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I. Preliminary Statement

A. Introduction.

Plaintiff moves for an *ex parte* temporary restraining order and a preliminary injunction to stop defendants' fraudulent misrepresentations, to freeze defendants' assets, to grant plaintiff expedited discovery, and to appoint a receiver.

Defendants sell two types of invention marketing services to do-it-yourself inventors. For \$790, defendants offer to review consumers' invention ideas and to compile research in a "business presentation" portfolio. Then, for an additional \$8,450 to \$12,450, defendants offer to take the consumer's invention idea to industry in the hopes of finding a licensee. To sell these services, defendants inundate consumers with a stream of misrepresentations. They claim to have working relationships with hundreds of key industry decision-makers, to have expertise in developing new product ideas, and to have a history of success in invention marketing. In reality, defendants have no meaningful relationships with industry decision-makers, their invention services are a sham rather than expert, and they use as examples of past successes no fewer than five previous inventions where the inventor earned either no royalties at all, or only a small amount well short of what typical consumers pay defendants in fees. While consumers take these claims to mean that defendants have been successful in the past and can thus help them license their ideas as well, the truth is that those who buy defendants' services are virtually certain to lose their entire investment. In fact, defendants even admitted to one consumer that, from the time they started operations in 1989 until September 1996, only five people made more money from their inventions than they paid defendants in fees. (PX 4; PX 17, Leistikow Atch. D at 2) While five is probably more successes than defendants really had, even this small amount demonstrates the long odds facing consumers, and it exposes the falsity of defendants' claims. Because fraud permeates defendants' entire sales scheme, there is a serious risk that assets will be dissipated and records destroyed unless the court grants plaintiff's relief *ex parte*. Accordingly, the court should

enter plaintiff's proposed temporary restraining order, and order defendants to appear and show cause why a preliminary injunction should not issue.

B. The Parties.

Plaintiff Federal Trade Commission ("the Commission") is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41 *et seq.* It is charged, *inter alia*, with enforcing Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). The Commission is authorized to initiate court proceedings to enjoin violations of the FTC Act, and to secure such equitable relief as may be appropriate in each case. 15 U.S.C. § 53(b).

Defendant Davison & Associates, Inc., is a Pennsylvania corporation (PX 51) with business addresses at 521 Eighth Street, Oakmont, Pennsylvania, and at 201 Route 910, Indianola, Pennsylvania. (*E.g.*, PX 11, Plottner at 1)^{1/} Davison & Associates was incorporated on December 8, 1989, and sells its invention promotion services throughout the United States and into Canada. (*See* PXs 5-25)

Defendant George M. Davison III, is President and CEO, and the founder of defendant Davison & Associates. (PX 11, Plottner at 2, 22-23) He has directly participated in some of his company's sales transactions, (PX 5, Arthur ¶ 2) and he signs many key documents involved in sales transactions, including an initial solicitation letter (*e.g.*, PX 11, Plottner at 2) and the company's conclusion and proposal recommending that the consumer's invention "should be commercialized." (*E.g.*, *id.* at 172) His home address is the Oakmont address for the corporate defendant.

^{1/} The exhibits supporting plaintiff's motion are contained in five volumes. Included in the exhibits are several witness declarations which themselves contain attachments. For ease of finding materials in the declarations, where appropriate this brief will cite to the PX number, the name of the witness, and the paragraph number or attachment number and the page number. For simplicity, since the Plottner declaration has just one attachment, citations will be made to the page number only.

Defendant Thomas Dowler has been a sales representative for defendant Davison & Associates for over five years. (PX 44 at 6) He has directly participated in many of the sales transactions of the consumer witnesses in this matter, (PX 12, Ross; PX 17 Leistikow; PX 18, Ferdinandsen) and as discussed herein, he has made numerous false statements to plaintiff's investigator in an effort to sell defendants' services. Moreover, he was the sales representative in a sale to a Minnesota resident where defendants disclosed, in an attempt to comply with that

1. Defendants' product research reports are a sham.

For \$790, defendants offer to perform “quality research” in the areas of legal protection, technical feasibility, and marketability.^{2/} As an inducement, defendants boast about their team of “international award winning designers, engineers, marketers, former U.S. Patent Examiners and many support staff members.” (E.g., PX 11, Plottner at 2)^{3/} Then, after consumers submit their ideas to defendants, a sales representative typically calls with praise. Defendant Dowler, for instance, phoned plaintiff’s undercover investigator who posed as potential customer Dave Polski telling him he was “surprised” he had never seen anything like Polski’s idea on the market, (PX 41 at 10) and that Polski’s logic was “awesome.” (*Id.* at 11-12) Polski’s awesome idea was the ID Baseball Cap, a baseball cap with a transparent sleeve to hold a picture identification card. Although Dowler liked the idea, he cautioned that no formal research had been done and that the idea would have to be discussed at the upcoming “review board meeting.” (*Id.* at 13-14)^{4/} After this meeting, the sales rep then typically calls back to say the review board liked the idea. Defendant Dowler for instance, while saying defendants could not predict success “until a product is actually in the market selling,” (PX 42 at 8)^{5/} told plaintiff’s investigator that the meeting went “extremely well,” and that “nobody has seen anything like this concept anywhere in the

^{2/} In some cases, defendants decline to offer any services after reviewing the consumers’ idea. Plaintiffs used three undercover investigators in an attempt to ascertain defendants’ sales practices. David Plottner, posing as David Polski, submitted an idea for an ID Baseball Cap, purchased defendants’ product research, and was offered an intermediate “design agreement” for \$2,790. Eric Nickerson posed as Scott Monroe, submitted an idea for a two-headed toothbrush, and was offered a similar design agreement, but before he paid defendants any money. John Arleo posed as Scott Puca and submitted two ideas, both of which defendants quickly rejected with little comment. The first was for a toothbrush with disposable bristles, and the second was for a removable guard to protect a car from dents.

^{3/} PX 14, 2nd Carter at Attch. 2B; PX 21, Wasniewski Attch. A at 1; PX 22, Wall Attch. D at 1.

^{4/} See also PX 12, Ross ¶ 3; PX 16, Limkilde ¶ 4; PX 17, Leistikow ¶ 3; PX 41 at 13-14 (Dowler suggests a “review” to see what the “other professionals” say).

^{5/} In the transcripts of the recorded sales pitches, defendant Dowler does not in fact say that Polski will make money, but does focus on defendants’ expertise and past successes.

marketplace to our knowledge.” (PX 42 at 3)

Those who pay the \$790 then wait about six weeks, all the while receiving additional fliers, letters, and other sales literature, including examples of previous “successes” Davison helped license. The results of the “quality research” then come in the form of a spiral bound booklet, and to a consumer unfamiliar with the terrain of new product development, may look impressive. In fact, the product is nothing more than a sham.

into a positive. Defendant Dowler told Polski that defendants' patent searches usually find similar ideas, but these merely present an opportunity to "leap-frog" over the prior art and come up with a better design. (PX 47 at 10) He added that most inventions fail either because the inventor failed to properly approach industry, or because the design was poor. (PX 44 at 6-7; PX 48 at 8-11) In fact, as Dr. Udell testifies, most ideas fail because there is simply no market for the idea. (PX 1, Udell ¶ 20)

Defendants also fail to take obvious first steps to assess the merits of consumers' inventions. Ms. Ross's invention, for instance, was to reconfigure the inside of a hand-lotion bottle to form a "V" so that all of the contents would flow to one point where the suction tube could reach, leaving less lotion unused. To determine whether a bottle can be made cost-effectively in this manner, Dr. Udell placed a simple phone call to a blow-mold manufacturer and determined that the idea was cost-prohibitive. (PX 1, Udell ¶ 21) Defendants failed to take this simple step, although it is difficult to believe it didn't occur to them. Nor do defendants take steps to improve on the consumer's idea. Defendants' product sketch for Ms. Ross, for instance, showed an even more costly product than the one she disclosed to defendants. (PX 1, Udell ¶ 22)

The portfolios also contain a jumble of data and articles that are "uniformly vague and largely non-relevant." (PX 1, Udell ¶ 10) Included in Polski's portfolio, for instance, are out-of-date projections on the U.S. and Canadian economies. (PX 11, Plottner at 111-15, 119; PX 1, Udell ¶ 20) Included in Ms. Ross's portfolio is a four-year-old article on "Plastics Grown in Bacteria," and a seven-year-old article on "Eight Hot Trends in Food Packaging." (PX 12, Ross Attch. H at 11, 13) Obviously, these have nothing to do with the decision at hand, whether these inventors should pursue their inventions. In fact, Dr. Udell testifies that the portfolios contain so much extraneous information that if they are actually shown to industry decision-makers, they

would likely have a negative impact. (PX 1, Udell ¶ 16)

Defendants' portfolios also contain the results of patent searches which, in the manner they are presented, have no value to consumers. Specifically, many of defendants patent searches find a reference that precludes the grant of a utility patent,^{6/} yet defendants never explain the meaning of the results, other than to say they pose no problems. (E.g., PX 47 at 9) Instead, defendants recommend that the consumer seek patent protection after finding a licensee, and after having spent thousands of dollars.

Christopher Fagan, a patent attorney with over 20 years of experience, and Dr. Udell both testify that determining the scope of protection is an obvious first step, particularly where the objective is to enter into a licensing agreement. (PX 2, Fagan at ¶ 2; PX 1, Udell at ¶ 14) Unless the inventor can protect his idea, he has nothing to license. To protect an idea, an inventor may either enter into a "confidential relationship" with a company or seek patent protection. If an inventor is fortunate enough to enter into a confidential relationship, he would then have a proprietary interest in any idea disclosed to the company.^{7/} But according to Mr. Fagan, this approach is unlikely to lead to a profitable licensing agreement as most large firms, to guard against frivolous lawsuits, require a signed acknowledgment that no confidential relationship exists before they will even consider an unsolicited invention idea. (PX 2, Fagan at ¶ 3)

Thus, to license inventions to the major corporations defendants claim to do business with, defendants must determine the scope of protection available under the patent laws. But of all of defendants' patent searches filed in this matter, there is not one idea capable of receiving a utility

^{6/} In some cases, inventors may seek a design patent which protects the outward appearance or ornamentation of an idea. But where the purpose of the idea lies in its practical utility rather than its appearance (*i.e.*, typical inventions), then only a utility patent will protect the idea. Also, because design patents can be easily gotten around, they offer little protection. (PX 2, Fagan ¶ 4) They are thus difficult to license.

^{7/} Defendant Dowler suggests that entering into a confidential relationship might be part of defendants' strategy. (PX 45 at 6-7)

patent. (*Id.* at ¶ 12) In many cases, Mr. Fagan testifies, defendants’ search was adequate and found a good reference precluding the grant of a utility patent.^{8/} The search for Polski, for instance, found a direct reference precluding the grant of a utility patent, yet defendants recommended that he proceed with a design phase. (*Id.* at ¶¶ 14-15) Defendant Dowler stated that the prior patents presented no problems, and that it is good practice to wait until a potential licensee has reviewed and modified the inventor’s design before seeking patent protection. (PX 47 at 8)^{9/} The problem with this approach is twofold. First, as Mr. Fagan testifies, the inventor may learn after making a considerable investment that he can’t protect his idea, and any disclosure to a potential licensee would simply be giving the idea away. (PX 2, Fagan ¶ 2) Second, if a company modifies the inventor’s design so that there is a patentable difference from the prior art, the company and not defendants’ customer will be entitled to patent protection. (*Id.* at ¶ 15) There are thus risks on both ends, which defendants simply ignore.

^{8/} Ms. Ross’s search, however, was woefully inadequate, failing to pick up clear references precluding the grant of a utility patent. (PX 2, Fagan ¶ 28) While defendants gave Ms. Ross the green light and took \$12,000 from her, according to Mr. Fagan, her idea is “not only old, it is also quite elementary.” (PX 26 at 3)

^{9/} Before the search, however, defendant Dowler told Polski the purpose of the search is to identify “areas unique and protectable.” (PX 42 at 6) He even acknowledged at this early point that this is “important to the manufacturer.” (*Id.*)

Edison and cannot be protected. (PX 2, Fagan at ¶ 21)^{10/} Ms. Callands and Ms. Ferdinandsen might be able to sell dolls they manufacture themselves, they might be able to protect a stylish design (which neither came up with), but each stands little chance of selling an idea that *anyone*

^{10/} Defendants declined to represent Ms. Callands beyond the research stage and she complained to the Pennsylvania Attorney General's Office seeking a refund. Despite the fact that her idea of a praying doll is obviously in the public domain, and despite having failed to previously market Ms. Ferdinandsen's praying bear, defendants, in responding to Ms. Callands' complaint, had the audacity to claim that they declined further representation because "the product she wished to develop was closely related to other inventions already patented." (PX 24, Callands Attch. 2A) Since they had to have known this before they did their "patent search," the more likely explanation is that they declined to represent Ms. Callands further because she claimed she couldn't afford it. (PX 19, Callands ¶ 6)

^{11/} Other obviously unprotectable ideas include Mr. Comer's hangar caddy, consisting of three pegs on a board, (PX 2, Fagan ¶ 18) and Mr. Wasniewski's pet toy consisting of a rod, a cord, and a bone. (*Id.* at ¶ 24)

^{12/} PX 12, Ross Attch. H at 82; PX 13, Carter Attch. B at 76; PX 16, Limkilde Attch. F at 71; PX 18, Ferdinandsen Attch. E at 101; PX 20, Paule Attch. F at 119; PX 21, Wasniewski Attch. G at 68; PX 22, Wall Attch. E at 93; PX 23, Comer at 119; *see also* PX 17, Leistikow Attch. C at 131 ("should move to the design stage"). The sole negative recommendation plaintiff knows of involves Ms. Callands, who paid the initial \$790 with funds from her pension account, (PX 19, Callands ¶ 5) and who explained, while her portfolio was being prepared, that she was too poor to pay the additional \$8,000 to \$15,000 for product representation. (*Id.* at ¶ 6)

(*Id.* at ¶ 17) Defendants do not, in other words, live up to the level of expertise they claim. And, after seven years of near complete failure, defendants must have proven even to themselves that their approach doesn't work.

2. Defendants' product representation agreements are unlikely to lead to licensing agreements, much less licensing agreements that result in financial gain.

After the research is complete, defendants then typically offer consumers a product representation agreement for between \$8,450 and \$12,450,^{13/} depending on how much of the

^{13/} At times, defendants have also offered an intermediate design stage for \$2,795.

^{14/} The offer to share future royalties is an added inducement designed to convince the consumer that Davison is looking for ideas it can profit from as well as the consumer. Defendant Dowler explained to plaintiff's investigator, for instance, that defendants often put up more money bringing an idea to market and hope to recoup those costs from royalties. (PX 46 at 17) Dowler explains "in a sense, we're a team and by having the royalty to cover all the exorbitant work and costs, it makes our goals the exact same as yours." (*Id.*)

licensing agreements rarely, if ever. Last September, defendants offered Ms. Leistikow, a Minnesota resident, a product representation agreement. Minnesota requires that invention

C. Defendants sell their invention marketing services by misrepresenting those services and defendants' history of success.

Defendants sell their worthless services by inundating consumers with a series of misrepresentations designed to convince them that defendants have a history of successful invention promotion and that they routinely enter into profitable licensing agreements. Specifically, defendants claim that they have a working relationship with a vast network of industry decision-makers, that they have entered into many licensing agreements that generated large royalties, that they will provide an objective and professional analysis of consumers' invention ideas, and that their services are necessary for consumers to license their invention ideas. In fact, defendants have no meaningful working relationships with industry decision-makers, the few ideas they licensed have rarely if ever generated significant royalties, they fail to perform even the most simplistic analysis of consumers' invention ideas, and their services do not help inventors license their ideas and are in no sense necessary. While consumers interpret defendants' claims to mean that defendants can help them find profitable licensing agreements, no reasonable consumer, knowing the truth behind defendants' claims, would buy their services.

1. Defendants misrepresent their relationship with industry decision-makers.

Defendants stress early on and throughout their sales presentations that they have developed a vast network of industry contacts with whom they have working and ongoing relationships. One of the first letters consumers receive, for instance, signed by defendant George Davison, states:

We have hundreds and hundreds of corporate executives who are working with our organization in the development of new products. They registered and signed Agreements of Confidentiality with our company and will pay royalties only for innovations that are

developed properly.^{15/}

The research contract continues this theme, stating “[o]ur firm has launched products with many corporations and each product started with a strong foundation built on quality research.”^{16/}

A letter consumers receive after they receive their research portfolios, before they enter into product representation agreements, adds:

We have built a system of hundreds and hundreds of companies registered and working with our company on new products. Our firm has worked through the “red tape” of getting approval from the legal divisions, manufacturing divisions, and marketing divisions of hundreds of companies. The confidential process and strategies have taken years for our firm to create and are protected trade secrets.^{17/}

These claims are false. Defendants’ admission that no more than five consumers since 1989 profited from defendants’ services proves that defendants have not established any meaningful network of industry contacts, much less of “corporate executives” who “work with” defendants developing new products. In their unsolicited mailings to potential licensees, defendants do appear to invite the recipient to return a form should they desire updates on future invention ideas. (*See* PX 13, Carter Attch. H at 2) Perhaps, a list of these respondents is what constitutes defendants’ system of hundreds and hundreds of companies. If so, that list certainly hasn’t led to successful licensing agreements in the past, and consumers are deceived if they think it portends success for their invention ideas. Defendants’ claims that they are working with

^{15/} *See* references cited *supra* note 3.

^{16/} PX 11, Plottner at 10; PX 12, Ross Attch. C; PX 16, Limkilde Attch. B; PX 17, Leistikow Attch. B; PX 19, Callands Ex. 2; PX 21, Wasniewski Attch. B; PX 25, Philbert Attch. A.

^{17/} PX 11, Plottner at 185; PX 12, Ross Attch E at 1; PX 21, Wasniewski Attch. H; PX 16, Limkilde Attch. C.

See In re Raymond Lee Org., 92 F.T.C. 489, 623-24 (1978), *aff'd*,

defendant George Davison. (*Id.* at ¶ 3)^{23/} After Heritage failed to properly market the product, Ms. Arthur hired lawyers to negotiate out of the licensing agreement. (*Id.* at ¶ 5) She thus lost more than what she paid defendants in fees, yet defendant George Davison’s resume lists Bark Buddies as a recent licensing achievement. (PX 32) Consumers reasonably interpret the Bark Buddies brochures to state that the product was successful, and would interpret the true facts to constitute failure.

Similarly, defendants use a brochure for the Snag-Buster, a weighted device designed to unhook a snagged fishing lure. The brochure claims that if you’re a fisherman, you’ve probably seen these in fishing stores or advertised in *Field & Stream*. (PX 31 at 4)^{24/} In fact, the licensee is a small regional wholesaler of fishing tackle located in South Dakota, and testifies that only 182 Snag-Busters have been sold in the three years they have been available, yielding less than \$100 in royalties. (PX 7, Strang ¶ 4)^{25/} A brochure for the Puzzle Sorter, a device to hold sorted puzzle pieces, claims that “puzzle builders worldwide are using the device.” (PX 31 at 6)^{26/} Here, defendants did arrange a licensing agreement that paid a royalty advance of \$2,000, but according to the licensee, it never put the product into production. (PX 10, Roberts ¶ 4) Thus, puzzle builders worldwide are not using this device, and \$2,000 in royalties is all it ever generated.

^{23/} Defendants at times showed consumers a letter, dated November 4, 1991, and signed by Adam Gardner, which states in part that “[p]rior to working with Davison & Associates we spent countless hours and dollars with unrealistic inventors” (PX 13, Carter Attch. A at 4; PX 18, Ferdinandsen Attch. D at 6) The letter does not disclose the relationship between defendant George Davison and Gardner, and it suggests that Heritage Gifts had a long history of working with inventors. In fact, while it’s possible that Heritage existed for a time in an unincorporated form, it was not incorporated until May, 1991, (PX 54) after Ms. Arthur contracted with defendants. (PX 5, Arthur ¶¶ 1-2)

^{24/} PX 11, Plottner at 15, 33; PX 14, Carter Attch. 2E at 5; PX 17, Leistikow Attch. A at 5; PX 20, Paule Attch. A at 4.

^{25/} Moreover, these royalties were paid to defendants, who then presumably sent the inventor his share. Defendants thus know how poorly Snag-Buster is doing, yet they use the brochure anyway.

^{26/} PX 11, Plottner at 31; PX 12, Ross Attch. D at 2; PX 14, Carter Attch. 2E at 6; PX 17, Leistikow Attch. A at 1; PX 20, Paule Attch. A at 5.

Further, a brochure for the EnviroGolf, a tent designed to protect golfers from the elements at a practice range, states that the device protects golfers all over the United States and as far away as Denmark. (PX 31 at 3)^{27/} In fact, only 10 of the units were ever sold as they fall over in gusty winds, and the product generated few royalties. (PX 8, Rilling ¶ 5) Finally, a brochure for the Spot-lite, a device to help windshield repair technicians, claims the device is used by many of the major glass repair franchisees and that a licensing agreement was entered into after defendants accomplished product research, corporate presentations, and licensing negotiations. (PX 31 at 5)^{28/} In fact, the inventor paid Davison over \$7,000, did the product research and found a licensee on his own, but earned no royalties as the product didn't sell. (PX 6, Lowder ¶¶ 2-4)

Thus defendants have represented as successes five earlier projects that were in fact failures—the inventors earned either no royalties or only an amount much less than what inventors typically pay defendants in fees. In all, plaintiff knows of 9 separate items featured in defendants' literature as successes.^{29/} In addition to the five failures, defendants also feature the Easy Pipe Lifter, a pulley device designed to lift pipes at a construction site and licensed to Easy Pipe Lifter Company, Inc. (PX 31 at 3)^{30/} According to LEXIS records, Adam Gardner, apparently the same

^{27/} PX 14, Carter Attch. 2E at 2; PX 16, Limkilde Attch. H at 2; PX 17, Leistikow Attch. A at 4; PX 20, Paule Attch. A at 6.

^{28/} PX 11, Plottner at 14, 34; PX 14, Carter Attch. 2E at 4; PX 17, Leistikow Attch. A at 2; PX 20, Paule Attch. A at 3.

^{29/} Defendant Dowler told Polski that these inventors were “very successful.” (PX 41 at 16; *see also* PX 43 at 6-7) The nine items exclude inventions defendant George Davison claims to have invented himself.

^{30/} *See also* references cited *supra* note 27.

^{31/} Adam Gardner is also an officer of Smart Parts, Inc., the licensee of inventions defendant George Davison claims to have invented himself. (PX 57)

In only one case does it appear that an inventor could have made a profit. The Oil Filter Gripper, which is featured prominently in defendants' sales literature, was for a time sold by Wal-Mart. But according to Dr. Udell, it is not a good product and Wal-Mart pulled it from its shelves due to poor sales, taking a loss on unsold units. (PX 1, Udell at ¶ 36) From his sale to Wal-Mart, the inventor may have earned more in royalties than he paid defendants in fees, but based on Dr. Udell's testimony, it is doubtful he could have earned significant profits. It is more improbable still that defendants could have recouped the \$70,000 to \$80,000 that defendant Dowler claimed defendants invested in the project. (PX 47 at 26)^{32/}

3. Defendants claim expertise in the area of new product development, thereby falsely implying that they professionally and objectively analyze consumers' invention ideas.

Defendants also claim to have expertise in the area of new product development, thereby implying that they use this expertise in evaluating and developing consumers' invention ideas. Defendants' initial letter to consumers states that "[o]ur firm's team is made up of international award winning designers, engineers, marketers, former U.S. Patent Examiners and many other support staff members." (PX 11, Plottner at 2)^{33/} This "team" includes a licensing attorney with 25 years of experience with major corporations on several continents, and defendant George Davison, who founded Davison & Associates to overcome problems he personally experienced in licensing his own ideas, and whose resume lists 12 "recent licensing achievements." (*E.g.*, PX 11,

^{32/} Thus, plaintiff has identified nine items defendants pitched as success stories. Of those nine, five were failures, one appears to have been licensed in a non-arm's length transaction, and one appears to have been at best an accidental success. In addition to these inventions, the Yard-Marker was licensed to Cole Manufacturing, and the Bench Blaster, invented by Greg Blount, was licensed to the ErgoFitness Corporation. (PX 31 at 3) Plaintiff lacks sales information for the Yard-Marker and the Bench-Blaster, but notes that Mr. Blount's answering machine plays a message indicating that the caller has reached the ErgoFitness Corporation and the offices of Greg Blount. The Bench-Blaster, in other words, appears to have been licensed to the inventor himself.

^{33/} See also references cited *supra* note 3.

^{34/} For the most part, these recent licensing achievement are coextensive with the 9 items defendants feature in their brochures. They also include, however, the “Windbreaker,” an equine product licensed in 1991, which generated zero sales. (PX 9, Balahtsis ¶ 5)

^{35/} See also PX 11, Plottner at 29; PX 14, Carter Attch. 2D at 1; PX 16, Limkilde Attch. D; PX 20, Paule Attch. C; PX 22, Wall Attch F; PX 25, Philbert Attch. B.

^{36/} See also references cited *supra* note 17.

^{39/} See also references cited *supra* note 12.

Plottner at 172) defendants claim that attempting commercialization is necessary to assess marketability. In fact, Dr. Udell testifies that it is standard practice to assess marketability before expending significant resources developing a new product idea, using tools that must be known to defendants. (PX 1, Udell ¶ 15) Simply stated, paying defendants to look for a licensee is not a reasonable way to assess marketability.

Thus, defendants sell invention marketing services they know are worthless by misrepresenting their industry contacts, their history of past success, and their expertise. These misrepresentations are designed to convince consumers that they stand a reasonably good chance

^{40/} FTC v. World Travel Vacation Brokers, 861 F.2d 1020, 1029 (7th Cir. 1988); FTC v. Atlantex Assocs., 1987-2 TRADE CAS. (CCH) ¶ 67,788 at 59,252 (S.D. Fla. 1987), *aff'd*, 872 F.2d 966 (11th Cir. 1989); *In re Cliffdale Assoc.*, 103 F.T.C. 110, 164-65 (1984), appeal dismissed *sub nom.* Koven v. FTC, No. 84-5337 (11th Cir. 1984).

^{41/} Regina Corp. v. FTC, 322 F.2d 765, 768 (3d Cir. 1976); *In re Kraft, Inc.*, 114 F.T.C. 40, 121 (1991), *aff'd*, 970 F.2d 311 (1992), *cert. denied*, 122 L.Ed.2d 652 (1993) (violation where statement misleads “by innuendo as well as by outright false statements.”); *see also* FTC Policy Statement on Deception, appended to *Cliffdale Assoc.*, 103 F.T.C. at 175-77.

^{42/} *In re Thompson Medical Co.*, 104 F.T.C. 648, 818-19 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986),
(continued...)

when they interpret a representation to mean what it purports to mean.^{43/} While claims must be material to be deceptive, express claims, and deliberately made implied claims, are presumed material.^{44/} Moreover, an implied claim or an omission is presumed material where the claim or

^{42/} (...continued)
cert. denied, 479 U.S. 1086 (1987).

^{43/} *Id.* at 788, 792 note 6.

^{44/} *Id.* at 816; *Cliffdale Assoc.*, 103 F.T.C. at 168.

^{45/} *Cliffdale Assoc.*, 103 F.T.C. at 182; *see also In re Southwest Sunsites*, 105 F.T.C. 7, 149, *aff'd*, 785 F.2d 1431 (9th Cir. 1986).

^{46/} *Thompson Medical*, 104 F.T.C. at 816-17; *see also* *FTC v. Southwest Sunsites*, 655 F.2d 711, 723 (5th Cir.), *cert. denied*, 456 U.S. 973 (1982).

^{47/} *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976) *cert. denied*, 430 U.S. 983 (1977) *Atlantex Assocs.*, 1987-2 Trade Cas. at 59,254; *Southwest Sunsites*, 105 F.T.C. at 141; *Thompson Medical Co.*, 104 F.T.C. at 788-90.

^{48/} *American Home Products v. FTC*, 695 F. 2d 681, 687 (3d Cir. 1982).

^{49/} *In re Raymond Lee Organization*, 92 F.T.C. 489 (1978), *aff'd*, 679 F.2d 905 (D.C. Cir. 1980) (per curiam).

^{50/} *See Atlantex Assocs.*, 1987-2 Trade Cas. at 59,254; *Southwest Sunsites*, 105 F.T.C. at 110.

^{51/} *See, e.g.*, PX 12, Ross ¶ 10 (knew there would be risks, but with defendants' experience, knowledge, and past successes, was convinced those risks could be minimized and overcome); PX 16, Limkilde ¶¶ 10-11 (knew there would be risks but would not have invested if she knew there was only a small chance of getting the product to the market).

^{52/} *Kline v. First Western Government Securities, Inc.*, 24 F.3d 480, 489 (3d Cir. 1994) (applying

B. Defendants George Davison and Dowler are individually liable for violations of the FTC Act.

Individual liability for violations of Section 5(a) of the FTC Act can be predicated either on an individual's having participated directly in the violative conduct, or on his having had a role in directing, controlling or formulating the violative practices and policies of a business defendant.^{53/} An individual may be held liable for consumer redress under the FTC Act when he had authority to control the acts of others and had actual or constructive knowledge that the latter were committing misrepresentations.^{54/}

As discussed, defendant George Davison is liable for the challenged acts and practices because he had the ability to control violations, and had actual, or at least constructive, knowledge that the violations were taking place. Moreover, he directly participated in the sales scheme by making personal solicitations, (PX 5, Arthur ¶ 2) and by signing key portions of defendants' sales materials. Defendant Dowler is also liable. He directly participated as a sales representative in many of the sales transactions, and he made numerous misrepresentations to plaintiff's investigator. Moreover, he sent Ms. Leistikow the Minnesota Cover Addendum establishing that no more than five of defendants' customers ever made a profit. He, accordingly, knows that defendants' claims are false.

C. This court has authority to grant the requested relief.

The Commission seeks a permanent injunction pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). The final proviso of Section 13(b) provides that "in proper cases the Commission may seek, and, after proper proof, the court may issue, a permanent injunction." This empowers the court to permanently enjoin violations of "any provision of law enforced by

^{53/} *Atlantex Associates*, 1987-2 Trade Cas. at 59,254-55.

^{54/} *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 573-75 (7th Cir.), *cert. denied*, 493 U.S. 954 (1989).

the Federal Trade Commission.”^{55/} A case involving routine fraud, such as this one, is a “proper case.”^{56/}

Once the FTC has invoked the equitable power of a federal court, the full breadth of the court’s authority is available, including such ancillary final relief as rescission of contracts and restitution.^{57/} Further, the court may grant a preliminary injunction and temporary restraining order, and whatever additional preliminary relief is necessary to preserve the possibility of final effective ultimate relief.^{58/} Such relief may include an order freezing assets and an order permitting expedited discovery and immediate access to records. Temporary restraining orders freezing defendants assets, appointing receivers, granting expedited discovery and other equitable relief have been granted *ex parte* by courts in the Third Circuit, and numerous other federal courts, in recent FTC actions brought under the second provision of Section 13(b)^{59/}

1. The FTC meets the standards for issuing a preliminary injunction.

Where a federal regulatory agency seeks a preliminary injunction to enforce a federal

^{55/} 15 U.S.C. § 53(b); *FTC v. Evans Products Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985).

^{56/} *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982); *see also Amy Travel*, 875 F.2d at 571-72; *World Travel Vacation Brokers*, 861 F.2d at 1026-28; *Atlantex*, 1987 Trade Cas. at 59,253.

^{57/} *H.N. Singer*, 668 F.2d at 1113.

^{58/} *Id.* at 1111-12.

^{59/} Cases in the Third Circuit granting *ex parte* temporary restraining orders and ancillary equitable relief include *FTC v. McGowan*, No. 96-3227 (D. N.J. 1996) (*ex parte* TRO with asset freeze, appointment of a receiver, expedited discovery and immediate access to the business premises); *FTC v. Sparta Chem*, No. 96-3228 (D. N.J. 1996) (*ex parte* TRO with asset freeze, appointment of a receiver and access to business premises); *FTC v. Car Checkers of America*, 1993-1 Trade Cas. (CCH) ¶ 70,125 (D. N.J. 1993) (*ex parte* TRO with asset freeze); *FTC v. Academic Guidance Services*, No. 92-3001 (D. N.J. 1992) (*ex parte* TRO with asset freeze, expedited discovery and order permitting access to business premises); *FTC v. Oak Tree Numismatics*, No. 91-1626 (D. N.J. 1991) (*ex parte* TRO with asset freeze, appointment of a receiver and expedited discovery). District courts have recently granted *ex parte* temporary restraining orders and ancillary equitable relief under Section 13(b) in similar actions against invention promotion companies. *FTC v. American Inventors Corp.*, No. 95-30219-MAP (D. Mass. 1995) (*ex parte* TRO with asset freeze and order to preserve documents); *FTC v. Global Patent Research Services*, No. 96-676-A (E.D. Va. 1996) (*ex parte* TRO with asset freeze, expedited asset discovery and order permitting access to business premises). The orders entered in these unpublished cases appear at PX 62.

^{60/} *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346 (9th Cir. 1989); *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174-75 (9th Cir. 1987).

^{61/} *Odessa Union Warehouse*, 833 F.2d at 175-76; *FTC v. Rare Coin Galleries*, 1986-2 Trade Cas. (CCH) ¶ 67,388, at 61,473. Fed. R. Civ. P. 65 does require a showing of irreparable injury for the issuance of a TRO. As

likelihood of success on the merits, combined with a possibility that the assets will be dissipated.^{64/}

Where business operations are permeated by deception, there is a strong possibility that assets may be dissipated during the pendency of the legal proceedings.^{65/} Mindful of this, courts have ordered such relief solely on the basis of pervasive deceptive activities such as those found in this case.^{66/} A freeze of defendant George Davison's assets is also warranted because he controls the deceptive scheme described herein, and had actual or constructive knowledge that defendants practices are deceptive.^{67/} A freeze of defendant Dowler's assets is also warranted as he directly participated in many of the sales transactions involved here, and made claims he knew were false. Without an immediate freeze of assets, it is likely that little, if any, funds will be available to satisfy any final order granting redress to deceived consumers.

3. A Receiver and an Accounting Are Necessary

Appointing a receiver over the defendant corporations is also essential to maintain the status quo, and to prevent the destruction of documents and the concealment or dissipation of corporate assets:

The district court's exercise of its equity power in this respect [appointment of a receiver] is particularly necessary in instances in which the corporate defendant, through its management, has defrauded members of the investing public; in such cases, it is likely that, in the absence of the appointment of a receiver to maintain the status quo, the corporate assets will be subject to diversion and waste to the detriment of those who were induced to invest in the corporate scheme and for whose benefit, in some measure, the . . .

^{64/} FSLIC v. Sahni, 868 F.2d 1096, 1097 (9th Cir. 1989) (requiring a showing that "likelihood" of dissipation placed an undue burden on FSLIC).

^{65/} *Id.*

^{66/} See SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1106 (2d Cir. 1972); SEC v. R.J. Allen & Associates, Inc., 386 F. Supp. 866, 881 (S.D. Fla. 1974). See also *H.N. Singer*, 668 F.2d at 1113.

^{67/} See *Amy Travel Service*, 875 F.2d at 573-76; *World Travel Vacation Brokers*, 861 F.2d at 1031.

injunctive action was brought.^{68/}

A temporary receiver can preserve records and make an accounting that will assist in

(1) identifying defendants' assets, (2) determining the size and the extent of the fraud, and

(3) identifying the persons injured.

D.

^{68/} SEC v. First Fin. Group of Tex., 645 F.2d 429, 438 (5th Cir. 1981); *see also* SEC v. Keller Corp., 323 F.2d 397, 403 (7th Cir. 1963) (“[I]t is hardly conceivable that the trial court should have permitted those who were enjoined from fraudulent misconduct to continue in control of [the corporate defendant’s] affairs for the benefit of those shown to have been defrauded.”).

^{69/} *In re Vuitton et Fils, S.A.*, 606 F.2d 1 (2d Cir. 1979); *cf.*, *American Can Co. v. Mansukhani*, 742 F.2d 314 (7th Cir. 1984).

had the opportunity to ensure that effective permanent relief will be available. The defendants have demonstrated their willingness to profit from hard-core, fraudulent conduct. Granting temporary relief before notice is provided will at least make it more difficult for defendants to conceal their assets and business records, and thereby frustrate the Court's ability to grant effective relief.

IV. CONCLUSION

For the foregoing reasons, the court should enter plaintiff's proposed temporary restraining order *ex parte*, and order defendants to appear and show cause why a preliminary injunction should not issue.

DATED: _____

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