

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

FEDERAL TRADE COMMISSION,)

Plaintiff,)

v.)

CHARLES DUNLEVY, individually,)

Defendant.)

Case No. 1:11-CV-1226

**STIPULATED PRELIMINARY INJUNCTION
WITH ASSET PRESERVATION
AND OTHER EQUITABLE RELIEF**

On April 14, 2011, Plaintiff, the Federal Trade Commission, filed its Complaint for Permanent Injunction and Other Equitable Relief in this matter, pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), and Motion for Temporary Restraining Order with Other Equitable Relief, and an Order to Show Cause Why a Preliminary Injunction Should Not Issue (“Motion for TRO”). On April 15, 2011, after a hearing was held on Plaintiff’s Motion for TRO, the Court entered a Temporary Restraining Order with Other Equitable Relief, and an Order to Show Cause Why a Preliminary Injunction

Should Not Issue pursuant to Rule 65 of the Federal Rules of Civil Procedure.

Defendant Charles Dunlevy (“Defendant”) received proper service of the Complaint, Summons and the papers filed in support of the FTC’s Motion for a TRO. The parties have consented to entry of this Stipulated Preliminary Injunction Order.

It is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

FINDINGS

1. This Court has jurisdiction over the subject matter of this case, and over the parties.
2. Venue lies properly with this Court.
3. There is good cause to believe that Defendant Charles Dunlevy has engaged in, and is likely to engage in the future in, acts and practices that violate Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, and that the Commission is therefore likely to prevail on the merits of this action.
4. There is good cause to believe that immediate and irreparable damage to the Court’s ability to grant effective final relief for consumers in the form of monetary restitution will occur from the sale, transfer, assignment, or other disposition or concealment by Defendant of any assets or records, unless

Defendant is preliminarily restrained and enjoined by order of this Court.

Therefore, there is good cause for the entry of the relief contained in this Preliminary Injunction, including an order preserving Defendant's assets and prohibiting the Defendant from destroying records.

5. Weighing the equities and considering the Commission's likelihood of ultimate success, the issuance of this Preliminary Injunction with asset preservation and other equitable relief is in the public interest.

6. No security is required of any agency of the United States for the issuance of a preliminary injunction. *See* Fed. R. Civ. P. 65(c).

DEFINITIONS

For purposes of this Preliminary Injunction Order ("Order"), the following definitions shall apply:

1. **"Acai Berry Product"** or **"Acai Berry Products"** shall refer to any products that are advertised, marketed, promoted, offered for sale, distributed, or sold with express or implied representations that the product contains acai berries.

2. **"Asset"** or **"Assets"** means any legal or equitable interest in, right to, or claim to, any real or personal property, including, but not limited to, "goods," "instruments," "equipment," "fixtures," "general intangibles," "inventory," "checks," or "notes" (as these terms are defined in the Uniform Commercial Code),

lines of credit, chattels, leaseholds, contracts, mail or other deliveries, shares of stock, lists of consumer names, accounts, credits, premises, receivables, funds, and all cash, wherever located.

3. **“Assisting others”** includes, but is not limited to: (a) performing customer service functions, including, but not limited to, receiving or responding to consumer complaints; (b) formulating or providing, or arranging for the formulation or provision of, any sales script or other marketing material; (c) providing names of, or assisting in the generation of, potential customers; (d) verifying, processing, fulfilling, or arranging for the fulfillment of orders; (e) performing or providing marketing, billing, or collection services of any kind, including, but not limited to, creating, hosting, or maintaining websites, or recruiting affiliates; or (f) acting as an officer or director of a business entity.

4. **“Competent and Reliable Scientific Evidence”** means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.

5. **“Covered Product”** means any dietary supplement, food, or drug, including, but not limited to, Acai Berry Products.

6. **“Defendant”** means Charles Dunlevy, and by whatever other names he may be known.)

7. **“Document” or “Documents”** means any materials listed in Federal Rule of Civil Procedure 34(a) and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, into reasonably usable form through detection devices. A draft or nonidentical copy is a separate Document within the meaning of the term.

8. **“Material”** means likely to affect a person’s choice of, or conduct regarding, goods or services.

9. **“Material connection”** means any relationship that materially affects the weight or credibility of any endorsement and that would not be reasonably expected by consumers.

10. **“Person”** means a natural person, an organization or other legal entity, including a corporation, partnership, sole proprietorship, limited liability company, association, cooperative, or any other group or combination acting as an entity.

11. **“Plaintiff”** means the Federal Trade Commission (“Commission” or “FTC”).

I. PROHIBITED BUSINESS ACTIVITIES

IT IS THEREFORE ORDERED that Defendant, and any officers, agents, servants, employees and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, in connection with the advertising, marketing, promotion, offering for sale, or sale of any Covered Product are hereby restrained and enjoined from:

A. Misrepresenting, or assisting others in misrepresenting, any material fact, expressly or by implication, including, but not limited to, that:

1. Any website or other published material is an objective news report;
2. Objective news reporters have performed independent tests of any product, service, or program, including, but not limited to a Covered Product;
3. Independent tests demonstrate the effectiveness of any product, service, or program featured in any website or other published material, including, but not limited to, a Covered Product; and
4. Comments posted on websites express the views of independent consumers;

B. Failing to disclose, or disclose adequately:

1. Any material connection, when one exists, between any user or endorser of any product, service, or program and Defendant or any other person manufacturing, advertising, labeling, promoting, offering for sale, selling or distributing such product, service, or program; and

2. If applicable, that the content of any website or other published material has not been authored by an objective journalist, but is in fact an advertisement placed for compensation.

II. PROHIBITED REPRESENTATIONS ABOUT COVERED PRODUCTS

IT IS FURTHER ORDERED that Defendant, and any officers, agents, servants, employees and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, in connection with the advertising, marketing, promotion, offering for sale, or sale of any Covered Product, are restrained and enjoined from making, or assisting others in making, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any representation that such product causes weight loss or rapid weight loss and any other representation about the health

benefits, performance, or efficacy of such product, unless the representation is non-misleading, and, at the time of making such representation, Defendant possesses and relies upon Competent and Reliable Scientific Evidence.

III. ASSET PRESERVATION

IT IS FURTHER ORDERED that:

A. Defendant, and any officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, are hereby restrained and enjoined from directly or indirectly selling, transferring, alienating, liquidating, encumbering, pledging, loaning, assigning, concealing, dissipating, converting, withdrawing or making any other disposition of any assets or any interest therein, wherever located, including any assets outside the territorial United States, that are owned, controlled or held by, or for the benefit of, in whole or in part, Defendant, or in the actual or constructive possession of Defendant.

B. The assets affected by this Section shall include both existing assets and assets acquired after the effective date of this Order.

C. Notwithstanding Section III.A above, Defendant may withdraw, transfer, encumber, or otherwise dissipate after-acquired assets up to \$5,000.00 prior to the expiration of this Order to pay actual, ordinary and necessary living expenses, including attorneys' fees, that Defendant reasonably incurs. In addition, by prior written agreement with counsel for the Commission, or prior approval by the Court, Defendant may withdraw, transfer, encumber, or otherwise dissipate additional assets for those purposes.

D. To the extent that Defendant withdraws, transfers, encumbers, or otherwise dissipates assets pursuant to Section III.C of this Order, he shall provide an accounting of his expenses to counsel for the Commission no later than the second business day of each calendar month.

IV. FINANCIAL REPORTS AND ACCOUNTING

IT IS FURTHER ORDERED that, to the extent not already produced, and in no event later than five (5) calendar days after entry of this Order, Defendant shall provide to counsel for the Commission:

A. A completed financial statement, in the form previously attached to the Temporary Restraining Order and identified as Attachment A for individuals, signed under penalty of perjury, and Attachment C (Consent to Release Financial Information). The financial statement shall include assets held outside the territory

of the United States, shall be accurate as of the date of the entry of this Order, and shall be verified under oath. Defendant shall attach to the completed financial statement copies of all local, state, provincial, and federal income and property tax returns, with attachments and schedules, as called for by the instructions to the financial statement; and

B. A detailed accounting of:

1. the names of all products advertised, marketed, promoted, offered for sale, distributed, or sold since January 1, 2008;

2. gross revenues and net profits (in U.S. Dollars) obtained from the advertising, marketing, or sale of each product identified in Subsection IV.B.1. above, from inception of the advertising, marketing, or sale of that product through the date of entry of this Order; and

3. the name, address, telephone number, e-mail address, website address, and contact person of each entity or person that: (i) supplied, manufactured, formulated, or created any product that is advertised, marketed, promoted, offered for sale, distributed, or sold by or on behalf of Defendant, (ii) provided any order fulfillment services of any kind, including, but not limited to, drop shipping, mailing, and/or distributing products, for or

on behalf of Defendant, and (iii) paid Defendant, whether directly or indirectly, related to Defendant's advertisement of any products.

V. REMOVAL OF WEBSITES

IT IS FURTHER ORDERED that, immediately upon service of the Order upon Defendant, Defendant and any officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, and any other person or entity served with a copy of this Order, to the extent not already completed, shall immediately take whatever action is necessary to ensure that any website used by Defendant for the advertising, marketing, promotion, offering for sale, or sale of Acai Berry Products, including, but not limited to, the websites located at health9news.com, acai-berry-trial-offers.com, acai-trial-offers.com, and colon-cleanse-trial-offers.com, shall be removed from the Internet.

VI. PRESERVATION OF RECORDS AND REPORT OF NEW BUSINESS ACTIVITY

IT IS FURTHER ORDERED that Defendant and any officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, are hereby restrained and enjoined from:

A. Failing to create and maintain books, records, accounts, bank statements, current accountants' reports, general ledgers, general journals, cash receipts ledgers, cash disbursements ledgers and source documents, documents indicating title to real or personal property, and any other data which, in reasonable detail, accurately, fairly, and completely reflect Defendant's income(s), and the disbursements, transactions, dispositions, and uses of Defendant's assets; and

B. Destroying, erasing, mutilating, concealing, altering, transferring, or otherwise disposing of, in any manner, directly or indirectly, any documents, including electronically-stored materials, that relate in any way to: the business practices or business or personal finances of Defendant; or the business practices or finances of entities directly or indirectly under the control of Defendant; and

C. Creating, operating, or exercising any control over any business entity, whether newly-formed or previously inactive, including any partnership, limited partnership, joint venture, sole proprietorship, or corporation, without first providing the Commission with a written statement disclosing: (1) the name of the business entity; (2) the address, telephone number, e-mail address, and website address of the business entity; (3) the names of the business entity's officers, directors, principals, managers, and employees; and (4) a detailed description of the business entity's intended activities.

VII. DISTRIBUTION OF ORDER BY DEFENDANT

IT IS FURTHER ORDERED that Defendant shall immediately provide a copy of this Order to any corporations, subsidiaries, affiliates, divisions, directors, officers, agents, partners, successors, assigns, employees, attorneys, agents, representatives, sales entities, sales persons, telemarketers, independent contractors, and any other persons in active concert or participation with them. Within ten (10) calendar days from the date of entry of this Order, Defendant shall serve on the Commission an affidavit identifying the name, title, address, telephone number, date of service, and manner of service of each person or entity Defendant served with a copy of this Order in compliance with this provision.

VIII. SERVICE OF ORDER

IT IS FURTHER ORDERED that copies of this Order may be served by any means, including facsimile transmission, electronic mail, personal or overnight delivery, or by U.S. Mail, by agents and employees of the Commission, by any law enforcement agency, or by private process server, upon any person that may have possession or control of any document of Defendant, or that may be subject to any provision of this Order.

IX. CONSUMER REPORTING AGENCIES

IT IS FURTHER ORDERED that, pursuant to Section 604(a)(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(1), any consumer reporting agency may furnish a consumer or credit report concerning Defendant to the Commission at the Commission's request.

X. DURATION OF THE PRELIMINARY INJUNCTION

IT IS FURTHER ORDERED that, the Preliminary Injunction granted herein shall continue until a final judgment and order is issued in this matter.

XI. CORRESPONDENCE WITH AND NOTICE TO PLAINTIFF

IT IS FURTHER ORDERED that, for purposes of this Order, all correspondence and pleadings to the Commission shall be addressed to:

Robin L. Rock, Esq.
Federal Trade Commission
225 Peachtree St., NE, Suite 1500
Atlanta, GA 30303

SO STIPULATED AND AGREED:

FOR PLAINTIFF

FEDERAL TRADE COMMISSION:

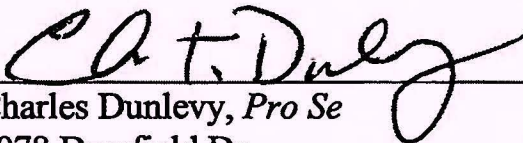


Date: 4-26-11

Robin L. Rock
Ga. Bar No.629532
Federal Trade Commission
Southeast Regional Office
225 Peachtree St., NE, Suite 1500
Atlanta, GA 30303
Tel: 404-656-1368; Fax: 404-656-1379
Email: rrock@ftc.gov

FOR DEFENDANT

CHARLES DUNLEVY:



Date: 4/25/11

Charles Dunlevy, *Pro Se*
9978 Deerfield Dr.
Irwin, PA 15642-2685

IT IS SO ORDERED, this 2nd day of May, 2011, at 3:00p.m.

/s/Thomas W. Thrash

Thomas W. Thrash, Jr.
United States District Judge