

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

RECEIVED

APR 28 2004

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

GLOBAL WEB PROMOTIONS PTY LTD.,
MICHAEL JOHN ANTHONY VAN ESSEN, and
LANCE THOMAS ATKINSON,

Defendants.

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

Case No. 04C 3022

Judge Aspen

Magistrate Judge Schenkier

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

I. INTRODUCTION

The FTC brings this action to stop Defendants from selling bogus products over the Internet via a deluge of junk e-mail or "spam" that violates federal law. Defendants sell fraudulent products, including weight loss patches and a human growth hormone spray, on dozens of Web sites. Defendants falsely claim that their patches will cause weight loss and that their human growth hormone spray will reverse the aging process. Several experts demonstrate that these products actually do nothing at all. Defendants likely sell hundreds of thousands of dollars of fraudulent products each month.

To direct traffic to their Web sites, Defendants are flooding consumers' in-boxes with massive amounts of spam. In fact, consumers have forwarded nearly 400,000 of Defendants' e-mail messages to the FTC since January 1, 2004. All of this spam violates central provisions of the recently enacted federal e-mail law, Controlling the Assault of Non-Solicited Pornography

and Marketing Act of 2003 (“CAN-SPAM”), 15 U.S.C. § 7701, *et seq.* The e-mail messages: (1) disguise their source to make it appear that the spam is coming from innocent third parties; (2) fail to provide a clear and conspicuous mechanism for consumers to opt-out from further e-mail; and (3) fail to provide a physical postal address in the message text.

The FTC asks that the Court enter a temporary restraining order bringing these practices to a swift end. Defendants are very likely sending millions of illegal spam messages every day and costing consumers hundreds of thousands of dollars. Although Defendants are in Australia and New Zealand, their products are all shipped by fulfillment companies within the United States. The FTC seeks a temporary restraining order to enjoin deceptive claims and illegal spam and to prohibit further sales and shipment of worthless products.

II. DEFENDANTS

Defendants are Global Web Promotions Pty Ltd. and two individuals who direct the company, Lance T. Atkinson and Michael J. Van Essen. Defendants sell a variety of nutritional supplements over the Internet, including an “Herbal-Rx Weight Loss Patch” and a product called “HGH” and “Natural HGH.” (PX 1 ¶¶ 6, 13-35.)

Defendants are recognized by anti-spam organizations as one of the largest sources of spam in the world.¹ Since January 1, 2004 through April 22, 2004, consumers have forwarded over 399,000 e-mails advertising Defendants’ products to uce@ftc.gov, the FTC’s spam database. (PX 1 ¶¶ 3-10, 41, Att. A.) The text of these e-mail messages contains a hyperlink that, if clicked, leads consumers to one of over 100 Web sites advertising Defendants’ products. (*Id.* ¶¶ 3-10, Att. A.) Defendants have likely procured dozens of third-party affiliates to transmit e-mail messages on their behalf. (*Id.* ¶¶ 9-10.)

¹ See, e.g., www.spamhaus.org/rokso/evidence.lasso?rokso_id=R0K3247 (listing in Spamhaus’s Registry of Known Spam Operations).

Although the FTC's investigation has revealed that Defendants are located in Australia and New Zealand (PX 1 ¶¶ 54-55, Att. X), Defendants take great strides to conceal their identity when selling their products. Their Web pages fail to provide any information identifying the sellers. (*Id.* ¶¶ 13-16, 21-23, 28-30, Atts. C, G, K.) Their Web site addresses change regularly and identify the site owners as individuals in various countries, such as Hong Kong, Singapore, Malaysia and Japan. (*Id.* ¶¶ 8, 11-12, Att. B.) Orders for Defendants' products are fulfilled by various companies located in the United States, and no information is provided with the products identifying the seller. (*Id.* ¶¶ 19, 26, 34, Atts. E, I, M.)

A. Global Web Promotions Pty Ltd.

Global Web Promotions Pty Ltd. ("GWP") is an Australian company with four shareholders. (PX 1 ¶ 54, Att. X.) Credit card transactions for purchases of Defendants' products identify GWP as the merchant. (*Id.* ¶¶ 13, 14, 17-18, 21, 24-25, 28, 32-33, Atts. D, H, L.)

B. Lance Atkinson

Lance T. Atkinson – a resident of Christchurch, New Zealand – is a registered member and 25% shareholder of GWP. (PX 1 ¶¶ 54-55, Att. X.) Atkinson is actively involved in the operations of GWP. In particular, he has registered domain names used as customer service sites for GWP products, including "herbal-support.com" and "herbalcustomers.com." (*Id.* ¶¶ 37-38, Atts. P, Q.)

C. Michael Van Essen

Michael Van Essen is a registered director and owns the largest share of GWP. (PX 1 ¶¶ 54-55, Att. X.) Van Essen lives at the Australian address identified as GWP's principal place of business. (*Id.* ¶ 55, Att. X.) Van Essen has also registered domain names utilized by GWP in its business. (*Id.* ¶ 40, Att. R.)

III. JURISDICTION AND VENUE

This matter is properly before the Court. The Court has subject matter jurisdiction over the FTC Act claims pursuant to 28 U.S.C. §§ 1331, 1337(a) & 1345. This Court also has personal jurisdiction over Defendants. The FTC Act provides for nationwide service of process. *See* 15 U.S.C. § 53(b). “Where a federal statute provides for nationwide service of process, personal jurisdiction may be obtained over any defendant having minimum contacts with the United States as a whole.” *FTC v. Bay Area Bus. Council, Inc.*, No. 02 C 5762, 2003 WL 1220245, at *2 (N.D. Ill. March 14, 2003); *see also United Rope Distributors, Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 534 (7th Cir. 1991). Venue is proper in this district pursuant to 28 U.S.C. § 1391(d) because “[a]n alien may be sued in any district.”

IV. DEFENDANTS’ BUSINESS PRACTICES

Since at least January 2004, Defendants have initiated millions of commercial e-mail messages that invite consumers to click on a hyperlink in the message text to visit one of Defendants’ Web sites and purchase products. These Web sites deceptively advertise nutritional supplement products, including weight loss patches and a human growth hormone spray.²

A. False and Unsubstantiated Product Claims

1. Weight loss patch claims

Defendants sell an “Herbal-RX Weight Loss Patch” on their Web sites for \$80.90 for a month’s supply. (PX 1 ¶ 14-15, Att. C, pp. 11-12.) Defendants’ Web sites claim that placing the patch on the body will cause weight loss by suppressing appetite and boosting metabolism. (*Id.* ¶ 14, Att. C pp. 1-10.) The Web sites state:

² In addition to the products discussed herein, Defendants sell various sexual enhancement products, including penis enlargement pills and a penis enlargement patch. (PX 1 ¶ 6.) The FTC has significant doubts that these products are in any way effective and seeks injunctive relief in this matter aimed at prohibiting Defendants from making claims for any product unless they are true and Defendants can substantiate them with scientific evidence.

- **LOSE WEIGHT THE EASIER WAY “TTS NOT A DIET... IT’S A PATCH” . . .** The Herbal RX Diet Patch . . . is so easy to use just peel and stick then watch the pounds melt away.
- Herbal RX Diet Patch is a cutting-edge, advanced appetite suppressant, metabolism booster, and energy enhancer...all in one! With Herbal RX Diet Patch, there are no more starvation diets and no difficult and dangerous exercises! It works all day & all night long! Just place a new adhesive skin patch anywhere on your body, each day for continuous, safe, and effective weight loss. Much like a Nicotine Patch takes away your craving for cigarettes, Herbal-RX Diet Patch drastically reduces your cravings for food, so you naturally do not want to over-eat. While at the same time, Herbal-RX Diet Patch is boosting your energy level, and jump-starting your metabolism to burn maximum body fat.
- **How much weight will I lose with Herbal-RX Diet Patch?**
In recent laboratory studies results proved that most people lose from 2 to 4 lbs. per week. There have been cases reported of as much as 6-lbs weight loss in one week. Results will vary from person to person, determined by how well you follow your weight loss program.

(*Id.* ¶ 14, Att. C pp. 1, 3, 8.)

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

(*Id.*)³

³ Dr. Jensen’s conclusions are consistent with an FTC staff report issued in December 2003 providing a summary and analysis of an FTC public workshop on Deception in Weight Loss Advertising. *See* <http://www.ftc.gov/os/2003/12/031209weightlossrpt.pdf>. The workshop included statements from ten experts in nutrition and the study and treatment of overweight and obesity. All ten of the experts agreed that “a claim that a product worn on the body or rubbed into the skin causes substantial weight loss is not scientifically feasible.” *Id.* at 13-14.

2. HGH product claims

Defendants also advertise products called “HGH” and “Natural HGH” (the “HGH products”) that they sell for \$74.95. (PX 1 ¶¶ 21, 28-29, Atts. G, K.) The HGH products are oral sprays that contain identical ingredients. (*Id.* ¶¶ 27, 35, Atts. J, N; PX 3 ¶ 18.) The HGH products are advertised via Web sites with essentially identical product claims. (PX 1 ¶¶ 21, 28, Atts. G pp. 1-12, K pp. 1-11.) Defendants’ claim that their HGH products will “reverse the effects of aging,” causing a veritable laundry list of positive physical and cognitive effects, including improved vision, new hair growth and increased sexual potency. (*Id.* ¶¶ 21, 28, Atts. G pp. 1-2, 5-8, K pp. 1-2, 5-8, 11.) The sites also claim that the HGH products can “maintain [a user’s] appearance and current biological age for the next 10 to 20 years.” (*Id.* ¶¶ 21, 28, Atts. G p. 7, K p. 5.)

Defendants’ claims about the HGH products are wholly false and cannot be substantiated. Two experts have examined the ingredients contained in the HGH products and opined that there is there is no scientific basis for any of Defendants’ claims regarding the products. (PX 3 ¶¶ 4, 18, 23-24, 26-30; PX 4 ¶¶ 4, 17, 22-29.)⁴ Defendants’ HGH product claims appear to be loosely based on studies that suggest a link between recombinant human growth hormone (a synthetic replacement for growth hormone naturally produced by the pituitary gland) and certain changes in body composition. (PX 3 ¶¶ 15-16; PX 4 ¶¶ 14-15.) However, Defendants’ products do not contain growth hormone of any kind. (PX 3 ¶ 4; PX 4 ¶ 4.) The only ingredients listed on the product labels that could conceivably have an effect on growth hormone in the body are amino acids. (PX 3 ¶ 24; PX 4 ¶ 23.) However, amino acids cannot produce any of the effects claimed by Defendants. (PX 3 ¶¶ 23-25; PX 4 ¶¶ 22-24.) Further, the amount of amino acids in the

⁴ The FTC consulted with: (1) Dr. Glenn D. Braunstein, Professor and Chairman of the Department of Medicine at Cedars-Sinai Medical Center (*see* PX 3), and (2) Dr. Gerhard D. Baumann, Professor of Medicine at Northwestern University, and Chief of the Endocrinology and Metabolism Section of the VA Chicago Health Care System (*see* PX 4).

products is so minuscule that its presence is irrelevant. (*Id.*) In sum, the experts state that the products will have no discernable effect on a user whatsoever. (PX 3 ¶ 26; PX 4 ¶ 25.)

B. Defendants' Illegal Spam Practices.

Defendants have initiated millions of spam e-mail messages touting their products that violate CAN-SPAM, 15 U.S.C. § 7701 *et seq*, the federal law regulating e-mail practices that became effective on January 1, 2004. Congress passed CAN-SPAM after finding that spamming imposes significant costs on the e-mail system that are passed along to subscribers in the form of higher prices and reduced convenience. *See* 15 U.S.C. §§ 7701(a)(3), (4). Congress further found that unsolicited e-mail messages – most of which are fraudulent or deceptive in one or more respects – threaten the convenience and efficiency of e-mail, an “extremely important and popular means of communication.” *Id.* at §§ 7701(a)(1), (2). The law does not make all unsolicited e-mail illegal; it simply proscribes the most abusive practices. For example, it requires that commercial e-mail messages correctly identify their source, allow consumers to unsubscribe, and contain a physical postal address at which the recipient may contact the sender. *Id.* at § 7704.

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

1. False or misleading header information

Instead of identifying themselves as the source of the e-mail they initiate, Defendants make it appear that the messages are sent by innocent third parties. They do this by inserting the e-mail addresses of unwitting third parties in the “reply-to” and/or “from” fields of their spam, a

practice often referred to as “spoofing.” This practice conceals the true identity of the sender and makes it seem that the spam is coming from a variety of innocent parties.⁵

The FTC has attached evidence of thousands of examples where Defendants have “spoofed” a wide array of victims – including various companies, Internet service providers such as AOL and Microsoft Network, schools and individual e-mail addresses. (PX 1 ¶¶ 42-50, Atts. S, T, U, V; PX 5 ¶ 4, Att. A; PX 6 ¶ 3; PX 7 ¶¶ 2-4; PX 8 ¶ 2-5, Atts. A, B, C; PX 10 ¶¶ 2-4, Atts., A, B, C; PX 11 ¶¶ 2-3, Att. A; PX 12 ¶¶ 2-3, Atts. A, B; PX 13 ¶¶ 3-4.) A representative sample of e-mail initiated by Defendants demonstrates that the spam contains at least dozens of “spoofed” third party e-mail addresses every day in the “reply-to” or “from” fields. (PX 1 ¶ 50, Att. V.)

Many of the spoofing victims have suffered considerable harm. Some of the e-mails that Defendants blast out are undeliverable. Under Internet protocols, those messages are then returned to the e-mail address in the “reply-to” field of the spam. Because of the forged headers, this flood of “bounced” undeliverable e-mails goes to those who have been spoofed. In addition, the recipients of this unwanted spam often complain to the person they believe is responsible – the spoofing victim – and this can damage that individual or entity’s reputation. For example:

- the company that owns the Hello Kitty line of girls’ products is continuing to have its hellokitty.com domain name spoofed by Defendants’ spam, causing the company to receive various missives from consumers complaining about Hello Kitty “advertising sexual aids” and sending “extremely offensive spam” (PX 6 ¶¶ 3, 5, Atts. B, C);
- the Internet’s third largest genealogy Web site incurred so many “bounced” e-mail messages attributable to Defendants that the traffic brought down the company’s mail server and eventually forced the company to switch the domain name it used for sending e-mail; the company also received dozens of e-mails and calls from angry consumers who attributed Defendants’ spam to the company (PX 7 ¶¶ 2-3, 5, Att. A);

⁵ Spoofing is used to disguise the identity of the sender, to make recipients open e-mails they may not otherwise open, or to bypass e-mail filters. See *Washington v. Heckel*, 24 P.3d 404, 407 n. 4 (Wash. 2001) (defining spoofing and discussing spam in general).

- an individual's personal e-mail address was flooded with hundreds of "bounced" e-mail messages attributable to Defendants, forcing the individual to miss messages from his friends and family and eventually cancel the personal e-mail address that he had used for nine years (PX 12 ¶¶ 2-4, Att. A).

2. Failure to provide clear and conspicuous opt-out mechanism and a physical address

CAN-SPAM also requires that senders provide a clear and conspicuous notice of the opportunity to decline to receive further e-mail messages and provide a physical postal address where the sender can be reached. *See* 15 U.S.C. § 7704(a)(5). If complied with, these steps would provide consumers with some tools to protest and prevent themselves from being subjected to additional spam. The FTC has attached representative examples of commercial e-mail messages initiated by Defendants. (*See* PX 1 ¶ 53, Att. W.) The e-mail messages often contain no opt-out mechanism, or, at best, a mechanism that is obscured or hidden. (PX 1 ¶¶ 52-3, Att. W; PX 9 ¶¶ 2-3, Att. A.) Moreover, the e-mail messages do not contain a physical postal address in the text. (*Id.*)

V. ARGUMENT

The FTC asks that the Court bring this scam to an immediate end by issuing a temporary restraining order that enjoins further deceptive product claims and illegal e-mail practices. A district court may issue injunctions to enjoin violations of the FTC Act. *See* 15 U.S.C. 53(b); *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir. 1988). To obtain a temporary restraining order, the FTC must merely demonstrate: (1) a likelihood of success on the merits, and (2) that the balance of the equities tips in its favor. *World Travel*, 861 F.2d at 1029. Courts in this district have repeatedly

exercised their authority to grant TROs in FTC fraud actions,⁶ and, as demonstrated below, the injunctive relief requested by the FTC is warranted in this case.

A. There Is A Substantial Likelihood That the FTC Will Prevail on the Merits.

The FTC Act prohibits “unfair or deceptive acts or practices.” 15 U.S.C. § 45(a). As demonstrated above in Section IV, there is ample evidence that Defendants continue to engage in repeated deceptive or unfair acts in violation of the FTC Act, including making material misrepresentations to consumers about their products and engaging in e-mail practices that violate CAN-SPAM. Through their fraudulent scheme, Defendants are bilking consumers out of what likely amounts to hundreds of thousands of dollars a month.⁷

1. Defendants are making material misrepresentations about their products.

Defendants make false claims about their weight loss patches and HGH products. Defendants’ misrepresentations are “deceptive acts or practices” prohibited by the FTC Act. See 15 U.S.C. §§ 45(a), 52(a). A material representation or omission that “likely would mislead” consumers acting reasonably under the circumstances is “deceptive” and violates the FTC Act. See *World Travel*, 861 F.2d at 1029. Express claims are presumed to be material. See *Kraft, Inc.*

⁶ See, e.g., *FTC v. 9094-5114 Quebec Inc., et al.*, No. 03 C 7486 (N.D. Ill. Oct. 23, 2003) (Leinenweber, J.); *FTC v. QT Inc., et al.*, 03 C 3578 (N.D. Ill. May 29, 2003) (St. Eve, J.); *FTC v. STF Group, Inc., et al.*, 03 C 977 (N.D. Ill. Feb. 12, 2003) (Zagel, J.); *FTC v. CSCT, Inc.*, 03 C 880 (N.D. Ill. Feb. 11, 2003) (Coar, J.); *FTC v. 1492828 Ontario Inc., et al.*, 02 C 7456 (N.D. Ill. Oct. 17, 2002) (Guzman, J.); *FTC v. Bay Area Bus. Council, Inc.*, 02 C 5762 (N.D. Ill. Aug. 15, 2002) (Darrah, J.); *FTC v. Stuffingforcash.com, Inc.*, 02 C 5022 (N.D. Ill. July 16, 2002) (Norgle, J.); *FTC v. TLD Network Ltd.*, No. 02 C 1475 (N.D. Ill. Feb. 28, 2002) (Holderman, J.); *FTC v. 1st Financial Solutions, Inc.*, No. 01 C 8790 (N.D. Ill. Nov. 19, 2001) (Kocoras, J.); *FTC v. Growth Plus Int’l Marketing, Inc.*, 2001 WL 128139 (N.D. Ill. Jan. 9, 2001) (Aspen, J.).

⁷ Consumers who purchase Defendants’ products have their credit card transactions processed by Mypaysystems, a payment processor located in Quebec. (PX 1 ¶¶ 17-18, 24-5, 32-3, Atts. C, p. 13, D, G, p. 15, H, K, p. 16, L.) The FTC has thus far been unable to obtain records concerning Defendants’ product sales but will continue to pursue that information. Nevertheless, the scope and size of this operation suggest that Defendants’ sales are significant.

v. *FTC*, 970 F.2d 311, 322 (7th Cir.1992); *FTC v. Febre*, 1996 WL 396117, at *2 (N.D. Ill. July 3, 1996). The “misrepresentation or practice need not be made with an intent to deceive” to violate the FTC Act. *World Travel*, 861 F.2d at 1029.

Here, as described above in Section IV.A.1, Defendants have consistently made express false claims about the central characteristics of their products. Defendants claim that their weight loss patches: (1) cause substantial weight loss, (2) increase metabolism, decrease appetite and reduce food cravings, and (3) cause permanent weight loss. (PX 1 ¶ 14, Att. C pp. 1, 3, 5, 7-8.) However, expert analysis establishes that Defendants’ patches do none of those things and, specifically, will not cause weight loss. (PX 2 ¶¶ 9-10, 14, 16, 18, 20-22, 24, 29-31, 34.)

Moreover, as described above in Section IV.A.2, Defendants have consistently made express false claims about their HGH products. Defendants claim that their HGH products “reverse the effects of aging,” causing a number of positive physical and cognitive effects. (PX 1 ¶¶ 21, 28, Atts. G, pp. 1-2, 5-8, K pp. 1-2, 5-8, 11.) Defendants’ Web sites also claim that the HGH products can “maintain [a user’s] appearance and current biological age for the next 10 to 20 years.” (*Id.* ¶¶ 21, 28, Atts. G, p. 7, K p. 5.) However, expert analysis by two doctors establishes that the HGH products have no physiological effect on the body. (PX 3 ¶ 26; PX 4 ¶ 25.)

In this case, Defendants’ deception is not only “likely” to mislead consumers, it has undoubtedly caused (and continues to cause) significant monetary loss to consumers. Consumers simply would not spend \$80.90 on a weight loss patch or \$74.95 on the HGH products if Defendants had not made false claims about their products. Accordingly, the FTC has demonstrated a likelihood of success on the merits, and a temporary restraining order against Defendants’ misleading advertising is warranted.

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

Defendants are also engaging in “unfair or deceptive acts or practices” under the FTC Act by violating CAN-SPAM.⁸ Defendants’ e-mail messages are aimed at driving traffic to Defendants’ Web sites and causing consumers to purchase Defendants’ products. Under CAN-SPAM, a party must “initiate” e-mail messages to be liable, and Defendants “initiate” the e-mail messages here by either “transmitting” the messages themselves or by “procuring” their transmission.⁹

Defendants first violate CAN-SPAM by initiating commercial e-mail messages that “contain[] header information that is materially false or materially misleading.” 15 U.S.C. § 7704(a)(1).¹⁰ As described above at Section IV.B.1, commercial e-mail messages initiated by Defendants repeatedly and consistently contain e-mail addresses of unwitting third parties in the “reply-to” and/or “from” fields. (PX 1 ¶¶ 42-50, Atts. S, T, U, V; PX 5 ¶ 4, Att. A; PX 6 ¶ 3; PX 7 ¶¶ 2-4; PX 8 ¶ 2-5, Atts. A, B, C; PX 10 ¶¶ 2-4, Atts., A, B, C; PX 11 ¶¶ 2-3, Att. A; PX 12 ¶¶ 2-3, Atts. A, B; PX 13 ¶¶ 3-4.) Thus, Defendants’ spam clearly contains header information that is materially false or materially misleading.

⁸ Pursuant to Section 7(a) of CAN-SPAM, the Act “shall be enforced by the [FTC] as if the violation of the Act were an unfair or deceptive act or practice proscribed under Section 18(a)(1)(B) of the [FTC Act] (15 U.S.C. 57a(a)(1)(B)).” A violation of a rule proscribed pursuant to 15 U.S.C. 57a(a)(1)(B) constitutes an “unfair or deceptive act or practice in violation of § 45(a)(1) [of the FTC Act].” *See* 15 U.S.C. § 57a(d)(3).

⁹ CAN-SPAM defines “initiate” as “to originate or transmit [a commercial e-mail message] or to procure the origination or transmission of such message[.]” 15 U.S.C. § 7702(9). “Procure,” as used in the definition of initiate, means “intentionally to pay or provide other consideration to, or induce, another person to initiate such a message on one’s behalf.” 15 U.S.C. § 7702(12).

¹⁰ CAN-SPAM defines “header information” to include the “originating domain name and originating electronic mail address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message.” 15 U.S.C. § 7702(8). For purposes of 15 U.S.C. § 7704(a)(1), “materially” includes “the alteration or concealment of header information in a manner that would impair the ability of . . . a law enforcement agency to identify, locate or respond to a person who initiated the e-mail message or to investigate the alleged violation, or the ability of a recipient of the message to respond to a person who initiated the electronic message.” 15 U.S.C. § 7704(a)(6).

Additionally, CAN-SPAM makes it unlawful for commercial e-mail messages to be initiated unless the message provides: (1) a clear and conspicuous notice of the opportunity to decline to receive further commercial e-mail messages from the sender; and (2) a valid physical postal address of the sender. *See* 15 U.S.C. § 7704(a)(5). As described above in Section IV.B.2 and demonstrated by the representative sample of Defendants' e-mail, commercial e-mail messages initiated by Defendants often completely ignore these requirements. (PX 1 ¶¶ 52-53, Att. W; PX 9 ¶ 2-3, Att. A.)

In sum, Defendants' repeated violations of CAN-SPAM constitute "unfair or deceptive acts or practices" in violation of the FTC Act. Accordingly, the FTC has demonstrated a likelihood of success on the merits, and a temporary restraining order against Defendants' e-mail practices is warranted.

3. Lance Atkinson and Michael Van Essen Are Individually Liable.

Lance Atkinson and Michael Van Essen are the perpetrators of this illicit scheme and are individually liable for the violations of the FTC Act described above. An individual may be held liable for violations of the FTC Act if the court finds that the individual: (1) actively participated in or had authority to control the deceptive practices, and (2) had or should have had knowledge or awareness of the practices. *See FTC v. Amy Travel*, 875 F.2d 564, 573-74 (7th Cir. 1989); *FTC v. Febre*, 1996 WL 396117, at *8 (N.D. Ill. July 3, 1996). Authority to control can be evidenced by "active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer." *Amy Travel*, 875 F.2d at 573. In addition, the defendants' "degree of participation in business affairs is probative of [their] knowledge." *Id.* at 574.

Here, both Atkinson and Van Essen are in positions to control the practices of GWP. GWP is a closely held company with four shareholders and a principle place of business located

at the same address listed as Van Essen's residential address. (PX 1 ¶ 54-55, Att. X.)¹¹ Both Atkinson and Van Essen have purchased Internet domain names used by GWP. (PX 1 ¶¶ 37-38, 40, Atts. P, Q, R.) As a result of their intimate involvement with GWP, both Van Essen and Atkinson had reason to know of the company's deceptive practices. *See, e.g., FTC v. Growth Plus Int'l Marketing, Inc.*, 2001 WL 128139, at *3 (N.D. Ill. Jan. 9, 2001) (defendants' corporate roles demonstrated knowledge); *FTC v. Windermere Big Win Int'l, Inc.*, 1999 WL 608715, at *5-6 (N.D. Ill. Aug. 5, 1999) (officer and director positions with companies provided "ample evidence" that individuals had authority to control and some knowledge of the deceptive practices).

B. The Balance Of Equities Favors the FTC.

In addition to demonstrating a likelihood of success on the merits, the balance of equities tips strongly in the FTC's favor here. In balancing the equities, the Court must assign greater weight to the public interest advanced by the FTC than to any of Defendants' private concerns. *World Travel*, 861 F.2d at 1030-31. Here, the public has a strong interest in preventing further fraudulent sales of ineffective products and stopping the deluge of spam sent in violation of federal law. In contrast, Defendants have no legitimate interest in continuing to defraud consumers as part of their business. The balance of the equities even more strongly favors the FTC because of the strong likelihood of success on the merits of its claims. *See FTC v. Sabal*, 32 F. Supp. 2d 1004, 1009 (N.D. Ill. 1998).

C. The Relief Sought In the FTC's Proposed TRO Is Appropriate.

In issuing injunctive relief under the FTC Act, district courts have authority "to grant any ancillary relief necessary to accomplish complete justice[.]" *World Travel*, 861 F.2d at 1026 (quoting *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982)). *See also Febre*, 128

¹¹ GWP's other shareholders are Linda Van Essen, who lives with Michael Van Essen, and Carly O'Connor, who lives with Lance Atkinson. (PX 1 ¶ 54, Att. X.)

F.3d at 534 (district court has authority in FTC action to “order any ancillary equitable relief necessary to effectuate the exercise of the granted powers”).

Here, the FTC requests that the Court issue a TRO that includes ancillary equitable relief narrowly tailored to stop Defendants’ scam immediately.¹² The FTC’s proposed TRO would enjoin Defendants from violating the FTC Act and CAN-SPAM. (*See* Proposed TRO §§ I, II.) It also would require that Defendants preserve records and provide an accounting of sales and assets. (*See* Proposed TRO §§ IV, VIII.) Defendants’ deceptive products are shipped to consumers from within the U.S. (PX 1 ¶¶ 19, 26, 34.) The proposed TRO seeks a stay of order processing and fulfillment of those products. (*See* Proposed TRO § III.) The FTC also seeks leave to conduct limited expedited discovery so that it may quickly determine whether assets wrongfully obtained from consumers or relevant documents are located in the United States. (*See* Proposed TRO § IX.) Such order provisions do not work an undue hardship on Defendants, for Defendants have no legitimate interest in persisting with unlawful conduct. *See, e.g., FTC v. World Wide Factors*, 882 F.2d 344, 347 (7th Cir. 1989) (upholding finding of “no oppressive hardship to defendants in requiring them to comply with the FTC Act, refrain from fraudulent representation or preserve their assets from dissipation or concealment”); *Sabal*, 32 F. Supp. 2d at 1009 (same).

¹² The FTC’s Proposed Temporary Restraining Order is attached to its Motion for a Temporary Restraining Order, Other Equitable Relief, and Order to Show Cause Why a Preliminary Injunction Should Not Issue.


VI. CONCLUSION

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

Respectfully Submitted,

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