds from the sale of Defendant’s products are wired into a bank account he controls in Latvia. (*Id.* ¶¶ 20(d), 24, Atts. H, pp. 2, 9, L pp. 4-5.)

Defendant has taken great strides to conceal his identity while marketing his products. He does not provide his real name or any registered business name to his product manufacturers and fulfillment houses; instead, transactions are conducted by “Greg Miller” on behalf of unregistered business names such as “Scientific Life Nutrition” and “Rejuvenation Health Corp.” (*Id.* ¶¶ 20, 21, 37, 43, Att. H pp. 1, 11-12, I pp. 19, 28, 34, 36, U p. 3.) He identifies his business as being located in Canada, Sweden, and Switzerland. (*Id.* ¶¶ 20(b), 21(d), 37(a), 41, Att. H p. 1, I pp. 2-6, U p. 3.) Although he has a Florida bank account (*id.* ¶¶ 22, 23, Att. K p. 5), the proceeds from the sale of his products are wire transferred to a bank account he controls in Latvia (*id.* ¶¶ 20(d), 24, Atts. H pp. 2, 9, L). Defendant’s products are sold on Web sites that fail to identify any registered business name, and the Web site domain names are registered to individuals in China. (*Id.* ¶¶ 7-8, 14, 25, 26, 30, 43, Atts. A, E, M, P.) Moreover, his Web sites are marketed via spam that uses multiple methods aimed at making the origin of the messages untraceable. (*Id.* ¶¶ 9-12, 27-29, Atts. B-D, N-O, PX 4 ¶¶ 6-12, Atts. B, C.)

III. JURISDICTION AND VENUE

This matter is properly before the Court. The Court has subject matter jurisdiction over the FTC Act claims pursuant to 28 U.S.C. §§ 1331, 1337(a) & 1345. This Court also has personal jurisdiction over Defendant. The FTC Act provides for nationwide service of process. *See* 15 U.S.C. § 53(b). “Where a federal statute provides for nationwide service of process, personal jurisdiction may be obtained over any defendant having minimum contacts with the United States as a whole.” *FTC v. Bay Area Bus. Council, Inc.*, No. 02 C 5762, 2003 WL 1220245, at *2 (N.D. Ill. March 14, 2003); *see also United Rope Distributors, Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 534 (7th Cir. 1991).

Venue is also proper in the Northern District of Illinois. Pursuant to the FTC Act, an action may be brought where a corporation or person “resides or transacts business.” *See* 15 U.S.C. § 53(b). Defendant has transacted considerable business in this district by advertising and

selling his products to consumers in this district. (*See, e.g.*, PX 1 ¶¶ 14, 30, 35 (FTC undercover purchases of Defendant’s products from Chicago, as well as delivery to Northern District of Illinois); *id.* ¶ 32, Att. P p. 3 (product testimonial on Defendants’ Web site from “Chicago” consumer); *id.* ¶¶ 20(g), 37(d) (order fulfillment records demonstrating dozens of product sales to consumers in this district).)

IV. DEFENDANT’S BUSINESS PRACTICES

Defendant has arranged and paid for the manufacture, fulfillment, and payment processing of “human growth hormone” products. Those products are deceptively advertised and sold on numerous Internet Web sites and marketed via illegal spam. Profits from the sale of Defendant’s products are wired directly into a bank account that he controls. Defendant has defrauded thousands of consumers out of hundreds of thousands of dollars.

A. Defendant Deceptively Promotes and Sells HGH Products

Defendant advertises products called “Supreme Formula HGH” and “Youthful Vigor HGH” (the “HGH products”) on dozens of Internet Web sites such as www.popggg.com and www.hsaae.com. (PX 1 ¶¶ 7, 14, 25, 30, Atts. E, P.) The HGH products are bottles of substantively identical tablets. (*Id.* ¶¶ 17, 36, Atts. G, T.) Defendant’s Web sites make essentially identical product claims about both HGH products. For example, Defendant’s Web sites state:

LOSE WEIGHT WHILE YOU SLEEP WITHOUT DIETING OR EXERCISE

Body Fat Loss	82% Improvement
Wrinkle Reduction	61% Improvement
Energy Level	84% Improvement
Muscle Strength	88% Improvement
Sexual Potency	75% Improvement
Emotional Stability	67% Improvement
Memory	62% Improvement

Look and Feel 20 YEARS YOUNGER!!

* * *

HGH reaches far beyond the scope of any one of these hormones to not only prevent biological aging, but to significantly reverse a broad range of the signs and symptoms associated with aging.

Do You Suffer from ANY of These Signs of Aging?

- Wrinkles, Fine Lines
- Poor Memory
- Lack of Enthusiasm
- Sagging Skin
- Diminished Eyesight
- Failing Sexual Performance
- Joint Problems
- Low Energy
- Skin Problems
- Weight Problems
- Sleep Difficulties
- Blood Pressure, Low/High
- Lack of Muscle Tone

* * *

If You Want...

- A Flat Tummy
- Trim Thighs
- Erase Cellulite
- Lose those Wrinkles
- Tighter Skin
- More Energy
- Sleep Better
- More Lean Muscle
- Sexual Potency
- Increased Memory

A system that is 100% SAFE and ENDORSED by DOCTORS!

(See *id.* ¶¶ 14, 30, Atts. E, P.)

Defendant's claims about his HGH products are wholly false and cannot be substantiated. The FTC has consulted with two medical experts in endocrinology. (See PX 2 & 3.) Both doctors state that the products that Defendant sells do not contain Human Growth Hormone and cannot produce effects similar in nature to any form of Human Growth Hormone. (See PX 2 ¶¶ 4, 18-30; PX 3 ¶¶ 4, 19-31.)¹ The doctors state that there is no credible medical evidence to support the claims made by Defendant. (See PX 2 ¶ 23; PX 3 ¶ 24.) Indeed, both doctors

¹ Human Growth Hormone ("GH") is a hormone that is produced by the pituitary gland and is integral to the human growth process. (PX 2 ¶ 6; PX 3 ¶ 6.) In normal individuals, the production of GH naturally drops off with the increase in age. (PX 2 ¶ 7; PX 3 ¶ 7.) The FDA has approved the use of a synthetic recombinant growth hormone, injected into the bloodstream, as a replacement for the body's own GH for individuals with an abnormal GH deficiency. (PX 2 ¶¶ 12-14; PX 3 ¶¶ 12-14.) Defendant's products, however, are tablets containing amino acids that taken orally in the doses prescribed would have no effect on a person whatsoever, let alone GH production. (PX 2 ¶ 18, 22-26; PX 3 ¶ 19, 23-27.)

conclude that the HGH products will “have no discernable physiological effect on the user.”
(*See* PX 2 ¶ 26; PX 3 ¶ 27.)

Since October 2003, Defendant has sold thousands of his “Supreme Formula HGH” and “Youthful Vigor HGH” to consumers for \$79.95 plus \$6.95 shipping. (*See* PX 1 ¶¶ 14, 20(g), 30, 37(d).)² Defendant paid to have the products shipped from fulfillment companies with whom he contracted. (*Id.* ¶¶ 20, 37, Atts. H, U.) Hundreds of thousands of dollars from the sale of the products have been deposited in Defendant’s bank account. (*Id.* ¶¶ 20(d), 24, 37(d), Att. L.)

B. Defendant’s Illegal Spam Practices.

Defendant has “initiated” what likely amounts to millions of spam e-mail messages touting his HGH products that violate CAN-SPAM, 15 U.S.C. § 7701 *et seq.*, the federal law regulating e-mail practices that became effective on January 1, 2004.³ Congress passed CAN-SPAM after finding that spamming imposes significant costs on the e-mail system, which are passed along to subscribers in the form of higher prices and reduced convenience. *See id.* at §§ 7701(a)(3), (4). Congress found that unsolicited e-mail messages – most of which are fraudulent or deceptive in one or more respects – threaten the convenience and efficiency of e-mail, an “extremely important and popular means of communication.” *Id.* at §§ 7701(a)(1), (2). The law does not make all unsolicited e-mail illegal; it simply proscribes the most abusive practices. For example, it requires that commercial e-mail messages correctly identify their source, allow consumers to unsubscribe, and contain a physical postal address at which the recipient may contact the sender. *Id.* at § 7704.

² Defendant purchased over 10,000 bottles of the Supreme Formula HGH tablets from a manufacturer for \$3.75 each. (*See* PX 1 ¶ 21(b), Att I pp. 2-3, 5, 8.)

³ CAN-SPAM defines “initiate” as “to originate or transmit [a commercial e-mail message] or to procure the origination or transmission of such message[.]” 15 U.S.C. § 7702(9). “Procure,” as used in the definition of “initiate,” means “intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one’s behalf.” 15 U.S.C. § 7702(12).

Here, consumers have forwarded approximately 40,000 examples of spam marketing Defendant's products to the FTC since January 1, 2004. (See PX 1 ¶¶ 3, 9, 27.) The messages show that Defendant's spam routinely violates the central provisions of CAN-SPAM. First, e-mail messages initiated by Defendant forge their source by providing false or misleading header information. Second, Defendant's spam fails to contain other requirements of CAN-SPAM, namely: (a) a clear and conspicuous notice of the opportunity to opt-out, and/or (b) a valid physical postal address.

1. False or misleading header information

CAN-SPAM prohibits utilizing false or misleading header information. See 15 U.S.C. § 7704(a)(1).⁴ In this case, the "header information" of commercial e-mail messages marketing Defendant's products does not identify Defendant or any registered business that he operates as the sender of the message. Instead, the spam contains false or misleading header information in at least two ways.

First, in certain instances, Defendant's spam contains forged return addresses. This is done by inserting unrelated e-mail addresses in the "reply-to" and/or "from" fields of the spam, a practice often referred to as "spoofing." (PX 4 ¶ 7.) This practice conceals the true identity of the sender. (*Id.*) The FTC has provided evidence of examples where Defendant's spam used forged return e-mail addresses purporting to be from users of hotmail.com, administered by Microsoft Network. (PX 1 ¶¶ 9-12, Atts. C-D.) Moreover, the FTC has submitted a chart that shows that spam advertising Defendant's HGH products were purportedly sent from dozens of clearly made up names such as "Raj Yumang" and "Mehboob Effross," using randomly

⁴ An e-mail message typically consists of two parts, the "header information" and the body. (PX 4 ¶ 3.) An e-mail "header" contains a variety of information – some of which is often viewable to an e-mail recipient such as the "From" or "Reply-to" fields. (*Id.*) Other e-mail header information is often hidden to message recipients unless the recipients change the default settings in their e-mail program, such as "Received from" lines of text that are inserted into an e-mail message by mail exchanging computers and provide the routing information of a message as it travels through the Internet to its destination. (*Id.* ¶ 4.)

generated e-mail addresses like microfilmportrayal@cox.net and exclamatorycringing@adelphia.net. (*Id.* ¶ 29, Att. O.)

In addition to “spoofing” the return address in the e-mail messages, the FTC has submitted a declaration from an Internet security expert that shows that Defendant’s spam is routed through third party computers with vulnerabilities. (PX 1 ¶ 7-10, 27-28, Atts. B, N; PX 4 ¶¶ 6-12, Atts. B & C.) These vulnerable computers – many of which are simply home personal computers with broadband connections operating without firewalls – are often referred to as “open proxies.” (PX 4 ¶ 8.) The act of bouncing e-mail messages through third party computers makes tracing e-mail back to its true origin near impossible because it obscures the routing information of the e-mail message. (*Id.* ¶ 10.) Spammers typically use this method to evade anti-spam efforts of the spam recipient or his or her Internet services provider. (*Id.* ¶ 6, 10-11.)

2. Failure to provide clear and conspicuous opt-out mechanism and a physical address

CAN-SPAM also requires that senders provide a clear and conspicuous notice of the opportunity to decline to receive further e-mail messages and provide a physical postal address where the sender can be reached. *See* 15 U.S.C. § 7704(a)(5). If complied with, these steps would provide consumers with some tools to protest and prevent themselves from being subjected to additional spam. The FTC has attached representative examples of commercial e-mail messages initiated by Defendant. (*See* PX 1 ¶¶ 10, 28, Atts. B, N.) The e-mail messages often contain no opt-out mechanism. (*Id.*) Moreover, the e-mail messages do not contain a physical postal address in the text. (*Id.*)

V. ARGUMENT

The FTC asks that the Court bring this scam to an immediate end by issuing a temporary restraining order that enjoins further deceptive product claims and illegal e-mail practices. The

FTC also requests that the Court freeze Defendant's assets to preserve assets needed if the Court determines that restitution should be made to consumer victims.

A district court may issue injunctions to enjoin violations of the FTC Act. *See* 15 U.S.C. 53(b); *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir. 1988). To obtain a temporary restraining order, the FTC must demonstrate: (1) a likelihood of success on the merits, and (2) that the balance of the equities tips in its favor. *World Travel*, 861 F.2d at 1029. Courts in this district have repeatedly exercised their authority to grant TROs in FTC fraud actions,⁵ and, as demonstrated below, the injunctive relief requested by the FTC is warranted in this case.

A. There Is A Likelihood That the FTC Will Prevail on the Merits.

The FTC Act prohibits “unfair or deceptive acts or practices.” 15 U.S.C. § 45(a). As shown above in Section IV, there is ample evidence that Defendant is engaging in repeated violations of the FTC Act and CAN-SPAM. Through his fraudulent scheme, Defendant has already cheated thousands of consumers out of hundreds of thousands of dollars.

1. Defendant is making deceptive claims about his products.

Defendant's false claims concerning his HGH products are “deceptive acts or practices” and false advertising prohibited by the FTC Act. *See* 15 U.S.C. §§ 45(a), 52(a).⁶ An act or practice is “deceptive” if a representation, omission, or practice “likely would mislead” consumers, acting reasonably, to their detriment. *See World Travel*, 861 F.2d at 1029. The “misrepresentation or practice need not be made with an intent to deceive” to violate the FTC Act. *Id.* The FTC may demonstrate the deceptive nature of advertising claims by either: (1)

⁵ *See* footnote 11, *infra*.

⁶ The dissemination of false advertisement for the purpose of inducing the purchase of a drug or device pursuant to 15 U.S.C. § 52(a) is an unfair or deceptive practice within the meaning of 15 U.S.C. § 45(a). *See* 15 U.S.C. § 52(b).

demonstrating the falsity of the claims, or (2) by showing that the defendant lacked a reasonable basis for making the claims, *i.e.*, “substantiation.” *See, e.g., FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998); *FTC v. US Sales Corp.*, 785 F. Supp. 737, 748 (N.D. Ill. 1992).

Here, Defendant’s deception is not only “likely” to mislead consumers, it has undoubtedly misled consumers. Defendant claims that his HGH products can cause a laundry list of positive physical and cognitive effects on the body, and thereby reverse or stop the aging process. (PX 1 ¶¶ 14, 30, Atts. E, P.) However, expert analysis from two medical doctors demonstrates that there is no scientific basis for the claims, and the products have no discernable effect on the body. (*See* PX 2; PX 3.) Thus, Defendant’s claims are false and cannot be substantiated with competent scientific evidence. It is axiomatic that thousands of consumers would not spend \$79.95 on a bottle of tablets if they knew that Defendant’s product claims were false, and the tablets had no discernable effect whatsoever. Accordingly, the FTC has demonstrated a likelihood of success on the merits, and a temporary restraining order against Defendant’s misleading advertising is warranted.

2. Defendant is initiating commercial e-mail that violates CAN-SPAM.

Defendant is also engaging in “unfair or deceptive acts or practices” under the FTC Act by initiating e-mail messages in violation of CAN-SPAM.⁷ Defendant’s e-mail messages are aimed at driving traffic to Defendant’s Web sites and causing consumers to purchase Defendant’s products. Under CAN-SPAM, liability is broadly assessed to any party that “initiates” e-mail messages. Defendant “initiates” the e-mail messages here either by “transmitting” the messages

⁷ Pursuant to Section 7(a) of CAN-SPAM, the Act “shall be enforced by the [FTC] as if the violation of the Act were an unfair or deceptive act or practice proscribed under Section 18(a)(1)(B) of the [FTC Act] (15 U.S.C. 57a(a)(1)(B)).” A violation of a rule proscribed pursuant to 15 U.S.C. 57a(a)(1)(B) constitutes an “unfair or deceptive act or practice in violation of § 45(a)(1) [of the FTC Act].” *See* 15 U.S.C. § 57a(d)(3).

himself or by “procuring” their transmission.⁸ Defendant’s culpability is self-evident from the fact that the commercial e-mail messages violating CAN-SPAM market his products and include hyperlinks in the text of the message that direct consumers to the Web sites from which he directly profits. (*See* PX 1 ¶¶ 7, 14, 25, 30.)

The commercial e-mail messages initiated by Defendant “contain[] header information that is materially false or materially misleading.” 15 U.S.C. § 7704(a)(1).⁹ As described above at Section IV.B.1, the “header information” of Defendant’s spam does not identify Defendant or any registered business that he operates as the source of the e-mail messages. Instead, the messages sometimes purport to originate from e-mail addresses of unrelated parties. (PX 1 ¶¶ 9-12, 29, Atts. C, D, O.) Moreover, the true routing information of the spam is obscured because the messages are bounced through vulnerable third party computers. (PX 1 ¶¶ 9-12, 27-28, Att. B, N; PX 4 ¶¶ 6-12, Atts. B & C.) The act of sending e-mail messages through such “open proxies” makes tracing e-mail back to its true origin near impossible. (PX 4 ¶ 10.)

Additionally, commercial e-mail messages initiated by Defendant violate the provisions of CAN-SPAM that require: (1) a clear and conspicuous notice of the opportunity to decline to receive further commercial e-mail messages from the sender; and (2) a valid physical postal address of the sender. *See* 15 U.S.C. § 7704(a)(5). As described above in Section IV.B.2 and

⁸ As explained in footnote 3, *supra*, CAN-SPAM predicates liability both on parties that transmit an e-mail message, as well as any parties that procure the transmission of the message. The definition of “initiate” specifically provides that “more than one person may be considered to have initiated a message.” 15 U.S.C. § 7702(9).

⁹ CAN-SPAM defines “header information” as the “source, destination and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message.” 15 U.S.C. § 7702(8). For purposes of 15 U.S.C. § 7704(a)(1), “materially” includes “the alteration or concealment of header information in a manner that would impair the ability of . . . a law enforcement agency to identify, locate or respond to a person who initiated the e-mail message or to investigate the alleged violation, or the ability of a recipient of the message to respond to a person who initiated the electronic message.” 15 U.S.C. § 7704(a)(6).

shown by the samples of Defendant's e-mail, commercial e-mail messages initiated by Defendant often completely ignore these requirements. (See PX 1 ¶¶ 10, 28, Atts. B, N.)

In sum, Defendant has sent, or had sent on his behalf, commercial e-mail messages that contain multiple violations of CAN-SPAM. Defendant's repeated violations of CAN-SPAM constitute "unfair or deceptive acts or practices" in violation of the FTC Act. Accordingly, the FTC has demonstrated a likelihood of success on the merits, and a temporary restraining order enjoining Defendant from further illegal e-mail practices is warranted.

B. The Balance Of Equities Favors the FTC.

In addition to demonstrating a likelihood of success on the merits, the balance of equities tips strongly in the FTC's favor here. In balancing the equities, the Court must assign "far greater" weight to the public interest advanced by the FTC than to any of Defendants' private concerns. *World Travel*, 861 F.2d at 1030.

The public equities are compelling in this case. Defendant has deceptively advertised his HGH products on Internet Web sites and marketed the products via illegal commercial e-mail messages. Defendant has sold thousands of his products to consumers and defrauded consumers out of hundreds of thousands of dollars. In sum, the public has a strong interest in preventing further fraudulent sales of ineffective products and stopping the deluge of spam sent in violation of federal law.

In contrast, Defendant has no legitimate interest in continuing to defraud consumers or initiate spam in violation of federal law. See *FTC v. World Wide Factors*, 882 F.2d 344, 347 (9th Cir. 1989) (upholding finding of "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"); *Sabal*, 32 F. Supp. 2d at 1009 (same).

C. The TRO Should Be Entered *Ex Parte* and Should Include An Asset Freeze and Other Ancillary Relief.

In issuing injunctive relief under the FTC Act, district courts have authority “to grant any ancillary relief necessary to accomplish complete justice[.]” *World Travel*, 861 F.2d at 1026 (quoting *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982)). *See also Febre*, 128 F.3d at 534 (district court has authority in FTC action to “order any ancillary equitable relief necessary to effectuate the exercise of the granted powers”). Here, the FTC requests that the Court issue a TRO that includes ancillary equitable relief narrowly tailored to stop Defendant’s scam immediately and preserve the possibility to refund victimized consumers.¹⁰

1. *Ex Parte* Relief and Asset Freeze

Ex parte relief is necessary here. An *ex parte* TRO is warranted where the facts show that irreparable injury, loss, or damage will result before the defendants can be heard in opposition. *See* Fed. R. Civ. P. 65(b). Part of the relief sought by the FTC in this case is restitution to consumers who were defrauded by Defendant. The FTC seeks to freeze Defendant’s assets to preserve the possibility of such relief. A district court has “a duty to ensure that . . . assets . . . [are] available to make restitution to injured customers” where the court determines that it is “probable that the FTC [will] prevail in a final determination of the merits.” *World Travel*, 861 F.2d at 1031.

Here, as in the other FTC actions in this district where courts have granted an *ex parte* TRO,¹¹ there is good cause to believe that assets that could be preserved to refund defrauded

¹⁰ The FTC has submitted a Proposed Temporary Restraining Order with its papers.

¹¹ *See, e.g., FTC v. Phoenix Avatar LLC, et al.*, No. 04 C 2897 (N.D. Ill. April 23, 2004) (Holderman, J.); *FTC v. 9094-5114 Quebec Inc., et al.*, No. 03 C 7486 (N.D. Ill. Oct. 23, 2003) (Leinenweber, J.); *FTC v. QT Inc., et al.*, 03 C 3578 (N.D. Ill. May 29, 2003) (St. Eve, J.); *FTC v. STF Group, Inc., et al.*, 03 C 977 (N.D. Ill. Feb. 12, 2003) (Zagel, J.); *FTC v. CSCT, Inc.*, 03 C 880 (N.D. Ill. Feb. 11, 2003) (Coar, J.); *FTC v. 1492828 Ontario Inc., et al.*, 02 C 7456 (N.D. Ill. Oct. 17, 2002) (Guzman, J.); *FTC v. Bay Area Bus. Council, Inc.*, 02 C 5762 (N.D. Ill. Aug. 15, 2002) (Darrah, J.); *FTC v. Stuffingforcash.com, Inc.*, 02 C 5022 (N.D. Ill. July 16, 2002) (Norgle, J.); *FTC v. TLD Network Ltd.*, No. 02 C 1475 (N.D. Ill.

(continued...)

consumers will disappear if Defendant receives notice of this action. As discussed above, Defendant's business operations are permeated by, and reliant upon, deceptive and unfair practices. The FTC's past experiences have shown that defendants engaged in similar schemes may withdraw funds from bank accounts if given notice of the FTC's action.¹² Indeed, such behavior seems especially possible in this case in light of Defendant's herculean efforts to conceal his identity and evade detection. Although Defendant is in Florida, he provides addresses in Canada, Sweden and Switzerland to companies that provide services to sell his products. (PX 1 ¶¶ 20(b), 21(d), 37(a), 39, 41, Att. H p. 1, I pp. 2-6, U p. 3, V.) Although Defendant has a bank account in Florida (*id.* ¶ 23, Att. K p.5), he requests that the proceeds from the sale of his products be wire transferred to a bank account he controls in Latvia (*id.* ¶¶ 20(d), 24, Atts. H pp. 2, 9, L pp. 4-5).¹³ His products are sold on Web sites that fail to identify any registered business name, and the Web site domain names are registered to individuals in China. (*Id.* ¶¶ 7-8, 14, 25, 26, 30, 43, Atts. A, E, M, P.) Furthermore, the Web sites are marketed via spam that uses multiple methods aimed at making the origin of the messages untraceable. (*Id.* ¶¶ 9-12, 27-29, Atts. B-D, N-O, PX 4 ¶¶ 6-12, Atts. B, C.)

The *ex parte* TRO that the FTC seeks in this matter is essentially identical to an *ex parte* TRO granted by Judge Holderman earlier this year in a similar deceptive advertising and illegal spam case. See *FTC v. Phoenix Avatar LLC*, No. 04 C 2897 (N.D. Ill. April 23, 2004). In *Phoenix Avatar*, the FTC alleged that the defendants were falsely advertising diet patches and

¹¹(...continued)
Feb. 28, 2002) (Holderman, J.); *FTC v. 1st Financial Solutions, Inc.*, No. 01 C 8790 (N.D. Ill. Nov. 19, 2001) (Kocoras, J.); *FTC v. Growth Plus Int'l Marketing, Inc.*, 2001 WL 128139 (N.D. Ill. Jan. 9, 2001) (Aspen, J.).

¹² See Declaration of Certification of Plaintiff's Counsel Pursuant to Fed. R. Civ. P. 65(b) and Local Rule 5.5(D) In Support of Plaintiff's *Ex Parte* Motion For Temporary Restraining Order (attached to Plaintiff's *Ex Parte* Motion for Temporary Restraining Order).

¹³ The FTC's Proposed TRO seeks the repatriation of any assets and documents overseas, including assets in the Latvian bank account. See Proposed TRO § V.

initiating commercial e-mail messages in violation of CAN-SPAM. Judge Holderman entered an *ex parte* TRO in that matter containing essentially identical provisions as the TRO requested here. See www.ftc.gov/os/caselist/0423084/040429phoenixavatartro.pdf.

2. Additional Equitable Relief

The FTC's proposed TRO includes additional narrowly tailored ancillary equitable relief. The proposed order enjoins Defendant from violating the FTC Act and CAN-SPAM. (See Proposed TRO §§ I, II.) It also requires that Defendant preserve records and provide an accounting of product sales and assets. (See *id.* §§ VI, X.) The FTC additionally seeks leave to conduct limited expedited discovery so that it may locate assets wrongfully obtained from consumers and preserve documentary evidence. (*Id.* § XI.)

VI. CONCLUSION

Defendant has caused and is likely to continue to cause consumer injury because of his continued FTC Act and CAN-SPAM violations. The FTC respectfully requests that the Court issue the injunctive relief sought to prevent ongoing consumer harm and to help ensure the possibility of effective final relief.

Respectfully submitted,

William E. Kovacic
General Counsel


Steven M. Wernikoff

Jason K. Bowler
Federal Trade Commission
55 East Monroe, Suite 1860
Chicago, IL 60603

Voice: (312) 960-5634

Facsimile: (312) 960-5600

Dated: July 21, 2004