

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

**RECEIVED**

OCT 28 2004

MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

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FEDERAL TRADE COMMISSION,	)	
	)	
Plaintiff,	)	
	)	Case No. 04C 6901
v.	)	
	)	Judge William J. Hibbler
INTERNATIONAL RESEARCH AND DEVELOPMENT	)	
CORPORATION OF NEVADA, <i>et al.</i> ,	)	Magistrate Judge Ian H. Levin
	)	
Defendants.	)	
	)	

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

**I. INTRODUCTION**

Capitalizing on consumers' fears over escalating gas prices, Defendants peddle magnets on Internet Web sites and via "spam" e-mail messages that purport to increase fuel economy "up to 27%" and reduce emissions when attached to a car's fuel line. Declarations from two experts, however, demonstrate that Defendants' product claims defy the laws of physics and cannot be accurate under basic scientific principles. Defendants' claims are deceptive under the FTC Act and are likely defrauding consumers out of hundreds of thousands of dollars.

The purported gas saving devices – "Super FuelMAX" – are manufactured and sold wholesale by Defendants International Research and Development Corporation of Nevada and Anthony Renda (collectively "the IRD Defendants") to "dealers" who then resell the products. In the product packaging, on Web sites, and in the promotional materials that they provide to their resellers, the IRD Defendants make numerous outlandish claims, including that by "fractur[ing] the hydrocarbon chains" in fuel, the Super FuelMAX magnets can cause "up to 27%" improvements in fuel economy, as well as a "reduction in harmful emissions." The IRD Defendants make these claims despite having been previously warned by the FTC that the claims likely violated the law, and despite the fact that the FTC previously sued one of their dealers for deceptively advertising Super FuelMAX.

Defendants Mark Ayoub, Floyd J. Tassin, and Marcia Tassin, and these individuals' related companies (collectively "Fuel Saver Pro Defendants") are one of the IRD Defendants' prominent dealers, deceptively advertising and reselling Super FuelMAX under the name "Fuel Saver Pro." To direct consumers to Web sites that sell Fuel Saver Pro for \$89.95, the Fuel Saver Pro Defendants are responsible for a deluge of "spam" e-mail messages that contain deceptive claims about Fuel Saver Pro. The spam also violates central provisions of the 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.* Consumers have forwarded to the FTC tens of thousands of the Fuel Saver Pro Defendants' e-mail messages. These messages violate CAN-SPAM by: (1) disguising their source through the use of falsified header information; and (2) failing to provide a physical postal address in the message text.

The FTC respectfully moves this Court for a temporary restraining order to bring Defendants' unlawful and harmful practices to a swift end. In addition to narrowly tailored conduct prohibitions, the FTC requests that the TRO contain an asset preservation provision to preserve the possibility of redress for victimized consumers who have purchased Defendants' bogus products, as well as a provision requiring Defendants to provide an accounting of their product sales.

## **II. 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 Defendants is established pursuant to the FTC Act's nationwide service of process provision, 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 Distribs., Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 534 (7th Cir. 1991).

Venue is 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). Defendants have transacted considerable business in this district by advertising and selling their products to consumers in this district. (*See, e.g.*, PX 1 ¶¶ 13-18, Atts. F-H (FTC purchase of Fuel Saver Pro - product was purchased from within and delivered to Northern

District of Illinois); *id.* ¶¶ 30(d), Att. R at HUMB89-92 (merchant payment processor records demonstrating Fuel Saver Pro Defendants' sales to other consumers in this district); *id.* ¶¶ 21-23 (FTC undercover purchase of IRD distributor kit - product was purchased from within and delivered to Northern District of Illinois); *id.* ¶¶ 22, 27, Atts. M, Q (e-mail correspondence from Defendant Anthony Renda to e-mail address used by FTC to purchase IRD dealer kit); *id.* ¶ 10 (Fuel Saver Pro spam directed to consumer within Northern District of Illinois)).

### III. DEFENDANTS

Defendants are two sets of enterprises that sell Super FuelMAX. The IRD Defendants sell Super FuelMAX wholesale to "dealers," including via "Dealer Marketing Kits." (PX 1 ¶¶ 20, 21, Atts. K, L.) The marketing kits sell for between \$260 and \$1,550 on the IRD Defendants' Web sites, including [www.irdusa.com](http://www.irdusa.com). (*Id.* ¶¶ 20, 21, 28, Atts. K, L.) The Web sites and marketing kit contain various promotional materials and claims about Super FuelMAX. (*Id.* ¶¶ 20, 21, 23-26, Atts. K, L, P.) Although the FTC has been unable to obtain financial records regarding IRD Defendants' product sales prior to filing this action, the IRD Defendants claim that "millions" of their purported fuel saving devices have been sold by dealers in over 80 countries. (*Id.* ¶¶ 26-27, Att. P at IRD03, 06, 07, 09, Att. Q.)

The Fuel Saver Pro Defendants are one of the IRD Defendants' prominent dealers, reselling Super FuelMAX under the name "Fuel Saver Pro" via a deluge of spam e-mail. The spam directs consumers to over 20 Web sites advertising Fuel Saver Pro. (PX 1 ¶¶ 7-10, Atts. A, C.) Consumers can purchase Fuel Saver Pro on the Web sites for \$89.95, plus \$6.95 shipping. (*Id.* ¶¶ 14-15, Att. F.) Bank records suggest that the Fuel Saver Pro Defendants have defrauded consumers out of at least \$50,000 from the sale of Fuel Saver Pro during 2004 alone. (*Id.* ¶¶ 14-16, 30(e), 31(b), 32(b).)

**A. International Research and Development Corporation of Nevada ("IRD")** is a Nevada corporation. (PX 1 ¶ 36, Att. X.) IRD is the manufacturer and wholesaler of Super FuelMAX, as well an entire line of "Max Products." (*Id.* ¶¶ 21, 26, Atts. L, P.)<sup>1</sup>

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<sup>1</sup> IRD also sells SoapMAX ("uses amazing flow-through magnetic capacitors with opposite polarities to make water wetter"), PowerMAX (fuel and water conditioner), FishMAX

(continued...)

**B. Anthony Renda** is president, secretary, and treasurer of IRD. (PX 1 ¶ 36, Att. X.) He has also registered the fictitious business names International Research & Development and IRD and holds himself out as vice-president of those entities. (*Id.* ¶ 37, Att. Y.) E-mail correspondence regarding IRD’s promotions purport to be sent from him. (*See id.* ¶ 27, Att. Q.)

**C. Net Marketing Group LLC** is a New Mexico limited liability company. (PX 1 ¶ 30(f), Att. R at HUMB57-59.) Net Marketing Group has established merchant accounts with at least two separate companies, myPaySystems and Humboldt Merchant Services, that have processed consumer credit card payments for Fuel Saver Pro purchases by consumers. (*Id.* ¶¶ 16, 30, Atts. G, R.) Net Marketing Group has paid over \$33,000 to Defendants Mark Ayoub, Epro2000, and Diverse Marketing Group, LLC. (*Id.* ¶ 31(b).) Payments via check have also been made from Net Marketing Group’s bank account “for purchase of fuel savers.” (*Id.* ¶ 31(b), Att. S at BONE54, 56.)

**D. Floyd J. Tassin, Jr.**, also known as Jay Tassin, is a principal of Net Marketing Group, LLC. He is the signatory on a Net Marketing Group merchant account to accept credit card payments for sales of Fuel Saver Pro to consumers. (PX 1 ¶ 30, Att. R at HUMB50-55, 78.) He is also a signatory for a Net Marketing Group bank account to which funds from consumer credit card purchases of Fuel Saver Pro are deposited. (*Id.* ¶ 31, Att. S at BONE07.)

**E. Marcia Tassin** is also a signatory to a Net Marketing Group bank account to which funds from Fuel Saver Pro sales are deposited. (PX 1 ¶ 30, Att. R at HUMB50-52; ¶ 31 Att. S at BONE07.) She is also listed as a contact with a merchant account to accept credit cards payments for sales of Fuel Saver Pro. (*Id.* ¶ 30(a), Att. R at HUMB50, 54, 78.) She has additionally authorized payments from the Net Marketing Group bank account “for purchase of fuel savers.” (*Id.* ¶ 31(b), Att. S at BONE54, 56.)

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<sup>1</sup> (...continued)

(generates four of the five sensory stimulants that attract fish), BatteryMAX (extends battery life), AromaMAX (air treatment ionizer with aromatherapy generator), and HeatMAX (an adaptation of FuelMAX that allegedly increases combustion efficiency of heating oil, diesel, and propane). (PX ¶¶ 21, 26, Atts. L, P at IRD272-283.) The FTC’s proposed TRO would require that Defendants possess competent and reliable scientific evidence that substantiates their product claims prior to making further sales. (*See Proposed TRO* § I(C)).

**F. Diverse Marketing Group, Inc. and Diverse Marketing Group, LLC** are Florida registered businesses. (PX 1 ¶¶ 33-34, Atts. U, V.) The companies are listed as the registrant for numerous Internet domain names that are used for Fuel Saver Pro Web sites. (*Id.* ¶¶ 5-8, Att. A.) Diverse Marketing Group, LLC has received repeated payments for “Fuel Saver Orders.” (*Id.* ¶ 32, Att. T.) The company has also paid third parties for “FS Sales.” (*Id.*)

**G. Mark Ayoub** is the president of Diverse Marketing Group, Inc. and manager of Diverse Marketing Group, LLC. (PX 1 ¶¶ 33-34, Atts. U, V.) Mark Ayoub also does business as EPRO2000, Inc., a Florida corporation administratively dissolved on October 4, 2002. (*Id.* ¶ 35, Att. W.) He opened the post office box that serves as a return address for the Fuel Saver Pro Defendants’ product shipments. (*Id.* ¶¶ 17, 38, Atts. H, Z.) He also has registered a post office box that serves as the address for many of the domain name registrations linked to Fuel Saver Pro Web sites. (*Id.* ¶¶ 5-8, 39, Atts. A, AA.)

#### **IV. DEFENDANTS’ DECEPTIVE BUSINESS PRACTICES**

##### **A. Defendants Deceptively Promote and Sell Super FuelMAX**

###### **1. IRD Defendants’ Claims**

The IRD Defendants advertise and sell Super FuelMAX, a set of magnets snapped onto a car’s fuel line, via “Dealer Marketing Kits” on their Web site. (PX 1 ¶¶ 20, 21, 24, 28, Atts. K, L, N.) The marketing kits, which cost from \$260 to over \$1,500, contain various promotional materials for Super FuelMAX and the device’s predecessor, FuelMAX, and advertise 300-400% profits to resellers. (*Id.* ¶¶ 21-26, Atts. L, P at IRD03, 07, 09.) The marketing kit materials tout that the Super FuelMAX can “increase gas mileage up to 27%” and “reduce harmful emissions.” (*Id.* ¶¶ 21-26, Att. P at IRD06-07.) Moreover, the product label for Super FuelMAX states: “INCREASE MILEAGE by up to 27%.” (*Id.* ¶ 24, Att. N.)

In support of these claims, the IRD Defendants present a pseudo-scientific explanation of how FuelMAX and Super FuelMAX supposedly fracture hydrocarbon chains in fuel, resulting in “more complete combustion,” in turn resulting in increased fuel economy and decreased emissions. (*See* PX 1 ¶¶ 19-20, 26, Atts. J, K, P at IRD07.) For example, the IRD Defendants’ Web site claims:

Super FuelMAX is a magnetic frequency resonator. By way of its patented Neodymium super conductors it generates the specific resonance frequency that, when installed over the fuel line, will fracture the hydrocarbon chains in the passing fuel. . . . When fuel molecules get exposure to the specific resonance created by the Neodymium in the Super FuelMAX, combustion becomes more efficient.

The Super Fuel MAX accelerates combustion and burns more of the fuel that is normally exhausted as un-burned pollution.

(PX 1 ¶ 20, Att. K at 2.)<sup>2</sup>

The IRD Defendants make these representations despite having received a warning letter from the FTC in 2001, after the FTC sued one of IRD's dealer for falsely advertising its Super FuelMAX device.<sup>3</sup> In this warning letter, FTC staff stated: "We have examined your promotional materials for Super FuelMAX and determined that you may be making false and unsubstantiated claims that violate the laws we enforce." (PX 1 ¶ 42, Att. DD.) In January 2002, FTC staff received a letter from Defendant Anthony Renda, on behalf of IRD, stating:

Our company's intentions are to take the appropriate steps to maintain compliance with FTC regulations. In that regard, please be informed that [IRD] has suspended FuelMAX retail sales in the United States until the necessary modifications to the promotions materials are made.

(*Id.* ¶ 43, Att. EE.) Nevertheless, the IRD Defendants continue to deceptively advertise their purported gas saving devices by marketing their products to resellers. (*Id.* ¶ 28.)

## **2. Fuel Saver Pro Defendants' claims**

The Fuel Saver Pro Defendants make similar or identical misrepresentations to consumers via spam e-mail messages and on Web sites. For example, the Fuel Saver Pro

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<sup>2</sup> IRD Defendants further claim that Super FuelMAX is protected under patents and was invented by Robert E. Kane, an individual allegedly with a degree in physics from the University of Minnesota. Their materials often cite a patent filing for patent application 09/504,756. (*See, e.g.*, PX 1 ¶¶ 24, 26, Att. N at 1, P at IRD205-07.) The patent application cited by Defendants, however, received a non-final rejection and was ultimately listed as abandoned for "Failure to Respond to Office Action." (*Id.* ¶ 45, Att. GG.) Moreover, the University of Minnesota's registrar's office has verified that no Robert E. Kane has ever been admitted to either a graduate or undergraduate program at the university or been awarded a Ph.D. in physics or any other Ph.D. program at the university. (*Id.* ¶ 44, Att. FF.)

<sup>3</sup> The Super FuelMAX dealer agreed to an injunction preventing it from misrepresenting the actual benefits or efficacy of any supposed fuel-saving or emissions-reducing products for motor vehicles. (*See* PX 1 ¶ 41, Att. CC.)

Defendants' e-mail messages state: "This revolutionary device Boosts Gas Mileage 27% by helping fuel burn better[.]" (PX 1 ¶ 10, Att. C.) The e-mail messages contain hyperlinks that, when clicked, direct consumers to the Fuel Saver Pro Defendants' Web sites. (*Id.* ¶¶ 7-10.) These Web sites state that the device "Increases Gas Mileage 27%+" and "Reduces Emissions by 43%." (*Id.* ¶ 14, Att. F at 1.) The Web sites also repeat the pseudo-scientific claims made on the IRD Defendants' Web site. (*Id.* ¶¶ 9, 14, Att. B, F at 3.)<sup>4</sup>

### **3. Defendants' product claims are contrary to known science**

The FTC has provided the Court with two expert declarations demonstrating that Defendants' product claims are false and lack scientific basis. First, there is no practical or theoretical basis for the claims that Super FuelMAX acts through magnetic resonance to fracture hydrocarbon chains in fuel. The FTC has consulted with William P. Halperin, Ph.D., director of the Nuclear Magnetic Resonance Central Facility at Northwestern University for the past 29 years. (*See* PX 2.) Dr. Halperin states that Super FuelMAX does not generate any type of magnetic resonance, but rather only a magnetic field. (*Id.* ¶ 11.) Dr. Halperin further states that the magnetic field generated by the device is incapable of altering the molecular structure of any compound, including gasoline. (*Id.* ¶ 13-15, 17.) Dr. Halperin concludes that the well-accepted laws of physics are incompatible with the claims made for the devices. (*Id.* ¶ 11.)

Moreover, even if it were hypothetically possible for the devices to fracture hydrocarbon chains, increased fuel economy would not result. The FTC has consulted with Kenneth Brezinsky, Ph.D., Professor of Mechanical and Industrial Engineering at the University of Illinois at Chicago and an expert in fuel combustion. (*See* PX 3.) Dr. Brezinsky states that "introduction of such supplemental fuel fragments in the fuel cylinder of a vehicle . . . would not increase the combustion efficiency or fuel economy of that vehicle." (*Id.* ¶ 10.) In fact, even if the devices could hypothetically increase fuel economy, Dr. Brezinsky states that Super FuelMAX could, at

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<sup>4</sup> The Fuel Saver Pro spam spiked when the national average price of gasoline broke all-time records this past spring. However, the Internet marketing appeared to stop in May, after Mark Ayoub was quoted in the Washington Post as saying that Fuel Saver Pro sales had "increased since gas prices have recently shot up." *See* "Caught Over a Barrel: Soaring Gas Prices Have Motorists' Wallets Running on Empty," *Washington Post*, May 4, 2004, at <http://www.washingtonpost.com/wp-dyn/articles/A64180-2004May3.html>.

best, cause merely a 1.5% increase in fuel economy given that modern engines already achieve 95-98% combustion efficiency. (*Id.* ¶¶ 14-15.) Therefore, according to Dr. Brezinsky, the claim that Super FuelMAX could cause a 27% improvement in gas mileage “contradict[s] what is known about combustion efficiency and cannot be accurate under basic scientific principles.” (*Id.* ¶ 15.)

Dr. Brezinsky also explains that there is no scientific basis for the claim that FuelMAX or Super FuelMAX can reduce the emissions of a typical vehicle. (PX 3 ¶¶ 16-19.) In fact, Dr. Brezinsky concludes that automobile emissions could be expected to increase if some of the claims made by Defendants were true. (*Id.*)

### **B. The Fuel Saver Pro Defendants’ Illegal Spam Practices**

The Fuel Saver Pro Defendants have marketed their product via a deluge of spam that directs consumers to their Web sites. Consumers have forwarded to the FTC approximately 36,000 examples of spam marketing the Fuel Saver Pro since January 1, 2004. (PX 1 ¶ 10, Att. C.) The e-mail messages routinely violate central provisions of the new federal e-mail law, CAN-SPAM, by utilizing false or misleading header information and by failing to provide a valid physical postal address.<sup>5</sup>

#### **1. False or misleading header information**

CAN-SPAM prohibits utilizing false or misleading header information. *See* 15 U.S.C. § 7704(a)(1).<sup>6</sup> The Fuel Saver Pro Defendants’ e-mail messages often contain forged header

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<sup>5</sup> Congress passed CAN-SPAM after finding that spam imposes significant costs on the e-mail system, which are passed along to subscribers in the form of higher prices and reduced convenience. *See* 15 U.S.C. §§ 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.

<sup>6</sup> An e-mail message typically consists of two parts, the header and the body. (PX 4 ¶ 3.) An e-mail “header” contains a variety of information – some of which is often visible to an e-mail recipient such as the “From” or “Reply-to” fields. (*Id.*) Other e-mail header information is often hidden from message recipients unless the recipients change the default settings in their e-mail program, such as  
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information that fails to identify the true sender. 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 examples of Fuel Saver Pro Defendants’ spam that used forged return e-mail addresses purporting to be from users of hotmail.com or msn.com. (PX 1 ¶¶ 10-12, Atts. C-E.) Moreover, the FTC has submitted a chart showing that spam messages advertising Fuel Saver Pro were purportedly sent from dozens of names on the same day using randomly generated e-mail addresses such as Yong Wong at CNZOBYCVEDK@yahoo.com and Troy Poe at LJYJGZLMFOMEE@hotmail.com. (*Id.* ¶ 11, Att. D.)

In addition to “spoofing” the return address in the e-mail messages, the FTC has submitted a declaration from an Internet security expert showing that Fuel Saver Pro Defendants’ spam is routed through third party computers with vulnerabilities. (PX 4 ¶¶ 8-12, Att. B.) These vulnerable computers – many of which are simply home personal computers with broadband connections operating without firewalls – are often referred to as “open proxies.” (*Id.* ¶¶ 8-11.) The act of bouncing e-mail messages through third party computers makes tracing e-mail back to its true origin nearly 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 a physical address**

CAN-SPAM also requires that senders provide a physical postal address where the sender can be reached. *See* 15 U.S.C. § 7704(a)(5). If complied with, this provision would provide consumers with a tool to protest and prevent themselves from being subjected to additional spam. Representative samples of Fuel Saver Pro Defendants’ spam reveal that the messages do not contain a physical postal address in the text. (*See* PX 1 ¶ 10, Att. C.)

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<sup>6</sup> (...continued)

“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.)

## V. ARGUMENT

The FTC requests a temporary restraining order that enjoins further deceptive product claims and illegal e-mail practices. The FTC also asks that the TRO include an asset preservation order and an accounting of Defendants' product sales to ensure the availability of restitution to defrauded consumers.

### A. Injunctive Relief Standard

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 merely 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. “[T]he FTC need not prove irreparable injury to obtain a preliminary injunction.” *Kinney v. Int’l Union of Operating Eng’rs*, 994 F.2d 1271, 1277 (7th Cir. 1993). The threshold showing of a likelihood to succeed under the Seventh Circuit’s test for injunctive relief is a better than negligible chance of success on the merits. *See Cooper v. Salazaar*, 196 F.3d 809, 813 (7th Cir. 1999). Courts in this district have repeatedly exercised their authority to grant TROs in FTC fraud actions,<sup>7</sup> and as demonstrated below, the injunctive relief requested by the FTC is warranted in this case.

### B. The FTC is Overwhelmingly Likely to 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, the evidence clearly shows that Defendants have committed repeated violations of the FTC Act, including making material misrepresentations to consumers about

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<sup>7</sup> *See, e.g., FTC v. Harry*, 04 C 4790 (N.D. Ill. July 27, 2004) (Manning, J.); *FTC v. 4049705 Canada, Inc.*, No. 04 C 4694 (N.D. Ill. July 27, 2004) (Kennelly, J.); *FTC v. Phoenix Avatar LLC*, No. 04 C 2897 (N.D. Ill. April 23, 2004) (Holderman, J.); *FTC v. 9094-5114 Quebec Inc.*, No. 03 C 7486 (N.D. Ill. Oct. 23, 2003) (Leinenweber, J.); *FTC v. QT Inc.*, 03 C 3578 (N.D. Ill. May 29, 2003) (St. Eve, J.); *FTC v. STF Group, Inc.*, 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.*, 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. Feb. 28, 2002) (Holderman, J.); *FTC v. 1<sup>st</sup> Financial Solutions, Inc.*, No. 01 C 8790 (N.D. Ill. Nov. 19, 2001) (Kocoras, J.); *FTC v. Growth Plus Int’l Marketing, Inc.*, 00 C 7886 (N.D. Ill. December 18, 2000) (Aspen, J.).

their products. The Fuel Saver Pro Defendants have further violated the FTC Act by engaging in e-mail practices that violate CAN-SPAM.

**1. Defendants' product claims are deceptive**

Defendants' false claims about their purported fuel saving devices are "deceptive acts or practices" prohibited by the FTC Act. *See* 15 U.S.C. § 45(a). The Seventh Circuit has explained that "representations . . . likely [to] mislead consumers, acting reasonably, to their detriment" are deceptive within the meaning of the FTC Act. *World Travel*, 861 F.2d at 1029; *FTC v. Phoenix Avatar*, No. 04 C 2897, 2004 WL 1746698, at \*9 (N.D. Ill. July 30, 2004). The "misrepresentation or practice need not be made with an intent to deceive" to violate the FTC Act. *World Travel*, 861 F.2d at 1029. "Indeed, an advertiser's good faith does not immunize it from responsibility for its misrepresentations[.]" *Id.*; *see also* *FTC v. NCH*, 1995 WL 623260, at \*7 (D. Nev. May 25, 1995) ("The fact that defendants and their sales representatives may have repeated the misrepresentations of [a third party] in good faith, however, is not material.").

As described in Section IV.A above, Defendants' Web sites and promotional materials, including the Fuel Saver Pro Defendants' e-mails, are replete with express and implied representations that promise consumers substantially improved gas mileage and reduced emissions by use of the Super FuelMAX a/k/a Fuel Saver Pro. These representations are both false and material. Defendants' deception is not only likely to mislead consumers, but has undoubtedly caused (and continues to cause) significant monetary loss to consumers. Consumers simply would not spend \$89.95 on a set of magnets if they knew that Defendants' products do not work as claimed. Thus, Defendants have violated the FTC Act and a temporary restraining order against Defendants' misleading advertising is warranted.<sup>8</sup>

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<sup>8</sup> Additionally, by distributing deceptive marketing material to be used in recruiting others into the scheme, Defendants have provided others with the means and instrumentalities to deceive others, a separate violation of the FTC Act. *See* *Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963) "Those who put into the hands of others the means by which they may mislead the public, are themselves guilty of a violation of [the FTC Act]."; *see also* *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922) ("That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law of unfair competition.").

## 2. The Fuel Saver Pro Defendants initiate e-mail messages that violate CAN-SPAM

The Fuel Saver Pro Defendants have also engaged in “unfair or deceptive acts or practices” under the FTC Act by initiating e-mail messages that violate CAN-SPAM.<sup>9</sup> The Fuel Saver Pro Defendants’ e-mail messages are aimed at driving traffic to their Web sites and causing consumers to purchase the Fuel Saver Pro. Under CAN-SPAM, liability is broadly assessed to any party that “initiates” e-mail messages, that is, by either “transmitting” the messages themselves or by “procuring” their transmission. *See Phoenix Avatar*, 2004 WL 1746698, at \*13 (“Liability [under CAN-SPAM] is not limited to those who physically cause spam to be transmitted, but also extends to those who ‘procure the origination’ of offending spam.”).<sup>10</sup> The Fuel Saver Pro Defendants’ culpability is self-evident from the fact that the commercial e-mail messages violating CAN-SPAM market Fuel Saver Pro devices and include hyperlinks in the text of the messages that direct consumers to Web sites from which these Defendants directly profit. (*See* PX 1 ¶¶ 7-10, 14-16, 30-32, Atts. A, C, G, R, S, T.)

The commercial e-mail messages initiated by the Fuel Saver Pro Defendants violate CAN-SPAM in at least two ways. First, the spam “contains header information that is materially false or materially misleading.” 15 U.S.C. § 7704(a)(1).<sup>11</sup> As described above at Section IV.B.1,

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<sup>9</sup> Pursuant to Section 7(a) of CAN-SPAM, the ACT “shall be enforced by the [FTC] as if the violation of this 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 and “unfair or deceptive act or practice in violation of § 45(a)(1) [of the FTC Act].” *See* 15 U.S.C. § 57a(d)(3).

<sup>10</sup> 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).

<sup>11</sup> 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

(continued...)

the header information of the Fuel Saver Pro Defendants' spam often does not identify these Defendants or any registered business that they operate as the source of the e-mail messages, and the true routing information of the spam is obscured because the messages are often bounced through vulnerable third party computers. Moreover, the spam fails to comply with CAN-SPAM's requirement that commercial e-mail messages contain 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 shown by the samples of Defendants' e-mail messages, the spam initiated by Defendants often completely ignore this requirement.

In sum, the Fuel Saver Pro Defendants have sent, or had sent on their behalf, commercial e-mail messages that contain multiple violations of CAN-SPAM. Defendants' 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.

### **C. The Balance of the Equities Favors the FTC**

Not only is the FTC likely to succeed on the merits, the balance of equities tips strongly in the FTC's favor. 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; *see also FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981) ("When the Commission demonstrates a likelihood of ultimate success, a countershooting of private equities alone would not suffice to justify denial of a preliminary injunction.").

The public equities are compelling in this case. Defendants misrepresent the effects of their product to consumers and barrage the public with spam. Both of these practices cause harm to individuals. Those who purchase Defendants' magnets do not receive the product for which they paid. Those who receive Defendants' spam "are forced to incur the costs of needlessly expended energy and time evaluating and eventually discarding" the messages. *Phoenix Avatar*, 2004 WL 1746698, at \*14. In sum, the public has a strong interest in preventing further

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

message to respond to a person who initiated the electronic message." 15 U.S.C. § 7704(a)(6).

fraudulent sales of ineffective products and stopping the deluge of spam sent in violation of federal law.

In contrast, Defendants have no legitimate interest in continuing to defraud consumers or initiate spam in violation of federal law. The balance of the equities even more strongly favors the FTC because of the strong likelihood of success on the merits of its claims. *See Phoenix Avatar*, 2004 WL 1746698, at \*15; *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1009 (N.D. Ill. 1998).

**D. The FTC Seeks Appropriate Relief In Its Proposed TRO<sup>12</sup>**

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 equitable relief narrowly tailored to stop Defendants’ scam immediately. The FTC’s proposed TRO would enjoin Defendants from violating the FTC Act and CAN-SPAM. (*See Proposed TRO* §§ I-III.) It also requires that Defendants preserve records and provide an accounting of product sales and assets. (*See id.* §§ V, VIII, IX.) 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.* § X.)

Moreover, the proposed order contains an asset preservation provision whereby Defendants would be limited to using their assets for necessary living expenses absent Court order or agreement by the FTC. (*Id.* § IV.) Part of the relief sought by the FTC in this case is restitution to consumers who were defrauded by Defendants. The FTC seeks to preserve Defendants’ 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; *see also Phoenix Avatar*, 2004 WL 1746698, at \*15.<sup>13</sup>

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<sup>12</sup> The FTC’s proposed TRO is attached to its Motion in Support of the TRO.

<sup>13</sup> The proposed asset preservation should apply to the individual Defendants’ assets, as  
(continued...)


In sum, the above order provisions do not work an undue hardship on Defendants, for Defendants have no legitimate interest in persisting with unlawful conduct. *See, e.g., 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”); *Phoenix Avatar*, 2004 WL 1746698, at \*15-16 (granting FTC’s motion for preliminary injunction with asset freeze); *Sabal*, 32 F. Supp. 2d at 1009.

## VI. CONCLUSION

Defendants have caused and are likely to continue to cause consumer injury because of FTC Act and CAN-SPAM violations. Therefore, the FTC respectfully requests that this Court issue the requested injunctive and ancillary equitable relief to halt Defendants’ illegal practices and ensure the availability of effective final relief.

Respectfully submitted,

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<sup>13</sup> (...continued)

well as corporate assets. An individual may be held liable for corporate practices where he or she has authority to control the business affairs, such as by assuming the duties of a corporate officer, and has or should have had knowledge of the deceptive practices of the business. *See FTC v. Amy Travel*, 875 F.2d 564, 573-74 (7th Cir. 1989). Here, as explained above in Section III, each of the individual defendants has intimate knowledge and extensive participation in the business affairs. Anthony Renda is the sole officer for IRD. The Tassins control bank and merchant accounts on behalf of Net Marketing Group. Mark Ayoub controls Diverse Marketing Group’s bank account and has opened its post office boxes.