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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.**	**Civ. No. 2:09-141 (FSH-MAS)** **Hearing Date: May 28, 2009**

PLAINTIFF FEDERAL TRADE COMMISSION'S
SUPPLEMENTAL BRIEF AND CERTIFICATIONS
IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION

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Plaintiff, Federal Trade Commission ("FTC" or "Commission"), pursuant to the Court's Order of May 14, 2009 (#53), respectfully submits its Supplemental Brief and Certifications in Support of its Motion for a Preliminary Injunction.

BACKGROUND

The Commission filed its Complaint on January 12, 2009, seeking injunctive and monetary relief against Dutchman Enterprises, LLC ("Dutchman"), United Community Services of America, Inc. ("UCSA"), and Dennis Lee ("Lee") for their ongoing, deceptive marketing of the Hydro Assist Fuel Cell ("HAFC") kit to buyers nationwide. The Complaint charges the defendants with promoting the HAFC kit with false and unsubstantiated claims that the product causes a substantial increase in gas mileage, and false claims that the HAFC kit has been scientifically proven to increase mileage between 50% and 261%. Compl. ¶¶ 14-17 (#1).

In filing this action, the Commission asked the Court to issue a Temporary Restraining Order ("TRO") to halt the defendants' violations of the FTC Act and to preserve the Court's ability to order monetary relief, and a Preliminary Injunction ("PI") extending that relief. TRO Mot. (#3). On January 14th, the Honorable Faith S. Hochberg, U.S.D.J., found probable cause that the defendants were violating the FTC Act and found that there was good cause to issue the TRO with an asset freeze on an *ex parte* basis due to the defendants' ongoing violations and record of fraud. The Court issued the requested TRO and directed the defendants to appear at a PI hearing before the Honorable Michael A. Shipp, U.S.M.J. TRO (#5).

After the Court issued the TRO, the defendants repeatedly violated the TRO by continuing to market the HAFC kit with prohibited claims that the HAFC kit

causes a substantial increase in gas mileage, and has been scientifically proven to do so, in violation of TRO ¶¶ I.A and I.B; by failing to submit financial disclosure forms in violation of TRO ¶ V; and by failing to identify dealers of the HAFC kit in violation of TRO ¶ VII. These violations continued even after this Court gave the defendants funds to retain outside counsel, and were still occurring as of the date of the PI hearing. Pl.'s Reply Mem., Ex. A, Burton Decl. ¶¶ 9-11 (#29/29-1).

On February 11th, following a hearing, the Honorable Michael A. Shipp issued a Report and Recommendation ("Report") recommending the denial of the FTC's motion. Report (#37). On February 18th, the FTC moved for a new hearing due to audibility issues with the recording of the hearing. The defendants sought to rehabilitate the recording, but these efforts did not produce a recording capable of true transcription. Notice (#51). The Court ordered a new hearing for May 28th.

DISCUSSION

The Court has ample probable cause to conclude that the defendants have deceptively marketed the HAFC kit in violation of the FTC Act and that a PI order is appropriate. Both the evidence presented earlier in this case and the additional evidence submitted with this brief—including consumer affidavits, scientific test results, and the report of a leading automotive engineer—shows that the defendants have deceptively marketed the HAFC kit and that preliminary relief is warranted.

I. Applicable Legal Standards

A. Standard for Preliminary Injunction

As a law enforcement agency seeking injunctive relief authorized by statute,

the FTC need only show that: (1) probable cause exists to believe that the FTC Act is being violated; and (2) absent relief, there is a reasonable likelihood of future violations. *United States v. Focht*, 882 F.2d 55, 57 (3d Cir. 1989); *In re Nat'l Credit Mgmt.*, 21 F. Supp. 2d 424, 439-40 (D.N.J. 1998) (FTC action). Unlike private litigants, the FTC need not show irreparable harm; harm to the public interest is presumed if an injunction does not issue.[1] Further, in balancing the equities, the Court should give great weight to the public interest. *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999); *FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1030 (7th Cir. 1988). In considering the evidence, the Court "need only to find some chance of probable success on the merits." *FTC v. World Wide Factors*, 882 F.2d 344, 347 (9th Cir. 1989).

B. Section 5(a) of the FTC Act and the Preponderance Standard

Section 5(a) 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 under the circumstances. *In re Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 439-40; *FTC v. Nat'l Invention Servs., Inc.*, 1997 WL 718492, at *4 (D.N.J. Aug.

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[1] *Affordable Media, LLC*, 179 F.3d at 1233 ("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).

11, 1997).[2] Deception may be proven by showing that the claim at issue is false, or that the defendants did not possess a reasonable basis for the claim when they made it. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994); *FTC v. Direct Mkt'g Concepts*, 569 F. Supp. 2d 285, 299 & n.6 (D. Mass. 2008).

When an advertiser makes a specific claim that scientific tests prove that a product works, the advertiser must possess such proof.[3] "Defendants have the burden of establishing what substantiation they relied on for their product claims." *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 959 (N.D. Ill. 2006). While the Commission must show that the defendants' substantiation is inadequate, it "need not conduct or present clinical studies showing that the product does not work as claimed." *Id.*

The FTC need only prove violations of Section 5(a) of the FTC Act by a preponderance of the evidence; it is not required to present irrefragable proof. *FTC v. Davison Assocs., Inc.*, 431 F. Supp. 2d 548, 554 (W.D. Pa. 2006); *FTC v. Check Enforcement*, 2005 WL 1677480, at *5 (D.N.J. July 18, 2005). The preponderance standard is simply "evidence by 'fifty-one percent,' or to the extent of 'more likely

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[2] The FTC does not have to prove actual reliance, injury, or scienter; the likelihood of deception "is the criterion by which advertising is measured." *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976); *see FTC v. Freecom Commc'ns*, 401 F.3d 1192, 1204 (10th Cir. 2005); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991). However, in the declarations discussed below, the FTC has provided proof of consumer reliance and injury.

[3] *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1492 n.3 (1st Cir. 1989); *Thompson Med. Co. v. FTC*, 791 F.2d 189, 194 (D.C. Cir. 1986); *Bristol-Myers Co. v. FTC*, 102 F.T.C. 21, 321, *aff'd*, 738 F.2d 554 (2d Cir. 1984); *see Direct Mkt'g Concepts, Inc.*, 569 F. Supp. 2d at 299.

than not.'" *In re OCA, Inc.*, 551 F.3d 359, 372 n.41 (5th Cir. 2008).

II. The Record Evidence Shows that Preliminary Injunctive Relief Is Appropriate.

The FTC has adduced proof sufficient to establish, by a preponderance of the evidence, that the defendants have deceptively marketed the HAFC kit in violation of Section 5(a) the FTC Act and that preliminary injunctive relief is appropriate. In particular, in its previous filings, the FTC has demonstrated that the defendants have falsely marketed the HAFC kit as a product that causes substantial increases in gas mileage, citing anecdotal, unscientific reports. Further, the FTC has relied on the defendants' recent misconduct, not merely their past record, to show that the defendants are likely to continue violating the law unless injunctive relief issues.

A. The Record Evidence Shows that the Defendants Have Deceptively Marketed the HAFC Kit in Violation of the FTC Act.

The defendants have misrepresented the HAFC kit's method of operation and efficacy, and they have led the public to believe that they have scientific proof for their gas mileage increase claims when, in fact, they are relying on unscientific, anecdotal reports. The defendants' misrepresentations clearly violate the FTC Act.

First, the HAFC kit's advertised method of operation is riddled with false claims. The defendants falsely claim that the "Hydro Assist Fuel Cell" is a fuel cell, PX12A at 7:18, when in fact, it is not. PX02 at 4 ¶ IV.A. They falsely claim that the HAFC kit produces hydrogen "water gas" as a fuel that "has five times the potential energy of regular gasoline," PX12A at 7:124-25, *id.* at 7:19-20 ("we're converting water to water gas and that is an actual fuel") (statement of defendant

Lee), when in reality, gasoline has much more energy than hydrogen. PX02 at 5 ¶ IV.C & App. 3. The defendants also falsely claim that the HAFC kit "burn[s] all the gasoline in your engine . . . instead of exhausting 70% of it into the air," PX11 at 8, when, in fact, over 90% of the fuel in a conventional internal combustion engine is combusted. PX02 at 6-7 ¶ IV.F-G & App. 3. They also lie to the public in claiming that "six powerful magnets" in their kit "ionize the gasoline to produce smaller molecules and help separate the compounds into simple elements," PX11 at 4, when in truth, magnets simply cannot ionize or alter the molecular structure of liquids, including gasoline. PX02 at 5-6 ¶ IV.D; *see also* Defs.' Br., Ex. D, Holler Aff'd at 3 (#5) (conceding that "magnets cannot alter the molecular structure of gasoline, nor can [they] 'ionize' . . . the fuel.").[4] As the above examples illustrate, the defendants' marketing of the HAFC kit is permeated with deception.

After the FTC presented these and other facts, the defendants "shifted gears" and advanced a previously-unpublicized and equally false theory for their claims. Under this theory, the HAFC kit purportedly increases gas mileage substantially not by increasing combustion efficiency (*i.e.*, the extent to which a vehicle burns

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[4] The defendants acknowledged that the above-cited claim was false, but did not remove it from their promotional materials. Pl.'s Reply Mem., Ex. A, Burton Decl. ¶ 10 & Attach. D (#29-1/#29-5). Also, notably, the defendants admit that several of the above steps take place *before* fuel enters a car's engine. PX11 at 5 (stating that HAFC kit "vaporize[s] and ionize[s] the fuel before mixing with oxygen and hydrogen inside the engine"); PX13 at 7 ("magnets ionize [gasoline] to help vaporize the gas before it is mixed with the water gas that is injected into the air intake"). Accordingly, expertise specifically relating to internal combustion engines is not necessary to debunk these claims.

gasoline), but by increasing mechanical work efficiency (*i.e.*, the extent to which a vehicle burns gasoline and converts the energy into mechanical work). However, the scientific report submitted by the FTC with its TRO motion forecloses this theory. Not only does the HAFC kit produce hydrogen at a net *loss* of energy, actually *reducing* the amount of energy available to the driver, PX02 at 4-5 ¶ IV.B & App. 2; *id.* at 7, but the kit produces hydrogen at a rate far too slow to yield any substantial improvement in fuel economy. PX02 at 6 ¶ IV.E & App. 3. The report specifically concludes that the HAFC kit "does *not* significantly improve the mechanical work efficiency" of vehicles. *Id.* at 7 ¶ IV.G (emphasis).

Due to basic physical limits, the HAFC kit is incapable of substantially increasing gas mileage. *Id.* Significantly, a personal inspection of the HAFC kit is unnecessary to debunk the defendants' false claims, because the physical facts contradicting their claims are already well-documented in the scientific literature. PX02 at 5 ¶ IV.C & App. 3; *id.* at 5-6 ¶ IV.D.[5] Nevertheless, as discussed further

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[5] The defendants dismissed these facts on the grounds that the FTC's expert, Dr. Halperin, had no relevant expertise. However, Dr. Halperin is clearly an expert in thermodynamics—the study of the conversion of heat energy into other forms of energy, including mechanical work. Thermodynamic and other physical laws govern the operation of the internal combustion engine. Hence, the defendants' dismissal of Dr. Halperin's expertise was improper. *See Wylie v. Ford Motor Co.*, 536 F.2d 306, 308 (10th Cir. 1976) ("It is not necessary that a witness who has broad and extensive training in physics, a field which embraces the science of mechanics, must be specifically qualified as an automotive engineer before he is allowed to testify.") (citations omitted); *see also Dychalo v. Copperloy Corp.*, 78 F.R.D. 146, 149 (E.D. Pa. 1978) (Becker, J.) (citing *Wylie* with favor and noting that "the basic laws of physics underlie all engineering specialization").

below, the FTC has obtained the results of scientific testing confirming that the kit does not substantially increase gas mileage as the defendants falsely claim.

The defendants' deceptive efficacy claims for the HAFC kit justly provoke skepticism. To overcome this skepticism, the defendants also falsely promote the HAFC kit as a scientifically-proven product, citing their own "orange test" results. In its prior filings, the FTC submitted evidence that the defendants' "orange tests" are anecdotal reports of road trips written by the defendants' business associates, not scientific studies conducted by automotive engineers or independent observers.[6] The defendants' "orange test" differs greatly from widely-accepted scientific tests for gas mileage—tests undertaken under controlled conditions in a laboratory using standard protocols specified by federal law, employing a dynamometer to simulate driving conditions and to control for relevant variables, and measuring carbon exhaust to calculate fuel consumed. Reply Mem. at 5-6, 9-10; Attach. H.

The above-cited facts make clear that the defendants have violated the FTC Act. There are three elements to the charged violations of the FTC Act: (1) the defendants made a claim in commerce; (2) the claim is material; and (3) the claim would likely mislead a reasonable consumer. *FTC v. Nat'l Invention Servs., Inc.*, 1997 WL 718492, at *4. As this Court's Report observed, there is no dispute that

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[6] *See, e.g.*, Defs.' 2d Br., Ex. D, Burlum Aff'd, Orange Tests (#19-2); Pl.'s Reply, Ex. A, Burton Decl. ¶ 12 (identifying "orange test" affiant Burlum as HAFC dealer based on his website). The defendants' attorneys promised to file "affidavits describing . . . tests performed by independent observers . . . prior to the hearing on February 5[th]," Defs.' 2d Br. at 4 n.1 (#19), but failed to file them.

the defendants made the challenged claims; the defendants expressly claim that the HAFC kit causes a substantial increase in gas mileage, and has been proven to do so.[7] Hence, the first element of the charged violations is established. Also, there is no real dispute that the defendants express claims are material. As a matter of law, express claims and claims used to induce the purchase of a product are material.[8] Hence, the second element of the violations is established. Further, there is no real dispute that consumers reasonably rely on the defendants' claims. Consumer reliance on express claims is presumptively reasonable.[9] Hence, the sole issue in dispute at present is whether the defendants' claims are false or unsubstantiated. The voluminous evidence summarized above shows that the defendants' advertised claims are both false and unsubstantiated. The defendants thus have engaged in deceptive commerce in violation of the FTC Act.

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[7] Report at 8; *see also* PX13 at 4 ("**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%)**.") (emphasis in original); *id.* at 7 ("[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.").

[8] Report at 8; *see 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).

[9] *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 express statements as intending to say exactly what they say."). Further, as noted below, the FTC has submitted consumer declarations providing proof of consumer reliance on the defendants' deceptive claims.

B. The Record Evidence Shows that the Defendants Are Likely to Persist in Violating the FTC Act and that the Public Interest Favors Preliminary Injunctive Relief.

As the Court's Report noted, "Defendant Lee has a checkered past and the similarities between prior offenses and the current allegations are striking." Report at 12. However, the FTC has not rested solely on Mr. Lee's "rap sheet" to show that there is a reasonable likelihood of future violations. The FTC has cited three other, salient factors: First, the defendants engaged in numerous violations of the Court's TRO in this matter. *See supra* page 2. Second, by promoting the HAFC kit with false and unsubstantiated claims, the defendants are violating not only the FTC Act but several state court orders prohibiting them from making such claims. PX07B at 10-11 (Alaska); PX07G at 8, 38 (Or.); PX07I at 10-11 (Wash.). Third, the defendants have promoted the HAFC kit on websites accessible throughout the country, PX01 ¶ 23, thereby violating court orders banning them from advertising products in several states. *See* PX07C at 3 (Idaho); PX07E at 28 (Maine); PX07H at 12-13 (Vt.). The defendants' repeated violations of the TRO and numerous state court injunctions shows that the defendants simply will not abide by the law, absent preliminary injunctive relief from a federal court.

In balancing the equities, public equities are entitled to far greater weight. Report at 12 (quotations omitted). Whether they sell products to wholesale or retail purchasers, the defendants deceptively market the HAFC kit to the detriment of the

public.[10] There is no oppressive hardship to defendants in requiring them to stop this activity. *Nat'l Credit Mgm't*, 21 F. Supp. 2d at 460 ("Defendants do not have the right to persist in conduct that violates Federal or state law."); *Thompson Med. Co.*, 791 F.2d at 195 ("The FTC has a mandate to assure that advertising is not false and misleading. Allowing firms to continue such advertising because to stop would hurt the firm's economic interests is obviously not part of the calculus of interests Congress intended the FTC to consider.").

III. Additional Evidence Submitted with this Filing Further Confirms that the Defendants Have Deceptively Marketed the HAFC Kit and that Preliminary Injunctive Relief is Appropriate.

In addition to the evidence previously presented, there are further grounds to issue a Preliminary Injunction at this time due to the emergence of: (1) numerous complaining consumers whom the defendants previously suggested were satisfied buyers; (2) the adverse opinion of a scientist previously cited by the defendants, who rejects the defendants' claims and their counsel's comparison of the HAFC kit to another device; and (3) physical, scientific dynamometer testing of the HAFC kit, which conclusively confirms that the product does not substantially increase gas mileage. This evidence addresses each of the issues identified in the Court's Report and further demonstrates that the requested PI order is well-warranted.

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[10] The defendants sell the HAFC kit to dealers, and these buyers are entitled to protection from deceptive practices. The term "consumer" in the FTC Act, 15 U.S.C. §§ 41 *et seq.*, does not exclude businesses that buy products for commercial purposes. S. REP. NO. 93-151 at 27 (1973) (discussing term and stating, "[t]he use of the word 'consumer' . . . is to be read in its broadest sense").

Aggrieved Consumers. First, since the unsealing of this case, numerous aggrieved consumers have come forward to challenge the defendants' claims for the HAFC kit and to demand relief from the defendants' deceptive marketing scam. Significantly, these consumers are not merely purchasers of the HAFC kit; many of them are, in fact, the *very same people* whose names appeared on the "orange test" reports (or "Mileage Test Calculation" forms) filed by the defendants in this case as proof for their claims. The defendants brazenly used these consumers' names in arguing that testing proves their claims. However, many of these consumers have come forward to swear, under oath, that they never received *any* substantial gas mileage increase with the HAFC kit. In most cases, they received no increase in gas mileage whatsoever, despite spending thousands of dollars and many hours in purchasing the HAFC kit, having it installed by a certified installer, and diligently trying to get the product to work. The declarations of these defrauded consumers vividly illustrate the real impact of the defendants' scam and plainly attest to the need for preliminary injunctive relief, including an asset freeze to preserve funds that the Commission intends to locate for effective redress to consumer victims. Sworn declarations from numerous consumers whose names appeared in the defendants' previous filings are attached hereto as **Exhibit A**.[11]

Physical, Scientific Testing. Second, since the unsealing of this case, the

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[11] Pursuant to the Court's statements and order of May 14, 2009, the FTC intends to move these items into evidence at the PI hearing. *See, e.g.*, *FTC v. Amy Travel Servs., Inc.*, 875 F.2d 564, 576-77 (7th Cir. 1989) (affirming admission of consumer declarations at final trial on merits under residual hearsay exception).

Commission has obtained the results of physical, scientific testing, in the form of dynamometer tests of the HAFC kit, confirming that the product cannot and does not substantially increase gas mileage. These physical tests were performed by an independent automotive testing facility in New Jersey, Compliance and Research Services, Inc., which has been recognized by the U.S. Environmental Protection Agency. The tests show that a vehicle that obtained gas mileage of 34-35 miles per gallon before the installation of the HAFC kit also received gas mileage of 34-35 miles per gallon after the installation of the kit. Hence, there is now additional, physical proof that the HAFC kit does not perform as the defendants claim. The certified dynamometer test results for the HAFC kit are attached as **Exhibit B**.[12]

The Automotive Engineer Cited by the Defendants Rejects Their Claims. Third, since the initial Preliminary Injunction hearing in this case, the FTC has learned that the automotive engineer and scientist whom the defendants cited at the February 5th hearing actually rejects their claims for the HAFC kit. In the hearing, the defendants cross-examined the FTC's witness, Dr. Halperin, using a book on internal combustion engines written by Dr. John Heywood, a mechanical engineer at the Massachusetts Institute of Technology ("MIT"). Dr. Heywood has decades of experience with internal combustion engines and is one of the nation's leading experts in the field. His book is one of the leading references in the field.

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[12] At the May 28th hearing in this matter, the FTC will introduce these test results through the testimony of the general manager of the above-referenced firm, who participated in the dynamometer testing. The FTC's other witnesses may also offer brief testimony relating to this testing.

However, Dr. Heywood firmly rejects the defendants' claims for the HAFC kit and their suggestion that a device developed at MIT, the plasmatron, bears any material similarity to the HAFC kit. After the February 5th hearing, the FTC contacted Dr. Heywood and provided him with the affidavits and material filed by the defendants in this case, the technical specifications and other materials for the HAFC kit filed by the FTC, and the test results for the HAFC kit. Applying his expertise in the field of automotive engines, fuels, and engineering, Dr. Heywood concurs that the defendants' claims for the HAFC kit are false and unsubstantiated by any scientific testing. He rejects the defendants' "orange test" results and their claims that the HAFC kit purportedly substantially increases gas mileage. In short, Dr. Heywood confirms that the defendants' marketing of the HAFC kit is a scam. Dr. Heywood has produced a detailed expert report to assist the Court, attached as **Exhibit C**.[13]

Further Detailed Criticism of Defendants' "Orange Tests" and HAFC Theory. Additionally, the FTC's initial expert witness, Dr. Halperin, an expert in experimental technique, has further analyzed the defendants' "orange test" protocol and their new theory concerning how the HAFC purportedly increases mileage. Dr. Halperin has produced a supplemental expert report identifying many grave flaws in the "orange test" that render it unscientific and unreliable. He has also produced a supplemental expert report reviewing scientific literature on the use of hydrogen, verifying that there is no scientific evidence that the HAFC kit or any

[13] In addition to the testimony of its initial expert witness, Dr. Halperin, the FTC intends to present the testimony of Dr. Heywood at the May 28th hearing.

device producing hydrogen at the same rate as the HAFC kit can have a substantial effect on gas mileage. These materials, attached as **Exhibit D**, further confirm that the defendants' tests and their claims for the HAFC kit are invalid.

IV. The FTC's Motion for Preliminary Injunctive Relief Is Not Moot.

The defendants have argued to FTC counsel that this case is moot because the defendants have sold their interests in the HAFC kit to a third party or have dissipated their assets. However, neither of these contentions moot the FTC's PI motion. "Abandonment of the illegal conduct does not render the controversy moot." *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 927 (6th Cir. 1968) (citations omitted). The Third Circuit has resolved this legal issue in favor of the FTC. *Spencer Gifts, Inc. v. FTC*, 302 F.2d 267, 268 (3d Cir. 1962) (per curiam); *Hunt Pen Co. v. FTC*, 197 F.2d 273, 281 (3d Cir. 1952) (upholding order issued years after practices ceased). Moreover, the fact that the defendants may have disposed of or hidden assets does not mean that assets cannot be found. This case is far from moot. Preliminary injunctive relief is appropriate to prevent further injury to consumers and to help recover defrauded consumers' funds.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests the issuance of a Preliminary Injunction against the defendants in this matter.

Respectfully submitted,

Dated: May 21, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing document and its attachments were served by operation of the Court's electronic case filing system upon the following:

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