

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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FEDERAL TRADE COMMISSION,)
STATE OF ILLINOIS,)
COMMONWEALTH OF KENTUCKY, and)
STATE OF NORTH CAROLINA,)

Plaintiffs,

v.

FORTUNE HI-TECH MARKETING, INC.,)
a Kentucky corporation, *et al.*,)
Defendants.)

13cv578

Judge John W. Darrah

Magistrate Arlander Keys

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' *EX PARTE* MOTION FOR A
TEMPORARY RESTRAINING ORDER WITH ASSET FREEZE, APPOINTMENT
OF A RECEIVER, OTHER EQUITABLE RELIEF, AND AN ORDER TO SHOW
CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

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Peter J. Vander Nat & William W. Keep, *Marketing Fraud: An Approach for Differentiating Multilevel Marketing from Pyramid Schemes*, 21 J. of Pub. Pol’y & Marketing 139 (Spring 2002) 5

The Federal Trade Commission, the State of Illinois, the Commonwealth of Kentucky, and the State of North Carolina bring this action to put an immediate end to an old-fashioned pyramid scheme that promises vast riches and a lavish lifestyle, but instead delivers significant financial losses for nearly all consumers who fall victim to its claims. Fortune Hi-Tech Marketing, Inc. (“FHTM”) bills itself as “the business model of the 21st century” and promises its recruits vast sums of money, but it really distinguishes itself in only one important way: the overwhelming majority of recruits make nothing at all.

In its decade of operation, FHTM has defrauded hundreds of thousands of consumers out of hundreds of millions of dollars. FHTM’s victims, including at least 100,000 current participants, live throughout the United States and Canada. The founders of this enterprise, Paul Orberson and Thomas Mills, along with a handful of others, have reaped millions while the overwhelming majority of recruits have lost nearly all of the money they invested in the scheme.

Defendants target consumers with an entrepreneurial spirit, emphasizing that FHTM provides an opportunity to build a business which can rapidly match consumers’ current income and provide financial independence. FHTM routinely touts six and seven-figure incomes to new recruits, assuring them that they will be able to achieve these results as long as they are willing to work hard. An increasing number of the recruits targeted by FHTM – particularly in places like Chicago – are Spanish-speaking.

FHTM describes its multi-level marketing (“MLM”) program as “network marketing,” and it claims to provide an opportunity for consumers to share in the billions of dollars that large companies spend on advertising each year. Strikingly, there is relatively little discussion, either during the recruiting process or even after a consumer joins FHTM, of the products that are to be sold – such as subscriptions to satellite television, utility and cell phone services, or various

house-brand shampoos and dietary supplement pills. In fact, FHTM's training is largely devoted to providing motivational guidance and advice on how to recruit new representatives. There is almost no discussion of how to sell FHTM's products, other than vague promises that the products "sell themselves." Further, there is hardly any mention of the hundreds of dollars new recruits must pay in fees and for their own purchases of FHTM products in order to qualify to receive the only meaningful compensation offered by FHTM – bonuses for recruiting others into the program. These fees and essentially required purchases can easily top \$1500 annually.

The only real chance a consumer has to break even with FHTM is by recruiting several new people to join the program, who then must pay their own application fees and purchase (or theoretically sell) a host of FHTM products and services which they likely would not otherwise purchase. As with any pyramid scheme, FHTM's defining characteristic is a compensation plan that is skewed heavily in favor of recruitment over sales. The Plaintiffs' expert, Dr. Peter Vander Nat,¹ has examined FHTM's financial data and determined that at least 88% of the compensation paid by FHTM is in the form of recruitment bonuses, not sales-based commissions. Furthermore, most recruits will never recoup their investments in FHTM. Conservatively, at least 90% of FHTM participants earn nothing through FHTM, and 94% of recruits drop out within a year. In fact, this massive loss rate is the inevitable mathematical consequence of FHTM's business model. If more than a minuscule number of recruits were able to achieve the results touted by FHTM, the bonuses could never be paid and the company would quickly collapse. FHTM's mission is to enroll ever more victims and replace them as they suffer

¹ Dr. Vander Nat has prepared an extensive declaration, which is being filed concurrently as Plaintiffs' Exhibit ("PX") 2. Dr. Vander Nat's *curriculum vitae* is attached to his Declaration. PX 2, Vander Nat, Att. A.

losses and quit the program.

FHTM's scheme resembles an iceberg – at any given time, and no matter how large or small this company becomes, the vast majority of consumers must be, and will be, financially underwater. Only a minuscule number of participants – probably less than 1% – are making even a five-figure annual income, and most consumers will lose more than they gain from their participation in FHTM. In short, this is a rigged game, the true nature of the scheme not readily apparent to the consumers who put in their time, energy, and money but ultimately fail.

Defendants are well aware of their obligations under the law, but continue to engage in this unlawful conduct. Each month that FHTM operates, consumers lose at least \$3 million, which is attributable to the company's blatant misrepresentations about earnings and the continued operation of the illegal pyramid scheme. Court intervention is necessary to put an immediate halt to the unlawful conduct and victimization of consumers.

Plaintiffs have submitted overwhelming evidence demonstrating both FHTM's deceptive earnings claims and its operation of a pyramid scheme – either of which alone is sufficient grounds to grant Plaintiffs' TRO motion. Plaintiffs ask that the court enter an *ex parte* temporary restraining order that includes a freeze of Defendants' assets, expedited discovery, and the appointment of a temporary receiver over the corporate Defendants. The requested relief is necessary to prevent ongoing injury to consumers, the destruction of evidence, and the dissipation of assets, thereby preserving the Court's ability to provide effective final relief.

I. Defendants' Business Practices

A. Defendants

Defendants are five corporations that operate as a common enterprise, and the two

individuals who own and direct the enterprise.² *Fortune Hi-Tech Marketing, Inc.* and *FHTM, Inc.*, are both Kentucky corporations with principal places of business in the same building in Lexington, Kentucky.³ *Alan Clark Holdings, LLC*, is a Kentucky corporation and is one of the entities Defendants use to contract with third-party providers of goods and services.⁴ *FHTM Canada, Inc.* lists a registered office in Ottawa,⁵ while *Fortune Network Marketing (UK) Limited* has its registered office in Reading, Berkshire, England.⁶ The corporations are owned and controlled by *Paul C. Orberson*, a veteran of the network marketing industry and the president or director of the domestic corporations and *FHTM Canada, Inc.*,⁷ and *Thomas A. Mills*, the CEO or director of the corporate Defendants.⁸

² The Court has subject matter jurisdiction over the FTC Act claims pursuant to 28 U.S.C. §§ 1331, 1337(a) and 1345, and 15 U.S.C. §§ 45(a) and 53(b), and supplemental jurisdiction over the claims of Plaintiffs State of Illinois, Commonwealth of Kentucky, and State of North Carolina, pursuant to 28 U.S.C. § 1367. See Compl. for Permanent Injunction and Other Equitable Relief, ¶¶ 1-12.

³ PX 5 (“Corporate Papers”) at pp. 5 & 13.

⁴ PX 1, Menjivar ¶ 7, Atts. B-D, F & G (contracts between Alan Clark Holdings, LLC and third-party service providers).

⁵ PX 5 at p. 21.

⁶ PX 5 at p. 23. The Court has personal jurisdiction over Defendants under the FTC Act’s nationwide service of process provision, 15 U.S.C. § 53(b), because Defendants have minimum contacts with the United States. See *FTC v. Cleverlink Trading Ltd.*, No. 05 C 2889, 2006 WL 1735276, at *4 (N.D. Ill. June 19, 2006) (Kendall, J.); *FTC v. Bay Area Bus. Council, Inc.*, No. 02 C 5762, 2003 WL 21003711, at *2 (N.D. Ill. May 1, 2003) (Darrah, J.). Moreover, under the FTC Act’s venue provision, an action may be brought wherever a corporation “resides or transacts business.” 15 U.S.C. § 53(b). Here, Defendants have transacted business in this district. See PX 1, Menjivar ¶¶ 20-23 (FTC investigator attended an FHTM recruiting meeting in Lyons, Illinois, within this District). In addition, venue is proper wherever a corporation is subject to personal jurisdiction. See *Bay Area*, 2003 WL 21003711, at *2.

⁷ PX 5 at pp. 1 (member of Alan Clark Holdings, LLC), 5 (President and Director of FHTM, Inc.), 13 (President and Director of Fortune Hi-Tech Marketing, Inc.) & 21 (Director of FHTM Canada, Inc.).

⁸ *Id.* at pp. 1 (member of Alan Clark Holdings, LLC), 5 (Vice President and Director of FHTM, Inc.), 13 (CEO of Fortune Hi-Tech Marketing, Inc.), 21 (Director of FHTM Canada, Inc.) & 25 (CEO of Fortune Network Marketing (UK) Limited).

B. FHTM's "21st Century" Business Model

FHTM bills itself as operating an innovative business model,⁹ when, in fact, it is nothing more than a network marketer.¹⁰ FHTM claims that the "genius" of its model is that its representatives are paid for something that everyone already does – paying bills for services that they need¹¹ – and that FHTM simply provides the opportunity for the representatives to be paid a portion of those bills each month.¹² At a high level, representatives are paid pursuant to a multi-level marketing compensation plan, whereby their earnings are based not only on their own sales, but on the sales of the people whom they recruit (who comprise their "downline").¹³ FHTM's compensation plan has two basic parts: commissions for product sales,¹⁴ and

⁹ FHTM's basic business presentation includes a description of FHTM as the "21st century business model." PX 1, Menjivar ¶ 10(M) & Att. PP at p. 5; *see also id.* ¶¶ 73-74, Att. MMMM at p. 8 (Presidential Ambassador Susan Frank's business presentation).

¹⁰ *See* PX 1, Menjivar Att. FFFF at p. 4 (describing an FHTM representative as "21st Century middleman"). "Network marketing" is another term for "multi-level marketing." Peter J. Vander Nat & William W. Keep, *Marketing Fraud: An Approach for Differentiating Multilevel Marketing from Pyramid Schemes*, 21 J. of Pub. Pol'y & Marketing 139 (Spring 2002). In other contexts, FHTM would be considered an "affiliate" marketer. *See, e.g., FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1205 (D. Nev. 2011); http://en.wikipedia.org/wiki/Affiliate_marketing ("Affiliate marketing a type of performance-based marketing in which a business rewards one or more affiliates for each visitor or customer brought about by the affiliate's own marketing efforts.") (last visited Jan. 17, 2013).

¹¹ PX 1, Menjivar ¶ 67, Att. GGGG at p. 8 (FHTM model "genius" because "[y]ou don't have to go try and convince people to spend this money because they already are").

¹² *See, e.g.,* PX 1, Menjivar Att. FFFF at p. 8 (Todd Rowland says "I'm always willing to make money on my own TV."); *id.* Att. LLLL at p. 11 ("You guys, to be able to get paid every month off of tens of thousands of bills that get paid while your at sleep – while you're asleep or not, or sitting on a beach or not, doing whatever you want to do because you can is why you want to do this business.").

¹³ In the most recent iteration of its pay plan, FHTM defines "downline" as "the size of your sales team." PX 1, Menjivar ¶ 10(P)(iii) & Att. YY at p. 2.

¹⁴ FHTM refers to selling products as "gathering loyal customers." PX 1, Menjivar ¶ 10(P)(iii) & Att. YY at p. 2 (Sept. 1, 2012 Compensation Plan). This is really just code for signing up new recruits, as those are primarily the people who buy the products and services offered through FHTM. PX 2, Vander Nat ¶ 9.

substantial recruitment bonuses for bringing in new FHTM representatives.¹⁵

FHTM targets its recruitment efforts at consumers who are struggling to make ends meet but have an entrepreneurial bent.¹⁶ Increasingly, FHTM has been targeting non-native English-speaking recruits, particular Spanish-speakers.¹⁷ In fact, several of the presentations at FHTM's annual convention are conducted in Spanish, as are many local recruiting meetings.¹⁸ Other than providing a basic explanation, FHTM discourages new recruits from learning the intricacies of the pay plan.¹⁹ New recruits are told that, to get their business started quickly, nearly everyone

¹⁵ PX 1, Menjivar ¶ 10(P)(iii) & Att. YY at p. 2 (Sept. 1, 2012 Compensation Plan).

¹⁶ PX 1, Menjivar ¶ 10(P)(iii) & Att. YY at p. 1 (“The FHTM plan consists of just two activities – gathering loyal customers and building teams of entrepreneurs like you who gather customers and build teams as well.”); *see also id.* ¶ 64(F) & Att. DDDD at pp. 62-63 (“Let me tell you something, if you like helping people and you want to change your family’s finances forever and you’d like to set up some revenue for them that works when they’re not working, let me tell you, no is the wrong answer for this.”); *id.* ¶ 55(B) & Att. VVV at p. 15 (“What Fortune’s about – and back to my original point about why we have the most lucrative compensation plan in the industry is our product is be your own boss. Own your own business. Make more money. Our product is what we have on our shelves and it comes in pretty red and white and blue packaging and it’s all nice and it’s there and it’s got – in other words, our product is own your own business, be your own boss, make more money.”).

¹⁷ PX 1, Menjivar ¶ 35, Att. FFF at p. 6 (Mills discussing expanded FHTM marketing offerings for Spanish speakers); *id.* Att. HHH at p. 7 (Orberon: “And I want to start by talking about some of our great Hispanic Spanish-speaking leaders in this company. Probably no group in our entire population brings more spirit to our company.”); *id.* ¶ 22 (FHTM magazine in Spanish); *id.* Att. AAA at p. 42 (Spanish-speaking FHTM representative: “There are twenty-six executives, fourteen Lexus winners. I am the only one that speaks English. The Whites don’t know about this, the gringos, the Chinese, the Filipinos, the blacks. They don’t know about this program yet.”); *id.* ¶ 86 & Att. XXXX at p. 1 (“Know spanish speaking person that needs \$2400 THIS MONTH - get them to [address redacted] San Jose 7pm 2nite & we’ll show them how!”) & p. 3 (training offered in Vietnamese).

¹⁸ PX 1, Menjivar ¶¶ 22 & 32.

¹⁹ PX 1, Menjivar ¶ 29(B), Att. BBB at p. 38 (Scott Aguilar advises representatives not to understand the compensation plan before they “get there” because they should just be recruiting); *id.* ¶ 53(E) & Att. TTT at p. 31 (“Okay, so when you show the plan, people are going to ask you questions. Don’t answer questions because when someone asks you one question, they’re going to ask you another one and another one . . .”).

buys products and services through FHTM and recruits additional people to do the same.²⁰

Cost of joining the ranks. It can be expensive to join FHTM. FHTM has more than 100,000 “Independent Representatives,”²¹ each of whom pays an initial sign-up fee of \$249 to join FHTM.²² Managers must also buy (or theoretically sell) products or services through FHTM if they want to be “qualified” to receive commissions on product sales or bonuses for recruiting new representatives. To “qualify,” managers must purchase (or sell) ten service contracts or product orders (referred to as 1000 volume points),²³ frequently grouped in “bundles,” which include recurring monthly fees.²⁴ Bundles typically include a selection of FHTM’s proprietary nutritional supplements and health and beauty products, True Essentials and Envy Organics, and personal service items such as identity theft protection and roadside auto

²⁰ See, e.g., PX 1, Menjivar ¶ 66(D) & Att. FFFF at p. 9 (“I know most of you listening to this already have your ten-point starter pack because most everybody starts exactly the way they need to maximize the pay plan. There’s no other good way to start if you’re not going to maximize everything.”).

²¹ PX 1, Menjivar ¶ 7(P) & Att. P at p. 1 (150,858 active representatives for July 2010-June 2011) & p. 2 (122,799 representatives for 2009). Although FHTM tries to insulate itself from liability by making each representative an “independent contractor,” FHTM’s General Counsel Keith Kuder admits that this is a fiction, and the representatives are agents of FHTM, whose actions FHTM must “answer for.” *Id.* ¶ 58(D), Att. XXX at p. 17.

²² PX 1, Menjivar ¶ 10(P)(iii) & Att. YY at p. 4. The initial fee has varied over the years from \$99 to \$299. See, e.g., *id.* ¶ 10(J), Att. KK (\$99 + \$8.99 processing and handling fee) & Att. IIII at p. 35 (“To get started here is \$299.”).

²³ PX 1, Menjivar ¶ 10(P)(iii) & Att. YY at pp. 3-4 (managers have to maintain 1000 “volume points” in order to “maximize the compensation”).

²⁴ See PX 1, Menjivar ¶ 10(Q), Att. ZZ (current bundle, or “Value Pack,” offerings); see also *id.* ¶¶ 10(A)-(D), Atts. X-AA (previous bundle offerings). The rules for “qualification” have changed, however, it has always meant the representative must purchase (or sell) some set amount of products or services. See, e.g., *id.* ¶ 10(P)(i) & Att. WW at p. 3 (October 2010 Compensation Plan says to remain “qualified,” representative must maintain 10 or more active personal customer points each month); *id.* Att. YY at p. 4 (September 2012 Compensation Plan says to become “qualified,” representative must maintain at least 1000 active volume points).

assistance.²⁵ Although they vary based on the number of points they include, bundles have historically cost between \$100 and \$400 per month,²⁶ totaling at least \$1200 annually, in addition to the annual fees paid by the representatives. Of course, representatives are led to believe that these costs will be more than offset by the money they will earn.²⁷

Qualified Managers can then be promoted to Regional Sales Manager by continuing to make the required purchases (or sales) each month and by recruiting six new Managers, each of whom must also make the required purchases (or sales) to become qualified.²⁸ A Regional Sales Manager can be promoted to Executive Sales Manager by maintaining 1500 volume points in sales (15 contracts or orders) per month and recruiting a downline of 96 Managers. There are fewer than 800 Executive Sales Managers within FHTM.²⁹ A downline of 636 Managers results in promotion to National Sales Manager, and ultimately to Platinum Sales Manager and Presidential Ambassador.³⁰

²⁵ PX 1, Menjivar ¶¶ 10(A)-(D) & Atts. X-AA.

²⁶ PX 1, Menjivar ¶¶ 10(A)-(D), (Q) & Atts. X-AA & ZZ. FHTM is constantly changing its bundles – a recent explanation also includes a summary of past bundle offerings. *Id.* Att. Z. FHTM strongly encourages that new representatives purchase bundles in order to immediately qualify their business. *Id.* ¶ 66(E), Att. FFFF at p. 19; *id.* ¶ 65, Att. EEEE at p. 14.

²⁷ PX 1, Menjivar ¶ 64(B) & Att. DDDD at p. 41 (“Now, go sign your third person up and all of a sudden, man, you’ve covered your overhead for an entire month.”).

²⁸ Representatives are technically able to achieve promotions by meeting much higher sales volume targets without recruiting any additional people. *See, e.g.*, PX 1, Menjivar ¶ 10(P)(iii) & Att. YY at p. 5 (promotion to RSM could be obtained by having 5500 volume points and FHTM’s approval); *see also id.* ¶ 66(E) & Att. FFFF at p. 19 (Rowland advises representatives that they could gather 70 customer points, but “much easier to build a team”). FHTM’s counsel, however, has admitted that at least as of October 2010, nobody had every been promoted at FHTM through this path. *Id.* ¶ 7(A) & Att. A at p. 4.

²⁹ PX 1, Menjivar ¶ 7(P) & Att. P at p. 1 (788 total ESMs in July 2010-June 2011 time period).

³⁰ PX 1, Menjivar ¶ 10(P)(iii) & Att. YY at pp. 5-6 (Sept. 1, 2012 Compensation Plan). Presidential Ambassadors occupy a special place in the hierarchy – they are involved in setting company policy and share in FHTM’s profits. *Id.* ¶ 65, Att. EEEE at pp. 11-12 (PAs share in revenue); *id.* ¶ 79,

Of the more than 100,000 representatives currently enrolled with FHTM, less than 1000 (or 1%) are enrolled above the first two levels of the compensation plan – Manager and Regional Sales Manager.³¹ Fewer than 70 people have reached the highest two levels of FHTM’s hierarchy.³² Since representatives must purchase (or sell) 1500 volume points per month in order to advance to the highest level in FHTM,³³ those who hope to make it to the top likely spend more than \$1500 per year to be an FHTM representative.

Products. FHTM claims to have “partnered” with various companies which sell products and services, such as satellite television and cellular phone services consumers are already likely to purchase.³⁴ Despite the emphasis on these “partners,” most product purchases, however, are of FHTM’s proprietary products.³⁵ FHTM makes almost no effort to promote these in-house products except as a mechanism to become eligible for bonuses and commissions.

FHTM does everything it can to capitalize on the names of the third-party businesses with which it has agreements. Not only does FHTM regularly refer to DISH Network and others

Att. RRRR at pp. 4-5 (PAs consulted in compensation plan changes); *id.* ¶ 36, Att. GGG at p. 10 (PAs referred to as “great leaders in the field” and as “work[ing] closely with home officials”).

³¹ PX 1, Menjivar ¶ 7(P), Att. P at p. 1.

³² PX 1, Menjivar ¶ 7(P), Att. P at p. 1; *see also id.* ¶ 64, Att. DDDD at p. 57 (Kevin Mullens claims there are forty-four NSMs and seven Presidential Ambassadors).

³³ A representative can reach the highest levels of FHTM with only 1500 volume points, or 15 customers. PX 1, Menjivar ¶ 10(P)(iii) & Att. YY at pp. 3-6 (Sept. 1, 2012 Compensation Plan).

³⁴ PX 1, Menjivar ¶ 7, Atts. B-G (FHTM agreements with third parties); *see also id.* ¶ 10(M) & Att. PP at p. 14 (list of products and services offered by FHTM); *id.* ¶ 64 & Att. DDDD at p. 13 (“We’re partnered with a company called Dish.”) & p. 14 (“We pretty much partner with anybody in the DSL/broadband industry. . . . You name it, they’re a partner with us.”).

³⁵ True Essentials and Envy Organics sales account for nearly half of all of FHTM’s sales for July 2010- June 2011. *See* PX 1, Menjivar ¶ 7(N) & Att. N. This does not even include bundle sales, which also include products from those lines. *Id.*

such as Frontpoint Home Security, Xoom Energy, and Taxbot, as its “partners,”³⁶ but representatives also use those purported relationships to lend legitimacy to FHTM, implying that such companies would only do business with FHTM if it was an upstanding company in its own right.³⁷

In reality, the agreements FHTM has with these companies do not create any special partnerships, but, rather, appear to be run-of-the mill affiliate agreements. For example, FHTM representatives are specifically prohibited from using any DISH logos or referring to DISH as a partner.³⁸ Indeed, FHTM expressly prohibits its representatives from making any claims that they can offer or match the best prices for these products and services.³⁹ Further, a price comparison of FHTM’s True Essentials and Envy Organics lines shows that equivalent products can typically be purchased for substantially less.⁴⁰

Pricing is largely irrelevant, however, because most representatives likely do not view the in-house products as something to market to customers, but rather as something they have to purchase to participate in FHTM. This view is reinforced by FHTM, which puts forth almost no

³⁶ PX 1, Menjivar ¶ 58, Att. XXX at pp. 21-22 (FHTM General Counsel acknowledging that FHTM representatives refer to Dish Network as a “partner” even if the two companies are not legal “partners”).

³⁷ PX 1, Menjivar ¶ 73, Att. MMMM (“If it was good enough for the big corporations that are a part of this, it was good enough for me and my family.”); *id.* ¶ 10(M) & Att. PP (FHTM offers “products and services from reputable companies”).

³⁸ PX 1, Menjivar ¶ 10(K), Att. LL at p.1. Representatives are forbidden to use such descriptions of other supposed “partners” as well. *Id.*

³⁹ *See, e.g.*, PX 1, Menjivar ¶ 10(O)(iii), Att. VV at pp. 10-11 (Policies and Procedures); *see also id.* ¶ 10(K), Att. LL at 1 (representatives can only refer to wireless plans as “competitively priced” and cannot promise to “beat prices”).

⁴⁰ *See* PX 4, Dohse ¶ 9 (less expensive alternatives available on Drugstore.com for nearly every True Essentials product) & ¶ 14 (less expensive alternatives available for Envy Organics products).

effort in training representatives on how to sell the products and services FHTM offers.⁴¹

Further, representatives are effectively prohibited from selling products over the Internet. They may not use banner advertisements or links on third-party websites (e.g., Google, Facebook) and are prohibited from selling products or services on commerce sites such as Amazon, eBay, or Craigslist without obtaining prior written approval from FHTM.⁴² Instead these products are purchased almost exclusively by FHTM representatives themselves – who only buy them so that they can qualify to participate in FHTM’s real business: recruiting new members.

Product commissions. As discussed, one component of the FHTM compensation plan is commissions on product sales. The rates of the commissions paid to representatives on their sales and the sales of their downline are typically very small – less than 2% of the underlying monthly bill or product purchase.⁴³ A large portion of those sales are comprised of “bundle” purchases of products and services, which are purchased directly by representatives and only offered to those who are newly enrolled.⁴⁴ It is very unlikely that representatives would ever purchase any of these products and services except to remain “qualified” for recruitment

⁴¹ See discussion, *infra*, III.B (FHTM Is A Pyramid Scheme).

⁴² PX 1, Menjivar ¶ 10(O)(i) & Att. TT at pp. 11-12. Similarly, sales at trade shows have to be pre-approved, and the company never allows the sale of products or services at garage sales, swap meets, flea markets or farmers’ markets. *Id.* at p. 12.

⁴³ PX 1, Menjivar ¶ 9(D) & Att. W (CGU At-A-Glance); *see also id.* ¶ 65, Att. EEEE (1% commission rate on bills until the eighth level when the rate increases to 5%). There is an option available to representatives to choose to receive up to a 25% commission on certain product sales and forego recruitment bonuses, but almost no one exercises this option. PX 2, Vander Nat ¶ 10.

⁴⁴ PX 2, Vander Nat ¶ 9 (bundle purchases are strongly promoted to new representatives and account for a large portion of total sales); *see also* PX 1, Menjivar ¶ 64, Att. DDDD at p. 39 (suggesting people buy a bundle even if they don’t like what is in it just so that they can qualify their business).

bonuses.⁴⁵ Considering that less than 12% of money paid to FHTM representatives is paid as commissions on the sales of products and services,⁴⁶ these sales really just provide cover for FHTM's recruitment business.

Recruitment bonuses. Product commissions are dwarfed by the recruitment bonuses offered by FHTM, which increase as the representative rises through the ranks of the FHTM compensation plan. Under the current compensation plan, for example, Regional Sales Managers will be paid at least \$100 for each new person in their downlines, while National Sales Managers will be paid at least \$190.⁴⁷ These bonuses accrue for unlimited levels in the representative's downline, and will be paid all the way through the new representative's upline. FHTM also doubles these bonus payments when the representative is particularly successful at recruiting in a certain month.⁴⁸

II. Defendants' Earnings Claims Are False and Violate the Law

FHTM dangles the promise of riches in order to lure consumers into joining its scheme. FHTM makes these promises in a variety of ways – through in-person presentations, pre-

⁴⁵ After Darla DiGrandi recently left FHTM for another MLM, she justified her decision: "There is no fee to join, it's a volume only company. Instead of buying multiple taxbots, amusement pack and roadside [sic], we buy something we can actually use. LOL." PX 1, Menjivar ¶ 89, Att. AAAAA at p. 2.

⁴⁶ PX 1, Menjivar ¶ 7(O), Att. O (over \$38 million paid in commissions in 2010-11, but more than \$32 million of that was for recruitment bonuses); PX 2, Vander Nat ¶ 8 (88% of FHTM payments classified as some type of recruitment bonus).

⁴⁷ PX 1, Menjivar ¶ 10(P)(iii), Att. YY at p. 12.

⁴⁸ PX 1, Menjivar ¶ 10(P)(iii), Att. YY at p. 12 (September 2012 Compensation Plan); *id.* ¶ 34, Att. EEE at pp. 14 (National Sales Manager Woodson Gardner describes the doubling of the bonus: "Remember those \$100 bills, well now they just went to 200, 200, 200, 200, 200, 200, 200."); *id.* ¶ 65(B), Att. EEEE at p. 10 (Brock Keen explains, "If your business is growing enough to where you're hitting those double bonuses, those 100s turn to 200s, the 60s turn to 120s, and the 30s turn to 60s and your residual doubles also for that month.").

recorded presentations, webcasts, and live and pre-recorded conference calls⁴⁹ – but no matter what the medium, the company’s rags-to-riches tales are patently false for nearly everyone who joins FHTM. In contrast to what many of its representatives say, the company’s own data does not lie: more than 90% of FHTM representatives earn less than \$15 in a year,⁵⁰ even though representatives typically spend at least \$1500 annually to remain “qualified” as FHTM representatives.⁵¹ Not surprisingly, 94% of FHTM representatives do not continue with FHTM after their (almost certainly unsuccessful) first year.⁵²

FHTM’s business model assures that most people will fail. The financial losses experienced by these representatives fuel the compensation for those who have engaged in enough recruiting to climb to the top of the pyramid.⁵³ At a time when consumers are eager to earn additional income, FHTM capitalizes on their vulnerability and lines the pockets of those few who successfully recruit hundreds or thousands of consumers into the business.

A. “Those Big Checks:” FHTM’s Earnings Claims

FHTM lures new recruits in with promises of large paychecks and extravagant lifestyles.

⁴⁹ FHTM staff, including Investigator Roberto C. Menjivar, have utilized the Internet to access scores of FHTM presentations and conference calls. Investigator Menjivar also participated in FHTM-related webinars and personally attended a Chicago-area Spanish-language FHTM recruitment meeting, and the 2011 FHTM national convention, which was held in Orlando, Florida. See PX 1, Menjivar ¶¶ 22, 29-31. FTC legal assistant Diane Jablonsky participated in undercover telephone calls with a Cleveland-area FHTM representative. See PX3, Jablonsky ¶¶ 5-6.

⁵⁰ PX 2, Vander Nat ¶ 13.

⁵¹ See PX 1, Menjivar ¶ 10(D), Att. AA (bundle is at least \$129.99 per month).

⁵² PX 2, Vander Nat ¶ 12; PX 1, Menjivar ¶ 7(N), Att. N (less than \$1 million in renewal fees collected in FHTM’s 2010-11 fiscal year).

⁵³ PX 2, Vander Nat ¶ 60 (participants who drop out “generate revenue for FHTM via joining fees and product purchases, while costing the company very little in rewards”).

On paper, FHTM cautions representatives against making any earnings claims – specific earnings claims or so-called “lifestyle” claims⁵⁴ – and instructs representatives to disclose the company’s annual Income Disclosure Statement when recruiting new members.⁵⁵ In practice, however, the Income Disclosure Statement is never even mentioned in FHTM’s most common recruiting tool – its video business presentations.⁵⁶ The reality is that the heart and soul of nearly every FHTM business presentation revolves around FHTM’s claims of big riches and grand lifestyles. These misrepresentations continue in the frequent training calls and presentations which new representatives are encouraged to attend. Top FHTM officials attempt to motivate representatives with promises of great financial success if they just do not give up⁵⁷ – assuming they continue to make substantial monthly purchases from FHTM to remain “qualified” to receive recruitment bonuses. These claims are designed to make consumers believe that the riches are not confined to the top of FHTM’s ranks but, rather, that they too are likely to earn

⁵⁴ PX 1, Menjivar ¶ 10(O)(iii), Att. VV at pp. 9-10 (August 2012 Policies and Procedures); *see also id.* ¶ 9(A) & Att. TT at p. 5 (Code of Ethics); *id.* Att. SS at p. 2 (Income Claims Policy).

⁵⁵ PX 1, Menjivar ¶ 10(O)(iii), Att. VV at p. 10 (August 2012 Policies and Procedures).

⁵⁶ The Income Disclosure Statement is not a part of the basic FHTM business presentation or business presentation scripts, which are utilized by many representatives and widely available online. PX 1, Menjivar ¶ 10(M)(i) & Att. NN (February 2012 business presentation script); *id.* ¶ 10(M)(ii) & Att. OO (May 2012 business presentation script); *id.* ¶ 10(M)(iii) & Att. PP (screen shots of slide presentation); *see also id.* ¶ 63(A) & Att. BBBB (Brock Keen business presentation); PX 1, Menjivar ¶ 63(B) & Att. CCCC (George Harris business presentation).

⁵⁷ *See, e.g.*, PX 1, Menjivar ¶ 74(D) & Att. MMMM at pp. 27-28 (“[FHTM has] allowed us to live out our dreams. And you know what? It can for you too if you’ll just put your effort in the right vehicle, in the right place.”); *id.* ¶ 26(B) & Att. AAA at p. 42 (“Whoever wants to take the opportunity, whoever wants to work, let’s go. Honestly. You can’t be serious. Ramiro, the way you saw him today. Very simple guy. Three-hundred registered in a month and he just made sixty thousand dollars. Yeah. My friend, the Zacatecas. Who doesn’t even know how to read and write in Spanish. Listen to me. He is about a hundred and fifty thousand a month right now.”); *id.* ¶ 29(B) & Att. BBB at p. 38; *id.* ¶ 38(C) & Att. JJJ at p. 9 (“You can’t be lazy if you want to win in business. Hello? This is network marketing, not net welfare marketing. Right? Okay? Although, I think the announcement that Paul Orberon just made, there’s going to be a lot of people that get rich by accident now.”).

substantial if they work hard.

Paul Orberson, FHTM's leader, recognizes that FHTM's main marketing tool is the promise that consumers will earn significant money by joining FHTM. At FHTM's most recent national convention, FHTM paraded its top thirty earners on stage with mock-up of a \$64 million check. Orberson explained that "it seems to be in our industry that's what people kind of gravitate toward is those big checks, seeing how much these people have earned and here's what so-and-so has earned, here's what so-and-so has earned in his time or her time in the company, and that's great."⁵⁸ Orberson has set the tone for the entire company in making such outlandish earnings claims.

Following Orberson's example, FHTM representatives regularly recruit by telling consumers exactly how much money they and others have earned in FHTM – the clear message being that anybody signing up with FHTM will be able to replicate these earnings. For example, one of FHTM's most influential Presidential Ambassadors recently bragged on Twitter that he had made more than \$5 million through FHTM,⁵⁹ another Presidential Ambassador claimed to have "earned millions of dollars in this company,"⁶⁰ and a third Presidential Ambassador told audiences that FHTM provides him with a "five-figure monthly income."⁶¹ A Platinum Sales

⁵⁸ PX 1, Menjivar ¶ 78, Att. QQQQ at p. 22. National Sales Manager Woodson Gardner sent out a photo of the check via Twitter. *Id.* ¶ 88(A) & Att. ZZZZ at p. 34. On stage at the prior year's national convention, Orberson told the story of a Presidential Ambassador who "was washing dishes at a Marriott hotel five, six years ago, and he's a millionaire in this business five, six, seven years later." *Id.* ¶ 36, Att. HHH at p. 7.

⁵⁹ PX 1, Menjivar ¶ 85, Att. WWWW at p. 4 (Todd Rowland).

⁶⁰ PX 1, Menjivar ¶ 45(A), Att. MMM at p. 5 (Joel McNinch).

⁶¹ PX 1, Menjivar ¶ 47(A), Att. OOO at p. 4 ("[W]e were looking for an opportunity that could, you know, replace quickly a five-figure monthly income And within a short period of time, we had that happen."). He also boasted that another FHTM Presidential Ambassador earned \$50,000 in his sixth

Manager told listeners on a team call: “[I]f you’re not aware of what you have your hands on, this is a multi-million-dollar business. Darla – Darla has made millions of dollars. Scott has made millions of dollars, millions and millions of dollars. So, understand, this is a multi-million-dollar organization.”⁶² At a Chicago-area recruiting event, one representative told an undercover FTC investigator that she made \$10,000 in one month and a friend made \$60,000 in one month.⁶³ Frequently, instead of mentioning specific dollar amounts, FHTM Presidential Ambassadors tell prospective and new FHTM recruits about how quickly they were able to supplant their previous income after joining FHTM.⁶⁴

Frequently, FHTM’s claims are even more direct. For example, the standard FHTM business presentation, which is widely used as a recruiting tool, details how a representative can

month as a representative. *Id.* ¶ 57, Att. WWW at p. 4; *see also id.* ¶ 57(C), Att. WWW at p. 4 (representative discloses that he made \$56,000 in one month, because an RSM in his downline added 344 people to his business in one month); *id.* ¶ 62, Att. AAAA at pp. 11-12 (“You can come in this and you can make \$500 a month, you can make \$1,000 a month. But you can also do what Quang is doing, six figures a month, over \$100,000, you guys, a month that man has achieved in three years.”).

⁶² PX 1, Menjivar ¶ 61, Att. ZZZ at pp. 5-6. Darla DiGrandi and Scott Aguilar recently quit FHTM to join a different MLM, purportedly because of poor earnings throughout FHTM, including the fact that only one person in their downline of 25,000 people (including 70 ESMs) currently makes even \$5000 per month. *Id.* at ¶ 84 & Att. VVVV at p. 2.

⁶³ PX 1, Menjivar ¶ 26, Att. AAA at pp. 38 & 42 (Nancy Villacorta).

⁶⁴ PX 1, Menjivar ¶ 46(A), Att. NNN at p. 7 (“By the time we got into months five, six and seven, those couple hundred dollar paychecks had become several thousand every month. Then, all of a sudden, we look up a year into it, after getting pretty serious about it, working it a lot of evenings and Saturdays, and our income is doubling, and in some months, tripling what I’m making as a high school football coach.”); *id.* ¶ 66(A), Att. FFFF at p. 3 (“[B]ecause of the pay plan that I’m about to thoroughly explain to you, in less than a year, we were able to walk away from that profession and have been full-time in the company now for a number of years. Have got our freedom back. We control our own life now. The income, obviously, is way more than I ever made as a coach.”); *see also id.* ¶ 71(A), Att. JJJJ at p. 6 (by “my sister’s third year in the company, her residual income in Fortune was more than she was making as a nurse and retired her from nursing”); *id.* ¶ 74(A), Att. MMMM at p. 4 (quadrupled previous income as a registered nurse within four months and replaced husband’s income within a year).

earn over \$82,000 a month.⁶⁵ The recruiters often go on to say that even if consumers have a 10% success rate, they will still earn over \$8,000 a month.⁶⁶ On Twitter, one Presidential Ambassador invited her followers to a business presentation so that they could learn how to make \$100,000 a year.⁶⁷

Even when FHTM avoids making direct earnings claims, top representatives attempt to lure consumers into FHTM with lifestyle claims, promising a “bigger life,” free from the confines of a traditional nine-to-five job.⁶⁸ They promise that FHTM will provide consumers with financial security for themselves and their children and grandchildren, as well as the freedom to spend time with their families,⁶⁹ and that there is no risk in choosing to join FHTM

⁶⁵ PX 1, Menjivar ¶ 68, Att. GGGG at pp. 22-23 (Darla DiGrandi presentation); *id.* ¶ 70(C)-(D), Att. IIII at pp. 28-30 (Scott Aguilar presentation).

⁶⁶ PX 1, Menjivar ¶ 68, Att. GGGG at pp. 22-23 (Darla DiGrandi presentation); *id.* ¶ 70(C)-(D), Att. IIII at pp. 28-30 (Scott Aguilar presentation). A National Sales Manager acknowledges that “\$82,000 a month doesn’t seem very believable . . . But if you understand the principles of this business, you understand it’s very easy to actually understand there’s lots of people in this business making northward of that amount of money.” *Id.* ¶ 64(D), Att. DDDD at p. 45 (Kevin Mullens).

⁶⁷ PX 1, Menjivar ¶ 83(C), Att. UUUU at p. 2 (DiGrandi: “Bring ur friends & learn how 2 make \$100k Ayr”). An FTC undercover investigator spoke with an FHTM representative at the 2011 FHTM national convention and was told that if he recruited four people and helped them develop a downline, he could easily earn \$10,000 in one month. *Id.* ¶ 33, Att. DDD at p. 3.

⁶⁸ *See, e.g.*, PX 1, Menjivar ¶ 55(D), Att. VVV at p. 24 (Ruel Morton: “We’re offering people something they want and need, which is more money, a bigger life. People want what we got. This is the greatest opportunity in the world right now in a down economy, in a depressed economy.”); *id.* ¶ 74(D), Att. MMMM at pp. 27-28 (Susan Frank: “So, I’m not sure if you want better for your family, if you want better for you, if you want retirement, if you’re looking to make just a little extra side money, here’s what I found in the real world. I had a job. It didn’t work out too good, so I got a second job. Well, if my first job didn’t work, why would I get a second job? How about a home-based business and a full-time life? That’s what this company has allowed us to have. It’s allowed us to live out our dreams. And you know what? I know it can for you, too, if you’ll just put your effort in the right vehicle, in the right place.”).

⁶⁹ PX 1, Menjivar ¶ 50(B), Att. QQQ at p. 4 (Jerry Brown: “I mean, this opportunity, again, it just gave me an opportunity to not just position myself, position my wife, but to position my daughters and also to position my grandkids so they have a great start on life.”); *id.* ¶ 49(B), Att. PPP at pp. 5-6 (Bob Budd: “And this business has provided me not just the finances which, trust me, they’re wonderful,

because “there isn’t an investment you could be a part of that could put the types of money in your bank account that this business can as long as you’re willing to work.”⁷⁰ Sadly, any such hope quickly dissolves when the newly recruited representatives make little or no income, but instead spend hundreds of dollars to participate in FHTM.

B. The Tip of the Iceberg: The Vast Majority of FHTM Representatives Are Underwater

FHTM’s promises of significant earnings are patently false: more than 90% of consumers who join FHTM earn nothing at all and at least 96% should expect to lose money.⁷¹ The company’s own data bears this out. FHTM’s Income Disclosure Statement shows that the average Manager earned only \$37 per month in commissions and bonuses, translating to an “annualized income” of \$440. According to the Income Disclosure Statement, Regional Sales Managers do not fare much better – earning an average of \$2269 per year. Though new recruits, and most representatives, may not realize it, Managers and Regional Sales Managers constitute more than 99% of all FHTM representatives.⁷²

Moreover, a closer examination of the earnings claims in the Income Disclosure Statement reveals that even these meager earnings claims are highly overstated. The averages included in the Income Disclosure Statement do not include any months in which a

but the time freedom to take advantage of those finances. I mean, I have a lot of friends who have a lot of money and a lot of finances, but they have no time to ever take any advantage of that money and have a lifestyle to go with it. FHTM has given me the advantage of both money and the time freedom to go enjoy it.”).

⁷⁰ PX 1, Menjivar ¶ 64(A), Att. DDDD at p. 36.

⁷¹ PX 2, Vander Nat ¶¶ 6 & 13.

⁷² PX 1, Menjivar ¶ 7(P), Att. P (150,014 of 150,858 total representatives are managers or RSMs).

representative did not earn a bonus or commission of at least \$15.⁷³ By doing so, the Income Disclosure Statement expressly excludes the more than 93% of Managers and more than 50% of Regional Sales Managers who do not earn \$15 in an average month.⁷⁴ Neither does the Income Disclosure Statement take into account the more than \$1500 in product costs and joining fees associated with being an FHTM representative. Thus, the monthly averages on the Income Disclosure Statement are themselves deceptive and stand in stark contrast to the general earnings claims and lifestyle claims consistently being made to recruits.⁷⁵

Furthermore, although FHTM representatives may characterize those who lose money with FHTM as “quitters,”⁷⁶ the truth is that FHTM is a rigged game. The majority of representatives must fail in order for FHTM to pay the small percentage of representatives who actually make money. A Presidential Ambassador acknowledged this in a video message:

Where does all this money come from that Paul keeps putting into the system? Well, guys, most people quit everything. And with our company, that’s actually a good thing because those people that quit the business, they don’t quit on their bills. So there is a lot of bills being paid out there in the world that a representative is just not collecting on. It’s going back into the compensation plan and being pushed right back out into the field because Paul didn’t create this business for him to make a profit, he created it for us to make a profit.⁷⁷

This explanation is partially right – although the compensation plan is fueled by the failure of representatives, it is not because of the revenue their minimal sales have brought into the

⁷³ PX 1, Menjivar ¶ 10(N)(i)-(iii), Atts. QQ-SS (Income Disclosure Statements for 2009-11).

⁷⁴ PX 2, Vander Nat ¶ 13.

⁷⁵ The claims also do not take into account the fact that FHTM charges its representatives \$6 for every paper check and \$5 for every direct deposit of the representatives earnings. PX 1, Menjivar ¶ O(iii), Att. VV at pp. 26-27 (Policies and Procedures).

⁷⁶ PX 1, Menjivar ¶ 73(A), Att. LLLL at p. 8.

⁷⁷ PX 1, Menjivar ¶ 73(A), Att. LLLL at p. 8.

company. It is because those representatives pay fees to sign up and have also paid for services that are necessary to run their business, but fail to collect any return on those investments.

C. FHTM's False Earnings Claims Violate the Law

Defendants are violating Section 5(a) of the FTC Act by falsely claiming that consumers who become FHTM representatives will earn substantial income.⁷⁸ FHTM's actual corporate data shows that these claims are patently false. The FTC has successfully brought cases against dozens of defendants who have made similar misrepresentations regarding earnings.⁷⁹

An act or practice is deceptive if it involves a material misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances. *See FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. World Media Brokers*, 415 F.3d 758, 763 (7th Cir. 2005); *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 957 (N.D. Ill. 2006). The materiality requirement is satisfied if the misrepresentation or omission involves information

⁷⁸ "For purposes of liability under the FTC Act, it is of no consequence" whether FHTM's independent representatives "would be considered at law as employees of the company or independent contractors." *FTC v. SkyBiz.com, Inc.*, No. 01-CV-396-K(E), 2001 WL 1673645, at *9 (N.D. Okla. Aug. 31, 2001) (citing *Goodman v. FTC*, 244 F.2d 584, 591-22 (9th Cir. 1957)); *see also Int'l Art Co. v. FTC*, 109 F.2d 393, 396 (7th Cir. 1940) ("We know of no theory of law by which the company could hold out to the public these salesmen as its representatives, reap the fruits from their acts and doings without incurring such liabilities as attach thereto."); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 527 (S.D.N.Y. 2000) ("The law is clear that under the FTC Act, a principal is liable for misrepresentations made by his/her agents (i.e., those with the actual or apparent authority to make such representations) regardless of the unsuccessful efforts of the principal to prevent such misrepresentations.").

⁷⁹ *See, e.g., FTC v. Febre*, No. 94 C 3625, 1996 WL 396117, at *3 (N.D. Ill. July 3, 1996) (recommending summary judgment in FTC's favor on false earnings claims), *report and recommendation adopted by*, 1996 WL 556957 (N.D. Ill. Sept. 27, 1996); *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) (affirming district court grant of summary judgment on false earnings claims); *FTC v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1072 (C.D. Cal. 2012) (granting summary judgment in FTC's favor on false earnings claims); *FTC v. Grant Connect, LLC*, 827 F. Supp. 2d 1199, 1225-26 (D. Nev. 2011) (same); *FTC v. Cruz*, No. 08-1877, 2008 WL 5277735, at * 1 (D.P.R. Dec. 18, 2008) (granting judgment in FTC's favor on false earnings claims); *SkyBiz.com*, 2001 WL 1673645, at *9, 11 (entering preliminary injunction on basis of false earnings claims); *Five-Star Auto Club*, 97 F. Supp. at 528 (S.D.N.Y. 2000) (granting judgment in FTC's favor on false earnings claims).

that is likely to affect a consumer's choice of, or conduct regarding, a product or service. *See Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

Reliance on express claims is considered presumptively reasonable, *see World Travel Vacation Brokers*, 861 F.2d 1020, 1029 (7th Cir. 1988), even if defendants offer "no guarantees." *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000). Courts consider the likely effect of a statement on the mind of an ordinary consumer when evaluating its deceptiveness.

See Bay Area, 423 F.3d at 635 (citing *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1202 (10th Cir. 2005)); *Kraft*, 970 F.2d at 322 (courts must look at overall net impression of consumers).

Deceptive claims about earnings potential, even those that do not guarantee certain earnings, are presumed to be material. *FTC v. Febre*, No. 94 C 3625, 1996 WL 396117, at *2 (N.D. Ill. July 3, 1996) (conditional earnings claims would be understood to represent typical or average earnings and are therefore deceptive). In presenting a business opportunity, defendants "must be prevented from bandying about high earnings achieved by the minority of [participants] with no indication of the unrepresentativeness of such earnings." *In re Nat'l Dynamics*, 85 F.T.C. 1052 (1975), 1973 WL 165114 (F.T.C.), at *1. An "endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will general achieve with the advertised product or service." 16 C.F.R. § 255.2(b) (Guides Concerning the Use of Endorsements and Testimonials in Advertising); *see also In re Cliffdale Assoc., Inc.*, 103 F.T.C. 110, 173 (1984), 1984 WL 565319 (F.T.C.), at *16 (testimonials presumed to represent typical experiences). Moreover, if defendants "lack evidence that the high reported earnings of a few [participants] are in fact representative of the

earnings of large numbers of other [participants], then it is clearly deceptive for them to portray the minority results reported to them without a clear indication of their unrepresentativeness.” *Nat’l Dynamics*, 1973 WL 165114 (F.T.C.), at *1.

Without a doubt, the litany of income representations made by FHTM representatives violate these clear principles of law. Over and over again, as encouraged by Paul Orberon, FHTM parades its highest earners before the masses in order to persuade others to join or continue to participate in FHTM. Because consumers join FHTM to earn money, there can be no question that the representations made about these few individuals’ substantial earnings are material to consumers’ decisions to join FHTM. The success of this minority of representatives, however, is not the experience of the majority of FHTM participants. For the period from 2006 through June 2011, FHTM’s own data show that 94% of those who enroll as representatives did not renew their participation after the initial year and 96% likely lose more money than they make.⁸⁰ Indeed, deceptive earnings claims are a hallmark of pyramid schemes. *See, e.g., SkyBiz.com*, 2001 WL 1673645, at *9; *Five-Star Auto Club*, 97 F. Supp. 2d at 527.

III. Defendants Are Operating an Illegal Pyramid Scheme

Not only are FHTM’s earnings claims false, but, by its very design, FHTM’s compensation plan ensures that only those at the top make money. By prioritizing recruitment over product sales, resulting in a system where rewards paid for recruitment are unrelated to sales to ultimate users, FHTM is operating an illegal pyramid scheme.

A. The Pyramid Explained: The Legal Standard

Pyramid schemes have long been considered illegal. *See, e.g., Public Clearing House v.*

⁸⁰ PX 2, Vander Nat ¶¶ 6 & 13.

Coyne, 194 U.S. 497, 512-15 (1904); *United States v. Fluker*, 698 F.3d 988, 992 (7th Cir. 2012). Pyramid schemes are illegal under the FTC Act, *see, e.g., In re Chem. Assoc., Inc.*, 77 F.T.C. 1500 (1970), 1970 WL 117383 (F.T.C.), and the laws of most states, including the state Plaintiffs in this action. *See, e.g.,* 815 Ill. Comp. Stat. 505/7(a); Ky. Rev. Stat. § 367.832, *et seq.*; N.C. Gen. Stat. § 14-291.2. The fundamental problem with the pyramid structure is that, inherent in its design, at any point in time and no matter what the size, most participants will be out the money they have contributed to the pyramid. *See Five-Star Auto Club*, 97 F. Supp. 2d at 531. A few people at the top of the pyramid make large sums, but the vast majority lose their investment. This inherent characteristic of pyramids – rewarding recruitment with no relationship to retail sales – inevitably leads to a situation where only a small number of participants can ever even recover their money.⁸¹ There can never be enough new entrants to ensure that everyone recovers their investment. *See United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 479 (6th Cir. 1999) (pyramid schemes are illegal because they “will inevitably harm later investors”). Indeed, pyramid schemes might be more aptly explained as icebergs. No more than a small percentage of an iceberg is above water, no matter what the size.⁸² The inevitable consequence of a pyramid scheme, akin to an iceberg, is that most participants will remain “underwater.”

In a simple pyramid scheme, each person who joins pays money which goes to those at a higher level of the pyramid. New people then recruit additional people under them (their “downline”) who each pay money upstream to a smaller group of people. The recruiters

⁸¹ PX 2, Vander Nat ¶ 26.

⁸² *See, e.g.,* <http://en.wikipedia.org/wiki/Icebergs> (“[T]ypically only one-ninth of the volume of an iceberg is above water.”) (last visited January 17, 2013).

typically get a cut not only from the people they recruit, but of the money paid in as new recruits are signed up further downline.⁸³

Although they are distinct, pyramid schemes commonly disguise themselves as legitimate MLMs. *See, e.g., Gold*, 177 F.3d at 480; *Five-Star Auto Club*, 97 F. Supp. 2d at 507. In most MLMs, participants can be paid for two different types of efforts – selling products and, at least indirectly, recruiting new members.⁸⁴ The key difference is that, in a pyramid scheme, the recruiting predominates, and there is little evidence of sales to consumers outside the enterprise. *See, e.g., Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 782-84 (9th Cir. 1996). Participants in a pyramid scheme are frequently forced to buy products they would ordinarily not buy simply as a cost of participating in the business opportunity. In such situations, it makes no difference in an economic sense whether people simply send cash to the people higher in the pyramid or if they pay money for products they do not really want – the end result is the same: the participants at the bottom lose money.

The seminal case distinguishing illegal pyramid schemes from legitimate MLMs is *In re Koscot Interplanetary, Inc.* 86 FTC. 1106 (1975), 1975 WL 173318 (F.T.C.). The Commission found that Koscot operated an unlawful pyramid scheme, articulating the legal test upon which courts continue to rely. The Commission held that illegal pyramid schemes “are characterized by the payment by participants of money to the company in return for which they receive (1) the

⁸³ An example of a pyramid scheme popular in the 1980s was known as the “airplane game.” In its simplest form, the airplane game consists of 15 people - 1 pilot, 2 co-pilots, 4 crew members, and 8 passengers. Each person invested a certain sum and was responsible for recruiting two new members. Once the airplane was full (1 x 2 x 4 x 8), the pilot would receive a payment and then be rotated out of the scheme. Typically, even when it operated optimally for participants, the promoter retained half of the money paid into the scheme. *See, e.g., Sheehan v. Bowden*, 572 So. 2d 1211, 1211-12 (Ala. 1990). Of course, in this particular example, the only purchase or sale made is the right to participate in the scheme.

⁸⁴ PX 2, Vander Nat ¶ 18.

right to sell a product *and* (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to sale of the product to ultimate users.” *Id.* at *59

(emphasis in original). The Commission explained that paying bonuses for recruiting:

will encourage both a company and its distributors to pursue that side of the business, to the neglect or exclusion of retail selling. The short-term result may be high recruiting profits for the company and select distributors, but the ultimate outcome will be neglect of market development, earnings misrepresentations, and insufficient sales for the insupportably large number of distributors whose recruitment the system encourages.

Id.

The determination of whether an enterprise is an illegal pyramid then focuses on whether the primary purpose of the enterprise is to reward recruitment over sales. *See, e.g., Gold*, 177 F.3d at 480, 483-84; *Omnitrition*, 79 F.3d at 781. Once the Plaintiffs establish that a program satisfies the *Koscot* test, it has met its burden of proving that the enterprise constitutes an illegal pyramid scheme. *Gold*, 177 F.3d at 482 (“Given the grave risks imposed on investors in illegal schemes, the government should have to do no more than prove that the program satisfies the definition of *Koscot*.”).

In a subsequent case, *In re Amway Corp.*, 93 F.T.C. 618 (1979), 1979 WL 198944 (F.T.C.), the Commission refined the *Koscot* test, and held that Amway was not a pyramid because that the primary purpose of the compensation scheme was not to reward recruiting. The Commission noted that Amway had adopted certain policies, which have come to be known as the “*Amway defenses*,” which prevented distributors from buying or forcing their recruits to buy unneeded inventory just to remain eligible for bonuses and that discouraged distributors from engaging in reckless recruiting.⁸⁵ The courts subsequently have made it clear, however, that a

⁸⁵ In *Amway*, the Commission emphasized that the defendant: (1) required distributors to buy back any unused products from their recruits upon termination; (2) would not pay any commissions to

defendant cannot avoid liability merely by adopting the *Amway* safeguards without evidence that the safeguards are enforced and actually work. See, e.g., *Omnitrition*, 79 F.3d at 783; *Stull v. YTB Int'l*, No. 10-600-GPM, 2011 WL 4476419, at *5 (S.D. Ill. Sept. 26, 2011) (“Whether a MLM plan operates as illegal pyramid scheme is determined by how it functions in practice.”); *FTC v. Equinox Int'l Corp.*, No. CV-S-990969HBR, 1999 WL 1425373, at *7 (D. Nev. Sept. 14, 1999) (“[I]mplementation of policies that would prevent a program from being a pyramid scheme do not insulate the program unless the policies are enforced and actually serve to deter inventory loading (making purchase quotas solely to receive the bonuses and rebates without reselling the product to an end user) and encourage retail sales.” (citing *Omnitrition*, 79 F.3d at 783)).

B. FHTM Is A Pyramid Scheme

The second prong of the *Koscot* test – recruitment with rewards unrelated to product sales to ultimate users – is the “*sine qua non*” in determining whether an enterprise is a pyramid scheme. See, e.g., *Gold*, 177 F.3d at 480; *Omnitrition*, 79 F.3d at 781. The courts and the FTC have emphasized that the key point is that, while recruitment aimed to build sales teams can be a valid business objective, an undue focus on recruitment leads to the neglect of retail sales to ultimate consumers; without such sales, the rewards paid to existing members cannot be funded without the continuous recruitment of new members. *Gold*, 177 F.3d at 479-80. To determine whether the primary purpose of an enterprise is to reward recruitment over sales, courts examine how the enterprise’s pay plan is structured, how that pay plan operates in practice, and how the

distributors unless they sold at least 70% of their purchased inventory each month (the “70% rule”); and (3) would not pay any commissions to distributors unless they made a retail sale to each of 10 different customers each month (the “10 customer rule”). *Amway*, 1979 WL 198944 (F.T.C.), at *69-70.

enterprise promotes itself. No matter how FHTM is analyzed, the enterprise's primary purpose is to recruit new participants, making it a classic pyramid scheme.

The terms of FHTM's pay plan favor recruitment. On its face, FHTM's pay plan rewards recruitment much more generously than sales. As Dr. Vander Nat notes, commissions are typically 1% - 2% on sales; thus, a representative who purchases a 1000 point bundle for as much as \$300 earns \$5.20, while the sale or purchase of a DISH TV package (which begin at \$50 monthly and require a 24-month commitment), or a home security system (which begin at \$43 monthly and require a 36-month commitment) earns a commission of merely \$0.80 and \$0.43, respectively.⁸⁶ In contrast, a Regional Sales Manager earns a \$100 recruitment, or "customer acquisition bonus" ("CAB"), for each new recruit the representative signs up, as long as the new enrollees pay sufficient sums to FHTM for products.⁸⁷ Moreover, as representatives move up the FHTM ladder and receive bonuses both for the representatives they recruit and also for representatives in their downlines, "these add-on enrollment CABs increase the per-capita size of the bonus."⁸⁸

The optimal scenario demonstrates that FHTM's pay plan favors recruitment. In order to assess the extent to which the FHTM compensation plan favors recruitment over product sales, Dr. Vander Nat employed a commonly used form of economic analysis called an "optimal scenario." In an optimal scenario model, it is assumed that every participant in an enterprise meets all the rules set forth by the program and receives the maximum rewards for the

⁸⁶ PX 2, Vander Nat ¶ 47; *see also* PX 1, Menjivar ¶ 10(Q) & Att. Z (bundle order form).

⁸⁷ PX 1, Menjivar ¶ 10(P)(iii) & Att. YY at p. 12. In reality, these "customers" are customers of FHTM's business opportunity and little else (besides the products and services they must buy to participate in FHTM).

⁸⁸ PX 2, Vander Nat ¶ 47.

actions undertaken.⁸⁹ According to Dr. Vander Nat's calculations, for every \$1 in product commissions, the plan offers recruitment rewards ranging from \$25 to \$42, depending on the rank or position of the participants.⁹⁰ Dr. Vander Nat's analysis not only demonstrates an overwhelming recruitment bias in FHTM's compensation plan, but that the recruitment bias is inherent in the very design of the plan.

Dr. Vander Nat's optimal scenario analysis also can be used to estimate the likelihood that participants will recoup their investment in FHTM. Based on this model, Dr. Vander Nat predicts the "expected business failure rate"⁹¹ and concludes "more than 96% of participants will fail to recoup their investment in FHTM's business opportunity and are thus harmed."⁹² Importantly, while acknowledging that many small businesses, including MLMs, experience a high participant loss rate, Dr. Vander Nat explains that the optimal scenario is significant because it shows that, in the case of FHTM, the large loss rates are not due to market forces but are inherent in the design of the pay plan:

For pyramids, these outcomes arise from the very design of the compensation plan – namely a plan that rewards recruitment with no cognizable relationship with retail sales and typically rewards recruitment far greater than retail sales, while leaving most participants in positions where they qualify for *de minimis* rewards or no rewards. Consequently, most participants experience failure and quit, while the firm continues with more recruitment in an effort to fund the rewards proposed by the plan.⁹³

The inevitable result of FHTM's pay plan focus on recruitment and the neglect of retail

⁸⁹ *Id.* at n. 2. FHTM's business presentations frequently make the same assumptions in describing FHTM's compensation structure. *Id.* at ¶ 84.

⁹⁰ *Id.* at ¶ 4.

⁹¹ *Id.* at ¶ 29.

⁹² *Id.* at ¶ 6.

⁹³ *Id.* at ¶ 26.

sales to ultimate consumers is a system that is unsustainable without the continued recruitment of new members. Not surprisingly, Dr. Vander Nat found that based on his optimal scenario analysis, over 90% of the rewards are unfunded.⁹⁴ He states that potential FHTM profits and joining fees “fail drastically” to fund the promised rewards, explaining:

Regardless of the levels to which such enrollment may be extended, the vast majority of the accrued rewards – which are overwhelmingly managerial bonuses for recruitment– remain perpetually unfunded. Optimal operation of FHTM’s plan is inherently unsustainable. The plan’s strong bias in favor of recruitment, coupled with a lack of funding of the recruitment bonuses that accrue under optimal operation, together require ongoing recruitment in a futile attempt to address the funding shortage –a vicious circle that cannot be solved due to the very terms of FHTM’s compensation plan.⁹⁵

As Dr. Vander Nat concludes, FHTM’s “compensation plan provides incentives to the participants that cut decisively in favor of recruitment, and, when coupled with the dramatic lack of funding for the maximum recruitment rewards, requires ongoing recruitment in a futile attempt to address a perpetual funding shortage for these rewards.”⁹⁶

Empirical data show that FHTM favors recruitment. Dr. Vander Nat also analyzed how the plan operates in practice by looking at the empirical data on the commissions actually earned by FHTM representatives for the years 2006 through June 2011.⁹⁷ Significantly, Dr. Vander Nat determined that over 88% of the compensation that is paid by FHTM to its representatives is actually paid out in the form of recruitment bonuses.⁹⁸ These bonuses are

⁹⁴ *Id.* at ¶ 57.

⁹⁵ *Id.* at ¶ 5.

⁹⁶ *Id.* at ¶ 94.

⁹⁷ This data was provided by FHTM to the Kentucky Attorney General.

⁹⁸ PX 2, Vander Nat ¶ 8.

unrelated to sales.⁹⁹

FHTM offers other bonuses focused solely on encouraging consumers to sign up more members. Thus, in addition to its standard product commissions and recruitment bonuses, FHTM offers additional bonuses, such as a “fast start” bonus, which an FHTM representative earns for recruiting individuals who then acquire 500 customer points within 60 days of entering the business.¹⁰⁰ Other one-time or periodic bonuses have also been offered,¹⁰¹ and high-ranking representatives can earn company-paid vacations,¹⁰² payments toward a leased BMW,¹⁰³ and housing allowances for its top representatives.¹⁰⁴ To qualify for each of these additional incentives, a representative must recruit substantial numbers of new representatives into FHTM’s scheme.

Dr. Vander Nat also explains that his estimate that 88% of compensation is paid for recruitment is likely to be substantially understated, since many commissions that are facially based on product sales are equally premised on recruitment.¹⁰⁵ Moreover, over half of all product

⁹⁹ In reality, although they are labeled “customer acquisition bonuses,” these “customers” are customers of FHTM’s business opportunity.

¹⁰⁰ PX 1, Menjivar ¶ 10(P)(iii), Att. YY at p. 8 (September 2012 Compensation Plan).

¹⁰¹ PX 1, Menjivar ¶ 10(H)(i-v), Atts. EE-II (listing various promotions and incentives offered in 2011 and 2012).

¹⁰² See, e.g., PX 1, Menjivar ¶ 43, Att. LLL at pp. 7-9 (listing travel award winners).

¹⁰³ See PX 1, Menjivar Att. LLL at p. 3; see also *id.* ¶ 74(C), Att. MMMM at p. 23 (“They also, at your second promotion, they have a platinum BMW car program where you can earn payments toward a car. We actually earned a car eight months into the company. We’re actually on our second car through this company. That’s not to say, look at us. We’re nobody special. We were just sick and tired of being sick and tired and absolutely wanted better.”).

¹⁰⁴ PX 1, Menjivar ¶ 74(C), Att. MMMM at p. 24 (“They just announced this past weekend that you can actually earn a housing allowance, \$2000 a month, as you meet a few qualifications.”).

¹⁰⁵ PX 2, Vander Nat ¶ 8.

bonuses actually go to a very small set of representatives at the top of the structure. This is because the commission rates are severely biased toward participants who have many levels of new recruits beneath them – and have thus recruited a substantial downline.¹⁰⁶

FHTM preaches recruitment. Defendants stress recruitment, not product sales, during their presentations to prospective representatives.¹⁰⁷ In fact, Paul Orberon defines success and failure in the business as a function of how well it recruits new members.¹⁰⁸ An FHTM Presidential Ambassador stated that “our product is own your own business, be your own boss, make more money.”¹⁰⁹ Similarly, a representative told an undercover FTC investigator during a Chicago area recruiting presentation that, “we are not selling products. It’s not about products.”¹¹⁰

High ranking FHTM representatives understand how the compensation plan works in practice – they readily acknowledge that FHTM is not actually about selling products, but about selling people an opportunity and a vision for a life with more freedom. The purported top-earner in FHTM told the listeners on one of his calls, “Guys, our product truly, in my independent rep opinion, is financial opportunity. We’re going out there and we’re telling

¹⁰⁶ *Id.*

¹⁰⁷ The courts look at how an enterprise is promoted when determining its primary purpose. *See, e.g., Omnitrition*, 79 F.3d at 782-83.

¹⁰⁸ PX 1, Menjivar, ¶ 36, Att. GGG at p. 27 (Orberon Convention transcript) (“[B]y the way, we had over 8000 representatives last month and I’m walking around like we failed.”); *see also id.* ¶ 87, Att. YYYY at p. 1 (various Orberon tweets congratulating recruitment efforts).

¹⁰⁹ PX 1, Menjivar, ¶ 55(B), Att. VVV at p. 15.

¹¹⁰ PX 1, Menjivar, ¶ 25(A), Att. AAA at p. 29.

people that they can have what they want.”¹¹¹ He continued:

We’re not out there selling things, guys. We’re out there offering people a chance to be part of something bigger than anything they’ve ever been a part of. . . . What Fortune’s about – and back to my original point about why we have the most lucrative compensation plan in the industry is our product is be your own boss. Own your own business. Make more money. Our product is what we have on our shelves and it comes in pretty red and white and blue packaging and it’s all nice and it’s there and it’s got – in other words, our product is own your own business, be your own boss, make more money.¹¹²

Another FHTM Platinum Sales Manager denies that FHTM is about selling products at all.¹¹³ One of FHTM’s National Trainers – also a top-earner – tells recruits, “50 people join your team in a month, times \$200, that’s a \$10,000 check that month. That \$10,000 check that Fortune would send you has nothing to do at all with the usage of products and services”¹¹⁴

Although business presentations may mention the products available through FHTM, these discussions are secondary to the recruiting aspects of the presentations.¹¹⁵ Even when FHTM President Paul Orberon tells representatives that FHTM needs to “get the dollars flowing through the system,” he does not encourage representatives to make more sales.¹¹⁶ Instead, he announces increased compensation and incentives to recruit more people into the

¹¹¹ PX 1, Menjivar ¶ 55(A), Att. VVV at p. 8.

¹¹² *Id.* at pp. 15 & 19.

¹¹³ PX 1, Menjivar ¶ 53(C), Att. TTT at p. 26 (DiGrandi: “[P]eople that are salespeople can’t do very well at this because they’re trying to sell it and there’s nothing to sell.”).

¹¹⁴ PX 1, Menjivar ¶ 70(B), Att. IIII at p. 24; *see also id.* ¶ 53(D) & Att. TTT at p. 30.

¹¹⁵ Six to seven minutes of the twenty-nine total minutes that comprise FHTM’s basic business presentation are dedicated to a discussion of products and services. *See* PX 1, Menjivar ¶ 10(M)(ii), Att. OO (May 2012 Business Presentation).

¹¹⁶ PX 1, Menjivar ¶ 79, Att. RRRR at pp. 5-7.

business, because he is unhappy with the current recruitment rates.¹¹⁷ Top representatives remind recruits that their primary focus should be on recruiting:

Guys, what do you need to do? You need to reach deep inside and find that thing that you can hang on to to get out there and face your fears, to get out there and show this business. This business has to be built every day. You wanted some practical advice. Recruit, recruit. You got to build a team. That means you need to become a recruiter.¹¹⁸

When one representative told his sponsor that he needed to make \$8,000 a month, the sponsor told him that as an Executive Sales Manager, “that’s 320 bucks a pop as you’re building your team. He said, you need to figure a way to get a check from somebody every single day for \$299,” which was the enrollment fee at that time.¹¹⁹ The advice is never to sell, it is always to recruit.¹²⁰

Under FHTM’s compensation plan, there is simply no incentive for FHTM representatives to purchase or sell goods or services beyond the amount required to qualify for bonuses.¹²¹ Over and over again, they are told that they will only ever have to sell or purchase the

¹¹⁷ PX 1, Menjivar ¶ 79, Att. RRRR at pp. 5-7.

¹¹⁸ PX 1, Menjivar ¶ 60, Att. YYY at pp. 39-40 (Ruel Morton).

¹¹⁹ PX 1, Menjivar ¶ 57(A), Att. WWW at pp. 14-15.

¹²⁰ Presidential Ambassador Mike Misenheimer calls it “chasing depth,” and claims that as a result, he “made more money in [his] first year in Fortune than [he] would have made in [his] lifetime without it.” PX 1, Menjivar ¶ 59(D)-(E), Att. YYY at pp. 16-17 & 19.

¹²¹ No doubt FHTM will argue that some of its sales are to outsiders, and therefore it cannot be considered a pyramid. The mere fact, however, that a company sells products with actual value to some people outside the enterprise does not make the enterprise legal. *See, e.g., Omnitrition*, 79 F.3d at 782; *Stull*, 2011 WL 4476419, at *5 (the fact that the product sold may have value, that a representative might have some retail business, and that representatives receive some compensation from retail sales, does not mean defendants are not operating illegal pyramid scheme); *Sky-Biz.com*, 2001 WL 1673645, at *10. Furthermore, several factors demonstrate that the majority of FHTM’s sales were purchases made by representatives themselves and not to outsiders: 1) the majority of purchases are for bundles, which are only available to representatives (PX 2, Vander Nat ¶ 9); 2) almost no representatives choose the compensation option that would maximize commissions paid on product sales (*Id.* at ¶ 10); and 3) there is

bare minimum of products or services, and they are provided with the simplest way to do that – by purchasing bundles.¹²² A Presidential Ambassador summed it up well at the 2011 FHTM national convention: “If you want to get rich in real estate, sell a house . . . If you want to get rich in Fortune, sign a rep.”¹²³

C. FHTM Pays Lip Service to Anti-Pyramid Scheme Rules

On paper, FHTM has adopted some policies that pretend to achieve the goal of the *Amway* defenses. However, these policies are not enforced and FHTM encourages its representatives to evade them. For example, FHTM says that (1) representatives may return some unused products to FHTM; (2) representatives must make a majority of their sales to someone other than themselves; and (3) 70% of the products or services a representative buys each month must be sold to third parties outside FHTM or used by the representative during the course of the month.¹²⁴

FHTM does nothing to enforce these rules. Unlike *Amway*, FHTM charges a 10% restocking fee on the products it will even allow a representative to return, requires the representative to return any compensation they earned as a result of buying the products, and the

virtually no incentive to buy or sell more than 15 products a month to maximize FHTM’s pay structure (*Id.*).

¹²² PX 1, Menjivar ¶ 54(B), Att. UU at p. 49 (National Sales Manager Woodson Gardner says that “the most customer points you’ll ever need is 15”); *id.* ¶ 70(A), Att. IIII at p. 14 (Scott Aguilar says that he has “16 customers on a report, 14 of them are just us”); *id.* ¶ 66(D) & Att. FFFF at p. 9 (“I know most of you listening to this already have your ten-point starter pack because most everybody starts exactly the way they need to maximize the pay plan. There’s no other good way to start if you’re not going to maximize everything.”); *id.* ¶ 64, Att. DDDD at p. 39 (suggesting people buy a bundle even if they don’t like what is in it just so that they can qualify their business).

¹²³ PX 1, Menjivar ¶ 38(F), Att. JJJ at p. 13 (Joel McNinch).

¹²⁴ PX 1, Menjivar, Att. VV, at p. 26 (Policies and Procedures); *see also id.* Att. YY at p. 3 (September 2012 Compensation Plan “Key Concepts,” including “The Majority Rule” and “70% Rule”).

refund comes directly from FHTM and not from the representative's upline sponsor.¹²⁵ The court in *Equinox* found that the same policies undermined the defendants' assertion of the first *Amway* defense. 1999 WL 1425373, at *8 (D. Nev. Sept. 14, 1999). As to the second and third *Amway* defenses, the "majority rule" and "70% rule," FHTM's only check on its policies is self-verification, which representatives are encouraged to manipulate.¹²⁶ Moreover, as an FHTM representative told an undercover FTC investigator, FHTM created bundles in large measure to create the fiction of sales outside of the representatives' households.¹²⁷ In fact, most of what is included in FHTM's current "bundles" are services, meaning they cannot be returned and there is no way of ever knowing whether they have been consumed.¹²⁸ FHTM's failure to enforce these rules and the analysis of its actual financial data make plain that the *Amway* defenses

¹²⁵ PX 1, Menjivar, Att. VV at p. 7 (Policies and Procedures).

¹²⁶ ESM Kent Brown offers guidance for characterizing purchases as either outside the household for a customer or for personal use. He says,

And the reason I clicked customer on that is because I do let other people use my Internet service if I'm at a coffee shop or something like that. . . . My True Essentials, I usually sample these out, the Mineral pH pills. I take those myself, but I also sample those out to people and those are available for sale if somebody if somebody wants to buy them. So, I'm going to establish that as a customer . . . The Bowel Cleaner, I set that up as a customer because I can sample that out as well.

PX 1, Menjivar ¶ 52, Att. SSS at p. 6.

¹²⁷ PX 3, Jablonsky ¶ 9, Att. A at p. 7 (FHTM representative Judy Nutter says, "[Y]ou know, you have to have more outside your home than in your home or you don't – you're not really a business. So, some states wouldn't let us come in because of that. So, they created the bundles as something you're buying, products to resell. So, they consider that bundle outside your house, even though it comes to your house and you might be using it.").

¹²⁸ The services currently included in the bundle offerings are: Amusement Pack, Consult a Doctor, Indentashield, and One Office (web conferencing). PX 1, Menjivar ¶ 10(Q), Att. ZZ.

cannot provide it any safe harbor.¹²⁹

FHTM has been the subject of investigation by several states, including its home state of Kentucky and North Carolina, both co-plaintiffs in this action. FHTM reached settlements with North Dakota, Montana, and Texas, not admitting to wrongdoing, but agreeing to provide restitution to consumers who lost money in the FHTM venture.¹³⁰ Unfortunately for consumers, FHTM has not seen fit to change its deceptive and illegal business practices even in light of these investigations. FHTM has made certain changes in its program, presumably in part because of these investigations.¹³¹ For example, FHTM reduced its entry fee from \$299 to \$99 in April 2010 and began to actively encourage representatives to purchase bundles.¹³² These changes, however, have had little practical effect on the operation of the scheme. Representatives have simply been forced to purchase more high-profit proprietary products from FHTM to cover for FHTM's reduced entry fee revenue.¹³³ More recently, in September 2012, FHTM raised its entry fee back to \$249, but reduced the number of recruits a representative is required to sign up to be promoted to Regional Sales Manager from twelve to six.¹³⁴ Dr. Vander

¹²⁹ *Gold*, 177 F.3d at 481-82 (empirical evidence that recruitment is emphasized over sales “deserves far more weight” than intent of policies); *Omnitrition*, 79 F.3d at 783.

¹³⁰ PX 1, Menjivar ¶ 90, Atts. BBBB & CCCC (USA Today articles); *see also Firm to repay Texans \$1.3 million*, Austin American-Statesman, Nov. 16, 2011, at B7.

¹³¹ *See* PX 3, Jablonsky ¶ 9, Att. A at p. 7 (FHTM representative claims bundles were created in response to the government).

¹³² PX 1, Menjivar ¶ 9(A), Att. T at p. 26; *id.* ¶ 90, Att. BBBB at p. 5; PX 3, Jablonsky ¶ 9, Att. A at p. 7.

¹³³ PX 2, Vander Nat ¶ 8. Indeed, even after these changes, the percentage of rewards paid for recruitment remained at approximately 88%. *Id.* at ¶ 96.

¹³⁴ PX 1, Menjivar ¶ 10(P)(iii), Att. YY at pp. 4-5; *id.* ¶ 10(P)(ii), Att. XX at p. 3.

Nat's analysis demonstrates that the most recent changes should be expected to similarly have little effect on the operation of the scheme – in particular, under the optimal scenario, recruitment bonuses remain dramatically underfunded.¹³⁵

FHTM regularly insists that it is not an illegal pyramid scheme. FHTM's General Counsel tells representatives that FHTM is not a pyramid scheme simply "by virtue of the fact that our representatives purchase and consume and sell onward products and services."¹³⁶ Even if this were an accurate statement of the law governing pyramid schemes, FHTM's own data plainly contradicts this. FHTM funds its compensation plan through the collection of fees and product purchases from its representatives. Like the illusion that they are creating the "business model of the 21st century," Defendants use smoke and mirrors to conceal from their own representatives that they are participating in a pyramid scheme where most of them must fail.

D. FHTM Has Caused Over \$169 Million in Consumer Injury

Dr. Vander Nat has reviewed extensive financial records for FHTM and reached the conclusion that FHTM has defrauded consumers of at least \$169 Million.¹³⁷ He characterizes this number as a "low-side" estimate.¹³⁸ With further data, not yet available to him, Dr. Vander Nat estimates that these losses could exceed \$250 Million.¹³⁹ These consumer losses are a direct result of FHTM's deceptive business practices.

¹³⁵ PX 2, Vander Nat ¶ 5.

¹³⁶ PX 1, Menjivar ¶ 58(B), Att. XXX at p. 11.

¹³⁷ PX 2, Vander Nat ¶ 16.

¹³⁸ *Id.* at ¶ 17.

¹³⁹ *Id.*

IV. The Court Should Enter a TRO to Stop Defendants' Scheme

FHTM's business practices violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a); Sections 2 and 2A of the Illinois Consumer Fraud and Deceptive Practices Act, 815 Ill. Comp. Stat. 5/2 and 5/2A; the Kentucky Consumer Protection Act, Ky. Rev. Stat. § 367.170; the North Carolina Pyramid and Chain Schemes Statute, N.C. Gen. Stat. § 14-291.2; and the North Carolina Unfair and Deceptive Practices Act, N.C. Gen. Stat. § 75-1.1(a). To prevent any further injury to innocent consumers, the Plaintiffs ask that the Court issue, *ex parte*, their proposed TRO. That order would enjoin Defendants' ongoing law violations and would provide for other equitable relief designed to preserve the Court's ability to provide full restitution to victims at the conclusion of the proceeding. The Court has full authority to enter the requested relief, which is strongly supported by the evidence. Courts in this district have repeatedly granted similar TROs in FTC actions.¹⁴⁰

¹⁴⁰ See, e.g., *FTC v. Freedom Cos. Mktg, Inc.*, No. 12 C 05743 (N.D. Ill. July 23, 2012) (Shadur, J.) (*ex parte* TRO with asset freeze); *FTC v. Apogee One Enters. LLC*, No 12 C 588 (N.D. Ill. Jan. 30, 2012) (Kennelly, J.) (same); *FTC v. Am. Credit Crunchers, Inc.*, No 12 C 1028 (N.D. Ill. Feb. 14, 2012) (Guzman, J.) (same); *FTC v. Yellow Page Mktg., B.V.*, No. 11 C 05035 (N.D. Ill. July 26, 2011) (Leinenweber, J.) (same); *FTC v. Am. Tax Relief LLC*, No. 10 C 6123 (N.D. Ill. Sept. 24, 2010) (Kocoras, J.) (*ex parte* TRO with asset freeze and appointment of a receiver); *FTC v. Central Coast Nutraceuticals, Inc.*, No. 10 C 4931 (N.D. Ill. Aug. 5, 2010) (Norgle, J.) (same); *FTC v. Asia Pacific Telecom, Inc.*, No. 10 C 3168 (N.D. Ill. May 25, 2010) (Hart, J.) (same); *FTC v. API Trade, LLC*, No. 10 C 1543 (N.D. Ill. March 10, 2010) (Guzman, J.) (*ex parte* TRO with asset freeze); *FTC v. 2145183 Ontario Inc.*, No. 09 C 7423 (N.D. Ill. Nov. 30, 2009) (Grady, J.) (*ex parte* TRO with asset freeze and appointment of receiver); *FTC v. Integration Media, Inc.*, No. 09 C 3160 (N.D. Ill. May 27, 2009) (Bucklo, J.) (*ex parte* TRO with asset freeze); *FTC v. Data Bus. Solutions, Inc.*, No. 08 C 2783 (N.D. Ill. May 14, 2008) (Dow, J.) (same); *FTC v. Union Consumer Benefits*, No. 08 C 2309 (N.D. Ill. April 23, 2008) (Aspen, J.) (same); *FTC v. Spear Sys., Inc.*, No. 07 C 5597 (N.D. Ill. Oct. 3, 2007) (Andersen, J.) (same); *FTC v. Sili Nutraceuticals, LLC*, No. 07 C 4541 (N.D. Ill. Aug. 13, 2007) (Kennelly, J.) (same); *FTC v. 1522838 Ontario Inc.*, No. 06 C 5378 (N.D. Ill. Oct. 4, 2006) (Gettleman, J.) (same); *FTC v. Datacom Mktg.*, No. 06 C 2574 (N.D. Ill. May 9, 2006) (Holderman, C.J.) (same); *FTC v. Cleverlink Trading Ltd.*, No. 05 C 2889 (N.D. Ill. May 16, 2005) (St. Eve, J.) (same).

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

The FTC Act provides that “in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” 15 U.S.C. § 53(b). Once the Commission invokes the federal court’s equitable powers, the full breadth of the court’s authority is available, including the power to grant such ancillary final relief as rescission of contracts and restitution. *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989). The court may also enter a temporary restraining order, a preliminary injunction, and whatever additional preliminary relief is necessary to preserve the possibility of providing effective final relief. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988); *see also Amy Travel*, 875 F.2d at 571. Such ancillary relief may include an asset freeze to preserve assets for eventual restitution to victimized consumers. *World Travel*, 861 F.2d at 1031. Injunctive relief is appropriate even if a defendant has ceased its illegal activities if there is “cognizable danger of recurrent violation,” *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953), and the commission of past illegal conduct is “highly suggestive of the likelihood of future violations.” *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979); *see also FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 212 (D. Mass. 2009); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1017 (N.D. Ind. 2000); *Five-Star Auto Club*, 97 F. Supp. 2d at 502. Similarly, the Court has authority to grant the requested relief pursuant to the Illinois Consumer Fraud and Deceptive Practices Act, 815 Ill. Comp. Stat. 505/7, the Kentucky Consumer Protection Act, K.R.S. 367.200, *et seq.*, the North Carolina Pyramid and Chain Schemes Statute, N.C. Gen. Stat. § 14-291.2, and the North Carolina Unfair and Deceptive Practices Act, N.C. Gen. Stat. § 75-1.1, *et seq.*

B. A TRO is Appropriate and Necessary

To grant preliminary injunctive relief in an FTC Act case, the district court must:

- (1) determine the likelihood that the Commission will ultimately succeed on the merits, and
- (2) balance the equities. *World Travel*, 861 F.2d at 1029. Under this “public interest” test, “it is not necessary for the FTC to demonstrate irreparable injury.” *Id.* When the court balances the equities, the public interest “must receive far greater weight” than any private concerns. *Id.*

1. Plaintiffs Have Demonstrated a Likelihood of Success on the Merits

The threshold showing of likelihood of success on the merits under the Seventh Circuit’s test for injunctive relief is a “better than negligible” chance of success. *Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999). Here, Plaintiffs’ likelihood of success is strong.

There is no doubt that Defendants’ activities qualify as deceptive acts or practices under Section 5(a) of the FTC Act, 15 U.S.C. §§ 45(a). Defendants routinely and consistently misrepresent the amounts consumers are likely to earn by joining the Defendants’ program. Although company policy ostensibly prohibits FHTM officials from making income claims or earnings representations of any kind, such misrepresentations figure prominently in virtually every recruiting presentation made for the company. Similarly, despite frequent reassurances to the contrary, the enterprise is a classic pyramid scheme, both by design and in operation.

2. In Addition to the FTC Act, Defendants are Violating State Laws

Counts IV through VIII of the Complaint allege that the same conduct that violates Counts I through III of the Complaint also violate the respective state laws. In construing the state consumer protection statutes, the courts look to decisions interpreting deceptive conduct under the FTC Act. *See, e.g., FTC v. Affiliate Strategies, Inc.*, 849 F. Supp. 2d 1085, 1112-13 (D. Kan. 2011) (North Carolina and Illinois law); *Heastie v. Cmty. Bank of Greater Peoria*, 727

F. Supp. 1133, 1138 (N.D. Ill. 1989) (“To be sure, the [Illinois] Consumer Fraud Act directs the courts to give consideration to the FTC’s interpretation of the [FTC] Act when determining whether an act or practice is unfair or deceptive.”); *Saltzman v. Enhanced Servs. Billing, Inc.*, 348 Ill. App. 3d 740, 751, 811 N.E.2d 191, 199 (1st Dist. 2004); *Dare to Be Great, Inc. v. Commonwealth*, 511 S.W.2d 224, 227 (Ky. Ct. App. 1974) (terms “false, misleading, and deceptive” in Kentucky Consumer Protection Act “are certainly no less broad than the language used in 15 U.S.C. § 45(a)(1)”); *Johnson v. Sturdivant*, 300 N.C. 247, 262, 266 S.E.2d 610, 620 (N.C. 1980) (“The similarity in language” between 15 U.S.C. § 45(a)(1) and N.C. Gen. Stat. § 75-1.1 “was not accidental . . . Because of the similarity in language, it is appropriate for us to look to the federal decisions interpreting the FTC Act for guidance in construing the meaning of G.S. § 75-1.1” (citations omitted)). Similarly, Illinois and North Carolina courts look for FTC Act guidance as to whether an enterprise constitutes an illegal pyramid scheme. *See, e.g.*, *People ex rel. Hartigan v. Unimax, Inc.*, 168 Ill. App. 3d 718, 723-24, 523 N.E.2d 26, 29 (1st Dist. 1988) (although Illinois considers criteria enunciated by the FTC for identifying an illegal pyramid scheme, Illinois law is broader); *State ex rel. Edmisten v. Challenge, Inc.*, 53 N.C. App. 513, 520, 284 S.E.2d 333, 338 (N.C. Ct. App. 1981).¹⁴¹

3. Individual Defendants are Personally Liable

Defendants Orberson and Mills are personally liable for the illegal conduct engaged in by their companies, corporate Defendants Fortune Hi-Tech Marketing, Inc., FHTM, Inc., Alan Clark Holdings, LLC, FHTM Canada, Inc, and Fortune Network Marketing (UK) Limited. An individual defendant may be held liable for injunctive relief and monetary restitution under the

¹⁴¹ Although Count VI of Plaintiffs’ Complaint alleges that FHTM has violated the Kentucky Pyramid Sales Act Violation, Plaintiffs’ request for a TRO is not based on that allegation.

FTC Act if the Court finds (1) that the defendant participated directly in or had some measure of control over a corporation's deceptive practices, and (2) had actual or constructive knowledge of the practices. *See World Media Brokers*, 415 F.3d at 764; *Bay Area*, 423 F.3d at 636; *Amy Travel*, 875 F.2d at 573-74. Authority to control may be evidenced by "active involvement in the corporate affairs, including assuming the duties of a corporate officer." *World Media Brokers*, 415 F.3d at 764 (citing *Amy Travel*, 875 F.2d at 573). The knowledge requirement is satisfied by a showing that the defendant (1) had actual knowledge of the deceptive acts or practices, (2) was recklessly indifferent to the truth or falsity of the representations, or (3) had an awareness of a high probability of fraud coupled with an intentional avoidance of the truth. *Id.*; *Bay Area*, 423 F.3d at 636; *Amy Travel*, 875 F.2d at 573. An individual's "degree of participation in business affairs is probative of knowledge." *Id.* The Commission need not prove subjective intent to defraud. *See id.*

Orberson is a veteran of the network marketing industry and the founder of FHTM.¹⁴² He participates in the national convention and participates in FHTM conference calls and other promotional events throughout the country.¹⁴³ He makes changes to the compensation scheme based on month-to-month data and trends and he discusses the financial success of FHTM representatives.¹⁴⁴ His active involvement in promoting the business is more than sufficient to

¹⁴² PX 5 at pp. 1 (member of Alan Clark Holdings, LLC), 5 (President and Director of FHTM, Inc.), 13 (President and Director of Fortune Hi-Tech Marketing, Inc.) & 21 (Director of FHTM Canada, Inc.); *see also* PX 1, Menjivar ¶ 7(A) & Att. A at p. 22 (FHTM counsel refers to Orberson and Mills as FHTM's founders).

¹⁴³ *See, e.g.*, PX 1, Menjivar ¶ 36 & Atts. GGG & HHH (convention transcripts); *id.* ¶ 78, Att. QQQQ (National Leadership Call); *id.* ¶ 87, Att. YYYYY at p. 5 (twitter feed discussing participation on various representatives' training calls and announcing changes to FHTM's pay plan).

¹⁴⁴ *See, e.g.*, PX 1, Menjivar ¶ 79, Att. RRRR at pp. 5-7 (announcing FHTM's "Match Pay" program).

show the requisite level of control and knowledge to find him personally liable. Mills is the CEO or director of the corporate Defendants and therefore has the ability to control them.¹⁴⁵ He also makes recruiting presentations and speeches on behalf of FHTM throughout the U.S. and Canada, including at the national conventions.¹⁴⁶ Although he may not be quite the public face of FHTM that Orberson is, his requisite knowledge can be inferred from his role as a co-founder and his active participation in promoting the business to new recruits, and from his role in representing the corporate Defendants in their contracts with third-party service providers.¹⁴⁷

C. The Equities Favor Issuance of a TRO

Once the Commission has decidedly shown a likelihood of success on the merits, the Court must balance the equities, assigning “far greater weight” to the public interest than to any of defendants’ private concerns. *World Travel*, 861 F.2d at 1029. The public equities in this case are compelling, as the public has a strong interest in halting Defendants’ illegal activities and preserving assets necessary to provide effective final relief to thousands of victims. Defendants, by contrast, have no legitimate interest in continuing to engage in illegal conduct. *See FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) (upholding finding of “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”).

¹⁴⁵ PX 5 at pp. 1 (member of Alan Clark Holdings, LLC), 5 (Vice President and Director of FHTM, Inc.), 13 (CEO of Fortune Hi-Tech Marketing, Inc.), 21 (Director of FHTM Canada, Inc.) & 25 (CEO of Fortune Network Marketing (UK) Limited).

¹⁴⁶ *See* PX 1, Menjivar ¶ 35, Att. FFF (convention transcript); *id.* ¶ 81(A), Att. SSSS at pp. 3 & 6 (“When Paul and I make decisions, everybody’s not going to like them, but you’re going to respect them and know that they’re there in place for longevity of this company.”).

¹⁴⁷ *See, e.g.*, PX 1, Menjivar ¶ 7(B), Att. B at p. 22.

D. The Temporary Restraining Order Should Include an Asset Freeze, a Temporary Receivership, and Other Ancillary Relief

Plaintiffs request that the Court issue a TRO that prohibits future law violations and preserves assets and documents to ensure that the Court can grant effective final relief.¹⁴⁸ Part of the relief sought by Plaintiffs is restitution for the victims of Defendants' fraud, which has caused millions of dollars of consumer loss. To preserve effective final relief for these consumers and prevent concealment or dissipation of assets, Plaintiffs seek an immediate freeze of Defendants' assets.

An asset freeze is appropriate once the Court determines that the plaintiffs are likely to prevail on the merits and that restitution would be an appropriate final remedy. *See World Travel*, 861 F.2d at 1031 & n.9. The district court, at that juncture, has "a duty to ensure that the assets of the corporate defendants [are] available to make restitution to injured consumers." *Id.* at 1031 (upholding freeze of company and individual assets). The freeze here should extend to individual assets as well because Plaintiffs are likely to succeed in showing that the individual defendants are liable for restitution. *See id.* at 1031. As described in the Federal Rule of Civil Procedure 65(b) Declaration filed concurrently, in the absence of an asset freeze, defendants in other FTC cases have effectively transferred large sums of money out of the country,¹⁴⁹ including at least one case involving a pyramid scheme.¹⁵⁰ Two of the defendants in this action are foreign corporations which presumably would make such transfers easy to accomplish.

¹⁴⁸ A Proposed *Ex Parte* TRO has been filed concurrently with Plaintiffs' TRO motion.

¹⁴⁹ *See* Declaration and Certification of Plaintiffs' Counsel Pursuant to Fed. R. Civ. P. 65(b) and Local Rule 5.5(d) in Support of Plaintiffs' *Ex Parte* Motion for Temporary Restraining Order and Motion to Temporarily Seal File ¶ 7 (describing need for *ex parte* relief and citing cases in which defendants who learned of impending FTC action withdrew funds, destroyed vital documents, and fled the jurisdiction).

¹⁵⁰ *Id.* at ¶ 7(1).

The appointment of a temporary receiver would prevent the destruction of documents and the dissipation of assets while the case is pending. Such an appointment is particularly appropriate in light of Defendants' pervasive fraud, which presents the likelihood of continued misconduct. As noted above, courts in this district have consistently appointed receivers in cases brought by the FTC,¹⁵¹ but a receiver is particularly important in a case involving the type of allegations involved in this case. *See, e.g., SkyBiz.com*, 2001 WL 1673645, at *12; *Five-Star Auto Club*, 97 F. Supp. 2d at 533-34; *Equinox*, 1999 WL 1425373, at *11. If Defendants are allowed to remain in control of their business, it is likely that evidence will be destroyed and the fruits of their fraud will be dissipated. A temporary receiver would eliminate those risks with a minimal disruption of any legitimate business activity. The receiver also would be helpful in assessing the extent of Defendants' fraud, tracing the proceeds of that fraud, and making an independent report of Defendants' activities to the Court.

E. The Temporary Restraining Order Should Be Issued *Ex Parte*

To prevent Defendants from dissipating or concealing their assets, the requested TRO should be issued *ex parte*. An *ex parte* TRO is warranted where the facts show that immediate and irreparable injury, loss, or damage will occur before the defendants can be heard in opposition. *See* Fed. R. Civ. P. 65(b). Here, as in similar FTC actions in this district where courts have granted an *ex parte* TRO, there is a serious risk that assets and evidence stemming from the illegal activity will disappear if Defendants receive prior notice. In this case, the blatantly deceptive nature of Defendants' scheme indicates there is a serious risk that Defendants will destroy documents and dissipate assets if given advance notice of the plaintiffs' motion.

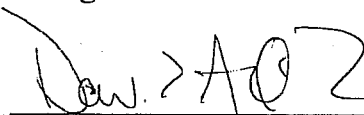
¹⁵¹ *See supra* n. 140.

V. Conclusion

For the foregoing reasons, Plaintiffs Federal Trade Commission, State of Illinois, Commonwealth of Kentucky, and State of North Carolina request that this Court enter the Proposed *Ex Parte* TRO and issue an Order to Show Cause Why a Preliminary Injunction Should Not Issue.

Respectfully submitted,

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