

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ONE OR MORE UNKNOWN PARTIES
DECEIVING CONSUMERS INTO MAKING
PURCHASES THROUGH:

www.cleanyos.com,
www.arlysol.com,
www.broclea.com,
www.cadclea.com,
www.cleancate.com,
www.cleankler.com,
www.cleanula.com,
www.clean-sale.com,
www.clean-sell.com,
www.clorox-sale.com,
www.clorox-sales.com,
www.cloroxstore.com,
www.crlysol.com,
www.elysol.com,
www.littletoke.com,
www.lybclean.com,
www.lysoiclean.com,
www.lysol-clean.com,
www.lysol-cleaners.com,
www.lysol-free.com,
www.lysolsales.com,
www.lysolservicebest.com,
www.lysol-sell.com,
www.lysol-wipe.com, and
www.thaclean.com,

Defendants.

Case No. _____

**MEMORANDUM IN SUPPORT
OF PLAINTIFF'S MOTION FOR
EX PARTE TEMPORARY
RESTRAINING ORDER WITH
ASSET FREEZE, AND ORDER TO
SHOW CAUSE WHY A
PRELIMINARY INJUNCTION
SHOULD NOT ISSUE**

INTRODUCTION

In the midst of the present pandemic, Lysol and Clorox brand cleaning and disinfecting products are in high demand and, often, short supply. As part of their efforts to protect themselves and their families, many consumers are seeking to purchase these products wherever they can find them, including over the Internet. The Defendants, who have deliberately concealed their true identities and locations, have been preying on the acute vulnerability of these consumers by tricking them into paying for Clorox or Lysol products that the Defendants never ship.

Plaintiff the Federal Trade Commission (“FTC” or “Commission”), by and through its attorneys, seeks an *ex parte* temporary restraining order (“TRO”) and other equitable relief against these unknown Defendants. The Defendants’ acts and practices violate Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45, and the Mail, Internet, or Telephone Order Merchandise Rule, 16 C.F.R. Part 435 (“MITOR” or the “Rule”).

The proposed TRO would enjoin Defendants’ illegal practices, suspend the means by which the Defendants have carried out their scheme, freeze assets to the extent they may be found, and authorize the Commission to speedily gather information from third parties to uncover Defendants’ true identities and locations and reveal the extent of their business operations. The Defendants have shown a determination to maintain operations that are permeated by fraud, and the FTC seeks the TRO on an *ex parte* basis in light of a substantial risk of continued consumer injury compounded by the Defendants’ success in concealing themselves.

I. THE PARTIES

A. The Federal Trade Commission

Plaintiff FTC is an independent agency of the United States Government created by statute. 15 U.S.C. § 41. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The FTC also enforces MITOR, 16 C.F.R. Part 435, which (among other things) requires Internet sellers to timely ship what consumers order or to give them refunds. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act and MITOR, and to secure such equitable relief as may be appropriate in each case. 15 U.S.C. §§ 53(b), 56(a)(2)(A), 56(a)(2)(B), and 57b.

B. The Defendants

At the time of filing, the Defendants are known to the Commission only through their deceptive websites. Aside from the common theme of their fraudulent tactics to trick vulnerable consumers into paying them for Lysol and Clorox products,¹ the unifying trait of the Defendants' websites identified to date is that they include the false representation that Defendants have a physical address in the Northern District of Ohio at 2180 Barlow Rd., Hudson, OH 44236. That

¹ While some of the evidentiary materials submitted herewith incorporate hearsay, including by relaying patterns of consumer complaints concerning the scheme, these complaints are consistent with the testimonial declarations. The Supreme Court has established that “a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.” *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). A district court may consider hearsay evidence in determining whether to grant a preliminary injunction. *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010) (citing *Camenisch* and so holding, and collecting numerous circuit and district court cases in accord). This principle can be no less applicable in the context of an application for a temporary restraining order to enforce federal law and to preserve the possibility of effective final relief.

address is, in fact, the address of the corporate headquarters of The Little Tikes Company, a business with no affiliation or association with Defendants' websites.²

II. DEFENDANTS' PRACTICES

Numerous complaints and reports from consumers across the nation paint an alarming pattern of Defendants' deceptive and unlawful practices.³

Since at least July 2020, during the global pandemic, Defendants have been scamming consumers urgently seeking cleaning and disinfecting products by tricking them into purchasing such products from Defendants' counterfeit websites. Specifically, Defendants purport to sell Clorox and Lysol products.⁴

To lure consumers, Defendants have used internet search engine, social media, and pop-up advertisements to bring consumers to their websites to order Clorox and Lysol cleaning and disinfecting products. These products have been in high demand due to the COVID-19 pandemic, and consumers may have difficulty finding them available for purchase in their local areas. Defendants have made express references to the pandemic in their marketing.⁵

² PX 1 (Declaration of Tiffany Smedley, FTC Investigator) at ¶¶ 8, 14-19, and Atts. A-F; PX 2 (Declaration of Christine Kellamis, Better Business Bureau of Akron) at ¶ 20.

³ PX 1 (Smedley) at ¶¶ 7-12; PX 2 (Kellamis) at ¶¶ 9-13.

⁴ PX 1 (Smedley) at ¶¶ 9-10, 16, and Atts. A-F; PX 2 (Kellamis) at ¶¶ 9-13, 17-18; PX 5 (Declaration of Gail Armant) at ¶¶ 3-5; PX 6 (Declaration of Katherine Barker) at ¶¶ 3-5; PX 7 (Declaration of Debra Bosch) at ¶¶ 3-5; PX 8 (Declaration of Pietro Dambrosio) at ¶¶ 3-6; PX 9 (Declaration of Salima Dunn) at ¶¶ 3-5; PX 10 (Declaration of Michelle Julien) at ¶¶ 3-5; PX 11 (Declaration of Robin Meador) at ¶¶ 3-6; PX 12 (Declaration of Susan Nelson) at ¶¶ 3-4; PX 13 (Declaration of Shamone Panter) at ¶¶ 3-5.

⁵ PX 1 (Smedley) at ¶¶ 9, 16, and Atts. A-F; PX 2 (Kellamis) at ¶¶ 17-18; PX 3 (Declaration of Lynn Diegel, The Clorox Company) at ¶ 5; PX 4 (Declaration of Siân Bowen, Reckitt Benckiser Group plc) at ¶ 5; PX 5-13, *passim*.

Many consumers who have visited Defendants' websites believed they were on official websites owned and operated, or otherwise authorized, by The Clorox Company ("TCC") or Reckitt Benckiser Group plc ("RB"), the manufacturers of Clorox and Lysol products, respectively. Many consumers have discovered that they were not dealing with TCC or RB only after providing Defendants with their payment information.⁶

Defendants are not part of, affiliated with, or authorized to sell products on behalf of TCC or RB. Neither are the Defendants authorized to use the Clorox or Lysol names and logos, or any other protected content of these well-known businesses.⁷

Defendants' copycat websites offer for sale a variety of Lysol and Clorox cleaning products at "special," "flash sale," or discount pricing. Defendants typically encourage consumers to spend \$50 or more by purporting to offer free shipping.⁸

To submit an order through Defendants' websites, Defendants require the consumer to provide payment information, such as a credit card number. Defendants immediately charge the consumer. Consumers report seeing a wide and inconsistent variety of charging descriptors on their statements when these charges are processed.⁹

We are not aware of any instance in which Defendants have delivered to any consumer any Lysol or Clorox products that the consumer ordered. Defendants do not ship ordered

⁶ PX 1 (Smedley) at ¶¶ 10-11; PX 3 (Diegel) at ¶ 8; PX 4 (Bowen) at ¶ 8; PX 6 (Barker) at ¶ 4; PX 7 (Bosch) at ¶ 4; PX 8 (Dambrosio) at ¶¶ 4, 6; PX 9 (Dunn) at ¶ 4; PX 10 (Julien) at ¶¶ 4-6; PX 11 (Meador) at ¶ 4; PX 12 (Nelson) at ¶ 4; PX 13 (Panter) at ¶ 4.

⁷ PX 3 (Diegel) at ¶ 14; PX 4 (Bowen) at ¶ 13.

⁸ PX 1 (Smedley) at ¶¶ 9, 16, and Atts. A-D, F; PX 2 (Kellamis) at ¶ 18 and Att. C; PX 11 (Meador) at ¶ 6, pp. 12-18; PX 12 (Nelson) at ¶ 4.

⁹ PX 1 (Smedley) at ¶ 11; PX 2 (Kellamis) at ¶ 13; PX 5-13, *passim*.

merchandise within any advertised time period – or within any period of time at all. Further, they do not offer consumers an opportunity to consent to shipping delays, and they do not provide refunds. The information we have indicates that Defendants have charged consumers for thousands of unfulfilled orders of Lysol and Clorox products since July 2020.¹⁰

After consumers have submitted their orders and payment information, their experiences have fallen into one of three categories. Consumers report (a) never hearing from Defendants again, even after attempting to check on their orders by email and/or telephone, (b) receiving communications from Defendants with falsified or fictitious delivery information about a purported shipment that never arrives, or (c) receiving some shipment from Defendants of a worthless product that the consumer did not order, such as a hair tie or a pair of socks.¹¹

Consumers have reported that when they have attempted to go back to Defendants' websites to check on order status they have discovered that the websites no longer exist. Although their websites have often disappeared in a matter of days or weeks, Defendants have continued to perpetrate their scheme using new websites with different URLs but essentially the same method of operation.¹²

¹⁰ PX 1 (Smedley) at ¶¶ 12, 23.

¹¹ PX 1 (Smedley) at ¶¶ 12, 20; PX 2 (Kellamis) at ¶ 13; PX 5-13, *passim*.

¹² PX 1 (Smedley) at ¶¶ 12, 16-18; PX 2 (Kellamis) at ¶¶ 13, 16, 19, 21; PX 13 (Panter) at p. 6.

Many consumers have tried to obtain chargebacks or refunds by appealing to their credit card companies or PayPal.¹³ However, Defendants' use of falsified shipment information has frustrated consumers' efforts to use these mechanisms. When consumers have presented their claims, Defendants have falsely represented that they fulfilled consumers' orders. As purported evidence, Defendants have provided evidence of actual shipments that have been unrelated to the consumers at all or that reflect only Defendants' shipments of worthless or incorrect items to consumers. Unfortunately, these deceptive tactics have sometimes successfully caused initial denials of consumers' requests for chargebacks or refunds.¹⁴

Among the Defendants' salient characteristics are their multiplicity of guises and their persistence. As of the filing of this action, we have identified more than 25 different websites deceptively purporting to sell Lysol or Clorox products and using the common false address in Hudson.¹⁵ Thus far, we have identified more than 50 different email addresses associated with these websites, and the Defendants have used more than 40 PayPal accounts to charge thousands of consumers through the scheme.¹⁶

¹³ "A chargeback occurs when a cardholder contacts his [card-]issuing bank to dispute a charge appearing on his account statement, and the issuing bank charges that amount back to the [seller's] bank. A 'reversal' occurs when a merchant is able to prove the legitimacy of the initial transaction, and the charge reappears on the cardholder's account (thus reversing the chargeback)." *United States v. Greenberg*, 835 F.3d 295, 298 (2d Cir. 2016).

¹⁴ PX 1 (Smedley) at ¶ 23(b). In *Greenberg*, the defendant successfully disputed thousands of chargebacks by lying to banks and card processors. 835 F.3d at 299, 305.

¹⁵ PX 1 (Smedley) at ¶ 18; PX 4 (Bowen) at ¶¶ 13-14.

¹⁶ PX 1 (Smedley) at ¶¶ 23-24.

III. THE COURT HAS JURISDICTION OVER THE DEFENDANTS AND VENUE IS PROPER IN THIS DISTRICT.

The Court has subject matter jurisdiction over the Commission’s claims pursuant to 28 U.S.C. §§ 1331, 1337(a) and 1345, and 15 U.S.C. §§ 45(a), and 53(b). Personal jurisdiction over Defendants exists under the FTC Act’s provision of nationwide and worldwide service of process, 15 U.S.C. § 53(b). *See, e.g., Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 449-51 (6th Cir. 2012) (“When Congress has enacted such nationwide service of process statutes, personal jurisdiction exists whenever the defendant has ‘sufficient minimum contacts with the United States’ to satisfy the due process requirements.”) (citation omitted). As Defendants have done business with consumers in the United States – including in Ohio – and have purposefully held themselves out on their websites as purportedly having an address here as part of their scheme to trick consumers,¹⁷ it is fair to subject them to personal jurisdiction here. *International Shoe Corp. v. Washington*, 326 U.S. 310 (1945).

Moreover, venue is proper in the Northern District of Ohio. Under the FTC Act, an action may be brought where a corporation or person “resides or transacts business.” 15 U.S.C. § 53(b). As described in the declarations, Defendants have transacted business in the Northern District of Ohio.¹⁸ Moreover, given the Defendants’ repeated use of an address in the Northern District of Ohio on their websites to trick consumers, venue lies in this District under 28 U.S.C. § 1391(b)(2), as a substantial part of the events giving rise to the claims in this case occurred in this District. Additionally, the FTC Act provides that, if the interests of justice require, any

¹⁷ PX 1 (Smedley) at ¶¶ 8, 14, 16-18, and Atts. A-2, B-2, C-2, D-2, E-2, F-2; PX 2 (Kellamis) at ¶¶ 10, 16; PX 4 (Bowen) at ¶¶ 13-14.

¹⁸ PX 9 (Dunn) at ¶ 2; PX 13 (Panter) at ¶ 2.

person may be “added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought.” 15 U.S.C. § 53(b).

IV. DEFENDANTS ARE VIOLATING SECTION 5 OF THE FTC ACT (COUNT I)

A. A Misrepresentation is Deceptive under Section 5 if it Is Likely to Mislead Consumers Regarding a Material Fact

Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits “unfair or deceptive acts or practices in or affecting commerce.” “[M]isrepresentations of material facts made for the purpose of inducing consumers to [make] purchase[s] ... constitute unfair or deceptive acts or practices forbidden by Section 5(a).” *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 630 (6th Cir. 2014) (citations and internal quotation marks omitted). In order for the FTC to prevail on its claim that Defendants engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act, it must show (1) that there was a representation, (2) that was likely to mislead consumers; and (3) the representation was material. *Id.* at 630-31 (citing *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003)).¹⁹

A representation is material if it is likely to affect a consumer's decision to buy a product or service. *Id.* at 631 (citation omitted). Both express and implied representations that are false or misleading are actionable under Section 5 of the FTC Act. *FTC v. Figgie Int'l*, 994 F.2d 595, 604 (9th Cir. 1993). Express claims and deliberately made implied claims are presumed material. *E.g., In re Nat'l Credit Mgmt. Group, LLC*, 21 F. Supp.2d 424, 441 (D.N.J. 1998); *In re Thompson Medical Co.*, 104 F.T.C. 648, 788-89 (1984), *aff'd* 791 F.2d 189 (D.C. Cir. 1986).

¹⁹ There is no intent element; the FTC need not prove that Defendants intended to deceive consumers. *E.M.A. Nationwide, Inc.*, 767 F.3d at 631 (citations omitted).

To determine if representations are “deceptive and likely to mislead consumers acting reasonably under the circumstances,” a court “look[s] to the likely effect the promoter’s handiwork will have on the mind of the ordinary consumer.” *E.M.A. Nationwide, Inc.*, 767 F.3d at 631 (citations and internal quotation marks omitted). The FTC need not show individual reliance on a defendant’s misrepresentations. *Figgie Int’l*, 994 F.2d at 605 (such a requirement “would thwart the effective prosecutions of large consumer redress actions and frustrate the statutory goals of [Section 13(b)]”); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991) (same). Rather, a presumption of actual reliance arises when a defendant made material misrepresentations, that were widely disseminated, and consumers made purchases from the defendant. *Figgie*, 994 F.2d at 605-06; *Sec. Rare Coin*, 931 F.2d at 1316.

Moreover, defendants may not evade liability for their deceptive conduct by blaming consumers for being too trusting. As the Supreme Court has held:

The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. ***Laws are made to protect the trusting as well as the suspicious.*** The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception.

FTC v. Standard Education Soc., 302 U.S. 112, 116 (U.S. 1937) (emphasis added).

B. Defendants’ Misrepresentations Violate Section 5 of the FTC Act

Count I of the Complaint alleges that the Defendants have violated Section 5 by making misrepresentations to induce consumers to pay for goods. As described above and in the accompanying evidentiary materials, Defendants represent that they are associated with the makers of Clorox and Lysol products and that, if consumers pay them, they will ship Clorox or Lysol products to the consumers.

These representations are false. These were express or deliberately made implied representations; they are therefore presumed material. Moreover, the materiality of these representations is beyond dispute, in that consumers have actually made payments to the Defendants in an effort to obtain the goods Defendants have purported to sell.

V. DEFENDANTS ARE VIOLATING MITOR (COUNT II)

A seller violates MITOR Section 435.2(a) if it “solicit[s] any order for the sale of merchandise” without a reasonable basis to expect that it will ship the ordered merchandise in the time stated in its ads, or if none, within 30 days. 16 C.F.R. § 435.2 (a)(1). Furthermore, when a seller fails to comply with the shipping requirements of MITOR, it must offer the buyer an opportunity to either receive a refund or consent to further delay. 16 C.F.R. § 435.2(b)(1).

By routinely failing to ship ordered merchandise within any period of time at all, and by routinely failing to offer consumers an opportunity to request refunds or to consent to any delay, Defendants have repeatedly violated MITOR Sections 435.2(a)(1) and (b)(1).

MITOR also requires sellers to honor the buyer’s refund demand if made prior to shipment. 16 C.F.R. § 435.2(c)(1). Additionally, if the seller fails to offer the buyer the opportunity to consent or cancel, the seller must automatically cancel the order and provide a prompt refund. 16 C.F.R. § 435.2(c)(5). Defendants have routinely failed to give prompt refunds to consumers who were entitled to them, and moreover they have used deceptive tactics to frustrate consumers’ efforts to get their money back.

VI. THE TEMPORARY AND PRELIMINARY RELIEF REQUESTED IS APPROPRIATE UNDER SECTION 13(B) OF THE FTC ACT

A. The Court Has the Authority to Grant the Relief Requested

The Court has the authority to grant preliminary and permanent relief pursuant to Fed. R. Civ. P. 65(b) and Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). Section 13(b) of the FTC Act states that “in proper cases the Commission may seek, and, after proper proof, the court may issue, a permanent injunction” against violations of “any provision of law enforced by the Federal Trade Commission.” 15 U.S.C. § 53(b).

As a result of Congress’s inclusion of the “proper cases” language as the second proviso of Section 13(b), the FTC need not initiate administrative proceedings in order to seek permanent injunctive relief in district court. *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982) (holding that routine fraud cases may be brought under the second proviso, without being conditioned on a requirement that the FTC institute an administrative proceeding); *see also FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984) (“Congress did not limit the court’s powers under the final proviso of § 13(b)...”). All preliminary equitable remedies are also available to the Court, including a preliminary injunction with ancillary relief. *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996).²⁰ When, as here, the public interest is implicated, exercise of the Court’s equitable powers is particularly appropriate. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

²⁰ The first part of Section 13(b) includes procedural and notice provisions applicable when the FTC seeks a preliminary injunction in support of an administrative proceeding, including a limit on the duration of a preliminary injunction. Those provisions are not relevant when, as here, the Commission has elected to seek a permanent injunction directly in district court under the “proper cases” language of the second proviso. *See Gem Merch.*, 87 F.3d at 468 n.3 (quoting “relevant part” of Section 13(b), excluding procedural and notice provisions applicable in connection with preliminary injunctions to support administrative proceedings).

In addition, Section 19 of the FTC Act, 15 U.S.C. § 57b, authorizes the Court to grant relief as it finds necessary to redress injury to consumers resulting from violations of a trade regulation rule, including MITOR. *See H.N. Singer*, 668 F.2d at 1110 (“It is clear that under this section [19] a district court has jurisdiction to issue a preliminary injunction.”).

Courts in this District have repeatedly exercised their authority to grant TROs with ancillary equitable relief in FTC fraud cases. *See, e.g., FTC v. Int’l Computer Concepts*, No. 1:94CV1678, 1994 U.S. Dist. LEXIS 20965 (N.D. Ohio Oct. 24, 1994) (granting preliminary injunction after having granted *ex parte* TRO).²¹ Without the requested relief, the public will suffer irreparable harm from the perpetuation of Defendants’ deceptive scheme.

B. The FTC Meets the Applicable Legal Standard for the Issuance of a Temporary Restraining Order

To obtain a temporary restraining order, the FTC must demonstrate that (1) it is likely to succeed on the merits of its case and (2) the equities favor granting the preliminary relief. *FTC v. Int’l Computer Concepts, Inc.*, No. 1:94CV1678, 1994 WL 730144, *12 (N.D. Ohio Oct. 24, 1994) (Matia, J.) (citing 15 U.S.C. § 53(b)). In balancing the equities, “the public interest should receive greater weight.” *Id.*; *see generally FTC v. Thomsen-King & Co.*, 109 F.2d 516, 519 (7th Cir. 1940) (“[a] court of equity is under no duty ‘to protect illegitimate profits or advance business which is conducted [illegally]’”). Importantly, unlike private litigants, “[t]he FTC ‘need not prove irreparable injury.’” *Id.* (quoting *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 903 (7th Cir. 1989)). The standard for preliminary injunctive relief under Section 13(b) differs from that typically applied to private litigants because the FTC acts as “a statutory guardian charged with safeguarding the public interest.” *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir.

²¹ *See also* Orders cited in the Rule 65(b) Certification of Counsel, filed herewith, at ¶ 13.

1975). In addition, the FTC “meets its burden on the ‘likelihood of success’ issue if it shows preliminarily, by affidavits or other proof, that it has a fair and tenable chance of ultimate success on the merits.” *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978)).

The evidence demonstrates that Defendants have been operating a systematic fraud by which they take consumers’ money for products they never ship; thus the FTC is likely to succeed in showing violations of the FTC Act and MITOR. Sections 13(b) and 19 of the FTC Act were designed to combat frauds of the type perpetrated by these Defendants. Moreover, the fraud is ongoing, immediate, and will not cease unless halted by the Court.

The FTC’s evidence meets the standard for issuance of a TRO and Preliminary Injunction. As set forth in this memorandum and accompanying exhibits, the Commission has presented ample evidence that it will likely succeed on the merits, and that the balance of the equities favors the requested injunctive relief.

C. An Asset Preservation Order Is Warranted to Preserve the Possibility of Final Effective Relief

A district court’s authority to enter orders to preserve the defendants’ assets is ancillary to its equitable authority to issue an injunction. The proposed TRO, and any eventual permanent injunction the Commission would seek, would require Defendants to issue refunds pursuant to MITOR. This relief would be rendered meaningless if Defendants were able to dissipate their assets during the pendency of this matter. Where business operations are permeated by deception, there is a strong possibility that assets may be dissipated during the pendency of the legal proceedings. *Nat’l Credit Mgmt.*, 21 F. Supp. 2d at 462 (citing *CFTC v. Am. Metals Exch. Corp.*, 991 F.2d 71, 79 (3d Cir. 1993)). Courts in this District have entered orders to preserve

assets in FTC matters involving pervasive deceptive activities such as those found in this case. *See, e.g., Int'l Computer Concepts, Inc.*, No. 1:94CV1678, 1994 WL 730144 at *12.²²

There is a strong possibility that assets may be dissipated in this case unless they are frozen. The Defendants have successfully concealed their identities and true locations, have used numerous accounts to take and move consumers' money, and have shown no intention to respect the law or engage in lawful practices. An immediate freeze of assets granted *ex parte* will permit Plaintiff to serve the order on persons and financial institutions that may hold assets of the Defendants and prevent those assets from being dissipated or leaving the country.

D. The Temporary Restraining Order Should Be Issued *Ex Parte*

Federal Rule of Civil Procedure 65(b) permits the Court to enter *ex parte* orders upon a clear showing that “immediate and irreparable injury, loss, or damage will result” if the Court waits until defendants have notice. *Ex parte* orders are proper in cases where requiring notice to the defendant would “render fruitless the further prosecution of the action.” *In re Vuitton et Fils, S.A.*, 606 F.2d 1, 5 (2d Cir. 1979). Moreover, “[e]x parte temporary restraining orders are most familiar to courts where notice to the adversary party is impossible either because the identity of the adverse party is unknown or because a known party cannot be located in time for a hearing.” *Am. Can Co. v. Mansukhani*, 742 F.2d 314, 322 (7th Cir. 1984).

As is set forth in the Certification of Counsel, requiring notice to these Defendants before the issuance of a TRO would frustrate the purpose of this action and would lead to irreparable injury. The Defendants have gone to extensive lengths to conceal themselves and have continued in their fraudulent practices despite the efforts of consumers and businesses. Under the provisions of the proposed TRO, including limited expedited discovery, the FTC would

²² *See also* Orders cited in the Rule 65(b) Certification of Counsel, filed herewith, at ¶ 13.

promptly seek information from third parties in order to uncover Defendants' identities and locations.

In addition, the FTC's past experiences have shown that, upon discovery of impending FTC action, defendants engaged in these types of schemes have moved funds and destroyed records. Mindful of this problem, courts often have granted FTC requests for *ex parte* temporary restraining orders in Section 13(b) cases.²³

VII. CONCLUSION

For the foregoing reasons, the FTC respectfully requests that the Court issue the requested *ex parte* Temporary Restraining Order. A proposed Order is included in the materials with this filing.

Respectfully submitted,

Dated: November 4, 2020

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²³ See Rule 65(b) Certification of Counsel, filed herewith, at ¶¶ 13-14.