IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

FEDERAL TRADE COMMISSION,	
Plaintiff,	**Case No. 4:96CV02225 SNL**
v.	
	Judge Limbaugh
RICHARD C. NEISWONGER, *et al.*,	
Defendants.	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S *EX PARTE* MOTION FOR A TEMPORARY RESTRAINING ORDER WITH ANCILLARY EQUITABLE RELIEF, AND A PRELIMINARY INJUNCTION, PENDING DECISION ON PLAINTIFF'S MOTION FOR A CIVIL CONTEMPT ORDER

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I. INTRODUCTION

Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), respectfully requests an *ex parte* Temporary Restraining Order and other equitable relief pending a final determination of whether defendant Richard C. Neiswonger ("Neiswonger") and two entities with notice acting in concert with him, contempt defendants William S. Reed ("Reed") and Asset Protection Group, Inc. ("APG") (all three, collectively, "contempt defendants"), have shown cause why they should not be held in civil contempt for violating this Court's Stipulated Final Judgment and Order for Permanent Injunction ("Permanent Injunction" or "Order"), entered February 28, 1997.

The Commission brought suit in this Court nearly ten years ago to stop defendant Neiswonger and others from deceptively marketing various training and business opportunities ("programs") to consumers nationwide, and to obtain other equitable relief, including monetary redress. In settlement of that suit, Neiswonger paid a sum for redress and promised not to use misrepresentations or to omit material facts in marketing programs to consumers. This Court then entered a stipulated Permanent Injunction ordering Neiswonger to honor his promise. As detailed below, Neiswonger and his current cohorts have broken that promise, and are now defrauding consumers in contempt of this Court.

In their ongoing scheme, Neiswonger, Reed, and APG hold themselves out as professionals in hiding assets from "capricious federal judges and any government agency." Citing explosive demand for their professional expertise in the field of "asset protection," the contempt defendants are deceptively marketing another training and business opportunity referred to herein as the "APG program." The contempt defendants represent that consumers who pay $9,800 for the APG program, which includes training materials, a one-day training

session, and a business affiliation with APG, will become well-compensated "APG asset protection consultants." Specifically, the contempt defendants assert that APG consultants will make "very substantial profits" selling the firm's "asset protection" services, chiefly the formation of Nevada and offshore companies for "COMPLETE PROTECTION AGAINST ASSET SEIZURE BY THE IRS or other government agencies."

The contempt defendants entice consumers to purchase the APG program with false and misleading claims that APG consultants are likely to earn a substantial or "six-figure" income. Neiswonger and his cohorts assert, in writing, that new APG consultants "will make very substantial profits" and are likely to enjoy a substantial income, with a "6-figure income potential on less than [a] full-time schedule." They maintain that "it takes only a couple of clients each week to produce a very substantial six-figure income," and expressly state that "**getting just six or eight clients in an entire month's time is a VERY reasonable, very achievable goal.**" The contempt defendants convey these claims to consumers through print advertisements, mailed promotional letters, and telephone calls. They also use paid "references" to reiterate those claims. As one APG "reference" told an FTC investigator posing as a prospective purchaser: "I've done at least $100,000 every year. Last year, I grossed close to $200,000. So, however much you want to work is as well as you'll do. . . . I only really do part-time."

In truth and fact, consumers who purchase the APG program are not likely to make a substantial income, a "six-figure" income, or "a very substantial six-figure income," from selling APG's "asset protection" services. Rather, APG consultants have suffered considerable losses or have not seen earnings even close to those touted. Nevada records further confirm that it is extraordinarily unlikely that consumers will earn a substantial or "six-figure" income as APG

consultants. As detailed below, and evidenced in the exhibits submitted with this filing,[1] the contempt defendants are making false and misleading income claims. These claims clearly violate the injunction against misrepresentations in Paragraph I of the Court's Permanent Injunction.

Contempt defendants Neiswonger, Reed, and APG are further violating the Permanent Injunction by failing to disclose material facts to consumers. First, the contempt defendants are paying "references" to promote their program to consumers—without disclosing to consumers how much they pay their references, as the Court's Permanent Injunction expressly requires. Second, they are withholding material facts from consumers concerning defendant Neiswonger's history of dishonest conduct, which has culminated in criminal convictions for wire fraud and money laundering, his civil forfeiture of $750,000 to federal law enforcement authorities, numerous state orders against his prior business ventures to prohibit deceptive practices, and this Court's Permanent Injunction.[2] Purchasers who have discovered the facts for themselves affirm that they never would have purchased the APG program if they had known the material facts. The contempt defendants clearly have failed to disclose material facts to consumers in violation of Paragraph II of the Permanent Injunction.

Defendant Neiswonger has further violated the Court's Permanent Injunction by failing to report his affiliation with APG to the FTC, and by failing to provide the FTC with proof of a

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[1] The documentary exhibits submitted in support of this Motion have been submitted in separate, bound volumes as PX01 *et seq.*

[2] *See* PX03-PX03I; *see also infra* Section III.C.2. Contempt defendant Reed is, likewise, no stranger to deceptive business practices. Reed is a *former* Colorado attorney whose license to practice law was suspended by the Colorado Supreme Court for "engag[ing] in misrepresentations and dishonesty." PX04, *Colorado v. Reed*, 942 P.2d 1204, 1205 (Colo. 1997). Reed's law license has not been reinstated. PX04A, Suspended Colorado Attorney Information, William Reed (June 19, 2006).

current $100,000 performance bond before promoting the APG program over the past two years, in violation of Paragraphs XI and V of the Permanent Injunction, respectively.

The Commission has returned to this Court to institute proceedings for appropriate civil contempt sanctions and remedies.[3] With its *ex parte* Motion for a Temporary Restraining Order, the FTC respectfully requests immediate, equitable relief to ensure that the contempt defendants do not thwart the Commission's contempt proceedings in advance. Without the requested Temporary Restraining Order, there is a grave danger that the contempt defendants will continue their deceptive business practices, hide or dispose of assets procured through their scheme, and allow or cause property, including relevant evidence, to be destroyed.

Federal Rule of Civil Procedure 65 expressly contemplates the issuance of *ex parte* Temporary Restraining Orders to prevent irreparable harm to the Court's ability to grant effective final relief. FED. R. CIV. P. 65(b). "The temporary restraining order is customarily issued, and usually *ex parte*, to maintain the status quo pending a detailed review on the merits." *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 224 (8th Cir. 1970). This Court has issued a Temporary Restraining Order, including an asset freeze, immediate access to business premises, financial disclosures, expedited discovery, and other equitable relief, in a previous case brought

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[3] The Commission is simultaneously filing in this Court a *ex parte* Motion for an Order to Show Cause, consolidated with a Motion for a Civil Contempt Order ("Motion for Order to Show Cause"). Accompanying this filing is an *ex parte* Motion to Temporarily Seal Filings. As set forth in the Motion to Seal Filings, the FTC requests that its moving papers and any responsive orders be held under temporary seal, to ensure that the contempt defendants do not receive notice of impending contempt proceedings before receiving service of an appropriate restraining order. As detailed *infra*, the contempt defendants' documented previous history of deception and the nature of their current "asset protection" enterprise give rise to a great risk of asset dissipation and spoliation of evidence if they receive notice of contempt proceedings prior to service of the requested Temporary Restraining Order.

by the Commission. *See* PX-LEGAL-01, TRO, *FTC v. Hayes*, No. 4:96CV02162 SNL (E.D. Mo. Nov. 4, 1996). Many other federal courts have granted similar FTC motions for *ex parte* Temporary Restraining Orders with other equitable relief, pending contempt proceedings.[4] Such relief is necessary here to prevent the contempt defendants from using their expertise to "shield" their ill-gotten gains from this Court, the FTC, and the consumers that they continue to mislead.

II. BACKGROUND

For a complete discussion of the background of this contempt action, the Commission respectfully refers the Court to the background section of its Motion for an Order to Show Cause, submitted contemporaneously with this motion. *See* Pl.'s Mot. for Order to Show Cause (§ II) at 4-13. The Commission's Motion for an Order to Show Cause describes the original litigation in this matter, as well as defendant Neiswonger's record of criminal convictions and state and federal injunctions, his business partnership with contempt defendant (and suspended attorney) Reed, and

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[4] *E.g.*, *McGregor v. Chierico*, 206 F.3d 1378, 1381 (11th Cir. 2000) (citing trial court's *ex parte* order for asset freeze and appointment of receiver, among other relief); *FTC v. Gill*, 183 F. Supp. 2d 1171, 1176-77 (C.D. Cal. 2001) (acknowledging temporary, *ex parte* injunctive relief issued, including asset freeze, appointment of temporary receiver, and order authorizing immediate access and expedited discovery); *FTC v. Chierico*, Civ. No. 96-1754 (S.D. Fla. June 23, 1998) (*ex parte* TRO ordering asset freeze, receiver, immediate access to premises, expedited discovery, mandatory financial disclosures, and other equitable relief pending contempt hearing); *FTC v. Giving You Credit, Inc.*, No. 96-C-2088 (N.D. Ill. Mar. 4, 1997) (*ex parte* TRO ordering asset freeze, immediate access to premises, expedited discovery, mandatory financial disclosures, and other equitable relief pending contempt hearing); *FTC v. Freedom Med., Inc.*, No. C2-95-510 (S.D. Ohio Nov. 7, 1995) (*ex parte* order pending contempt hearing, allowing immediate access to premises, and continuing asset freeze and receiver); *FTC v. Paradise Palms Vacation Club*, No. C81-1160-V (W.D. Wash. June 29,1992) (*ex parte* TRO pending contempt hearing, ordering asset freeze, immediate access to premises, and other equitable relief); *FTC v. Pacific Med. Clinics Mgm't, Inc.*, No. 90CV1277 (S.D. Cal. Mar. 10, 1992) (order issued pending contempt hearing, ordering asset freeze, discovery, and mandatory financial disclosures). The unpublished orders cited above have been submitted in a separate, bound volume and identified as PX-LEGAL-02 through PX-LEGAL-06.

their central roles in promoting and selling the APG program with misrepresentations and other violations of this Court's Permanent Injunction. The next section of this memorandum addresses the Court's authority to grant the requested Temporary Restraining Order, the facts and evidence demonstrating the Commission's entitlement to such an Order, the clear need for ancillary equitable relief, and the substantial grounds warranting the requested *ex parte* relief.

III. LAW AND DISCUSSION

A. This Court Has Authority to Grant a Temporary Restraining Order and Ancillary Equitable Relief, Pending a Final Decision on the Merits of the Commission's Motion for a Civil Contempt Order.

The Court has authority to enter a Temporary Restraining Order to enjoin the contempt defendants from misleading consumers in violation of its Order, moving or dissipating assets, or causing evidence to be destroyed. The FTC initially brought suit in this case under Section 13(b) of the FTC Act, 15 U.S.C.§ 53(b). PX01 at 1; PX01A at 2 (Compl.). District courts retain their full panoply of equitable powers in cases filed by the FTC pursuant to Section 13(b) of the FTC Act.[5] "[A] district court has the broad, inherent, equitable duty and power to do what justice so require[s]," and when the public interest is involved, "'those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'" *United*

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[5] *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991) ("Section 13(b) does not limit the full exercise of the district court's inherent equitable power."); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984) (confirming that FTC can seek preliminary injunctions with ancillary equitable relief, including asset freezes and appointment of receiver, because FTC Act did not restrict courts' inherent equitable powers); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982) (holding that FTC Act "gave the district court authority to grant any ancillary relief necessary to accomplish complete justice"); *see also FTC v. Kitco, Inc.*, 612 F. Supp. 1280, 1281 (D. Minn. 1985) ("[t]he fundamentally equitable nature of an action for injunctive relief under section 13(b), and the ancillary relief sought . . . has been recognized by several courts").

States v. Missouri Self Serv. Gas Co., 671 F. Supp. 1232, 1241 (W.D. Mo. 1987) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946)). Moreover, the parties agreed to conclude the original litigation in this case with a stipulated injunction, in which this Court retained jurisdiction "for all purposes." PX01 at 13, ¶ XIII. With this provision, the Court reserved its equitable powers. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 380-81 (1994) (stating that courts have power to enforce consent orders when orders expressly reserve jurisdiction).

The federal courts retain their equitable authority to issue Rule 65(b) *ex parte* Temporary Restraining Orders when such orders are shown to be necessary to preserve a meaningful contempt remedy. *See United States v. United Mine Workers*, 330 U.S. 258, 282-83 (1947) (concluding that court properly issued an *ex parte* Temporary Restraining Order before government's contempt motion could be heard); *cf. Ford v. Boeger*, 362 F.2d 999, 1005 (8th Cir. 1966) ("The court has power to preserve existing conditions while it is determining its own authority to grant injunctive relief."). As set forth above, the Court has ample authority, and there is ample precedent, for granting a Temporary Restraining Order and other relief, including a temporary asset freeze and the appointment of a receiver, pending a final decision on the merits of contempt proceedings.

B. The Commission Has Demonstrated a Likelihood of Success on the Merits of its Motion for a Civil Contempt Order, and is Entitled to a Temporary Restraining Order Pending a Final Decision.

1. Legal Standard for Temporary Restraining Order

Section 13(b) of the FTC Act authorizes the Court to grant injunctive relief to the FTC "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b); *see FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999) (acknowledging that

Section 13(b) "places a lighter burden on the Commission than that imposed on private litigants by the traditional equity standard; the Commission need not show irreparable harm"); *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991) (same); *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980) (same); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1343 (4th Cir. 1976) (same).

The FTC is entitled to a Temporary Restraining Order upon showing (1) a likelihood of success on the merits (here, the merits of the motion for a civil contempt order), and (2) the equities weigh in favor of granting the preliminary relief requested. 15 U.S.C. § 53(b); *Affordable Media, LLC*, 179 F.3d at 1233; *University Health, Inc.*, 938 F.2d at 1217; *Food Town Stores, Inc.*, 539 F.2d at 1343.[6] As summarized below, the FTC is likely to succeed on the merits of the contempt proceedings, and the requested relief is in the public interest.

2. The Commission Is Likely to Succeed on the Merits of the Contempt Proceedings.

The Commission is very likely to succeed in proving that the contempt defendants are in contempt of the Court's Permanent Injunction. As evidenced in the submitted exhibits, which include the contempt defendants' corporate records, writings, and promotional materials, the sworn declarations of FTC investigators and numerous consumers, and the recorded statements of the contempt defendants and their agents, the contempt defendants are subject to the Court's

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[6] Once the FTC shows a likelihood of success on the merits of its contempt motion, irreparable injury is presumed. *Chierico*, 206 F.3d at 1388. "Given this presumption, the FTC need not prove subjective reliance by each customer" on the misrepresentations that violate the permanent injunction. *Id.*; *Security Rare Coin & Bullion Corp.*, 931 F.2d at 1315-16 (8th Cir.) ("This is not a private fraud action, but a government action brought to deter unfair and deceptive trade practices and obtain restitution on behalf of a large class of defrauded investors. It would be inconsistent with the statutory purpose for the court to require proof of subjective reliance by each individual consumer.").

Permanent Injunction,[7] and they have repeatedly violated that Order by: (1) misrepresenting that prospective purchasers will likely earn a substantial or "six-figure" income from client fees generated using the APG program, in violation of Permanent Injunction ¶ I and I.A.; (2) failing to disclose, in advance of purchase, the amount of remuneration received by "references" whose names were given to prospective purchasers, in violation of Permanent Injunction ¶ II.A; and (3) failing to disclose material facts to consumers concerning defendant Neiswonger's history of dishonest conduct, in violation of Permanent Injunction ¶ II.

The evidence further shows that defendant Neiswonger has also violated this Court's Order by: (4) failing to provide proof of a current performance bond while marketing the APG program, in violation of Permanent Injunction ¶ V; and (5) failing to report his affiliation with APG, in violation of Permanent Injunction ¶ XI. As discussed below, the FTC has presented clear evidence that the contempt defendants are acting in contempt of this Court.

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[7] Neiswonger, Reed, and APG are subject to this Court's Permanent Injunction because they have acted in concert in marketing the APG program and they have actual notice of the Court's Order. Actual notice is notice of an order's existence, not of its precise terms. *See Perfect Fit Indus., Inc. v. Acme Quilting Co.*, 646 F.2d 800, 808 (2d Cir. 1981). Personal service is not required for actual notice. FED. R. CIV. P. 65(d). Neiswonger signed the Permanent Injunction as a named defendant. PX01 at 14. Contempt defendant Reed received written notice no later than January 2005, when he received a letter from an aggrieved APG consultant, specifically citing the FTC's lawsuit against Neiswonger. PX36B at 5-7. APG President Reed responded to that letter in writing, expressly referencing Neiswonger's "problems with the FTC" and court orders. *Id.* at 8-10. Additionally, APG has notice of the Order because at least one of its agents, Neiswonger, already has notice. *See id.*; *United States v. One Parcel of Land Located at 7326 Highway 45 North, Three Lakes, Oneida County, Wisconsin*, 965 F.2d 311, 316 (7th Cir. 1992) ("a corporation 'knows' through its agents"); *see also* PX01 at 12 ¶ XII.A (requiring Neiswonger to serve Order on officers, directors, agents, attorneys, representatives, servants, employees, salespersons, and telemarketers); Pl.'s Mot. for Order to Show Cause at 12-13, 28-29. "It is well-settled that a court's contempt power extends to non-parties who have notice of the court's order and the responsibility to comply with it." *Chicago Truck Drivers v. Brotherhood Labor Leasing Corp.*, 207 F.3d 500, 507 (8th Cir. 2000).

a. The Contempt Defendants Have Employed False and Misleading Income Claims in Violation of Permanent Injunction ¶¶ I and I.A.

Paragraph I of the Permanent Injunction prohibits Neiswonger and the other contempt defendants from misrepresenting any material fact in advertising, marketing, promoting, or selling business programs, which include training sessions and business affiliations. PX01 at 3-4, ¶ I. As clearly set forth in the Permanent Injunction, "material fact[s]" include, but are expressly not limited to, any claim that consumers will earn a six-figure income, $150,000 income, or words of similar import, from client fees generated using any program. PX01 at 3-4, ¶ I, I.A. The contempt defendants have violated this injunction by misrepresenting that prospective purchasers are likely to earn a substantial or "six-figure" income from client fees generated using the APG program.

The contempt defendants have often represented to prospective purchasers of the APG program, in writing, that they can expect to earn a substantial or "six-figure" income working as APG "asset protection consultants." APG's written promotional materials contain many statements from Neiswonger and Reed, emphasizing that consumers who buy and use the APG program will likely earn a substantial or "six-figure" income as APG consultants:

> In our business, you are really in charge. You set your own hours, you have no territory restrictions, you can choose to generate your own clients or use our recommended appointment-setting service to obtain clients for you. . . . You do **not** sacrifice your life for your business.
>
> **But make no mistake: the financial rewards are here!** This is a "high transaction business," meaning that each client represents significant dollars – on average, from $1,700 to $6,400 to you per client! Obviously it takes only a couple of clients each week to produce a very substantial six-figure income — and the full-time potential is unlimited!

> **It doesn't take much imagination to see that getting just six or eight clients in an entire month's time is a VERY reasonable, very achievable goal.**
>
> Of course, 20 would be better! – providing as much as $128,000 income to you. Whatever your first year income goal, it will require only a small number of clients. Actually just ONE satisfied client has the ability to refer several, so a $64,000 to $128,000 income your very first year can be "triggered" by just three or four clients.

PX10 at 3-4, New Consultant Authorization Letter (statement of defendant Neiswonger) (emphasis in original); PX33B at 2-3 (same); PX34A at 2-3 (same); PX38A at 2-3 (same); PX41F at 2-3 (same). Similar statements pervade APG's other promotional materials.[8]

The contempt defendants also verbally represent to prospective purchasers that they are likely to earn a substantial or six-figure income from fees generated using the APG program. FTC investigators recorded these verbal representations in telephone calls in which they posed as prospective purchasers of the APG program, to uncover and document the contempt defendants' sales pitches.[9] In these phone calls, APG personnel and agents, including defendant Neiswonger,

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[8] *See* PX06 at 1, APG "Special Free Report" Letter (touting "6 figure income potential, from less than full-time schedule") (statement of defendant Neiswonger); PX42C at 1, APG "Second Notice" Letter (same); PX42D at 1, APG "Third and Final Notice" Letter (same); PX21 at 2 (same); *see also* PX06 at 8 ("Everything you need to do very, very well financially . . . is provided to you.") (statement of contempt defendant Reed); PX42C at 6 (same); PX06 at 11 ("You will also be making very substantial profits") (emphasis in original) (statement of defendant Neiswonger); PX42C at 8 (same); PX42D at 4 (same). The contempt defendants make infrequent, inconspicuous, and equivocal attempts to disclaim their substantial income claims. *See* Pl's Mot. for Order to Show Cause at 16 n.18. These statements are patently ineffective. *See, e.g., Removatron, Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989) ("Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression.").

[9] *See* PX05, Stahl Decl. at ¶¶ 2-5, 6, 8, 10-11, 13 (describing taping procedure and recordings); PX12, Ramage Decl. at ¶¶ 2-8, 10-16, 20 (same); PX07, PX09, PX11, PX14, PX16-PX20, PX23-PX24 (transcripts of recorded phone calls).

represent that consultants readily find clients and are likely to build a substantial, six-figure income as consultants. *See* PX09 at 11, Tr., R. Neiswonger (Dec. 29, 2005) ("The front end money is great. You know, you make anywhere from a minimum of $1,700 up to as much as $6,400 off each client. So, even a couple clients a week, which is nothing, you're talking about a lot of money.") (statements of defendant Neiswonger) (emphasis added). As Neiswonger told one FTC investigator, posing as a prospective APG consultant:

> MR. NEISWONGER: . . . Give me a ballpark as to the kind of income that you're accustomed to, just approximately.
> MS. WILKE: Approximately $60,000 a year.
> MR. NEISWONGER: Okay. So, that's good money.
> MS. WILKE: Right.
> MR. NEISWONGER: That's good money, certainly, for a salaried position, you know.
> MS. WILKE: Right. It's --
> MR. NEISWONGER: But if we could put you well over 100, then you would consider the possibility of going full-time?
> MS. WILKE: Right.
> MR. NEISWONGER: Okay.

Id. at 15. As APG's Marketing Director, Neiswonger repeatedly refers to a $100,000 or "six-figure" income to entice consumers to purchase the APG program. *See id.*; *see also* PX19 at 10, Tr., R. Nicewonger [sic] (Mar. 3, 2005) ("Our goal with every new consultant is to get you up to 100 clients quick. . . . Whether it takes three months or six months or nine months, once we get you up to 100 clients, now you've got six figures coming in just on residuals.") (statement of defendant Neiswonger). APG references make similar "six-figure" income claims. *See, e.g.*, PX17 at 7, Tr., B. Black (Mar. 2, 2005) ("I've done at least $100,000 every year. Last year, I grossed close to $200,000. So, however much you want to work is as well as you'll do.") (statement of APG reference). These phone transcripts provide more proof of the contempt

defendants' substantial or "six-figure" income claims. APG agents occasionally say that they "cannot make a specific income claim," *e.g.*, PX16 at 31, but frequently do so anyway.

Sworn consumer declarations further confirm that the contempt defendants have repeatedly conveyed that purchasers of the APG program are likely to earn a substantial or six-figure income from doing business as consultants. *See, e.g.*, PX35 at 1 ¶2; PX37 at 1 ¶3; PX40 at 1 ¶3, 2 ¶6; PX41 at 4 ¶14; PX42 at 1 ¶3, 2 ¶6, 7 ¶19; *see also* PX34A at 3.

However, the contempt defendants' claims of a substantial or "six-figure" income are false and highly misleading. Consumers who purchase the APG program are not likely to earn a substantial or six-figure income from doing business as APG consultants. As the submitted declarations attest, many people who have diligently worked as APG consultants have suffered financial losses or made meager earnings far below those touted by the contempt defendants. *See, e.g.*, PX33, Dee Decl., at 2 ¶9-10, 3 ¶11 ("I believed APG's promise of significant income and a ready and willing customer base. I quickly learned that these claims are not true."); PX34, Falcone Decl., at 2 ¶9 ("My investments are total losses."); PX36, Hammond Decl., at 2 ¶7 ("I spent thousands of dollars in advertising costs and attempted to do the business for at least a year. . . . I never sold anything."); PX37, Hinzman Decl., at 2 ¶ 6-8 ("I had been had by the references and ripped-off royally by APG."); PX40, M. Pianga Decl., at 3 ¶11, 4 ¶15, 5, ¶19 ("In addition to the $9800 I paid to start the APG business, I lost money . . . on marketing materials."); PX42 at 5-6 ("I quickly learned there was no client base . . . . I lost a good sum of other money attempting to run the APG business . . . ."); *see also* PX41, Rogers Decl., at 4 ¶14 ("I believed APG's claims of significant income . . . . Neiswonger and the references made APG

sound like a great investment opportunity. Nothing could be further from the truth.").[10] Many former consultants report little to no success selling APG's services. PX33 at 2 ¶9-10, 3 ¶11; PX34 at 1 ¶ 6; PX35, Greaves Decl., at 2 ¶ 7; PX36 at 2 ¶7; PX37 at 2 ¶ 6-8; PX38, Langley Decl., at 3; PX39, at 2 ¶ 6; PX40 at 3 ¶11, 4 ¶15, 5, ¶19; PX41 at 4 ¶14; PX42 at 5-6.

Nevada corporate records further confirm that it is extraordinarily unlikely that APG consultants will ever earn a substantial or six-figure income selling APG's services. Nevada records contain relevant information because APG's "asset protection" services involve the sale of Nevada corporations, with APG providing services as the resident agent of the corporation.[11] Nevada records show that APG has provided resident agent services for nearly 3,200 Nevada corporations since 1998. PX26 at 3-4 ¶ 12. Although this number might seem large at first blush, contempt defendant Reed admitted in a phone call recorded last year that APG has nearly 400 consultants.[12] A comparison of these two numbers is revealing: Even if all 3,200 corporations

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[10] Moreover, although APG claims that it will provide consultants with clients (*e.g.*, PX40A at 2 ("Yes, we will even provide your clientele for you!")) and encourages consultants to use APG's "proprietary strategic alliance" with a recommended telemarketing firm to set up appointments with carefully-screened, "qualified prospective clients," *id.*, many former consultants report that these appointments were based on cold-calls, in which prospective clients only granted permission to have someone stop by with free information. PX40 at 2 ¶ 5, 3-4 ¶¶ 11-14; *see also* PX37 at 2 ¶ 6; PX38 at 2-3 ¶¶ 6-10; PX41 at 2 ¶ 8, 3 ¶ 12; PX42 at 3-5 ¶¶ 10-15. APG's custom-tailored prospecting script often yields appointments with persons who have no idea what APG is about or why the consultant is visiting them. *See id.*; PX34 at 2 ¶¶ 6-8; PX39, H. Pianga Decl., at ¶ 5. As the leads vanish, so do potential earnings.

[11] PX06 at 8 (APG "Special Free Report"), 24 (APG "Asset Protection Without Leaving the Country" Promotional Material) ("This is what you will receive . . . One full year of resident agent and registered office service for your corporation."). Nevada records indicate that APG serves as a resident agent through a similarly-named Nevada firm, "APG, Inc.," located at the contempt defendants' offices. PX26, Burton Decl., at 3 ¶ 10 & n.1.

[12] PX18 at 42, 56; *see also* PX42 at 3 ¶ 9. The current number of APG consultants may be even higher. The website for *Entrepreneur* magazine, entrepreneur.com, contains a

had been sold by APG consultants, with 400 consultants doing business, a typical APG consultant would have sold only 8 corporations in his or her entire history with the company. *Id.* at 4 ¶ 13. Even if one incorrectly assumes, for purposes of argument, that all of the firms that APG serves as a resident agent had been formed in the past three years alone, a typical APG consultant would have sold just 2 or 3 corporations each year—yielding, at a profit of $1,700 each, income far below the substantial or "six-figure" income touted in APG's promotional materials.[13]

Nevada records and the foregoing calculations further confirm what consumers have learned from bitter, expensive experience: The contempt defendants' income claims are false and misleading, and violate Paragraphs I and I.A of this Court's Permanent Injunction.

b. The Contempt Defendants Have Repeatedly Failed to Disclose Material Facts to Consumers In Violation of Permanent Injunction ¶¶ II and II.A.

Paragraph II of the Permanent Injunction requires the contempt defendants to "disclose to all purchasers in advance of any purchase all material facts" in promoting any program. Under the terms of the Permanent Injunction, "material facts" include, but are expressly not limited to, "the amount of remuneration or any other benefit received by each reference whose name is provided to the prospective purchaser." PX 01 at 4-5, ¶ II, II.A. Notwithstanding the Court's injunction, the contempt defendants have withheld material facts from consumers.

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promotional listing for APG, noting that APG has 427 "licensees." PX26 at 5 ¶ 16 & Attach. A.

[13] *See* PX26 at 4 ¶ 14. Nevada records also show that consultants cannot earn a substantial income from fees generated by the annual renewal of Nevada corporations. The renewal fees paid to consultants are relatively low ($450 to $600), PX06 at 11, and consultants do not sell enough corporations to earn large residuals in the first place. PX26 at 4. Moreover, APG clients often do not renew their corporations. Nearly 50% of the 3,200 companies that list APG as their resident agent are now defunct. *Id.* at 4 ¶ 15.

Although the Court's Permanent Injunction expressly requires the contempt defendants to disclose the amount of remuneration paid to their "references," PX01 at 5 ¶ II.A, the contempt defendants have consistently failed to disclose to consumers the amount paid to APG references.[14] APG's Vice-President of Marketing has admitted, in a taped phone call, that APG references are paid to serve as references. PX20 at 26-27, Tr., D. Lemay (admitting fact of payment). APG's Vice-President did not disclose the amount of compensation, however, stating only that references receive "nominal" compensation. *Id.* at 14, 26-27. More often, the contempt defendants and their agents fail to disclose that references are compensated at all. *See* n.14. Their failure to disclose the amount of remuneration paid to APG references blatantly violates Paragraph II.A of the Court's Permanent Injunction.

The contempt defendants also have repeatedly failed to disclose material facts to consumers regarding defendant Neiswonger, particularly his criminal convictions for wire fraud and money laundering related to the marketing and sale of business opportunity programs, his forfeiture of hundreds of thousands of dollars to the U.S. Department of Justice, this Court's Permanent Injunction, and the many orders entered by state agencies to enjoin deceptive business practices.[15]

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[14] *E.g.*, PX36 at 2 ¶4 (consumer declaration attesting that APG references did not disclose remuneration); PX40 at 5 ¶ 17 (same); PX42 at 2 ¶4, 6-7 ¶18 (same); PX06 (no disclosure in written promotional material); PX10 (same); PX21 at 17, 22, 29 (no disclosure in sales pitch by defendant Neiswonger); PX22 at 12, 38-44, Tr., D. Lemay (no disclosure in sales pitch by APG employee); PX23 at 30-31 (no disclosure in sales pitch by defendant Neiswonger); PX20 at 4-19, Tr., B. Hutchinson (no disclosure in sales pitch by APG reference); PX24 at 3-16, Tr., J. Hutchinson (same); PX25 at 4-14 (same).

[15] *See* PX03-PX03I (records of convictions, forfeiture, and state orders); *see also* PX36 at 2-3, ¶8 (consumer declaration affirming that no disclosure of these material facts was made); PX40 at 3, ¶8, 5, ¶18 (same); PX42 at 6, ¶17 (same); PX06 (no disclosure in APG promotional material); PX10 (same); PX21 at 17, 22, 29 (no disclosure in recorded sales pitch by defendant Neiswonger); PX23 at 30-31 (same).

Defendant Neiswonger's past history of dishonest practices would be material to consumers weighing whether to spend $9,800 for the APG program, as demonstrated by those purchasers who discovered the undisclosed facts for themselves. For example, a consumer residing in the Eighth Circuit who bought the APG program and worked as an APG consultant later discovered on the Internet that defendant Neiswonger was a convicted felon, and that his business partner, contempt defendant Reed, has had his law license suspended for dishonest practices involving the handling of assets. He described his reaction: "I couldn't believe my eyes. Not only did I feel duped, I knew that I could not in good conscience recommend that anyone 'protect' their assets by giving it to an ex-con and a lawyer who had lost his license to practice law for safe-keeping." PX36 at 2-3 ¶8; *see also* PX36B at 6; PX40 at 5 ¶ 18; PX42 at 6 ¶ 17.

The materiality of these disclosures is further highlighted by the fact that they are required by law. The Franchise Rule, 16 C.F.R. Part 436.1, independently requires the contempt defendants to disclose the criminal history of defendant Neiswonger, among other material facts, to potential purchasers of the APG training and business opportunity program. *See* 16 C.F.R. § 436.1(a)(2), (4); *see also* Pl.'s Mot. for Order to Show Cause at 23-24 & n.23 (discussing Franchise Rule). This legal requirement provides additional grounds for finding that the withheld facts would have been material to consumers. Consumers were entitled by law to know these facts.

c. Other Violations of the Court's Permanent Injunction

Defendant Neiswonger has further violated the Court's Order, and continues to do so, by failing to provide proof of a current $100,000 performance bond while marketing the APG

program.[16] Additionally, Neiswonger has also violated the Court's Permanent Injunction by failing to report his business affiliation with APG to the FTC.[17] The weight of evidence concerning the contempt defendants' order violations demonstrates that the Commission is overwhelmingly likely to succeed on the merits of the contempt proceedings.

3. The Public Interest Also Favors the Requested Temporary Restraining Order, and the Commission is Entitled to the Requested Order.

On balance, the public interest in stopping the contempt defendants' order violations and preserving their assets and evidence strongly outweighs the contempt defendants' pecuniary interest in keeping their scheme and its proceeds under their control.

Once the Commission demonstrates a likelihood of success on the merits, the Court should enter injunctive relief if the balance of equities indicate that such relief would be in the public interest. 15 U.S.C. § 53(b). In an FTC law enforcement action, harm to the public interest in the absence of an injunction is presumed. *See United States v. Odessa Union Warehouse*

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[16] This Court's Permanent Injunction requires Neiswonger to provide the FTC with proof of a current $100,000 performance bond before marketing programs. *See* PX01 at 8 ¶ V.E. Neiswonger obtained a performance bond in 1997 in connection with another enterprise, but the surety of that bond cancelled and withdrew the bond in 2004. *E.g.*, PX27, Monteiro Decl., at 2 ¶¶ 7-9; *id.* at 3 ¶¶ 10-11; PX30, Notice of Cancellation; PX31, FTC File Copy of Letter from Int'l Fid. Ins. Co. (Jan. 14, 2004). Following the cancellation of his bond, Neiswonger failed to provide the FTC with proof of a new, current performance bond. PX27 at 1 ¶¶ 2-4; *id.* at 2 ¶ 7 & 3¶ 12. Nevertheless, Neiswonger has continued to promote the APG program with his business partner, Reed, in violation of Paragraph V of the Order. *See, e.g.*, PX06; PX10; PX21; PX23.

[17] Paragraph XI of the Order required Neiswonger to report to the FTC, in writing, any new business affiliation with any program for a period of three years, commencing in 1997. PX01 at 12 ¶ XI. While this part of the Court's Order was in effect, Neiswonger entered into a new business affiliation by forming APG's first Board of Directors with contempt defendant Reed in late 1998. PX02 at 1. Neiswonger did not report this new business affiliation to the FTC. PX27 at 1 ¶ 2-5; *id.* at 2 ¶ 6. From these facts, it appears that Neiswonger sought to conceal his conduct and forestall law enforcement action.

Co-op, 833 F.2d 172, 175-76 (9th Cir. 1987); *FTC v. Ameridebt*, 373 F. Supp. 2d 558, 563 (D. Md. 2005). Even if this presumption did not apply, however, harm to the public interest is evident from the contempt defendants' multiple violations of the Court's Order, discussed above.

In weighing the public interest against private interests, the public interest must receive greater weight. *FTC v. National Tea Co.*, 603 F.2d 694, 696 n.4 (8th Cir. 1979) ("in light of the [FTC Act's] purpose to protect the public-at-large, rather than individual private competitors, courts must properly emphasize the public equities"); *see FTC v. World Wide Factors*, 882 F.2d 344, 347 (9th Cir. 1989); *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1083 (D.C. Cir. 1981). Here, a Temporary Restraining Order with ancillary equitable relief is needed to prevent serious harm to the Court's ability to enter complete relief at the conclusion of contempt proceedings. The Court should act to prevent the contempt defendants from continuing to mislead consumers, or from seizing the opportunity to spoil evidence or to disperse and hide ill-gotten gains. There is no oppressive hardship to the contempt defendants in requiring them to comply with the Court's Permanent Injunction, to temporarily surrender dominion over entities they have used to violate the Court's Order, and to abstain from dissipating their assets. The contempt defendants have no legitimate interest in continuing conduct that violates the Court's Order. Balancing the equities, a restraining order with ancillary relief is in the public interest.

C. Good Cause Exists to Issue Ancillary Equitable Relief, Including a Temporary Asset Freeze and the Appointment of a Temporary Receiver.

The contempt defendants' ongoing order violations, their expertise at moving assets beyond the reach of "capricious federal judges and any government agency," and their previous history of dishonest dealings, discussed below, all provide good cause for ancillary equitable

relief, in the form of order provisions: (1) temporarily freezing the contempt defendants' assets to preserve their ill-gotten gains for disgorgement; (2) appointing a temporary receiver to halt the corporate contempt defendants' deceptive practices and locate and secure assets; (3) allowing the Commission immediate access to the contempt defendants' business premises to marshal evidence and identify other victims of the contempt defendants' scheme; and (4) ordering financial disclosures and limited, expedited discovery.

1. The Court Has the Authority to Issue Ancillary Equitable Relief.

The Commission is requesting ancillary relief in the form of well-established equitable, interim remedies.[18] This Court has broad authority in equity to grant such preliminary relief in public interest cases. *See generally Porter*, 328 U.S. at 398; *FSLIC v. Dixon*, 835 F.2d 554, 561-62 (5th Cir. 1987). Indeed, this Court has granted an asset freeze, immediate access to business premises, financial reports, disclosures, and expedited discovery, in a previous case filed by the Commission. PX-LEGAL-01, *FTC v. Hayes*, No. 4:96CV2162 SNL (E.D. Mo. Nov. 4, 1996). Many courts opening contempt proceedings have granted *ex parte* ancillary relief like that requested here. *See supra* n.4.

Federal courts have widely held that the possibility of dissipation is sufficient to order equitable relief including an asset freeze. *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989)

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[18] An asset freeze pending final disposition is a well-established equitable remedy in FTC law enforcement actions. *See, e.g., U.S. Oil & Gas Corp.*, 748 F.2d at 1431-32 (upholding asset freeze and temporary receiver as equitable remedies "incident to [the Court's] express statutory authority to issue a permanent injunction under Section 13" of FTC Act); *Worldwide Factors*, 882 F.2d at 344 (affirming asset freeze and appointment of special master); *H.N. Singer*, 668 F.2d at 1113 (upholding asset freeze). Appointment of a temporary receiver is likewise a well-established equitable remedy in FTC cases. *See, e.g., FTC v. American Nat'l Cellular*, 810 F.2d 1511, 1514 (9th Cir. 1987); *U.S. Oil & Gas*, 748 F.2d at 1431-32.

(citing *H.N. Singer, Inc.*, 668 F.2d at 1112); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 716-19 (5th Cir. 1982); *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972). The appointment of a temporary receiver is likewise appropriate "in circumstances where dissipation of assets and destruction of documents are foreseeable," where there is ""fraud, or the imminent danger of property being lost, injured, diminished in value or squandered." *In re National Credit Mgm't Group, LLC*, 21 F. Supp. 2d 424, 463 (D.N.J 1998); *see American Nat'l Cellular, Inc.*, 810 F.2d at 1514 (affirming appointment of receiver in FTC action); *U.S. Oil & Gas Corp.*, 748 F.2d at 1431 (same).

2. The Court Should Order the Requested Ancillary Relief Based on Contempt Defendants' Contemptuous Conduct, Their Expertise at Hiding Assets, and Their Records of Dishonesty in Handling Assets.

The contempt defendants' contemptuous conduct, their professed expertise at moving and hiding assets, and their previous histories of dishonesty all demonstrate the need for interim, precautionary relief, lest the contempt defendants dissipate or hide assets, property, or evidence. First, as discussed at length, the contempt defendants are using misrepresentations and omissions of material fact in multiple violations of the Permanent Injunction. *See supra* Section III.B.2. When "business operations are permeated by misrepresentations and fraud, the likelihood that assets may be dissipated during the pendency of the legal proceedings is strong." *National Credit Mgm't Group LLC*, 21 F. Supp. 2d at 462. Second, as discussed below, there is a great danger that the contempt defendants in this case will dissipate assets, as they are promoting a program to hide assets "from capricious federal judges and any government agency." PX25 (BULLETPROOF ASSET PROTECTION 121) (statement of contempt defendant Reed). Lastly, as discussed further below, the contempt defendants have documented histories of misconduct and

dishonesty in the handling of assets. In short, the contempt defendants' present and past practices give every indication that temporary relief is essential here to preserve the possibility of effective final relief.

a. The Contempt Defendants Possess Expertise at Moving and Hiding Assets.

The contempt defendants hold themselves out as pre-eminent experts and professionals in the "field" of moving and hiding assets, advertising the fact that they have the knowledge and the means to move assets and property out of the jurisdiction of the federal courts. They tout their skill in the field of "asset protection," the purpose of which, as the contempt defendants define it, is to "bulletproof" assets to avoid paying judgments and/or government authorities. *See* PX06 at 3 (touting how APG can "'bulletproof' assets against . . . lawsuits, against family disputes, even against IRS attacks") (statement of defendant Neiswonger); PX15 at 3 (same). APG's written promotional materials identify contempt defendant Reed as a "nationally recognized asset protection authority," PX06 at 3, PX42C at 2, and state that "[i]n overall experience, Asset Protection Group ranks as the oldest firm in the field." PX15 at 39. In one piece of APG promotional material, contempt defendant Reed's picture appears next to the following statement, printed in a large typeface:

> As a collection attorney this man sued more than 1,000 people a month! *He knows every trick in the book to hide money and protect assets.* Now, for the first time ever, he reveals all of his strategies to help make you 'bulletproof' from lawsuits, judgments and government agencies—secrets used by the super-rich people he could never collect from.

PX15 at 41, APG "Ultimate Asset Protection" Promotional Material (with picture) (italics

added); *see also id.* at 43 (identifying the above-referenced "collection attorney" as Reed).

Not only do APG promotional materials assert that contempt defendant Reed "knows every trick in the book to hide money and protect assets," *id.* at 41, Reed has actually written a book detailing his *modus operandi* for hiding assets. Reed's book, titled "Bulletproof Asset Protection," describes how readers can foil federal law enforcement agencies seeking assets. *See* PX25 (book excerpts). His advice includes the following statements:

> If you are at risk from a potential lawsuit, a divorce, or a government agency, the first question will be, "Where are your assets?"
>
> . . . .
>
> The second possible response to the question on the location of your assets goes like this: "I don't have any assets."
>
> This is the response I prefer. Short, clean, and direct. Like a perfect murder, the questioner may have a dead body, but in no way is it connected to you.

Id. (BULLETPROOF ASSET PROTECTION 47-48) (statement of contempt defendant Reed).

> In the event you are party to a federal law suit or in a dispute with a government agency . . . you may want the maximum asset protection afforded by an offshore corporation. An offshore corporation operates very much like a Nevada corporation, except there is greater privacy and your assets are shielded from capricious federal judges and any government agency.

Id. (BULLETPROOF ASSET PROTECTION at 120-21) (statement of contempt defendant Reed).

> Once your money is beyond the reach of my friend the federal judge, your assets are safe. An offshore corporation is the first and perhaps the only structure you'll ever need. . . .
>
> As a starting point in offshore asset protection, I always recommend the formation of an international business company (IBC). . . . Currently, we are using Bahamian IBCs to open corporate brokerage accounts in the Cayman Islands.

Id. (BULLETPROOF ASSET PROTECTION at 165) (statement of contempt defendant Reed). Reed's statements make clear that he has the expertise and means to hide assets overseas, and is prepared

to move assets from the jurisdiction of this Court.

Remarkably, in APG promotional materials, defendant Neiswonger specifically refers to hiding assets from the FTC. He states, in a promotional letter: "If you stop to think about it, there are many reasons someone might want this level of asset protection. . . . *Someone in or interested in a business regulated by and subject to fines from the FTC* . . . or a state agency." PX06 at 9 (statement of defendant Neiswonger) (emphasis added); PX15 at 9 (same); PX40B at 9 (same). Accordingly, based on their own statements, there is good cause to believe that the contempt defendants will "practice what they preach" when faced with contempt proceedings, and dissipate or dispose of assets and evidence to thwart those proceedings.

b. The Contempt Defendants Have Records of Professional Misconduct, Dishonesty, and/or Concealment in Handling Assets.

The Court also should enter an order issuing the requested ancillary relief because the contempt defendants have records of professional misconduct, dishonesty, or concealment relating to the handling of assets. Their prior crimes or misconduct increase the likelihood that irreparable injury will occur unless the Court institutes an asset freeze, appoints a receiver, and issues other precautionary and equitable relief.

1. Defendant Neiswonger Has a History of Dishonesty and Concealment in Handling Assets.

Defendant Neiswonger has a long history of dishonest conduct. He has: (1) been convicted of wire fraud and money laundering;[19] (2) forfeited three-quarters of a million dollars ($750,000) that he allegedly failed to disclose to federal authorities seeking the proceeds of his

[19] PX03A, Judgment, *United States v. Neiswonger*, No. 4:98CR0364-RWS (E.D. Mo. Dec. 1998) (criminal convictions providing for prison sentence).

crimes;[20] (3) directed, participated in, and/or owned numerous businesses that state regulators have issued administrative orders against for deceptive practices;[21] and (4) been made subject to this Court's Permanent Injunction, a remedial order designed to prevent the resumption of deceptive practices. PX01 at 2; *see also United States v. Van Dyke*, 605 F.2d 220, 228-29 (6th Cir. 1979).[22] Neiswonger's past record of dishonest conduct relating to the handling of assets indicates that he has the present ability to hide or dissipate assets and property. *See, e.g., SEC v. First Am. Bank & Trust Co.*, 481 F.2d 673, 682 (8th Cir. 1973) ("[T]he very existence of improper conduct in the past raises an inference that such conduct will continue in the future."); *SEC v. R. J. Allen & Assocs., Inc.*, 386 F. Supp. 866, 878 (S.D. Fla. 1974) ("Illegal past conduct gives rise to the inference that there is a reasonable likelihood of future violations.").

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[20] PX03B, Settlement Agreement, *United States v. $1,350,238.60 U.S. Currency*, No. 4:00CV2018-CDP (E.D. Mo. July 3, 2001); PX03C, Order Adopting Settlement Agreement (E.D. Mo. July 11, 2001)) (forfeiture).

[21] PX03I at 2, Financial Disclosure Statement of Richard C. Neiswonger (disclosing companies affiliated with Neiswonger from 1985 to 1996, including Leasehold Analysis, Inc., Expense Reduction Associates, Inc., Auditel International, and Property Valuation Consultants); PX03D, Consent to Voluntary Agreement, *In re Leasehold Analysis, Inc.*, (Iowa Comm. Dep't Ins. Div. Aug. 18, 1994); PX03E, Amended Assurance of Discontinuance, *In re Leasehold Analysis, Inc.*, No. 93-10092 (Mich. Att'y Gen. Dep't Mar. 10, 1994); PX03F, Amended Assurance of Discontinuance, *In re Expense Reduction Analysts, Inc.*, No. 93-10093 (Mich. Att'y Gen. Dep't Nov. 18, 1993); PX03G, Assurance of Discontinuance, *In re Auditel, Int'l*, No. 90-10119 (Mich. Att'y Gen. Dep't May 24, 1991); PX03H, Assurance of Voluntary Compliance, *In re Property Valuation Consultants, Inc.*, No. 90-AVC-900204 (Ill. Att'y Gen. Off. Dec. 19, 1990).

[22] As the Sixth Circuit reported in the *Van Dyke* case, Neiswonger participated in yet another deceptive scheme in the 1970s, led by an appellant who was ultimately convicted of mail fraud. This scheme bears a resemblance to Neiswonger's current scheme: "At one salesman training session conducted by Neiswonger, assisted by Appellant, the salesmen were told that some distributors earned as high as $100,000.00 per year . . . whereas no such profits or sales figures existed in fact." 605 F.2d at 224.

2. Contempt Defendant Reed Has a Record of Professional Misconduct, Dishonesty and Concealment in Handling Assets.

Like defendant Neiswonger, contempt defendant Reed has a prior record of dishonesty and concealment in the handling of assets. As previously noted, Reed is a former attorney whose license to practice law was suspended by the Supreme Court of the State of Colorado for misrepresentations and dishonesty in handling and disclosing assets.[23] In suspending Reed's license to practice law, the Colorado Supreme Court specifically cited his "dishonest and selfish motive" as "an aggravating factor for discipline purposes." 942 P.2d at 1206. Reed's law license has not been reinstated. PX04A at 1-2. His past misconduct increases the likelihood that irreparable injury will occur, absent injunctive relief. *See First Am. Bank & Trust Co.*, 481 F.2d at 682; *R. J. Allen & Assocs., Inc.*, 386 F. Supp. at 878.

c. Temporary, Equitable Relief is Necessary.

Equitable relief in the form of an asset freeze, and the appointment of a temporary receiver, with immediate access to business premises, is necessary in this case. An asset freeze is critical here given the contempt defendants' history of deception and concealment of funds from law enforcement authorities. Freezing APG's assets is premised on its central role in the fraud, and the likelihood that the firm and its officers will be held liable for monetary relief. *See FTC v. H.N. Singer*, 668 F.2d at 1113 (upholding asset freeze issued with preliminary injunction in

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[23] PX04, *Colorado v. Reed*, 942 P.2d 1204, 1205 (Colo. 1997) ("[Reed] engaged in misrepresentations and dishonesty by transferring various purported ownership interests to lawyer employees of [his] firm who were not managers or operating directors, did not receive profits, and did not participate in the ownership of the firm."); *see also id.* (noting that "a district judge ruled that the respondent actually received substantial sums of money from [his firm], and that the respondent and his firm failed to disclose this information wilfully and with the intent to defraud").

franchise opportunity case).[24] The fact that an asset freeze may disrupt the contempt defendants' enterprise is not determinative. Although an order may curtail the contempt defendants' activities, "that is a necessary and . . . unavoidable consequence of the violation." *National Soc'y of Prof. Engineers v. United States*, 435 U.S. 679, 697 (1978). A temporary freeze of the assets of both Neiswonger and Reed is also warranted because both individuals control the marketing activities of APG, and both individuals have personally participated in the deceptive practices described herein.[25] *See FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572-76 (7th Cir. 1989); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1031 (7th Cir. 1988).

The appointment of a temporary receiver and immediate access to business premises is likewise necessary in these circumstances, which involve "fraud, or the imminent danger of property being lost, injured, diminished in value or squandered."[26] In the absence of a receiver, the public risks the destruction or concealment of relevant documents and dissipation of corporate assets, and the defendants would be free to continue their deceptive business practices. *See SEC*

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[24] In addition to a provision directing the contempt defendants not to dissipate or conceal assets, the proposed TRO includes a provision directing financial institutions to freeze the assets of the contempt defendants that are in their custody or control. This Court has the authority to direct its order to such third parties to preserve assets that are easily dissipated and may be difficult or impossible to trace. *See United States v. First Nat'l City Bank*, 379 U.S. 378, 385 (1965); *Reebok Int'l, Ltd. v. McLaughlin*, 49 F.3d 1387, 1391 (9th Cir. 1995); *Waffenschmidt v. Mackay*, 763 F.2d 711, 714 (5th Cir. 1985).

[25] *See* Pl.'s Mot. for Order to Show Cause at 12-14. Although Neiswonger and Reed both actively market the APG program, certain corporate documents appear to be in Reed's name only. PX02 at 3-9. Accordingly, the FTC is particularly concerned that Reed, acting alone, will be able to hide or dissipate corporate assets unless he is subject to the requested asset freeze.

[26] *National Credit Mgm't Group*, 21 F. Supp. 2d at 463; *see also R. J. Allen & Assocs., Inc.*, 386 F. Supp. at 878 ("a receiver is necessary to prevent diversion or waste of assets . . . . [and] is permissible and appropriate where necessary to protect the public interest and where it is obvious, as here, that those who have inflected serious detriment in the past must be ousted").

v. Keller Corp., 323 F.2d 397, 403 (7th Cir. 1963). A temporary receiver will be able to secure the contempt defendants' business premises, halt the contempt defendants' deceptive practices, and preserve the contempt defendants'assets, to prevent any irreparable loss or injury to the Court's ability to enter complete and effective final relief. *See generally U.S. Oil & Gas*, 748 F.2d at 1431-32 (affirming appointment of receiver with asset freeze in FTC action); *FTC v. American Nat'l Cellular*, 810 F.2d 1511, 1514 (9th Cir. 1987) (same). The receiver will also be able to preserve documents for inspection, facilitating the recovery of evidence from the business premises by the Commission.[27] Without the requested relief, the FTC and the Court may well find that the contempt defendants have empty coffers and offices.

D. Good Cause Exists to Enter the Requested Temporary Restraining Order Without Notice to Contempt Defendants Under Fed. R. Civ. P. 65, Because Notice Will Most Likely Result in Irreparable Harm.

The Court should exercise its discretion to enter the requested Temporary Restraining without notice to the contempt defendants because prior notice may well eviscerate the Court's

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[27] In conjunction with its request for a receiver to preserve the contempt defendants' assets and documents, the FTC requests leave of Court for immediate financial disclosures and limited, expedited discovery in the form of depositions of corporate officers and employees and subpoenas for documents. Federal Rules 26(d), 33(a), and 34(b) allow the Court to alter the standard provisions and timeframes that govern depositions and production of documents. To swiftly identify assets for relief and ensure compliance with any asset freeze, the FTC requests that the Court order the contempt defendants to complete and return the financial statements attached to the proposed TRO to the FTC. The requested disclosure and discovery order rests upon the Court's broad and flexible authority in equity to grant preliminary emergency relief in cases involving the public interest. *See Porter*, 328 U.S. 395, 398 (1946); *Chierico*, 206 F.3d at 1381 (citing trial court's order); *Federal Express Corp. v. Federal Expresso, Inc.*, 1997 U.S. Dist. LEXIS 19144, at *6 (N.D.N.Y. Nov. 24, 1997) (early discovery "will be appropriate in some cases, such as those involving requests for a preliminary injunction") (quoting commentary to FED. R. CIV. P. 26(d)). Numerous federal courts have ordered financial disclosures and expedited discovery at the outset of FTC contempt proceedings. *See supra* n.4.

ability to enter complete relief as it may deem appropriate. *See, e.g.*, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974).

"District courts are afforded wide discretion in fashioning an equitable remedy for civil contempt." *Chierico*, 206 F.3d at 1385. Pursuant to Federal Rule of Civil Procedure 65, a temporary restraining order may be granted without notice to defendants if

> (1) it clearly appears from specified facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

FED. R. CIV. P. 65(b). As set forth above, and in the affidavit of counsel submitted in support of this Motion, there is substantial evidence demonstrating that immediate and irreparable injury is likely to occur if the Court notifies the contempt defendants of the Commission's contempt filings before service of the requested Temporary Restraining Order.

1. With Notice, Contempt Defendants May Well Destroy Evidence, Irreparably Interfering with the Commission's Contempt Action.

The Court should take the precaution of entering the requested orders without immediate notice to the contempt defendants. Immediate notice would provide the contempt defendants the opportunity to dissipate or destroy property, including relevant correspondence, business records, or financial documents. The Commission has conducted a non-public investigation to date precisely because there is a strong likelihood that the contempt defendants will hide or destroy property and evidence if given advance notice. Given their past misconduct and their current fraudulent practices, the Court should not give the contempt defendants the opportunity to engage in such conduct. *See supra* Sections III.B.2 & III.C.2.

2. With Notice, Contempt Defendants Are Likely to Dissipate Assets, Irreparably Harming the Commission's Ability to Obtain Full Disgorgement and Effective, Final Relief.

The Commission's ability to achieve effective final relief in the form of full disgorgement is likely to be compromised or eviscerated if the contempt defendants are given notice and time to hide or dissipate assets. The contempt defendants plainly possess the motive, the knowledge, the experience, and the means to move and hide assets from the Court. *See supra* Section III.C.2. Moreover, they have profited handsomely from their violations of the Court's Order.[28]

If the contempt defendants receive notice of the FTC's filings or any responsive orders before receiving service of the requested Temporary Restraining Order, it is only reasonable to conclude that they would pursue the tactic outlined in their own materials:

> Lawyers for plaintiffs will only continue to pursue cases they believe will pay off, not those against judgment-proof defendants. The best way of getting the plaintiff's lawyer to accept a token settlement is to convince the lawyer that you have no assets.

PX42A at 26, APG "Stop Being a Target for Money-Hungry Lawyers" Promotional Material. If the contempt defendants receive notice, they can be expected to "follow their own advice" and dissipate assets to become "judgment-proof defendants." The Court should take the reasonable precaution of entering its orders without notice.

IV. CONCLUSION

The contempt defendants are violating this Court's Permanent Injunction. Accordingly,

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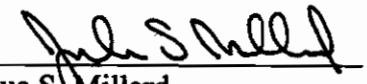
[28] The contempt defendants have reaped approximately four million dollars, and possibly more, from the deceptive promotion and sale of the APG program. APG generally requires consumers to pay $9,800 for the APG program. PX06 at 13; PX15 at 13; PX42C at 11; PX42D at 7. A current commercial listing for APG on the website for *Entrepreneur* magazine indicates that APG has 427 "licensees." PX26 at 5 ¶ 16 & Attach. A. 427 persons paying $9,800 would mean that the contempt defendants have taken $4,184,600 from consumers.

the Commission has instituted civil contempt proceedings in this Court, and respectfully requests temporary relief to ensure that the contempt defendants do not thwart those proceedings.

The requested Temporary Restraining Order with Ancillary Equitable Relief is necessary to enjoin the contempt defendants from doing what they do best—hiding property and evidence to ensure that "assets are shielded from capricious federal judges and any government agency." Given the contempt defendants' order violations, the nature of their asset-hiding enterprise, their histories of dishonest conduct, and the public interest in ensuring compliance with the Court's Permanent Injunction, this Court should enter the measures proposed by the Commission.

WHEREFORE, the Commission requests that the Court enter the proposed Temporary Restraining Order, and then a Preliminary Injunction, pending a final decision on the Motion for a Civil Contempt Order.

Respectfully submitted,



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Date: July 17, 2006

* Mr. Millard and Ms. Claybaugh are attorneys employed by the United States Federal Trade Commission. They are licensed to practice law in States other than Missouri, and appear in this matter consistent with E.D. Mo. L.R. 83-12.01(A).