

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

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FEDERAL TRADE COMMISSION,

Plaintiff,

v.

CENTRAL COAST NUTRACEUTICALS, INC.,
a California corporation,

iLIFE HEALTH AND WELLNESS, LLC,
a Delaware limited liability company,

SIMPLY NATURALS, LLC, a Delaware limited
liability company,

FIT FOR LIFE, LLC, a Delaware limited
liability company,

HEALTH AND BEAUTY SOLUTIONS LLC,
a Delaware limited liability company,

GRAHAM D. GIBSON, and

MICHAEL A. MCKENZY,

Defendants.

Case No.

10C 4931

JUDGE NORGLÉ

MAGISTRATE JUDGE SCHENKIER

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

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I. INTRODUCTION

The Federal Trade Commission asks that the Court bring an immediate halt to a massive Internet marketing scheme that over the last several years has defrauded hundreds of thousands of consumers. Central Coast Nutraceuticals, Inc. (“CCN”) advertises bogus products such as weight loss and cancer prevention pills on the Internet, claiming they are available with “risk-free trial offers.” Unfortunately, the product claims are false and consumers learn too late that a “trial” of defendants’ products is anything but “risk-free” – CCN ends up charging consumers for the “free” trial and also enrolling them in a continuity program under which it continues to send the pills and charge consumers for them.

This enterprise took in \$30 million or more from consumers in 2009 alone. Since 2007, victimized consumers have flooded law enforcement agencies and the Better Business Bureau (“BBB”) with more than 2800 complaints against CCN. In 2009, the BBB singled out CCN by name when listing fake “free trial offers” as one of its “Top 10 Scams and Rip-Offs of 2009.”¹

The FTC is specifically challenging the central product claims CCN makes for two of its products. First, CCN claims on its websites that AcaiPure, a supposed acai berry weight loss supplement, causes rapid and substantial weight loss, including up to 30 pounds in as little as four weeks. An expert states that there is no scientific evidence whatsoever to suggest that these pills could cause any weight loss. Second, CCN has claimed that Colopure, a reputed colon cleanser, helps to prevent colon cancer. Once again, an expert states that this product is at best a laxative, and nothing in it would cure or prevent colon cancer. CCN relies on false celebrity endorsements, supposedly from celebrities such as Oprah Winfrey and Rachael Ray, and phony consumer testimonials to reinforce many of its false claims about its products.

¹ PX 1, Menjivar Dec. Atts. OO, PP.

CCN tries to reduce any skepticism consumers might have for these products by stressing the “free trial” at a nominal cost. Consumers believe that these “free trials” amount to free samples. But after consumers enter their credit card numbers to pay the nominal fee, they soon learn that CCN’s “risk-free” offer is a fraud, and that it is all but impossible to avoid paying at least \$39.95 for the full price of at least one bottle of these pills. The true terms of these offers are buried in the fine print on CCN’s websites, or disclosed for the first time only on the invoice that comes with the pills. Perhaps most egregiously, CCN has routinely even charged consumers who complied with all of its onerous terms.

CCN’s illegal tactics are not limited to charging consumers for the “free trial” that consumers would never have requested if they knew CCN’s actual terms. In addition, CCN has also neglected to inform consumers that it will continue to send monthly bottles of pills – and keep billing consumers’ credit cards until consumers manage to contact CCN and persuade it to let them cancel. Thus, simply by agreeing to pay defendants a nominal shipping fee for a “risk free trial,” many consumers have incurred hundreds of dollars in unauthorized charges.

It is not surprising that CCN has attracted the attention of the BBB and law enforcement. The BBB first began forwarding significant numbers of complaints to CCN in May 2008 and, by late 2008, the BBB was receiving dozens of complaints every day about CCN. CCN told the BBB it would not change its offending conduct. Similarly, the BBB’s National Advertising Division (“NAD”) challenged CCN’s claims that its colon cleansing product would help prevent colon cancer. But after promising in May 2009 to discontinue the cancer claims, CCN simply changed the product’s name and continued to make the same claims for another year. In June 2009, CCN agreed to an order with the Arizona Attorney General that should have ended at least

the deceptive free trial offer and continuity program conduct. However, CCN continued its practices in direct and stark violation of the terms of that state court order.

Of course thousands of victimized consumers have complained to their credit card companies about these charges. In response, Visa began cutting off CCN whenever it was able to locate one of the credit card processing accounts CCN had with a bank. Recently, and apparently because it was having difficulty finding banks to process credit cards, CCN made changes to its trial offer practices and removed some false product claims. CCN continues to make false weight loss claims for its AcaiPure product, however, and to impose conditions on its trial offers that are only disclosed on the post-sale invoice.

The Commission's evidence of these law violations is overwhelming. The Commission has submitted, along with its motion, declarations from two former CCN employees. Both employees were customer service representatives with detailed knowledge of the thousands of angry consumers who called CCN each week to complain about unauthorized charges. The Commission has also submitted declarations from nearly twenty consumer victims describing CCN's deceptive practices. Corroborating the victims' accounts are the results of several undercover purchases made by FTC investigators. Also included are declarations from two experts, and representatives of the BBB, Visa, Inc., Oprah Winfrey, and Rachael Ray, detailing CCN's deception.

Thus, to bring an immediate halt to defendants' ongoing illegal practices and to preserve assets for eventual restitution to consumers who CCN has victimized since 2007, the Commission asks that the Court issue an *ex parte* temporary restraining order ("TRO") that includes a freeze of defendants' assets and the appointment of a receiver over the corporate defendants. The requested relief is required to prevent continued injury to consumers, the

destruction of evidence, and the dissipation of assets, thereby preserving the Court's ability to provide effective final relief to the hundreds of thousands of consumers defendants have victimized.

II. DEFENDANTS

Defendants are five interrelated companies and the two individuals who control them – Graham D. Gibson and Michael A. McKenzy. The main corporate defendant is CCN. Gibson and McKenzy have set up four other corporations – iLife Health and Wellness, LLC, Simply Naturals, LLC, Fit for Life, LLC, and Health and Beauty Solutions LLC – to act as “fronts” in helping CCN to avoid attracting further law enforcement attention and to allow it to circumvent Visa's efforts to shut down CCN accounts with excessive chargeback activity. CCN is a California corporation, while the other companies are incorporated in Delaware. All five corporations operate from the same business premises in Phoenix, Arizona, sharing employees, finances, and business practices. Gibson and McKenzy own, operate, and manage the corporate defendants. Because defendants operate the corporate entities as a common enterprise, they all are jointly and severally liable for their various law violations. *See FTC v. Bay Area Business Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005); *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1173, 1175 (1st Cir. 1973); *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1116 (S.D. Cal. 2008).

This matter is properly before the Court. The Court has subject matter jurisdiction over the FTC Act claims pursuant to 28 U.S.C. §§ 1331, 1337(a) and 1345. This Court also has personal jurisdiction over the defendants. Section 13(b) of the FTC Act provides that “process

may be served on any person, partnership, or corporation wherever it may be found.”² Courts have consistently held that, since process can be served anywhere in the United States under the FTC Act, personal jurisdiction is proper anywhere in the United States as well.³ The defendants in this case clearly have established the minimum contacts with the United States necessary to give rise to personal jurisdiction.⁴

III. DEFENDANTS’ ILLEGAL BUSINESS PRACTICES

CCN relies on false claims about what its products can achieve, as well as hidden terms and conditions meant to deceive consumers into agreeing to supposed risk-free trial offers. In fact, consumers not only end up being charged full price for what they believed was simply a free sample, but also are signed up for costly membership programs and repeated unauthorized charges.

A. False and Unsubstantiated Product Claims

² Rule 4(k)(1) of the Federal Rules of Civil Procedure provides that valid service of process is sufficient to establish personal jurisdiction. Courts have uniformly relied upon this Rule to interpret statutes which authorize nationwide service of process as also authorizing nationwide personal jurisdiction. *See, e.g., Action Embroidery Corp. v. Vanguard Inds. East, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004) (Clayton Act); *Fitzsimmons v. Barton*, 589 F.2d 330, 332 (7th Cir. 1979) (securities laws).

³ *FTC v. Cleverlink Trading Ltd., et al.*, No. 05-2889, 2006 U.S. Dist. LEXIS 45244, at *14-15 (N.D. Ill. June 19, 2006); *FTC v. Bay Area Bus. Council, Inc., et al.*, No. 02 C 5762, 2003 U.S. Dist. LEXIS 3865, at *6 (N.D. Ill. April 30, 2003) (“When a federal statute provides for nationwide service of process, as the FTC Act does, personal jurisdiction may be obtained over any defendant having minimum contacts with the United States as a whole.”).

⁴ Venue is also proper in the Northern District of Illinois. Pursuant to the FTC Act, an action may be brought in any district where a corporation or person “resides or transacts business.” 15 U.S.C. § 53(b). Here, the defendants have transacted business in this district, as evidenced by the fact that they have received more than 67,000 calls from Illinois consumers, and the FTC has received at least 73 complaints about the defendants from Illinois consumers. PX 1, Menjivar Dec. ¶¶ 43, 56. Moreover, because personal jurisdiction is proper in this matter, it necessarily follows that venue is proper pursuant to 28 U.S.C. § 1391(c), which provides that venue is proper in any judicial district in which a defendant corporation is subject to personal jurisdiction.

The claims made for CCN products are central to consumers' decisions to try the "free trial." These claims are utterly false.

AcaiPure. CCN has marketed AcaiPure throughout the Internet as a scientifically proven weight loss product that will achieve rapid and substantial weight loss, with no side effects. These claims are simply false and there is no evidence to support them.

CCN's weight loss claims have always been the featured selling point for AcaiPure. At the top of many of its websites until recently, under a large "DO YOU QUALIFY" heading, CCN has included a questionnaire asking consumers: "How much weight would you like to lose?" and "How quickly would you like to lose weight?"⁵ A drop down menu appeared for consumers to transmit their responses, with possible answers including: "more than 20 lbs," "in less than 1 month." Regardless of their answers, all consumers were congratulated for being "a perfect candidate" for AcaiPure.⁶

CCN furthers its bogus weight loss claims by employing false consumer testimonials and celebrity endorsements all over its websites.⁷ For example, the FAQs on the AcaiPure websites state that "most of our customers report weight loss anywhere from 10-25 lbs in the first

⁵ PX 1, Menjivar Dec. Atts. A, C; PX 2, Krause Dec. Att. A.

⁶ PX 1, Menjivar Dec. Att. Q.

⁷ CCN employs false testimonials for many of its products, in addition to AcaiPure. *See, e.g.*, PX 1, Menjivar Dec. Atts. A, B, C, EE (AcaiPure), D, E, F, G (Colopure), H, I, J, K (Celebrity Smile); PX 2, Krause Dec. Atts. A (AcaiPure), F (Colopure), K (Celebrity Smile); PX 3, Tyndall Dec. Atts. A (Avela), B (Cholestapro), C (Green Tea Extreme); PX 23, Castellani Dec. ¶ 3 (influenced by Celebrity Smile testimonials); PX 26, Croox-Magat Dec. ¶ 5 (same); PX 30, Homewood Dec. ¶ 5 (influenced by Celebrity Smile testimonials); PX 32, Lanning Dec. ¶ 3 (influenced by Colopure testimonials); PX 39, Wooten Dec. ¶ 5 (same); PX 40, Green Dec. ¶ 3 (influenced by AcaiPure and Colopure testimonials).

month.”⁸ CCN prominently features supposed consumers with dramatic before and after photos, making claims such as “I have lost 30lbs in the last 4 weeks,” or “I lost 27 pounds with AcaiPure!”⁹ In fact, CCN uses stock photos available on the Internet as the photos for its testimonials¹⁰ and manipulates the supposed hometowns for the testimonialists shown to match the location of the consumer viewing the website.¹¹

Until recently, CCN employed various other deceptive means to mislead consumers. For example, the order pages on AcaiPure’s website contained the following faux “warning” at the top of the page:

“WARNING! AcaiPure Is Fast Weight Loss That Works. It Was Not Created For Those People Who Only Want To Lose A Few Measly Pounds. AcaiPure was created to help you achieve the incredible body you have always wanted ...USE WITH CAUTION! Major weight loss in short periods of time may occur.” (Emphasis in original.)¹²

⁸ PX 1, Menjivar Dec. Atts. A, B, C, EE; PX 2, Krause Dec. Att. A. *See also* PX 26, Croox-Magat Dec. ¶ 5 (“The website stated that I could lose up to 20 pounds.”).

⁹ PX 1, Menjivar Dec. Atts. A, B, C, EE; PX 2, Krause Dec. Att. A.

¹⁰ PX 1, Menjivar Dec. ¶ 24, Att. T. For example, a former contestant on the NBC television show “The Biggest Loser” has alleged that CCN used before and after photographs of her in its Internet advertisements, although she is identified by a different name in the CCN advertisement. *See* PX 21, *Eisenbarth v. FWM Laboratories, Inc., et al.*, No. 09-cv-3525 (D. Minn.) (Amended Complaint filed Apr. 6, 2010, Att. B).

¹¹ PX 11, Steel Dec. ¶ 38 (some consumers told her they saw testimonial from person from their hometown but later, when those consumers went back to the same website from a different computer, they saw the same person with the same photo, same name, and same testimonial, but with a different city and state listed); PX 32, Lanning Dec. ¶ 3 (“I was surprised that someone from my own hometown (Findlay, Ohio) had endorsed Colopure.”); PX 39, Wooten Dec. ¶ 5 (“I was surprised and encouraged that someone from my hometown (Paxton, Illinois) had used the product and had lost weight.”); PX 40, Green Dec. ¶ 3 (testimonial from someone from declarant’s hometown, Scottsbluff, Nebraska. “Seeing someone from Scottsbluff stating that the products (AcaiPure and Colopure) worked for her made me feel more secure that the products were legitimate, and influenced my decision....”).

¹² PX 1, Menjivar Dec. Att. A.

In addition, CCN sometimes also used a “virtual spokesperson” – an image integrated into the websites appearing over the text and other content on the website – to talk about the purported benefits of AcaiPure and to reinforce CCN’s weight loss claims. The virtual spokesperson explained that AcaiPure “contains a unique proprietary blend of nutrients scientifically proven to help people lose up to five times their body fat, compared to just a traditional diet and exercise program by itself” and “enables rapid weight loss in a fiercely short time period, without any unwanted side effects, starvation, impossible to follow diet schemes or unnecessary fatigue.”¹³ The spokesperson also made a direct claim that these assertions are backed by established medical research, asserting that AcaiPure was proven by “double-blind, placebo-controlled weight loss studies from the medical establishment.”¹⁴

Similarly, CCN used images and purported quotes from celebrities such as Oprah Winfrey and Rachael Ray to make consumers believe they endorse AcaiPure,¹⁵ when in fact they do not.¹⁶ Even after Oprah Winfrey sued CCN to stop the false claims,¹⁷ the company

¹³ PX 1, Menjivar Dec. Atts. P (CD), Q (transcript).

¹⁴ *Id.*

¹⁵ PX 1, Menjivar Dec. Atts. A (Rachael Ray), C (Rachael Ray and cover of “O” magazine); PX 2, Krause Dec. Att. A (Rachael Ray); PX 11, Steel Dec. ¶ 40 (saw endorsements of Oprah Winfrey and Rachael Ray on websites); PX 13, Lorimer Dec. ¶ 11 (told CCN that websites gave impression that Oprah Winfrey and Rachael Ray endorsed CCN products); PX 24, Cimino Dec. ¶ 3 (celebrity endorsements); PX 32, Lanning Dec. ¶ 3 (Rachael Ray endorsement); PX 38, Williams Dec. ¶ 3 (Oprah Winfrey, Dr. Oz, and media endorsements); PX 41, Quong Dec. ¶ 4 (Rachel Ray endorsement).

¹⁶ PX 15, Pattison Dec. ¶¶ 8-11 (Oprah Winfrey has never endorsed or approved AcaiPure, any other acai berry product by name, nor the use of her image, name, or trademarks for such products); PX 16, Ray Dec. ¶¶ 7-8 (Rachael Ray never used, endorsed, or approved AcaiPure or any other acai berry product, nor the use of her image or name for such products).

¹⁷ *Dr. Mehmet Oz; ZO CO I, LLC; OW Licensing Co., LLC; and Harpo, Inc., v. FWM Laboratories, Inc., et al.*, 09 CV 7297 (S.D.N.Y. August 19, 2009). Despite prominently using the

(continued...)

continued using her image on numerous AcaiPure websites for at least eight months.¹⁸ Many consumers state that they trusted the product because of Oprah’s “endorsement.”¹⁹

There is no medical evidence whatsoever to show that acai berries or that AcaiPure in particular can produce weight loss for people. According to weight loss expert Dr. Robert F. Kushner, a professor at Northwestern University Feinberg School of Medicine and the Clinical Director of the Northwestern Comprehensive Center on Obesity in Chicago, none of the ingredients in AcaiPure, separately or together, could possibly cause the type of rapid and substantial weight loss that CCN claims.²⁰ Moreover, Dr. Kushner states there have been no double-blind, placebo-controlled weight loss studies of any kind conducted on either acai berries or AcaiPure.²¹ Dr. Kushner concludes that it would be impossible to lose any significant amount of weight by taking a product which supposedly works by “stimulating the digestive track,” as CCN claims for AcaiPure.²²

¹⁷(...continued)

images of these and other celebrities on its websites, some of CCN’s websites include fine print footnotes (which are not tied to any text) that the celebrity images shown “were found on public websites and believed to be in (sic) public domain,” and that “Celebrities neither endorse nor sponsor any of the products and/or services.” As evidenced by the substantial number of consumer complaints, consumers’ overall net impression is that the celebrities shown have been endorsing CCN’s products. In short, the fine print does nothing to cure the deception.

¹⁸ PX 15, Pattison Dec. ¶ 6, Att. A (AcaiPure website still using image on April 8, 2010).

¹⁹ At least one AcaiPure website continues to employ a picture of a celebrity next to the headline “Celebrities Love Acai.” PX 1, Menjivar Dec. Att. B.

²⁰ PX 9, Kushner Dec. ¶ 9.

²¹ PX 9, Kushner Dec. ¶ 14.

²² PX 9, Kushner Dec. ¶ 19.

Colopure. CCN also has made false claims about its colon cleansing products, most recently Colopure. CCN marketed Colopure as a cancer prevention supplement.²³ In reality, it is nothing but a laxative.²⁴ In fact, CCN's Colopure pill is exactly the same as its AcaiPure pill, except that Colopure does not contain the acai berry extract.²⁵ Of course, CCN instructed its employees never to tell consumers that Colopure and AcaiPure are essentially the same product.²⁶ These claims appear to have stopped only very recently.

CCN first attempted to scare consumers about the dangers of colon cancer by featuring alarming colon cancer statistics prominently at the top of its websites:

- “**Colon cancer** is currently the second leading cancer killer in the United States, with **60,000 Americans** expected to die from the disease this year;”
- “An estimated **150,000 people in America** will be diagnosed with colorectal cancer this year, and while progress is being made to prevent and treat the disease, tragically more than **57,000 will die** from it;”
- “**Colon cancer** is one of the deadliest diseases to affect Americans . . . The Early Show medical correspondent Dr. Emily Senay reports that an average of **57,000**

²³ PX 1, Menjivar Dec. Atts. D, F.

²⁴ PX 10, Miller Dec. ¶ 25.

²⁵ See PX 1, Menjivar Dec. Atts. V, W; PX 11, Steel Dec. ¶ 41; PX 12, Roark Dec. ¶ 33.

²⁶ PX 11, Steel Dec. ¶ 41 (“Management told us that Colopure and Acaipure . . . were essentially the same pill, but that we were never to tell consumers this.”); PX 12, Roark Dec. ¶ 33 (“McKenzy told us that Colopure and AcaiPure . . . were essentially the same pill, but that we were never to tell consumers this.”).

Americans die each year from colon cancer . . . when colon cancer is caught late, it is survivable only **8 percent** of the time.”²⁷

(Emphases in original.) CCN then warned consumers, “**Attention:** you could have up to 25 pounds of excess weight and toxic buildup in your system right now! This could be . . . a breeding ground for nasty bacteria inside your intestines.”²⁸ (Emphasis in original.) In sum, the first thing consumers saw when visiting the Colopure website was a list of shocking and frightening colon cancer statistics, essentially conveying that consumers faced a high risk of contracting, or even dying from, the deadly disease.

CCN then juxtaposed these assertions with claims about the virtues of Colopure in cleansing the colon, including:

- “America’s #1 Colon Cleanse”
- “The purest way to *detoxify* your body and *cleanse* your entire system”
- “Remove toxic buildup”
- “Cleanse your entire system”
- “Detoxify your organs”
- “It breaks down and removes toxic waste matter which may have been stuck in the folds and wrinkles of your digestive system for years and years.”²⁹

(Emphases in original.) The necessary conclusion was that using Colopure to clean out the toxins in your digestive tract would help prevent colon cancer.

²⁷ PX 1, Menjivar Dec. Atts. D, F.

²⁸ *Id.*

²⁹ *Id.*

CCN continued to make its cancer prevention claims long after promising NAD that it would end them.³⁰ NAD, a self-regulatory agency consisting of experts in advertising review, concluded that CCN's advertisements claimed that its product, Colotox (the predecessor to Colopure) would prevent colon cancer. NAD challenged CCN to provide substantiation for the cancer prevention claims.³¹ To settle NAD's action – and presumably avoid having NAD refer the matter to the FTC – CCN promised to permanently discontinue all statements regarding cancer “to avoid any misperception that Colotox helps prevent colon cancer.”³² CCN simply turned around and changed Colotox's name to Colopure, created new websites, and continued to make the same cancer prevention claims.³³

CCN's claims about Colopure are blatantly false. According to cancer expert Dr. Denis R. Miller, currently the Therapeutic Area Leader of Oncology-Hematology at PAREXEL International Corporation, Colopure is merely a laxative.³⁴ Indeed, Dr. Miller says there is no competent and reliable scientific evidence to support the claim that Colopure, or any of its ingredients, or that colon cleansing in general, diminishes the risk of developing colon cancer.³⁵

³⁰ PX 18, NAD Decision (May 22, 2009) at 17 (CCN “advised NAD that it was permanently discontinuing certain claims including all statements regarding cancer to avoid any misperception that Colotox helps prevent colon cancer.” See PX 1, Menjivar Dec. Atts. D, F (website captures February through April 2010).

³¹ PX 18, NAD Decision (May 22, 2009) at 1.

³² PX 18, NAD Decision (May 22, 2009) at 2.

³³ Colopure and Colotox contain the exact same ingredients and CCN's claims regarding the supposed cancer prevention properties of both products were identical. See PX 1, Menjivar Dec. Atts. D, F, W; PX 12, Roark Dec. Att. C; PX 18, NAD Decision (May 22, 2009) at 1, 17.

³⁴ PX 10, Miller Dec. ¶ 25.

³⁵ PX 10, Miller Dec. ¶ 45.

To the contrary, Dr. Miller concludes that the ingredients of Colopure may have potential harmful side effects.³⁶

B. Deceptive Trial Offers

CCN has carefully crafted its programs to convince consumers that they have little to lose by giving its products a try, claiming that consumers can get a “free” or “risk free” trial of CCN’s products by entering their credit or debit card numbers to pay a nominal fee, typically \$1.95 to \$4.95, to cover shipping and handling.³⁷ Consumers regularly believed that this was, in essence, a free sample.³⁸ These trials have been anything but “free” or “risk free.” Instead, CCN almost universally charged consumers for much more than consumers had anticipated, including tens of millions of dollars that consumers never authorized.

³⁶ PX 10, Miller Dec. ¶ 43 (each of Colopure’s eight ingredients have “adverse side effects which would be compounded seven-fold in that all but one of these compounds is a laxative . . . Chronic use of laxatives to treat constipation may result in loss of bowel function, with exacerbation of constipation, bowel obstruction, and even death.”).

³⁷ PX 1, Menjivar Dec. Atts. A, B, C, EE (AcaiPure), D, E, F, G (Colopure), H, K (Celebrity Smile), L, N (Gloskin); PX 2, Krause Dec. Atts. A (AcaiPure), F (Colopure), K (Celebrity Smile), P (Gloskin); PX 3, Tyndall Dec. Atts. A (Avela), B (Cholestapro), C (Green Tea Extreme).

³⁸ *See, e.g.*, PX 23, Castellani Dec. ¶ 3 (“free sample” displayed prominently in pop-up window); PX 25, Cluff Dec. ¶ 6 (believed she could keep “free trial” based on website); PX 27, Roman Dec. ¶ 6 (“I had nothing to lose except the minimal shipping fee.”); PX 28, Dentler Dec. ¶ 3 (believed would only pay S&H for month’s supply of tablets); PX 30, Homewood Dec. ¶ 6 (did not realize he could be charged for more than S&H); PX 34, Powell Dec. ¶ 3 (never would have tried product if knew she would have to return or pay full price); PX 36 Stockton Dec. ¶ 11 (nothing on website saying had to return product or be charged); PX 37, Tyma Dec. ¶ 3 (would not have signed up for offer if she knew she had to pay more than S&H); PX 38, Williams Dec. ¶¶ 4, 6 (nothing on website saying had to return product or be charged); PX 39, Wooten Dec. ¶ 6 (believed only had to pay S&H); PX 40, Green Dec. ¶ 4 (believed products were hers to keep at no cost beyond S&H); PX 41, Quong Dec. ¶ 4 (believed product was hers to keep at no additional cost).

The words “free trial” were posted prominently all over CCN’s websites in a big, bold font.³⁹ For example, the AcaiPure website trumpets its “Free Trial” offer in big and colorful letters in at least four places on its home page.⁴⁰ The AcaiPure website touts at the top center, in the largest, brightest font that appears on the page, “**Limited Time FREE Trial,**” with “(Pay S&H)” in small font underneath.⁴¹ In other places, CCN has stated, “Claim your **FREE TRIAL** Bottle of AcaiPure today!,” “Claim your *FREE* Trial Offer Now!,” “Claim your **FREE TRIAL,**” and “Where do we send your **FREE** Trial?”⁴² (Emphases in original.) CCN’s virtual spokesperson also appeared in the corner of its websites to reinforce the “risk-free” nature of the trial product:

we’re not even going to ask you to pay for it . . . [w]e’ll send you a risk-free 30-day supply . . . absolutely free of charge . . . without any risk. All we ask for is you pay a small shipping and handling fee of \$4.95. . . . Be quick. . . . We can’t guarantee this free 30-day supply will still be available next time you visit us.⁴³

CCN’s order page again emphasized the nominal cost and risk-free nature of the trial, stating: “AcaiPure Risk Free Trial;” “Send my risk free trial now for only \$1.95;” “The total charge for your trial is \$1.95.”⁴⁴

³⁹ PX 1, Menjivar Dec. Atts. A, B, C, EE (AcaiPure), D, E, F (Colopure), H, K (Celebrity Smile), L, N (Gloskin); PX 2, Krause Dec. Atts. A (AcaiPure), F (Colopure), K (Celebrity Smile), P (Gloskin); PX 3, Tyndall Dec. Atts. A (Avela), B (Cholestapro), C (Green Tea Extreme).

⁴⁰ PX 1, Menjivar Dec. Atts. A, B, C, EE.

⁴¹ PX 1, Menjivar Dec. Att. A.

⁴² PX 1, Menjivar Dec. Atts. A, B, C, EE; PX 2, Krause Dec. Att. A.

⁴³ PX 1, Menjivar Dec. Atts. P, Q.

⁴⁴ PX 1, Menjivar Dec. Atts. C, EE; PX 2, Krause Dec. Att. A.

Unfortunately for consumers, there was nothing remotely “free” or “risk free” about CCN’s offers. Consumers who believed they were receiving a free sample of CCN’s product were instead charged the full price for the trial supply – typically between \$39.95 and \$59.95.⁴⁵ The “catch” in this plan was that it was almost impossible to avoid being charged the full price for the free trial. CCN buried key terms of the trial in fine print at the bottom of the order page.⁴⁶ These were also hidden in the legal “terms and conditions” section of the website.⁴⁷ Other key aspects were only disclosed to consumers on the invoice they received after they had received the pills.⁴⁸ Consumers typically did not learn that they would be charged for the supposed “free trial” until they saw the bill on their credit or debit card statements.⁴⁹

⁴⁵ See, e.g., PX 23, Castellani Dec. ¶ 7 (Celebrity Smile); PX 25, Cluff Dec. ¶ 10 (AcaiPure); PX 27, Roman Dec. ¶ 10 (Celebrity Smile); PX 30, Homewood Dec. ¶ 6 (Celebrity Smile); PX 34, Powell Dec. ¶ 12 (Colopure); PX 36 Stockton Dec. ¶ 11 (Colopure); PX 37, Tyma Dec. ¶ 9 (Celebrity Smile); PX 38, Williams Dec. ¶ 6 (AcaiPure and Colopure); PX 39, Wooten Dec. ¶ 13 (Colopure); PX 41, Quong Dec. ¶ 9 (AcaiPure).

⁴⁶ PX 1, Menjivar Dec. Atts A, C, EE (AcaiPure), D, F (Colopure), H, I, J, K (Celebrity Smile), L, N (Gloskin); PX 2, Krause Dec. Atts. B (AcaiPure), H (Colopure), L (Celebrity Smile); PX 3, Tyndall Dec. Att. B (Cholestapro); PX 11, Steel Dec. ¶¶ 10-11; PX 12, Roark Dec. ¶¶ 9-10.

⁴⁷ PX 1, Menjivar Dec. Atts. A, C, E (AcaiPure), D, E, F, G (Colopure), H, I, J, K (Celebrity Smile), L, M, N, O (Gloskin); PX 2, Krause Dec. Atts. A (AcaiPure), F (Colopure), K (Celebrity Smile), P (Gloskin); PX 3, Tyndall Dec. Atts. A (Avela), B (Cholestapro), C (Green Tea Extreme); PX 11, Steel Dec. ¶¶ 10-11; PX 12, Roark Dec. ¶¶ 9-10.

⁴⁸ PX 22 Boedecker Dec. ¶ 13 (CCN representative said terms and conditions were in “fine print” on shipping insert); PX 30, Homewood Dec. ¶ 6 (upon reading shipping insert, “[t]his was the first time I realized I would be charged anything other than \$1.95 for the free trial”); PX 31, Langdon Dec. ¶ 5 (invoice stated would be charged unless returned product); PX 37, Tyma Dec. ¶ 6 (packing slip “made me realize that there was a chance I could be charged something for the product”); PX 38, Williams Dec. ¶ 6 (materials in package with products stated products had to be returned or be charged). See also PX 1, Menjivar Dec. Att. U; PX 39, Wooten Dec. Att. B.

⁴⁹ PX 11, Steel Dec. ¶¶ 18-19; PX 12, Roark Dec. ¶¶ 13-16; PX 23, Castellani Dec. ¶ 9; PX 27, Roman Dec. ¶¶ 10, 12-13; PX 39, Wooten Dec. ¶ 14.

What consumers do not know – and are obviously not intended to know – is that to avoid being charged the full price for this “free trial” they must receive and return the pills to CCN within a 14-day window.⁵⁰ Needless to say, it is nearly impossible to comply with this condition. Of course many people never know of these terms in the first place. Indeed, most CCN websites obscure the fact that consumers will be required to return the “free trial” if they want to avoid the charges.⁵¹ In addition, CCN has made it very difficult to accomplish all of its return conditions in such a short time, particularly because it takes at least several days for the product to reach consumers in the mail.⁵² Consumers then have to try it and ship it back with enough time to ensure CCN receives it within that very short time period.

Nowhere on any of its websites does CCN explain two other obstacles it created to ensure that consumers will be charged full price for the trial. First, the packing slip that comes with the product from CCN instructs consumers, for the first time and inconspicuously, that they must obtain a return merchandise authorization (“RMA”) number before returning the product.⁵³

⁵⁰ PX 11, Steel Dec. ¶¶ 18-19; PX 12, Roark Dec. ¶¶ 13-16; PX 22, Boedecker Dec. ¶ 13; PX 23, Castellani Dec. ¶ 9; PX 27, Roman Dec. ¶¶ 10, 12-13; PX 30, Homewood Dec. ¶ 6 ; PX 31, Langdon Dec. ¶ 5; PX 37, Tyma Dec. ¶ 6; PX 38, Williams Dec. ¶ 6; PX 39, Wooten Dec. ¶ 14, Att. B; PX 41, Quong Dec. ¶ 9.

⁵¹ PX 1, Menjivar Dec. Atts. A, C, EE (AcaiPure), D, E, F, G (Colopure), H, I, J, K (Celebrity Smile), L, M, N, O (Gloskin); PX 2, Krause Dec. Atts. A, B (AcaiPure), F, H (Colopure), K, L (Celebrity Smile), P, Q (Gloskin); PX 3, Tyndall Dec. Atts. A (Avela), B (Cholestapro), C (Green Tea Extreme); PX 11, Steel Dec. ¶ 13 (believed consumers who reported there were no terms and conditions on websites); PX 12, Roark Dec. ¶ 11 (same).

⁵² PX 11, Steel Dec. ¶¶ 13, 15, 19-23; PX 12, Roark Dec. ¶¶ 11-19; PX 23, Castellani Dec. ¶¶ 3, 6 (26 days to receive trial); PX 25, Cluff Dec. ¶ 8 (never received trial); PX 26, Croox-Magat Dec. ¶ 8 (never received trial); PX 31, Langdon Dec. ¶¶ 3-5 (13 days to receive trial); PX 32, Lanning Dec. ¶ 7 (never received trial); PX 38, Williams Dec. ¶ 6 (couple of weeks to receive trial).

⁵³ PX 1, Menjivar Dec. Att. U; PX 12, Roark Dec. Att. D; PX 38, Williams Dec. ¶ 6. *See also* PX 39, Wooten Dec. Att. B.

Former employees state that the RMA numbers serve absolutely no functional purpose for CCN other than to discourage consumers from returning the product.⁵⁴ Former employees also report that CCN makes little to no effort to even track returns.⁵⁵ Further, CCN has often made it extremely difficult for consumers to obtain an RMA number in a timely manner.⁵⁶

Second, consumers do not learn until after they receive the products that they are required to purchase delivery confirmation for their return packages to prove to CCN that CCN actually receives the returns within 14 days.⁵⁷ This requires sending the pills back by certified mail or some other cumbersome alternative. Again, there is no legitimate purpose for this requirement – it is simply another part of the deceptive scheme.⁵⁸

CCN has routinely charged even those customers who complied with its onerous terms. Indeed, CCN goes to even greater lengths to collect from those consumers who manage to avoid having their credit or debit cards charged for CCN products they never wanted. After they agree to the trial offer, many consumers begin to suspect that CCN is not reputable. Their suspicions

⁵⁴ PX 11, Steel Dec. ¶ 31; PX 12, Roark Dec. ¶ 29.

⁵⁵ PX 11, Steel Dec. ¶ 33; PX 12, Roark Dec. ¶ 31. *See also* PX 1, Menjivar Dec. Att. Z at 15-19.

⁵⁶ PX 11, Steel Dec. ¶¶ 24, 32; PX 12, Roark Dec. ¶ 30; PX 13, Lorimer Dec. ¶ 16; PX 28, Dentler Dec. ¶ 5 (emails and multiple phone calls requesting RMA number not returned).

⁵⁷ PX 11, Steel Dec. ¶ 34 (employees instructed to require proof of delivery before issuing credit; sometimes instructed not to issue refund even with such proof); PX 12, Roark Dec. ¶ 31 (if consumer did not use Fed Ex or purchase delivery confirmation, employees instructed to deny receiving returned product); PX 29, Greer Dec. ¶ 8 (delivery confirmation required to receive credit); PX 34, Powell Dec. ¶ 9 (refused refund because couldn't prove received by CCN warehouse); PX 35, Schmelter Dec. ¶ 9 (same); PX 37, Tyma Dec. ¶ 11 (same).

⁵⁸ Even when CCN agrees to give consumers credit for returned products, CCN imposes a 15% restocking charge, although that charge is hidden in inconspicuous hyperlinks and fine print in most of its websites. PX 11, Steel Dec. ¶ 10; PX 12, Roark Dec. ¶ 9. *See, e.g.*, PX 37, Tyma Dec. ¶ 11; PX 39, Wooten Dec. ¶¶ 19-20.

are confirmed after contacting the BBB or viewing the myriad of CCN complaints posted on the Internet. These consumers promptly close their accounts to avoid future CCN charges.⁵⁹

Frustrated by its inability to extract money from such consumers, CCN representatives begin hounding these consumers months later. The CCN representatives demand additional supposed “late fees” or “processing fees,” threaten to turn the matter over to a collection agency (resulting in even greater fees), and promise to destroy the consumer’s credit record.⁶⁰ Sadly, many consumers succumb to CCN’s threats and pay CCN even though they do not believe they owe any money.⁶¹

C. Costly Membership Plans

As if it were not enough to charge consumers for the free trial, for most of the time it has operated, CCN also automatically signed consumers up to receive monthly shipments of the pills – again at full price and again burying this continuing obligation in very fine print.⁶² This “continuity plan” meant that even consumers who had made every effort to get out of the trial were surprised to find still more products arriving in the mail and more charges for these products. Consumers then had to spend considerable time and energy reaching a live person at

⁵⁹ PX 28, Dentler Dec. ¶ 4; PX 30, Homewood Dec. ¶ 9; PX 34, Powell Dec. ¶ 10; PX 41, Quong Dec. ¶ 6.

⁶⁰ PX 12 Roark Dec. ¶ 44 (instructed to tell consumers CCN would refer to third party debt collector and could damage consumer’s credit score); PX 25, Cluff Dec. ¶ 10; PX 28, Dentler Dec. ¶ 7; PX 30, Homewood Dec. ¶ 9; PX 32, Lanning Dec. ¶ 9; PX 34, Powell Dec. ¶ 12; PX 36, Stockton Dec. ¶ 11; PX 41, Quong Dec. ¶ 9.

⁶¹ PX 12, Roark Dec. ¶ 45; PX 30, Homewood Dec. ¶ 15; PX 36, Stockton Dec. ¶¶ 14-15; PX 40 Green Dec. ¶ 11.

⁶² PX 1, Menjivar Dec. Atts. A, C, EE (AcaiPure), D, F (Colopure), H, I, J, K (Celebrity Smile), L, N (Gloskin); PX 11, Steel Dec. ¶ 9; PX 12, Roark Dec. ¶ 8; PX 22, Boedecker Dec. ¶ 7; PX 25, Cluff Dec. ¶ 9; PX 26, Croox-Magat Dec. ¶ 8; PX 29, Greer Dec. ¶ 5; PX 30, Homewood Dec. ¶ 6; PX 34, Powell Dec. ¶ 7; PX 38, Williams Dec. ¶ 6; PX 39, Wooten Dec. ¶ 12; PX 40, Green Dec. ¶ 6.

CCN and going through the inevitable hoops to make these charges come to an end.⁶³

Consumers have lost millions of additional dollars in charges for these subsequent shipments that they did not know would occur and that they did not want.

D. Additional Charges For Unordered Products or Services

Historically, CCN went even a step further and charged consumers for additional, completely separate, weight loss or fitness products or services (known as “upsells”) consumers had never even heard of, let alone ordered or authorized charges for.⁶⁴ The upsells included CCN products, as well as products offered by third parties, for which CCN then earned commissions.⁶⁵ CCN’s websites included pre-checked boxes for these upsells next to the location where consumers entered their credit or debit card information. To avoid being charged for the upsells, which sometimes involved additional continuity plans, consumers were forced to

⁶³ PX 11, Steel Dec. ¶ 20 (most consumers did not know they were enrolled in continuity plan); PX 12, Roark Dec. ¶ 17 (same); PX 22, Boedecker Dec. ¶ 7 (learned of continuity plan from reading complaints about CCN on Internet); PX 25, Cluff Dec. ¶ 9 (learned of continuity plan when saw second debit on bank statement); PX 26, Croox-Magat Dec. ¶ 8 (learned of continuity plan when received second shipment); PX 29, Greer Dec. ¶ 5 (learned of continuity plan when received second shipment); PX 30, Homewood Dec. ¶ 6 (learned of continuity plan from shipping insert with trial); PX 34, Powell Dec. ¶ 7 (learned of continuity plan when received second shipment); PX 38, Williams Dec. ¶ 6 (learned of continuity plan from shipping insert with trial); PX 39, Wooten Dec. ¶ 12 (learned of continuity plan when received second shipment); PX 40, Green Dec. ¶ 6 (learned of continuity plan from shipping insert with trial).

⁶⁴ PX 13, Lorimer Dec. ¶ 9 (BBB informed CCN as to significant numbers of complaints relating to upsells); PX 19, Arizona Complaint ¶¶ 14, 17; PX 23, Castellani Dec. ¶¶ 7, 14 (received bottles of pills not ordered); PX 24, Cimino Dec. ¶¶ 4-5 (received and charged for two additional products not ordered); PX 36, Stockton Dec. ¶ 6 (received and charged for additional product not ordered).

⁶⁵ PX 13, Lorimer Dec. ¶ 9 (BBB received complaints as to Fit Factory service); PX 19, Arizona Complaint ¶ 14, 17 (consumers charged for Hoodiaburst, Hoodiawater, and Fit Factory service, without their knowledge or consent); PX 24, Cimino Dec. ¶ 5 (Hoodiaburst Gum and Hoodiawater); PX 36, Stockton Dec. ¶ 6 (Hoodiawater).

affirmatively uncheck these boxes.⁶⁶ CCN placed them on the website so consumers would not see them and uncheck the boxes. Indeed, consumers rarely saw the boxes or realized that they needed to take any action to avoid the upsells.⁶⁷ Consumers were then hit with additional charges of up to \$60 per month until the consumers finally noticed the charges and cancelled the additional products or services with third parties.

E. Failure to Provide Refunds

Needless to say, when consumers realize that their credit cards have been charged for the full price of the trial offer, or for subsequent shipments, they want a refund. Several of CCN's websites for AcaiPure and other products prominently promised easy refunds, stating:

[I]f for any reason you do not find [the product] is right for you we will gladly give you a full refund, no questions asked.⁶⁸

But CCN has rarely paid refunds, and then only under pressure from the BBB or law enforcement.⁶⁹ Former CCN employees state that CCN makes it as difficult as possible for consumers to obtain refunds.⁷⁰ These former employees also state that CCN instructs customer service staff to lie about refunds, telling consumers refunds had been processed when in fact they

⁶⁶ PX 1, Menjivar Dec. Atts. QQ, RR, SS, TT (in responses to BBB complaints, CCN states "Order page also displays two upsell items that are optional, for 29.95 and 9.95. Customer must deselect these items if they do not want to receive them."); PX 13, Lorimer Dec. ¶ 10; PX 19, Arizona Complaint ¶ 16.

⁶⁷ PX 13, Lorimer Dec. ¶ 10; PX 19, Arizona Complaint ¶ 16.

⁶⁸ PX 1, Menjivar Dec. Atts. L (Gloskin), EE (AcaiPure); PX 2, Krause Dec. Att. A (AcaiPure). *See also* PX 1, Menjivar Dec. Atts. H, K (Celebrity Smile); PX 3, Tyndall Dec. Att. A (Avela).

⁶⁹ PX 11, Steel Dec. ¶ 30; PX 12, Roark Dec. ¶ 26.

⁷⁰ PX 11, Steel Dec. ¶¶ 27-32, 34; PX 12, Roark Dec. ¶¶ 25-31.

had not been.⁷¹ CCN tells its employees to simply make up and provide refund “confirmation numbers” to consumers to make it seem as if CCN has processed a refund.⁷²

In fact, CCN instructs its staff to refuse refunds to consumers unless they explicitly threaten to complain to the BBB or law enforcement, or threaten to seek a chargeback with their credit card companies.⁷³ Yet even these consumers frequently do not receive refunds. Former employees state that for extended periods of time, CCN was unable to process refunds to consumers’ credit or bank accounts because it had lost its merchant processing accounts due to high chargeback rates.⁷⁴

Since they cannot obtain refunds from CCN, consumers are left with challenging these charges with their credit card companies. It was this high “chargeback” rate that drew the attention of Visa, and underlies its continuing efforts to stop banks from processing for CCN.⁷⁵

⁷¹ PX 11, Steel Dec. ¶ 44 (instructed to tell consumers that “credit had gone through on CCN’s side” and consumers should check with financial institution; “refund had been processed on our end and the consumer simply needed to wait 7-10 more days for the refund to appear;” “there must have been an error in processing.”); PX 12, Roark Dec. ¶ 36 (customer service representatives were instructed to lie to consumers about refunds, such as: “It has been processed and you should see it on your statement in 7-10 days;” “It looks like a credit was processed on ___ date, I do not know why you did not see it;” “We do not know why it is taking so long, but we assure you that the refund has been processed;” “I will attempt to process the refund again;” “The error must be on the part of your bank so you should contact your bank.”). *See also* PX 1, Menjivar Dec. ¶¶ 33-36, Atts. AA, BB, CC, DD (told refund being “processed,” but never received).

⁷² PX 11, Steel Dec. ¶ 44; PX 12, Roark Dec. ¶ 36.

⁷³ PX 11, Steel Dec. ¶ 30 (instructed employees to only issue refunds when consumer was going to initiate chargeback or complain to BBB, FTC, or law enforcement); PX 12, Roark Dec. ¶ 26 instructed employees to only issue refunds when consumer was going to initiate chargeback or complain to BBB or law enforcement); PX 39, Wooten Dec. ¶¶ 22-23 (refund only after complained to BBB).

⁷⁴ PX 11, Steel Dec. ¶ 44; PX 12, Roark Dec. ¶ 36.

⁷⁵ PX 14, Elliott Dec. ¶¶ 34-40, 59-61.

In recent times, CCN has even turned to banks in other countries, such as Iceland, to try and continue this fraudulent business.⁷⁶

IV. DEFENDANTS' CONTINUING VIOLATIONS

CCN is well aware that it has scammed thousands of consumers with its deceptive practices. As early as May 2008, the BBB began forwarding large volumes of complaints to CCN from consumers who maintained that they had been unwittingly charged for the trial, enrolled in CCN's continuity program, or were being charged for undisclosed upsells.⁷⁷ By late 2008, the BBB was receiving 25-30 complaints per day about CCN's trials and continuity program, its undisclosed upsells, or the misleading celebrity endorsements and testimonials on its websites.⁷⁸ In total, the BBB has received an astronomical 2882 consumer complaints regarding CCN in just 3 years, earning CCN a rare "F" rating from the BBB.⁷⁹ Similarly, as discussed above, in early 2009, NAD challenged CCN's claims that its colon cleansing product would help prevent colon cancer.⁸⁰

Law enforcement officials also have taken action against CCN, which, along with Gibson, was sued in December 2008 by the Arizona Attorney General's Office for misrepresenting CCN's "risk free" trial offers, its continuity program, undisclosed upsells, and

⁷⁶ PX 14, Elliott Dec. ¶¶ 71-72.

⁷⁷ PX 13, Lorimer Dec. ¶ 6.

⁷⁸ PX 13, Lorimer Dec. ¶¶ 11, 13.

⁷⁹ PX 13, Lorimer Dec. ¶¶ 16-17.

⁸⁰ PX 18, NAD Decision, at 1.

failure to provide refunds.⁸¹ CCN eventually settled that matter in June 2009, agreeing to pay a fine of \$1 million and providing \$350,000 for consumer restitution.⁸²

CCN has ignored these various authorities' demands for it to stop its deceptive practices. The company simply refused the BBB's repeated requests for it to change its practices in response to thousands of complaints.⁸³ In response to NAD, after promising in May 2009 to discontinue the cancer claims for Colotox, CCN merely changed the product's name to Colopure and continued at least until April 2010 to make the same claims.⁸⁴ Finally, not even the Arizona lawsuit deterred CCN. Except for eliminating the prechecked boxes on its order pages for upsells and adding some customer service representatives, CCN did not significantly change any of its practices after settling the case.

In the last few months, as the expense of running its scam has gotten too high, CCN has belatedly made some efforts to modify its websites to lessen some of its most deceptive practices. In particular, at least some of CCN's websites now conspicuously disclose that consumers are signing up for monthly membership plans and the fact that consumers will be charged the full price for a bottle of pills if they do not return them within the trial period.⁸⁵

⁸¹ PX 19, Arizona Complaint ¶ 21. The Florida Attorney General also has announced an investigation of CCN, focusing on its failure to honor cancellation requests, and its misrepresentations as to its trial offers and continuity plans. *See* PX 1 (Menjivar Decl.) ¶ 58, Att. U.

⁸² PX 20, Arizona Consent Judgment ¶¶ 18-19. CCN also paid \$25,000 to Arizona for investigative costs and attorneys fees. *Id.* ¶ 20.

⁸³ PX 13, Lorimer Dec. ¶ 10.

⁸⁴ Colopure and Colotox contain the exact same ingredients and CCN's claims regarding the supposed cancer prevention properties of both products were identical. *See* PX 1, Menjivar Dec. Atts. D, F, W; PX 12, Roark Dec. Att. C; PX 18, NAD Decision (May 22, 2009) at 1, 17.

⁸⁵ PX 1, Menjivar Dec. Atts. B, G, M, O.

Even the few “improved” websites, however, still do not disclose the RMA requirement or that CCN requires proof of receipt for returns of the trial product. These conditions continue to be disclosed for the first time on the packing slip with the pills.⁸⁶

These changes seem to have been motivated by the fact that CCN had become so notorious for defrauding consumers that it could no longer find a merchant bank to process its credit card transactions. Visa began actively monitoring CCN in the fall of 2008 because CCN’s chargeback rate had reached alarming levels.⁸⁷ By early to mid-2009, CCN had one of the highest Visa chargeback rates of any company in the United States, and a series of merchant banks terminated CCN, largely at Visa’s urging, because of the millions of dollars in chargeback fees CCN was incurring.⁸⁸ CCN responded to Visa’s pressure by resorting to every conceivable trick to avoid Visa’s detection, including using different company names to open new merchant accounts and, ultimately, using overseas banks to process charges.⁸⁹

Even though it has made some modest changes to its deceptive practices, it is time for all of CCN’s deceptive practices to end. Only an order by this court will stop defendants and prevent a resumption of other deceptive practices.

V. ARGUMENT

The practices outlined above are all clear violations of the consumer protection laws, including Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a), 52, and Section 907(a) of

⁸⁶ See PX 1, Menjivar Dec. Att. U; PX 38, Williams Dec. ¶ 6; PX 39, Wooten Dec. Att. B.

⁸⁷ PX 14, Elliott Dec. ¶¶ 34-40 .

⁸⁸ PX 14, Elliott Dec. ¶¶ 45-46, 49-51, 55-58, 64-66.

⁸⁹ PX 14, Elliott Dec. ¶ 71-72.

the Electronic Funds Transfer Act (“EFTA”), 15 U.S.C. § 1693e(a). To prevent any further injury to innocent consumers and to preserve defendants’ assets for eventual restitution to past victims, the FTC asks that the Court issue its proposed temporary restraining order. That order would prohibit defendants’ ongoing illegal practices, freeze their assets, and impose a receivership over the corporate defendants who could make an independent report of defendants’ activities to the Court. The Court has full authority to enter the requested relief, which is strongly supported by the evidence. Courts in this district have repeatedly granted similar TROs in FTC actions.⁹⁰

A. This Court has the Authority to Grant the Requested Relief

The FTC Act provides that “in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” 15 U.S.C. § 53(b). Once the Commission invokes the federal court’s equitable powers, the full breadth of the court’s authority is available, including the power to grant such ancillary final relief as rescission of contracts and restitution. *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989). The court may also enter a temporary restraining order, a preliminary injunction, and whatever additional preliminary relief is necessary to preserve the possibility of

⁹⁰ See, e.g., *FTC v. Asia Pacific Telecom, Inc., et al.*, No. 10 C 3168 (N.D. Ill. May 25, 2010) (Hart, J.) (*ex parte* TRO with asset freeze and appointment of receiver); *FTC v. API Trade, LLC, et al.*, No. 10 C 1543 (N.D. Ill. March 10, 2010) (Guzman, J.) (*ex parte* TRO with asset freeze); *FTC v. 2145183 Ontario Inc., et al.*, No. 09 C 7423 (N.D. Ill. Nov. 30, 2009) (Grady, J.) (*ex parte* TRO with asset freeze and appointment of receiver); *FTC v. Integration Media, Inc., et al.*, No. 09 C 3160 (N.D. Ill. May 27, 2009) (Bucklo, J.) (*ex parte* TRO with asset freeze); *FTC v. Data Bus. Solutions, Inc., et al.*, No. 08 C 2783 (N.D. Ill. May 14, 2008) (Dow, J.) (same); *FTC v. Union Consumer Benefits*, No. 08 C 2309 (N.D. Ill. April 23, 2008) (Aspen, J.) (same); *FTC v. Spear Systems, Inc., et al.*, No. 07 C 5597 (N.D. Ill. Oct. 3, 2007) (Andersen, J.) (same); *FTC v. Sili Neutraceuticals, LLC, et al.*, No. 07 C 4541 (N.D. Ill. Aug. 13, 2007) (Kennelly, J.) (same); *FTC v. 1522838 Ontario Inc., et al.*, No. 06 C 5378 (N.D. Ill. Oct. 4, 2006) (Gettleman, J.) (same); *FTC v. Datacom Mktg., et al.*, No. 06 C 2574 (N.D. Ill. May 9, 2006) (Holderman, C.J.) (same); *FTC v. Cleverlink Trading Ltd., et al.*, No. 05 C 2889 (N.D. Ill. May 16, 2005) (St. Eve, J.) (same).

providing effective final relief. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988); *see also Amy Travel*, 875 F.2d at 571. Such ancillary relief may include an asset freeze to preserve assets for eventual restitution to victimized consumers. *World Travel*, 861 F.2d at 1031. Injunctive relief is appropriate even if a defendant has ceased its illegal activities if there is “cognizable danger of recurrent violation,” *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953), and the commission of past illegal conduct is “highly suggestive of the likelihood of future violations.” *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979). *See also FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 212 (D. Mass. 2009); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1017 (N.D. Ind. 2000); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 536 (S.D.N.Y. 2000).

B. A Temporary Restraining Order Is Appropriate and Necessary

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

1. The FTC Has Demonstrated There is a Strong Likelihood That Defendants Have Violated the FTC Act

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

There is no doubt that defendants’ activities qualify as deceptive acts or practices under Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. 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. *FTC v. Bay Area Bus. Council*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. World Media Brokers*, 415 F.3d 758, 763 (7th Cir. 2005); *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 957 (N.D. Ill. 2006). Failing to disclose a material fact, even without an affirmative misrepresentation, is equally deceptive under the FTC Act. *See Bay Area*, 423 F.3d at 635; *Amy Travel*, 875 F.2d at 575. Use of fine print and terms buried in hyperlinks do nothing to prevent deception, and are simply a ruse to try and defend the inevitable legal challenges to these deceptive practices.

The materiality requirement is satisfied if the misrepresentation or omission involves information that is likely to affect a consumer's choice of, or conduct regarding, a product or service. *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992). Moreover, health claims may be presumed material to consumers. *Id.* at 322-23. Courts consider the likely effect of a statement on the mind of an ordinary consumer when evaluating its deceptiveness. *See Bay Area*, 423 F.3d at 635 (citing *FTC v. Freecom Communics., Inc.*, 401 F.3d 1192, 1202 (10th Cir. 2005)).

Submitting unauthorized charges to consumers' accounts also are "unfair" practices that violate Section 5. Under Section 5(n) of the FTC Act, an act or practice is unfair if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or to competition. *See* 15 U.S.C. § 45(n); *see also Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1363-66 (11th Cir. 1988). Defendants routinely submit charges to consumers' credit cards without their express informed consent, either because the consumer was not adequately informed of the terms and conditions of the offer, or the consumer followed the terms and conditions of the offer to avoid charges but was charged nonetheless. Such conduct is consistently held to be unfair under the

FTC Act. *See, e.g., FTC v. Global Mktg. Group, Inc.*, 594 F. Supp. 2d 1281, 1288-89 (M.D. Fla. 2008); *FTC v. J.K. Publications, Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000).

Defendants' business practices have consistently violated the FTC Act. Defendants have made, and continue to make, blatantly false product claims and material misrepresentations about testimonials. Until forced to modify its practices to avoid being shut down by its credit card processors, Defendants materially misrepresented endorsements, money-back guarantees, and trial offers, inadequately disclosed the material terms and conditions regarding their trial offers, membership plans, and other charges, and placed unauthorized charges on consumers' accounts, all in direct violation of the FTC Act.⁹¹

2. The Individual Defendants are Personally Liable

Defendants Gibson and McKenzy are personally liable for the violations described above. An individual defendant may be held liable for injunctive relief and monetary restitution under the FTC Act if the Court finds (1) that he participated directly in or had some measure of control over a corporation's deceptive practices, and (2) that he had actual or constructive knowledge of the practices. *World Media Brokers*, 415 F.3d at 764; *Bay Area*, 423 F.3d at 636; *Amy Travel*, 875 F.2d at 573-74. Authority to control may be evidenced by "active involvement in the corporate affairs, including assuming the duties of a corporate officer." *World Media Brokers*, 415 F.3d at 764 (citing *Amy Travel*, 875 F.2d at 573). The knowledge requirement is satisfied by a showing that the defendant (1) had actual knowledge of the deceptive acts or

⁹¹ Similarly, defendants routinely assessed charges to consumers' debit accounts both for its trial programs and continuity plans without obtaining written authorization from the consumers. This practice violates Section 907(a) of the EFTA, 15 U.S.C. § 1693e(a), and Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b), which provide that preauthorized electronic transfers from a consumer's bank account require written authorization from the consumer.

practices, (2) was recklessly indifferent to the truth or falsity of the representations, or (3) had an awareness of a high probability of fraud coupled with an intentional avoidance of the truth. *Id.*; *Bay Area*, 423 F.3d at 636; *Amy Travel*, 875 F.2d at 573. An individual’s “degree of participation in business affairs is probative of knowledge.” *Id.* The Commission need not prove subjective intent to defraud. *Id.*

Graham D. Gibson meets this standard for individual liability. Gibson is the owner of CCN, Simply Naturals, LLC, and Fit for Life, LLC, and controls all five corporate defendants.⁹² His participation in the illegal practices is demonstrated by his being the signatory on the corporate defendants’ incorporation papers, bank accounts, domain registrations, phone bills, and merchant account applications.⁹³ Gibson has been the point person in dealing with both the BBB and Visa about CCN’s fraudulent practices.⁹⁴ He is directly involved in the corporate defendants’ daily affairs. Because Gibson actively monitors his employees’ dealings with consumers, he has detailed knowledge of the hundreds of irate customers who have called CCN each day.⁹⁵

⁹² PX 4, CCN Articles of Incorporation; PX 6, Simply Naturals Corp. Certificate; PX 7, Fit for Life Corp. Certificate; PX 11, Steel Dec. ¶ 5; PX 12, Roark Dec. ¶ 4; PX 13, Lorimer Dec. ¶ 8; PX 14, Elliott Dec. ¶ 60.

⁹³ PX 1, Menjivar Dec. ¶ 45, Atts. GG, HH, II, JJ (bank records), ¶¶ 47, 49-52, Atts. LL, MM, NN (domain registrations); PX 4, CCN Articles of Incorporation; PX 6, Simply Naturals Corp. Certificate; PX 7, Fit for Life Corp. Certificate; PX 14, Elliott Dec. Atts. B, D, I, K.

⁹⁴ PX 13, Lorimer Dec. ¶¶ 8-12, 14; PX 14, Elliott Dec. ¶¶ 59-61, Atts. E, G.

⁹⁵ PX 11, Steel Dec. ¶¶ 5, 8, 9, 36, 50; PX 12, Roark Dec. ¶¶ 4, 23, 41.

Michael A. McKenzie is also individually liable under the FTC Act. McKenzie is the second-in-command for the corporate defendants.⁹⁶ He trains, monitors, and supervises the corporate defendants' employees, and is listed on several of their merchant account applications as the primary business contact besides Gibson.⁹⁷ McKenzie is the managing member and principal of iLife Health and Wellness, LLC,⁹⁸ and manages the daily operations of the corporate defendants, evidencing his authority to control, and participation in the activities of, the corporate defendants, as well as his knowledge of their illegal activities.⁹⁹

3. The Equities Tip Decidedly in the Commission's Favor

Once the Commission 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 defendants' private concerns. *World Travel*, 861 F.2d at 1029. The public equities in this case are compelling, as the public has a strong interest in halting defendants' illegal activities and preserving assets necessary to provide effective final relief to thousands of victims. Defendants, by contrast, have no legitimate interest in continuing to engage in illegal conduct. *See FTC v. World Wide Factors, Ltd*, 882 F.2d 344, 347 (9th Cir. 1989) (upholding finding of "no

⁹⁶ PX 11, Steel Dec. ¶ 5; PX 12, Roark Dec. ¶ 4.

⁹⁷ PX 11, Steel Dec. ¶¶ 5, 8, 12-13, 16, 25-27, 30, 33-35, 39, 43-44, 46-47, 49-50, 52-54; PX 12, Roark Dec. ¶¶ 4, 7, 11, 20-21, 24-25, 27-28, 30-31, 33, 35-37, 41, 43, 46, 48-50; PX 14, Elliott Dec. ¶ 69, Atts. I, M, N, O, P, Q, R, S.

⁹⁸ PX 14, Elliott Dec. Att. L. McKenzie also describes himself as the Manager and owner of 100% of the equity of defendant Simply Naturals, LLC, as well. PX 14, Elliott Dec. Atts. M, N, O, P, Q, R, S.

⁹⁹ PX 11, Steel Dec. ¶¶ 5, 8, 12-13, 16, 25-27, 30, 33-35, 39, 43-44, 46-47, 49-50, 52-54; PX 12, Roark Dec. ¶¶ 4, 7, 11, 20-21, 24-25, 27-28, 30-31, 33, 35-37, 41, 43, 46, 48-50.

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”).

C. The Court Should Enter the FTC’s Proposed TRO

The FTC requests that the Court issue a TRO that prohibits future law violations and preserves assets and documents to ensure that the Court can grant effective final relief in this case.¹⁰⁰ Defendants’ unlawful conduct has resulted in tens of millions of dollars of consumer loss – as much \$40 million annually by defendants’ own estimate.¹⁰¹ Moreover, the FTC requests that the TRO be issued *ex parte*. An *ex parte* TRO is warranted where the facts show that immediate and irreparable injury, loss, or damage will occur before the defendants can be heard in opposition. *See* Fed. R. Civ. P. 65(b).

CCN has been using credit card merchant accounts with banks in other countries, such as Iceland.¹⁰² Thus, there are likely significant sums being held in overseas banks, and absent action by this Court there is a quite tangible risk that those funds will disappear if defendants receive prior notice.¹⁰³ Defendants have already shown that they are willing to go to practically any lengths to continue their deceptive practices, including hiding behind different company names and websites, moving their credit card processing offshore, and simply lying to law enforcement and the BBB when necessary.

¹⁰⁰ A Proposed TRO has been filed concurrently with the FTC’s TRO motion.

¹⁰¹ PX 14, Elliott Dec. Att. L (defendants estimate annual Visa/Mastercard/Discover sales of \$40 million).

¹⁰² PX 14, Elliott Dec. ¶¶ 70-72.

¹⁰³ *See* Declaration and Certification of Plaintiff’s Counsel Pursuant to Fed. R. Civ. P. 65(b) and Local Rule 5.5(d) in Support of Plaintiff’s *Ex Parte* Motion for Temporary Restraining Order and Motion to Temporarily Seal File, filed concurrently with the FTC’s TRO motion.

Part of the relief sought by the Commission in this case is restitution for the victims of defendants' fraud. To preserve the possibility for such relief, the Commission seeks a freeze of defendants' assets and an immediate accounting to prevent concealment or dissipation of assets pending a final resolution of this litigation. An asset freeze is appropriate once the Court determines that the Commission is likely to prevail on the merits and that restitution would be an appropriate final remedy. *See World Travel*, 861 F.2d at 1031 & n.9. In the words of the Seventh Circuit, the district court at that juncture has "a duty to ensure that the assets of the corporate defendants [are] available to make restitution to injured consumers." *Id.* at 1031. In a case such as this, where the Commission is likely to succeed in showing that a corporate officer is individually liable for the payment of restitution, the freeze should extend to individual assets as well. *Id.* (affirming freeze on individual assets). This Court has authority to order a party to freeze property under its control, whether the property is within or outside the United States. *U.S. v. First Nat'l City Bank*, 379 U.S. 378, 384 (1965). Such an order is necessary and appropriate here to ensure the possibility of effective final relief.

The appointment of a temporary receiver over the corporate defendants is necessary to preserve the potential for a complete remedy. Such an appointment is particularly appropriate where defendants' pervasive fraud presents the likelihood of continued misconduct. If defendants are allowed to remain in control of their business, it is likely that evidence will be destroyed and the fruits of their fraud will be dissipated. By taking custody of the business, a receiver would prevent further harm to consumers and prevent destruction or concealment of assets and records without disrupting any legitimate business activity. At the same time, a temporary receiver would be helpful to the court in assessing the extent of defendants' fraud,

tracing the proceeds of that fraud, preparing an accounting, and making an independent report of defendants' activities to the Court.

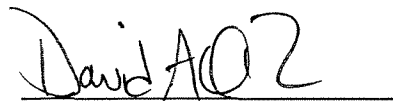
In sum, the relief sought is necessary to preserve the *status quo*, prevent ongoing illegal activities, and ensure that defendants cannot move assets and records outside of this Court's reach.

VI. CONCLUSION

Defendants have caused and are likely to continue to cause substantial injury to consumers as a result of their violations of the FTC Act and the EFTA. The Commission therefore asks that the Court issue the requested injunctive relief to prevent ongoing harm and to help ensure the possibility of effective final relief, including monetary restitution.

Respectfully submitted,

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