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12
13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 FEDERAL TRADE COMMISSION,

16 Plaintiff,

17 v.

18 CENTRO NATURAL SERVICES, INC.,
a corporation,

19 XAVIER RODRIGUEZ,
20 individually and as an officer
of Centro Natural Services,
21 Inc., and

22 ROCIO DIAZ,
23 individually and as an officer
of Centro Natural Services,
24 Inc.,

25 Defendants.

Case No.

**MEMORANDUM OF POINTS AND
AUTHORITIES SUPPORTING
PLAINTIFF'S *EX PARTE*
APPLICATION FOR A
TEMPORARY RESTRAINING
ORDER WITH EQUITABLE
RELIEF, AND ORDER TO SHOW
CAUSE**

I. INTRODUCTION

1 The Federal Trade Commission ("FTC" or "Commission")
2 submits this application to halt the sale of a fraudulent
3 weight-loss product. Defendants falsely claim that their
4 weight-loss system, which includes three tablets and a "special
5 soap," will enable users to "lose half a pound every day" and
6 "not regain it."¹ Defendants' advertisements target obese
7 consumers and prey on their desperation to improve their health
8 and appearance. For example, defendants' television commercial
9 features a woman in a dark room crying:

10 "I'm desperate. I have high blood pressure.
11 I have cellulite all over. I am ugly."

12 Then the woman shouts: "I want to die."²

13 After this dramatic moment, defendants launch into a sales pitch
14 for their product and falsely promise consumers that their
15 weight loss treatment is "designed by specialists" to cause
16 rapid weight loss without the need to reduce calories or
17 increase physical activity.³ Defendants then instruct consumers
18 to "call right now" for a special offer and pay only half of the
19

20 ¹ Declaration of Craig Kauffman, Exhibit G ¶¶ 6-9, 17, 73
21 (Centro Natural Services infomercial).

22 ² *Id.* at Exhibit I ¶ 37. Defendants' advertisements
23 originally appeared in Spanish and have been translated by The
24 Language Doctors, a professional translation service. For the
purpose of this memo, plaintiff will refer to the English
translations of the advertisements.

25 ³ *Id.* at Exhibit G ¶ 68; I ¶ 15-16.

1 \$158 cost of the weight-loss treatment.⁴ In addition to
2 significant monetary injury, defendants' practices may cause
3 some consumers to suffer health problems because they may decide
4 to forgo legitimate weight-loss treatment, including diet and
5 exercise, in favor of defendants' bogus product. In short,
6 defendants are preying on vulnerable consumers and misleading
7 them into purchasing phony weight-loss pills.

8 Defendants' false claims constitute deceptive acts or
9 practices and false advertising in violation of Sections 5(a)
10 and 12 of the Federal Trade Commission Act ("FTC Act"), 15
11 U.S.C. §§ 45(a) and 52. Because of the blatantly fraudulent
12 nature of defendants' advertising, the FTC brings this action
13 pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and
14 seeks a noticed *ex parte*⁵ temporary restraining order ("TRO")
15 enjoining defendants from engaging in the fraudulent sale of
16 weight-loss products and ordering ancillary equitable relief,
17 including document preservation and expedited discovery related
18 to customer lists and any scientific substantiation for the
19 products. This relief is necessary to halt the ongoing fraud,
20 prevent further consumer injury, and evaluate the extent of

21 ⁴ *Id.* at Exhibit I ¶ 32, 58.

22 ⁵ Although plaintiff submits its application for a TRO *ex*
23 *parte*, defendants have received notice of this action.
24 Plaintiff contacted the defendants on October 13, 2006 to inform
25 them that the FTC planned to submit an application for a TRO.
Please see counsel's *Certification and Declaration in Support of*
Plaintiff's Application for a TRO for a detailed explanation of
how plaintiff notified the defendants.

consumer injury. Without it, defendants will continue to defraud consumers.

1 2 **II. THE PARTIES**

3 **A. Plaintiff**

4 Plaintiff Federal Trade Commission is an independent agency
5 of the United States Government. 15 U.S.C. §§ 41-58. The
6 Commission enforces Sections 5(a) and 12 of the FTC Act, 15
7 U.S.C. §§ 45(a) and 52, which prohibit, respectively, deceptive
8 acts or practices, and false advertisements for food, drugs,
9 devices, services, or cosmetics, in or affecting commerce. The
10 FTC is authorized under Section 13(b) of the FTC Act, 15 U.S.C.
11 § 53(b), to initiate through its own attorneys federal district
12 court proceedings to enjoin violations of the FTC Act, and to
13 secure such equitable relief as may be appropriate in each case.

14 **B. Defendants**

15 Defendant Centro Natural Services, Inc. ("Centro Natural")
16 is a California corporation located at 828 North Bristol Street,
17 Suite 101, Santa Ana, California 92703.⁶ The company has
18 operated a website that markets dietary supplements to Spanish-
19 speaking consumers since approximately 2001.⁷
20
21
22

23
24 ⁶ Declaration of Craig Kauffman, ¶¶ 2-3 & Exhibits A-C.

25 ⁷ See www.archive.org (database of old webpages).
26

1 Defendant Xavier Rodriguez is president of Centro Natural.⁸
2 He has represented Centro Natural in the company's discussions
3 with the FTC. Indeed, in a letter to the FTC, defendant
4 Rodriguez identified himself as "the Sole Shareholder of Centro
5 Natural Svcs., Inc."⁹

6 Defendant Rodriguez's wife, Rocio Diaz, is an officer of
7 Centro Natural.¹⁰ In a letter to the FTC, defendant Rodriguez
8 stated, "Rocio Diaz Rodriguez is my wife and Secretary of the
9 Corporation."¹¹ In addition, Rocio Diaz appears as Centro
10 Natural's spokesperson in television commercials for the
11 company.¹² In one television commercial, Defendant Diaz states,
12 "Hi how are you, I'm Rocio Diaz. . . . Do you want to lose up to
13 35 pounds in only two months? An average of half a pound every
14 day without regaining it. Then join me."¹³ Defendants Rodriguez
15 and Diaz both reside in Los Angeles County.

18 ⁸ *Id.* at ¶¶ 2, 3, 6 & Exhibits A-C (corporate records from
19 Lexis and the California Secretary of State), H (letter from
20 Xavier Rodriguez to the FTC).

21 ⁹ *Id.* at ¶ 6 & Exhibit H.

22 ¹⁰ *Id.* at ¶ 2 & Exhibit B (corporate record identifying Rocio
23 Diaz as Vice President of Centro Natural Services, Inc.).

24 ¹¹ *Id.* at ¶ 6 & Exhibit H.

25 ¹² *Id.* at Exhibits G ¶ 40; I ¶ 5.

26 ¹³ *Id.* at Exhibit G ¶ 40.

III. JURISDICTION AND VENUE

1 This matter is properly before the Court. The Court has
2 subject matter jurisdiction over the FTC Act pursuant to 28
3 U.S.C. §§ 1331, 1337(a), and 1345. Venue also is proper in the
4 Central District of California. Pursuant to the FTC Act, an
5 action may be brought where a corporation or person "resides or
6 transacts business." 15 U.S.C. § 53(b). The corporate
7 defendant, Centro Natural Services, Inc., is incorporated in
8 California and located in Santa Ana, California.¹⁴ The
9 individual defendants, Xavier Rodriguez and Rocio Diaz, also
10 transact business in this district. See Section II, *supra*.

IV. DEFENDANTS' BUSINESS PRACTICES

A. The Product

12 Centro Natural markets various dietary supplements to the
13 Spanish-speaking community through radio and television
14 commercials and its website, *www.centronaturaldesalud.com*.
15 Although plaintiff does not have a dissemination schedule for
16 defendants' advertisements, at a minimum the television
17 infomercial aired on station 62 KRCA in Riverside and Los
18 Angeles.

19 One of Centro Natural's products, the Centro Natural de
20 Salud Obesity Treatment ("CNS Obesity Treatment") includes three
21 different diet pills, which consumers are instructed to take
22

24 ¹⁴ *Id.* at ¶¶ 2, 3 & Exhibits A-C (corporate records from Lexis
25 and the California Secretary of State).

1 with meals, and a "reducing soap."¹⁵ The pills contain various
2 vitamins and minerals, and small amounts of several herbs.¹⁶ The
3 proposed defendants sell the CNS Obesity Treatment to consumers
4 for \$79 for a 60-day supply.¹⁷ Defendants repeatedly state that
5 the product is "guaranteed" to cause consumers to lose weight.¹⁸
6 Defendants refused to reveal the exact amount of money consumers
7 have lost as a result of Centro Natural's deceptive practices,
8 but one business report states that the company had annual sales
9 of approximately \$1.5 million in 2005.¹⁹

10 **B. The Advertising Claims**

11 Centro Natural's advertisements make numerous false claims
12 about the company's weight-loss treatment. First, Centro
13 Natural claims that the CNS Obesity Treatment causes rapid and
14 substantial weight loss, as much as 35 pounds in two months,
15 without the need to diet or exercise. For example, defendants'
16 website makes the false promise: "You can lose between 20 and 30
17 pounds in just two months."²⁰ Defendants' television
18 infomercials make similar assertions:

19 ¹⁵ *Id.* at Exhibits G ¶ 13, 69-70, 73; I ¶ 2, 12.

20 ¹⁶ Declaration of Dr. Edward Blonz, Attachment C (product labels showing list of ingredients).

21 ¹⁷ Declaration of Craig Kauffman at Exhibit G ¶ 34.

22 ¹⁸ *Id.* at Exhibit I ¶ 17, 34, 47, 54, 62.

23 ¹⁹ *Id.* at ¶ 2 & Exhibit B (Dun & Bradstreet report on Centro
24 Natural Services, Inc.).

25 ²⁰ *Id.* at Exhibits D, F (Centro Natural website).

1 *Male voice states:* "Do you want to lose weight and not
2 regain it? With our treatment you lose up to 35 pounds in
3 just two months."

4 *Text on screen reads:* "Get rid of up to 35 pounds in
5 only 2 months. "#1 Fat Burner; #2 Weight Loss; #3
6 Weight Control."

7 *Male voice states:* "Take three pills a day. One fat-
8 burning pill with your breakfast, one weight-loss pill with
9 lunch, and one weight-control pill with dinner."

10 *Text on screen reads:* "NO DIETS, NO SKIPPING DINNER,
11 NO CALORIE COUNTING, NO SIDE EFFECTS."

12 ***

13 *Male voice states:* "We do not put you on a diet. It [the
14 obesity treatment] consists of three bottles, three
15 different formulas that by their combination make you lose
16 a minimum of half a pound every day for two months."

17 ***

18 *Female speaker states:* "In effect, while eating you lose
19 weight."

20 ***

21 *Voice states:* "The Natural Health Center is proud to offer
22 you the only treatment that can make you lose half a pound
23 everyday. It's a treatment that's one hundred natural,
24 without side effects. Look: our treatment has been
25 supported for twelve years. It's for two months and you
26 will lose up to 35 pounds."

1 *Female voice states:* "As if that weren't enough, with your
2 order you will receive for free a reducing soap to avoid
3 flaccidity and lose sizes."

4 ***

5 *Female speaker states:* "Don't forget, for one time only, we
6 are including a reducing soap to avoid flab in the stomach,
7 under the chin, in the forearms. . . . Apply the soap in a
8 circular motion for about three minutes, very important."

9 ***

10 *Male voice states:* "As you lose weight the skin loosens.
11 This special soap compresses body tissues also helping you
12 lose dress sizes."

13 ***

14 *Rocio Diaz states:* "Do you want to lose up to 35 pounds in
15 only two months? An average of half a pound every day
16 without regaining it? Then join me."²¹

17 Centro Natural also claims that the CNS Obesity Treatment
18 safely causes users to lose weight permanently. For example,
19 one of defendants' infomercials begins with the tantalizing
20 introduction, "Do you want to lose weight and not regain it?"²²
21 All of defendants' infomercials make express claims about
22 permanent weight loss, including:

23 ²¹ *Id.* at Exhibits G ¶¶ 6-7, 14, 17-18, 30, 40, 52; I ¶¶ 8,
24 12.

25 ²² *Id.* at Exhibit G, second image.

"You do not regain the pounds you lose."

"But the best thing is that you won't gain it back."

"The most incredible thing is that you do not regain it."²³

C. Defendants' Claims Are False

Defendants' claims about the CNS Obesity Treatment are wholly false and unsubstantiated. To evaluate the claims, the FTC consulted with Dr. Edward Blonz, who has over 20 years of experience teaching, researching, and publishing in the fields of nutrition, obesity, and weight loss.²⁴ As detailed in his declaration, Dr. Blonz found that the CNS Obesity Treatment does not enable users to safely lose up to as much as a half pound a day and does not cause permanent weight loss.²⁵ First, it is "not scientifically feasible" for a consumer to safely lose up to a half pound per day for a two-month period.²⁶ As Dr. Blonz explains, substantial weight loss requires a reduction in caloric intake, an increase in caloric expenditure, or a significant increase in the metabolic rate.²⁷ For a user to lose a half pound per day for two months, he or she would have to

²³ *Id.* at Exhibits G ¶¶ 30, 48; I ¶ 8.

²⁴ Declaration of Dr. Edward Blonz, ¶¶ 1-10 & Attachment A (curriculum vitae).

²⁵ *Id.* at ¶¶ 16-17, 29-36.

²⁶ *Id.* at ¶ 32.

²⁷ *Id.* at ¶¶ 18-31.

1 produce an energy deficit of 1,750 calories per day.²⁸ "Such a
2 deficit is scientifically implausible and well beyond any
3 reported in the scientific literature."²⁹ Dr. Blonz's findings
4 are consistent with other expert opinions. As a federal
5 district court held in a similar case:

6 To lose one pound of weight, according to a
7 credible expert, the average individual
8 needs a deficit of approximately 3,500
9 calories between caloric intake and caloric
10 output. Although drugs may make it easier
11 to achieve this deficit, they cannot alter
12 this basic equation. Thus, it would be
13 impossible for a person who did not diet or
14 exercise to lose weight simply by taking the
15 defendant's drug or weight loss product. It
16 is thus elementary that if a person consumed
17 calories in excess of his/her daily needs,
18 and did not diet or exercise there would be
19 weight increase, rather than decrease.

20 *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1273 (S.D. Fla.
21 1999) (entering judgment with permanent injunction and \$8
22 million in consumer redress).

23 Furthermore, even if it were scientifically possible to
24 lose a half pound per day for two months safely, the ingredients

25 ²⁸ *Id.* at ¶ 31.

26 ²⁹ *Id.*

in the CNS Obesity Treatment cannot cause such weight loss.³⁰

After a thorough search of scientific literature, Dr. Blonz
found no evidence that the ingredients in the CNS Obesity
Treatment can cause rapid and substantial weight loss.³¹

On April 18, 2006, the FTC asked defendants for scientific
proof that the CNS Obesity Treatment causes weight loss. On
June 23, 2006, defendant Xavier Rodriguez replied, "Clinical
trials are ongoing and shortly I will supply any documentation I
have."³² Not surprisingly, defendants have failed to provide any
further information to the FTC. The defendants did send the
Better Business Bureau a one-paragraph letter from Dr. Jorge
Velasquez stating that the CNS Obesity treatment worked for some
of his patients.³³ The brief letter, however, failed to provide
any supporting documentation and fell well short of defendants'
duty to possess a reasonable basis for its advertising claims.
See FTC v. Schering Corp., 118 F.T.C 1030 (1994) (requiring that
tests and studies relied upon as reasonable basis must employ
appropriate methodology and address specific claims made in the
advertisement). Here, defendants have produced no qualifying
substantiation for their claims. Conversely, established
scientific research, respected experts in the field of

³⁰ *Id.* at ¶¶ 15, 17.

³¹ *Id.* at ¶¶ 14, 29-30.

³² Declaration of Craig Kauffman, Exhibit H ¶ 6.

³³ Declaration of Dr. Blonz, Exhibit D, pg 161-162.

1 nutrition, and the findings of other courts all support the
2 FTC's position that the defendants' claims are false.

3 **V. THE COURT SHOULD ENTER THE REQUESTED RELIEF**

4 In its Complaint, the FTC seeks a permanent injunction and
5 other equitable relief to redress the injury caused by
6 defendants' deceptive practices. To prevent defendants from
7 committing further law violations pending resolution of this
8 action, the FTC seeks a TRO, including a document preservation
9 provision, narrowly tailored expedited discovery, and an order
10 to show cause why a preliminary injunction should not issue.

11 **A. Section 13(b) of the FTC Act Authorizes the Court to
12 Grant the Requested Relief**

13 The FTC Act, in 15 U.S.C. § 53(b), authorizes a district
14 court to grant permanent injunctions to enjoin violations of the
15 FTC Act in "proper cases."³⁴ Matters involving false and
16 deceptive advertising are proper cases for injunctive relief
17 under the FTC Act. *FTC v. World Wide Factors, Ltd.*, 882 F.2d
18 344, 348 (9th Cir. 1989) (affirming grant of preliminary
19 injunction, converted from TRO after hearing, in case involving
20 false and deceptive advertising); *FTC v. World Travel Vacation
21 Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir. 1988) (holding
22 false and deceptive advertising to induce purchase is a "proper
23 case").

24 ³⁴ The Commission proceeds under Section 13(b), which gives
25 the Commission the authority to initiate a permanent injunction
26 action in district court. *FTC v. Pantron I Corp.*, 33 F.3d 1088,
27 1102 (9th Cir. 1994); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107,
28 1110-13 (9th Cir. 1982).

1 Incident to its authority to issue permanent injunctive
2 relief, this Court has the inherent equitable power to grant all
3 temporary and preliminary relief necessary to effectuate final
4 relief, including an *ex parte* TRO, expedited discovery, a
5 preliminary injunction, and other necessary remedies. *FTC v.*
6 *Pantron I*, 33 F.3d 1088, 1102 (9th Cir. 1994) (holding that
7 section 13(b) "gives the federal courts broad authority to
8 fashion appropriate remedies for violations of the [FTC] Act");
9 *Singer*, 668 F.2d at 1113 ("We hold that Congress, when it gave
10 the district court authority to grant a permanent injunction
11 against violations of any provisions of law enforced by the
12 Commission, also gave the district court authority to grant any
13 ancillary relief necessary to accomplish complete justice . . .
14 ").³⁵

15 On numerous occasions, in similar cases, the Ninth Circuit
16 has affirmed the type of injunctive relief requested here. See,
17 *e.g.*, *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1232 (9th
18 Cir. 1999) (*ex parte* TRO, preliminary injunction); *FTC v.*
19 *Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir.

20 ³⁵ See also *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468
21 (11th Cir. 1996) (Section 13(b)'s "unqualified grant of
22 statutory authority . . . carries with it the full range of
23 equitable remedies . . ."); *FTC v. Amy Travel Service, Inc.*,
24 875 F.2d 564, 571 (7th Cir. 1989), *cert. denied*, 493 U.S. 954
25 (1989) ("All other circuits that have dealt with the issue have
26 found that section 13(b) grants the authority to issue other
27 necessary equitable relief."); *FTC v. Southwest Sunsites, Inc.*,
28 665 F.2d 711, 718 (5th Cir.), *cert. denied*, 456 U.S. 973 (1982)
(holding "a grant of jurisdiction such as that contained in
Section 13(b) carries with it the authorization for the district
court to exercise the full range of equitable remedies
traditionally available to it").

1997) (*ex parte* TRO, preliminary injunction); *World Wide Factors*, 882 F.2d at 346 (TRO, preliminary injunction); *Singer*, 668 F.2d at 1109 (*ex parte* TRO, preliminary injunction).

B. This Case Meets the Standard for a TRO and Preliminary Injunction

The evidence submitted by the Commission meets the standard for issuing a noticed *ex parte* TRO and a preliminary injunction. To grant the Commission a preliminary injunction to enforce the FTC Act, the Court must only "1) determine the likelihood that the Commission will ultimately succeed on the merits and 2) balance the equities." *Affordable Media*, 179 F.3d at 1233 (quoting *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984)); *see also World Wide Factors*, 882 F.2d at 346 (holding same). The Court need not consider the same factors as it would in a motion for injunctive relief among private litigants. *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174-75 (9th Cir. 1987); *see also Affordable Media*, 179 F.3d at 1233 (holding the Commission must meet "a lighter burden . . . than that imposed on private litigants"). Unlike private litigants, "the Commission need not show irreparable harm." *Affordable Media*, 179 F.3d at 1233. "Harm to the public interest is presumed." *World Wide Factors*, 882 F.2d at 346. Moreover, in balancing the equities, the public interest should receive greater weight than private interests. *Id.* at 347.³⁶ As

³⁶ This is particularly true where the evidence demonstrates that a defendant's business is rooted in deception, for a "court of equity is under no duty to protect illegitimate profits or advance business which is conducted [illegally]."

(continued...)

discussed herein, the evidence submitted by the Commission shows both that it is likely to prevail on the merits and that the equities weigh in its favor.

1. Defendants' Misrepresentations Violate the FTC Act.

The Commission likely will prevail on the merits. Section 5(a) of the FTC Act prohibits deceptive acts and practices in or affecting commerce. Section 12 of the FTC Act prohibits the dissemination of any false advertisement in order to induce the purchase of food, drugs, devices, services, or cosmetics. Under Section 12, an advertisement is "false" if it is "misleading in a material respect." 15 U.S.C. § 55(a)(1); see also *Pantron I*, 33 F.3d at 1099 ("Indeed, a 'false advertisement' need not even be 'false'; it need only be 'misleading in a material respect.'"). To prevail under Sections 5(a) and 12, the FTC must demonstrate that "first, there is a representation, omission, or practice that, second is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material." *Pantron I Corp.*, 33 F.3d at 1095, citing *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-65 (1984) (FTC's Policy Statement on Deception); *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001). As set forth below, all three of these elements are established

³⁶(...continued)
CFTC v. British American Commodity Options Corp., 560 F.2d 135, 143 (2d Cir. 1977), cert. denied, 438 U.S. 905 (1978), (quoting *FTC v. Thomsen-King & Co.*, 109 F.2d 516, 519 (7th Cir. 1940)).

sufficiently for the Court to grant a TRO and preliminary injunction.

1 First, defendants have made numerous false representations
2 about the CNS Obesity Treatment through express statements
3 contained in their television infomercials and Internet website.
4 Through such statements, defendants claim that the CNS Obesity
5 Treatment causes rapid and substantial weight loss without
6 dieting or exercise. Defendants also have represented that the
7 CNS Obesity Treatment causes permanent weight loss. These
8 claims are "not scientifically feasible."³⁷ Moreover, defendant
9 Xavier Rodriguez acknowledged that Centro Natural's claims are
10 false when he promised NARC that he would modify Centro
11 Natural's advertisements.³⁸

12 Second, defendants' misrepresentations are likely to
13 mislead reasonable consumers. False claims are inherently
14 "likely to mislead." *In re Thompson Med. Co.*, 104 F.T.C. 648,
15 788, 818-19 (1984), *aff'd*, *Thompson Med. Co. v. FTC*, 791 F.2d
16 189 (D.C. Cir. 1986). This case involves express claims that
17 the CNS Obesity Treatment causes rapid, substantial, and
18 permanent weight loss. Reasonable consumers have no obligation
19
20

21
22 Declaration of Dr. Edward Blonz, ¶ 32.

23 ³⁷

24 Declaration of Craig Kauffman, Exhibit K.

25
26 ³⁸

to doubt the veracity of express claims. *In re Cliffdale Assocs.*, 103 F.T.C. 110 (1984).

1 Third, defendants' false claims are material. Express
2 misrepresentations, as well as implied claims that significantly
3 involve health or safety, are *presumed* to be material. *Kraft,*
4 *Inc. v. FTC*, 970 F.2d 311, 322-23 (7th Cir. 1992), *cert. denied*,
5 507 U.S. 909 (1993). Because defendants' claims about the CNS
6 Obesity Treatment involve "the purpose, safety, efficacy, or
7 cost of the product," the claims are material as a matter of
8 law. See *In re Cliffdale Assocs.*, 103 F.T.C. at 176-84; see
9 also *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000).³⁹
10 Moreover, defendants' claims are material because they go to the
11 core reason why consumers would buy the CNS Obesity Treatment.
12 See *Kraft*, 970 F.2d at 322 (holding statement material if likely
13 to affect consumers' decision to buy the product or service).
14 Consumers likely would not spend \$79 for a bottle of vitamins if
15 defendants had not misrepresented that the product was proven to
16 be effective as a weight-loss treatment.

17 In this case, defendants' false representations are likely
18 to mislead consumers acting reasonably under the circumstances.
19 Accordingly, the Commission has demonstrated a likelihood of
20 success on the merits, and a TRO to enjoin defendants' false
21 advertisements is warranted.

22
23 ³⁹ The subjective good faith of the advertiser is not a valid
24 defense to an enforcement action brought under Section 5;
25 instead, the FTC need establish merely that "the
26 representations, omissions, or practices would likely mislead
consumers, acting reasonably, to their detriment." *World
Travel*, 861 F.2d at 1029.

**2. The Individual Defendants Are Liable for
Injunctive and Monetary Relief**

1 The Commission is also likely to succeed in demonstrating
2 that the individual defendants are the perpetrators of this
3 illicit scheme and are individually liable for violating the FTC
4 Act. An individual may be held liable for violations of the FTC
5 Act if the Court finds that the individual (1) actively
6 participated in the violative practice or (2) had authority to
7 control the deceptive practices and had or should have had
8 knowledge or awareness of the practices. *Publishing Clearing*
9 *House*, 104 F.3d at 1170-71; see also *Gem Merchandising*, 87 F.3d
10 at 470; *Amy Travel*, 875 F.2d at 573-74. Authority to control
11 can be evidenced by "active involvement in business affairs and
12 the making of corporate policy, including assuming the duties of
13 a corporate officer." *Amy Travel*, 875 F.2d at 573.
14 Constructive knowledge can be shown by demonstrating that
15 defendants were recklessly indifferent to the truth, or had an
16 awareness of a high probability of fraud coupled with an
17 intentional avoidance of the truth. *Publishing Clearing House*,
18 104 F.3d at 1171. In addition, the "degree of participation in
19 business affairs is probative of knowledge." *Amy Travel*, 875
20 F.2d at 574.

21 Defendants Xavier Rodriguez and Rocio Diaz actively
22 participate in the violations and have the authority to control
23 the acts and practices of the Centro Natural. As described
24 above, defendant Xavier Rodriguez is president and sole
25 shareholder of Centro Natural. Defendant Rocio Diaz is also an
26

officer of the company. Thus, the defendants are in the position to control the practices of these closely-held entities. See *Amy Travel*, 875 F.2d at 573.

In addition, evidence shows that both Xavier Rodriguez and Rocio Diaz actively participated in the deceptive practices. See Section II, *supra*. Defendant Rocio Diaz serves as the company spokesperson in infomercials for the CNS Obesity Treatment. As president and sole shareholder of Centro Natural, Defendant Xavier Rodriguez controls the content of the company's advertisements.

Moreover, defendant Rodriguez has express knowledge that Centro Natural's commercials mislead consumers and make false promises about the CNS Obesity Treatment. In 2005, the National Advertising Review Council ("NARC"),⁴⁰ a highly respected voluntary association formed by advertisers and the Better Business Bureau, investigated Centro Natural and issued a decision challenging Centro Natural's advertising claims for its weight-loss product. Specifically, NARC questioned the accuracy of Centro Natural's claim that its product would cause consumers to lose 35 pounds in two months.⁴¹ After a thorough investigation and multiple discussions with the company, NARC found that Centro Natural "did not provide the evidence necessary to support the qualified claims made in the

⁴⁰ According to its website, NARC's "purpose is to foster truth and accuracy in national advertising through voluntary self-regulation." See www.narcpartners.org.

⁴¹ Declaration of Craig Kauffman § 8 & Exhibit K.

advertisement" of its weight-loss system.⁴² NARC recommended that Centro Natural discontinue certain claims. Defendant Xavier Rodriguez, on behalf of Centro Natural, responded to NARC's decision in late March 2005, stating, "I agree with all the recommendations set forth . . . and accept [the] decision in its entirety and will modify the advertising as suggested."⁴³ Defendants, however, continued to advertise and promote the CNS Obesity Treatment through deceptive and unsubstantiated claims, causing ongoing harm to consumers. In light of the individual defendants' involvement, control, and knowledge of this scheme, they can be held individually liable.

**3. The Equities Weigh in Favor of Granting
Injunctive Relief.**

Once the FTC has shown a likelihood of success on the merits, the Court must balance the equities, assigning greater weight to the public interest than to defendants' private concerns, in determining whether to grant injunctive relief. *World Wide Factors, Ltd.*, 882 F.2d at 347; *World Travel*, 861 F.2d at 1030-31. Here, the balance of the equities tips strongly in the FTC's and consumers' favor. Immediate injunctive relief is necessary to protect the public from future financial harm that will inevitably result from defendants' deceptive practices. Indeed, defendants' flouting of their agreement with NARC shows that only the coercive effect of an

⁴² *Id.* at Exhibits J-K.

⁴³ *Id.* at Exhibit J-K.

1 injunction will halt their deceptive conduct. In contrast,
2 defendants have no legitimate interest to balance against the
3 need for an injunction. They are making false claims to
4 vulnerable consumers struggling with obesity. The FTC's
5 proposed TRO prevents defendants from engaging in this illegal
6 conduct. Such a restriction does not impose an undue hardship
7 on defendants, for they have no legitimate interest in
8 persisting with conduct that violates federal law. *World Wide*
9 *Factors*, 882 F.2d at 347 (upholding district court finding of
10 "no oppressive hardship to defendants in requiring them to
11 comply with the FTC Act, refrain from fraudulent representation
12 or preserve their assets from dissipation or concealment").

12 **C. A TRO with a Document Preservation Provision, Business**
13 **Activities Notification, and Expedited Discovery**
14 **Relating to Customer Lists and Scientific**
15 **Substantiation Is Necessary for Effective Final Relief**

16 The proposed order includes other equitable relief that is
17 necessary for effective final relief. First, plaintiff seeks a
18 provision requiring defendants to preserve business records and
19 other information. Second, plaintiff requests that Xavier
20 Rodriguez and Rocio Diaz notify the Commission before creating
21 or operating any other business entity. A provision requiring
22 defendants to report any new business will deter them from
23 continuing their practices under a different company or product
24 name. Finally, plaintiff requests the right to conduct
25 expedited discovery related to defendants' customer lists and
26 any scientific substantiation for its products. Such provisions

are narrowly tailored to minimize any burden to defendants and
are necessary and appropriate to advance this litigation.

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**D. A Noticed *Ex Parte* Temporary Restraining Order
Should Be Issued**

1 This matter is an appropriate case for the issuance of a
2 noticed *ex parte* TRO. Rule 65(b) of the Federal Rules of Civil
3 Procedure permits this Court to enter *ex parte* orders where the
4 facts show that irreparable injury, loss, or damage will result
5 if notice is given. Here, defendants will use the meet and
6 confer time period to continue selling their fraudulent product,
7 resulting in irreparable monetary loss to consumers. Indeed,
8 defendant's behavior towards the FTC and NARC shows that they
9 will continue to prey on vulnerable consumer until a court
10 intervenes. See *SlimAmerica*, 77 F. Supp. 2d at 1268 (Court
11 granted *ex parte* TRO in case where defendants failed to honor
12 their agreement with NARC). Defendants' business is based upon
13 false representations, and thus it is appropriate for this Court
14 to put an immediate halt to their activities.

VI. CONCLUSION

16 Defendants have caused and are likely to continue to cause
17 substantial consumer injury through their FTC Act violations.
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1 This Court should issue the requested TRO to prevent ongoing
2 consumer harm and to help ensure the possibility of effective
3 final relief.

4 Dated: _____, 2006

Respectfully submitted,

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