Sealed

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FEDERAL TRADE COMMISSION,

PLAINTIFF,

v.

HISPANIC GLOBAL WAY, CORP; HISPANIC GLOBAL WAY, LLC; HISPANIC GLOBAL WAY VENEZ CORP, also d/b/a TVO; HISPANIC GLOBAL WAY VENEZ I CORP; GOLD LEAD USA CORPORATION; SKY ADVANCE CHOICES CORP; SKY ADVANCE, LLC; FIRST AIRBORNE SERVICE TRADING CORP, also d/b/a FAST SOLUTIONS, L'NATURE LAB, MOVIL ENGLISH F.A.S.T., MOLDING MOTION 5 FIRST AIRBORNE; HISPANIC NETWORK CONNECTIONS LLC, also d/b/a LO VI EN TV; FAST SOLUTIONS PLUS CORP; GRAND TEAM SERVICE CORP; MARIA ELIZABETH VERA; RAFAEL MARTIN HERNANDEZ; ROBERTO CARRASCO MACEDO; AND MARIA GISELLA CARRASCO,

DEFENDANTS.

Filed Under Seal

Case No. 14-22018 CIV-ALTONAGA

FEDERAL TRADE COMMISSION'S *EX PARTE* MOTION FOR A TEMPORARY RESTRAINING ORDER, ASSET FREEZE, APPOINTMENT OF A TEMPORARY RECEIVER, IMMEDIATE ACCESS, OTHER EQUITABLE RELIEF, AND ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT ISSUE, AND MEMORANDUM IN SUPPORT THEREOF

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I. INTRODUCTION

Defendants' nation-wide Spanish-language television commercials and inbound telemarketing violate the law and harm consumers in two ways. First, by routinely delivering the wrong product and then refusing to make consumers whole, they essentially steal consumer's money. This is an unfair practice in violation of the FTC Act. Second, they make extravagant false and unsubstantiated weight loss claims about their "Moulding Motion 5" belt, charging $159 to $249 for a product that fails to provide any of their promised benefits. This is a deceptive practice in violation of the FTC Act. Although it is impossible to determine the full extent of injury before accessing Defendants' records, these ongoing practices likely have caused millions of dollars in consumer injury.

The Commission respectfully requests that this Court issue an *ex parte* temporary restraining order ("TRO") to stop Defendants' scam and prevent them from destroying documents and dissipating assets. Given the egregiousness of Defendants' practices and their use of multiple, shifting front companies to move money offshore, providing Defendants with notice of this proceeding would undermine the effectiveness of final relief. The FTC's proposed *ex parte* TRO would stop Defendants illegal sales practices; temporarily freeze their assets; appoint a temporary receiver over the Corporate Defendants; provide immediate access to relevant business premises and records; and require Defendants to turn in their passports until they repatriate all assets.

II. THE DEFENDANTS

The Corporate Defendants, eleven Florida corporations, operate as a common enterprise, sharing office space, management, and funds. Four Individual Defendants control the common

enterprise. They act as a single entity to defraud consumers, and ultimately transfer their ill-gotten gains to Peru and other countries.

A. Defendants Share Office Space and Management, and Commingle Funds.

Defendants operate out of the same offices. **Hispanic Global Way, Corp** ("HGW Corp"), **Hispanic Global Way Venez Corp** ("HGW Venez"), **Hispanic Global Way Venez I Corp** ("HGW Venez I"), and **Hispanic Global Way, LLC** ("HGW LLC") (collectively known as "Hispanic Global Way"); **Gold Lead USA Corporation** ("Gold Lead"); **Sky Advance Choices Corp** ("Sky Advance Choices"), **Sky Advance, LLC** ("Sky Advance") (collectively known as "Sky Advance"); and **Grand Team Service Corp** ("Grand Team") all operate from a single office at 4005 NW 114th Avenue, Suite 13, Doral, Florida 33178. PX1 ¶¶ 17-23, Exs. 2-8.[1] **First Airborne Service Trading Corp (d/b/a Fast Solutions, Nature Lab, Movil English**

[1] The FTC submits 3 volumes containing a total of 25 exhibits in support of its Motion. **Volume 1** contains PX1, FTC investigator John Aiken's declaration. These exhibits include: (1) information about the Corporate Defendants' business structure; (2) a summary of numerous consumer complaints related to the Defendants' business practices; (3) an analysis of Defendants' banking and financial records; and (4) an analysis of data obtained from third-party processors. PX1 summarizes voluminous records pursuant to Federal Rule of Evidence 1006. The original records are available for examination or copying. **Volume 2** contains declarations from an FTC employee and consumer victims. PX2-PX7 include a declaration of an FTC employee who conducted four undercover calls posing as a consumer and transcripts of those calls. PX8 through PX22 are sworn consumer declarations from 15 consumer victims. **Volume 3** contains: (1) a declaration from Cornell University professor, David Levitsky; (2) Spanish-language television advertisements; and (3) certified translations of these advertisements. Plaintiff uses the following format for evidentiary citations: "PX1 at 2" refers to page 2 of Plaintiff's Exhibit 1; "PX2 ¶ 13, Ex. 1" refers to Paragraph 13 and Exhibit 1 to Plaintiff's Exhibit 2. Exhibits containing personally identifiable information have been redacted, pursuant to the Southern District of Florida's Civil Filing Requirements Section 3 and Federal Trade Commission policy.

F.A.S.T.) ("First Airborne")[2] and **Hispanic Network Connections LLC** (d/b/a Lo vi En TV) ("Hispanic Network Connections") both operate from the suite next door.[3] PX1 ¶¶ 24, 25, Exs. 10-11. **Fast Solutions Plus Corp** ("Fast Solutions Plus") operates out of a different suite in the same building. PX1 ¶ 26, Ex. 19. Although based in Florida, Defendants' call centers are in Peru. PX1 ¶ 56, Ex. 39.[4]

The Corporate Defendants also pool their assets and revenues, as evidenced by multiple payments between Defendants' bank accounts. There are numerous transfers between HGW Corp, HGW Venez, Gold Lead, First Airborne, Hispanic Network Connections, Fast Solutions Plus, HGW LLC, and Sky Advance Choices. PX1 ¶¶ 83-87, 89-91, 96, 101 and Exs. 46 and 47. They also make payments on each other's behalf, such as paying each other's annual corporate fees. PX1 ¶ 88.

B. <u>The Individual Defendants Control the Common Enterprise by Serving as Officers, Managers, and Bank Account Signatories for the Corporate Defendants.</u>

Maria Elizabeth Vera is, or was, an officer of HGW Corp, HGW Venez, and HGW Venez I, a manager of HGW LLC and Sky Advance, and a signatory for HGW Corp, HGW Venez, and HGW LLC's bank accounts. PX1 ¶¶ 28, 59, Exs. 43-44. Additionally, Ms. Vera is listed as a contact for HGW Corp on the Better Business Bureau ("BBB") website, and the BBB has notified her about consumer complaints filed against Hispanic Global Way. PX1 ¶ 28, 45,

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[2] In 2012, First Airborne operated from the same suite as Hispanic Global Way. PX1, ¶ 24, Ex. 9.

[3] In 2013, Hispanic Network Connections operated from the same suite as Hispanic Global Way. PX1 ¶ 25, Exs. 16-17.

[4] A non-Defendant director of HGW resides in Lima. PX1 ¶ 17.

Ex. 34. **Rafael Martin Hernandez** is, or was, an officer of HGW Corp, HGW Venez, HGW Venez I, First Airborne, Sky Advance Choices, Gold Lead, and Fast Solutions Plus. PX1 ¶¶ 29, 59 Exs. 43-44. He is, or was, a manager of Sky Advance and of Hispanic Network Connections. PX1 ¶ 29. He is a signatory on HGW Corp, HGW LLC, HGW Venez, Sky Advance, and Hispanic Network Connection's bank accounts. PX1 ¶¶ 29, 59, Exs. 43-44. Mr. Hernandez is listed as a contact for HGW Corp on BBB's website. PX1 ¶ 29, 45, Ex. 33. **Roberto Carrasco Macedo** is, or was, an officer of Grand Team and a signatory on Grand Team's bank account. PX1 ¶¶ 30, 59, Exs. 43-44. He also was the vice president of HGW Corp and a signatory on a HGW Corp bank account. *Id.* **Maria Gisella Carrasco** is, or was, an officer of First Airborne and Grand Team. PX1 ¶ 31. She also is, or was, a manager for Sky Advance and Hispanic Network Connections. *Id.* She is a signatory on Hispanic Network Connections' and on a First Airborne bank account. PX1 ¶¶ 31, 59, Exs. 43-44.

C. Defendants Market Their Products Through a Common Enterprise.

The Corporate Defendants sell and market the same products through the same television advertisements. They use the same invoicing and billing systems and share customer telephone numbers. Often, consumers ordering from one Defendant receive invoices listing several others. For example, an FTC employee posing as a consumer ordered a product from Hispanic Network Connections and received a package invoice from "Customer Services Department[:] Hispanic Global Way-HGW[,] Hispanic Network Connections-HNC[,] First Airborne Service Trading-Fast Solutions[,] Molding Motion 5." PX1 ¶ 127, Ex. 60.

Additionally, consumers ordering from one Defendant are frequently billed by another. For example, consumers ordering from Hispanic Global Way received notes with their packages stating that the bank debit or credit card charge "will be recorded in your statement under the

name FIRST AIRBORNE SERVICE TRADING and/or HISPANIC GLOBAL WAY." *See, e.g.*, Herrera, PX16 ¶ 8, Ex. C; Morales, PX19 ¶¶ 2-3, Exs. A, B (purchased a product from HGW Corp but charge appeared as "First Airborne Svc Trad"). Customer service numbers printed on Hispanic Global Way invoices are the same as those on Hispanic Network Connection invoices. Herrera, PX16, Ex. D and Flores, PX14, Ex. B.

Defendants' website clearly illustrates the many ties between Defendants. PX1 ¶ 33, Exs. 23-26. A posted newsletter states that Maria Carrasco, the CEO of "First Airborne Service Trading Corporation USA" and the General Manager of "F.A.S.T. Corp., who works at the Miami branch," visited the Peruvian call centers to train telemarketers at the "Gold Lead" and "Hispanic Global Way" "branches." It also states that the "[C]orporation organized a sports event with the participation of all the branches, including Sky Advance Corp., Gold Lead, . . . and Hispanic Global Way . . . " PX1 ¶ 33, Ex. 23 at 2, 4.[5] Finally, HGW Corp's customer service department responds to complaints made about other Corporate Defendants. *See, e.g.*, PX1 ¶ 48, Ex. 37.

D. Defendants' Business is Structured to Evade Detection and Transfer Money Offshore.

Tellingly, Defendants have created a complex web of merchant and bank accounts under ever-changing names in an attempt to cover their trail of illegal conduct and hide assets. Between 2012 and 2014, Defendants used at least 14 merchant accounts, at 6 different banks,

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[5] *See also* PX1 ¶ 33, Ex. 24 (brochure for Hispanic Global Way Corporation stating, "Join the great FAST SOLUTION Family!") and Ex. 25 (sales promotion stating "Participants: Hispanic Global Way, Fast Corp USA, Miami branch, ABC and Gold Lead"). HGW Corp's Facebook page also includes photographs of Maria Vera interacting with Defendants' telemarketing "sales team" and comments from Rafael Hernandez about their sales "goals." *Id.*, Ex. 27.

using 17 different billing descriptors. PX1 ¶¶ 106-107, Ex. 50 at 1-6, ¶¶ 110-111, Ex. 55, ¶¶ 115, Exs. 57-58, ¶¶ 119-121.[6] In the past six years, Defendants have opened at least 28 bank accounts and closed 16 of them.[7] PX1 ¶ 59, Ex. 43. They also empty their accounts receiving large disbursements of consumer funds with alarming speed and frequency.[8] Since 2009, Defendants have transferred approximately $5.98 million to accounts in Peru and other countries. PX1 ¶¶ 81, 97, 105, Ex. 48.

III. STATEMENT OF FACTS

Defendants market a variety of products, including the Moulding Motion 5 weight-loss belt, through national Spanish-language television commercials.[9] Defendants regularly take

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[6] Due to their high chargeback rates (an indicia of fraud), Visa, Inc. and MasterCard, Inc. placed Defendants in their fraud monitoring programs, and merchant banks terminated their accounts. PX1 ¶ 109, Ex. 50, ¶¶ 110-113, Exs. 51-54. Bank of America, N.A. terminated its merchant account with Sky Advance Choices in August 2012, and BMO Harris Bank N.A. terminated its account with HGW Corp in December 2011. PX1 ¶ 112, Ex. 53, ¶ 113, Ex. 54.

[7] Defendants have opened accounts under the following names: First Airborne, d/b/a Fast Solutions, First Airborne, d/b/a L' Nature Lab, First Airborne, d/b/a Movil English F.A.S.T., First Airborne, d/b/a Molding Motion, Grand Team Service, HGW Corp, HGW LLC, HGW Venez, d/b/a TVO, Hispanic Network Connections, Sky Advance Choices Corp, and Sky Advance Choices Corp, d/b/a SAC. PX1 ¶ 59, Ex. 43, ¶ 121.

[8] From November 2013 through February 2014, Defendants funneled between $797,664 and $927,8727 out of their accounts on a monthly basis, resulting in relatively low beginning and ending balances. PX1 ¶ 98, Ex. 49.

[9] *See, e.g.*, PX1 ¶¶ 34-35, PX 24 (DVD of commercial), PX25 (DVD of commercial), and PX 23, Exs. C-D (translations of commercials); Herrera, PX16 ¶¶ 1, 2 (Moulding Motion 5, California); Alvarez, PX8 ¶¶ 1, 2 (Moulding Motion 5, New York); Duarte, PX12 ¶¶ 1, 2 (Moulding Motion 5, Illinois); Fierro, PX 13 ¶¶ 1, 2 (Moulding Motion 5, Georgia); Flores, PX 14 ¶¶ 1, 2 (Moulding Motion 5,Texas); Morales, PX19 ¶¶ 1, 2 (Air Climber exercise equipment, Florida); Collazos, PX11 ¶¶ 1, 2 (Movil English course, Florida); Garzon, PX15 ¶¶ (Movil English course, Connecticut); Chaires, PX10 ¶¶ 1, 2 (Extreme Powernet girdle, Massachusetts); Mercedes, PX18 ¶¶ 1, 2 (Body Signer Skin girdle, Pennsylvania); Resendez, PX20 ¶¶ 1, 2 (girdle, Texas); Topete, PX22 ¶¶ 1, 2 (Extreme Powernet girdle, California). Defendants also advertise some of their

consumers' money and then send incorrect, incomplete, and defective merchandise. When consumers try to notify Defendants of these problems, many are unable to contact Defendants to arrange a refund or exchange. Others are either flatly told that they cannot return the defective order or that they must pay an exorbitant fee to do so. Additionally, Defendant make false and unsubstantiated claims about the Motion Moulding 5's ability to cause weight loss. These deceptive and unfair practices have caused millions of dollars in consumer injury and will continue to harm consumers unless stopped.

A. Defendants Routinely Send Wrong Orders and Then Make It Difficult, Impossible, or Costly for Consumers to Obtain Relief.

Defendants routinely send consumers the wrong or defective products. They send: 1) products different than what consumers ordered;[10] 2) incomplete shipments;[11] 3) the correct product, but in the wrong size or color;[12] 4) a package missing the promised "free" item, such as

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products on their website (hispanicglobalway.com). Although the site provides a toll-free number to place orders, consumers cannot order directly from the website. PX1 ¶ 32.

[10] *See* Garzon, PX15 ¶ 2-3 (ordered MP5 player but received MP3 player); Topete, PX22 ¶¶ 3 (girdles were different from ones ordered and came in wrong size); Resendez, PX20 ¶¶ 2-3 (same).

The consumer declarations submitted with this motion are illustrative of nearly 190 consumer complaints about these practices. These complaints, which are analyzed at PX1 ¶¶ 53-54, are from Consumer Sentinel (an FTC database that captures consumer complaints reported to the FTC and other law enforcement agencies), the BBB, and the Florida Attorney General.

[11] Garzon, PX15 ¶¶ 2- 3 (order missing English courses); Collazos, PX11 ¶¶ 2-4 (same); Morales, PX19 ¶ 4 (arm straps missing from exercise equipment).

[12] Mercedes, PX18 ¶¶ 2-3 (received girdles in wrong size); Canavati, PX9 ¶¶ 2, 5 (received leggings in wrong color); Kendrick, PX17 ¶¶ 3, 5 (received leggings in wrong size).

a VISA gift card;[13] and/or 5) a defective product.[14] Defendants then often do not answer their customer service telephone number and, when they do, they put consumers on hold endlessly, hang-up, or otherwise ignore them.[15] Defendants' customer service representatives argue with, insult, or otherwise dismiss the persistent consumers who manage to reach them.[16]

At best, Defendants tell consumers who navigate this gauntlet that they will only correct their shipping error if the consumer returns the faulty product at her own expense and pays an additional fee, ranging from $16.95 to $299.[17] Defendants tell other consumers they must

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[13] Fierro, PX13 ¶ 5 (order missing free gift card and cream); Duarte, PX12 ¶ 4 (order missing free $100 debit card); Herrera, PX16 ¶¶ 6, 8 (order missing free gift card, creams, and cookbook); Collazos, PX11 ¶ 2, 4 (order missing free gift card); Rodriguez, PX21 ¶¶ 2, 4 (order missing free cream).

[14] Morales, PX19 ¶ 4 (exercise equipment missing arm straps); Herrera, PX16 ¶ 5 (Moulding Motion 5 did not heat up as set forth in instructions); Rodriguez, PX21 ¶ 4 (leggings were ripped and see-through).

[15] Canavati, PX9 ¶¶ 6-9 (disconnected several times and unable to reach representatives); Mercedes PX18 ¶ 4 (called six to seven times before representative answered and put on hold endlessly); Collazos, PX11, ¶¶ 6-8 (unable to speak with representative); Resendez, PX20 ¶¶ 4-5 (experienced difficulty reaching a representative and hung up on); Topete, PX22 ¶¶ 5-6 (difficulty reaching representative and also hung up on); Garzon, PX15 ¶ 3 (unable to reach representative); Duarte, PX12 ¶ 6 (could not reach representative); Chaires, PX10, ¶¶ 8-9, 11-12 (experienced difficulty reaching representative and hung up on).

[16] *See, e.g.*, Duarte, PX12 ¶ 5, Topete, PX22 ¶ 5 (hung up on her after saying, "This is not my department."); Flores, PX14 ¶ 7; Fierro, PX13 ¶ 8 (called a "crazy old woman" for asking for promised gifts); Resendez, PX20 ¶ 4; Collazos, PX11 ¶ 6; Alvarez, PX8 ¶ 9.

[17] Correa, PX2 ¶ 54, PX7 (translation of call to return product) (told she would have to pay an additional $49 to ship Moulding Motion 5 back and receive a different product); Mercedes, PX18 ¶ 4 (told to pay $45 to return incorrect product and receive correct one); Canavati, PX9 ¶¶ 6, 8 (told that to receive missing leggings, she would have to pay $50 in shipping and handling); Resendez, PX20 ¶ 4 (told to pay for return shipping and an additional $25 to receive correct product); Topete, PX22 ¶ 4 (told to pay an additional $20 to receive correct product); Rodriguez, PX21 ¶ 5 (told to return incorrect product at her own expense and pay an additional $16.95 to receive correct product); Herrera, PX16 ¶ 6 (paid an additional $299 to obtain non-defective

purchase an additional product to receive the missing portions of their original purchase.[18] Consumers are often, therefore, left with a dilemma: effectively paying for nothing or paying more money to Defendants in the hope of obtaining the correct product or a partial refund.[19] This is tantamount to theft. Of course, Defendants do not disclose this practice in their advertisements or sales calls. Therefore, consumers have no way to anticipate or avoid it.[20]

B. <u>When Asked, Defendants Lie About Their Refund Policies to Induce Consumers to Purchase Products.</u>

Indeed, in the initial sales call, Defendants tell consumers who ask about their refund policy that they can return products for a full refund – even after using the products.[21] In fact,

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Moulding Motion 5); Kendrick PX17 ¶¶ 6-8 (told to pay return shipping of $6.95 and additional $149 to receive correct product).

[18] Fierro, PX13 ¶ 6 (told she could receive the free cream that Defendants failed to send only if she paid the difference in price for a larger size cream and for shipping and handling); Morales, PX19 ¶ 4 (told that, to receive missing arm straps, she would need to purchase another product).

[19] Mercedes, PX18 ¶ 5 (never able to exchange incorrect product because it was impossible to reach a representative); Collazos, PX11 ¶¶ 6-8 (same); Fierro, PX13 ¶¶ 6-8 (unable to obtain promised products because representatives mocked her and ignored her complaints); Canavati, PX9 ¶ 9 (unable to obtain correct merchandise because unable to reach representative); Resendez, PX20 ¶ 4-5 (consumer stuck with wrong product); Topete, PX22 ¶ 5-6 (unable to return or exchange incorrect product); Garzon, PX15 ¶ 3 (same); Duarte, PX12 ¶ 4-6 (same).

One hundred and twenty one (121) consumers filed complaints with Consumer Sentinel, BBB, and the Florida Attorney General stating they received wrong or defective products but were unable to return or exchange them. An additional 69 consumers filed complaints stating they were unable to return or exchange the products without incurring additional fees. PX1 ¶ 54.

[20] Because of these practices, the BBB gave three Corporate Defendants an "F" rating, the BBB's lowest rating, as of May 2014. PX1 ¶ 45 (HGW Corp), PX1 ¶ 46 (Hispanic Network Connections), PX1 ¶ 47 (Fast Solutions Plus). These ratings are based on the volume of complaints against a business and its failure to resolve them. PX1 ¶ 43, Ex. 32.

[21] Correa, PX2 ¶ 22; PX3 at 18-19 (told she could return the product for a full refund within 30 days); Alvarez, PX8 ¶ 6 (told she could obtain full refund if she did not like Moulding Motion 5); Herrera, PX16 ¶ 3 (same); Flores, PX14 ¶ 4 (product "guaranteed" for 30 days); Chaires,

even when they reach Defendants — a rare feat — they discover that Defendants' statements were simply lies.[22]

C. Defendants Make False and Unsubstantiated Weight-Loss Claims for the Moulding Motion 5.

Defendants advertise the Moulding Motion 5 through a national advertising campaign on Spanish-language television.[23] The Moulding Motion 5 is a purported weight-loss belt comprised of two parts: a bag filled with liquid and a belt.[24] Defendants promise that the

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PX10 ¶ 5 (told she could return girdle within 30 days for a full refund if not satisfied); Kendrick, PX17 ¶ 3 (told she could return leggings if not satisfied). In some instances, consumers receive invoices that contradict Defendants' money-back guarantee representations by stating that "All sales are final." These invoices are confusing because they also state that "[a]ll merchandise can be change[sic] in 30 days." *See, e.g.*, Herrera, PX16, Ex. D.

[22] Alvarez, PX8 ¶¶ 8-9 (unable to obtain refund and also continuously hung up on or ignored); Herrera, PX16 ¶ 11 (unable to obtain full refund); Chaires, PX10 ¶¶ 8, 9, 11, 12 (unable to obtain full refund and continuously hung up on and ignored); Flores, PX14 ¶ 7-9 (unable to obtain refund and experienced continuous difficulty reaching representatives); Correa, PX2 ¶ 47; PX7 at 3-5 (could not obtain refund); Kendrick, PX17 ¶¶ 3, 5-8.

Of the 190 complaints, 20 consumers filed complaints through Consumer Sentinel, the BBB, or the Florida Attorney General stating that representatives said that consumers could receive full refunds, but Defendants refused to provide them. PX1 ¶¶ 54-55. Seven (7) complaints show that Defendants demanded additional fees for returns even though they induced consumers to initially purchase products by promising full refunds. *Id.*

[23] PX1 ¶¶ 34-35; PX24 (Univision commercial); PX25 (Telemundo commercial); PX23, Ex. C-D (translations of commercials); Alvarez, PX8 ¶¶ 1, 2 (saw advertisement in New York); Duarte PX12 ¶¶ 1, 2 (saw advertisement in Illinois); Fierro, PX13 ¶¶ 1, 2 (saw advertisement in Georgia); Flores, PX14 ¶¶ 1, 2 (saw advertisement in Texas); Herrera, PX16 ¶ 1, 2 (saw advertisement in California).

As of March 2014, Defendants used a merchant account under the name Molding Motion 5 to collect money from consumers. PX1 ¶¶ 111, 121, Ex. 55. First Airborne does business as "Molding Motion 5 First Airborne." PX1 ¶ 24.

[24] The instructions tell users insert the bag into the belt, place the belt around one's waist for 30-45 minutes a day, and proceed with usual daily activities. PX23, Ex. B.

Moulding Motion 5 (for which they charge $159 to $249)[25] causes rapid and substantial weight loss, without the need for exercise or dieting. They also claim that Moulding Motion 5 users are likely to obtain the weight loss results reported by Defendants' testimonialists. These claims, however, are false, and unsubstantiated.

1. Defendants Promise Rapid and Substantial Weight Loss, without Diet or Exercise.

Defendants' advertisements make repeated, express claims that the Moulding Motion 5 causes rapid and substantial weight loss. For example, one advertisement states:

> . . . It is time to lose weight and look better. It's time for Moulding Motion 5. We all know that the sauna is a traditional and **very effective method to lose weight**. Moulding Motion is a portable sauna without wires or batteries. . . . Moulding Motion 5 has already shown to millions of people around the world that it is indeed possible to improve your figure, lose weight. . . .[26]

This advertisement repeatedly touts how easily and quickly one can lose weight with the Moulding Motion 5. For example, a purported user declares, "I just activate it. I put it on, and I lose weight naturally," followed by another who states: "The heat is generated by Moulding

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[25] Correa, PX2 ¶ 16 ($169); Duarte, PX12 ¶ 3 ($169); Flores, PX14 ¶ 4 ($249); Herrera, PX16 ¶ 3 ($159). Although the advertisements call the product "Moulding Motion 5" (emphasis added), the Defendants' invoices and merchant account name identify it as "Molding Motion 5."

[26] PX24 (Univision commercial); PX23, Ex. C (translation) (emphasis added). The following disclaimer appears only once in a small, inconspicuous typeface and difficult to read white font: "This product should be part of a low-calorie diet and exercise regime." Most viewers are unlikely to be able to read and understand this disclosure. It does not change the net impression of the advertisement. The Spanish to English language translations of the referenced advertisements (PX23, Exs. C and D) do not reflect the actual appearance of the text in the advertisements, including font size and color, and do not describe visuals.

Motion 5, and from the first minute, I am losing weight." Still another states: "25 pounds, easy and fast."[27]

These express claims of rapid and substantial weight loss permeate Defendants' marketing. Further, their advertisements make a strong, implied claim that Moulding Motion 5 users can lose this weight without diet or exercise. The above advertisement stresses how "easy and fast" it was to lose 25 pounds, and that the device will cause weight loss "from the first minute."

Another frequently run television ad makes the same claim in a slightly different way:

> No, no, no, no, no, rice is fattening. That has a lot of calories, you have to walk 30 minutes, eat six times a day, no cholesterol, no carbohydrates, no fat, no chocolates, no beer, no sweets, no bread, stop suffering already, lose weight now, fast with Moulding Motion 5 and its new dual impact HD Gel Pad. You activate the micro-capsule and the heat spreads throughout your body, makes you sweat, you burn calories, lose weight . . . . Do not be fooled by imitations that do not work. You feel it warming, you feel you are sweating, you feel it working. Call now, order the original Moulding Motion 5 . . . and for those who want to lose more than 20 pounds we will send a second Gel Pad free . . .[28]

This advertisement promises that, to lose weight, Moulding Motion 5 users need not continue "suffering" by giving up rice, fat, chocolate, beer, sweets, or bread, or through regular exercise. Rather, you simply turn on the device and "the heat spreads throughout your body, makes you sweat, you burn calories, lose weight." To lose "more than 20 pounds" you need only

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[27] PX24 (Univision commercial); PX23, Ex. C (translation).

[28] PX25 (Telemundo commercial); PX23, Ex. D (translation). The following disclaimer briefly appears only once in this advertisement in small, blurry, inconspicuous typeface in a white font against a white background: "This product should be part of a low-calorie diet and exercise regime." *Id.* Consumers cannot reasonably be expected to see, read, and understand these disclosures.

use the free, second Gel Pad. The clear net impression is that the Moulding Motion 5 will cause consumers to lose weight quickly and easily, without the "suffering" of diet or exercise.

In addition, Defendants' advertisements feature numerous testimonials buttressed with "before-and-after" photos. The "after" photos depict significantly thinner individuals with captions stating the testimonialists lost 15 to 34 pounds.[29] By combining these testimonials with the express claims that consumers can quickly and easily lose substantial weight, Defendants strongly imply that typical consumers can expect to experience the same results.[30]

Defendants' telemarketers reinforce both the express and implied advertising claims in the advertisements. One promised an FTC employee posing as a consumer that Defendants would provide a "certification" that her wearing the Moulding Motion 5 would cause her to lose six pounds per week, and 18 pounds in three weeks, without dieting or exercising:

> But let me tell you that it gets activated with the least amount of movement. Okay? **So, I don't need you to do any type of exercise nor diet.** What I'm definitely going to ask you to do is for you to put it on every day, at least a minimum of one hour daily.[31]
>
> . . . Okay, then we can draft up a certification. Why? Because per week, you eliminate approximately six pounds . . . . Okay? So, what we're going to do with you is we're going to send you a certification indicating that in practically three weeks, you're losing approximately 18 pounds, which is approximately 10 kg, which is what you

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[29] PX24 (Univision commercial); PX23, Ex. C (translation); PX25 (Telemundo commercial); PX23, Ex. D (translation).

[30] *Id.* The disclaimer "Results may vary" accompanies these testimonials in small, inconspicuous typeface. This disclosure is unlikely to be read and understood by most viewers and does not change the net impression of the advertisement.

[31] PX2 ¶ 15; PX3 at 2 (emphasis added); *see also* PX16, Herrera (stating that the product heats up and will help her lose body fat).

need to lose.[32]

2. Defendants' Weight Loss Claims are Baseless.

Dr. David Levitsky, a professor at Cornell University, and an expert in the fields of weight loss and obesity, explains that Defendants' claims are false and cannot be substantiated.[33] Specifically, he states that there is no biophysical mechanism that would cause a device that applies heat to humans' skin (such as the Moulding Motion 5) to cause any biologically significant weight loss.[34] Not surprisingly, after conducting a thorough literature search of the leading life science and biomedical databases, Dr. Levitsky found no clinical studies addressing the external application of heat to skin to produce weight loss.[35] Dr. Levitsky therefore concluded that the Moulding Motion 5 cannot cause biologically significant weight loss, much less rapid and substantial weight loss.[36]

D. Consumer Injury

A review of available bank records suggests that from January 2012 through February 2014, Defendants had gross revenues of at least $7,436,747.37. PX1 ¶¶ 99, 108, 114. Of this amount, $2,949,421.36 is comprised of money orders collected from consumers from May 2013 through February 2014. PX 1, ¶¶ 79, 99.[37] Although not all of these revenues necessarily trace

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[32] PX2 ¶ 14; PX3 at 4.

[33] PX23 ¶ 17.

[34] *Id.* ¶ 15. Dr. Levitsky defines "biologically significant" weight loss as five percent of an individual's body weight. *Id.* ¶ 13.

[35] *Id.* ¶ 16.

[36] *Id.* ¶ 17.

[37] The remaining $4,487,326.01 comes from Visa and MasterCard charges. PX 1 ¶¶ 108, 114.

back to Defendants' ongoing illegal practices, they likely have caused millions in consumer injury. One hundred and ninety (190) consumers submitted complaints against Defendants. This high volume of complaints likely represents only a fraction of injured consumers. Actual consumer complaints represent only the "tip of the iceberg" when it comes to consumer deception. *See United States v. Offices Known as 50 State Distrib. Co.*, 708 F.2d 1371, 1374-75 (9th Cir. 1983), *quoting United States v. Brien*, 617 F.2d 299, 308 (1st Cir. 1980). In the FTC's experience this is especially true for Spanish speaking consumers.[38] In addition to the consumer injury tied to their illegal refund and exchange practices, every dollar consumers paid for Defendants' worthless Moulding Motion 5 – one of Defendants' flagship products – represents consumer injury.[39]

IV. ARGUMENT

As set forth below, and as supported by the three volumes of evidence attached to the FTC's Motion, the Court can, and should, enter an *ex parte* TRO against all Defendants.[40] The

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[38] *See Hispanic Outreach Forum and Law Enforcement Workshop: A Summary of the Proceeding*, October 2004, at 10 available at *www.ftc.gov/sites/default/files/documents/reports/hispanic-outreach-forum-and-law-enforcement-workshop-summary-proceedings-october-2004/hispanicoutreach.pdf.*

[39] Not only did Defendants widely disseminate advertisements for Moulding Motion 5, they also do business as "Molding Motion 5" and operate merchant accounts under this name. PX1 ¶ 24 and ¶¶ 111, 121, Ex. 55.

[40] Defendants may argue that an *ex parte* action is not appropriate because they cooperated with law enforcement in an unrelated matter. In 2013, Defendants notified the U.S. Secret Service that unrelated entities allegedly stole their customer list and made harassing phone calls to Defendants' customers. PX1 ¶ 56. They also sued these entities. PX1 ¶ 57. This incident, however, is entirely unrelated to this matter. According to many consumer complaints, callers attempted to induce Defendants' consumers into making payments that they did not owe by falsely representing their affiliation with the government and other entities. The practices

FTC has amply demonstrated that it is likely to succeed on the merits, and the equities are decidedly in the public's favor. Further, this relief is necessary to put an immediate stop to Defendants' ongoing violations, preserve assets for potential redress, maintain the *status quo* until final adjudication of this matter, and preserve critical evidence to prove liability.

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

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the issuance of injunctive relief to enjoin violations of Section 5 of the FTC Act, including "any ancillary relief necessary to accomplish complete justice." *FTC v. USA Fin., LLC,* 415 Fed. App'x. 970, 976 (11th Cir. 2011); *see also AT&T Broadband v. Tech Commc'n, Inc.*, 381 F.3d 1309, 1316 (11th Cir. 2004) (citations omitted). This includes a temporary restraining order, or any other preliminary relief necessary to preserve the possibility of providing effective final relief. *FTC v. Gem Merch Corp.*, 87 F.3d 466, 468-69 (11th Cir. 1996); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433-1434 (11th Cir. 1984). Ancillary relief may include an asset freeze, immediate access to business premises and records to prevent the destruction of evidence, and the appointment of a receiver or a monitor. *U.S. Oil & Gas*, 748 F.2d at 1432-34; *AT&T Broadband*, 381 F.3d at 1316.

B. The FTC Meets the Standard for Granting a Government Agency's Request for a TRO or Preliminary Injunction.

A two-prong analysis applies in determining whether to grant the FTC's Motion: (1) the likelihood that the FTC will ultimately succeed on the merits; and (2) a balancing of the equities. *FTC v. IAB Mktg Associates*, LP, 746 F.3d 1228, 1232 (11th Cir. 2014); *FTC v. U.S. Mtg.*

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involved here, however, relate to Defendants' unfair and deceptive refund and exchange practices and their false weight-loss claims.

Funding, Inc., 2011 WL 810790 at *2 (S.D. Fla. Mar. 1, 2011). In balancing the equities, "the public interest should receive far greater weight" than any private interest. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988). As demonstrated below, this two-prong test warrants the issuance of a TRO.

1. The FTC is Likely to Succeed on the Merits.

The FTC is likely to succeed on the merits. The overwhelming evidence shows that Defendants violate the FTC Act by: (1) routinely sending incorrect, incomplete, and defective merchandise and then making it, at best, difficult and costly, and often impossible, to obtain even a partial refund or to make an exchange to obtain the product ordered; (2) misrepresenting their refund policies; and (3) making false and unsubstantiated weight-loss claims about the Moulding Motion 5.

a. Defendants' Consistent Failure to Accurately Fulfill Consumers' Orders and Their Refusal to Provide No-Cost Refunds or Exchanges is Unfair.

Defendants' practices are unfair and violate Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1), because: (1) they cause substantial injury to consumers; (2) consumers cannot reasonably avoid this injury; and (3) they are not outweighed by any countervailing benefits to consumers or to competition. 15 U.S.C. § 45(n) (defining unfair practices). *See also FTC v. Neovi Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010); *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1193 (10th Cir. 2009); *FTC v. Direct Benefits Group LLC*, 2013 WL 3771322 at *13 (M.D. Fla. Jul. 18, 2013); FTC Policy Statement on Unfairness (Dec. 17, 1980) ("FTC Unfairness Statement"), appended to *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1984 WL 565290 at *95 (1984).

(1) Defendants Cause Substantial Injury to Consumers.

Defendants take consumers' money and then ship the wrong or defective goods. Defendants then ignore consumer complaints and take no remedial actions, or, at best, charge additional substantial fees to exchange the goods. *See supra* at 7-9.

Consumers who attempt to call Defendants' customer service department after receiving the wrong or defective goods often are unable to get through, or, after getting through, are told that Defendants will not provide an exchange or refund. Moreover, Defendants' representatives berate, insult, and hang up on consumers who do get through. All these consumers are left paying for unwanted goods. Others reach Defendants and are told that they can only make an exchange or obtain a refund if they first pay additional fees, typically ranging from $20-$299. These consumers are left with the unenviable option of paying still more money in the hope of finally obtaining the goods ordered; or refusing to pay additional fees and being left with unwanted goods.

Small individual injuries are substantial for the purposes of the FTC Act where a defendant inflicts a small harm to a large number of people. *Neovi*, 604 F. 3d at 1157; *FTC v. Direct Benefits Group*, 2013 WL 3771322 at *13; *FTC v. Commerce Plant, Inc.*, 878 F. Supp. 2d 1048, 1078 (C.D. Cal. 2012); FTC Unfairness Statement, 1984 WL 565290 at *101 n.12. Defendants' consumer injury goes well beyond that standard. Here, Defendants caused a large injury to a large number of people.

(2) The Injury Caused By Defendants is Not Reasonably Avoidable by Consumers.

Defendants' customers cannot reasonably anticipate Defendants' shipping, refund, and exchange practices. Consumers would not reasonably expect that Defendants would take their

money, ship the wrong goods, and fail to remedy that mistake. Thus, by the time a consumer learns of these practices, it is too late to avoid injury – Defendants already have the consumer's money. *See Neovi*, 604 F.3d at 1158; *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988); *FTC v. Windward Mktg Ltd.*, 1997 WL 33642380 at *10-11 (N.D. Ga. Sep. 30, 1997). This is especially true here because, unsurprisingly, Defendants fail to disclose their unusual and unexpected practices. *Int'l Harvester*, 1984 WL 565290 at *87.

(3) There Are No Countervailing Benefits From Defendants' Practices.

Defendants' practice – systematically shipping the wrong products and then either refusing to provide refunds or exchanges, or only doing so after imposing additional fees – provides no cognizable benefits to consumers or to competition. These practices force consumers to pay for goods they did not order or to pay additional fees to obtain the product they wanted. Where there is a clear adverse consequence to consumers from a seller's practices, the practice is unfair if there is no countervailing benefit for consumers or competition. *Commerce Planet*, 878 F. Supp. 2d at 1078; *FTC v. J.K. Publ'n Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000); *Windward Mktg.*, 1997 WL 33642380 at *11. Increased revenue to the party committing an unfair act or practice is not a positive countervailing benefit. *Orkin*, 849 F.2d at 1358, 1365. Here, there is simply no benefit to consumers or legitimate commerce.

b. Defendants' Deceptive Refund and Return Policies and Their Weight Loss Claims for Moulding Motion 5 are Deceptive.

An act or practice is deceptive under Section 5(a) if it involves a material misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances, to their detriment. *FTC v. Peoples Credit First, LLC*, 244 Fed. App'x 942, 944 (11th Cir. 2011), citing *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003). Courts construe a seller's affirmative claims, disclaimers, and omissions to determine whether these representations create a deceptive net impression. To violate Section 5(a), the net impression need only have the tendency or capacity to deceive, it need not actually deceive consumers. *Tashman*, 318 F.3d at 1283; *FTC v. Peoples Credit First, LLC*, 2005 WL 3468588 at *5-6 (M.D. Fla. Dec. 18, 2005).

A misrepresentation is material if it involves facts that a reasonable person would consider important in choosing a course of action. *FTC v. Vacation Prop. Svcs.*, 2012 WL 1854251 at *2 (M.D. Fla. May 21, 2012); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999); *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1266 (S.D. Fla. 2007).

Express misrepresentations are presumed to be material. *See, e.g., FTC v. 1st Guar. Mortg. Corp.*, 2011 WL 1233207 at *12 (S.D. Fla Mar. 30, 2011); *FTC v. RCA Credit Svcs.*, 727 F. Supp. 2d 1320, 1329 (M.D. Fla. 2010), citing *Transnet Wireless*, 506 F. Supp. 2d at 1267; *see also USA Bevs.*, 2005 WL 5654219 at *6 (false representations are likely to mislead consumers acting reasonably). Moreover, consumer reliance on express claims is presumed reasonable. *FTC v. Pacific First Benefit, LLC*, 472 F. Supp. 2d 974, 979 (N.D. Ill. 2008); *FTC v. Capital Choice Consumer Credit, Inc.*, 2004 WL 5149998 at *33 (S.D. Fla. Feb. 20, 2004).

(1) Defendants Make Deceptive Refund and Exchange Claims.

Defendants' telemarketers expressly tell consumers who ask about their refund policies that they can return products for a full refund with no obligation. In fact, when consumers try to obtain refunds, Defendants refuse to provide them or tell consumers they have to pay additional fees to return or exchange the products, thus, rendering their original representation false. *See supra* at 9-10. These false, express claims are presumed material, and therefore deceptive. Indeed, consumers ask about refund policies because they are important to their purchasing decision. *FTC v. U.S. Mortg. Funding, Inc.*, 2011 WL 810790 at *5 (S.D. Fla. Mar. 1, 2011) (granting *ex parte* TRO after finding that Defendants misrepresented they would provide consumers with refunds).

(2) Defendants Make Deceptive Weight-Loss Claims for Moulding Motion 5.

Defendants make both express and implied deceptive weight loss claims for Moulding Motion 5. A weight-loss claim is deceptive when there is no reasonable basis for the claim, the claim is false, or both. *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1190 (N.D. Ga. 2008); *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 957-58 (N.D. Ill. 2006); *see also FTC v. Alcoholism Cure Corp.*, 2011 WL 8190540 at *4 (M.D. Fla. Dec. 5, 2011) (citing *Nat'l Urological* for the proposition that false advertising claims can be based on not having a reasonable basis, falsity, or both). Here, Defendants expressly claim their device will cause rapid and substantial weight loss, strongly imply that users can lose substantial weight without diet or exercise, and strongly imply that typical users can expect the weight loss indicated in the testimonials. Dr. David Levitsky explains, based on his expertise in the fields of weight loss and obesity and an extensive review of the relevant scientific literature, that there is no biophysical

mechanism through which the Moulding Motion 5 could cause substantial weight loss. Therefore, Defendants' claims are false, unsubstantiated, and deceptive in violation of Section 5(a) of the FTC Act.

(i) Defendants Make Express, Deceptive Weight Loss Claims.

Defendants' television advertisements make repeated express claims that using Moulding Motion 5 will cause rapid and substantial weight loss, and repeat those claims during telemarketing calls. *See supra* at 10-14. These express claims are false and unsubstantiated. The substantiation needed for weight-loss claims "must, at a minimum, consist of competent and reliable scientific evidence." *Nat'l Urological*, 645 F. Supp. 2d at 1190, citing *QT*, 448 F. Supp. 2d at 961. As discussed above, Dr. Levitsky explains, that these claims cannot be true and substantiated. *See supra* at 14.

Because they are express, the claims are presumed to be material. *See supra* at 20. Moreover, claims concerning health issues like weight loss are always presumed material. *FTC v. Bronson Ptnrs., LLC*, 564 F. Supp. 2d 119, 135 (D. Conn., 2008); *Nat'l Urological*, 645 F. Supp. 2d at 1190; *QT*, 448 F. Supp. 2d at 960. Beyond these presumptions, because the Defendants' sole claimed benefit of Moulding Motion 5 is substantial weight loss, the claims are the only reason for reasonable consumers to purchase it.

(ii) Defendants Make Deceptive Implied Claims about Moulding Motion 5.

Defendants make strongly implied claims that using Moulding Motion 5 will cause weight loss without the need for diet and exercise. *See supra* at 12-13. They also make strongly implied claims that a typical consumer can obtain the same substantial weight loss indicated in the testimonials from purported satisfied customers. *See supra* at 13. Extrinsic evidence is not

required to interpret implied claims, such as these, that are neither subtle nor provide conflicting messages susceptible to more than a single interpretation. *Bronson Ptnrs*, 564 F. Supp. 2d at 125-127. *See also FTC v. Kraft*, 970 F.2d 311, 318 n.4, 319-20 (7th Cir. 1992) (only the most "barely discernible" implied claims require extrinsic evidence for interpretation). As described above, each of these claims are both false and unsubstantiated.

The clear net impression of Defendants' advertisements is that Moulding Motion 5 will cause consumers to lose a substantial amount of weight quickly and easily, without dieting or exercise. Defendants' small, inconspicuous, and difficult to read disclaimer stating that "This product should be part of a low-calorie diet and exercise regime" (*See supra* at 11, fn. 26 and 12, fn. 28) does not change the net impression created by this strongly implied claim. First, disclaimers can only be effective when they are clear and conspicuous, which Defendants' disclaimers are not. *In re: Thompson Medical Co.*, 104 F.T.C. 648, 842-43 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987). Moreover, even if consumers were able to read this disclosure, it cannot overcome the overwhelmingly contrary message of the advertisements that consumers quickly can lose a substantial amount of weight regardless of whether they diet or exercise.

Consumers also reasonably understand that the results shown in the testimonials are typical. "When an advertisement contains a testimonial reflecting the experience of an individual with a product, there is an explicit representation that such experience reflects the typical or ordinary results anyone may anticipate from the use of the product." *Bronson Ptnrs*, 564 F. Supp. 2d at 125 (quoting *In re: Porter & Dietsch, Inc.*, 90 F.T.C. 770, 1977 WL 188556 at *1010 (FTC 1977)). Defendants' impossible to read disclosures that "Results may vary" (*see supra* at 13, fn. 30) do not effectively disclaim their representation that the featured

testimonialists' experiences are typical of what consumers will achieve. *See FTC v. Cyberspace.com*, 453 F.3d 1196, 1200 (9th Cir. 2006); *FTC v. Medlab, Inc.*, 615 F. Supp. 2d 1068, 1077 (N.D. Cal. 2009); *QT,* 448 F. Supp. 2d at 924 n.15; 930 *FTC v. Medical Billers Network, Inc.*, 543 F. Supp. 2d 283, 305-06 (S.D.N.Y. 2008). Moreover, even if these disclaimers were legible, they would still be insufficient. *See FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. § 255.2(b) (stating that even disclosures stronger than "results may vary," such as "These testimonials are based on the experiences of a few people and you are not likely to have similar results" do not "adequately reduce[] the communication that the experiences depicted are generally representative.").

Finally, as health claims, the Defendants' claims are presumed to be material to the decisions of reasonable consumers. *Bronson Ptnrs.*, 564 F. Supp. 2d at 125; *Nat'l Urological*, 645 F. Supp. 2d at 1190. Further, given the strength and prevalence of these claims, Defendants clearly intended to make them. Intentionally made implied claims are also presumed to be material. *SlimAmerica, Inc.*, 77 F. Supp. 2d at 1272; *FTC v. Wilcox*, 926 F. Supp.1091, 1098 (S.D. Fla. 1995); *Capital Choice Consumer Credit,* 2004 WL 5149998 at *32.

2. The Equities Are Decidedly in the Public's Favor.

As noted above, in balancing the equities, public interest equities must be given greater weight. *World Wide Factors*, 882 F.2d at 347; *World Travel Vacation Brokers*, 861 F.2d at 1029; *USA Bevs.*, 2005 WL 5654219 at *5. The public interest in this case is compelling – halting Defendants' unlawful and injurious conduct and preserving and repatriating assets that may be used to compensate Defendants' numerous victims. In contrast, Defendants have no

legitimate interest in continuing to engage in unlawful acts and practices.[41] The equities, therefore, are decidedly in the public's favor.

3. The Corporate Defendants Operate as a Common Enterprise and, Therefore, are Jointly and Severally Liable.

Although there are eleven separate Corporate Defendants, the distinction between them is a mere formality because they function as a common enterprise. "When determining whether a common enterprise exists, courts look to a variety of factors, including: common control, the sharing of office space and officers, whether business is transacted through a 'maze of interrelated companies,' the commingling of corporate funds and failure to maintain separation of companies, unified advertising, and evidence which 'reveals that no real distinction existed between the Corporate Defendants.'" *FTC v. Wolf*, 1996 WL 812940 at *7 (S.D. Fla. Jan. 30, 1996) (internal citations omitted); *see also Direct Benefits Group*, 2013 WL 3771322 at *18; *FTC v. Wash. Data Res.*, 856 F. Supp. 2d 1247, 1271 (M.D. Fla. 2012) ("If the structure, organization, and pattern of a business venture reveal a 'common enterprise' or a 'maze' of integrated business entities, the FTC Act disregards corporateness.") (citations omitted), *aff'd*, 704 F.3d 1323 (11th Cir. 2013); *FTC v. Vacation Prop. Svcs.*, 2012 WL 1854251 at *5 (M.D. Fla. May 21, 2012); *Capital Choice Consumer Credit*, 2004 WL 5149998 at *24; *FTC v. U.S. Oil & Gas Corp.*, 1987 U.S. Dist. Lexis 16137, at *58-63 (S.D. Fla. July 10, 1987)[42] (finding common enterprise where corporate defendants were under common control, shared office space

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[41] *See World Wide Factors*, 882 F.2d at 347 ("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").

[42] Not reported in Westlaw, only LEXIS citation available.

and employees, and used similar sales techniques).[43]

The Defendants conduct their businesses through a labyrinth of interrelated employees and entities that fail to operate as distinct companies. *See supra* at 1-5. They sell and market the same products, rely on the same television advertisements, share common ownership and control, are located almost exclusively at the same address, use the same invoicing and billing system, and commingle assets. As such, the various Corporate Defendants are jointly and severally liable for each other's actions.

4. The Individual Defendants are Each Personally Liable for Corporate Defendants' Illegal Acts and Practices.

Maria Vera, Rafael Hernandez, Roberto Carrasco Macedo, and Maria Gisella Carrasco are personally liable for injunctive relief, consumer redress, and other equitable relief. Courts apply different tests to determine individual liability for injunctive relief and monetary relief, and the Individual Defendants meet both.

First, the Individual Defendants are personally liable for injunctive relief. Once the Commission establishes that a business violated Section 5 of the FTC Act, individual defendants are liable for injunctive relief if they either had authority to control the wrongful practices or participated in them. *Gem Merch.*, 87 F.3d at 470; *FTC v. Amy Travel Svc., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989); *1st Guar. Mortg.*, 2011 WL 1233207 at *16. Here, while the Commission need only prove either authority to control or participation in companies' actions, the Individual

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[43] *See also FTC v. Network Svcs. Depot*, 617 F.3d 1127, 1142-43 (9th Cir. 2010) ("Our cases hold that entities constitute a common enterprise when they exhibit either vertical or horizontal commonality—qualities that may be demonstrated by a showing of strongly interdependent economic interests or the pooling of assets and revenues."). *J.K. Publ'n.*, 99 F. Supp. 2d at 1202 (finding common enterprise where corporate defendants conducted their businesses through a "maze of interrelated companies").

Defendants both had authority to control and participated in the companies' actions. Status as a corporate officer, particularly in a small, closely-held corporation, establishes a presumption of authority to control. *Wilcox*, 926 F. Supp. at 1104 ("Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer"), *quoting Amy Travel,* 875 F.2d at 573; *Transnet Wireless*, 506 F. Supp.2d. at 1270 ("An individual's status as a corporate officer gives rise to a presumption of ability to control small, closely-held corporation") (citations omitted). Bank signatory authority or acquiring services on behalf of a corporation also evidences authority to control. *USA Fin., LLC,* 415 Fed. App'x. at 974-75 (11th Cir. 2011); *Transnet Wireless*, 506 F. Supp.2d. at 1271.

Here, each Individual Defendant is an officer or manager of at least two of the Corporate Defendants, which all are small, closely held companies (*see supra* at 3-4), giving rise to a presumption of control. Each also is a signatory on the Defendants' bank accounts and, through those accounts, for example, paid an advertising agency to air the deceptive ads that initiated their scheme, including ads for the bogus Moulding Motion 5. PX1 ¶ 34, Ex. 29. Additionally, their website and social media sites reveal their day-to-day participation in their business, including interacting with and training their telemarketing sales staff. *See supra* at 5 and PX1 ¶ 33, Exs 23-27. Thus, the Individual Defendants' executive and managerial positions and direct participation in the companies' actions make them individually liable for injunctive relief.

Second, they are also personally liable for monetary relief. To obtain monetary relief, the FTC must prove that, in addition to participation or authority to control, the Individual Defendants knew about, were recklessly indifferent to, or intentionally avoided knowing about the wrongful acts. *Gem Merch.*, 87 F.3d at 470 (11th Cir. 1996), *Amy Travel,* 875 F.2d at 57; *1st*

Guar. Mortg., 2011 WL 1233207 at *15. The FTC need not establish intent to defraud or even actual knowledge of the wrongful conduct. *1st Guar. Mortg.*, 2011 WL 1233207 at *15; *Wilcox*, 926 F. Supp. at 1104. Participation in corporate affairs, such as being a corporate officer or bank signatory, is probative of knowledge. *Wilcox*, 926 F. Supp. at 1104; *Transnet Wireless*, 506 F. Supp.2d at 1270; *1st Guar. Mortg*, 2011 WL 1233207 at *15.

Here, in addition to managing the Corporate Defendants and their flow of money, the Individual Defendants were on notice about the multitude of complaints lodged against their companies based on their BBB "F" rating. In fact, the BBB notified Maria Vera about these numerous complaints pursuant to its practice of contacting businesses to inform them about the grievances. *See supra* at 3.[44] Moreover, some of the Individual Defendants spent time at their call centers, training and presumably monitoring the activities of their telemarketers, and also

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[44] Defendants' excessive chargeback rates triggered Visa's and MasterCard's fraud monitoring programs and resulted in merchant banks terminating their accounts. *See supra* at 6, fn.6. Visa's records show that HGW Corp. had a chargeback rate of 44.36%. PX1 ¶ 109, Ex. 50 at 8-9. High chargeback rates put, or should have put, the Individual Defendants on notice of the Corporate Defendants' fraudulent practices. *Amy Travel,* 875 F.2d at 574-575 (high volume of consumer complaints and excessive chargebacks were a signal to individual defendants that sales scripts contained misrepresentations); *FTC v. Wells*, 385 Fed. App'x. 712, 713 (9th Cir. 2010) (notice of chargebacks at 10 to 20 times the rates generally permitted for credit card probative of knowledge). Additionally, merchant chargeback rates of one percent and higher can be an indication of a problem involving the merchant, including unauthorized charges to a cardholder's account and deceptive marketing practices. *Commerce Planet*, 878 F. Supp. 2d at 1075-76 (high volume of consumer complaints and excessive chargeback rates of between 5 percent and 7 percent consistent with fraud); *FTC v. Grant Connect, LLC,* 827 F. Supp. 2d 1199, 1221-1222 (D. Nev. 2011) (high chargeback rates of between 3 percent and 15 percent "suggest that in fact consumers were deceived about what they were ordering."); *J.K. Publ'n.,* 99 F. Supp. 2d at 1203 ("[t]he combination of very high chargeback rates, merchant name changes, unanswered telephone calls to customer service . . . leads one to conclude that the defendant businesses were committing fraud against innocent cardholders."); *FTC v. Crescent Publ'g Grp.*, 129 F. Supp. 2d 311, 315-16, 322 (S.D.N.Y. 2001) (fraud evidenced by strikingly high chargeback rate that averaged 10.51 percent).

likely recorded the telemarketing calls. *See supra* at 5.[45] Thus, if they were not directing their representatives to misrepresent their refund policies, and refuse to allow refunds and exchanges, they had ample opportunity to hear their representatives do so. At the very least, Defendants intentionally ignored consumer complaints and evidence of their telemarketers' misrepresentations or were recklessly indifferent to them. Indeed, their desire to avoid responsibility for their illicit acts through an intentional pattern and practice of conducting business under a multitude of different names and accounts at a large number of banks is probative of their knowledge. *J.K. Publ'n.*, 99 F. Supp. 2d at 1202 (repeated changes of business names suggests defendants' knowledge of their illegal activities). Because the Individual Defendants knew about, or consciously avoided knowledge of, the wrongful actions, they are personally liable for monetary, as well as injunctive relief.

A. <u>The Proposed *Ex Parte* TRO is Necessary</u>

An *ex parte* TRO tailored to Defendants' egregious scheme is necessary and legally appropriate to prevent Defendants from dissipating assets and destroying evidence. The FTC respectfully requests a TRO to: (a) freeze Defendants' assets; (b) appoint a temporary receiver over the Corporate Defendants; (c) grant the FTC and the temporary receiver immediate access to the Defendants' records and information, including expedited discovery; and (d) require the Individual Defendants to surrender their passports to the Court until they repatriate funds they have transferred offshore. Defendants are likely to immediately dissipate assets or destroy evidence if given advanced notice of the FTC's action.

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[45] Defendants' telephone provider, IPBX, likely recorded these calls. PX1 ¶ 57, Ex. 40 ¶¶ 14, 19, PX1 ¶ 92.

1. The Asset Freeze, Repatriation, and Passport Turnover Provisions Are Essential to Guarantee Funds for Effective Final Relief.

The Eleventh Circuit has repeatedly upheld the authority of district courts to order asset freezes, appoint receivers, and require immediate access to business premises and records where, as here, corporate defendants and their officers deceive consumers, and it is likely that, in the absence of this relief, assets will be subject to waste and records will be destroyed. *See, e.g., Gem Merch.*, 87 F.3d at 469 ("district court may order preliminary relief, including an asset freeze, that may be needed to make permanent relief possible"); *U.S. Oil & Gas*, 748 F.2d at 1433-34 (affirming district court's ruling granting ancillary relief freezing assets and appointing receiver); *McGregor v. Chierico*, 206 F.3d 1378, 1381 (11th Cir. 2000) (citing trial court's *ex parte* order for asset freeze and appointment of receiver, along with other equitable relief, pending resolution of contempt proceedings); *see also USA Bevs.*, 2005 WL 5654219 at *8 (appointing a receiver is essential to ensure compliance with the [court's order], and to prevent the destruction of evidence and the concealment or dissipation of assets); *R.J. Allen & Assoc.*, 386 F. Supp. 866, 878 (S.D. Fla. 1974) ("the appointment of [a] receiver is necessary 'to prevent diversion or waste of assets to the detriment of those for whose benefit, in some measure, the injunction action is brought'"), *quoting SEC v. Capital Counsellors, Inc.*, 332 F. Supp. 291, 304 (S.D.N.Y. 1971); *Wolf*, 1996 WL 812940 at *9; *SlimAmerica* 77 F. Supp. 2d 1263 at 1276-1277.[46] Notably, courts in this district have frozen defendants' assets, appointed receivers, and

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[46] The Eleventh Circuit also has noted the importance of asset freezes in cases that seek equitable final remedies. *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 987 (11th Cir. 1995) ("[a] request for equitable relief invokes the district court's inherent equitable powers to order preliminary relief, including an asset freeze, in order to assure the availability of permanent relief"); *SEC v. Lauer*, 445 F. Supp. 2d 1362, 1367 (S.D. Fla. 2006).

granted the FTC immediate access to defendants' business premises in numerous FTC enforcement actions. *See IAB Mrkting Assocs.*, 972 F. Supp. 2d at 1313-17; *FTC v. Prime Legal Plans LLC*, 2012 WL 4854762 at *1 (S.D. Fla. Oct. 12, 2012).[47]

Because the FTC is likely to succeed in showing that the individual Defendants are personally liable for restitution (*see supra* at 26-29), it is legally appropriate that the asset freeze extend to their assets as well. *Gem Merch. Corp.*, 87 F.3d at 470 (upholding use of individual defendants' assets for restitution); *Amy Travel*, 875 F.2d at 574-75; *World Travel*, 861 F.2d 1020 at 1031; *In re: Nat'l Credit Mgmt. Grp.*, 21 F. Supp. 2d 424, 462 (D.N.J. 1998). Defendants' monetary liability provides them with considerable motivation to place their assets beyond the Court's reach.[48] They already have transferred at least $5.9 million to Peru and other countries. *See supra* at 6.[49] Given the Individual Defendants' strong ties to Peru and the amount of funds

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[47] *See also FTC v. Premier Precious Metals, Inc.*, No. 0:12-cv-60504-RNS, Dkt No.11 (S.D. Fla. March 20, 2012); *FTC v. VGC Corp.*, No. 1:11-cv-21757-JEM, Dkt No. 16 (S.D. Fla. May 16, 2011); *FTC. v. U.S. Mortg. Funding, Inc.*, No. 11-CV-80155-Cohn. Dkt No. 20 (S.D. Fla. Feb. 20, 2011); *FTC v. First Universal Lending, LLC*, No. 09-82322-Civ-Zloch Dkt No.13 (S.D. Fla. Nov. 19, 2009); *FTC v. Kirkland Young, LLC*, No. 09-23507-Civ-Gold, Dkt No. 19 (S.D. Fla. Nov. 18, 2009); *FTC v. 1st Guar. Mortg.*, No. 09-61840-Civ-Seitz, Dkt No. 15 (S.D. Fla. Nov. 17, 2009); *FTC v. Global Mktg.*, 594 F. Supp. 2d 1281, 1286 (S.D. Fla. 2009); *FTC. v. Direct Benefits Group*, LLC, No. 6:1-cv-1186-Orl-28TBS, 2012 WL 3715204, *1 (M.D. Fla. Aug. 9, 2012).

[48] Defendants' ongoing deceptive practices, including the use of multiple company "fronts" to evade detection, indicate a willingness to engage in wrongdoing, including reaping the profits of their scheme by dissipating assets and destroying critical evidence. Defendants continue their unlawful conduct even after being shown repeatedly from the BBB the clear evidence of their deception. *See supra* at 9, fn. 20; *see also SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972) ("Because of the fraudulent nature of appellants' violations, the court could not be assured that appellants would not waste their assets prior to refunding their public investors' money").

[49] While the FTC acknowledges that not all of the funds in Defendants' bank accounts may trace back to their illegal conduct, a broad asset freeze is necessary because Defendants' intricate

deposited there, they have considerable incentive not to repatriate these funds and, potentially, even to flee this Court's jurisdiction and rejoin their funds. The TRO should therefore require the Individual Defendants to turn over their passports, whether U.S. or foreign, subject to their repatriating the millions of dollars that they have already transferred abroad.[50] Courts have ordered this relief in cases where there is compelling evidence that a Defendant has substantial foreign assets. *SEC v. Resource Development Int'l LLC*, 160 Fed. App'x. 368, 369 (5th Cir. 2005) (granting *ex parte* TRO requiring repatriation of assets and surrender of passports in scheme to defraud investors); *SEC v. Universal Consulting Resources LLC*, 2010 WL 4873733 at * 2 (D. Colo. Nov. 23, 2010) (ordering surrender of passport and repatriation of assets because defendants "have interests in or ownership of assets outside the United States"); *SEC v. Private Equity Mgmt. Grp. LLC*, 2009 WL 1310984 at *7 (C.D. Cal. Apr. 27, 2009) (ordering surrender of passports and repatriation of assets); *SEC v. Stanford Int'l Bank Ltd.*, 2009 WL 9123278 at *1, 5 (N.D. Tex. Feb. 17, 2009) (ordering surrender of passports because of flight risk and repatriation of assets because "some assets are located abroad.").

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banking system makes it impossible to trace funds to Defendants' fraud. Courts have authority to grant "any ancillary relief necessary to accomplish complete justice" including the power to grant "a broad asset freeze" where the funds are not even necessarily traceable to alleged violations. *See, e.g., FTC v. J.K. Publ'n*, 2009 WL 997421 at *5 (C.D. Cal. Apr. 13, 2009) (rejecting defendants' arguments that traceability requirement exists); *see also Nat'l Credit Mgmt. Grp.*, 21 F. Supp. 2d at 462 (ordering broad asset freeze where there was no way to determine how many consumers across the country were misled but FTC was likely to prevail and broad asset freeze was necessary to preserve assets for possible restitution).

[50] In effect, this requirement complements and puts "teeth" into the proposed TRO's provision (TRO ¶ IX) that requires the repatriation of all foreign assets.

a. The Appointment of a Receiver, Immediate Access to Business Premises, and Expedited Discovery Are Needed to Locate, Identify, and Preserve Assets and Evidence.

A receiver is critical to identifying, securing, and controlling the use of the Corporate Defendants' assets, as well as marshalling and preserving the records. This will help the FTC navigate Defendants' muddled bank accounts and identify Defendants' ill-gotten gains, which are dispersed throughout their labyrinth of bank accounts. Moreover, allowing the Defendants, as opposed to a receiver, to control the Corporate Defendants would be tantamount to allowing the proverbial fox to guard the henhouse.[51] The FTC and receiver's immediate access to Defendants' business premises, and expedited discovery about their assets and location of evidence, will also protect evidence to help the court determine: (1) the full scope of Defendants' law violations;[52] (2) the identities of injured consumers; (3) the total amount of consumer injury; and (4) the nature, extent, and location of the Defendants' assets.[53] As a matter of law, district courts have broad equitable powers and may depart from normal discovery procedures, particularly in a case involving the public interest. Fed. R. Civ. P. 26(d), 30(a)(2),

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[51] The asset freeze also is necessary to put an end to Defendants' fraudulent conduct. *U.S. Mortg. Funding,* 2011 WL 810790 at *6 (finding asset freeze necessary to prevent defendants from engaging in unlawful conduct, such as misrepresenting ability to provide refunds, and to "insure existing assets are not dissipated").

[52] Although the Defendants claim that a group of companies and individuals stole their call-lists and are responsible for the harassing calls (*see supra* at 16, fn. 40), the FTC does not currently know whether Defendants are responsible or not for these calls. Assuming that they are responsible for the calls, however, their egregious practices indicate that immediate access to their documents is necessary to prevent them for destroying the evidence, which would be the only way to determine their responsibility for the harassing practices.

[53] Indeed, Defendants run their call centers from Peru. *See supra* at 3. There may be very few corporate records that are even in the U.S., and, therefore, *ex parte* relief is necessary to ensure that whatever documentation is accessible to the FTC is not destroyed or sent abroad.

33(a), and 34(b); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (equitable powers broader where public interest is involved).

B. The TRO Should Be Entered *Ex Parte.*

The proposed TRO should be entered *ex parte* because, given the opportunity, Defendants are likely to dissipate assets or destroy evidence. Federal Rule of Civil Procedure 65(b) permits this Court to enter *ex parte* orders upon a clear showing that "immediate and irreparable injury, loss, or damage will result" if notice is given. *See also Cardile Bros. Mushroom Packaging v. Wonder-Land Invs., Inc.*, 2009 WL 936671, at *1 (S.D. Fla. April 6, 2009) (granting *ex parte* TRO because "if notice is given to Defendants of the pendency of Plaintiff's Motion for a Temporary Restraining Order, trust assets will be threatened with dissipation before the Motion is heard"). In such cases, *ex parte* relief is "indispensable" because "it is the sole method of preserving a state of affairs in which the Court can provide effective and final relief." *In re Vuitton et Fils S.A.*, 606 F.2d 1, 5 (2d Cir. 1979) (notice would "render fruitless further prosecution of the action"); *FTC v. U.S. Mortg. Funding*, 2011 WL 810790 at *1; *AT&T Broadband v. Tech Commc'ns.*, 381 F.3d at 1319. The FTC's experience shows that similarly-situated defendants have acted to dissipate assets and destroy evidence upon notice of an FTC enforcement action. *See* Rule 65(b) Cert. ¶ 9

Indeed, the evidence that Defendants have transferred millions of dollars offshore is a sufficient basis for granting *ex parte* relief. *FTC v. Willms*, 2011 WL 4103542 at *11 (W.D. Wash. Sept. 13, 2011) (granting asset freeze because evidence showed defendants moved funds to offshore bank account and companies); *FTC v. Debt Solutions, Inc.*, 2006 WL 1041996 at *7 (W.D. Wash. April 3, 2006) (finding possibility of dissipation of assets where corporate defendants sent physical assets to Canada); *USA Bevs.*, 2005 WL 5654219 at *9 (granting asset

freeze where evidence showed that Defendants had wired funds to Costa Rica); *FTC v. Sage Seminars, Inc.*, 1995 WL 798938 at *8 (N.D. Cal. Nov. 2, 1995) (granting asset freeze where evidence showed that defendant maintained assets outside of the U.S.).

V. CONCLUSION

The FTC respectfully requests that the Court grant this Motion and issue a proposed temporary restraining order, including an Order to Show Cause Why a Preliminary Injunction Should Not Issue.

Respectfully submitted,

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