

To direct traffic to their Web sites, Defendants are flooding consumers' in-boxes with massive amounts of spam. In fact, consumers have forwarded nearly half a million of Defendants' e-mail messages to the FTC since January 1, 2004. All of this spam violates 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.* The e-mail messages: (1) disguise their source to make it appear that the spam is coming from innocent parties; (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 Defendants' ongoing and harmful practices to a swift end. The FTC brings this motion *ex parte* to obtain a temporary freeze of Defendants' assets to preserve the possibility of redress for victimized consumers who bought Defendants' products. Defendants' pattern of fraud and concealment of their identity indicates that they are likely to hide assets if they receive advance notice of this action.

II. DEFENDANTS

Defendants are two companies and four individuals that operate as a common enterprise to sell herbal supplement products, including diet patches, over the Internet. From January 1, 2004 through April 21, 2004, consumers forwarded over 490,000 e-mails advertising Defendants' products to uce@ftc.gov, the FTC's spam database. (PX 1 ¶¶ 3-10, 37, Att. A.) The text of these e-mail messages contains a hyperlink that, if clicked, leads consumers to one of over 100 Web sites advertising Defendants' products. (*Id.* ¶¶ 3-10, Att. A.)

Although the FTC's investigation has revealed that the individual Defendants all live together in suburban Detroit (PX 3 ¶ 6), they take great strides to conceal their identity when selling their products. Their Web pages fail to provide any information identifying the sellers. (PX 1 ¶¶ 16, 25, Atts. C, J.) Their Web site addresses change regularly and identify the site

owners as individuals in various countries, such as Lithuania, India, Singapore, Taiwan and Korea. (*Id.* ¶¶ 11-12, Att. B.) When shipping their products, Defendants use a variety of company names, including “Phoenix Avatar,” “AIT Herbal Marketing” and “Avatar Nutrition” (*Id.* ¶¶ 18-21, 26, 27, Atts. D-F, H, K), and identify their business address as a Post Office Box in West Bloomfield, Michigan, or an address that corresponds to a bar and grill in Detroit (*id.* ¶¶ 20, 27, 30, 35, 36, 46, Atts. F, K, N, R, T; PX 3 ¶¶ 7-9).

A. Phoenix Avatar, LLC

Phoenix Avatar, LLC is a Nevada limited liability company whose registered agent and manager is Eastbiz.com, Inc. (PX 1 ¶ 29, Att. M.) Defendant DJL, LLC paid Eastbiz.com to form Phoenix Avatar, LLC. (*Id.* ¶ 34(e).) Credit card transactions for purchases of Defendants’ products identify Phoenix Avatar, LLC as the merchant. (*Id.* ¶ 18, Att. D.)

B. DJL, LLC

DJL, LLC (“DJL”) is a Michigan limited liability company, and Defendant Daniel Lin is its registered agent. (PX 1 ¶ 30, Att. O.) DJL pays for the shipment of many of Defendants’ products. (*Id.* ¶ 34(d); PX 3 ¶¶ 4-5.) Money paid by consumers for Defendants’ products is deposited into a DJL bank account. (PX 1 ¶¶ 34-35.) The signatories of this bank account are Defendants Daniel Lin, James Lin and Mark Sadek. (*Id.* ¶ 34, Att. Q.)

C. Daniel J. Lin

Daniel Lin is DJL’s registered agent and one of the signatories for its bank account. (PX 1 ¶¶ 30, 34, Atts. O, Q.) Daniel Lin is identified as the owner of AIT Herbal Marketing on an account application to accept credit card payments. (*Id.* ¶ 35, Att. R.) He also personally responds to customer requests for refunds concerning Defendants’ products. (*Id.* ¶ 35(e), Att. S.)

D. Mark M. Sadek

Sadek has shipped hundreds of Defendants’ products to consumers. (PX 3 ¶¶ 3-5.) He also opened the post office box that serves as a return address for Defendants’ product shipments.

(*Id.*) Sadek also registered a toll-free telephone number that is printed on invoices shipped with Defendants' products. (PX 1 ¶¶ 31-32, Att. P.) Sadek is also a signatory on the DJL bank account which receives money paid by consumers for Defendants' products. (*Id.* ¶ 34, Att. Q.) Sadek further personally responds to customer requests for refunds concerning Defendants' products. (*Id.* ¶ 35(e), Att. S.)

E. James Lin

James Lin is a signatory on the DJL bank account. (PX 1 ¶ 34, Att. Q.) James Lin also made arrangements with the owners of a bar and grill to have mail delivered for Defendants at that location. (PX 3 ¶¶ 7-9.)

F. Christopher M. Chung

Chung registered the business name "A I T Herbal Marketing" used by Defendants. (PX 1 ¶ 30, Att. N.) He also purchased Internet services for Defendants' operation. (*Id.* ¶ 36, Att. T.)

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 Defendants. 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). Here, Defendants have transacted considerable business in this district by

advertising and selling their products to consumers in this district. (*See, e.g.*, PX 1 ¶¶ 13-28 (FTC undercover purchases of Defendants' products from Chicago); *id.* ¶ 23, Att. J p. 5 (product testimonial on Defendants' Web site from Chicago consumer); *id.* ¶ 32-33 (phone calls to Defendants' customer service number from consumers in Northern District); *id.* ¶ 35(d) (credit card records involving consumer in Northern District).)

IV. DEFENDANTS' BUSINESS PRACTICES

Since at least October 2003, Defendants have initiated millions of commercial e-mail messages that invite consumers to click on links in the text of the e-mail and visit one of dozens of Defendants' Internet Web sites. These Web sites deceptively advertise and sell herbal supplement products, including diet patches.¹

A. Defendants Deceptively Promote and Sell Diet Patches.

Defendants advertise products called "Med Diet Patch" and "Slim Form Patch" on their Web sites for \$59.95 for a 30-day supply. (PX 1 ¶¶ 14-28, Atts. C, J.) Defendants actually deliver a product called "Premium Diet Patch." (*Id.* ¶¶ 20-21, 27-28, Atts. G, L.) Defendants' Web sites make essentially identical product claims about the patches, namely that placing the patch on the body will cause weight loss by suppressing appetite and boosting metabolism. (*Id.* ¶¶ 14, 23, Atts. C, J.) For example, Defendants' Web sites state:

- Med Diet Patch is a cutting-edge, advanced appetite suppressant, metabolism booster, and energy enhancer . . . all in one! With Med Diet Patch, there are no more starvation diets and difficult and dangerous exercise! . . . Med Diet Patch drastically reduces your cravings for food, so you naturally do not want to over-eat. While at the same time, Med Diet Patch is boosting your energy level, and jump-starting your metabolism to burn maximum body fat. (*Id.* ¶ 14, Att. C p 1.)

¹ In addition to diet patches, Defendants appear to sell other products, including a penis enlargement pill and a spray that purportedly stimulates the pituitary gland to produce human growth hormone. (PX 1 ¶¶ 6-10.) The FTC has significant doubts that these products are in any way effective and seeks injunctive relief in this matter aimed at prohibiting Defendants from making claims for any product unless they are true and Defendants can substantiate them with scientific evidence.

- Slim Form Patch is a “steady” weight loss system. This means you lose fat. While the patch is working hard to turn fat into toned muscle, you can eat normally . . .without dieting. . . . The SFP is so easy to use [*sic*] just peel and stick then watch the pounds melt away. . . . In recent laboratory studies results proved that most people lose from 2 to 4 lbs. per week. There have been cases reported of as much as 6-lbs. weight loss in one week. (*Id.* ¶ 23, Att. J pp. 1-3.)

Defendants’ claims about their diet patches are wholly false and cannot be substantiated. The FTC has consulted with Michael D. Jensen, M.D., a Professor of Medicine with the Mayo Clinic College of Medicine. (*See* PX 2.) Dr. Jensen states that there is no credible medical evidence that the patch would cause weight loss, increase metabolism or decrease appetite. (*Id.* ¶¶ 19-21.) According to Dr. Jensen, the main ingredient in the patch is a kind of sea weed. (*Id.* ¶ 18.) Even assuming that the sea weed and other patch ingredients could somehow be delivered into the body from the patch, it would not cause any weight loss. (*Id.* ¶¶ 16-18.)²

B. Defendants’ Illegal Spam Practices.

Defendants have initiated millions of spam e-mail messages touting their 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. 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* 15 U.S.C. §§ 7701(a)(3), (4). Congress further 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

² Dr. Jensen’s conclusions are consistent with an FTC staff report issued in December 2003 providing a summary and analysis of an FTC public workshop on Deception in Weight Loss Advertising. *See* <http://www.ftc.gov/os/2003/12/031209weightlossrpt.pdf>. The workshop included statements from ten experts in nutrition and the study and treatment of overweight and obesity. All ten experts agreed that “a claim that a product worn on the body or rubbed into the skin causes substantial weight loss is not scientifically feasible.” *Id.* at 13-14.

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.

Defendants routinely violate the central provisions of CAN-SPAM in two ways. First, e-mail messages initiated by Defendants contain forged “from” and/or “reply-to” addresses. Second, Defendants’ spam fails to contain identification required by CAN-SPAM, namely: (1) clear and conspicuous notice of the opportunity to opt-out, and/or (2) a valid physical postal address. These violations not only affect the system as a whole, but cause real hardship to individuals or businesses.

1. False or misleading header information

Instead of identifying themselves as the source of the e-mail they initiate, Defendants make it appear that the messages are sent by innocent third parties. They do this by inserting the e-mail address of unwitting third parties in the “reply-to” and/or “from” fields of their spam, a practice often referred to as “spoofing.” This practice conceals the true identity of the sender and makes it seem that the spam is coming from a variety of innocent parties.³

The FTC has attached evidence of thousands of examples where Defendants have used fake e-mail addresses of a number of Internet service providers, including AOL and Microsoft Network. (PX 1 ¶¶ 3-10, 38-41, Atts. A, U, W; PX 4-7.) A representative sample of e-mail initiated by Defendants demonstrates that their spam contains at least dozens of “spoofed” third party e-mail addresses every day in the “reply-to” or “from” fields. (PX 1 ¶ 41, Att. W.)

Many of the spoofing victims have suffered considerable harm. Some of the e-mails that Defendants blast out are undeliverable. Under Internet protocols, those messages are then

³ Spoofing is used to disguise the identity of the sender, to make recipients open e-mails they may not otherwise open, or to bypass e-mail filters. *See Washington v. Heckel*, 24 P.3d 404, 407 n. 4 (Wash. 2001) (defining spoofing and discussing spam in general).

returned to the e-mail address in the “reply-to” field of the spam. Because of the forged headers, this flood of “bounced” undeliverable e-mails goes to those who have been spoofed. In addition, the recipients of this unwanted spam often complain to the individuals they believe are responsible – the spoofing victims – and this can damage their reputations. For example:

- an e-mail service provider specifically designed to protect its subscribers from spam was spoofed by Defendants and received tens of thousands of forged “bounces” daily, causing slow or unresponsive e-mail service to its customers; indeed, many of the company’s customers left, and the company was added to several known spam “blacklists” which prevented its subscribers from being able to send e-mail to anyone or any service that subscribes to the blacklists. (See PX 6; PX 1 ¶¶ 6-10, Att. A.)
- a company marketing virus and spam free e-mail accounts was spoofed by Defendants and received tens of thousands of bounced e-mail messages that caused bandwidth “spikes” of ten times its normal levels; the bandwidth spikes slowed down the speed at which its customers could retrieve and send e-mail, resulting in customer complaints and forcing the company to purchase another mail server to accommodate the increased e-mail traffic. (See PX 5; PX 1 ¶¶ 6-10, Att. A.)
- another anti-spam e-mail provider received so many “bounced” e-mail messages attributable to Defendants that the company was forced to close part of its network for approximately 10 days; the company lost customers and was required to pay a monetary penalty for excess bandwidth use. (See PX 7; PX 1 ¶¶ 6-10, Att. A.)

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 Defendants. (See PX 1 ¶¶ 3, 42-44, Att. X.) The e-mail messages often contain no opt-out mechanism, or, at best, a mechanism that is obscured or hidden. Moreover, the e-mail messages do not contain a physical postal address in the text.

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 Defendants' assets to preserve assets that will be 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 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. Courts in this district have repeatedly exercised their authority to grant TROs in FTC fraud actions,⁴ 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 Defendants continue to engage in repeated deceptive or unfair acts in violation of the FTC Act, including making material misrepresentations to consumers about their products and engaging in e-mail practices that

⁴ *See, e.g., 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. 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.).

violate CAN-SPAM. Through their fraudulent scheme, Defendants are cheating consumers out of what likely amounts to hundreds of thousands of dollars.⁵

1. Defendants are making material misrepresentations about their products.

Defendants make false claims about their diet patches. Defendants' misrepresentations are "deceptive acts or practices" prohibited by the FTC Act. *See* 15 U.S.C. §§ 45(a), 52(a). A material representation or omission that "likely would mislead" consumers acting reasonably under the circumstances is "deceptive" and violates the FTC Act. *See World Travel*, 861 F.2d at 1029. Express claims are presumed to be material. *See Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir.1992); *FTC v. Febre*, 1996 WL 396117, at *2 (N.D. Ill. July 3, 1996). 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.

Here, as described above in Section IV.A, Defendants have consistently made express false claims about the central characteristics of their diet patches. Defendants claim that their patches: (1) cause substantial weight loss, and (2) increase metabolism, decrease appetite and reduce food cravings. (PX 1 ¶¶ 14-23, Atts. C, J.) However, expert analysis by a doctor from the Mayo Clinic establishes that Defendants' weight loss patches do none of those things and, specifically, will not cause weight loss. (PX 2 ¶¶ 9-21.)

In this case, Defendants' deception is not only "likely" to mislead consumers, it has undoubtedly caused (and continues to cause) significant monetary loss to consumers. Consumers simply would not spend \$59.95 on a diet patch if they knew that Defendants' products did not work as claimed. Accordingly, the FTC has demonstrated a likelihood of success on the merits, and a temporary restraining order against Defendants' misleading advertising is warranted.

⁵ Bank records show that Defendants are accepting deposits of roughly \$100,000 a month from credit card processors, including the two companies that processed the FTC's undercover purchases of Defendants' products. (PX 1 ¶¶ 34-35.)

2. Defendants are initiating commercial e-mail that violates CAN-SPAM.

Defendants are also engaging in “unfair or deceptive acts or practices” under the FTC Act by initiating e-mail messages in violation of CAN-SPAM.⁶ Defendants’ e-mail messages are aimed at driving traffic to Defendants’ Web sites and causing consumers to purchase Defendants’ products. Under CAN-SPAM, a party must “initiate” e-mail messages to be liable, and Defendants “initiate” the e-mail messages here either by “transmitting” the messages themselves or by “procuring” their transmission.⁷

Defendants initiate commercial e-mail messages that “contain[] header information that is materially false or materially misleading.” 15 U.S.C. § 7704(a)(1).⁸ As described above at Section IV.B.1, commercial e-mail messages initiated by Defendants repeatedly and consistently contain e-mail addresses of unwitting third parties in the “reply-to” and/or “from” fields. (PX 1 ¶¶ 3, 38-41, Atts. U-W; PX 4-7.) Thus, Defendants’ spam clearly contains header information that is materially false or materially misleading.

Additionally, CAN-SPAM makes it unlawful for a commercial e-mail message to be initiated unless the message provides: (1) a clear and conspicuous notice of the opportunity to

⁶ 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).

⁷ 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).

⁸ CAN-SPAM defines “header information” to include 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).

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 shown by the samples of Defendants' e-mail, commercial e-mail messages initiated by Defendants often completely ignore these requirements. (*See* PX 1 ¶¶ 3, 42-44, Att. X.)

In sum, 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 against Defendants' e-mail practices is warranted.

3. Daniel Lin, Mark Sadek, James Lin and Christopher Chung Are Individually Liable.

Daniel Lin, Mark Sadek, James Lin and Christopher Chung are perpetrators of this illicit scheme and are individually liable for the violations of the FTC Act described above. An individual may be held liable for FTC Act violations if the court finds that the individual: (1) actively participated in or had authority to control the deceptive practices, and (2) had or should have had knowledge or awareness of the practices. *See FTC v. Amy Travel*, 875 F.2d 564, 573-74 (7th Cir. 1989); *FTC v. Febre*, 1996 WL 396117, at *8 (N.D. Ill. July 3, 1996). 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. In addition, the defendants' "degree of participation in business affairs is probative of [their] knowledge." *Id.* at 574.

Here, as described in Section II, each of the individual defendants are actively involved in the business affairs of this operation. Daniel Lin, Mark Sadek and James Lin are signatories on the bank account that receives proceeds from the sale of Defendants' products. (PX 1 ¶ 34, Att. Q.) Daniel Lin and Mark Sadek personally respond to consumer refund requests. (*Id.* ¶ 35, Att. S.) Sadek ships Defendants' products, and he registered a post office box and a telephone

number for Defendants. (PX 1 ¶ 32, Att. P; PX 3 ¶¶ 3-5, Att. A.) James Lin arranged for a bar and grill to accept mail on behalf of Defendants. (PX 3 ¶¶ 7-9.) Christopher Chung registered one of the business names used by Defendants and purchased Internet services for Defendants. (PX 1 ¶¶ 30, 36, Atts. N, T.) In sum, each of the individual defendants has actively participated in or is in position to control Defendants' deceptive practices, and each has or should have knowledge of the practices.

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 greater weight to the public interest advanced by the FTC than to any of Defendants' private concerns. *World Travel*, 861 F.2d at 1030-31. Here, 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, Defendants have no legitimate interest in continuing to defraud consumers as part of their business. 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 FTC v. Sabal*, 32 F. Supp. 2d 1004, 1009 (N.D. Ill. 1998).

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 Defendants' scam immediately and preserve the possibility to refund victimized consumers.⁹

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 Defendants. The FTC seeks to freeze Defendants' assets to preserve the possibility of such relief. As in the other cases in this district where courts have granted the FTC an asset freeze *ex parte*,¹⁰ irreparable injury, loss, or damage will likely result if Defendants receive notice of this action. In short, if Defendants' assets are not preserved, those assets may disappear and be unable to be used to redress consumer injury.

As discussed above, Defendants' 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.¹¹ Indeed, such behavior seems especially possible in this case in light of Defendants' herculean efforts to conceal their identity and evade detection. Defendants forge their e-mail messages to make them look like they come from innocent third parties. Their Web pages fail to provide any

⁹ The FTC has submitted a Proposed Temporary Restraining Order with its papers.

¹⁰ *See, e.g., 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. 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.).

¹¹ *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).

information identifying the sellers. Their Web site addresses change regularly and identify the site owners as individuals around the world. They use multiple company names and business addresses, including the address of a bar and grill. Moreover, Defendant Daniel Lin was previously convicted of financial fraud, further demonstrating lack of respect for the law. (PX 1 ¶ 47, Att. Y.)

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 FTC v. World Wide Factors*, 882 F.2d 344, 347 (7th 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). Here, Defendants’ assets should be preserved to ensure that they are available to make restitution to injured consumers.¹²

The FTC’s proposed TRO includes additional narrowly tailored ancillary equitable relief. The proposed order enjoins Defendants from violating the FTC Act and CAN-SPAM and requires that Defendants preserve records and provide an accounting of product sales and assets. (See Proposed TRO §§ I, II, 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.)

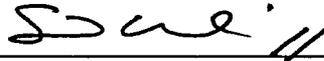
¹² The court’s “duty” to ensure that assets are available to make restitution is not affected here by the fact that the FTC has not initially attacked all of the products sold by Defendants. The FTC has demonstrated that Defendants have defrauded money from consumers who purchased Defendants’ diet patches. An asset freeze is imperative to protect the ability to reimburse those consumers who have already lost money. If Defendants can demonstrate that amounts being held for defrauded consumers are more than necessary to redress defrauded consumers, the asset freeze can be amended accordingly.

VI. CONCLUSION

Defendants have caused and are likely to continue to cause consumer injury because of the FTC Act and CAN-SPAM violations. This Court should issue the requested injunctive relief to prevent ongoing consumer harm and to help ensure the possibility of effective final relief.

Respectfully submitted,

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