

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-61072-CIV-Zloch/Rosenbaum

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMERICAN PRECIOUS METALS, LLC,
a Florida limited liability company,

HARRY R. TANNER, JR., individually and as
an owner, officer, and managing member of
AMERICAN PRECIOUS METALS, LLC,

and

ANDREA TANNER, individually and as an
owner, officer, and managing member of
AMERICAN PRECIOUS METALS, LLC,

Defendants.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF
FTC'S MOTION FOR *EX PARTE* TRO WITH ASSET FREEZE AND RECEIVER AND
ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT
ISSUE**

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Federal Trade Commission (“FTC”) moves the Court to enjoin a deceptive telemarketing scheme that has injured consumers nationwide. Since at least June 2007, Defendants have operated a telemarketing scheme that deceives consumers and causes many to lose their life savings or retirement accounts.¹ In their scheme, Defendants lure consumers into purchasing large quantities of precious metals on credit, a process known as “leveraging,” by promising consumers significant profits with no or minimal risk.² Defendants charge hefty fees, commissions, and interest, which are not clearly and accurately disclosed³ and which render the leveraged precious metals largely unprofitable and risky as investments. In fact, even when precious metals perform well in the marketplace, consumers who purchase Defendants’ leveraged investments lose money.⁴

Defendants are aware of the dismal performance of their leveraged precious metals investments, but, as in prior schemes, they continue to aggressively and deceptively promote the investments as lucrative and safe. Defendants’ deceptive practices violate Section 5 of the Federal Trade Commission Act (“FTC Act”) and the Telemarketing Sales Rule (“TSR”), 15 U.S.C. § 45(a) and 16 C.F.R. Part 310. Unless enjoined, Defendants will likely continue to violate the law by deceiving consumers with false promises of high profits and low risk.

The FTC seeks an *ex parte* temporary restraining order and a preliminary injunction to stop Defendants’ law violations. To preserve the Court’s ability to redress consumer injury, the FTC also asks the Court to freeze Defendants’ assets and appoint a temporary receiver over the Corporate Defendant. Plaintiff’s motion is supported by declarations from injured consumers and state and federal investigators, and copies of Defendants’ telemarketing script, website, and

¹ Ex. 7 ¶¶ 20, 36; Ex. 13 ¶¶ 15, 17; Ex. 16 ¶¶ 5, 24, 30; Ex. 17 ¶¶ 7, 11.

² Ex. 4 ¶¶ 2-6; Ex. 5 ¶¶ 3, 6; Ex. 6 ¶¶ 2-7; Ex. 7 ¶¶ 4-6, 10, 18-20; Ex. 8 ¶¶ 2-3, 8; Ex. 9 ¶¶ 3-4, 6, 8; Ex. 10 ¶¶ 4-6; Ex. 11 ¶¶ 2, 4-6, 9-10; Ex. 12 ¶¶ 3, 5, 7; Ex. 13 ¶¶ 4-11; Ex. 14 ¶¶ 3-4, 6, 12, 15-16; Ex. 15 ¶¶ 2-4, 7, 13-14; Ex. 16 ¶¶ 2-7, 10-12, 21, 30; Ex. 17 ¶¶ 3-4, 7.

³ Ex. 4 ¶¶ 7, 9, 15; Ex. 5 ¶¶ 8-10, 14; Ex. 6 ¶¶ 9, 11-12, 16; Ex. 7 ¶¶ 8, 17, 29, 32; Ex. 8 ¶¶ 5, 7, 9, 10; Ex. 9 ¶¶ 7, 18; Ex. 10 ¶¶ 9, 12; Ex. 11 ¶¶ 5, 7-8; Ex. 12 ¶¶ 9, 17-23; Ex. 13 ¶¶ 8, 18, 20-21, 27; Ex. 14 ¶¶ 10, 16-17, 24; Ex. 15 ¶¶ 5-6; Ex. 16 ¶¶ 10, 15, 30.

⁴ Ex. 6 ¶ 17. *See also* Ex. 10 ¶ 14.

sales materials.⁵ The evidence demonstrates the egregiousness of Defendants' deception, the significant injury sustained by consumers, and the need for immediate injunctive relief.

II. STATEMENT OF FACTS

A. IDENTIFYING THE DEFENDANTS

Defendant **American Precious Metals, LLC**, a Florida limited liability company, is a telemarketing boiler room headquartered in Deerfield Beach.⁶ American Precious Metals claims to offer consumers the opportunity to purchase physical metal bars, bullion, and coins,⁷ purportedly as high profit, low risk investments.⁸ American Precious Metals has received over \$37 million from consumers since its June 2007 formation.⁹

Defendant **Harry R. Tanner, Jr.**, is the president and a managing member of American Precious Metals and has been since its formation.¹⁰ Defendant Tanner is no stranger to the fraudulent telemarketing of investment opportunities. Indeed, prior to orchestrating the instant telemarketing scheme, Tanner and three other companies that he presided over were banned by the National Futures Association ("NFA") and fined \$100,000 for deceptive practices involving false promises about the profitability and risk of futures investments.¹¹ Tanner is responsible for hiring telemarketers at American Precious Metals and has staffed the company with salespersons who, like him, have prior discipline histories related to deceptive sales practices.¹²

⁵ Simultaneous with this pleading, Plaintiff submits four volumes of declarations, evidence, and legal authority. *See* Plaintiff Federal Trade Commission's Volumes I - IV.

⁶ Ex. 1 ¶ 6; Ex. 2 ¶ 9.

⁷ Ex. 6 ¶¶ 3, 8; Ex. 7 ¶ 7; Ex. 8 ¶ 6; Ex. 10 ¶ 7; Ex. 12 ¶ 8; Ex. 13 ¶¶ 4, 8; Ex. 15 ¶¶ 2, 4, 7; Ex. 16 ¶ 19; Ex. 17 ¶ 4.

⁸ Ex. 4 ¶¶ 2-6; Ex. 5 ¶¶ 3, 6; Ex. 6 ¶¶ 2-7; Ex. 7 ¶¶ 4-6, 10, 18-20; Ex. 8 ¶¶ 2-3, 8; Ex. 9 ¶¶ 3-4, 6, 8; Ex. 10 ¶¶ 4-6; Ex. 11 ¶¶ 2, 4-6, 9-10; Ex. 12 ¶¶ 3, 5, 7; Ex. 13 ¶¶ 4-11; Ex. 14 ¶¶ 3-4, 6, 12, 15-16; Ex. 15 ¶¶ 2-4, 7, 13-14; Ex. 16 ¶¶ 2-7, 10-12, 21, 30; Ex. 17 ¶¶ 3-4, 7.

⁹ Ex. 2 ¶ 15. *See also* Ex. 2 ¶ 31.

¹⁰ Ex. 1 ¶ 6; Ex. 2 ¶ 9.

¹¹ Ex. 1 ¶ 25; Ex. 2 ¶ 42.

¹² Ex. 1 ¶ 26; Ex. 2 ¶ 42; Ex. 7 ¶ 38; Ex. 13 ¶¶ 23-27.

Tanner manages day-to-day operations of the business with his wife, Defendant **Andrea Tanner**. Andrea Tanner is the vice president and a managing member of the company.¹³ Together, Defendants Harry and Andrea Tanner are the only signatories on the company's three known bank accounts, the only managers identified on the company's telemarketing sales license application, and the only officers identified on the company's business license records.¹⁴ Between 2007 and 2010, their residence served as the company's registered address with the state of Florida.¹⁵ The Tanners direct and control the business practices of American Precious Metals, including the telemarketing practices, and are aware of the company's law violations. Harry Tanner receives and responds to consumer complaints from the Better Business Bureau.¹⁶ In addition, he and his wife have been sued by defrauded investors.¹⁷

B. DEFENDANTS' DECEPTIVE TELEMARKETING PRACTICES

Simply put, Defendants cold-call consumers and promise them large profits, with little or no investment risk.¹⁸ In fact, consumers have incurred significant losses as a result of the risky structure of the Defendants' heavily-leveraged transactions.¹⁹

Defendants' boiler rooms are staffed with salespersons, many of whom were sanctioned or banned from selling other investments because of past deceptive conduct involving false promises regarding profit and risk.²⁰ In their current scheme, Defendants deceive consumers

¹³ Ex. 1 ¶¶ 6, 9; Ex. 2 ¶ 9.

¹⁴ Ex. 1 ¶¶ 6, 9; Ex. 2 ¶¶ 9, 29.

¹⁵ Ex. 1 Att. A; Ex. 2 Att. D.

¹⁶ Ex. 3.A. ¶ 9.

¹⁷ Ex. 13 Att. B. *See also* Ex. 10 ¶ 18; Ex. 14 ¶ 26.

¹⁸ Ex. 4 ¶¶ 2-6, 8, 15; Ex. 5 ¶¶ 3, 6, 16; Ex. 6 ¶¶ 2-7; Ex. 7 ¶¶ 4-6, 8-10, 18-20; Ex. 8 ¶¶ 2-3; Ex. 9 ¶¶ 3-4, 6, 8; Ex. 11 ¶¶ 2-5, 9-10; Ex. 12 ¶¶ 2-3, 5, 7; Ex. 14 ¶¶ 2-3; Ex. 15 ¶¶ 2-4, 7, 14; Ex. 16 ¶¶ 2-7, 10-12, 21, 30; Ex. 17 ¶ 2-4, 7.

¹⁹ Ex. 4 ¶¶ 8, 12-13; Ex. 5 ¶¶ 15, 30; Ex. 6 ¶ 17; Ex. 7 ¶ 39; Ex. 9 ¶ 11; Ex. 10 ¶¶ 10, 17; Ex. 11 ¶ 17; Ex. 12 ¶¶ 20, 22; Ex. 13 ¶ 27; Ex. 14 ¶ 24; Ex. 15 ¶ 12; Ex. 16 ¶¶ 23-25; Ex. 17 ¶¶ 9-11.

²⁰ Ex. 1 ¶ 26; Ex. 2 ¶ 42; Ex. 7 ¶ 38; Ex. 13 ¶¶ 24-27.

about the profitability,²¹ risk,²² costs,²³ and other characteristics²⁴ of precious metals using misrepresentations and omissions. Defendants tell consumers that leveraged precious metals are lucrative, safe investments.²⁵ Defendants induce consumers to buy investments by misrepresenting that prices are “poised to skyrocket” or will reach a particular price within a short time period, often only months.²⁶ In many instances, Defendants tell consumers that, if they act quickly, they will quickly double or triple their investment.²⁷ Defendants employ high-pressure sales solicitations and sometimes cite to findings by their fictitious “research department” that metals are certain to rise in price and yield significant profits.²⁸

Defendants augment telemarketing efforts with marketing materials and an Internet website.²⁹ Defendants disseminate materials that include statements such as: “Rarely are there ‘no brainers’ in life and very rarely are there ‘no brainer’ investment opportunities. Invariably,

²¹ Ex. 4 ¶¶ 2-5, 15; Ex. 5 ¶¶ 3, 6, 16; Ex. 6 ¶¶ 2-6; Ex. 7 ¶¶ 4-6, 9-10, 18-20, 32; Ex. 8 ¶¶ 2-3; Ex. 9 ¶¶ 3, 6; Ex. 10 ¶¶ 4-6; Ex. 11 ¶¶ 4-5, 9; Ex. 12 ¶¶ 3, 5; Ex. 13 ¶¶ 4-11; Ex. 14 ¶¶ 3-4, 6, 12, 16; Ex. 15 ¶¶ 2-4, 14; Ex. 16 ¶¶ 2-5, 12, 15, 17, 21, 30; Ex. 17 ¶ 3.

²² Ex. 4 ¶¶ 2, 6, 8, 15; Ex. 5 ¶ 6; Ex. 6 ¶¶ 5, 7; Ex. 7 ¶¶ 6, 10, 20, 32; Ex. 9 ¶¶ 4, 8; Ex. 10 ¶ 6; Ex. 11 ¶¶ 2-5, 10; Ex. 12 ¶¶ 3,7; Ex. 13 ¶¶ 3-4, 6-7, 9; Ex. 14 ¶¶ 3, 9, 12, 15-16; Ex. 15 ¶¶ 3-4, 7, 14; Ex. 16 ¶¶ 5-8, 30; Ex. 17 ¶¶ 3-4, 7.

²³ Ex. 4 ¶¶ 7, 15; Ex. 5 ¶¶ 6, 8-10, 14; Ex. 6 ¶¶ 9, 11-12; Ex. 12 ¶¶ 9, 17, 19; Ex. 13 ¶¶ 8, 18, 20-21, 27; Ex. 14 ¶¶ 10, 16-17, 24. *See also* Ex. 7 ¶¶ 8, 17, 29, 32; Ex. 8 ¶¶ 5-11; Ex. 9 ¶ 18; Ex. 10 ¶¶ 9,12; Ex. 11 ¶¶ 5, 7-8; Ex. 15 ¶¶ 5-6, 14; Ex. 16 ¶¶ 10, 15, 22.

²⁴ Ex. 4 ¶¶ 9, 14-15; Ex. 5 ¶ 7; Ex. 6 ¶ 8, 11-12; Ex. 7 ¶¶ 7, 16-20, 29, 32; Ex. 9 ¶¶ 3, 6-7; Ex. 10 ¶ 7; Ex. 11 ¶ 5; Ex. 13 ¶¶ 5, 27; Ex. 15 ¶¶ 4, 6-7, 14; Ex. 17 ¶ 4. *See also* Ex. 8 ¶¶ 6-11, 18.

²⁵ Ex. 4 ¶¶ 2-6; Ex. 5 ¶¶ 3, 6; Ex. 6 ¶¶ 2-7; Ex. 7 ¶¶ 4-6, 10, 18-20; Ex. 8 ¶¶ 2-3, 8; Ex. 9 ¶¶ 3-4, 6, 8; Ex. 10 ¶¶ 4-6; Ex. 11 ¶¶ 2, 4-6, 9-10; Ex. 12 ¶¶ 3, 5, 7; Ex. 13 ¶¶ 4-11; Ex. 14 ¶¶ 3-4, 6, 12, 15-16; Ex. 15 ¶¶ 2-4, 7, 13-14; Ex. 16 ¶¶ 2-7, 10-12, 21, 30; Ex. 17 ¶¶ 3-4, 7.

²⁶ Ex. 5 ¶ 16; Ex. 6 ¶ 6; Ex. 7 ¶ 9; Ex. 11 ¶ 9; Ex. 12 ¶ 3; Ex. 13 ¶ 10; Ex. 14 ¶ 6; Ex. 15 ¶¶ 2, 8; Ex. 16 ¶ 3; Ex. 17 ¶ 3;. *See also* Ex. 4 ¶¶ 2- 3; Ex. 8 ¶ 3; Ex. 9 ¶ 3, 6; Ex. 10 ¶ 4.

²⁷ Ex. 4 ¶ 2; Ex. 5 ¶¶ 3, 16; Ex. 6 ¶¶ 2, 4, 10; Ex. 7 ¶ 5; Ex. 15 ¶ 2; Ex. 16 ¶ 6.

²⁸ Ex. 4 ¶¶ 2, 4; Ex. 7 ¶¶ 4, 18-20; Ex. 8 ¶ 3; Ex. 10 ¶ 5; Ex. 12 ¶¶ 5, 13; Ex. 13 ¶ 6; Ex. 14 ¶ 4. *See also* Ex. 11 ¶ 10; Ex. 15 ¶ 3.

²⁹ Ex. 5 ¶ 4; Ex. 7 ¶ 11; Ex. 11 ¶ 3; Ex. 14 ¶ 5; Ex. 16 ¶ 8; Ex. 17 ¶ 2.

‘too good to be true’ investments turn out to be just that. However this is not the case with silver. It remains the investment opportunity of a life time.”³⁰

Defendants assure consumers that precious metals are low-risk investments³¹ and pressure consumers to borrow from home equity loans, life insurance policies, or retirement accounts to invest in leveraged precious metals.³² They promise that consumers will quickly realize large profits that will enable them to repay their loans or to secure a more comfortable retirement.³³ Defendants tell consumers that precious metals have been an investor’s “safe haven” for thousands of years and assure consumers that the investments are safe.³⁴

Defendants’ sales pitches and marketing materials emphasize that precious metals are low-risk because they are tangible, physical assets.³⁵ Defendants’ telemarketing script states, “We deal only with the tangible, physical assets – in this case, bars, bullion, and coins.”³⁶ Defendants prominently offer to provide consumers with “secured storage or delivery.”³⁷ Consumers are nonetheless discouraged from taking delivery of their metals.³⁸

³⁰ Ex. 7 Att. A; Ex. 5 Att. A; Ex. 16 Att. A.

³¹ Ex. 4 ¶¶ 2, 6, 8, 15; Ex. 5 ¶ 6; Ex. 6 ¶¶ 5, 7; Ex. 7 ¶¶ 6, 10, 20, 32; Ex. 9 ¶¶ 4, 8; Ex. 10 ¶ 6; Ex. 11 ¶¶ 2-5, 10; Ex. 12 ¶¶ 3,7; Ex. 13 ¶¶ 3-4, 6-7, 9; Ex. 14 ¶¶ 3, 9, 12, 15-16; Ex. 15 ¶¶ 3-4, 7, 14; Ex. 16 ¶¶ 5-8, 30; Ex. 17 ¶¶ 3-4, 7.

³² Ex. 7 ¶¶ 18-20; Ex. 13 ¶ 15; Ex. 16 ¶ 5. *See also* Ex. 14 ¶ 20.

³³ Ex. 7 ¶ 20; Ex. 13 ¶ 15; Ex. 14 ¶ 20; Ex. 16 ¶ 5.

³⁴ Ex. 4 ¶¶ 2, 6, 8, 15; Ex. 5 ¶ 6; Ex. 6 ¶¶ 5, 7; Ex. 7 ¶¶ 6, 10, 20, 32; Ex. 9 ¶¶ 4, 8; Ex. 10 ¶ 6; Ex. 11 ¶¶ 2-5, 10; Ex. 12 ¶¶ 3,7; Ex. 13 ¶¶ 3-4, 6-7, 9; Ex. 14 ¶¶ 3, 9, 12, 15-16; Ex. 15 ¶¶ 3-4, 7, 14; Ex. 16 ¶¶ 5-8, 30; Ex. 17 ¶¶ 3-4, 7.

³⁵ Ex. 1 ¶¶ 21-23, Att. B. *See also* Ex. 6 ¶ 8; Ex. 7 ¶ 7; Ex. 8 ¶ 6; Ex. 10 ¶ 7; Ex. 12 ¶ 8; Ex. 13 ¶ 4; Ex. 15 ¶¶ 3-4, 7, 14; Ex. 17 ¶ 4.

³⁶ Ex. 1 Att. B.

³⁷ Ex. 6 ¶ 8; Ex. 7 ¶ 7; Ex. 8 ¶¶ 6, 12; Ex. 10 ¶ 7; Ex. 12 ¶ 8; Ex. 13 ¶ 8; Ex. 16 ¶ 19; Ex. 17 ¶ 4.

³⁸ Ex. 16 ¶ 19.

In fact, Defendants do not purchase physical metal bars, bullion, or coins for their leveraged investment program.³⁹ Instead, after taking their fees and commissions, Defendants deposit consumers' investment funds in the account of a clearinghouse. The clearinghouse records the investments on its books and purchases metals derivatives, but does not maintain, acquire, or store physical precious metals.⁴⁰

When telemarketing, Defendants fail to truthfully and conspicuously disclose the total fees, commissions, interest charges, and leverage balances that consumers must pay for the metals.⁴¹ Defendants do not clearly inform consumers that Defendants charge a commission of 15 percent of the consumers' total purchase, including the leveraged portion of the transaction.⁴² In some instances, Defendants lead consumers to believe that the commission is only 15 percent of the consumers' cash outlay.⁴³ Defendants similarly fail to adequately disclose that consumers must pay \$250 in account opening fees, a three percent markup or spread, interest charges of 4½ percent above the U.S. prime rate, and the full leverage balance to acquire their metals.⁴⁴

In addition to failing to disclose the total costs of the metals, Defendants often fail to clearly inform consumers that their metals are subject to equity calls.⁴⁵ Defendants do not adequately explain that consumers are receiving loans that are secured by the metals and incur

³⁹ See Ex. 2 ¶¶ 20-24; Ex. 3.B. pp. 59-60, 66.

⁴⁰ Ex. 3.B. pp. 59-60, 66.

⁴¹ Ex. 4 ¶¶ 7, 9, 15; Ex. 5 ¶¶ 8-10, 14; Ex. 6 ¶¶ 9, 11-12, 16; Ex. 7 ¶¶ 8, 17, 29, 32; Ex. 8 ¶¶ 5, 7, 9, 10; Ex. 9 ¶¶ 7, 18; Ex. 10 ¶¶ 9, 12; Ex. 11 ¶¶ 5, 7-8; Ex. 12 ¶¶ 9, 17-23; Ex. 13 ¶¶ 8, 18, 20-21, 27; Ex. 14 ¶¶ 10, 16-17, 24; Ex. 15 ¶¶ 5-6; Ex. 16 ¶¶ 10, 15, 30.

⁴² Ex. 4 ¶¶ 7, 15; Ex. 5 ¶¶ 6, 8-10, 14; Ex. 6 ¶¶ 9, 11-12, 15-16; Ex. 7 ¶¶ 8, 17, 29; Ex. 8 ¶ 9; Ex. 10 ¶¶ 9, 12; Ex. 11 ¶¶ 5, 7-8; Ex. 13 ¶¶ 8, 18; Ex. 15 ¶¶ 5-6.

⁴³ Ex. 5 ¶¶ 6, 8-10, 14; Ex. 8 ¶ 9.

⁴⁴ See Ex. 4 ¶ 15; Ex. 5 ¶¶ 10, 14; Ex. 6 ¶¶ 11-12; Ex. 7 ¶¶ 16-17, 29, 32; Ex. 8 ¶¶ 9-10; Ex. 10 ¶¶ 9, 12; Ex. 12 ¶ 19; Ex. 15 ¶¶ 5-6.

⁴⁵ Ex. 4 ¶ 6; Ex. 7 ¶ 16; Ex. 8 ¶¶ 18-19; Ex. 9 ¶ 18; Ex. 11 ¶ 5; Ex. 13 ¶ 18; Ex. 15 ¶¶ 6-7, 11, 14.

interest.⁴⁶ Defendants do not inform consumers that, because the accounts are leveraged, consumers may receive equity calls that will require them to invest additional money to keep their investments from being liquidated.⁴⁷ Defendants falsely tell consumers that an equity call is unlikely.⁴⁸

In fact, an equity call is issued when a consumer's equity falls below 15 percent of the market value of the total metal in the consumer's account.⁴⁹ Consumers' accounts are typically opened with 20 percent equity and the remaining 80 percent is leveraged or financed.⁵⁰ As a result, consumers' precious metals investments are vulnerable to equity calls with even modest price decreases. Moreover, because consumers' equity levels are constantly eroded by interest on the significant leveraged balances, consumers can be subject to equity calls even when prices remain constant. Consumers who wish to purchase precious metals from Defendants are asked to sign and return a series of forms and contracts.⁵¹ The forms and contracts do not clearly alert consumers to the significant costs and risks associated with the precious metals investments. Defendants' forms and contracts do not adequately disclose the total fees, commissions, interest charges, and leverage balances that consumers must pay, or that consumers may receive equity calls that will require them to pay additional money to prevent the metals from being liquidated.⁵²

⁴⁶ Ex. 4 ¶ 14; Ex. 5 ¶ 14; Ex. 6 ¶ 12; Ex. 7 ¶ 16; Ex. 8 ¶ 7; Ex. 9 ¶ 18; Ex. 12 ¶ 19; Ex. 15 ¶ 6; Ex. 16 ¶ 10. *See also* Ex. 11 ¶ 5.

⁴⁷ Ex. 4 ¶ 6; Ex. 7 ¶ 16; Ex. 8 ¶¶ 18-19; Ex. 9 ¶ 18; Ex. 11 ¶ 5; Ex. 13 ¶ 18; Ex. 15 ¶¶ 6-7, 11, 14.

⁴⁸ Ex. 5 ¶ 7; Ex. 14 ¶ 9.

⁴⁹ Ex. 5 Att. B; Ex. 10 Att. D; Ex. 16 Att. D.

⁵⁰ *See generally* Ex. 5 Att. B; Ex. 10 Att. D; Ex. 16 Att. D.

⁵¹ Ex. 5 ¶ 9, Att. B; Ex. 7 ¶¶ 12, 20-21, Att. B, F, H; Ex. 8 Att. A, B, ¶ 14; Ex. 10 ¶ 15, Att. D; Ex. 11 ¶ 8, Att. C; Ex. 12 ¶¶ 11-12, Att. A-B; Ex. 15 ¶ 7; Ex. 17 ¶ 7; Ex. 16 ¶¶ 10, 14.

⁵² Ex. 5 Att. B; Ex. 7 Att. B, F, H, 29; Ex. 8 Att. A-B, ¶¶ 5-11, 14, 19; Ex. 10 Att. D; Ex. 11 ¶ 8; Ex. 12 Att. A-B; Ex. 15 ¶ 7, Att. B; Ex. 16 Att. B, D.

In 2010, Defendants began using a “Commission and Fee Disclosure,” which summarily lists some of the fees, commissions, and interest charged to consumers. The “Commission and Fee Disclosure” form is deficient for three reasons. First, it does not clearly and conspicuously disclose Defendants’ commissions. The form states that “15% of the Total Metal Value shall be charged on purchase transactions.” However, the form does not define “Total Metal Value” or specify a dollar value for the metal or the commission. Consumers who read the form remain unaware of the amount of commission to be charged.⁵³

Second, the form states that “4½ plus Prime shall be charged on any financed metal.” This refers to interest that consumers must pay on the leveraged portion of their transactions. However, because the form does not disclose the amount financed or provide a dollar value for the interest, it fails to adequately inform consumers of the charges on their accounts. Third, the form entirely omits other material information, including: the fact that consumers are charged a 3 percent mark up or spread on the metals, the quantity of metals being purchased, the purchase price of the metals, and the likelihood that consumers will receive an equity call that will require them to pay additional money to prevent their account from being liquidated. Without this information, consumers cannot accurately assess the profitability of the investments.

To purchase precious metals from Defendants, consumers must complete and return the forms and contracts to American Precious Metals, along with payment to fund their investment. After their purchase, the equity in consumers’ accounts is typically drained by fees and commissions and by the constant accumulation of interest charges on the leverage portion of their accounts.⁵⁴ These fees, commissions, and interest charges negatively affect consumers’ ability to breakeven or profit on the investments.⁵⁵

The structure of Defendants’ precious metals transactions makes it likely that consumers will be subject to equity calls and, if the equity calls are unmet, to forced liquidation of their

⁵³ Ex. 8 ¶¶ 5, 9-11, 15.

⁵⁴ Ex. 7 ¶¶ 26-29; Ex. 8 ¶ 17; Ex. 11 ¶ 7; Ex. 12 ¶ 18; Ex. 13 ¶¶ 17-18, 20, 17; Ex. 15 ¶ 12; Ex. 17 ¶¶ 9-11; Ex. 16 ¶ 22.

⁵⁵ Ex. 5 ¶¶ 26, 30; Ex. 6 ¶¶ 15-16; Ex. 7 ¶¶ 29-32; Ex. 10 ¶ 14; Ex. 12 ¶¶ 18, 20-21; Ex. 13 ¶¶ 17-18, 20, 27; Ex. 14 ¶ 24; Ex. 15 ¶¶ 12-14; Ex. 17 ¶¶ 9-11; Ex. 16 ¶¶ 22, 24, 30.

accounts. Defendants generally open consumers' accounts with only 20 percent equity, even though daily interest charges can swiftly reduce consumers' accounts to equity call levels. In addition, American Precious Metals contacts consumers whose equity levels have risen and encourages them to use their equity to purchase additional precious metals on leverage.⁵⁶ This ensures that consumers' equity levels remain low. With low equity levels, consumers cannot withdraw funds to realize gains from their investments – or to demand delivery of the physical metals, which Defendants do not possess. Instead, consumers remain subject to equity calls that force them to choose between paying additional money for the investments or having the investments liquidated, in whole or in part, and potentially realizing a financial loss.

When a consumer does not deposit additional cash in response to an equity call, or when a consumer's equity decreases to 10 percent of the value of the metal listed in his or her account, the consumer's precious metals account is liquidated, either partially or wholly.⁵⁷ In some instances, consumers' accounts are liquidated without notice or forewarning.⁵⁸ When an account is liquidated, the precious metals listed in the consumer's account are marked as "sold" and the "proceeds" are applied to pay the leverage balance or loan.⁵⁹ If the account is wholly liquidated and funds remain after the consumer's loan is satisfied, they are remitted to the consumer.⁶⁰

Consumers have lost significant money as a result of the Defendants' telemarketing scheme.⁶¹ In some instances, consumers have lost their entire retirement or life savings.⁶² For example, American Precious Metals pressured 70-year old retiree Joao Curalov to cash out his retirement account and invest in highly-leveraged silver. He was promised certain profits and a

⁵⁶ Ex. 5 ¶¶ 4, 21-23, 28; Ex. 7 ¶ 22; Ex. 11 ¶ 9; Ex. 12 ¶¶ 15-16; Ex. 14 ¶¶ 15, 19.

⁵⁷ Ex. 5 Att. B; Ex. 7 Att. B, H, F; Ex. 10 Att. D.

⁵⁸ Ex. 4 ¶ 13; Ex. 7 ¶ 26; Ex. 9 ¶ 10; Ex. 11 ¶¶ 13-14.

⁵⁹ Ex. 5 Att. B; Ex. 7 ¶ 26; Ex. 16 Att. D.

⁶⁰ Ex. 4 ¶ 13; Ex. 5 ¶ 15; Ex. 7 ¶ 26; Ex. 11 ¶¶ 13-14; Ex. 15 ¶ 14; Ex. 16 ¶ 25.

⁶¹ Ex. 4 ¶¶ 8, 12-13; Ex. 5 ¶¶ 15, 30; Ex. 6 ¶ 17; Ex. 7 ¶ 39; Ex. 9 ¶ 19; Ex. 10 ¶ 17; Ex. 11 ¶ 17; Ex. 12 ¶¶ 20, 22; Ex. 13 ¶ 27; Ex. 14 ¶ 24; Ex. 15 ¶ 12; Ex. 17 ¶¶ 9-11; Ex. 16 ¶ 25.

⁶² See Ex. 7 ¶ 20; Ex. 17 ¶¶ 9-11.

comfortable retirement. Instead, Mr. Curalov lost over \$550,000 at the hands of Defendants' telemarketers, who extracted approximately \$468,917 in commissions.⁶³

III. LEGAL ARGUMENT

A. DEFENDANTS VIOLATE SECTION 5 OF THE FTC ACT

Section 5 of the FTC Act, 15 U.S.C. § 45(a), prohibits unfair or deceptive acts or practices in or affecting commerce. An act or practice is deceptive under Section 5 if it involves a material representation or omission that would likely mislead consumers, acting reasonably under the circumstances.⁶⁴ Courts consider the overall net impression when evaluating the deceptiveness of an act or practice.⁶⁵

Defendants violate Section 5 in two ways: through misrepresentations and material omissions. Defendants misrepresent that: (1) consumers are likely to earn high or substantial profits in a short time period on the precious metals sold by Defendants; and (2) the precious metals sold by Defendants are low or minimal risk investments. After representing to consumers that they will earn high profits quickly with minimal risk of loss, Defendants fail to adequately disclose: (1) the total fees, commissions, interest charges, and leverage balances that consumers are required to pay; and (2) that consumers are likely to receive equity calls that will require them to pay additional money or to liquidate their precious metals accounts.

Defendants' misrepresentations and omissions are material and are likely to mislead consumers acting reasonably. A "material" misrepresentation or practice is one that is likely to affect a consumer's choice of or conduct regarding a product or service.⁶⁶ "Express claims, or deliberately made implied claims, used to induce the purchase of a particular product or service

⁶³ Ex. 7.

⁶⁴ *FTC v. Peoples Credit First, LLC*, 244 Fed. Appx. 942, 944 (11th Cir. 2007) (following *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003)).

⁶⁵ *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp.2d 1167, 1189 (N.D. Ga. June 4, 2008), *aff'd*, 2009 U.S. App. LEXIS 27388 (11th Cir. Dec. 15, 2009); *FTC v. Peoples Credit First, LLC*, No. 8:03-cv-2353, 2005 U.S. Dist. LEXIS 38545, at *24 (M.D. Fla. Dec. 18, 2005), *aff'd*, 244 Fed. Appx. 942 (11th Cir. July 19, 2007).

⁶⁶ *Nat'l Urological Group*, 645 F. Supp.2d at 1190 (citing *FTC v. QT, Inc.*, 448 F. Supp.2d 908, 960 (N.D. Ill. 2006)).

are presumptively material.”⁶⁷ Defendants’ express promises of high profits and low risk are deliberately-made to induce consumers to buy precious metals and, therefore, are material.

Defendants’ omissions are also material. The total fees, commissions, interest charges, and leverage balances that consumers are required to pay and the fact that the precious metals may result in equity calls are factors that are likely to affect a consumer’s decision whether to purchase from Defendants. Consumers report that, had they been aware of these facts, they would not have purchased Defendants’ precious metals investments.⁶⁸

Defendants’ representations and omissions are likely to and, as evidenced by declarations from consumers, actually do, mislead consumers who are acting reasonably. Contrary to their representations, Defendants’ investments are not likely to earn a profit. The substantial fees, commissions, and interest charges assessed on consumers’ precious metals accounts make it unlikely that consumers will profit. Moreover, because the consumers’ purchases are leveraged and subject to loss if an equity call is unmet, the transactions carry a high risk of loss.

B. DEFENDANTS VIOLATE THE TSR

As with Section 5, Defendants violate the TSR in two ways: through misrepresentations and material omissions. The TSR prohibits sellers and telemarketers from misrepresenting, directly or by implication, any material aspect of an investment opportunity, including, but not limited to, risk, liquidity, earnings potential, or profitability. 16 C.F.R. 310.3(a)(2)(vi). Defendants violate this provision by misrepresenting that consumers who purchase precious metals from Defendants will earn substantial profits in a short time period, with low or minimal risk of loss of their investment.

The TSR also requires telemarketers and sellers to disclose specific categories of information to consumers. These disclosures must be made truthfully, in a clear and conspicuous manner, and before the consumer pays for the goods or services that are the subject of the telemarketing sales offer. 16 C.F.R. 310.3(a)(1). Defendants violate the TSR by failing to adequately disclose to consumers the total costs and material conditions of their sales offer.

⁶⁷ *Nat’l Urological Group*, 645 F. Supp.2d at 1190 (citing *FTC v. Windward Mktg., Ltd.*, No. 1:96-cv-615, 1997 U.S. Dist. LEXIS 17114, at * 28 (N.D. Ga. Sept. 30, 1997)); *FTC v. SlimAmerica, Inc.*, 77 F. Supp.2d 1263, 1272 (S.D. Fla. June 30, 1999).

⁶⁸ Ex. 8 ¶¶ 18-20; *See* Ex. 6 ¶¶ 12, 15-16; Ex. 7 ¶ 32; Ex. 9 ¶ 18; Ex. 11 ¶¶ 2, 17; Ex. 12 ¶ 23; Ex. 13 ¶ 27; Ex. 15 ¶ 15; Ex. 16 ¶ 30.

Defendants are required to disclose the total costs to purchase, receive, or use, and the quantity of any goods or services that are the subject of their sales offer. 16 C.F.R. § 310.3(a)(1)(i). They violate the TSR by failing to clearly and conspicuously disclose, before the consumers pay, the total fees, commissions, interest charges, and leverage balances that consumers are required to pay to purchase or receive the precious metals. Defendants also violate the TSR by failing to clearly and conspicuously disclose all material restrictions, limitations, or conditions to purchase or receive the precious metals. 16 C.F.R. § 310.3(a)(1)(ii). Specifically, Defendants fail to adequately disclose that consumers are likely to receive equity calls that will require consumers to pay additional money or to liquidate their precious metals. This information is material to consumers, many of whom are investing their entire life savings and are without the ability to meet future equity calls.⁶⁹

C. THE COURT IS AUTHORIZED TO GRANT THE RELIEF REQUESTED

This Court has the power to grant the requested relief under Sections 13(b) and 19 of the FTC Act. Section 13(b) of the FTC Act authorizes the FTC to bring suit in federal court when it has reason to believe that a party “is violating, or is about to violate, any provision of the law enforced by the [FTC] and that enjoining such conduct is in the public interest.”⁷⁰ The second proviso of Section 13(b), under which this action is brought, provides that “in proper cases the FTC may seek and, after proper proof, the court may issue a permanent injunction.”⁷¹ It is appropriate to invoke the remedies of Section 13(b) to halt a straightforward violation of Section

⁶⁹ Ex. 11 ¶ 17. *See also* Ex. 9 ¶ 18; Ex. 13 ¶ 17.

⁷⁰ Section 13(b) consists of two distinct parts. The first portion of the statute, through and including the first proviso, is concerned with provisional injunctive relief in aid of an administrative complaint. This portion of Section 13(b), which is inapplicable to the current action, gives authority for the issuance of temporary restraining orders and preliminary injunctions after a proper showing by the FTC and notice to the defendants. The instant action is brought under the second portion of Section 13(b), which concerns actions for permanent injunctions. 15 U.S.C. § 53(b).

⁷¹ 15 U.S.C. § 53(b). *See also* *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-470 (11th Cir. Jul. 9, 1996); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432-34 (11th Cir. 1984) (quoting *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982)); *FTC v. USA Financial, LLC*, No. 10-12152, 2011 U.S. App. LEXIS 3774, at *11 (11th Cir. Feb. 25, 2011); *FTC v. U.S. Mort. Funding, Inc.*, No. 11-cv-80155, 2011 U.S. Dist. LEXIS 31148, at *5-6 (S.D. Fla. Mar. 1, 2011).

5.⁷² A case such as this one, which involves an ongoing deceptive telemarketing scheme, qualifies as a proper case under Section 13(b).

By permitting the FTC to seek a permanent injunction, Congress also gave the district court power to order preliminary relief as needed to make permanent relief possible, including issuing temporary restraining orders with asset freezes, temporary receivers, and other ancillary relief.⁷³ In addition, the district court may issue an *ex parte* temporary restraining order.⁷⁴ Courts in this district and throughout the Eleventh Circuit have ordered Section 13(b) remedies in cases brought to enforce Section 5 and the TSR and have issued *ex parte* temporary restraining orders granting the full panoply of ancillary relief requested here.⁷⁵

A second basis to provide preliminary relief is Section 19 of the FTC Act, 15 U.S.C. § 57b. Section 19 grants the Court jurisdiction to order relief necessary to redress injury to consumers from Defendants' violations of the TSR. 15 U.S.C. § 57b(a)(1)(b). The court's authority to grant equitable relief under Section 19 of the FTC Act, 15 U.S.C. § 57b, includes the authority to grant preliminary injunctive relief.⁷⁶

D. IMMEDIATE INJUNCTIVE RELIEF IS NECESSARY TO PREVENT FURTHER HARM

In the Eleventh Circuit, courts consider two factors⁷⁷ when determining whether to grant a preliminary injunction under Section 13(b): (1) the likelihood of success on the merits; and (2)

⁷² See *Nat'l Urological Group*, 645 F. Supp.2d at 1208; *Gem Merch. Corp.*, 87 F.3d at 468; *SlimAmerica, Inc.*, 77 F. Supp.2d at 1275.

⁷³ *Gem Merch. Corp.*, 87 F.3d at 468-480; *U.S. Oil & Gas*, 748 F.2d at 1434 (quoting *Singer*, 668 F.2d at 1113); *FTC v. USA Financial, LLC*, 2011 U.S. App. LEXIS 3774, at *13-14; *U.S. Mort. Funding*, 2011 U.S. Dist. LEXIS 31148, at *5-6.

⁷⁴ Fed. R. Civ. P. 65(b); *FTC v. USA Bevs., Inc.*, No. 05-61682, 2005 U.S. Dist. LEXIS 39042, at *8 (S.D. Fla. Nov. 4, 2005).

⁷⁵ *E.g.*, Plaintiff FTC's Volume IV.

⁷⁶ *FTC v. Career Info. Servs., Inc.*, No. 1:96-cv-1464, 1996 U.S. Dist. LEXIS 21207, at *10 (N.D. Ga. June 21, 1996) (citing *Singer*, 668 F.2d at 1110-12).

⁷⁷ Unlike in private controversies, irreparable injury need not be shown. Harm to the public interest is presumed in statutory enforcement actions. See *U.S. Mort. Funding*, 2011 U.S. Dist. LEXIS 31148, at *6-7 (citing *FTC v. University Health, Inc.*, 938 F.2d 1206, 1217 (11th Cir. 1991)); *FTC v. Para-Link Int'l, Inc.*, No. 8:00-cv-2114, 2000 U.S. Dist. LEXIS 17372, at *14 (M.D. Fla. Feb. 28, 2001); *Career Info. Servs.*, 1996 U.S. Dist. LEXIS 21207, at *11.

the balance of equities.⁷⁸ When demonstrating its “likelihood of ultimate success,” the FTC is not required to show a *strong probability* of success, although the evidence presented in this matter makes such a showing. Rather, because irreparable injury is presumed in a statutory enforcement action, the FTC need only show that it has “some chance of probable success on the merits.”⁷⁹ Moreover, when a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight.⁸⁰

The evidence filed in support of this motion shows that the FTC not only meets, but exceeds the standard for success on the merits. In addition, the equities weigh heavily in favor of granting the requested preliminary relief in this case to protect the public from Defendants’ unlawful telemarketing scheme and to preserve the Court’s ability to render effective relief. Defendants have repeatedly violated the FTC Act and the TSR by making false representations and material omissions while telemarketing precious metals. Defendants falsely represent that consumers who purchase their precious metals will quickly earn substantial profits⁸¹ with low or minimal risk.⁸² Defendants fail to clearly and conspicuously disclose the total fees, commissions, interest charges, and leverage balances that consumers are required to pay to purchase and receive the precious metals,⁸³ which render the investments largely unprofitable.

⁷⁸ *U.S. Mort. Funding*, 2011 U.S. Dist. LEXIS 31148, at *6 (citing *University Health*, 938 F.2d at 1217); *USA Bev.*, 2005 U.S. Dist. LEXIS 39042, *8; *Para-Link Int’l*, 2000 U.S. Dist. LEXIS 17372, at *14; *Career Info. Servs.*, 1996 U.S. Dist. LEXIS 21207, at *11.

⁷⁹ *FTC v. Home Assure, LLC*, No. 8:09-cv-547, 2009 U.S. Dist. LEXIS 32053, at *17 (M.D. Fla. Apr. 8, 2009) (citing *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989)).

⁸⁰ *Home Assure, LLC*, 2009 U.S. Dist. LEXIS 32053, at *5 (following *FTC v. World Travel Vacation Brokers* 861 F.2d 1020, 1030 (7th Cir. 1988)); *FTC v. USA Bevs., Inc.*, No. 05-61682, 2005 U.S. Dist. LEXIS 39075, at *15 (S.D. Fla. Dec. 5, 2005).

⁸¹ Ex. 4 ¶¶ 2-5, 15; Ex. 5 ¶¶ 3, 6, 16; Ex. 6 ¶¶ 2-6; Ex. 7 ¶¶ 4-6, 9-10, 18-20, 32; Ex. 8 ¶¶ 2-3; Ex. 9 ¶¶ 3, 6; Ex. 10 ¶¶ 4-6; Ex. 11 ¶¶ 4-5, 9; Ex. 12 ¶¶ 3, 5; Ex. 13 ¶¶ 4-11; Ex. 14 ¶¶ 3-4, 6, 12, 16; Ex. 15 ¶¶ 2-4, 14; Ex. 16 ¶¶ 2-5, 12, 15, 17, 21, 30; Ex. 17 ¶ 3.

⁸² Ex. 4 ¶¶ 2, 6, 8, 15; Ex. 5 ¶ 6; Ex. 6 ¶¶ 5, 7; Ex. 7 ¶¶ 6, 10, 20, 32; Ex. 9 ¶¶ 4, 8; Ex. 10 ¶ 6; Ex. 11 ¶¶ 2-5, 10; Ex. 12 ¶¶ 3, 7; Ex. 13 ¶¶ 3-4, 6-7, 9; Ex. 14 ¶¶ 3, 9, 12, 15-16; Ex. 15 ¶¶ 3-4, 7, 14; Ex. 16 ¶¶ 5-8, 30; Ex. 17 ¶¶ 3-4, 7.

⁸³ Ex. 4 ¶¶ 7, 15; Ex. 5 ¶¶ 6, 8-10, 14; Ex. 6 ¶¶ 9, 11-12; Ex. 12 ¶¶ 9, 17, 19; Ex. 13 ¶¶ 8, 18, 20-21, 27; Ex. 14 ¶¶ 10, 16-17, 24. *See also* Ex. 7 ¶¶ 8, 17, 29, 32; Ex. 8 ¶¶ 5-11; Ex. 9 ¶ 18; Ex. 10

Defendants also fail to clearly and conspicuously disclose that consumers are likely to receive equity calls that will require consumers to pay additional money or to liquidate their precious metals,⁸⁴ which makes the investments risky. Defendants' false representations and omissions are material and mislead consumers who rely on the claims made by Defendants. Consumers consistently report that the profitability, risk, cost, and other central characteristics of the precious metals were material to their decision to buy, and that they were misled by Defendants.⁸⁵ The FTC has shown a strong probability of success on the merits of this case.

The balance of equities mandates that injunctive relief be ordered in this case. The FTC has demonstrated that Defendants have engaged and continue to engage in widespread deception while telemarketing precious metals. Sections 13(b) and 19 of the FTC Act were designed to combat such abuses. Where, as here, public and private equities are at issue, public equities far outweigh private equities.⁸⁶ This is particularly true in the instant case, since Defendants can claim no vested interest in an illegal business activity.⁸⁷ Further, the need for injunctive relief is especially acute where it may prevent significant injury, as is true in this case.

The injunctive relief proposed by Plaintiff orders that Defendants obey the law, including Section 5 and the TSR. This relief would serve the public interest by stopping the long-standing deception perpetrated by Defendants and preventing further economic injury to consumers nationwide. Defendants' past conduct indicates that, without judicial intervention, they are likely to continue to violate the FTC Act and TSR.⁸⁸ Defendants have deceived consumers for

¶¶ 9,12; Ex. 11 ¶¶ 5, 7-8; Ex. 15 ¶¶ 5-6, 14; Ex. 16 ¶¶ 10, 15, 22.

⁸⁴ Ex. 4 ¶ 6; Ex. 7 ¶ 16; Ex. 8 ¶¶ 18-19; Ex. 9 ¶ 18; Ex. 11 ¶ 5; Ex. 13 ¶ 18; Ex. 15 ¶¶ 6-7, 11, 14.

⁸⁵ Ex. 7 ¶ 32; Ex. 8 ¶¶ 18-20; Ex. 9 ¶ 18; Ex. 11 ¶¶ 2, 17; Ex. 13 ¶ 27; Ex. 15 ¶ 4; Ex. 16 ¶ 30. *See also* Ex. 4 ¶ 15; Ex. 6 ¶¶ 12, 15-16.

⁸⁶ *Home Assure*, 2009 U.S. Dist. LEXIS 32053, at *5; *USA Bevs., Inc.*, 2005 U.S. Dist. LEXIS 39075, at *15.

⁸⁷ *U.S. v. Ellis Research Labs., Inc.*, 300 F.2d 550, 554 (7th Cir. 1962) ("Defendants contend that the result of the injunction will be to put them out of business. They can have no vested interest in a business activity found to be illegal.")

⁸⁸ *USA Bevs.*, 2005 U.S. Dist. LEXIS 39075, at *22 ("Defendants' past misconduct gives rise to the inference that there is a reasonable likelihood of future violations."); *SEC v. R. J. Allen &*

nearly four years with their current scheme. Their deceptive activity continues unabated, in spite of their awareness that their practices are injuring consumers. Moreover, before establishing American Precious Metals, Defendant Harry R. Tanner, Jr., engaged in similar deceptive practices while telemarketing futures investments.⁸⁹ Indeed, shortly after his NFA expulsion and ban, Tanner established American Precious Metals and staffed it with other sales persons who, like him, had been sanctioned or banned from selling futures because of deceptive conduct.⁹⁰ Defendants' deception must be halted to prevent further injury to the public.

When enacting Section 13(b), Congress intended to serve the public interest by protecting victims from the effects of deceptive trade practices "as quickly as possible."⁹¹ By temporarily and preliminarily enjoining Defendants' illegal practices, this Court will effectuate Congress' intent.

E. INDIVIDUAL DEFENDANTS ARE LIABLE FOR THE DECEPTIVE PRACTICES

An individual who *either* participates directly *or* has the authority to control the corporation's violative acts is liable and subject to injunctive relief.⁹² 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.⁹³ An individual subject to injunctive relief may also be held liable for monetary relief if the individual knew or should have known that the

Assocs., Inc., 386 F. Supp. 866, 877 (S.D. Fla. 1974).

⁸⁹ Ex. 1 ¶ 25, Att. N.

⁹⁰ Ex. 1 ¶ 26, Att. O.

⁹¹ *World Travel Vacation Brokers* 861 F.2d at 1028). *See also FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 719 (5th Cir. 1982).

⁹² *Gem Merch. Corp.*, 87 F.3d at 470 (citing *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989)); *USA Financial*, 2011 U.S. App. LEXIS 3774, at *9.

⁹³ *FTC v. Wilcox*, 926 F. Supp. 1091, 1104 (S.D. Fla. 1995) (following *Amy Travel Servs.*, 875 F.2d at 573.) *See also FTC v. Transnet Wireless Corp.*, 506 F. Supp.2d 1247, 1270 (S.D. Fla. 2007) ("An individual's status as a corporate officer gives rise to a presumption of ability to control small, closely-held corporation.")

company's acts or practices were deceptive.⁹⁴ An intent to defraud need not be shown.⁹⁵ Nor must the FTC demonstrate that defendants had actual knowledge of the misrepresentations – reckless indifference to the truth or falsity of the representations or an awareness of a high probability of fraud coupled with an intentional avoidance of the truth will suffice.⁹⁶

Defendants Harry R. Tanner, Jr., and Andrea Tanner participate directly in the wrongful acts and practices or have authority to control the Corporate Defendant, and have knowledge of their wrongdoing. Thus, both are individually liable for injunctive and ancillary monetary relief. Harry Tanner is an owner of American Precious Metals and serves as its president and managing member.⁹⁷ Andrea Tanner is also an owner, officer, and manager of the Corporate Defendant.⁹⁸ As the owners, officers, and managing members, Harry and Andrea Tanner have authority to control the activities of the company. In addition, Harry Tanner is the administrator of the company's Internet websites, which contain misleading representations.⁹⁹ Harry and Andrea Tanner together submitted, and thereby implicitly approved, the company's telemarketing script while seeking a telemarketing license for the corporation and identified themselves as the sole managers of the company.¹⁰⁰ As the sole signatories of the company's three known bank accounts,¹⁰¹ Harry and Andrea Tanner exert control over the company's finances.

Finally, the Tanners have knowledge of their wrongdoing. Harry Tanner personally receives complaints from consumers and the Better Business Bureau concerning the

⁹⁴ *Gem Merch. Corp.*, 87 F.3d at 470; *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp.2d 1167, 1207 (N.D. Ga. 2008), *aff'd*, 2009 U.S. App. LEXIS 27388 (11th Cir. Dec. 15, 2009).

⁹⁵ *Transnet Wireless*, 506 F. Supp.2d at 1270 (citing *FTC v. Jordan Ashley*, No. 93-2257, 1994 U.S. Dist. LEXIS 7494, at *9 (S.D. Fla. Apr. 5, 1994)).

⁹⁶ *FTC v. Atlantex Assocs.*, No. 87-0045, 1987 U.S. Dist. LEXIS 10911, at * 25 (S.D. Fla. Nov. 25, 1987), *aff'd*, 872 F.2d 966 (11th Cir. 1989); *FTC v. Wolf*, No. 94-8119, 1994 U.S. Dist. LEXIS 1760, at *24 (S.D. Fla. Jan. 30, 1996).

⁹⁷ Ex. 1 ¶¶ 6, 8-12, Att. A; Ex. 2 ¶ 9, Att. D.

⁹⁸ Ex. 1 ¶¶ 6, 8-9, Att. A; Ex. 2 ¶ 9, Att. D.

⁹⁹ Ex. 1 ¶ 24, Att. K, Att. L.

¹⁰⁰ Ex. 1 ¶ Att. B.

¹⁰¹ Ex. 2 ¶ 29, Att. J.

corporation's deceptive telemarketing practices.¹⁰² Harry and Andrea Tanner both have been sued by and Harry Tanner settled claims with consumers aggrieved by the company's deceptive practices.¹⁰³ Despite knowledge of consumers' complaints, the Tanners have never altered the company's deceptive practices. Instead, Harry and Andrea Tanner have allowed the company's practices to continue unabated. Moreover, this enterprise is not Defendant Harry Tanner's first foray into fraud; he was previously found liable for engaging in deceptive and misleading sales solicitations through other telemarketing companies. His prior experience with deception leaves no doubt that he possesses the expertise to direct Defendants' massive telemarketing scheme and that he blatantly disregards the law.

F. ANCILLARY EQUITABLE RELIEF IS NEEDED TO PREVENT FURTHER FRAUD AND PROTECT THE AVAILABILITY OF EFFECTIVE FINAL RELIEF FOR CONSUMERS

The FTC seeks redress for consumers as a part of the final relief in this case. To ensure the possibility of such relief, the FTC has proposed entry of an *ex parte* temporary restraining order pending the preliminary injunction hearing. Consistent with orders issued in other Section 13(b) actions, the temporary restraining order would: (1) require Defendants to immediately cease deceptive sales practices; (2) freeze Defendants' assets; (3) appoint a temporary receiver over the Corporate Defendant; and (4) permit the FTC immediate access to the Corporate Defendant's business premises and records to preserve evidence.

Asset freezes are a proper equitable remedy to assure the availability of permanent relief.¹⁰⁴ Freezing the assets of the individuals¹⁰⁵ and the corporation is essential to prevent the

¹⁰² Ex. 3.A. ¶ 9; Ex. 7 ¶ 23.

¹⁰³ Ex. 13 Att. B; Ex. 10 Att. F; Ex. 14 Att. G.

¹⁰⁴ *Gem Merch. Corp.*, 87 F.3d at 469 (“[A] district court may order preliminary relief, including an asset freeze, that may be needed to make permanent relief possible.”); *U.S. Mort. Funding*, 2011 U.S. Dist. LEXIS 31148, at *18.

¹⁰⁵ Courts have frozen individual defendants' assets where the individuals controlled the deceptive activity and had actual or constructive knowledge of the deceptive nature of the practices in which they were engaged. *Amy Travel Serv.*, 875 F.2d at 574. A court may impose an asset freeze based on the mere possibility of dissipation of assets. *See USA Bevs.*, 2005 U.S. Dist. LEXIS 39075, at *26.

dissipation of assets during the pendency of litigation.¹⁰⁶ In this case, the business practices are permeated with deception: false promises, misrepresentations, and deliberate omissions. Defendants continue their unlawful conduct with full awareness of the harm to consumers.

There is a strong likelihood that assets will be dissipated or concealed during legal proceedings, causing irreparable injury to the FTC's ability to obtain relief for consumers. The possibility of a large monetary judgment depriving Defendants of the fruits of their illicit labor provides Defendants with ample incentive to conceal or dissipate otherwise recoverable assets. Courts have routinely ordered assets frozen on the basis of pervasive deceptive activities.¹⁰⁷

The FTC also seeks the appointment of a temporary receiver to locate and preserve the Corporate Defendant's assets and records and to obviate the threat of destruction, dissipation, or secretion.¹⁰⁸ A temporary receiver is necessary because the business is permeated by deception.¹⁰⁹ Assets and records can be concealed or destroyed at the touch of a button, unless a third party entrusted by the Court has possession of the business. A temporary receiver can also oversee the business, supervise sales and marketing tactics, and ensure that consumers are not further deceived.

G. EX PARTE RELIEF IS REQUIRED TO PRESERVE THE COURT'S ABILITY TO FASHION MEANINGFUL RELIEF AND PREVENT IRREPARABLE INJURY

Plaintiff requests that the proposed temporary restraining order be entered *ex parte*. Congress has looked favorably on the availability of *ex parte* relief:

Section 13 of the FTC Act authorizes the [FTC] to file suit to enjoin any violation of the FTC [Act]. The [FTC] can go to court

¹⁰⁶ See *Gem Merch. Corp.*, 87 F.3d at 469; *U.S. Mort. Funding*, 2011 U.S. Dist. LEXIS 31148, at * 18; *USA Bevs.*, 2005 U.S. Dist. LEXIS 39075, at *25 (citing *Southwest Sunsites*, 665 F.2d at 718-19).

¹⁰⁷ See Plaintiff's Rule 65(b) Declaration in Support of Motion for *Ex Parte* Temporary Restraining Order, filed herewith.

¹⁰⁸ The FTC recommends that the Court appoint one of the three candidates recommended in Plaintiff's Application for Temporary Receiver, filed herewith.

¹⁰⁹ *Wolf*, 1996 U.S. Dist. LEXIS 1760, at *28 (following *SEC v. R.J. Allen & Assoc., Inc.*, 386 F. Supp. 866, 878 (S.D. Fla. 1974) (“[A] receiver is permissible and appropriate where necessary to protect the public interest and where . . . those who have inflicted serious detriment in the past must be ousted.”))

ex parte to obtain an order freezing assets, and is also able to obtain consumer redress.

S. Rep. No. 103-130 at 15-16 (1994).

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 notice is given. Proper circumstances for *ex parte* relief include situations where notice would “render fruitless further prosecution of the action.”¹¹⁰ Cases in which a defendant’s business practices are permeated by deception – such as this one – fit squarely into the narrow category of situations in which *ex parte* relief is appropriate to make possible full and effective final relief.

As is set forth in detail in the Rule 65(b) Declaration of Counsel filed herewith, notice to Defendants would likely cause irreparable injury. Defendants have shown such a disregard for the law that an *ex parte* temporary restraining order is necessary. Only through an *ex parte* temporary restraining order can the Court prevent the otherwise likely destruction of documents and secretion of assets – both of which would jeopardize the possibility of final effective relief. Moreover, the FTC’s past experience shows that, upon discovery of impending legal action, defendants in FTC actions often engage in deceptive schemes to withdraw funds from bank accounts and move or destroy documents.¹¹¹

IV. CONCLUSION

For the foregoing reasons, the FTC requests that the Court grant its *Ex Parte* Motion for a Temporary Restraining Order with Asset Freeze, Appointment of Receiver, and Other Equitable Relief and Order to Show Cause Why a Preliminary Injunction Should Not Issue.

¹¹⁰ *In re Vuitton et Fils S.A.*, 606 F.2d 1, 5 (2d Cir. 1979); see also *Carroll v. Princess Anne*, 393 U.S. 175, 180 (1968) (“There is a place in our jurisprudence for *ex parte* issuance without notice, of temporary restraining orders of short duration . . .”).

¹¹¹ See Plaintiff’s Rule 65(b) Declaration.

Respectfully submitted,

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