

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

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

SPEAR SYSTEMS, INC., a
Wyoming corporation;

BRUCE PARKER, individually, and as an officer
or director of Spear Systems, Inc.;

LISA KIMSEY, individually, and as an officer
of Spear Systems, Inc.; and

XAVIER RATELLE, individually, and doing
business as eHealthyLife.com,

Defendants.

Case No. 07 C 5597

Judge Wayne R. Andersen

Magistrate Judge Michael T. Mason

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

I. INTRODUCTION

Defendants are an international operation that deceptively market and sell dietary supplements on Internet Web sites utilizing a flood of illegal “spam” email messages. One of their products is a “human growth hormone” pill that Defendants claim reverses the aging process and causes users to look and feel younger. Another product is a diet pill purportedly made from an African plant called Hoodia gordonii that supposedly causes substantial weight loss. Analyses by medical experts, however, demonstrate that Defendants’ product claims are totally false and that the products have no effect on users whatsoever. Since 2006, Defendants’ false claims have defrauded thousands of consumers out of approximately \$1 million.

To direct potential customers to dozens of Web sites selling their products, Defendants employ massive amounts of illegal commercial email messages. The spam messages violate federal law and harm consumers in many ways. The messages falsify information that would identify the true sender, contain false subject lines designed to fool people into opening the messages, and fail to offer any mechanism by which consumers can opt-out from receiving further email messages. Since July 2006, the FTC has received over 185,000 complaints about Defendants’ spam messages.

The FTC respectfully asks this Court to bring Defendants’ harmful practices to a swift end. The FTC brings this motion *ex parte* to obtain a temporary freeze of Defendants’ assets in order to preserve the possibility of redress for victimized consumers who bought Defendants’ products. Defendants, who are located in the United States, Canada, and Australia, have taken great efforts to hide their illegal practices by utilizing anonymous Web sites and spam. Moreover, after depositing sales proceeds into U.S. bank accounts, they have transferred significant amounts of money to overseas accounts and converted other funds into anonymous

pre-paid debit cards. Defendants' pattern of fraud, as well as their avid attempts to conceal their identity, indicates that they are likely to hide assets if they receive notice of this action.

II. JURISDICTION AND VENUE

The 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. *See* 15 U.S.C. § 53(b). "Where a federal statute provides for nationwide service of process, personal jurisdiction may be obtained over any defendants having minimum contacts with the United States as a whole." *FTC v. Bay Area Bus. Counsel, Inc.*, No. 02 C 5762, 2003 WL 1220245, at *2 (N.D. Ill. March 14, 2003).

Venue is proper in the Northern District of Illinois. First, two of the defendants are foreigners who are subject to venue in any district. *See* 28 U.S.C. § 1391(d). Moreover, pursuant to the FTC Act, an action may be brought where a corporation or person "resides or transacts business." 15 U.S.C. § 53(b). Defendants have advertised and sold products to consumers in this district. (*See* PX 1 ¶¶ 6-24 (undercover purchases of Defendants' products in this district); *id.* ¶ 35 (telephone calls from consumers in this district to Defendants' customer service telephone number)).

III. BACKGROUND

A. The Scheme

Defendants are three individuals – one in the United States, one in Australia, and one in Canada – and the Wyoming corporate entity that they use to sell various dietary supplement products on Internet Web sites. They sell pills called "HGHLife" and "HGHPlus" that purportedly elevate a user's level of human growth hormone (collectively, "HGH Products"). (PX 1 ¶¶ 19-24, Atts. N-S.) They also sell diet pills called "HoodiaLife" and "HoodiaPlus" that supposedly contain *Hoodia gordonii*, a cactus-like plant found in Africa (collectively, "Hoodia

Products”). (*Id.* ¶¶ 6-18, Atts. A-M.) A single bottle of each of these products costs \$55.95, plus \$9.99 for shipping and handling. (*Id.* ¶¶ 8, 14, 21.)

Defendants’ products appear to be marketed solely by spam email messages. (PX 1 ¶¶ 6, 12, 19, 27-31, Atts. A,G,N; PX 13 ¶ 17, Att. B (examples of email messages).) The email messages contain links that, if clicked, direct consumers to Web sites where consumers can purchase Defendants’ products with a credit card. (PX 1 ¶¶ 6-8, 12-14, 19-21.) The FTC has identified over 140 Internet Web sites advertising Defendants’ products in spam messages. (*Id.* ¶¶ 27-28, Att. V.) None of the Web sites identify Defendants as the seller or provide any contact information. (*Id.*) If consumers purchase the products, their credit card bills either identify the seller as “Herbal Sales” or “IP-Ehealthylife.com.” (*Id.* ¶¶ 10, 16, 23, Atts. D,J,Q.) Since April 2006, credit card sales of Defendants’ products have generated over \$940,000. (PX 4 ¶ 5; PX 1 ¶ 34; PX 5 ¶ 2, Att. A at VIS002.)¹

Consumers who purchase a product from one of Defendants’ Web sites receive an email message from help@ehealthylife.com. (PX 1 ¶¶ 9, 15, 22, Atts. C, I, P.) The message contains a telephone number and directs customers to the Web site, www.ehealthylife.com. (*Id.*) The ehealthylife.com Web site advertises and sells HoodiaLife and HGHLife. (*Id.* ¶ 26, Att. U.) Defendants’ products are shipped from a fulfillment center in Michigan, and the return address identifies the seller as “eHealthyLife.” (*Id.* ¶¶ 11, 18, 24, Atts. E, L, R.) The labels on the products received by consumers identify the company manufacturing the products as “eHealthy Life.” (*Id.* ¶¶ 11, 18, 24, Atts. F, M, S.)

¹ Defendants have relationships with at least two credit card processors. They have processed over \$620,000 in credit card charges using a processor in the United States (PX 4 ¶ 5; PX 1 ¶ 34), and they have processed over \$320,000 in charges utilizing a Caribbean bank (PX 5 ¶ 2, Att. A at VIS002).

B. The Defendants

Defendants are the three key individuals behind this enterprise and the corporate entity that is used to perpetuate the scheme:

1. **Spear Systems, Inc.** (“Spear”) is a Wyoming corporation with a business address in Birmingham, Alabama.² (PX 1 ¶ 25, Att. T.) In March 2006, Spear contracted with a U.S. credit card processor to accept credit cards to sell “herbal products.” (PX 4 ¶ 3, Att. A at FIR001.) Using this connection into the credit card system, Spear processed at least \$620,000 in credit card sales for Defendants’ products. (*Id.*; PX 1 ¶¶ 34.) The proceeds from those transactions were deposited into an account at U.S Bank in the name of Spear. (PX 4 ¶ 3, Att. A at FIR006; PX 6.) Spear then converted roughly \$600,000 into anonymous pre-paid debit cards. (PX 6; PX 1 ¶¶ 32-33.) In addition, Spear is the entity that responds when customers request that credit card charges for Defendants’ products be reversed. (PX 4 ¶ 4, Att. A at FIR0131, 138, 142, 158, 164, 169, 177, 182, 186, 243, 245, 328.)

2. **Bruce Parker** resides in Brisbane, Australia, and is listed as the sole officer on Spear’s incorporation documents. (PX 6 ¶ 3; PX 1 ¶ 25, Att. T.) He is the only signatory on Spear’s account at U.S Bank, which receives the proceeds from product sales. (PX 6 ¶ 3, Att. A at USB04-5.) He signed the contract with, and paid the bills to, the company operating Spear’s virtual office. (PX 8 ¶¶ 3-4, Att. A at YOU003-4, 14.)

3. **Lisa P. Kimsey** is a resident of Caldwell, Idaho. Kimsey signed the merchant account application on behalf of Spear so that it could accept credit cards for the product sales. (PX 4 ¶ 3, Att. A at FIR001-4, 7.) In the application, Kimsey held herself out as the “CFO” of Spear. (*Id.* at FIR001, 4.) Kimsey also is a signatory on a Spear bank account at

² Spear’s Birmingham business address is actually a virtual office, which provides clients with a business address, answering services, voicemail technology, mail and package handling, and administrative support. (*See* PX 8.)

Wachovia Bank, identifying herself again as Spear's CFO. (PX 7 ¶¶ 2, 3, Att. A at WAC004-6.) She also received monthly payments from that bank account. (*Id.* ¶ 5.)

4. **Xavier Ratelle** is a resident of Montreal, Quebec. Ratelle purchased the domain name ehealthylife.com, which is identified as the seller in the confirmation email messages, on the product label, and on shipment labels received by consumers who purchase Defendants' products from the spam Web sites. (PX 9 ¶ 3, Att. A at INT003-11.) Ratelle is also the subscriber for the telephone number included in the email messages consumers receive after making purchases. (PX 11 ¶¶ 2-3, Att. A at GOT0011-12.) The Web site ehealthylife.com contains advertisements for HoodiaLife and HGHLife essentially identical to those in the Web sites linked to the spam messages. (PX 1 ¶ 26, Att. U.)

IV. DEFENDANTS' ILLEGAL BUSINESS PRACTICES

A. Defendants' False and Unsubstantiated Product Claims

1. Defendants deceptively promote their HGH Products

The Web sites promoting Defendants' HGH Products make a variety of explicit claims about the products' ability to turn back or reduce the aging process by altering the amount of human growth hormone in a user's body. For example, the Web sites state the HGH Products will help:

- "shed unwanted pounds, increase muscle mass and density, restore bone health, give your skin and hair natural shine and enjoy more invigorating energy to burn;"
- "take a decade or two off your face in only months;" and
- "aid your body in almost every function that it performs, from regulating metabolism and burning fat to maintaining bone density, muscle mass, mental functions, digestive functions, immuno-defense activity and skin and organ repair. You will have a whole new body in only a few short months!"

(PX 1 ¶ 20, Att. O at FTC 113-114, 117-118.)

Defendants' claims about their HGH Products are false and unsubstantiated. In fact, according to a medical expert in endocrinology from Northwestern University, Defendants' HGH Products have no effect on a person whatsoever. (See PX 2.) The products do not contain human growth hormone and cannot produce effects similar in nature to any form of growth hormone. (See *id.* ¶¶ 17, 27-28.)³ There is no credible medical evidence to support the claims made by Defendants. (*Id.* ¶¶ 22, 25.) In sum, contrary to the claims made on their Web sites, Defendants' HGH products have no physiological effect on users. (*Id.* ¶ 27.)

2. Defendants deceptively promote and sell Hoodia Products

The Web sites and email messages promoting Defendants' Hoodia Products make extravagant weight loss claims, relying on purported scientific studies about the Hoodia gordonii plant. Email messages touting Defendants' Hoodia Products claim that users will safely lose 25 pounds in a month. (PX 1 ¶ 6, Att. A.) Defendants' Web sites make similar claims, stating, among other things: “[w]hat if you could actually shed 10, 15, or even 25 pounds quickly and safely in less than 30 days? Now you can[.]” (*Id.* ¶ 7, Att. B at FTC 7.) Defendants further represent that the Hoodia Products will “keep the weight off permanently.” (*Id.* at FTC 13.)

Defendants' claims about their Hoodia Products are also false and unsubstantiated. According to a medical expert in nutrition and obesity with Northwestern University's Feinberg School of Medicine, there is no credible medical evidence to support the claim that Hoodia gordonii (or any other ingredient in Defendants' Hoodia Products) causes weight loss. (PX 3 ¶ 14.) Furthermore, Defendants' claim that the Hoodia Products can cause users safely to lose up to 25 pounds a month is patently false because it is not safe or healthy to lose three pounds or

³ Human growth hormone (“GH”) is produced by the pituitary gland and is integral to the human growth process. (PX 2 ¶¶ 6-7.) In normal individuals, the production of GH naturally drops off with the increase in age. (*Id.* ¶ 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. (*Id.* ¶¶ 11-13.) Defendants' products, however, are tablets containing amino acids that, taken orally in the doses prescribed, have no effect on GH levels. (*Id.* ¶ 17.)

more each week for several weeks. (*Id.* ¶ 19.) Given that the Hoodia Products do not cause weight loss in the first place, their claim of permanent weight loss is also deceptive. (*Id.* ¶ 20.) Indeed, without a change in dietary or exercise habits, it is not feasible for users to experience permanent weight loss. (*Id.* ¶ 21.)

B. Defendants' Illegal Spamming Practices

Defendants are responsible for likely millions of illegal commercial email messages promoting their products. Since July 2006, consumers have forwarded over 185,000 email messages advertising Defendants' products to an email address at which the FTC accepts spam complaints. (PX 1 ¶ 28, Att. V.) The FTC has submitted several examples of the spam as exhibits. (*See* PX 1 ¶ 29-31; PX 13 ¶ 17, Att. B.)⁴ All of the messages blatantly disregard one or more of the protections Congress provided in the CAN-SPAM Act, 15 U.S.C. § 7701, *et seq.*, the federal law regulating commercial email (discussed *infra* § V.B.2).⁵ The messages falsify information that would identify the real sender, contain false subject lines designed to fool people into opening the messages, and fail to include an opt-out mechanism by which consumers could stop the spam messages from continuing. These illegal actions cause significant harm to consumers and Internet service providers.

⁴ The spam examples submitted were obtained by the FTC from a secure database run by Microsoft Corporation, which operates the free email service Hotmail. (PX 12.) The Microsoft database contains unsolicited email messages received by thousands of Hotmail "trap" accounts," *i.e.*, unused email accounts that receive unsolicited spam messages. (*Id.*)

⁵ Congress passed CAN-SPAM after finding that spamming imposes significant costs on the email 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 commercial email messages – most of which are fraudulent or deceptive in one or more respects – threaten the convenience and efficiency of email, an "extremely important and popular means of communication." *Id.* at §§ 7701(a)(1), (2). The law does not make all commercial email messages illegal; it simply proscribes the most abusive practices. For example, it requires that commercial email 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.

1. Defendants' spam falsifies information that would identify the real sender

The spam messages touting Defendants' products insert the email addresses of unwitting third parties in the "from" fields of the 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. Because the email messages also fail to provide the physical address of Defendants, it is essentially impossible for a recipient of the email messages to identify who is responsible for the message. (*Id.* ¶¶ 9-16, 22.)⁶

2. The spam attempts to fool people into opening the messages

Subject lines of email messages contain information that consumers use to evaluate whether to open the messages. The subject lines of many of the spam messages touting Defendants' products deceptively suggest that the recipients have a prior relationship with the sender. The messages include subject lines such as "Fwd: Warning," "Re: Help," "re: answer," and "Re: Hi!" (PX 13 ¶ 17, Att. B at HOTMAIL36, 44, 53, 61.) In fact, Defendants do not have prior relationships with the recipients (*see* PX 12 (email messages sent to "trap accounts")), and the subject lines presumably are used to trick consumers into opening messages they otherwise would delete.

3. The spam fails to provide consumers with an opt-out mechanism

A key feature of CAN-SPAM is the requirement that commercial email messages sent to consumers contain a mechanism that consumers can use to opt-out of receiving future messages. Defendants' spam messages, however, fail to provide consumers with the opportunity to opt-out.

⁶ In addition to cloaking the identity of the real sender, changing the address of the email message's return path causes harm to individual users and Internet service providers. When spammers send out email messages, a number of them are undeliverable because of wrong addresses or other reasons. (PX 13 ¶ 8.) The flood of undeliverable email messages is returned to the "reply-to" address of the innocent party, not the spammer, causing the innocent party and its Internet service provider to deal with additional bandwidth and transaction costs. (*Id.*)

Indeed, Defendants' spam messages invariably do not include *any* notification to recipients of their ability to decline receiving further email messages from Defendants. (See PX 13 ¶ 17, Att. B.) Thus, once consumers receive unwanted messages, there is no mechanism by which consumers can stop the messages.

V. ARGUMENT

In order to protect the public from Defendants' illegal activities and to prevent Defendants from continuing to make unlawful profits, the FTC requests that the Court enter a TRO with an asset freeze and additional ancillary relief to ensure the availability of restitution to defrauded consumers. Courts in this district have repeatedly exercised their authority to grant TROs in similar FTC actions.⁷

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 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*,

⁷ *See, e.g., FTC v. Sili Neutraceuticals, LLC*, 07C 4541 (N.D. Ill. Aug. 13, 2007) (Kennelly, J.) (*ex parte* TRO and asset freeze for violations of FTC Act and CAN-SPAM); *FTC v. Kinion*, 05C 6737 (N.D. Ill. Dec. 7, 2005) (Hibbler, J.) (TRO and asset preservation for violations of CAN-SPAM Act); *FTC v. Cleverlink Trading Limited*, 05 C 2889 (N.D. Ill. May 15, 2005) (St. Eve., J.) (*ex parte* TRO and asset freeze for violations of CAN-SPAM Act); *FTC v. International Research & Dev. Corp. of Nevada*, 04C 6901 (N.D. Ill. Nov. 10, 2004) (Hibbler, J.) (TRO and asset preservation for violations of FTC Act and CAN-SPAM); *FTC v. Harry*, 04 C 4790 (N.D. Ill. July 27, 2004) (Manning, J.) (*ex parte* TRO and asset freeze for violations of FTC Act and CAN-SPAM); *FTC v. Phoenix Avatar LLC*, No. 04 C 2897 (N.D. Ill. April 23, 2004) (Holderman, J.) (*ex parte* TRO and asset freeze for violations of FTC Act and CAN-SPAM); *FTC v. Stuffingforcash.com, Inc.*, 02 C 5022 (N.D. Ill. July 16, 2002) (Norgle, J.) (*ex parte* TRO and asset freeze for violations of FTC Act concerning commercial email marketing work-at-home scheme); *FTC v. TLD Network Ltd.*, No. 02 C 1475 (N.D. Ill. Feb. 28, 2002) (Holderman, J.) (*ex parte* TRO with asset freeze for violations of FTC Act for commercial email marketing deceptive sale of domain names).

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).

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 by making material misrepresentations to consumers about their products and have engaged in email practices that violate CAN-SPAM.

1. Defendants' product claims are deceptive

Defendants' false claims about their products are "deceptive acts or practices" prohibited by Section 5 of the FTC Act. *See* 15 U.S.C. § 45(a): The FTC can establish corporate liability under Section 5 of the FTC Act by demonstrating "material representations likely to mislead a reasonable consumer." *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005); *see also* *FTC v. Phoenix Avatar*, No. 04 C 2897, 2004 WL 1746698, at *9 (N.D. Ill. July 30, 2004). The FTC is not required to prove intent to deceive. *Bay Area*, 423 F.3d at 635. The FTC may demonstrate the deceptive nature of advertising claims by either: (1) demonstrating the falsity of the claims; or (2) 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).

As described in Sections IV.A.1 and 2 above, Defendants' Web sites and email messages are replete with express representations that promise consumers amazing physical and cognitive affects. Expert analyses by medical doctors demonstrate that there is no scientific basis for the claims, and the products have no discernable effect on users. Thus, Defendants' representations are both false and unsubstantiated. Defendants' deception is not only likely to mislead

consumers, but undoubtedly has caused (and continues to cause) significant monetary loss to consumers. Consumers simply would not spend \$65.94 on Defendants' products if they knew that the products did not work as claimed. Thus, Defendants have violated the FTC Act, and a temporary restraining order against Defendants' misleading advertising is warranted.

2. Defendants initiate email messages that violate CAN-SPAM

Defendants' violations of the CAN-SPAM are well-documented and widespread. Defendants are directly responsible for compliance with the law, and therefore they are liable for the systematic violations of it.⁸

a. Defendants are "initiators" of commercial email

Defendants are legally responsible for the email messages promoting their products. CAN-SPAM imposes liability for a commercial email message upon "initiators" of the messages. 15 U.S.C. § 7704(a)(1). The definition includes not only those who "originate or transmit" the message, *i.e.*, the button pushers, but also those who "procure" the transmission of the message. 15 U.S.C. § 7709(9). CAN-SPAM defines procurers as those who "intentionally pay or provide other consideration to, or induce, another person to initiate" a message on their behalf. 15 U.S.C. § 702(12). *See also 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.").

Here, Defendants "initiate" the commercial email messages at issue. The email messages market Defendants' products and include hyperlinks in the text of the messages that direct consumers to Web sites from which Defendants directly profit. Under these circumstances, it is

⁸ A violation of CAN-SPAM is a violation of Section 5 of the FTC Act. 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 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).

axiomatic that Defendants either send the messages themselves, or they procure someone to do it on their behalf. *See Phoenix Avatar*, 2004 WL 1746698, at *13 (granting preliminary injunction after finding it “quite likely” that the defendants who utilized Web sites to sell diet patches, and profited from those sites, “initiated the transmission of the spam advertising the Web sites”).

b. Defendants’ commercial email messages violate CAN-SPAM

i. False or misleading header information

Defendants initiate commercial email messages that contain “header information that is materially false or materially misleading” in violation of CAN-SPAM. 15 U.S.C. § 7704(a)(1).⁹ As described above, in §IV.B.1, Defendants’ messages falsify the routing information. This practice impairs the ability of consumers and law enforcement to determine the sender’s true identity. By initiating spam messages containing materially false and misleading header information, Defendants violate CAN-SPAM.

ii. Deceptive subject headings

Defendants initiate commercial email messages that contain subject headings that are “likely to mislead a recipient . . . about a material fact regarding the contents or subject matter of the message” in violation of CAN-SPAM. 15 U.S.C. § 7704(a)(2). As demonstrated in §IV.B.2, subject headings of Defendants’ spam like as “Fwd: Warning,” “Re: Help,” “re: answer,” and “Re: Hi!” deceptively suggest a prior relationship with the recipient.

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” including “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 email 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).

iii. *Failure to include opportunity to decline further email messages*

Defendants initiate commercial email messages that fail to include a “clear and conspicuous” notice of the opportunity . . . to decline to receive further commercial electronic mail messages from the sender” in violation of CAN-SPAM. 15 U.S.C. § 7704(a)(5)(A). As discussed in §IV.B.3, Defendants violate this provision by initiating messages that do not contain any mechanism at all to decline future email messages.

iv. *Failure to include a postal address*

CAN-SPAM requires that senders provide a physical postal address where the sender can be reached. *See* 15 U.S.C. § 7704(a)(5). A review of the email message demonstrates that Defendants also fail to include the required valid postal address. (*See* PX 13, Att. B.)

C. The Balance of the Equities Favors the FTC

The FTC respectfully requests that this Court enter a narrowly tailored TRO that brings Defendants’ illegal practices to a swift end, and that preserves Defendants’ assets in order to prevent ill-gotten gains from being dissipated or transferred. In fashioning appropriate injunctive relief, this Court has authority to “to grant any ancillary relief necessary to accomplish complete justice[.]” *World Travel*, 861 F.2d at 1026; *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 granted powers”). If a district court determines that it is probable that the FTC will prevail on the merits, the court has a “duty to ensure that the assets . . . [are] available to make restitution to injured consumers.” *World Travel*, 861 F.2d at 1031.

1. The FTC seeks a narrowly-tailored TRO

The FTC requests that the Court issue a TRO that prospectively prohibits law violations and preserves assets and documents to ensure that the Court can grant effective final relief at the

conclusion of this case. Sections I-IV of the Proposed TRO contain conduct prohibitions to ensure further compliance with the FTC Act and CAN-SPAM. Sections V-IX contain asset preservation and accounting provisions aimed at identifying and preserving funds obtained unlawfully by Defendants, and identifying individuals or entities who have acted in concert or participation with Defendants. The remainder of the Proposed TRO contains reporting and discovery provisions to obtain information relevant to a preliminary injunction hearing. These are necessary provisions to identify the scope of the unlawful practices, other participants, and the location of ill-gotten gains. Defendants have no legitimate right to continue unlawful conduct, dissipate their unlawful profits, or conceal information needed to effectuate relief in this case.¹⁰

2. The TRO would work no valid hardship on Defendants

The balance of equities tips strongly in the FTC's favor. The FTC's proposed TRO would prohibit Defendants from making false claims about products, would stop Defendants and their agents from sending commercial email messages that violate CAN-SPAM, and would preserve assets for equitable monetary relief. The TRO would work no valid hardship on Defendants, as they have no right to engage in, or profit from, practices that violate the law. *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").

In balancing 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

¹⁰ The TRO provisions, including the asset preservation provisions, should apply to the individual defendants, as well as Spear. 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 Bay Area*, 423 F.3d at 636; *World Travel*, 861 F.2d at 1031. Here, as explained above in Section III.B, each of the individual defendants has intimate knowledge and extensive participation in the business affairs.

1030; *see also* *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981). The balance of equities also 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; *Sabal*, 32 F. Supp. 2d at 1009.

3. Ex parte relief is necessary

Ex parte relief is necessary here. An *ex parte* TRO is warranted where facts show that irreparable injury, loss, or damage may result before defendants may be heard in opposition. *See* Fed. R. Civ. P. 65(b). Here, as in similar FTC actions in this district where courts have granted an *ex parte* TRO,¹¹ there is a tangible risk that assets from the illegal activity, as well as relevant documents, will disappear if Defendants receive prior notice. Defendants already have demonstrated their ability to hide their identities. They use false addresses and routing information in their email messages. They utilize Web sites that provide no contact information.

In addition, Defendants regularly transfer funds overseas and convert funds to anonymous debit cards. Since 2006, Spear has transferred approximately \$260,000 to a bank account in Hong Kong. (PX 1 ¶ 33.) Moreover, Spear has transferred over \$600,000 to an account with a company that issues pre-paid MasterCard debit cards. (PX 1 ¶ 32-33.) And recently, Defendants have used a Caribbean bank to process their credit card sales. In sum, *ex parte* relief is necessary to preserve the *status quo* and ensure that Defendants cannot move assets and records outside of this Court's reach.


¹¹ Courts in this district have recently granted *ex parte* TROs under similar circumstances. Most recently, Judge Kennelly sitting as emergency judge, entered an *ex parte* TRO with asset freeze this August in a matter involving similar hoodia and HGH products being marketed by spam email. *See FTC v. Sili Neutraceuticals, LLC*, 07 C 4541 (N.D. Ill. Aug. 13, 2007) (Kennelly, J.). Other courts have entered similar orders in similar circumstances. *See, e.g., FTC v. Harry*, 04 C 4790 (N.D. Ill. July 27, 2004) (Manning, J.) (granting *ex parte* TRO and asset freeze in matter involving false HGH claims and CAN-SPAM violations); *FTC v. Phoenix Avatar LLC*, No. 04 C 2897 (N.D. Ill. April 23, 2004) (Holderman, J.) (granting *ex parte* TRO and asset freeze in matter involving false claims concerning diet patches and CAN-SPAM violations).

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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