

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

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FEDERAL TRADE COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Judge Matthew F. Kennelly
	)	
IMM INTERACTIVE, INC., a New York	)	Magistrate Judge Jeffrey T. Gilbert
Corporation formerly known as INTERMARK	)	
COMMUNICATIONS, INC., also d/b/a COPEAC	)	
and INTERMARK MEDIA,	)	
	)	
Defendant.	)	
	)	

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**FTC'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR A TEMPORARY  
RESTRANING ORDER WITH OTHER EQUITABLE RELIEF AND ORDER TO  
SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

**I. INTRODUCTION**

The Federal Trade Commission asks that the Court take immediate action to stop an online marketing scheme that uses fake news websites and false weight loss claims to deceive consumers into purchasing products. For at least the past year, Defendant IMM Interactive, Inc. has operated numerous websites featuring phony investigative reports and reviews of a range of dubious products, including acai berry weight loss supplements. Defendant crafts the sites to look like legitimate news sites by using domain names such as channel9healthbeat.com and nbsnewsat6.com, and by displaying mastheads such as "NBS News" or News 9." The sites also prominently claim that the reports have been "seen on" several major news outlets, including ABC and CNN. Defendant's websites often feature a supposed reporter's independent investigative report of losing twenty-five pounds after using an acai berry supplement for four weeks. The report is followed by a section full of glowing consumer "comments" about the product.

Nearly everything about these “news” sites is fake. The websites are not maintained by news organizations. The reporter, the investigation, and the consumer comments are all fabricated. Moreover, the claims about weight loss from acai berries are false: no evidence establishes that acai berries cause weight loss, and the dramatic weight loss Defendant describes is unachievable. Instead, the websites are simply advertisements aimed at deceptively enticing consumers to purchase the featured products from third party websites, thereby generating commissions for Defendant. The FTC has received numerous complaints from consumers who, having been deceived by fake news sites like those of Defendant, were charged between \$60 and \$100 for the products. Defendant has spent over \$1 million to disseminate their deceptive ads throughout the Internet, and their deceptive conduct likely has injured thousands of consumers.

The FTC respectfully asks this Court to bring Defendant’s harmful practices to a swift end by entering the FTC’s proposed Temporary Restraining Order (“TRO”). The FTC’s proposed TRO is narrowly tailored to enjoin Defendant’s illegal practices and preserve the Court’s ability to provide effective final relief.<sup>1</sup>

## **II. DEFENDANT’S ILLEGAL BUSINESS PRACTICES**

This case revolves around Defendant IMM Interactive, Inc.’s websites that are designed to look like the sites of objective news organizations that have conducted independent evaluations of products, such as acai berry dietary supplements.<sup>2</sup> Printouts of examples of

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<sup>1</sup> This matter is one of ten cases filed by the FTC, including five cases in this district, against advertisers of acai berry dietary supplements and other products through deceptively formatted fake news websites. The FTC recently has sought and obtained injunctions in this district against false and unsubstantiated weight loss claims about similar acai berry products. *See FTC v. Central Coast Nutraceuticals, Inc.*, 10 C 4931 (N.D. Ill. Aug. 5, 2010) (Norgle, J.).

<sup>2</sup> The Court has personal jurisdiction over Defendant under the FTC Act’s nationwide service of process provision, 15 U.S.C. § 53(b), because Defendant has minimum contacts with the United States. *See FTC v. Cleverlink Trading Ltd.*, No. 05 C 2889, 2006 WL 1735276, at \*4 (N.D. Ill. June 19, 2006) (continued...)

Defendant's sites which include channel9healthbeat.com, nbsnewsat6.com, and consumerproductsdaily.com have been submitted to the Court.<sup>3</sup> Defendant has operated these sites since at least February 2010. Although the websites do not identify that Defendant is responsible for them, the domain names for the sites were registered and paid for by Defendant.<sup>4</sup>

Defendant, which recently changed its name from Intermark Communications, Inc. and also does business as COPEAC and Intermark Media, is involved in "affiliate marketing."<sup>5</sup> Its fake news sites are aimed at getting consumers to click on a link, visit a third party website, and purchase products resulting in Defendant earning commissions.<sup>6</sup> To attract consumers to visit the websites, Defendant has spent over \$1.3 million during roughly the last year to place over a billion online ads throughout the Internet on high-volume websites such as weather.com,

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<sup>2</sup>(...continued)

(Kendall, J.); *FTC v. Bay Area Bus. Council, Inc.*, No. 02 C 5762, 2003 WL 21003711, at \*2 (N.D. Ill. May 1, 2003) (Darrah, J.). Moreover, under the FTC Act's venue provision, an action may be brought wherever a corporation "resides or transacts business." 15 U.S.C. § 53(b). Here, Defendant has transacted business in this district. *See* PX 1, McKenney (FTC Investigator) Dec. ¶¶ 7-11, Atts. B-F (Defendant's websites accessible in this district; ad for websites placed in Evanston Review). In addition, venue is proper over a corporation wherever it is subject to personal jurisdiction. *See Bay Area*, 2003 WL 21003711, at \*2.

<sup>3</sup> *See* PX 1, McKenney (FTC Investigator) Dec. ¶¶ 7-11, Atts. B-F.

<sup>4</sup> *See* PX 2, Willis (GoDaddy) Dec., Att. A.

<sup>5</sup> IMM Interactive, Inc. changed its name from Intermark Communications, Inc. on March 25, 2011. *See* PX 1, McKenney (FTC Investigator) Dec. ¶ 20, Att. L.

<sup>6</sup> In its capacity here, Defendant acts as an "affiliate." An affiliate is an Internet-based marketer hired by a seller of goods ("merchant") to attract consumers to a merchant's website. The merchant often pays the affiliate based on the number of consumers the affiliate draws to the merchant's website or based on the amount of product sales the affiliate generates. *See id.* ¶¶ 3-5, Att. A (providing background of affiliate marketing); *see also* *1 800 Contacts, Inc. v. Lens.com, Inc.*, F. Supp. 2d , No. 07-CV-591, 2010 WL 5150800, at \*4 (D. Utah Dec. 14, 2010) (discussing affiliate marketing); *Amazon.com LLC v. N.Y. State Dep't of Taxation & Fin.*, 913 N.Y.S.2d 129, 134 (N.Y. App. Div. 2010) (same).

msnbc.com, cnn.com, and usatoday.com.<sup>7</sup> Over a million consumers have clicked on those ads and visited Defendant's sites promoting acai berry dietary supplements.<sup>8</sup> Defendant furthers its illegal business in two key ways: (1) utilizing the deceptive fake news format; and (2) misrepresenting that the acai berry products it promotes cause rapid, substantial weight loss.

#### A. Defendant's Use of Deceptive Fake News Format

Defendant's websites convey the net impression that they display legitimate objective news reports evaluating the featured products. Specifically, the sites:

- contain mastheads suggesting that the sites are affiliated with objective news organizations such as "News 9," "NBS News 6," or "Consumer Products Daily;"<sup>9</sup>
- contain subject tabs frequently used on news websites such as "Home," "World," "Business," "Opinion," and "Sports,"<sup>10</sup>
- employ logos of real news outlets such as ABC, Fox News, CBS, CNN, USA Today and Consumer Reports;<sup>11</sup>

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<sup>7</sup> See PX 3, Cronberger (Pulse 360) Dec. ¶¶ 2-3 (discussing ads placed by Defendant through Pulse 360 network); PX 4, Nashed (AdBlade) Dec. ¶¶ 2-5, Att. A at 16-18 (discussing ads placed by Defendant through AdBlade network); PX 1, McKenney (FTC Investigator) Dec. ¶¶ 12-14, Att. G (summarizing Pulse 360 data). Defendant creates attention-grabbing text for its ads that falsely insinuate a connection to a news story, such as the following ad that appeared in the Evanston Review: "Acai Berry EXPOSED (Chicago Report) – Chicago Warning: Health Reporter Discovers the Shocking Truth." See *id.* ¶ 8, Att. C at p. 1. Defendant purchased other similar ads that read: "<city>: People are Shocked! Finally a No Nonsense Diet that WORKS! Consumer Products Investigates" and "Warning to <city> Residents – Shocking Report on Acai Berry Diet!" *Id.* Att. G at pp. 3, 17.

<sup>8</sup> PX 1, McKenney (FTC Investigator) Dec. ¶¶ 12-13 (summarizing Pulse 360 ad data). In addition to the acai berry products, Defendant also has operated websites utilizing the deceptive news format to promote products involving work-at-home business opportunities, debt relief, penny auctions, skin treatments, teeth whitening, electronic cigarettes and natural disaster preparation. See *id.* ¶ 13(e), Att. G (spreadsheet of product advertising).

<sup>9</sup> See, e.g., *id.* ¶¶ 7-9, Att. B at p. 1, Att. C at p. 5, Att. D at p. 1.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* See also *id.* ¶ 10, Att. E (utilizing logo of Consumer Reports).

- represent that a “reporter” or “columnist” decided to investigate a popular product or service, such as the acai berry weight loss supplements, by performing an independent test and reporting the results;<sup>12</sup> and
- include a “comments” section containing what appear to be consumer testimonials depicting positive experiences with the products.<sup>13</sup>

Defendant’s news reports are fake. There are no independent investigations; instead, the images of “reporters” are simply stock photographs.<sup>14</sup> The ordinary consumers are phony.<sup>15</sup> Defendant’s websites are simply paid advertising for third-party merchants who sell the products.<sup>16</sup> Defendant fails to adequately disclose its connection to these merchants and, instead, create the impression of objectivity.<sup>17</sup>

<sup>12</sup> See, e.g., *id.* ¶¶ 7, 9, 11, Att. B at pp. 1-2, Att. D at pp. 1-2, Att. F at pp. 1-2.

<sup>13</sup> See, e.g., *id.* ¶¶ 7, 9, 11, Att. B at p. 3, Att. D at p. 3, Att. F at p. 3.

<sup>14</sup> For example, the “columnist” Stacie Sandler is depicted in two of Defendant’s websites with photos of two entirely different people. Compare *id.* ¶ 9, Att. D at p. 1 (nbsnewsat6.com website) with *id.* ¶ 11, Att. F at p. 1 (consumerproductsdaily.com website). In addition, one photo identified by Defendant as its “reporter” Julia Miller appears to be the image of a prominent French news anchor. Compare *id.* ¶ 8, Att. C at p. 5 (channel9healthbeat.com website) with *id.* ¶ 19, Att. K (article discussing use of French news anchor on fake news sites).

<sup>15</sup> For example, comments contained in at least three different websites operated by Defendant are identical. Compare *id.* ¶ 7, Att. B at p. 3 (channel9healthbeat.com website) with *id.* ¶ 9, Att. D at p. 3 (nbsnewsat6.com website) and ¶ 11, Att. F at p. 3 (consumerproductsdaily.com website). In addition, the dates of the consumer comments are automatically updated to make them look current every time a visitor visits the website. Compare *id.* ¶ 9, Att. D at p. 3 (nbsnewsat6.com website dated March 16, 2011) with *id.* ¶ 10, Att. E at p. 3 (nbsnewsat6.com website dated December 17, 2010).

<sup>16</sup> See *id.* ¶¶ 3-5, Att. A (discussion of affiliate marketing). Defendant’s fake news sites have touted a variety of acai berry products, including “Acai Optimum,” “LeanSpa Acai,” “Pure Acai Select,” and “Acai Reduce.” See *id.* ¶¶ 7-11, Atts. B-F.

<sup>17</sup> Defendant includes the vague term “advertorial” in small, inconspicuous font at the top of its websites. (See, e.g., *id.* ¶¶ 7-9, 11, Att. B at p. 1, Att. C at p. 5, Att. D at p. 1, Att. F at p. 1.) Even if consumers understood what this term meant, it is strategically hidden among Defendant’s prominent fake news imagery and text. In addition, at the bottom of some, but not all, of Defendant’s sites, Defendant has inserted a statement that reads: “[t]his website, and any page on the website, is based loosely off a true story, but has been modified in multiple ways including, but not limited to: the story, the photos, and the comments. Thus, this page, and any page on this website, are not be taken literally or as a non-fiction story. . . . This page receives compensation for clicks on or purchase of products featured on this site.”

(continued...)

## B. False Acai Berry Weight Loss Claims

Defendant's websites also make false and unsupportable weight loss claims about the acai berry supplements that they actively promote.<sup>18</sup> Particularly, Defendant's websites prominently claim that individuals who take an acai berry product, sometimes in combination with a colon cleanse product, can lose twenty-five pounds in four weeks with "no special diet" and "no intense exercise."<sup>19</sup>

Defendant's weight loss claims are indisputably false. There is no medical evidence whatsoever that acai berries alone, or in combination with a companion product, can produce the type of weight loss that Defendant claims. The FTC has submitted testimony from a nutrition expert from Northwestern University establishing that: (1) there are no scientific studies establishing that acai berries are effective in causing weight loss; (2) any weight loss caused by companion products like colon cleanse products would be marginal, and would pale in comparison to Defendant's claims; and (3) weight loss of twenty-five pounds in four weeks, which Defendant claims can be achieved without exercise or dietary changes, simply is not possible by dietary means.<sup>20</sup>

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<sup>17</sup>(...continued)

(See *id.* ¶¶ 9-11, Att. D at p. 4, ¶ , Att. F at p. 4.) As explained *infra* at p.10, n. 25, this statement, which appears well below the links to the merchant sites where consumers are invited to obtain the products, is not conspicuous and does nothing to undo the express claims made by Defendant in the body of its websites.

<sup>18</sup> Acai is a small dark purple fleshy berry-like fruit of a tall slender palm tree (*Euterpe oleracea*), which is native to Central and South America. See Merriam Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/acai>.

<sup>19</sup> See PX 1, McKenney (FTC Investigator) Dec. ¶¶ 7-11, Att. B at pp. 1-3, Att. D at pp. 1-3, Att. F at p. 1-3.

<sup>20</sup> See PX 5, Kushner Dec. ¶¶ 7-11. The FTC's expert, Dr. Robert F. Kushner, is a Professor of Medicine at Northwestern University Feinberg School of Medicine, Clinical Director of the Northwestern Comprehensive Center on Obesity in Chicago, and Medical Director of the Center for Lifestyle Medicine in Chicago. *Id.* ¶ 1.

### C. Consumers Have Been Harmed by Defendant's Deceptive Practices

The FTC has been flooded with complaints from consumers tricked into purchasing the acai berry products touted in fake news sites like those offered by Defendant.<sup>21</sup> Consumers were charged between \$60 and \$100 for the products, often after believing that they were receiving a "free trial" of the products.<sup>22</sup> Many consumers complaints reference the names of specific acai berry products Defendant has peddled.<sup>23</sup> Due to the high level of consumer confusion caused by fake news sites, many legitimate news agencies or consumer organizations have issued public warnings about them.<sup>24</sup> Given the fact that Defendant has spent over \$1.3 million for ads to attract consumers to its fake news sites, Defendant likely has received multiple times that amount in ill-gotten commissions from this scheme.

### III. ARGUMENT

Defendant's practices are clear violations of the FTC Act. To prevent further consumer injury and to preserve Defendant's assets for restitution to victims, the FTC asks that this Court issue the proposed temporary restraining order. The order would prohibit Defendant's ongoing illegal practices, protect assets, and require an accounting of ill-gotten gains. Courts in this district have granted TROs with comparable relief in similar FTC actions.<sup>25</sup>

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<sup>21</sup> See PX 1, McKenney (FTC Investigator) Dec. ¶¶ 15-17, Att. I (sample consumer complaints).

<sup>22</sup> *Id.* The complaints reveal that many consumers were unwittingly signed up for a recurring membership program resulting in monthly charges for the products.

<sup>23</sup> *Id.* ¶ 17.

<sup>24</sup> See *id.* ¶ 18, Att. J (attaching various articles warning of fake news sites).

<sup>25</sup> See, e.g., *FTC v. Central Coast Nutraceuticals, Inc.*, 10 C 4931 (N.D. Ill. Aug. 5, 2010) (Norgle, J.) (entering *ex parte* TRO for false claims regarding acai berry supplements); *FTC v. Atkinson*, 08C5666 (N.D. Ill. Oct. 6, 2008) (Kendall, J.) (*ex parte* TRO and asset freeze for violations of FTC Act involving deceptive sale of pharmaceuticals and dietary supplements); *FTC v. Spear Systems, Inc.*, 07C (continued...)

#### A. A Temporary Restraining Order Is Appropriate and Necessary Here

A district court may issue injunctions to enjoin violations of the FTC Act. *See* 15 U.S.C. § 53(b); *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir. 1988). To obtain a temporary restraining order, the FTC must merely demonstrate: (1) a likelihood of success on the merits, and that (2) the balance of the equities tips in its favor. *World Travel*, 861 F.2d at 1029. “[T]he FTC need not prove irreparable injury to obtain a preliminary injunction.” *Kinney v. Int’l Union of Operating Eng’rs*, 994 F.2d 1271, 1277 (7th Cir. 1993). The FTC easily satisfies the TRO elements here.

##### 1. There is a Strong Likelihood Defendant Has Violated the FTC Act

The FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce” generally, 15 U.S.C. § 45(a), and the dissemination of “any false advertisement . . . for the purpose of inducing, or which is likely to induce . . . the purchase of food [or] drugs,” *id.* §§ 52m-55. An act or practice is deceptive if it involves a material misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances, in a material respect. *See FTC v. Kraft*, 970 F.2d 311, 314 (7th Cir. 1992); *see also FTC v. Bay Area Bus. Council*, 423 F.3d 627, 635 (7th Cir. 2005). Misrepresentations and omissions involving information likely to affect consumer choice are considered material. *See Kraft*, 970 F.2d at 322. Health claims may be presumed material. *Id.* at 322.23. The failure to disclose a material fact, even without an affirmative misrepresentation, is equally deceptive. *See Bay Area*, 423 F.3d at 635. Proof of actual deceptive or intent to deceive is unnecessary. *Id.*

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<sup>25</sup>(...continued)

5597 (N.D. Ill. Oct. 5, 2007) (Andersen, J.) (*ex parte* TRO and asset freeze for violations of FTC Act involving sale of dietary supplement); *FTC v. Sili Neutraceuticals, LLC*, 07C 4541 (N.D. Ill. Aug. 13, 2007) (Kennelly, J.) (same); *FTC v. Harry*, 04 C 4790 (N.D. Ill. July 27, 2004) (Manning, J.) (same); *FTC v. AVS Marketing, Inc.*, 04 C 6915 (N.D. Ill. Oct. 27, 2004) (Moran, J.) (same); *FTC v. Phoenix Avatar LLC, et al.*, No. 04 C 2897 (N.D. Ill. April 23, 2004) (Holderman, J.) (same).

The threshold showing of likelihood of success is a “better than negligible” chance. *See Cooper v. Salazaar*, 196 F.3d 809, 813 (7th Cir. 1999). The FTC has far exceeded that threshold in demonstrating that Defendant has violated the FTC Act by: (1) making false and unsubstantiated claims about acai berry products; and (2) misrepresenting that its websites provided independent reviews and failing to disclose adequately that the sites are ads.

**a. Defendant’s False Product Claims**

As described in § II.B above, Defendant’s websites make express outright false claims that the promoted acai berry products will cause rapid, substantial weight loss, including as much as twenty-five pounds in four weeks. The FTC may demonstrate the deceptive nature of advertising claims by either: (1) demonstrating the falsity of the claims; or (2) showing that Defendant lacked a reasonable basis for making the claims, *i.e.*, “substantiation.” *See, e.g., FTC v. QT*, 448 F. Supp. 2d 908, 958-59 (N.D. Ill. 2006); *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998).

Here, the FTC’s expert testimony shows that: (1) no medical evidence whatsoever establishes that acai berries alone, or in combination with a companion product, can produce the rapid, substantial weight loss that Defendant claims, and (2) achieving weight loss of twenty-five pounds in four weeks, like Defendant claims, simply is not possible by ingesting any product. Courts in this district have repeatedly granted TROs under similar circumstances, *see supra* f.n. 24, including an *ex parte* TRO entered last year prohibiting nearly acai berries claims, *see FTC v. Central Coast Nutraceuticals, Inc.*, 10 C 4931 (N.D. Ill. Aug. 5, 2010) (Norgle, J.).

**b. Defendant’s Deceptive Website Format**

Although the FTC need not prove more to obtain the relief requested, as described in § II.A above, Defendant’s websites also deceptively create the impression that the sites are

objective news reports when, in fact, the sites are ads. Courts look to the “overall, net impression” of an ad to determine whether the messages or claims it conveys are likely to mislead reasonable consumers. *QT*, 448 F. Supp. 2d at 958; *see also Kraft*, 970 F.2d at 314. To discern the net impression, courts view the advertisement “as it would be seen by the public generally” including those “who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions.” *Niresk Indus., Inc. v. FTC*, 278 F.2d 337, 342 (7th Cir. 1960) (citation omitted); *see also FTC v. Crescent Pub. Group, Inc.*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (when evaluating the likelihood that an advertisement has misled consumers, “it is appropriate to look not at the most sophisticated, but the least sophisticated consumer”).

Defendant’s websites overwhelmingly convey the net impression that objective news reporters have performed independent tests or investigations demonstrating the effectiveness of the featured products. The appearance of Defendant’s fake news websites mirrors those of legitimate news websites by including the mastheads, subject tabs, photos of supposed reporters, and even consumer comments. The websites claim the featured reports have been “seen on” major reputable news outlets such as ABC, Fox News, CBS, CNN, USA Today and Consumer Reports. In fact, Defendant has not performed independent tests on the products, and the reporter, the news organization, and the comments all are completely fictional. As explained above, at § II.C, consumers not only are *likely* to be deceived by these sites, they *have been* deceived by Defendant’s websites.<sup>26</sup>

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<sup>26</sup> Defendant’s occasional use of buried disclaimers in some of its sites is insufficient to cure the deceptive nature of the websites. “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.” *FTC v. US Sales Corp.*, 785 F. Supp. 737, 751 (N.D. Ill. (continued...)

## **2. The Equities Tip Decidedly in the FTC's Favor**

Once the FTC has shown a likelihood of success on the merits, the Court must balance the equities, assigning “far greater weight” to the public interest than to any of Defendant’s private concerns. *World Travel*, 861 F.2d at 1029. The public equities in this case are compelling, as the public has a strong interest in halting Defendant’s deceptive conduct and preserving assets necessary to provide effective final relief to victims. Defendant, by contrast, has no legitimate interest in engaging in illegal conduct. *See FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) (upholding finding of “no oppressive hardship to defendants in requiring them to comply with the FTC Act, refrain from fraudulent representation or preserve their assets from dissipation or concealment”); *Sabal*, 32 F. Supp. 2d at 1009.

## **B. This Court Should Enter the FTC’s Narrowly Tailored Proposed TRO**

The FTC requests that the Court issue the FTC’s proposed TRO.<sup>27</sup> In fashioning appropriate injunctive relief, this Court has authority “to grant any ancillary relief necessary to accomplish complete justice[.]” *World Travel*, 861 F.2d at 1026; *see also Febre*, 128 F.3d at 534 (district court has authority in FTC action to “order any ancillary equitable relief necessary to effectuate the exercise of the granted powers”). The FTC’s proposed order would maintain the

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<sup>26</sup>(...continued)

1992); *see also FTC v. Direct Marketing Concepts, Inc.*, 624 F.3d 1, 12 (1st Cir. 2010). Defendant’s use a well-hidden “advertisorial” label is inadequate to cure the websites’ net impression. *See SEC v. Corp. Relations Group, Inc.*, No. 6:99CV1222ORL28KRS, 2003 WL 25570113, at \*8 (M.D. Fla. Mar. 28, 2003) (“The ‘advertisorial’ label on some, but not all, of the articles does not clearly convey the fact that the Defendants were paid . . . for the promotions.”), *aff’d*, 99 Fed. App’x 881 (11th Cir. 2004). Similarly, the small type disclaimers hidden at the bottom of some of Defendant’s websites are not sufficiently prominent to leave an accurate impression on consumers. Indeed, the disclaimers do not deny the misrepresentations made about the acai berry claims and are, thus, wholly deficient. *See FTC v. Phoenix Avatar, LLC*, 04 C 2897, 2004 WL 1746698, at \*10 (N.D. Ill. July 30, 2004) (Holderman, J.) (rejecting disclaimer defense, noting “disclaimer does not address, much less deny, the representations regarding weight loss and therefore cannot cure the deceptive representations”).

<sup>27</sup> The proposed TRO is attached to the FTC’s motion for a TRO.

*status quo* by prohibiting future law violations and preserving assets and documents to ensure that the Court can grant effective final relief.

### **1. Prohibited Business Activities**

The FTC's Proposed TRO contains provisions necessary to stop Defendant's illegal conduct. Particularly, Sections I and II prohibit Defendant from further violating the FTC Act by making false weight loss claims about acai berry products, by misrepresenting that its sites are objective news reports, and by failing to clearly and conspicuously disclose that its websites are advertisements.

### **2. Asset Preservation, Financial Statements, and Accounting**

Part of the relief sought by the FTC in this case is restitution for the victims of Defendant's fraud. When a district court determines that it is "probable that the FTC [will] prevail in a final determination of the merits," it has "a duty to ensure that the assets of the corporate defendant [are] available to make restitution to the injured customers." *World Travel*, 861 F.2d at 1031; *see also Phoenix Avatar*, 2004 WL 1746698, at \*15 (granting preliminary injunction with asset freeze in matter involving false claims about dietary supplements).

Here, Defendant has lured over a million consumers to its deceptive websites, and numerous consumers have been tricked into purchasing products due to Defendant's misrepresentations and false claims. In order to protect the possibility of restitution for these victims, the FTC seeks to preserve Defendant's assets. Particularly, Section III of the Proposed TRO would prohibit Defendant from utilizing assets except for reasonable, usual and ordinary business expenses. Additionally, Section IV would require Defendant to provide the FTC with a completed financial statement and an accounting. These provisions are necessary and appropriate to determine the amount of money lost by consumers, the amount of Defendant's ill-

gotten gains, and to prevent the concealment or dissipation of assets pending a final resolution of this litigation.

### **3. Additional Necessary Relief**

The FTC's Proposed TRO also contains provisions necessary for halting Defendant's illegal conduct and maintaining the *status quo*. Section V requires Defendant to preserve records and report new business activity. Section VI allows for expedited discovery of information relevant to a preliminary injunction hearing. Section VII requires Defendant to distribute the Order to relevant third parties. These are necessary provisions to help identify the scope of unlawful practices, other participants, and the location of assets.

### **IV. CONCLUSION**

Defendant has caused and is likely to continue to cause substantial injury to the public through its violations of the FTC Act. The FTC respectfully requests that the Court issue the proposed TRO to protect the public from further harm and to help ensure the possibility of effective final relief.

Respectfully submitted,

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DATED: April 13, 2011