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UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

US DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO, FLORIDA

**FEDERAL TRADE COMMISSION,**

**Plaintiff**

v.

**J. WILLIAM ENTERPRISES, LLC, a Florida  
limited liability company, also d/b/a PRO  
TIMESHARE RESALES;**

**PRO TIMESHARE RESALES OF FLAGLER  
BEACH LLC, a Florida limited liability  
company;**

**JESS KINMONT, individually and as an officer  
of J. WILLIAM ENTERPRISES, LLC and PRO  
TIMESHARE RESALES, LLC;**

**and**

**JOHN P. WENZ, JR., individually and as an  
officer of PRO TIMESHARE RESALES OF  
FLAGLER BEACH, LLC;**

**Defendants.**

Case No. U-16-W-2123-DRL-31-DCI

[FILED UNDER SEAL]

**PLAINTIFF'S *EX PARTE* MOTION FOR A TEMPORARY RESTRAINING ORDER  
WITH ANCILLARY EQUITABLE RELIEF AND A PRELIMINARY INJUNCTION  
AND MEMORANDUM IN SUPPORT OF THE *EX PARTE* MOTION**

**(FILED UNDER TEMPORARY SEAL)<sup>1</sup>**

<sup>1</sup> Motion to seal filed concurrently.

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## I. INTRODUCTION

Plaintiff Federal Trade Commission (hereafter sometimes referred to as the “FTC” or the “Commission”) moves this Court for an *ex parte* temporary restraining order (“TRO”) with ancillary equitable relief to prevent Defendants from continuing to violate Section 5(a) of the Federal Trade Commission Act (the “FTC Act”), 15 U.S.C. § 45(a), and the Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310, and to prevent the dissipation of assets and the destruction of documents. The *ex parte* relief requested includes prohibitions of misrepresentations, an asset freeze, immediate access to Defendants’ business premises to copy and preserve documents, the appointment of a temporary receiver over the corporate defendants, and an order to show cause why a preliminary injunction should not be issued against Defendants.

Defendants generate excitement for their purported resale or rental services by often telling consumers that they have a buyer or renter ready and willing to buy or rent their properties at a specified price. In other instances, Defendants tell consumers that the sale or rental of their timeshare properties will occur quickly, usually within a few days to a few months. Defendants require an advance fee for their services. However, after receiving the upfront fee, Defendants do not sell or rent consumers’ properties. Defendants’ misrepresentations violate Section 5(a) of the FTC Act, which prohibits “unfair or deceptive acts or practices in or affecting commerce.” They also violate the TSR, 16 C.F.R. § 310.3(a)(4), which prohibits sellers and telemarketers from making any false or misleading statements to induce any person to pay for goods or services.

In addition, Defendants' activities violate the TSR in two other ways: (1) Defendants call consumers whose telephone numbers are on the Do Not Call Registry, in violation of 16 C.F.R. § 310.4(b)(1)(iii)(B); and (2) in connection with telemarketing, Defendants initiated or caused others to initiate outbound calls to telephone numbers in area codes when Defendants had not paid a required annual fee for access to telephone numbers within such area codes, in violation of 16 C.F.R. § 310.8.

Thus, in order to halt Defendants as well as prevent the Defendants' unlawful conduct and preserve the status quo by preventing the Defendants dissipation of assets and destruction of evidence, Plaintiff requests an *ex parte* TRO with ancillary relief pursuant to Sections 13(b) of the FTC Act, 15 U.S.C. § 53(b).

## **II. DEFENDANTS**

### **A. J. William Enterprises, LLC**

J. William Enterprises, LLC, ("JWE" or "the company"), is a limited liability company formed in Florida on December 9, 2009. JWE is a telemarketer and seller of timeshare resale and/or rental services. It does business in Deland, Florida, and has used the fictitious business name Pro Timeshare Resales since October 27, 2011.<sup>2</sup> It markets such services to consumers throughout the United States.<sup>3</sup> Bank records reflect transfers from JWE to accounts held by PTR of Flagler Beach of more than \$4.4 million since May 2012.<sup>4</sup>

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<sup>2</sup> PX refers to the Plaintiff's Exhibit number in the FTC filing; ¶ refers to the paragraph number in a declaration; Att. refers to an attachment to a declaration. PX 1 [Liggins], ¶¶ 9 and 11, Att. A, B, and E.

<sup>3</sup> PX 4 [ADAMS, CORRINE], ¶ 1; PX 5 [ADAMS, MARCY], ¶ 1; PX 6 [BELL], ¶ 1; PX 7 [BROWN], ¶ 1; PX 8 [BURSTEN], ¶ 1; PX 9 [BUTTERWORTH], ¶ 1; PX 10 [BYARD] ¶ 1; PX 11 [CONAWAY], ¶ 1; PX 12 [CZERWIECKI], ¶ 1; PX 13 [DAVIS], ¶ 1; PX 14 [DAYTON], ¶ 1; PX 15 [DESHON], ¶ 1; PX 16 [DUMAS], ¶ 1; PX 17 [DUPUIS], ¶ 1; PX

**B. Pro Timeshare Resales of Flagler Beach LLC**

Pro Timeshare Resales of Flagler Beach, LLC, (“PTR of Flagler Beach”) is a limited liability company formed in Florida on January 3, 2012. PTR of Flagler Beach is also a telemarketer and seller of timeshare resale and/or rental services. It does business in Bunnell, Florida, and operates as a second location for JWE.<sup>5</sup>

**C. Jess Kinmont**

Jess Kinmont (“Kinmont”) owns and controls JWE. Kinmont is the owner and Managing Member of JWE since the company was formed on December 9, 2009,<sup>6</sup> and is the only authorized signatory on the Company’s financial accounts.<sup>7</sup> He signs corporate documents as Managing Member.<sup>8</sup>

**D. John P. Wenz, Jr.**

John P. Wenz, Jr. (“Wenz”) is the Managing Member of PTR of Flagler Beach.<sup>9</sup> He manages the operation in Bunnell, Florida, which is the second location of JWE.<sup>10</sup> He is the only signatory on PTR of Flagler Beach’s bank accounts.<sup>11</sup> He is a salesperson for JWE<sup>12</sup> and

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18 [ECKELBERG], ¶ 1; PX 19 [EDMISTON], ¶ 1; PX 20 [FARNHAM], ¶ 1; PX 21 [GAUDETTE], ¶ 1; PX 22 [GIANCOLA], ¶ 1; PX 23 [HARDING], ¶ 1; PX 24 [KAMENS], ¶ 1; PX 25 [KAVIGAN], ¶ 1; PX 26 [KRENZ], ¶ 1; PX 27 [KRIER], ¶ 1; PX 28 [LIGGINS], ¶ 1; PX 29 [LUCIUS], ¶ 1; PX 30 [NURSE], ¶ 1; PX 31 [OLSEN, CAROL], ¶ 1; PX 32 [OLSEN, DON], ¶ 1; PX 33 [OLSON], ¶ 1; PX 34 [PURINTON], ¶ 1; PX 35 [REID], ¶ 1; PX 36 [SHUTLER], ¶ 1; PX 37 [TURNER], ¶ 1; PX 38 [WALTERS], ¶ 1; PX 39 [RANGAN], ¶ 1.

<sup>4</sup> PX 1 [LIGGINS], ¶ 20, Att. L.

<sup>5</sup> PX 1 [LIGGINS], ¶ 23, Att. O.

<sup>6</sup> PX 1 [LIGGINS], ¶ 9.

<sup>7</sup> PX 1 [LIGGINS], ¶ 18, Att. J.

<sup>8</sup> PX 1 [LIGGINS], ¶ 23, Att. O.

<sup>9</sup> PX 1 [LIGGINS], ¶ 10, Att. C and D.

<sup>10</sup> PX 1 [LIGGINS], ¶ 24, Att. P.

<sup>11</sup> PX 1 [LIGGINS], ¶¶ 21, 22, Att. M and N.

has signed a rental agreement on behalf of JWE in Bunnell, Florida, using JWE's fictitious business name, Pro Timeshare Resales.<sup>13</sup>

### III. STATEMENT OF FACTS

#### A. Defendants' Deceptive Business Practices.

Since at least November 2011, Defendants, using the name "Pro Timeshare Resales," have engaged in a deceptive telemarketing campaign designed to trick consumers throughout the United States into believing that Defendants will sell or rent consumers' timeshare properties. Defendants call consumers, many of whom have registered their telephone numbers with the National Do Not Call Registry,<sup>14</sup> and falsely claim they have buyers lined up to purchase consumers' timeshares at a specified price,<sup>15</sup> or they promise to sell the timeshares quickly, sometimes within a specified time period, such as a few days to six months.<sup>16</sup> Defendants then inform consumers that they must pay an upfront fee for

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<sup>12</sup> PX 1 [LIGGINS], ¶ 23, Att. O.

<sup>13</sup> PX 1 [LIGGINS], ¶ 25, Att. Q.

<sup>14</sup> PX 4 [ADAMS, CORRINE], ¶ 6; PX 7 [BROWN], ¶ 3; PX 9 [BUTTERWORTH], ¶ 3; [CONAWAY], ¶ 4; PX 12 [CZERWIECKI], ¶ 4; PX 13 [DAVIS], ¶ 4; PX 14 [DAYTON], ¶ 3; PX 15 [DESHON], ¶ 3; PX 16 [DUMAS], ¶ 3; PX 18 [ECKELBERG], ¶ 3; PX 20 [FARNHAM], ¶ 5; PX 22 [GIANCOLA], ¶ 3; PX 24 [KAMENS], ¶ 5; PX 26 [KRENZ], ¶ 3; PX 36 [SHUTLER], ¶ 6; PX 37 [TURNER], ¶ 3.

<sup>15</sup> PX 6 [BELL], ¶ 4; PX 8 [BURSTEN], ¶¶ 4,7; PX 10 [BYARD], ¶¶ 2,7,8; PX 11 [CONAWAY], ¶ 6; PX 13 [DAVIS], ¶ 8; PX 16 [DUMAS], ¶ 6; PX 17 [DUPUIS], ¶¶ 4,7,9; PX 18 [ECKELBERG], ¶ 8; PX 20 [FARNHAM], ¶ 7; PX 24 [KAMENS], ¶ 7; PX 25 [KAVIGAN], ¶ 3; PX 28 [LIGGINS], ¶ 6; PX 33 [OLSON], ¶ 7; PX 34 [PURINTON], ¶ 7; PX 35 [REID], ¶ 6.

<sup>16</sup> PX 4 [ADAMS, CORRINE], ¶¶ 8,10; PX 5 [ADAMS, MARCY], ¶ 4; PX 6 [BELL], ¶ 4; PX 8 [BURSTEN], ¶ 6; PX 9 [BUTTERWORTH], ¶ 4; PX 10 [BYARD] ¶ 2; PX 11 [CONAWAY], ¶ 7; PX 12 [CZERWIECKI], ¶ 5; PX 13 [DAVIS], ¶ 5; PX 14 [DAYTON], ¶ 4; PX 15 [DESHON], ¶ 3, 11; PX 16 [DUMAS], ¶ 4; PX 17 [DUPUIS], ¶ 19; PX 18 [ECKELBERG], ¶¶ 5, 9; PX 19 [EDMISTON], ¶ 5; PX 20 [FARNHAM], ¶ 3; PX 21 [GAUDETTE], ¶ 6; PX 23 [HARDING], ¶¶ 5, 6; PX 27 [KRIER], ¶ 5; PX 29 [LUCIUS], ¶¶ 3, 7;

Defendants' services.<sup>17</sup> The initial fee generally ranges from \$500 to \$2,500, and sometimes more.<sup>18</sup> However, in many, if not all, instances, Defendants do not sell or rent the consumers' timeshare, do not actually have a buyer or renter for any timeshares, and do not sell or rent timeshares within the promised period of time (or any period of time).<sup>19</sup>

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PX 30 [NURSE], ¶ 7; PX 31 [OLSEN, CAROL], ¶ 3; PX 34 [PURINTON], ¶ 7; PX 35 [REID], ¶ 3; PX 36 [SHUTLER], ¶ 3; PX 37 [TURNER], ¶ 5; PX 38 [WALTERS], ¶¶ 5, 9.

<sup>17</sup> PX 4 [ADAMS, CORRINE], ¶¶ 3, 7, 8, 9, 12; PX 5 [ADAMS, MARCY], ¶ 5; PX 6 [BELL], ¶¶ 4, 5; PX 8 [BURSTEN], ¶ 7; PX 9 [BUTTERWORTH], ¶ 5; PX 10 [BYARD] ¶ 3; PX 11 [CONAWAY], ¶ 7; PX 12 [CZERWIECKI], ¶ 5; PX 13 [DAVIS], ¶¶ 5, 6; PX 14 [DAYTON], ¶ 4; PX 15 [DESHON], ¶¶ 3, 4; PX 16 [DUMAS], ¶ 4; PX 17 [DUPUIS], ¶ 4; PX 18 [ECKELBERG], ¶ 4; PX 19 [EDMISTON], ¶ 6; PX 20 [FARNHAM], ¶ 4; PX 21 [GAUDETTE], ¶ 8; PX 23 [HARDING], ¶ 4; PX 24 [KAMENS], ¶ 3; PX 25 [KAVIGAN], ¶ 3; PX 27 [KRIER], ¶ 4; PX 28 [LIGGENS], ¶ 4; PX 29 [LUCIUS], ¶ 4; PX 30 [NURSE], ¶ 4; PX 31 [OLSEN, CAROL], ¶ 3; PX 32 [OLSEN, DON], ¶¶ 3, 4, 5; PX 33 [OLSON], ¶ 3; PX 34 [PURINTON], ¶¶ 5, 7; PX 35 [REID], ¶¶ 3, 7; PX 36 [SHUTLER], ¶¶ 4, 9; PX 37 [TURNER], ¶¶ 7, 8; PX 38 [WALTERS], ¶ 5, 7, 9.

<sup>18</sup> PX 4 [ADAMS, CORRINE], ¶ 3; PX 5 [ADAMS, MARCY], ¶ 5; PX 6 [BELL], ¶ 4; PX 8 [BURSTEN], ¶ 7; PX 9 [BUTTERWORTH], ¶ 5; PX 10 [BYARD] ¶ 3; PX 11 [CONAWAY], ¶ 7; PX 12 [CZERWIECKI], ¶ 5; PX 13 [DAVIS], ¶ 5; PX 14 [DAYTON], ¶ 4; PX 15 [DESHON], ¶ 3; PX 16 [DUMAS], ¶ 4; PX 17 [DUPUIS], ¶ 4; PX 18 [ECKELBERG], ¶ 4; PX 19 [EDMISTON], ¶ 6; PX 20 [FARNHAM], ¶ 4; PX 21 [GAUDETTE], ¶ 8; PX 23 [HARDING], ¶ 4; PX 24 [KAMENS], ¶ 3; PX 25 [KAVIGAN], ¶ 3; PX 27 [KRIER], ¶ 4; PX 28 [LIGGENS], ¶ 4; PX 29 [LUCIUS], ¶ 4; PX 30 [NURSE], ¶ 4; PX 31 [OLSEN, CAROL], ¶ 3; PX 32 [OLSEN, DON], ¶ 3; PX 33 [OLSON], ¶ 3; PX 34 [PURINTON], ¶ 5; PX 35 [REID], ¶ 3; PX 36 [SHUTLER], ¶ 4; PX 37 [TURNER], ¶ 7; PX 38 [WALTERS], ¶ 5; PX 39 [RANGAN], ¶ 4.

<sup>19</sup> PX 4 [ADAMS, CORRINE], ¶ 13; PX 5 [ADAMS, MARCY], ¶ 9; PX 6 [BELL], ¶ 20; PX 8 [BURSTEN], ¶ 13; PX 9 [BUTTERWORTH], ¶ 10; PX 10 [BYARD] ¶ 13; PX 11 [CONAWAY], ¶ 16; PX 12 [CZERWIECKI], ¶ 16; PX 13 [DAVIS], ¶ 12; PX 14 [DAYTON], ¶ 12; PX 15 [DESHON], ¶ 12; PX 16 [DUMAS], ¶ 15; PX 17 [DUPUIS], ¶ 22; PX 18 [ECKELBERG], ¶ 16; PX 19 [EDMISTON], ¶ 11; PX 20 [FARNHAM], ¶ 16; PX 21 [GAUDETTE], ¶ 13; PX 23 [HARDING], ¶ 10; PX 24 [KAMENS], ¶ 11; PX 25 [KAVIGAN], ¶ 19; PX 26 [KRENZ], ¶ 1; PX 27 [KRIER], ¶ 12; PX 28 [LIGGENS], ¶ 12; PX 29 [LUCIUS], ¶ 12; PX 30 [NURSE], ¶ 11; PX 31 [OLSEN, CAROL], ¶ 10; PX 32 [OLSEN, DON], ¶ 10; PX 33 [OLSON], ¶ 10; PX 34 [PURINTON], ¶ 15; PX 35 [REID], ¶ 12; PX 36 [SHUTLER], ¶ 14; PX 37 [TURNER], ¶ 11; PX 38 [WALTERS], ¶ 12; PX 39 [RANGAN], ¶ 11.

After consumers indicate they are interested in purchasing Defendants' services, Defendants obtain credit card payment information from the consumers.<sup>20</sup> Defendants then typically send a form agreement to the consumers electronically for signature.<sup>21</sup> The Defendants typically send the agreement with a cover letter, which states in part:

Pro Timeshare would like to thank you for the opportunity to represent you in the resale and/or rental of your vacation property. . . We are looking forward to another successful account.<sup>22</sup>

Upon receiving Defendants' contract, many consumers electronically sign and return it, mistakenly believing the contract is for the sale or rental of their timeshare properties as Defendants had represented in the telemarketing call.<sup>23</sup> Consumers are often rushed through the signing process with additional high-pressure sales tactics, such as assurances that the buyer is actually waiting to purchase or rent the consumers' timeshare properties and that the sale or rental of their properties will occur once they sign and return the agreement.<sup>24</sup>

Upon closer reading, consumers sometimes realize that the agreement is only a contract for the advertising of consumers' timeshares, not a contract for the sale of their timeshare.<sup>25</sup> In fact, the Advertising Agreement states inconspicuously that Defendants have "sold zero timeshares."<sup>26</sup> This despite their oral representations and the fact that Defendants

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<sup>20</sup> E.g., PX 4 [ADAMS, CORRINE], ¶¶ 3, 8; PX 5 [ADAMS, MARCY], ¶ 5; PX 6 [BELL], ¶ 5.

<sup>21</sup> E.g., PX 5 [ADAMS, MARCY], ¶ 5; PX 6 [BELL], ¶ 5; PX 10 [BYARD] ¶ 3.

<sup>22</sup> E.g., PX 4 [ADAMS, CORRINE], ¶ 3, Att. A; PX 5 [ADAMS, MARCY], ¶ 4, Att. A; PX 6 [BELL], ¶ 9, Att. B; PX 10 [BYARD] ¶ 5, Att. A;

<sup>23</sup> E.g., PX 5 [ADAMS, MARCY], ¶ 4; PX 10 [BYARD] ¶ 13; PX 9 [BUTTERWORTH], ¶ 6.

<sup>24</sup> E.g., PX 9 [BUTTERWORTH], ¶¶ 4, 6; PX 17 [DUPUIS], ¶ 5; PX 20 [FARNHAM], ¶ 7.

<sup>25</sup> E.g., PX 6 [BELL], ¶ 6, Att. A; PX 8 [BURSTEN], ¶ 8; PX 19 [EDMISTON], ¶ 9.

<sup>26</sup> E.g., PX 4 [ADAMS, CORRINE], ¶¶ 3, 7, 8, 9, Att. A, B, C, D; PX 5 [ADAMS, MARCY], ¶ 5, Att. C; PX 10 [BYARD] ¶ 5, Att. A.

market using the name “Pro Timeshare Resales.” Consumers who question Defendants about the contract are told that it is a standardized form contract that consumers must sign and return in order to proceed with the sale.<sup>27</sup> These consumers are then often reassured by Defendants that a sale is imminent or would occur quickly.<sup>28</sup> Moreover, consumers often assume that Defendants would, of course, need to advertise in order to sell or rent their timeshare properties.

Consumers consistently report that their timeshares were never sold or rented.<sup>29</sup> As time passed, the Defendants would often request additional monies from consumers, claiming that the sale or rental was about to take place, and that the additional monies were necessary to finalize the deal.<sup>30</sup>

Consumers are understandably frustrated and concerned because Defendants’ promises of a quick sale or rental have failed to materialize. Many consumers complained to the Defendants and requested refunds.<sup>31</sup> Often, Defendants placate consumers with additional false promises that a sale is imminent.<sup>32</sup> Defendants’ managers often reassure the consumers

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<sup>27</sup> PX 17 [DUPUIS], ¶ 5; PX 28 [LIGGENS], ¶ 4; PX 29 [LUCIUS], ¶ 4; PX 37 [TURNER], ¶ 7.

<sup>28</sup> PX 17 [DUPUIS], ¶ 5; PX 28 [LIGGENS], ¶ 6; PX 29 [LUCIUS], ¶¶ 7, 8; PX 37 [TURNER], ¶¶ 7, 8.

<sup>29</sup> See fn. 19.

<sup>30</sup> E.g., PX 4 [ADAMS, CORRINE], ¶¶ 4, 7, 8, 9; PX 6 [BELL], ¶¶ 9, 11, 12, 14, 15; PX 10 [BYARD] ¶¶ 5, 11; PX 39 [RANGAN], ¶ 6.

<sup>31</sup> PX 5 [ADAMS, MARCY], ¶ 7; PX 6 [BELL], ¶ 16; PX 8 [BURSTEN], ¶¶ 8, 12; PX 12 [CZERWIECKI], ¶ 12; PX 16 [DUMAS], ¶ 13; PX 17 [DUPUIS], ¶ 18; PX 20 [FARNHAM], ¶ 12; PX 24 [KAMENS], ¶¶ 6, 9; PX 27 [KRIER], ¶ 6; PX 28 [LIGGENS], ¶ 10; PX 30 [NURSE], ¶ 9; PX 32 [OLSEN, DON], ¶ 7; PX 35 [REID], ¶ 9; PX 36 [SHUTLER], ¶ 11; PX 37 [TURNER], ¶ 9.

<sup>32</sup> PX 6 [BELL], ¶¶ 17, 18; PX 8 [BURSTEN], ¶ 9; PX 20 [FARNHAM], ¶ 13; PX 24 [KAMENS], ¶ 7; PX 36 [SHUTLER], ¶ 13.

that their timeshares will be sold or rented within a short period of time.<sup>33</sup> For example, several consumers told staff that, after they complained, they were eventually transferred to a manager named Eric Etayo. Etayo told consumers that he would personally take over their accounts and that he had never failed to accomplish the sale of a timeshare once he had undertaken to do so.<sup>34</sup> Despite transfer to different sales representatives or managers and additional reassurances of sale, the timeshares remained unsold or unrented.<sup>35</sup>

Moreover, Defendants generally do not refund consumers' money.<sup>36</sup> Although the form agreement used by Defendants provides consumers with ten days to cancel, most such cancellation requests are thwarted with further assurances of promised sales.<sup>37</sup>

Many of the outbound calls made by Defendants are to consumers who are on the Do Not Call Registry.<sup>38</sup> Furthermore, the Defendants have not paid the required annual fee for access to telephone numbers within area codes included in the National Do Not Call Registry.<sup>39</sup>

## **B. Consumer Injury**

Defendants' scam has caused more than \$17 million in consumer injury since November 2011.<sup>40</sup>

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<sup>33</sup> E.g., PX 6 [BELL], ¶ 18; PX 8 [BURSTEN], ¶¶ 8, 9; PX 20 [FARNHAM], ¶ 13.

<sup>34</sup> E.g., PX 6 [BELL], ¶ 18; PX 15 [DESHON], ¶ 11.

<sup>35</sup> See fn. 19.

<sup>36</sup> See fn. 32.

<sup>37</sup> Id.

<sup>38</sup> See fn. 14.

<sup>39</sup> PX 1 [Liggins], ¶ 8.

<sup>40</sup> PX 1 [Liggins], ¶ 15, Att. H.

#### **IV. ARGUMENT AND CITATION OF AUTHORITY**

A temporary restraining order is necessary to prevent defendants from continuing to perpetrate their scam. This Court may issue a temporary restraining order to prevent a defendant from violating the FTC Act, where, as here, the FTC seeks a temporary restraining order as part of a civil action seeking permanent injunctive relief.<sup>41</sup> Indeed, the full range of this Court's inherent equitable powers may be employed during the pendency of an action for permanent injunctive relief.<sup>42</sup>

Unlike private litigants, the FTC, an independent regulatory agency, need not demonstrate irreparable injury in order to obtain injunctive relief.<sup>43</sup> It is subject to a lighter burden. Accordingly, in order to obtain a temporary restraining order (or a preliminary injunction),<sup>44</sup> the FTC must show only that (1) it is likely to succeed on the merits, and (2) injunctive relief is in the public interest.<sup>45</sup>

##### **A. Plaintiffs are Likely to Succeed on the Merits of Their Claims.**

###### **1. Defendants have violated Section 5 of the FTC Act.**

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce."<sup>46</sup> A defendant is liable under Section 5 for making false or misleading

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<sup>41</sup> See 15 U.S.C. § 53(b) (second proviso, "Provided further, that in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.").

<sup>42</sup> *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir.1996).

<sup>43</sup> *FTC v. IAB Mktg. Assocs., LP*, 746 F.3d 1228, 1232 (11th Cir. 2014).

<sup>44</sup> The factors considered in ruling on a motion for a temporary restraining order "mirror" those considered on a motion for a preliminary injunction. 11A Federal Practice & Procedure § 2951 (3d ed.); see *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225 (11th Cir. 2005) (same).

<sup>45</sup> *Id.*

<sup>46</sup> 15 U.S.C. § 45(a)(1).

representations if the defendant (1) made a representation (2) that was likely to mislead consumers acting reasonably under the circumstances and (3) the representation was material.<sup>47</sup> As demonstrated below, Defendants made material misrepresentations that misled consumers, and thus, they have violated Section 5 of the FTC Act.

**a. Defendants make representations that are likely to mislead consumers.**

At the core of its business practices, in many instances, Defendants tell consumers that they have a buyer or renter ready and willing to buy or rent their properties at a specified price. In other instances, Defendants tell consumers that the sale or rental of their timeshare properties will occur quickly, usually within a few days to a few months.

These representations are likely to mislead consumers. Whether a representation is likely to mislead consumers is “evaluated from the perspective of the reasonable prospective purchaser, that is, a reasonable consumer in the audience targeted by the advertisement.”<sup>48</sup> “Consumers need not be actually deceived, the representations need only have the tendency or capacity to deceive.”<sup>49</sup> “[W]hile customer reliance is not controlling, how consumers resolve ambiguities in representations made to them is highly probative of whether the representations have a tendency or capacity to deceive.”<sup>50</sup> While “[p]roof of actual deception is unnecessary to establish a violation of Section 5, such proof is highly probative to show

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<sup>47</sup> *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003) (citations omitted).

<sup>48</sup> *FTC v. Wash. Data Res.*, 856 F. Supp. 2d 1247, 1272 (M.D. Fla. 2012), *aff'd*, 704 F.3d 1323 (11th Cir. 2013).

<sup>49</sup> *Tashman*, 318 F.3d at 1283 (Vinson, J., dissenting) (citing *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir.1979)).

<sup>50</sup> *Id.*

that a practice is likely to mislead consumers acting reasonably under the circumstances."<sup>51</sup> "The important criterion in determining the meaning of an advertisement is the net impression that it is likely to make on the general populace."<sup>52</sup> Thus, "when assessing the meaning and representations conveyed by an advertisement, the court must look to the advertisement's overall, net impression rather than the literal truth or falsity of the words in the advertisement."<sup>53 54</sup>

As shown below, the representations of JWE and PTR of Flagler Beach LLC (1) had the capacity or tendency to deceive consumers because they were false or lacked a reasonable basis, and (2) actually deceived consumers.

*First*, a representation is likely to mislead, and thus violates Section 5, if it has the capacity or tendency to deceive; that is, it is either false or lacks a reasonable basis.<sup>55</sup> JWE's and PTR's oral representations that they had buyers lined up to purchase consumers' timeshares at a specified price, or could sell consumers' timeshares quickly, as well as the representations made in the cover letters they sent to consumers, that defendants would "represent you in the resale and/or rental of your vacation property" are false. The testimony

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<sup>51</sup> *FTC v. USA FIN., LLC*, 415 Fed.Appx. 970, 972 (11th Cir. 2011).

<sup>52</sup> *FTC v. EMA Nationwide, Inc.*, 767 F.3d 611, 631 (6th Cir. 2014) (internal citation omitted).

<sup>53</sup> *FTC v. Nat'l Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1189 (N.D. Ga. 2008), *aff'd*, 356 F. App'x 358 (11th Cir. 2009).

<sup>54</sup> Even to the extent Defendants subsequently sent written contracts to consumers that inconspicuously disclaimed earlier oral misrepresentations, the oral misrepresentations violate Section 5 of the FTCA. "Circuits to apply § 5 in such circumstances have concluded that 'the law is violated if the first contact is secured by deception, even though the true facts are made known to the buyer before he enters into the contract of purchase.'" *FTC v. Financial Freedom Processing, Inc.*, 2013 U.S. App. Lexis 16766, \*3 (5<sup>th</sup> Cir. 2013)(citations omitted); *accord EMA Nationwide, Inc.*, 767 F.3d at 632.

<sup>55</sup> *Tashman* at 1280, n.5.

of numerous consumers evidences that Defendants do not have buyers lined up to purchase consumers' timeshares at a specified price (or at any price) or sell consumers' timeshares quickly.<sup>56</sup> Thus, Defendants' representations are false.

*Second*, although actual deception is unnecessary, evidence—like that presented here—that consumers are actually deceived is “highly probative to show that a practice is likely to mislead consumers...”<sup>57</sup> Here, Defendants deceived many consumers with their representations that they had prospective buyers ready to buy consumers' timeshare properties or could sell consumers' timeshare properties quickly.<sup>58</sup>

**b. Defendants' Representations are Material.**

Each of Defendants' representations to consumers is also material. “A representation or omission is material if it is the kind usually relied on by a reasonably prudent person.”<sup>59</sup> A misleading impression is material if it “involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.”<sup>60</sup> “Express claims, or deliberately-made implied claims, used to induce the purchase of a particular product or service are presumed to be material.”<sup>61</sup>

Defendants' representations are material for at least two reasons. *First*, Defendants make express or deliberately-made implied representations that they can sell or rent

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<sup>56</sup> *Id.*

<sup>57</sup> *FTC v. Direct Benefits Grp., LLC*, No. 6:11-CV-1186-ORL-28TBS, 2013 WL 3771322, at \*15 (M.D. Fla. July 18, 2013) (citation and quotation marks omitted).

<sup>58</sup> (App. 147-148, ¶ 5; App. 247-247, ¶ 5; App. 257, ¶ 4; App. 271-272, ¶ 5; App. 285, ¶ 3; App. 335, ¶ 6)

<sup>59</sup> *FTC v. Windward Mktg.*, No. 1:96-cv-615-FMH, 1997 U.S. Dist. LEXIS 17114, at \*27, 1997 WL 33642380, at \*9 (N.D. Ga. Sept. 30, 1997).

<sup>60</sup> *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006) (citation and quotes omitted).

<sup>61</sup> *Windward Mktg.*, 1997 WL 33642380, at \*10 (N.D. Ga. Sept. 30, 1997).

consumers' timeshare properties in order to induce consumers to purchase Defendants' services, and this is presumptively material.<sup>62</sup>

*Second*, representations that go to "the heart of a consumer's decision to purchase" a product or service are presumptively material.<sup>63</sup> Here, the Defendants' representations lured consumers into entering a monetary transaction they otherwise would not have agreed to enter.<sup>64</sup> For example, consumer Corinne Adams states:

I have lost more than \$9,269 to Pro Timeshare Resales. If I had known that Pro Timeshare Resales was not going to sell my timeshare, as they promised they would do, I would never have paid any money to them.<sup>65</sup>

### c. Individual Liability

An individual defendant is liable for corporate practices that violate Section 5 of the FTC Act, if the defendant (1) had "some knowledge of the practices"<sup>66</sup> and (2) either "participated directly in the practices" or "had authority to control them."<sup>67</sup> Circumstantial

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<sup>62</sup> *Id.*; *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999) (citations omitted).

<sup>63</sup> *FTC v. USA Beverages, Inc.*, No. 05-61682, 2005 U.S. Dist. LEXIS 39075, at \*17 (S.D. Fla. Dec. 5, 2005), *report and recommendation adopted*, No. 05-61682, 2005 U.S. Dist. LEXIS 39026 (S.D. Fla. Dec. 8, 2005).

<sup>64</sup> (App. 149, ¶ 13; App. 179, ¶ 12; App. 204, ¶ 8; App. 225, ¶ 15)

<sup>65</sup> (App. 149, ¶ 13)

<sup>66</sup> The Commission need not demonstrate that defendants had actual knowledge of the misrepresentations; reckless indifference to the truth or falsity of the representations or an awareness of a high probability of fraud coupled with an intentional avoidance of the truth will suffice. *FTC v. Atlantex Assoc.*, No. 87-0045-CIV-Nesbitt, 1987 U.S. Dist. LEXIS 10911, at \*25-26 (S.D. Fla. Nov. 25, 1987); *see also FTC v. World Media Brokers*, 415 F.3d 758, 764 (7th Cir. 2005); *FTC v. Amy Travel Serv.*, 875 F.2d 564, 875 F.2d at 574.

<sup>67</sup> *FTC v. Gem Merch. Corp.*, 87 F.3d at 470. (citation and quotation marks omitted). Proof of intent to defraud is not required to satisfy the knowledge requirement. *FTC v. Jordan Ashley*, No. 93-2257, 1994 U.S. Dist. LEXIS 7494, at \*11 (S.D. Fla. Apr. 5, 1994) (citing *Amy Travel*, 875 F.2d at 573-74). Nor must the Commission demonstrate that defendants had actual knowledge of the misrepresentations; reckless indifference to the truth or falsity of the representations or an awareness of a high probability of fraud coupled with an intentional

evidence is sufficient to establish that a defendant had “requisite ... knowledge” of a deceptive or fraudulent practice,<sup>68</sup> and a defendant’s “degree of participation in business [affairs] is probative of knowledge.”<sup>69</sup> In addition, even if there is no evidence that a defendant participated directly in a fraudulent practice, “[a]uthority 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.”<sup>70</sup> In fact, a defendant’s “status as a corporate officer gives rise to a presumption of ability to control a small, closely-held corporation.”<sup>71</sup>

#### i. Kinmont’s Liability

Kinmont has the authority to control the deceptive practices. Kinmont is the Managing Member<sup>72</sup> and sole member of JWE.<sup>73</sup> He is the sole signatory on JWE’s Wells Fargo Bank corporate accounts, which he signs as the sole member of the company.<sup>74</sup> Kinmont also listed Pro Timeshare Resales as a fictitious business name of JWE in Wells Fargo bank documents.<sup>75</sup> Kinmont also had notice of the deceptive practices. He personally handled consumer complaints against the company that the Better Business Bureau

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avoidance of the truth will suffice. *FTC v. Atlantex Assoc.*, No. 87-0045-CIV-Nesbitt, 1987 U.S. Dist. LEXIS 10911, at \*25-26 (S.D. Fla. Nov. 25, 1987); *see also FTC v. World Media Brokers*, 415 F.3d 758, 764 (7th Cir. 2005); *Amy Travel*, 875 F.2d at 574.

<sup>68</sup> *Wiand v. Wells Fargo Bank, N.A.*, 938 F. Supp. 2d 1238, 1244 (M.D. Fla. 2013),

<sup>69</sup> *FTC v. Transnet Wireless*, 506 F. Supp. 2d 1247, 1270 (S.D. Fla. 2007) (citation and quotation marks omitted).

<sup>70</sup> *Amy Travel Serv.*, 875 F.2d 564, 573 (7th Cir. 1989) (citations omitted); *see IAB Mktg. Assocs.*, 746 F.3d at 1233 (same).

<sup>71</sup> *Transnet Wireless*, 506 F. Supp. 2d at 1270 (citation and quotation marks omitted).

<sup>72</sup> PX 1 [LIGGINS], ¶ 9, Att. A and B.

<sup>73</sup> PX 1 [LIGGINS], ¶ 18, Att. J.

<sup>74</sup> PX 1 [LIGGINS], ¶ 18, Att. J.

<sup>75</sup> PX 1 [LIGGINS], ¶ 19, Att. K.

forwarded to JWE.<sup>76 77</sup> Because Kinmont knows about, participates directly in, and controls the scam, he is individually liable for the practices of JWE and PTR of Flagler Beach.

**ii. Wenz' Liability**

Wenz is the owner of PTR of Flagler Beach<sup>78</sup> and the sole signatory on its SunTrust Bank corporate accounts.<sup>79</sup> He is also a salesperson for JWE<sup>80</sup> and the manager for JWE's operations in Bunnell, Florida.<sup>81</sup> Wenz knows about and participates directly in the scam by communicating with consumers about the sale of their timeshares.<sup>82</sup> Because Wenz knows about, participates directly in, and controls the scam, he is individually liable for the practices of JWE and PTR of Flagler Beach.

**d. The Corporate Defendants Operate as a Common Enterprise.**

The JWE and PTR of Flagler Beach have operated as a common enterprise in which the companies' assets, services, and management are intertwined through two interrelated corporate entities. Courts in this district have held defendants liable for the acts of one another under a "common enterprise" theory of liability "if, for example, the companies (1)

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<sup>76</sup> PX 2 [PEPPER] declaration, ¶¶ 7, 9; The BBB has been receiving complaints about Pro Timeshare Resales (JWE's fictitious business name) since November of 2011, provides notice of complaints to entities that are the subject of the complaints, and has communicated with Kinmont on more than one occasion about complaints against Pro Timeshare Resales.

<sup>77</sup> In April of 2014, Kinmont met with the Florida Attorney General's office at their request to discuss his company's business practices. The company's problematic business practices continued after that meeting.

<sup>78</sup> PX 1 [LIGGINS], ¶¶ 21, 22, 25, Att. M, N, Q.

<sup>79</sup> PX 1 [LIGGINS], ¶ 22, Att. N.

<sup>80</sup> PX 1 [LIGGINS], ¶ 23, Att. O.

<sup>81</sup> PX 1 [LIGGINS], ¶ 25, Att. Q.

<sup>82</sup> PX 36 [SHUTLER], ¶ 9, Att. D.

maintain officers and employees in common, (2) operate under common control, (3) share offices, (4) commingle funds, and (5) share advertising and marketing.”<sup>83</sup>

All of the elements of a common enterprise exist here. The connection between JWE and PTR of Flagler Beach is indicated through various applications and documents filed with state and local agencies and in a rental agreement.<sup>84</sup> For example, in an application for a telemarketing license filed by Kinmont as the owner of JWE, he listed both JWE’s Deland address and PTR of Flagler Beach’s Bunnell address as locations where JWE does business.<sup>85</sup> That application also listed Wenz as a salesperson for JWE,<sup>86</sup> and the Florida Department of Agriculture and Consumer Services issued a telemarketing license to Wenz as a salesperson for JWE.<sup>87</sup> In addition, Wenz, the managing member of PTR of Flagler Beach, signed a business application with the City of Bunnell, Florida, describing the company’s business as a telemarketing office and identifying his company as Pro Timeshare Resales, the same fictitious name used by JWE.<sup>88</sup> In another license application made to the City of Bunnell, signed by a manager of the business, Wenz was identified as the “owner/manager of Pro Timeshare Resales/J. Williams [sic] Enterprises.”<sup>89</sup> JWE and PTR of Flagler Beach also commingled funds. Also, from January 2012 to the present, JWE transferred more than \$4.4 million dollars from its Wells Fargo bank account to PTR of Flagler Beach’s SunTrust bank

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<sup>83</sup> *FTC v. Direct Benefits Grp., LLC*, No. 6:11-cv-1186-Orl-28TBS, 2013 WL 3771322 at \*18 (M.D. Fla. July 18, 2013).

<sup>84</sup> PX 1 [LIGGINS], ¶ 25, Att. Q.

<sup>85</sup> PX 1 [LIGGINS], ¶ 23, Att. O.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> PX 1 [LIGGINS], ¶ 25, Att. Q.

<sup>89</sup> *Id.*

accounts.<sup>90</sup> The two companies also share advertising and marketing. For example, they advertise on the same website. .<sup>91</sup>

## **2. Defendants have violated the Telemarketing Sales Rule.**

In 1994, Congress directed the FTC to prescribe rules prohibiting abusive and deceptive telemarketing acts or practices pursuant to the Telemarketing Act. 15 U.S.C. §§ 6101-6108. The FTC then adopted the TSR. 16 C.F.R. §\_310. The Defendants have repeatedly violated the TSR by: (a) making false or misleading statements to induce consumers to purchase their timeshare resale and/or rental services; (b) calling consumers on the National Do Not Call Registry; and (c) failing to pay the required fee to access the National Do Not Call Registry. Each violation is discussed in turn.

### **a. Defendants Made False or Misleading Statements to Induce Persons to Pay for Goods and Services.**

The TSR prohibits any seller or telemarketer from making a false or misleading statement to induce any person to pay for goods or services.<sup>92</sup> The Defendants are sellers or telemarketers engaged in telemarketing as defined by the TSR since they arrange for the sale of goods or services, or initiate or cause telemarketers to initiate outbound telephone calls.<sup>93</sup> As explained above, the Defendants falsely represent that they have a buyer or renter for the consumer's timeshare who will pay a specified price or that proposed defendants will quickly sell or rent their timeshare. Therefore, the Defendants violated the TSR by making false claims to induce the purchase of goods or services.

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<sup>90</sup> PX 1 [LIGGINS], ¶ 20, Att. L.

<sup>91</sup> PX 1 [LIGGINS], ¶ 14, Att. G.

<sup>92</sup> 16 C.F.R. § 310.3(a)(4).

<sup>93</sup> 16 C.F.R. § 310.2(aa), (cc), and (dd).

**b. Defendants Called Consumers on the National Do Not Call Registry.**

Under the TSR, sellers and telemarketers are prohibited from initiating outbound telephone calls to numbers on the National Do Not Call Registry.<sup>94</sup> The FTC has received more than 820 Do Not Call complaints about the Defendants.<sup>95</sup> The FTC has obtained several declarations from consumers whose phone numbers were registered on the National Do Not Call Registry at the time the Defendants called.<sup>96</sup> Therefore, Defendants have repeatedly violated the TSR by making telephone calls to phone numbers listed on the National Do Not Call Registry.

**c. Defendants Failed to Pay the Required Fees to Access the National Do Not Call Registry.**

Under the TSR, sellers and telemarketers are prohibited from calling any telephone number within a given area code unless the seller on whose behalf the call is made has paid the annual fee for access to the telephone numbers within that area code that are included in the National Do Not Call Registry.<sup>97</sup> The Defendants have not paid the required fee to access the National Do Not Call Registry prior to making their calls.<sup>98</sup> Therefore, the Defendants violated the law by making calls prior to paying the required fee.

**B. Injunctive Relief is in the Public Interest.**

A temporary restraining order prohibiting Defendants from continuing to perpetrate their scam is in the public interest. It is well established that the FTC's efforts to "protect the

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<sup>94</sup> 16 C.F.R. § 310.4(b)(1)(iii)(B).

<sup>95</sup> PX 1 [LIGGINS], ¶ 5.

<sup>96</sup> See fn. 14.

<sup>97</sup> 16 C.F.R. § 310.8.

<sup>98</sup> PX 1 [LIGGINS], ¶ 8.

purchasing public against deceptive methods and misrepresentations by which purchasers are deceived . . . [are] in the public interest.”<sup>99</sup> The “principal equity weighing in favor of” injunctive relief is thus “the public’s interest in effective enforcement” of the FTC Act, which is “intended to safeguard . . . consumers.”<sup>100</sup> Indeed, as the Second Circuit has noted, the passage of a statute prohibiting conduct, like Section 5’s prohibition of false and misleading representations, “is, in a sense, an implied finding that violations will harm the public and ought, if necessary, be restrained.”<sup>101</sup> Accordingly, where, as here, the FTC has demonstrated that it is likely to succeed on the merits,<sup>102</sup> defendants “face a difficult task in justifying the nonissuance of a preliminary injunction.”<sup>103</sup>

The public’s interest in preventing Defendants from continuing to perpetrate their scam far outweighs any private interest Defendants may have in continuing to perpetrate it. Defendants “have no vested interest in a business activity found to be illegal.”<sup>104</sup>

Here, a temporary restraining order is in the public interest. As shown above, Plaintiffs is likely to prevail on the merits of their claims against the Defendants, and the Defendants have demonstrated that they will continue to operate the deceptive scam. The

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<sup>99</sup> *FTC v. Rhodes Pharmacal Co.*, 191 F.2d 744, 747 (7th Cir. 1951).

<sup>100</sup> *Univ. Health*, 938 F.2d at 1225 (citation and quotation marks omitted).

<sup>101</sup> *United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 28 (2d Cir. 1972); *see* 11A Fed. Prac. & Proc. Civ. § 2948.4 (3d ed.) (“A federal statute prohibiting the threatened acts that are the subject matter of the litigation has been considered a strong factor in favor of granting a preliminary injunction.”).

<sup>102</sup> (*see, supra*, at 12-19)

<sup>103</sup> *Univ. Health*, 938 F.2d at 1225.

<sup>104</sup> *Diapulse*, 457 F.2d at 29 (citation and quotation marks omitted).

BBB notified JWE and Kinmont that consumers were complaining that JWE was deceiving them, and causing them financial harm.<sup>105</sup>

In sum, Plaintiff is likely to succeed on the merits of their claims that Defendants are violating the FTC Act by making false and misleading statements to consumers as part of their timeshare resale and/or rental scam. Moreover, a temporary restraining order prohibiting Defendants from continuing to perpetrate their scheme is in the public interest. Accordingly, the Court should grant Plaintiff's request for a temporary restraining order.

**V. AN ASSET FREEZE IS NECESSARY TO PRESERVE ASSETS FOR FINAL RELIEF.**

This Court not only has power to issue a temporary restraining order, but also has the inherent power of a court of equity to grant ancillary relief, including freezing assets.<sup>106</sup> “The FTC's burden of proof in the asset-freeze context is relatively light.”<sup>107</sup> All that is necessary is a “reasonable approximation of a defendant's ill-gotten gains.”<sup>108</sup>

Here, the possibility of permanent relief—*i.e.*, consumer redress—will be jeopardized unless the Court issues the requested asset freeze. Defendants' partial bank account records show that JWE has taken in more than \$17 million since November 2011 in one bank account alone<sup>109</sup> and JWE has transferred more than \$4.4 million to an account owned by PTR of Flagler Beach since January of 2012.<sup>110</sup> The possibility of a large monetary judgment depriving Defendants of the fruits of their illicit labor provides them with ample incentive to

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<sup>105</sup> See fn. 74.

<sup>106</sup> *FTC v. Gem Merch. Corp.*, 87 F.3d at 469 (“[A] district court may order preliminary relief, including an asset freeze that may be needed to make permanent relief possible.”).

<sup>107</sup> *FTC v. IAB Mktg. Assocs.*, 746 F.3d at 1234.

<sup>108</sup> *Id.* (citation and quotation marks omitted).

<sup>109</sup> PX 1 [LIGGINS], ¶ 15, Att. H.

<sup>110</sup> See fn. 4

conceal or dissipate otherwise recoverable assets. Accordingly, the Court should grant Plaintiffs' request for an asset freeze.

**VI. A TEMPORARY RECEIVER AND IMMEDIATE ACCESS TO THE BUSINESS PREMISES IS NECESSARY TO PROTECT ASSETS AND EVIDENCE AND TO MAINTAIN THE STATUS QUO, INCLUDING THE PROTECTION AND PRESERVATION OF ASSETS AND EVIDENCE.**

In similar actions involving fraudulent conduct, courts have regularly exercised their equitable authority to appoint a temporary receiver over corporate defendants and to grant plaintiffs immediate access to defendants' records.<sup>111</sup> Here, that fraud permeates Defendants' scheme<sup>112</sup> and that consumers have already sustained extensive injury<sup>113</sup> warrants the appointment of a receiver and an immediate access. A temporary receiver and immediate access will ensure that JWE does not engage in unlawful activity during the pendency of this action and does not destroy critical evidence about the scope of Defendants' fraud, thereby increasing the possibility that this Court will be able to provide effective final relief at the end of this action. Indeed, "[t]o allow defendants to retake control of the corporate form would be tantamount to allowing the proverbial fox to guard the henhouse."<sup>114</sup>

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<sup>111</sup> See, e.g., *FTC v. D&S Marketing Solutions, LLC*, 8:16-cv-1435-MSS-UAM (M.D. Fla. June 18, 2016); *FTC and State of Florida v. E.M. Systems & Services, LLC, et. al.*, 8:15-cv-01417-SDM-EAJ (M.D. Fla. June 17, 2015); *FTC v. Direct Benefits Group, LLC*, 6:11-CV-1186-JA-TBS (M.D. Fla. July 19, 2011); *FTC v. Prophet 3H, Inc.*, 1:06-cv-1692 (N.D. Ga. July 18, 2006); *FTC v. Info. Mgmt. Forum, Inc.*, No. 6:12-cv-986-GAP-KRS (M.D. Fla. June 28, 2012); *FTC v. VGC Corp.*, No. 1-11-cv-21757 (S.D. Fla. May 16, 2011); *FTC v. U.S. Mortgage Funding, Inc.*, No. 9:11-cv-80155-JIC (S.D. Fla. Feb. 9, 2011)

<sup>112</sup> (see, *supra*, pp. 6-8)

<sup>113</sup> See fn. 19.

<sup>114</sup> *FTC v. USA Beverages, Inc.*, No. 05-61682 CIV, 2005 WL 5654219, at \*8 (S.D. Fla. Dec. 6, 2005).

**VII. AN EX PARTE ORDER IS NECESSARY BECAUSE THE DEFENDANTS ARE LIKELY TO HIDE ASSETS AND DESTROY EVIDENCE IF INFORMED OF THIS ACTION.**

This Court should issue an order *ex parte* where, as here, “providing notice to the defendant would render fruitless the further prosecution of the action.”<sup>115</sup>

A moving party can establish that an *ex parte* order is necessary with an attorney declaration that offers evidence that a defendant is likely to hide fraudulently obtained assets or destroy evidence if informed of an action. For instance, in *AT&T Broadband*, the Eleventh Circuit held that it was appropriate for a district court to issue an *ex parte* order where the moving party submitted an attorney affidavit “detailing numerous cases where defendants charged” with similar violations had “destroyed or transferred records, evidence, and assets.”<sup>116</sup>

As demonstrated by the Attorney Declaration filed concurrently herewith, it is likely that Defendants will take additional steps to frustrate effective prosecution-- including hiding fraudulently obtained assets and evidence, if informed of this action. Defendants have secreted substantial assets, withdrawing over \$530,000 in cash, which is untraceable.<sup>117</sup> This is on top of more than \$1.5 million in transfers made to accounts held by Kinmont.<sup>118</sup> It is thus likely that Defendants will take additional steps to avoid liability. Accordingly, the Court should consider this motion, and provide the requested relief, on an *ex parte* basis.

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<sup>115</sup> *AT&T Broadband v. Tech Commc'ns, Inc.*, 381 F.3d 1309, 1319-20 (11th Cir. 2004) (citation and quotes omitted).

<sup>116</sup> *Id.* at 1319.

<sup>117</sup> PX 1 [LIGGINS], ¶ 16.

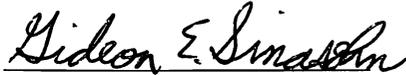
<sup>118</sup> PX 1 [LIGGINS], ¶ 16.

**VIII. CONCLUSION**

For all the reasons stated above, Plaintiff respectfully requests that the Court issue an *ex parte* temporary restraining order including an asset freeze, immediate access, appointment of a receiver, and order to show cause why a preliminary injunction should not issue.

Respectfully submitted,

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