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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

**DUTCHMAN ENTERPRISES, LLC;
UNITED COMMUNITY SERVICES
OF AMERICA, INC., also doing
business as UCSA DEALERS GROUP,
LLC; and DENNIS LEE;**

Defendants.

Civil Action No.

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

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I. INTRODUCTION

Preying on American consumers' concerns about gas prices and the nation's dependence on foreign oil, defendants Dutchman Enterprises, LLC ("Dutchman"), United Community Services of America, LLC ("UCSA"), and Dennis Lee ("Lee") are hawking the "Hydro Assist Fuel Cell" ("HAFC"), a purported "**Proven Gas Saving Technology**," priced at over \$1,000, that the defendants claim "**will likely double your gas mileage!**" PX11 at 3, 2 (emphases in original).¹ The defendants proclaim that the HAFC has improved gas mileage "by more than 300% in some instances," with increases of up to 261% "achieved in scientific highway tests." *Id.* at 2, 4. However, the defendants' claims for the HAFC violate basic scientific laws and well-established physical principles—their claims are false and cannot be substantiated. Accordingly, the Federal Trade Commission ("Commission" or "FTC") has filed suit against the defendants, and respectfully requests the entry of a Temporary Restraining Order to bring their deceptive practices to a swift end and to obtain related temporary, equitable relief.

The Commission brings this motion *ex parte* to preserve the possibility of monetary redress for consumers. Defendant Lee, who has authority to control defendants Dutchman and UCSA, is a convicted felon with a history of consumer fraud involving purported energy-generating products. At least nine states have prosecuted or sued Lee for peddling such products and/or business opportunities

¹ "PX" references in this memorandum refer to Plaintiff's Exhibits contained in the Volumes of Exhibits in Support of Plaintiff's *Ex Parte* Motion for Temporary Restraining Order filed contemporaneously with this memorandum.

with false claims in violation of consumer protection laws. Courts in eight states have entered injunctive orders against Lee, and he has been held in violation of at least one of these orders. Given Lee’s criminal history of fraud, his recidivism, and his ongoing deceptive conduct, it is likely that he will hide or dissipate assets upon receiving notice of this lawsuit unless the Court takes the precaution of entering an *ex parte* TRO with a temporary asset preservation order.

To further protect the Court’s ability to order effective final relief and deter the defendants from disposing of their property and records, the Commission also requests that the Court authorize expedited discovery and order the defendants to preserve documents and other evidence. Lastly, the Commission requests that the Court direct the defendants to show cause why a Preliminary Injunction should not issue pending a final decision in this matter.

II. BACKGROUND

A. The Parties

Plaintiff FTC is an independent agency of the United States government created by the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (“FTC Act”). 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. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the Commission, through its own attorneys, to initiate federal district court proceedings to enjoin violations of the FTC Act and secure appropriate equitable relief, including rescission of contracts and restitution, the refund of monies paid, and the disgorgement of ill-gotten gains.

Defendant Dutchman Enterprises, LLC is a Delaware limited liability company doing business at 3002 Route 23 North, Newfoundland, New Jersey. PX05 at 3; PX14B; PX15 at 5. Dutchman developed the Hydro Assist Fuel Cell, PX15 at 5, and transacts business in the District of New Jersey and throughout the United States, marketing the HAFC and its parts directly to consumers and through representatives referred to as “dealers.” *See, e.g.*, PX12; PX14B; PX15 at 5; *see also infra* Section III.A.1.

Defendant United Community Services of America, Inc. is a Delaware corporation doing business at 3002 Route 23 North, Newfoundland, New Jersey. PX06 at 3; PX16 at 1-3. UCSA transacts business in the District of New Jersey and throughout the United States, marketing the HAFC directly to consumers and through dealers. *See, e.g.*, PX11 at 1-8; PX11A at 21; PX13; PX16 at 1, 3; *see also infra* Section III.A.1.

Defendant Dennis Lee (“Lee”) is Dutchman’s Chief Operating Officer and Director of Marketing, PX05 at 3, and UCSA’s President. PX06 at 3. At all times relevant to this case, Lee has possessed authority to control Dutchman and UCSA. *Id.* Additionally, Lee does business in this district and throughout the United States by advertising and promoting the sale of the HAFC. *E.g.*, PX01 ¶ 16; PX12; PX15 at 7; PX16 at 2, 3.

At least nine states have charged Lee with violating consumer protection laws by promoting the sale of products and/or business opportunities with false or unsubstantiated claims, such as claims that his products generate “free electricity.”

PX07 at 3-6 (Cal.); PX07A; PX07B at 2-8 (Alaska); PX07C at 2 (Idaho); PX07D at 10-14 (Ky.); PX07E at 2-8 (Maine); PX07F at 2-10 (N.M.); PX07G at 2-3 (Or.); PX07H at 2 (Vt.); PX07I at 2-8 (Wash.).² These actions have resulted in felony convictions against Lee, PX07 at 3-6 (Cal.),³ PX07D at 2-4 (Ky.), jail time for Lee, PX07 at 3-6 (Cal.), court orders banning Lee from advertising or selling products in at least three states, PX07C at 3 (Idaho), PX07E at 28 (Maine), PX07H at 12-13 (Vt.), orders enjoining Lee from making unsubstantiated claims in advertisements, PX07B at 10-11 (Alaska), PX07F at 11-12 (N.M.), PX07G at 8, 38 (Or.), PX07I at 10-11 (Wash.), and at least one court order finding Lee in violation of an earlier order. PX07I at 43-52 (Wash.); *see also* PX07G at 22-26, 28, 35 (Or.) (additional contempt order, vacated due to error in taping of hearing). Lee’s current deceptive marketing of the HAFC violates several of these orders. *See infra* Section IV.D.

² The above-cited law enforcement actions named defendant UCSA as a co-defendant or “d/b/a” of defendant Lee. *E.g.*, PX07B at 2 (Alaska); PX07C at 2 (Idaho); PX07D at 10 (Ky.); PX07E at 2 (Maine); PX07F at 2 (N.M.); PX07G at 2 (Or.); PX07H at 2 (Vt.); PX07I at 2 (Wash.).

³ Lee pled guilty to eight felony charges in the State of California, which charged him with criminal violations of the Seller’s Assisted Marketing Plan Act, CAL. CIV. CODE §§ 1812.201-22, as well as common law fraud in connection with his marketing of a heat pump that purportedly generated electricity. PX07 (Cal.); PX07A, *Lee v. Ventura County Sheriff’s Dept.*, No. 90-56368, 1992 U.S. App. LEXIS 7361 at *1 (9th Cir. 1992) (recounting facts of case and affirming dismissal of convict Lee’s lawsuit against state law enforcement personnel).

Notably, in their promotional materials, the defendants falsely deny that Lee was convicted of crimes in California. PX13 at 24 (“Having never been officially convicted . . . Dennis was illegally kidnapped by the State of California and put into prison”); *see* PX15 at 7:16 (“he was never actually even convicted”).

B. Jurisdiction and Venue

This Court has subject matter jurisdiction over the FTC's claims pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345. Personal jurisdiction over the defendants exists pursuant to the FTC Act's provision for nationwide service of process, 15 U.S.C. § 53(b). *See Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 369 (3d Cir. 2002); *Green v. William Mason & Co.*, 996 F. Supp. 394, 396 (D.N.J. 1998).

Additionally, venue is proper in the District of New Jersey. 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 noted above, all of the defendants do business in this district in Newfoundland, New Jersey, which is located in Passaic County.

III. DEFENDANTS' DECEPTIVE BUSINESS PRACTICES

A. Defendants Deceptively Market the Hydro Assist Fuel Cell.

1. The Defendants Represent that the Hydro Assist Fuel Cell Substantially Increases Vehicles' Gas Mileage, and that Scientific Tests Prove Their Claim.

The defendants promote and sell the Hydro Assist Fuel Cell or "HAFC" kit, and its parts, to American consumers nationwide via print advertisements, Internet websites, recorded video infomercials, and other means described below. *See, e.g.*, PX08; PX09; PX11; PX12; PX14B. According to the defendants, the HAFC is a combination of technologies featuring a fuel cell developed by Dutchman. PX11 at 4; PX11A at 6; PX15 at 5. The defendants claim the HAFC offers "Incredible Savings," fostering "Less Dependence on Foreign Oil." PX09; PX11 at 3. More specifically, as alleged in the Commission's Complaint and detailed below, the

defendants claim that the HAFC substantially increases vehicles' gas mileage, and that scientific tests prove that the HAFC substantially increases gas mileage.

a. Print Advertisements

Print advertisements for the defendants' product have appeared in *Newsweek* and *Popular Science*, among other places.⁴ One advertisement appearing in both publications trumpets that consumers can “**TURN ANY VEHICLE INTO A HYBRID WITH A \$1,000 FUEL CELL MODIFICATION KIT.**” PX08 at 1-2 (emphasis in original); PX01 ¶ 10. The print ads depict vehicles that purportedly experienced substantial increases in gas mileage following the installation of the defendants' HAFC kit. *E.g.*, PX08 at 1 (“This 2007 Honda Civic got 35 miles per gallon stock. Now it gets **85 miles per gallon** highway with a kit that cost \$1,000 and a four hour installation[.] This 2006 Mazda got 33 miles per gallon stock. Now it gets **121 miles per gallon** highway”) (emphasis in original); PX09 at 1 (claiming 39 mpg to 121 mpg increase); *see also* PX09A (*Smithsonian* magazine ad claiming to “double mileage, even with SUVs”). The print ads invite the public to visit the Internet website “picctv.com” for more details. PX08, PX09; PX09A.

b. Internet Websites

Visitors to the advertised website, picctv.com, are automatically routed to another website, preignitioncc.com. PX01 ¶ 14, PX10. This website promotes the Hydro Assist Fuel Cell as a “**Proven Gas Saving Technology**” and precursor to

⁴ An Internet website registered to defendants Lee and UCSA, declarationofenergyindependence.com, displays substantially identical electronic versions of these ads online. PX01 ¶¶ 20, 24; PX13 at 10-12; PX16 at 3.

another purported gas-saving product, the Pre-Ignition Catalytic Converter (“PICC”), which “is still under development.” PX11 at 3, 8; PX11A at 4, 11.

Like the HAFC print ads, preignitioncc.com contains express claims that the HAFC substantially increases vehicles’ gas mileage, such as the following:

The HAFC system will likely double your gas mileage! The kit is ABSOLUTELY GUARANTEED to increase your gas mileage by at least 50%. There is a scientific procedure for testing the vehicle before and after the modification that will PROVE the effect the kit has on your mileage. We have actually improved mileage by more than 300% in some instances.

PX11 at 2; PX11A at 4 (emphasis in original). The website also contains a chart identifying nearly two dozen types of vehicles that have experienced substantial increases in gas mileage, ranging from 50% to 261%, due to the HAFC. An abbreviated version of this chart follows.

Sample of Documented Results with the Hydro Assist Fuel Cell

			MPG		
			Before	After	Savings
Toyota Corolla	1996	4 cyl	23	60	160%
Hyundai	2000	4 cyl	33	75	127%
[Ford] F-150	1995	8 cyl	12.7	33	159%
Marquis	2002	8 cyl	26.78	64.43	141%
Honda Civic	2007	4 cyl	33	85	158%
Ford Cargo Van	1995	6 cyl	11.9	43	261%
<i>Results achieved in scientific highway tests.</i>					

PX11 at 3-4; PX11A at 5-6 (excerpted; emphasis in original).

Preignitioncc.com is just one of several websites affiliated with or registered to the defendants that market the HAFC kit with express claims that the product substantially increases gas mileage, and that scientific tests prove that it produces such results.⁵ For example, a website registered to defendants Lee and UCSA, declarationofenergyindependence.com, asserts: “**THE HAFC SAVES 50% OR BETTER... PERIOD! . . . Mazda 2006 from 46 to 92 mpg now 120 . . . (160%) Dutchman’s 2007 Honda Civic [went] from 33 to 85 . . . (158%).**” PX13 at 4 (emphasis in original); see PX01 ¶¶ 20, 24; PX16 at 3. This website also asserts: “[W]e have scientific data on over two hundred vehicles right now that have gotten over 50% increase in fuel economy and there are a dozen of the smaller four cylinder cars that have gotten over 100 miles per gallon.” PX13 at 7. Moreover, the defendants’ HAFC Installation Manual, displayed on another website registered to Lee and UCSA, installersupport.info, states: “the mileage increases ranged from an increase of about 50% to . . . 100% (and, in some instances, far better than 100% increase).” PX14 at 4; see PX01 ¶¶ 20, 24; PX16 at 1-2.⁶

⁵ Preignitioncc.com bears the notice, “© 2007-2008 UCSA Dealers Group, LLC,” PX11 at 8; PX11A at 11, and states: “This website is brought to you by the UCSA Dealer[s] Group, LLC. UCSA stands for United Community Services of America. . . . This website has been set up to help our dealers” PX11A at 21. A search of national and state domestic corporate registration databases reveals no registered business named “UCSA Dealers Group, LLC.” PX01 ¶ 18. Accordingly, it appears that “UCSA Dealers Group, LLC” is an unregistered, fictitious business name for defendant UCSA. *Id.*

⁶ Another site affiliated with the defendants asserts, “One V-8 F-150 Ford pickup . . . went from 11 mpg highway to 33 mpg. . . . Four cylinder vehicles

c. Video Infomercials

On the Internet, the defendants also promote the HAFC in recorded video infomercials, such as the video recording marked as exhibit PX12 and transcribed in exhibit PX12A. PX01 ¶¶ 16, 17. In this video, defendant Lee presents himself as a “representative for Dutchman Enterprises,” PX01 ¶ 16, PX12A at 3:5-6, and echoes the mileage claims for the HAFC made in print and on Internet websites. Significantly, Lee represents to the public that “the HAFC alone can increase fuel economy by more than 50 percent, and in many cases, it is proven to even more than double your gas mileage.” PX12 at 2:26-2:36; PX12A at 4:19-21; *see also* PX12 at 30:28; PX12A at 24:20-22 (“yes, indeed, we have seen far greater than 50 percent increases in mileage”) (statement of defendant Lee).

d. Defendants’ Dealers

In addition to print advertisements, Internet websites, and infomercials, the defendants also promote the sale of the HAFC through agents known as “dealers.” These dealers are persons authorized by UCSA or Dutchman to sell and distribute the HAFC. PX11 at 7 (referring to dealer selling HAFC kit); PX11A at 21 (citing

almost always double mileage One of our specialists did a 1998 Air [S]tream motor home and it went from 6.8 miles per gallon to 22 mpg!” PX15 at 4; *see id.* at 3 (“We currently have around a dozen cars with the HAFC . . . that have increased their mileage, on our scientific mileage test, of over one hundred miles per gallon!”). These claims appear on wingsofjoy.info, the site of an authorized dealer of the defendants’ product. PX15. In a telephone call placed to defendant Dutchman, Dutchman’s staff specifically referred wingsofjoy.info to the attention of an FTC investigator posing as a consumer seeking information about the HAFC. PX01 ¶ 32; PX19 at 9:22-10:6; *see infra* Section III.A.1.d (discussing phone calls).

“community of UCSA dealers”); PX13 at 5; PX15 at 6 (“dealers . . . are in line to distribute the HAFC kit nationwide”); *see also id.* at 7 (“Dutchman can assure you, that you will always be treated fairly and professionally by our distributors who will live up to their commitments.”). The defendants invite consumers to request an online price quote for the HAFC, PX11 at 7, and explain that consumers “will be assigned a dealer when [they] request a price quote.” PX11A at 21.

The defendants’ dealers represent to prospective purchasers that the HAFC substantially increases gas mileage, and that scientific tests prove that the HAFC produces such results. FTC investigators recorded these verbal representations in phone calls in which they posed as prospective HAFC buyers to record dealers’ sales pitches.⁷ For example, in one phone call, a dealer stated, “we guarantee at least a minimum of a 50 percent increase in the mileage. . . . And a lot of vehicles are getting way more than that.” PX24 at 7:11-16; *id.* at 22:9-10 (citing “actual vehicles that were . . . scientifically tested”). Another dealer was asked, “in the real world, what kind of results are you actually seeing in cars like mine as far as improved gas mileage?” This dealer responded, “eighty to 100 percent increases.” PX18 at 13:16-19; *see id.* at 6:19-20 (“We’ve got a couple dozen vehicles that are over 100 mile[s] a gallon”). Others made similar claims. PX21 at 6:6-13 (“We

⁷ *See* PX01 ¶¶ 26, 30, 31 (describing taping procedure and recordings); PX03 ¶¶ 3, 6-7 (same); PX04 ¶¶ 3, 6-7 (same); PX18, PX19, PX21, PX22, PX24 (transcripts of recorded phone calls). Before making these calls, the investigators received HAFC price quotes and other promotional emails. PX01 ¶¶ 27-28; PX03 ¶ 4; PX04 ¶ 4. Copies of such emails accompany this filing. PX17; PX20; PX23.

just had it installed on a Volkswagen And we went from – this is highway miles – we went from 30 to 77, a little over 77.”); PX22 at 9:1-10:3 (claiming that testing proved that dealer’s vehicle “went 43.5 miles . . . on .56 gallons of gas”).

Notably, the HAFC’s purported gas mileage benefits do not come cheap. The defendants’ dealers have quoted prices of \$1,040, \$1,075, \$1,095, and \$1,175 for the HAFC. PX22 at 28:13; PX15 at 1; PX24 at 12:14-15; PX17 at 1.

2. The Defendants Represent How the Hydro Assist Fuel Cell Purportedly Increases Vehicles’ Gas Mileage.

In their promotional and instructional materials, the defendants describe the HAFC kit and offer a pseudo-scientific explanation of how it purportedly works.

The defendants describe the HAFC as “a combination of long standing, proven technologies” featuring a “precisely engineered fuel cell.” PX11 at 4; PX11A at 6; PX15 at 11; *see* PX12A at 7:13-20. According to the defendants, once this “fuel cell” is installed, it draws electricity from the vehicle’s battery to turn liquid water “into pure gas that is mixed with your gasoline in the combustion chamber. The HHO (water) gas is so rich (5X the potential energy of gasoline) that the amount of gas used to get the same power needed can be leaned out.” PX09 at 1, 2; *see* PX11 at 4; PX11A at 6-7; PX12 at 7:08-7:14, 9:26-9:36; PX12A at 7:24-25, 10:13-15, 12:12-15 (“In other words, we need less actual gasoline . . . if we’re enriching the fuel with water gas.”); PX13 at 6-7.

According to the defendants, the HAFC not only produces “water gas” that is “far more chocked with potential energy than gasoline is,” PX12A at 8:1-2, the HAFC kit also employs “six powerful magnets that ionize the gasoline to produce

smaller molecules and help separate the compounds into simple elements so they burn more completely.” PX11 at 4; PX11A at 7; *see also* PX09 at 1, 2 (promoting “ionization to pre-treat the car’s fuel”); PX12A at 14:4-11 (same). Additionally, the HAFC kit also uses a fuel additive called a “covalizer,” which, the defendants claim, “breaks down the covalent bonds of the long chain gas molecules and helps ‘crack’ and vaporize your fuel.” PX11 at 4; *see* PX09 at 1-2; PX12A at 15:3-11.

Together, the defendants maintain, these technologies substantially increase gas mileage, “greatly decreas[ing] the amount of fuel needed.” PX09 at 1, 2; *see* PX14 at 3 (touting “combination of fuel economizing technologies”); PX11 at 4-5; PX11A at 7; PX13 at 7. With their technology, the defendants assert, consumers will be able to fix “the big fuel wasting combustion process” and “burn all the gasoline in [the] engine . . . instead of exhausting 70% of it into the air.” PX11 at 6, 8; PX11A at 8, 11; *see also* PX21 at 14:22-15:3. However, as discussed below, the defendants are marketing a product that cannot exist and function as claimed.

3. The Defendants’ Claims Are Contrary to Science.

The defendants’ claims for the HAFC violate basic laws of thermodynamics and well-established physical principles, and have no scientific basis. This is the conclusion of an independent, scientific evaluation of the defendants’ materials describing the HAFC, documented in the expert declaration filed herewith.

The FTC staff asked a distinguished physicist, William P. Halperin, Ph.D, the John Evans Professor of Physics at Northwestern University, who serves as the Director of the Nuclear Magnetic Resonance Facility at Northwestern University,

to determine whether the defendants' claims for the HAFC have a scientific basis. Dr. Halperin examined promotional and instructional materials for the HAFC, reviewed pertinent scientific literature, and ultimately produced an expert report, sworn under penalty of perjury, concluding that "the HAFC cannot improve fuel economy or gasoline mileage of a vehicle as described and as claimed." PX02 at 8. In his declaration, Dr. Halperin explains that the defendants' materials contain gross errors and misrepresentations of fact, and the HAFC kit cannot substantially increase gas mileage for numerous reasons, including the six summarized below.

First, the "Hydro Assist Fuel Cell" is not a fuel cell as the defendants claim. A fuel cell converts fuel, like hydrogen, and an oxidant, like oxygen, into electricity, thereby producing electric power. *Id.* at 4 ¶ IV.A (citation omitted). In contrast, the HAFC purportedly *consumes* electricity from a vehicle's battery to generate hydrogen and oxygen. *Id.* Consequently, Dr. Halperin notes, the HAFC is not a fuel cell, and the name "Hydro Assist Fuel Cell" is a "misnomer that misrepresents the function and the performance efficiency of the HAFC." *Id.*

Second, while the HAFC may use electricity to produce hydrogen and oxygen (so-called "water gas") as the defendants claim, this process (known as electrolysis) actually results in a *net loss* of chemical energy. *Id.* at 4-5 ¶ IV.B & App. 2. This is true because energy, in the form of heat, is lost during the process of electrolysis. *Id.* at 5 ¶ IV.B & App. 2. As Dr. Halperin explains, under the first law of thermodynamics, known as the principle of conservation of energy, and the second law of thermodynamics, which constrains the efficiency of heat engines,

the production of “water gas” necessarily results in a net loss of energy. *Id.* at 4-5 ¶ IV.B & App. 2; *id.* at 7. Producing “water gas” actually *reduces* the amount of energy available at the driver’s disposal.

Third, the defendants’ basic premise that “water gas” has “5X the potential energy of gasoline” is false. The energy content of gasoline is *much greater* than that of hydrogen, the fuel in “water gas.” *Id.* at 5 ¶ IV.C & App. 3. Indeed, the energy content in one liter of “water gas,” the amount purportedly produced by the HAFC in one minute, PX14 at 25, is actually equivalent to the energy content of 0.011 of a tablespoon of gasoline—an amount “negligible from an energy point of view.” PX02 at 10. Moreover, Dr. Halperin observes, the HAFC purportedly produces “water gas” at a rate far too small to have a substantial effect on fuel economy and gas mileage. *Id.* at 6 ¶ IV.E & App. 3.

Fourth, there is no scientific basis for the defendants’ claims that “six powerful magnets” in the HAFC kit “ionize the gasoline to produce smaller molecules and help separate the compounds into simple elements.” Practically speaking, magnets on Earth cannot ionize or realign molecules or otherwise alter the molecular structure of liquids, including gasoline. *Id.* at 5-6 ¶ IV.D. Indeed, Dr. Halperin notes, the most powerful magnetic materials known fall “far short” of the magnitude of the field theoretically required to accomplish such a feat. *Id.* at 5-6 ¶ IV.D (“For reactions involving liquids at room temperature or above . . . such magnetic fields are in excess of ten million times the ambient magnetic field of the planet Earth and have never been generated by man.”).

Fifth, there is no known basis for the defendants' claim that the "covalizer" fuel additive "breaks down the covalent bonds of the long chain gas molecules and helps 'crack' and vaporize your fuel." *Id.* App. 4. However, if the "covalizer" worked as the defendants claim, by breaking the bonds of gasoline molecules, Dr. Halperin notes that it actually would have a negative effect, *reducing* the chemical energy available in combustion. *Id.*

Lastly, the defendants' claim that the HAFC helps to "burn all the gasoline in your engine . . . instead of exhausting 70% of it into the air," advances another false premise. It is well-established that over 90% of the fuel in a conventional internal combustion engine is combusted. *Id.* at 6-7 ¶ IV.F-G & App. 3.

"The marketers' claims of increased economy are in violation of the basic laws of thermodynamics, and well-established physical principles." *Id.* at 8 ¶ V. As Dr. Halperin concludes, the HAFC kit cannot substantially increase gas mileage as the defendants claim. *Id.* Consequently, the defendants' claims for the HAFC kit are false and cannot be substantiated.

IV. ARGUMENT

In view of the defendants' ongoing, deceptive marketing of the HAFC kit, and defendant Lee's history of fraud and recidivism, the Commission respectfully requests the issuance of an *ex parte* Temporary Restraining Order with provisions for asset and document preservation, expedited discovery, and an order for the defendants to show cause why a Preliminary Injunction should not issue.

As discussed below, the Court has the authority to enter the relief sought;

the FTC has met the standard for issuance of a Temporary Restraining Order and Preliminary Injunction; an asset and document preservation order with expedited discovery is necessary to preserve the Court's ability to order effective relief; and the Court has good cause to issue the requested TRO on an *ex parte* basis.

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

The Court has the authority to grant injunctive relief under the second proviso of Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which 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.”⁸ Section 13(b) of the FTC Act preserves the Court's inherent power to order not only permanent injunctive relief, restitution, and/or disgorgement of ill-gotten gains,⁹ but also preliminary equitable remedies, including temporary orders instituting asset freezes and issuing other relief.¹⁰

⁸ 15 U.S.C. § 53(b); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *In re Nat'l Credit Mgmt.*, 21 F. Supp. 2d 424, 461-62 (D.N.J. 1998). A “proper case” is a case involving a violation of a law enforced by the FTC. *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982). This action is not brought under the first proviso of Section 13(b), which addresses the circumstances under which the FTC can seek preliminary relief before or during an administrative proceeding. *See id.* at 1110-11.

⁹ *See, e.g., FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-70 (11th Cir. 1996); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-15 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989).

¹⁰ *Security Rare Coin*, 931 F.2d at 1314 (“Section 13(b) does not limit the full exercise of the district court's inherent equitable power.”); *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346-47 (9th Cir. 1989); *FTC v. U.S. Oil & Gas*

When, as here, the public interest is implicated, the Court’s equitable powers “assume an even broader and more flexible character than when only a private controversy is at stake.” *Gem Merch. Corp.*, 87 F.3d at 469 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Courts in the District of New Jersey have repeatedly exercised their authority to grant *ex parte* TROs with ancillary equitable relief in FTC fraud cases,¹¹ and as demonstrated below, the relief requested by the FTC is warranted in this case.

B. The Commission Has Met the Standard for Issuance of a Temporary Restraining Order and Preliminary Injunction.

In the Third Circuit, an agency of the United States government seeking injunctive relief authorized by statute need only show that: (1) probable cause exists to believe that the statute in question is being violated; and (2) absent relief, there is a reasonable likelihood of future violations. *United States v. Focht*, 882

Corp., 748 F.2d 1431, 1434 (11th Cir. 1984) (confirming that the FTC may request preliminary injunctions with ancillary equitable relief, including asset freezes, because the FTC Act did not restrict courts’ inherent equitable powers); *H.N. Singer, Inc.*, 668 F.2d at 1113 (holding that the FTC Act “gave the district court authority to grant any ancillary relief necessary to accomplish complete justice”); *In re Nat’l Credit Mgmt.*, 21 F. Supp. 2d at 462; *see infra* Section IV.C.

¹¹ See, e.g., *FTC v. Rann*, No. 00-2792 (D.N.J. June 9, 2000); *FTC v. Screen Test USA, Inc.*, No. 99-2371 (D.N.J. May 24, 1999); *FTC v. McGowan*, No. 96-3227 (D.N.J. July 1, 1996); *FTC v. Sparta Chem*, No. 96-3228 (D.N.J. July 1, 1996); *FTC v. Car Checkers, Inc.*, No. 93-623 (D.N.J. Feb. 8, 1993); *FTC v. Fax Corp., Inc.*, No. 90-983 (D.N.J. Mar. 19, 1990); *FTC v. Engage-A-Car Servs., Inc.*, 1986 U.S. Dist. LEXIS 19976 (D.N.J. Sept. 24, 1986); *see also Sparta Chem*, No. 96-3228 (D.N.J. Nov. 13, 2007) (*ex parte* TRO issued in contempt action arising in FTC case).

F.2d 55, 57 (3d Cir. 1989); *In re Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 439-40.

Courts also consider the balance of equities and the public interest. 21 F. Supp. 2d at 440. Unlike private litigants, however, the FTC need not show irreparable harm; harm to the public interest is presumed in the absence of an injunction.¹² As set forth below, the Commission has met the standard for issuance of a TRO:

Probable cause exists to believe that the defendants are violating the FTC Act, these violations will likely continue unless the Court intervenes, and the public interest favors the issuance of the requested Order.

1. The FTC Has Demonstrated Probable Cause That the Defendants Are Violating Section 5 of the FTC Act.

Proving a statutory violation is similar to the traditional requirement of proving likelihood of success on the merits. *In re Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 440. In considering this factor, the Court “need only to find some chance of probable success on the merits.” *World Wide Factors*, 882 F.2d at 347.

Section 5 of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a). It condemns as deceptive any material representation or omission that would likely mislead consumers acting reasonably

¹² *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999) (“the Commission need not show irreparable harm”); *see FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991); *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1343 (4th Cir. 1976); *In re Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 438-39 (“[I]rreparable injury must be presumed in a statutory enforcement action.”) (quotation omitted); *FTC v. Nat'l Invention Servs., Inc.*, No. 97-3459, 1997 WL 718492, at *3 (D.N.J. Aug. 11, 1997) (“‘irreparable injury’ . . . [is] presumed from the fact that a federal regulatory statute has apparently been violated”).

under the circumstances. *In re Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 441; *FTC v. Davison Assocs., Inc.*, 431 F. Supp. 2d 548, 559 (W.D. Pa. 2006).

The Court has probable cause to conclude that the defendants are violating Section 5 of the FTC Act. As described above, and evidenced in the exhibits to this filing, defendants Dutchman, UCSA, and Lee are marketing the HAFC with claims that the product substantially increases vehicles' gas mileage and has been proven to do so in "scientific highway tests." *E.g.*, PX11 at 2-4. These claims are false and cannot be substantiated; as Dr. Halperin explains in his expert report, the defendants' claims violate thermodynamic laws and physical principles, and have no scientific basis. PX02. As a matter of law, the defendants' false claims are material because they are express in nature, and are used to promote the purchase of the HAFC.¹³ These false claims are also likely to mislead consumers because, as a matter of law, consumers are entitled to rely on express claims and are under no obligation to doubt the veracity of the defendants' explicit gas mileage claims.¹⁴

¹³ A claim is considered material if it "involves information that is important to consumers and, hence, [is] likely to affect their choice of, or conduct regarding a product." *FTC v. Cyberspace.com, LLC*, 453 F. 3d 1196, 1201 (9th Cir. 2006). Express claims and implied claims used to induce the purchase of a product are presumed to be material. *Thompson Med. Co. v. FTC*, 104 F.T.C. 648, 816 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *see also Pantron I Corp.*, 33 F.3d at 1095-96; *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 604 (9th Cir. 1993); *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 688 n.11 (3d Cir. 1982) ("Once the Commission finds deception, it is normally allowed to infer materiality.").

¹⁴ *See FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) ("Consumer reliance on express claims is presumptively reasonable. It is reasonable to interpret

Accordingly, based on the defendants' deceptive promotion of the HAFC kit with false, express claims of gas mileage increases of 50% and higher, the Court has ample probable cause to conclude that the defendants are violating the FTC Act.

2. There Is a Reasonable Likelihood of Future Violations.

In analyzing whether there is a reasonable likelihood of future violations absent injunctive relief, courts consider several factors, including “the isolated or recurrent nature of the infraction,” and “the nature of the defendant’s occupation.” *In re Nat’l Credit Mgmt.*, 21 F. Supp. 2d at 446. “Past misconduct . . . is highly suggestive of the likelihood of future violations and a ‘court should therefore look at the totality of the circumstances and any factors suggesting that the infraction might not have been an isolated occurrence.’” *Id.* (citations omitted).

In this case, there is a high likelihood of future violations of the FTC Act if the Court does not enter the requested Order. As a marketer of energy-related products, defendant Lee has made a career of flouting consumer protection laws. Acting individually and through companies such as UCSA, Lee has deceptively promoted such products throughout the United States, earning felony convictions and jail time, as well as injunctions in eight states. *See supra* Section II.A. Despite

express statements as intending to say exactly what they say.”). The FTC does not have to prove actual reliance. *FTC v. Freecom Commc’ns*, 401 F.3d 1192, 1204 (10th Cir. 2005) (“the FTC need not prove scienter, reliance, or injury to establish a § 5 violation”); *Security Rare Coin*, 931 F.2d at 1316; *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976) (“the FTC has been sustained in finding that advertising is misleading even absent evidence of that actual effect on customers; the likelihood . . . of deception is the criterion by which advertising is measured”).

these sanctions and orders, Lee and his co-defendants are deceptively marketing another energy-related product, the purported “gas saving” HAFC kit, in violation of the FTC Act. *See supra* Sections III.A, IV.B.1; PX13 at 7 (“We are getting the customers . . . and we need installers.”); *see also* PX21 at 11:18 (“this morning, I have sold about 10 units.”) (statement of HAFC dealer). The defendants’ law violations are hardly isolated in nature; they represent simply the latest episode in Lee’s career of commercial deception. Accordingly, it is proper to issue the requested Order to enjoin further violations of the FTC Act.¹⁵

3. The Requested Order Is in the Public Interest.

In considering whether to issue the requested Temporary Restraining Order and balancing the equities, the Court should give great weight to the public interest. *Affordable Media*, 179 F.3d at 1236 (“Obviously, the public interest in preserving the illicit proceeds . . . for restitution to the victims is great.”); *FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1030 (7th Cir. 1988).

The balance of equities tips strongly in favor of issuing the requested Order. The private equities in this case are not compelling. “A court of equity is under no duty ‘to protect illegitimate profits or advance business which is conducted illegally.’” *CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 143 (2d Cir. 1977) (quoting *FTC v. Thomsen-King & Co.*, 109 F.2d 516, 519 (7th Cir. 1940)); *In re Nat’l Credit Mgmt.*, 21 F. Supp. 2d at 460 (“Defendants do not have

¹⁵ Section I of the proposed Order would enjoin the defendants from marketing products with false or unsubstantiated claims in violation of the Act.

the right to persist in conduct that violates Federal or state law”). Indeed, the public’s interest in stopping the defendants’ false advertising campaign for the HAFC kit and preserving assets for a meaningful monetary remedy far outweighs the defendants’ desire to continue their deceptive advertising activities. “[T]here is 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.” *World Wide Factors*, 882 F.2d at 347. The public interest thus strongly favors entry of the requested Order.

C. An Asset Preservation Order and Expedited Discovery Are Necessary to Preserve the Possibility of Final Effective Relief.

In addition to injunctive relief, the Commission seeks monetary redress for purchasers of the HAFC kit. To preserve the possibility of such redress, and to ascertain the extent of consumer injury caused by the defendants’ practices, the Commission requests that the Court issue an order requiring the preservation of assets and evidence, and authorizing expedited discovery.¹⁶ The equitable relief

¹⁶ Sections II through VIII of the proposed Order contain provisions for the preservation of assets and records, the disclosure of the defendants’ financial status, the identification of their dealers, and expedited discovery to help identify and preserve property and evidence. The rest of the proposed Order provides for a preliminary injunction hearing and contains related procedural provisions.

Section III of the proposed TRO includes a provision directing banks and other financial institutions to freeze assets of the defendants in their custody or control. This Court has the authority to direct its order to third parties to preserve assets that are easily dissipated and may be difficult or impossible to trace. *See United States v. First Nat’l City Bank*, 379 U.S. 378, 385 (1965); *Reebok Int’l, Ltd. v. McLaughlin*, 49 F.3d 1387, 1391 (9th Cir. 1995); *Waffenschmidt v. Mackay*, 763 F.2d 711, 714 (5th Cir. 1985).

requested is similar to that ordered in prior FTC cases in the District of New Jersey. *See supra* note 11.

1. An Asset Preservation Order Is Necessary.

When a district court determines that the Commission is likely to prevail in a final determination on the merits, it has “a duty to ensure that . . . assets . . . [are] available to make restitution to the injured customers.” *World Travel Vacation Brokers, Inc.*, 861 F.2d at 1031. To help ensure the availability of assets, preserve the status quo, and guard against the dissipation and diversion of assets, the Court may issue an order freezing the defendants’ assets. Such an order is well within the Court’s authority. *See CFTC v. Am Metals Exch. Corp.*, 991 F.2d 71, 79 (3d Cir. 1993); *Gem Merch. Corp.*, 87 F.3d at 469 (affirming asset freeze obtained by FTC); *World Travel Vacation Brokers, Inc.*, 861 F.2d at 1031 (same); *Singer*, 668 F.2d at 1107 (same); *In re Nat’l Credit Mgmt.*, 21 F. Supp. 2d at 462 (“a freeze of the assets of all Defendants is appropriate to preserve those assets for possible restitution”). Courts have ordered assets frozen on the basis of pervasive deceptive activities and even the mere possibility of dissipation of assets. *See, e.g., FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989) (holding that possibility of dissipation of assets is sufficient to justify freeze requested by government); *In re Nat’l Credit Mgmt.*, 21 F. Supp. 2d at 462 (citing *Am Metals Exch. Corp.*, 991 F.2d at 79) (freezing assets due to pervasive fraud).

An asset preservation order is necessary in this case because the defendants’ advertising campaign for the HAFC is permeated by misrepresentations, rendering

it likely that the defendants will dissipate assets during litigation. The defendants' promotional materials for the HAFC kit are riddled with false claims. *See supra* Section III.A. In cases involving such deceptive conduct, there is a strong likelihood that the defendants will seek to dissipate assets. *See, e.g., In re Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 462; *FTC v. Nat'l Prize Info. Group Corp.*, No. 2:06-CV-1305, 2006 WL 3234360 at *7 (D. Nev. Nov. 2, 2006); *Nat'l Invention Servs., Inc.*, 1997 WL 718492, at *3. Without an asset freeze, it is unlikely that assets will remain to satisfy a final order granting monetary relief. *See, e.g., In re Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 462; *FTC v. Neiswonger*, 494 F. Supp. 2d 1067, 1083 (E.D. Mo. 2007).

The requested asset preservation order should apply to defendant Lee's assets as well as those of the corporate defendants because Lee is directly involved in the deceptive promotion of the HAFC and is liable for their illegal activities.¹⁷

¹⁷ Individual defendants are liable for corporate violations of the FTC Act if they participate in those acts, have a role in formulating the practices of the company resulting in those acts, or have the authority to control others' actions (such as by assuming the duties of a corporate officer) that they know or should know are taking place. *In re Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 461; *see Amy Travel Serv.*, 875 F.2d at 573-74; *Five-Star Auto Club*, 97 F. Supp. 2d at 535. Moreover, individual defendants also may be held liable for monetary relief if they have knowledge of misrepresentations, reckless disregard to the truth or falsity of representations, or awareness of a high probability of fraud with an intentional avoidance of the truth. *Amy Travel Serv.*, 875 F.2d at 574. Here, defendant Lee may be held personally liable for Dutchman and UCSA's violations because, among other things, he personally promotes the sale of the HAFC with false claims and serves as a high officer of both firms with authority to control their deceptive marketing activities. *See supra* Sections II.A, III.A; *Amy Travel Serv.*, 875 F.2d at 574 ("the degree of participation in business affairs is probative of knowledge.").

Moreover, Lee's personal history of fraud and recidivism underscores that there is a substantial likelihood that he will dissipate assets and/or destroy evidence upon receiving notice of this action unless he is restrained from doing so by this Court.¹⁸ The requested Order is necessary to preserve the possibility of meaningful monetary relief in this case.

2. Expedited Discovery Is Appropriate.

In conjunction with its request for an asset freeze, the FTC seeks leave to conduct limited, expedited discovery and to obtain immediate financial disclosures from the defendants. Specifically, the FTC requests leave to conduct depositions and to issue subpoenas for documents on an expedited basis, and asks that the Court direct the defendants to complete and return the financial disclosure forms attached to the proposed TRO, in order to identify assets for relief and ensure that all relevant assets are subject to the proposed asset freeze.

Federal Rules of Civil Procedure 26(d), 33(a), and 34(b) authorize the Court to alter the standard provisions and applicable timeframes that govern depositions and production of documents. This type of discovery order reflects the Court's broad and flexible authority in equity to grant preliminary relief in cases involving

¹⁸ The proposed TRO also contains a provision directing the defendants to preserve records and evidence. It is appropriate to enjoin defendants charged with deception from destroying evidence and doing so would place no significant burden on them. *See FTC v. Stout*, No. 99-5705, 1999 WL 34833240, *1 (D.N.J. Dec. 8, 1999); *see also SEC v. Unifund SAL*, 910 F.2d 1028, 1040 n.11 (2d Cir. 1990) (characterizing such orders as "innocuous").

the public interest.¹⁹ Judges of this district have issued temporary injunctive orders authorizing expedited discovery and financial disclosures at the outset of numerous actions brought by the FTC under Section 5 of the FTC Act. *See* cases cited *supra* n.11; *see also Stout*, 1999 WL 34833240, at *3-4. Any hardship caused by the requested relief would be temporary, and is greatly outweighed by the public's interest in safeguarding evidence and assets procured through deception.

D. *Ex Parte* Relief Is Necessary and Proper.

The proposed *ex parte* TRO is necessary, and the Court has the authority to enter the requested Order without prior notice to the defendants, because the defendants have demonstrated a manifest disregard for the law and prior notice will likely result in the disappearance of assets procured through their illegal conduct.

Federal Rule of Civil Procedure 65 allows this Court to enter *ex parte* orders upon a clear showing that “immediate and irreparable injury, loss, or damage will result” if the defendants receive advance notice of a proposed order. FED. R. CIV. P. 65(b)(1)(A). Entry of an *ex parte* order is proper when there is a risk that defendants will dissipate or otherwise dispose of their property. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-79 (1974); *see American Can Co. v. Mansukhani*, 742 F.2d 314, 322 (7th Cir. 1984); *In re Vuitton et Fils, S.A.*, 606

¹⁹ *See Porter*, 328 U.S. at 398; *FSLIC v. Dixon*, 835 F.2d 554, 562 (5th Cir. 1987); *Federal Express Corp. v. Federal Expresso, Inc.*, 1997 U.S. Dist. LEXIS 19144, at *6 (N.D.N.Y. Nov. 24, 1997) (early discovery “will be appropriate in some cases, such as those involving requests for a preliminary injunction”) (quoting commentary to FED. R. CIV. P. 26(d)).

F.2d 1, 4-5 (2d Cir. 1979); *see also Vuitton v. White*, 945 F.2d 569, 571-72 (3d Cir. 1991) (citing *Vuitton*, 606 F.2d at 4-5, and reversing denial of *ex parte* relief).

An *ex parte* order is necessary and proper in this case because the defendants are engaged in fraudulent conduct in violation of federal law and state court orders, and their disregard for the law renders it unlikely that they would comply with a noticed order requiring them to preserve assets. By promoting the HAFC kit with false and unsubstantiated claims that the product substantially increases vehicles' gas mileage, see *supra* Section III.A, defendant Lee is violating not only the FTC Act but several state court orders prohibiting him from making unsubstantiated advertising claims. See PX07B at 10-11 (Alaska); PX07G at 8, 38 (Or.); PX07I at 10-11 (Wash.); *see also supra* Section IV.B.²⁰ Defendants UCSA and Dutchman are complicit in these violations.²¹ As previously noted, this illegal conduct is not isolated in nature; Lee is a convicted felon who has been held in violation of a state court order for deceptively peddling products. PX07I at 43-52 (Wash.). In addition, as detailed in the Certification of Counsel filed with this memorandum,

²⁰ Additionally, Lee is promoting the HAFC on websites accessible throughout the United States, PX01 ¶ 23, which would appear to violate other, specific court orders banning him from advertising products in certain states. See PX07C at 3 (Idaho); PX07E at 28 (Maine); PX07H at 12-13 (Vt.).

²¹ UCSA and Dutchman likely are violating the state orders because they have knowledge of the orders as a matter of law through Lee, who is an officer of both firms, *Neiswonger*, 494 F. Supp. 2d at 1080 n.18, and they are participating with Lee in falsely promoting the HAFC as detailed *supra* Section III.A. See generally PX07B at 10 (Alaska) (decree binding Lee and those in concert with him); PX07I at 10 (Wash.) (same).

it is the FTC's experience that defendants engaged in deceptive marketing dissipate their assets and/or destroy records if given prior notice of a proposed TRO. *See* Pl.'s Rule 65 Cert. *passim*. Numerous courts have issued similar *ex parte* orders at the FTC's request to prevent such foreseeable, irreparable injury. *See supra* n.11. Granting *ex parte* relief renders it more difficult for defendants to conceal assets and deters them from disposing of property to frustrate the Court's ability to order full relief. The substantial risk of asset dissipation in this case, coupled with the defendants' ongoing law violations, justifies the issuance of the requested Order.

V. CONCLUSION

For the reasons delineated above, the Commission respectfully requests that the Court enter an *ex parte* Temporary Restraining Order and Show Cause Order, including provisions for expedited discovery and the preservation of assets and evidence, to halt the defendants' ongoing violations of the FTC Act and to protect the Court's ability to issue effective, final relief in this matter as it may deem appropriate.

Respectfully submitted,

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