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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

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|----------------------------------|---|---------------------------|
| |) | |
| FEDERAL TRADE COMMISSION, |) | Civil No. |
| |) | |
| Plaintiff, |) | MEMORANDUM |
| |) | IN SUPPORT OF |
| v. |) | PLAINTIFF'S MOTION |
| |) | FOR A TEMPORARY |
| CIRCA DIRECT LLC, and |) | RESTRAINING ORDER |
| ANDREW DAVIDSON, |) | AND ORDER TO SHOW |
| |) | CAUSE WHY A |
| Defendants. |) | PRELIMINARY |
| |) | INJUNCTION SHOULD |
| |) | NOT ISSUE |
| |) | |

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I. INTRODUCTION

Defendants – operating out of Margate, New, Jersey – inundate the Internet with trillions of advertisements disguised as news reports, placing their ads on popular websites such as msnbc.com, latimes.com, and freedictionary.com. These fake news reports entice consumers with headlines that read:

Acai Berry Diet Exposed: Miracle Diet or Scam?
As part of a new series: ‘Diet Trends: A look at America’s Top Diets’ we examine consumer tips for dieting during a recession.

Surplus Auctions Exposed: 95% Off Retail Possible?
As part of a new series: “How to Save Big Bucks when Shopping Online”

New Jersey JOB REPORT
Work At Home Mom Makes \$6,795/Month Part-Time

and claim to be from media outlets with names such as “Online6Reports” or “Memphis Gazette.” In their sham news items, reporters, with by-lines like “Health and Diet Columnist” or “Hot Trends and Shopping Deals writer,” purport to review a range of products, including bogus acai berry weight-loss products or dubious surplus auction websites, also frequently claiming to have tested the products themselves. In fact, nothing Defendants present is real – there are no independent tests performed on the featured products; no investigative reporters; and no consumers posting responses to the articles.

Defendants use this trickery to hawk countless products, including making patently false weight-loss claims for acai berry pills. Defendants’ news features on acai berry pronounce, among other things, that “Acai Berry trend uncovers steps to weight loss success,” and go on to claim that featured acai berry products can

cause the remarkable weight-loss of 25 pounds in 4 weeks. The “reported” results in these advertisements, however, have no scientific basis, and in fact are not physically possible, even with intense diet and exercise.

Defendants’ unlawful advertising practices violate Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45, 52. To immediately halt this blatant misconduct and preserve documents and assets necessary for effective final relief, Plaintiff Federal Trade Commission (“FTC”) seeks, under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), issuance of a temporary restraining order (“TRO”) and an order to show cause why a preliminary injunction should not issue. The proposed TRO would enjoin Defendants’ illegal conduct, preserve assets and documents, and require a prompt accounting of their finances and scope of their online operations. This relief is necessary to prevent continued harm to consumers, dissipation of assets, and destruction of evidence, thereby preserving the Court’s ability to provide effective final relief to consumers injured by Defendants’ illegal practices.

II. THE PARTIES

A. Plaintiff

The FTC is an independent agency of the United States government created by the FTC Act, 15 U.S.C. § 41 *et seq.* The FTC enforces Section 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, which respectively prohibit unfair or deceptive acts or practices in or affecting commerce and false advertisements for food, drugs, devices, devices, services, or cosmetics in or affecting commerce. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC, through its

own attorneys, to initiate federal district court proceedings to enjoin violations of the FTC Act and secure appropriate equitable relief, including rescission of contracts and restitution, the refund of monies paid, and the disgorgement of ill-gotten gains.

B. Defendants

Defendants are high-volume advertisers of a broad array of products, including acai berry weight-loss products, primarily through the Internet. PX 5 (McKenney Dec.) ¶¶ 5-8,10 and 11, FTC-000284, Atts. A, B, D and E, FTC-000293-359, 363-391; PX 6 (Schools Dec.) ¶¶ 4, 6-8, 11-25, and 34 (table of products advertised), FTC000394, 397-99, 400-412, 419-20, and Atts. A, B (video), F, G, H, I (video), J, FTC000431-82, 485-89, 499-505, 507-12, 514-17, 520-31, 532-42. Defendant Circa Direct LLC (“Circa Direct”), incorporated- on January 27, 2009, is a New Jersey limited liability company with its main business address at 607 N. Delavan Avenue, Margate, New Jersey 08402. PX 6 ¶¶ 35-36, FTC000420-21 and Att R, FTC-000607-09. Circa Direct previously operated its business at the address 209 N. Essex Avenue, Margate, New Jersey 08402. PX 6 ¶ 35, FTC000420, Att. R, FTC-000607. Andrew Davidson, a New Jersey resident, is Circa Direct’s Chief Executive Officer; he also owns and apparently resides at Circa Direct’s 607 N. Delavan Avenue address. PX 6 ¶ 37, FTC000421 and Att. S at FTC-000612. Mr. Davidson purchases advertising for Circa Direct with credit cards in his own name. PX 4 (Vincent Dec.) ¶ 7, FTC-000262. Records show that Mr. Davidson personally has registered more than a hundred websites, including

the website circadirect.com and other websites through which Circa Direct has advertised acai berry-based weight-loss products, surplus auction services, work-at-home programs, and teeth whiteners, among other products and services. PX 2 (Hernandez Dec.) ¶ 2, FTC-000036, Atts. A and B, FTC-000038-207; PX 6 ¶ 4, FTC000394 . Mr. Davidson also has negotiated deals with advertising companies, including Pulse360, Inc. and SuperMedia LLC, on behalf of his company Circa Direct to place advertisements on a broad range of websites, including superpages.com, latimes.com, msnbc.com, and weather.com.¹ PX 3 (Cronberger Dec.) ¶ 5, FTC-000247, Att. A, FTC-000252-261; PX 4 ¶ 4, FTC-000262.

Defendants' business consists of driving consumers to merchant websites that sell different types of products, including acai berry weight-loss products, and generating sales of these products. Typically, either the merchants themselves or intermediaries that work with these merchants – known as affiliate network companies – pay Defendants a portion of each sale Defendants generate (“cost-per-sale”), or less commonly, a fee for each consumer Defendants send to a merchant’s website (“cost-per-click”). *See, e.g.* PX 5 ¶¶ 8-9, FTC-000284, Atts. B at FTC-000325-27 and C, FTC000360-362; PX 6 ¶¶ 18-19, FTC000404-05, and Att. G at

¹ As discussed below, this Court has subject matter jurisdiction over the FTC’s claims pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345. Personal jurisdiction over Defendants exists pursuant to the FTC Act’s provision for nationwide service of process, 15 U.S.C. § 53(b). Additionally, venue is proper in the District of New Jersey. Under the FTC Act, an action may be brought where a corporation or person “resides or transacts business.” *Id.* As noted above, Defendants do business in this district in Margate, New Jersey, which is located in Atlantic County.

FTC-000503, Att. H at FTC-000517. Defendants create and widely disseminate banner advertisements – graphic images that are typically rectangular in shape – contracting with websites directly (PX 4 ¶¶ 2-5, FTC-000262 and Atts. A, FTC-000267, B, FTC-000270 (insertion order), D, FTC-000275 (banner ad), E, FTC-000277 (banner ads), F, FTC-000279 (banner ads), and G, FTC-000281 (banner ads)) or with advertising network companies for their placement on dozens of popular websites. PX 3 ¶¶ 2-4, FTC-000247. These banner ads commonly appear above, to the right of, or below content appearing on these websites. If consumers click on these banner ads, as discussed below, they are taken to one of Defendants’ websites (*e.g.*, PX 5 ¶ 11, FTC-000284, Att. E at FTC-000380-385), typically referred to as a “landing page,” which in turn contain hyperlinks to merchant websites where consumers can buy the product advertised. *E.g.* PX 5 ¶ 11, FTC-000284, Att. E at FTC-000381-291; PX 6 ¶¶ 13-16, FTC-000401-403, Atts. B, C-E, FTC-000485-97.

III. DEFENDANTS’ DECEPTIVE PRACTICES

Since at least November 2008, Defendants have spent nearly \$7 million, (PX 4 ¶¶ 5 and 7, FTC-000262; PX 6 ¶ 8, FTC-000398), to disseminate trillions of their banner advertisements on a variety of websites, including superpages.com, latimes.com, msnbc.com, thefreedictionary.com, and weather.com. PX 4 ¶ 5, FTC-000262; PX 6 ¶¶ 8, 13-19, 21-25, FTC-000398-99, 401-404, 409-12 and Atts A, FTC-431-82, B, I. These banner ads induce consumers to click on them with claims that consumers can learn, among other things, the “shocking truth” about

acai berry (e.g. PX 4 ¶ 5, FTC-000262, Att. G at FTC-000282; PX 6 ¶ 20, FTC000405-12, Att. A, FTC000431-33, 434-38, 446-51, 455-49); how to make more than \$6,000 a month working-at-home online, (e.g., PX 4 ¶ 5, FTC-000262, Att. G at FTC-000282; PX 6 ¶ 20, 405-12, Att. A, FTC000431-32, 466-71); how to turn yellow teeth white from home for under four dollars, (e.g., PX 6 ¶ 20, FTC-000405-12, Att. A, FTC000472-7, and the “1 Rule of a Flat Stomach.” E.g, PX 4 ¶ 5, FTC-000262, Att. D, FTC-000275; PX 5 ¶ 11, FTC-000284, Att. E at FTC-000380. More than six million Internet users have clicked on Defendants’ deceptive banner ads. PX 6 ¶ 8, FTC-000398-99.

A. Defendants Falsely Claim that Targeted Products Cause Rapid and Substantial Weight Loss.

Many of the advertisements that Defendants have disseminated promote acai berry weight-loss products. PX 5 ¶¶ 4-6, 10-11, FTC-000284, Atts. A, FTC-000293, B, FTC-000298, D, FTC-000363, and E, FTC-000370; PX 6 ¶¶ 13-16, 21-24, FTC000401-03, Att. B, C, D, I, J, FTC0000484-89, 490-93, 520-31. Most recently, Defendants have widely propagated “teaser” banner ads that portray a woman squeezing her exposed belly, combined with the statement:

“1 Trick of a Tiny Belly:
Cut down a bit of your belly every day by using this 1
weird old tip”

PX 6 ¶¶ 21-23, 409-10, Atts. I, J, FTC-000519-42.

Another such ad depicts a bucket of blue-colored berries and states:

“Acai Berry EXPOSED (Consumer Report)
Washington Warning! Health Reporter Discovers The
Shocking Truth!”

PX 5 ¶ 6 and Att. B, FTC-000287-288, 333-334; PX 6 ¶ 20, FTC-000401-03.

Upon clicking the banner ads above and similar ads, consumers view a landing page, controlled by Defendants, that markets one of at least a half dozen different brands of acai berry dietary supplements, which Defendants feature on a rotating basis. *E.g.*, PX 5 ¶ 11, FTC-000284, Att. E, FTC-000370; PX 6 ¶¶ 15, 20, FTC 402, 406-7, Att. A, FTC-000434-39, 446-50, Att. C, FTC-000484-90; *see also* PX 6 ¶ 34, FTC-000419-20 (chart summarizing offers). On these websites a purported health columnist claims she lost an astonishing 25 pounds in four weeks after she used an acai berry dietary supplement, typically in combination with another product, such as a special-blend of coffee or a colon cleanse. Although the featured acai berry weight-loss products, as well as any secondary products, vary from one of Defendants' websites to another, these websites tend to make the same or very similar weight-loss claims. *E.g.*, PX 6 ¶ 20, FTC-000405-07, Att. A, FTC-000434-35 (LeanSpa with Pure HCA; FTC-000446 (UltraBerry Slim), FTC-000455 (TrimSport Acai). For example, many websites display the large, bolded headline: "1 Trick of a Tiny Belly: Reporter Loses Her 'Belly' Using 1 Easy Tip." *E.g.*, PX 6 ¶¶ 15, 20, 21, 25, Atts. A, B, C, I, J, FTC-000434, 446, 455, 485. Above this headline is a "news-looking" logo, flanked by quotes from both a male and female reporter, which read: "Acai Berry trend uncovers steps to weight loss success," and "Acai Berry Diet, Is it a scam or not?" *Id.*

Below the news headline, a "reporter," frequently identified as Julie Ayers or Julia Miller, reports on her experience in ordering, receiving, and finally taking

a combination of weight-loss products, including the products LeanSpa Acai and South Beach Java. *E.g.*, PX 6 ¶¶ 13-16, FTC-000401-03, Att. B, C, D, E, FTC-000485-97. *See also* FTC-000434-38; 446-49; 455-49. She claims that she decided to serve as a “guinea pig” to “find out the truth” about about the acai berry weight-loss fad. *E.g.*, PX 5 ¶¶ 4 and 10, FTC-000284, Att. A, FTC-000293, and D, FTC-000363; PX 6 ¶¶ 13-16, FTC-000401-03, Att. B, C, FTC-000485-90. Her article provides a week-by-week account of her dramatic weight loss without changing “anything about [her] daily routine.” *Id.* at FTC-00486. For example, on day seven, Julie or Julia finds that she lost 9 pounds, at the two-week mark, she was at “an unbelievable 16 pounds of weight-loss, by the third week she lost an additional 6 pounds and dropped 2 dress sizes, and in the fourth week she shed her last 3 pounds. *Id.* at FTC-000486-87. Her report concludes with the statement:

**“I couldn’t be any happier with the results.
I lost 25 lbs in 4 Weeks, No Special Diet, No Intense Exercise.”**

(bold in original). *Id.* at FTC-000487. Near this claim, as well as near other similar weight-loss claims, are hyperlinks for ordering the featured products, including, in some instances, LeanSpa Acai and South Beach Java. *E.g.*, PX 6 ¶¶ 13-16, FTC-000401-03, Att. B, C, D, E, FTC-000485-97. Additional claims of weight-loss success, purportedly provided by consumers, appear in the “comments” section below the article. *E.g.*, PX 5 ¶¶ 4 and 10, FTC-000284, Att. A, FTC-000293, and D, FTC-000363; PX 6 ¶¶ 13-16, FTC-000401-03, Att. B, C, FTC-000487-88; *see also* PX 6 ¶¶ 27-31, FTC-000413-416 (collecting comments).

At the FTC’s request, Dr. Ed Blonz, a professor at the Department of

Clinical Pharmacy at the University of California, San Francisco, and a Fellow of the American College of Nutrition, analyzed each of the ingredients in LeanSpa Acai and South Beach Java. PX 1 (Blonz Dec.) ¶¶ 2-3, FTC-000002-003. Dr. Blonz, an expert in the fields of nutrition, dietary supplements, obesity, fad diets, and body- weight management and reduction, (PX 1 ¶ 1, FTC-000001, Att. 1 at FTC-000014-17), also searched and reviewed scientific literature regarding these products and their respective ingredients. PX 1 ¶ 7, FTC-000003-4. Dr. Blonz found that “there is not one study in the scientific literature reporting any effect of the acai berry or an acai berry extract, on weight loss in humans,” (PX 1 ¶ 11, FTC-000005), and, based on his review of the scientific literature, “there is no substantiation for any statement that any level of intake of The Products individually or in combination, or the ingredients therein, can achieve the claimed rate of weight loss without dieting or intense exercise.” PX 1 ¶ 5, FTC-000003.

In addition, Dr. Blonz concluded that any claim that the ingredients of either product, taken separately or in combination, causes rapid and substantial weight loss is false. PX 1 ¶ 4, FTC-000005. Indeed, Dr. Blonz reports that such claims approach physiological impossibility, even with diet and exercise, because a weight loss of 25 pounds in four weeks requires a daily *deficit* of more than 3,000 calories, and exercise equivalent to running approximately 25 miles a day to burn the needed calories. PX 1 ¶ 28, FTC-000008-09. This is a far cry from the claim, made in Defendants’ advertisements, of achieving such dramatic weight loss with “no intense exercise.”

B. Defendants' Misrepresent That Their Websites Constitute Objective News Reports; That Independent Tests Demonstrate the Effectiveness of Featured Products; and That Posted Comments Reflect the Views of Ordinary Consumers.

Defendants commonly design their websites, including the acai berry websites discussed above, to look like objective news reports on an investigative columnist's (*e.g.*, PX 5 ¶¶ 4 and 10, FTC-000284, Att. A, FTC-000293 and D, FTC-000363; PX 6 ¶ 20, FTC-405-09, Att. A, FTC-000431-65, ¶ 19, FTC-000404-05, Att. H (acai berry and surplus auction websites)), or an ordinary consumer's experience (*e.g.*, PX 5 ¶ 6, FTC-000284, Att. B, FTC-000298; PX 6 ¶ 18, FTC-000404, Att. G, FTC-000506-12), in using a particular product, program, or service, such as a weight-loss product, a surplus auction service, a work-at-home program, or an inexpensive teeth whitener. *Id.* In many instances, before consumers even click through to Defendants' fake news websites, Defendants' banner ads already have created the impression that these websites contain a news article by making statements such as:

“Acai Berry EXPOSED (Consumer Report)
Washington Warning! Health Reporter Discovers The Shocking
Truth!”

PX 6 ¶ 17, FTC-000406.

“Piscataway Mom Makes \$84/hr Online!
We Investigated How She Makes \$8000/Month.
You Won't Believe How . . .”

PX 6 ¶ 24. FTC-000410.

The websites' content builds on this messaging in Defendants' banner ads. For example, the websites often have news headlines such as:

“Acai Berry Diet Exposed: Miracle Diet or Scam?
As part of a new series: ‘Diet Trends: A look at America’s Top Diets’
we examine consumer tips for dieting during a recession.”

PX 5 ¶ 6, FTC-000284, Att. B at FTC-000335.

“New Jersey JOB REPORT
Work At Home Mom Makes \$6,795/Month Part-Time”

PX 6 ¶ 17, FTC-000404.

Surplus Auctions Exposed: 95% Off Retail Possible?
As part of a new series: “How to Save Big Bucks when Shopping
Online”

PX 6 ¶ 19, FTC-000405.

Many of these featured articles expressly state that the reporter personally has tested a product or service. *E.g.*, PX 5 ¶¶ 4, 10, FTC-000284, Att. A, FTC-000293, and D, FTC-000363; PX 6 ¶ 20, Att. A, FTC-000434. For example, Defendants’ websites that advertise LeanSpa Acai contain the statements:

But we here at News 6 are a little skeptical and aren’t sure that we’ve seen any real proof that these pills work for weight-loss. So we decided to put these products to the test. What a better way to find out the truth than to conduct our own study?

PX 6 ¶ 22, FTC-409-10, Att. J, FTC-000485.

Another reason I chose LeanSpa Acai is because it is the most concentrated and purest acai product on the market. This would give me the most accurate results for my test.

Id. at FTC-000485.

We were pretty skeptical, but wanted to find out for ourselves if this product could actually do everything that it claimed.

Like us, here at News 6, you might be a little doubtful about the effects of this diet, but you need to try it for yourself; the results are real. After conducting our own personal study we are pleased to see

that people are finding success with it (myself included :)).

Id. at FTC-000487.

Julie Ayers, our Health and Nutrition columnist, recently put the Acai and COffee (sic) Diet to the test. After four weeks of testing the effects of America's Newest Superfood combined with a Coffee Diet Aid, she has reached the conclusion to what this diet is all about, and the results were surprising.

Id. at FTC-000485.

In addition to the express statements made in "news" articles on their websites, Defendants use several other devices to bolster the overall impression that their websites contain objective reports on the products featured. For example, Defendants attribute the articles to news reporters working for news outlets such as "News 6," "News Daily 7," and the "New Jersey Job Report." *E.g.*, PX 5 ¶ 6, FTC-000284, Att. B at FTC-000335; PX 6 ¶ 17, FTC-000404. Defendants' websites also liberally display trademarks from established news companies, including ABC, CNN, and Fox News, even though their content has no affiliation with these companies. *Id.* Defendants typically give their websites news-sounding names such as onlinenews6.com, online6reports.com, online6health.com, online8report.com, and memphisgazette.net. *E.g.*, PX 5 ¶ 4, FTC-000284, Att. A, FTC-000293; PX 6 ¶ 5, FTC000-394-97. Finally, the websites assign writers by-lines such as "Health and Diet Columnist" or "Hot Trends and Shopping Deals writer." *See, e.g.*, PX 5 ¶ 11, FTC-000284, Att. E at FTC-000381; PX 6 ¶ 20, Att. A, FTC-000434, 446.

The farce is extended even further when Defendants purport to publish

ordinary consumers' responses to the articles, a feature legitimate news websites commonly offer their readers to encourage debate. *E.g.*, PX 5 ¶ 4, FTC-000284, Att. A at FTC-000296-297; *cf.* PX 6 ¶ 26, FTC-000412, Att. K, FTC-000543-559.

For example, a person who identifies herself as Diane states:

My friends and I have all been waiting for the acai diet to hit the news. Atleast [sic] 5 of us have all done the acai diet (costing upwards of \$300+) and we all lost a bunch of weight. This stuff truley [sic] is incredible and has changed all of our lives. Good luck to everyone who takes advantage of this wonderful opportunity [.]

PX 6 ¶¶ 20, 28-29, FTC-00413-14, 436.

Despite Defendants' ardent efforts to deceive consumers into believing otherwise, nearly all of the information contained on Defendants' landing pages is *fake*, from the news article itself, to the female news reporter pictured,² to the consumer responses posted below the article.³ Tellingly, the news articles discussing acai berries on Defendants' websites vary little, if at all, from one

² The photographs for the "health and diet columnists" pictured on Defendants' landing pages are actually stock photographs that appear on countless other fake news websites. PX 6 ¶ 33 FTC-000416-19, Atts. N, O, FTC-000585-86, 588-96. Indeed, the photo purported to be of the health columnist "Julia Miller," displayed on many of Defendants acai berry websites, is likely that of a popular French television reporter named Melissa Theuriau. PX 6 ¶ 33, FTC-000416-19, Atts. O, P, Q, FTC-000587-596, 597-602, 603-05.

³ For example, identically worded comments, with the same misspellings and grammatical errors, are posted across Defendants' acai berry websites, even appearing in the same order. PX 6 ¶¶ 27-29, FTC-000413-414. Even more probative, strikingly similar responses, purportedly from the same person, are posted on websites that report on a completely different topic – surplus auction services. These responses merely swap out the word "acai berry diets," for example, for "surplus auction websites. PX 6 ¶ 30-31, FTC-000415.

another, apart from the brand of weight-loss product featured. *E.g.*, PX 6 ¶¶ 15, 20, 21, 25, Atts. A, B, C, I, J, FTC-000434-38, 446-51, 455-59, 485-89. In fact, Defendants' news articles about weight-loss products with completely different active ingredients, such as products containing acai berries versus Hydroxy Citric Acid (HCA), are practical clones of each other, right down to the "consumer comments." *E.g.*, PX 6 ¶¶ 15, 20, 21, 25, Atts. A, B, C, I, J, FTC-000434-38, 446-51, 455-59, 485-89.

C. Defendants Fail to Disclose, or Disclose Adequately, That Defendants' Websites Are Paid Advertisements

Defendants' confusingly-worded, hidden disclaimers are wholly ineffective to overcome the overall net impression, as set forth above, that an independent journalist wrote the news articles and tested the featured products personally. *See, e.g.*, PX 5 ¶¶ 4 and 10 and Att. A and D, FTC-000286, 290, 293-297, 363-369; PX 6 ¶¶ 15, 20, 21, 25, Atts. A, C, J, FTC-000434-38, 446-51, 455-59, 485-89. Defendants bury qualifying information in the top heading and at the very bottom of their websites.. *Id.* First, Defendants' landing pages inconspicuously contain the confusing term "Advertorial," in small- type, amidst other distracting information, such as bold logos and reporter photos, in their top borders. *Id.* Second, Defendants' websites often include a boiler plate-like disclosure at the very bottom of their websites, in extremely small-print type, following a several-page comment section and well-below the claims made about the featured products. *See, e.g.*, PX 5 ¶¶ 6-8 and Att. B, FTC-000287-289, 301-306, 320-325, 335-338; PX 6 ¶¶ 15, 20, 21, Atts. A, C, J, FTC-000437-38, 449-50, 458-59, 488-

89.

Defendants use two different types of disclosures at the bottom of their websites, depending on the type of product advertised. *See, e.g.*, PX 5 ¶ 6 and Att. B, FTC-000287-288, 338 (website advertising acai berry weight-loss product) *cf.* PX 5 ¶ 7 and Att. B, FTC-000288, 305-306 (website advertising work-at-home program). Below an ambiguously-worded heading,⁴ Defendants' websites that advertise acai berry weight-loss products commonly print a disclosure, in even-smaller-print type, that the statements on the website have not been approved by the Food and Drug Administration and are provided "for general information purposes only." *See, e.g.*, PX 6 ¶ 15, FTC-00402, Att. C, FTC-000488. Consumers must scroll through two pages after finishing the article to view this disclosure, a considerable distance from the hyperlinks to purchase the featured products. *Id.* at FTC-000485-89. Even if consumers read this disclosure, it is not understandable, nor does the information conveyed necessarily correct consumers' belief that Defendants' websites contain objective news reports. A differently worded disclosure appears at the bottom of Defendants' websites that market non-health products, including work-at-home programs, (*see, e.g.*, PX 5 ¶ 7 and Att. B, FTC-000288, 305-306), or surplus auction services. PX 6 ¶ 19, FTC-404-05, Att.

⁴ Although these disclaimers vary in content, each uniformly appears under the same heading, which states in capital letters: "TERMS AND CONDITIONS CAREFULLY READ AND AGREE TO PURCHASE TERMS BEFORE ORDERING." PX 6 ¶ ¶ 15, 20, 21, Atts. A, C, J, FTC-000437, 449, 458, 488. The type size of the heading is much smaller than that of body of the website. *Id.*

G, FTC-000517. This disclosure states that the website is “based loosely off a true story, but has been modified in multiple ways.” Two paragraphs later, in the same minuscule print, the disclosure further states that the “page receives compensation for the clicks on or purchase of products featured on this site.” *Id.*

IV. LEGAL ARGUMENT

To stop Defendants’ ongoing deceptive weight-loss claims for LeanSpa Acai and numerous other acai berry-based products, and their misleading use of fake editorial content to advertise these and other products characterized by fraud, the FTC respectfully requests that the Court issue a TRO enjoining future challenged misrepresentations; preserving assets and information; and ordering Defendants to show cause why a preliminary injunction should not be entered. As discussed below, the requested relief, which the Court is authorized to grant under Section 13(b) of the FTC Act, is warranted because probable cause exists to believe Defendants have violated the FTC Act and there is a reasonable likelihood that future violations will occur absent the relief requested. An asset restriction and document preservation order is necessary to protect this Court’s ability to order effective final relief; and a prompt accounting of the scope of Defendants’ business is necessary to stop ongoing injury to consumers.

A. The Court Is Authorized to Grant the Requested Relief

Section 13(b) of the FTC Act authorizes the FTC to seek, and the Court to issue, temporary, preliminary, and permanent injunctions. The second proviso of Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), states that “in proper cases the

Commission may seek, and, after proper proof, the court may issue, a permanent injunction” against violations of “any provision of law enforced by the Federal Trade Commission.” 15 U.S.C. § 53(b).⁵ Any case alleging violations of a law enforced by the FTC constitutes a proper case for which injunctive relief may be sought. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *In re Nat’l Credit Mgmt.*, 21 F. Supp. 2d 424, 461-62 (D.N.J. 1998). Moreover, Section 13(b) preserves the Court’s inherent authority not only to order permanent relief, restitution, or disgorgement of ill-gotten gains, but also to grant ancillary and preliminary equitable relief, including temporary orders imposing asset freezes and issuing other relief. *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991) (“Section 13(b) does not limit the full exercise of the district court’s inherent equitable power”); *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 346-47 (9th Cir. 1989) (finding proper under 13(b) an order preserving assets from dissipation or concealment); *FTC v. H.N. Singer*, 668 F.2d 1107, 1111 (9th Cir. 1982) (finding that the district court is authorized to order an asset freeze and rescission in a case brought under 13(b)).⁶

Here, where the public interest is at stake, the court’s equitable authority

⁵ See also *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996) (noting that “Section 13(b) of the Federal Trade Commission Act authorizes the FTC to seek, and the district courts to grant, preliminary and permanent injunctions against practices that violate any of the laws enforced by the Commission”).

⁶ See also *Gem Merch.*, 87 F. 3d at 469-70 (district court may award consumer redress under Section 13(b)); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir. 1982) (court authorized to “exercise the full range of equitable remedies traditionally available to it” in Section 13(b) actions).

“assumes an even broader and more flexible character than when only a private controversy is at stake.” *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)); *see also United States v. Laerdal Mfg.*, 73 F.3d 852, 857 (9th Cir. 1995); *Pantron I Corp.*, 33 F.3d at 1102. Courts in the District of New Jersey repeatedly have exercised their authority to issue a full range of equitable relief in cases alleging violations of the FTC Act, including an order to freeze assets and a TRO enjoining deceptive practices and allowing expedited discovery.⁷ Finally, if warranted, the Federal Rules of Civil Procedure authorize District Courts to depart from normal discovery procedures

⁷ Cases in which the District of New Jersey has granted the FTC preliminary relief include: *FTC v. Indep. Mktg. Exch., Inc.*, No. 1:00-cv-00568 (D.N.J. Feb. 3, 2010) (TRO freezing assets and expediting discovery), *available at* FTC-000693; *FTC v. Preferred Platinum Network, LLC*, No. 3:10-cv-00538 (D.N.J. Feb. 1, 2010) (TRO disabling defendants’ websites, freezing assets, and expediting discovery), *available at* FTC-000742; *FTC v. Romeo*, 2:09-cv-01262 (D.N.J. Apr. 20, 2009) (order to show cause why PI should not issue) (Apr. 28, 2009) (stipulated PI barring certain claims and preserving documents), *available at* FTC-000775; *FTC v. Hope Now Modifications, LLC*, No. 1:09-cv-01204 (D.N.J. Mar. 20, 2009) (TRO freezing assets and expediting discovery); *FTC v. New Hope Property, LLC*, No. 1:09-cv-01203 (D.N.J. Mar. 20, 2009) (TRO freezing assets and expediting discovery), *available at* FTC-000670; *FTC v. United Credit Adjusters, Inc.*, No. 3:09-cv-00798 (D.N.J. Feb. 24, 2009) (TRO freezing assets, requiring immediate turnover of computers and expediting discovery), *available at* FTC-000818; *FTC v. Dutchman Enter., LLC*, No. 2:09-cv-00141 (D.N.J. Jan. 20, 2009) (TRO preserving assets and expediting discovery), *available at* FTC-000655; *FTC v. Clifton Telecard Alliance One, LLC*, No. 2:08-cv-01480 (D.N.J. Apr. 2, 2008) (TRO appointing monitors over business), *available at* FTC-000625; *FTC v. Sparta Chem, Inc.*, No. 96-3228 (D.N.J. Nov. 14, 2007) (TRO freezing assets, appointing receiver, authorizing immediate access to premises and expediting discovery), *available at* FTC-000790. These entered TROs are compiled in Volume VI of the Exhibits Supporting the FTC’s Motion for TRO, Other Equitable Relief, and Order to Show Cause Why A Preliminary Injunction Should Not Issue.

and to fashion discovery by order to meet needs in particular cases. Fed. R. Civ. P. 1, 26(d), 30(a), 33(a), and 34(b).

B. The FTC Has Met the Standard for Issuance of a Temporary Restraining Order and Preliminary Injunction.

In the Third Circuit, a grant of temporary or preliminary relief is warranted in a statutory enforcement action brought by an agency of the United States if:

(1) probable cause exists to believe that a statute in question is being violated; and

(2) absent the relief, there is a reasonable likelihood of future violations. *United States v. Focht*, 882 F.2d 55, 576 (3d Cir. 1989); *FTC v. Check Enforcement*, 2003 U.S. Dist. LEXIS 26941, *13 (D.N.J. Jul. 30, 2003); *Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 440. Courts also weigh the equities and the public interest. *Check Enforcement*, 2003 U.S. Dist. LEXIS 26941, *13; *Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 440. Unlike private litigants, however, the FTC need not show irreparable harm and thus harm to the public interest is presumed. *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999) (“the Commission need not show irreparable harm”); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991); *Check Enforcement* 2003 U.S. Dist. LEXIS 26941, *13 (“Indeed, because Congress has seen fit to act in a given area by enacting a statute, irreparable injury must be presumed in a statutory enforcement action.”).⁸

⁸ See also *Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 438-39; *FTC v. Nat'l Invention Servs., Inc.*, 1997 WL 718492 (D.N.J. Aug. 11, 1997) (“‘harm’ requirements are presumed from the fact that a federal regulatory statute has apparently been violated”).

1. The FTC Has Demonstrated Probable Cause to Believe That Defendants Are Violating Sections 5 and 12 of the FTC Act.

The record demonstrates ample probable cause that Defendants have violated Sections 5 and 12 of the FTC Act, in disseminating false weight-loss claims for acai berry products and in misrepresenting their websites as independent and objective sources of information about these and many other products. Section 5(a) of the FTC Act condemns as unlawful “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1) and 52(b)(2). Section 12(a) prohibits “any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement” relating to food or drugs affecting or likely to affect commerce. 15 U.S.C. § 52(b)(2).⁹ “A violation of Section 12, the dissemination of false advertising, constitutes a violation of Section 5(a).” 15 U.S.C. § 52(b); *FTC v. Nat’l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1188 (N.D. Ga. 2008) (quoting *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 957 (N.D. Ill. 2006), *aff’d*, 512 F.3d 858 (7th Cir. 2008)).

⁹ The acai berry dietary supplements that Defendants advertise, including LeanSpa Acai, are considered either a “food” or “drug” under the law. Section 15(c) of the Act defines a drug, in part, as any article, other than food, “intended to affect the structure or function” of the human body and Section 15(c) defines food as an article used as a food. Advertisements for drugs and dietary supplements fall under Section 12 of the FTC Act. *See, e.g., FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1273 (S.D. Fla. 1999) (purported weight loss tablets); *Porter v. Dietsch, Inc. v. FTC*, 605 F.2d 294 (7th Cir. 1979) (same); *FTC v. Pharmtech Research, Inc.*, 576 F. Supp. 294, 299-301 (D.D.C. 1983) (same). For purposes of this action, it is not necessary to determine whether the product is a food or a drug because Section 12 applies equally to both.

An act or practice is deceptive under Section 5 if “(1) there was a representation, omission, or practice; (2) the representation, omission or practice is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission or practice is material.” *FTC v. Stefanich*, 559 F.3d 924, 928 (9th Cir. 2009); *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir.2003); *Kraft Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992); *Nat’l Credit Mgmt.*, 21 F.Supp. 2d at 441. Courts apply this same three-prong test to determine if a party has disseminated a “false advertisement” – defined as an advertisement that is “misleading in a material respect” (15 U.S.C. §§ 52(b) and 55) – in violation of Section 12. *FTC v. Direct Mktg. Concepts, Inc.*, 624 F. 3d 1, 6, 2010 U.S. App. LEXIS 21743 at *12 (1st Cir. 2010); *FTC v. Nat’l Urological Group*, 645 F. Supp. 2d at 1188; *QT*, 448 F. Supp. 2d at 957; *Kraft*, 970 F.2d at 314; *FTC v. Chinery*, Civ. No. 05-3460, 2007 WL 1959270 at *5 (D.N.J. July 5, 2007) (same). Knowledge of an advertisement’s falsity is not determinative of whether an advertiser has violated the FTC Act. *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977); *Porter & Dietsch, Inc. v. FTC* , 605 F.2d 294, 309 (7th Cir. 1979); *FTC v. US Sales Corp.*, 785 F. Supp. 737, 751 (N.D. Ill. 1982).

a. Defendants’ Weight-Loss Claims for Acai Berry Products Violate Sections 5 and 12 of the FTC Act.

As set forth below, the FTC has established probable cause that Defendants made the claim that their products cause substantial and rapid weight-loss, and that this claim is material and likely to mislead reasonable consumers in violation of Sections 5 and 12 of the FTC Act. In determining whether an advertisement

communicates a particular claim, the Court considers the overall, net impression. *Nat'l Urological Group*, 645 F. Supp. 2d at 1189 (“court must look to the overall, net impression rather than the literal truth or falsity of the works in the advertisement”); *QT*, 448 F. Supp. 2d at 957-58. Moreover, testimonials concerning a person’s success in using a product imply a claim that consumers reasonably would ascribe to themselves. *See, e.g., Porter & Dietsch* 605 F.2d at 301-03 (finding ads conveyed extravagant weight-loss claims through use of testimonials); *FTC v. Bronson Partners, LLC*, 564 F. Supp. 2d 119, 131 (D. Conn. 2008) (testimonials convey the implied claim that reported experience reflects “typical and ordinary results” if consumers use the product).

As here, where the claims are express or conspicuously implied, courts have authority to interpret the ad’s meaning without the aid of extrinsic evidence. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92, (1965) (the meaning of an advertisement may be determined by an examination of the ad itself); *Nat'l Urological Group*, 645 F. Supp. 2d at 1189 (citing *In re Thompson Med. Co., Inc.*, 104 F.T.C. 648, p. 102 (1984) (noting that when an advertisement unequivocally states a claim, “it is reasonable to interpret the ads as intending to make [it]”)); *QT*, 448 F. Supp. 2d at 958.

As described in Section III.A *infra*, Defendants’ advertisements represent that the investigative reporter who used the featured acai berry dietary supplements lost 9 pounds in the first week alone, and an incredible 25 pounds in 4 weeks. The ads also expressly represent that she achieved these remarkable results without any

changes to her daily routine, including diet and exercise. *Id.* The court is authorized to, and should, find that in looking at Defendants' claims as a whole, the impression conveyed is that the acai berry products that Defendants advertise will cause substantial and rapid weight loss for consumers.

The record further establishes that Defendants' weight-loss claims are patently false and lack a reasonable basis. There are two bases upon which the FTC can prove that claims are misleading: (1) falsity; and (2) no reasonable basis to assert the claim as true. *Pantron I*, 33 F.3d at 1095; *QT*, 448 F. Supp. 2d at 957-58 (N.D. Ill. 2006), *aff'd*, 512 F.3d 858 (7th Cir. 2008). False and unsubstantiated claims are inherently "likely to mislead" consumers, and consumers have no obligation to doubt the veracity of express claims. *In re Thompson Med. Co.*, 104 F.T.C. 648, 788, 818-19 (discussing with approval FTC's Policy Statement on Deception (Oct. 14, 1983)), *aff'd* 791 F.2d 189 (D.C. Cir. 1986).

An advertiser must possess "competent and reliable scientific evidence" to substantiate health-related claims, including weight-loss claims. *Nat'l Urological Group*, 645 F. Supp. 2d at 1190; *QT*, 448 F. Supp. 2d at 908; *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1274 (S.D. Fla. 1999).¹⁰ As set forth in Dr. Blonz's declaration, there is *no* substantiation to support Defendants' extreme weight-loss claims for LeanSpa Acai and South Beach Java (the product sold in conjunction

¹⁰ Courts have found that competent and reliable scientific evidence for medical, health-related claims means a well-conducted, placebo-controlled, randomized, double-blind study. *See, e.g., QT*, 448 F. Supp. 2d at 962; *SlimAmerica*, 776 F. Supp. 2d at 1274.

with it), or products containing similar ingredients, at any intake-level, “without diet or intense exercise.” Moreover, according to his review of the scientific literature and extensive experience in the fields of nutrition, diet plans, and dietary supplements, Dr. Blonz concludes that these claims for acai berry-based supplements not only lack substantiation, they are not scientifically plausible, and thus outright false.

Finally, Defendants’ misleading weight-loss claims were material. Courts find materiality if a claim conveys information “that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product.” *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201(9th Cir. 1996) (quoting *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984)); *QT, Inc.*, 448 F. Supp. 2d 908, 960, *aff’d*, 512 F.3d 858; *see also Colgate-Palmolive Co.*, 380 U.S. 374, 392 (court can infer, after finding that a deceptive claim was made, that the claim was material). Express claims, deliberately implied claims used to induce the purchase of a product, and claims that “significantly involve health,” are presumed to be material. *Pantron I Corp.*, 33 F.3d at 1095-96; *FTC v. Figgie Internat’l, Inc.*, 994 F.2d 595, 604 (9th Cir. 1993); *Am. Home Prods. Corp. v. FTC*, 95 F.2d 681, 688 n.11 (3rd Cir. 1983); *QT*, 448 F. Supp. 2d at 960. Defendants’ claims of weight-loss go to the core reasons why consumers would choose to purchase or use the advertised acai berry products. Moreover, Defendants’ express claims of substantial and rapid weight loss warrant a presumption of materiality. *See Novartis*, 223 F.3d at 786 (applying presumption of materiality where claim

“involved both a health matter and the products’ purpose and efficacy”).

b. Defendants’ Claims That Its Websites Contain Objective News Content and Independent Reviews of Featured Products Violate Section 5 of the FTC Act.

Defendants mislead consumers into believing that their advertisements offer objective news reports; that independent tests demonstrate the effectiveness of advertised products; and that published comments reflect the views of ordinary consumers, all in violation of Section 5 of the FTC Act. As discussed in Section IV.B.1, *supra*, in determining whether this claim is made, the court should consider the overall, net impression of the advertisements, not statements made in isolation. *FTC v. Am. Home Prods., Corp.*, 695 F.2d 681, 687 (3d Cir. 1982), *citing Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976). Defendants meticulously weave together various elements – news-sounding headlines, writer by-lines, and website names, employ logos of legitimate news companies, and post “consumer” comments posted below the fake news items – to create the unmistakable net impression that their websites are objective news reports. Given that Defendants’ ads make this claim expressly or by strong implication, the Court can find the claim based on the face of the ads. *Nat’l Urological Group, Inc.*, 645 F. Supp. 2d at 1189; *see also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652 (1985) (extrinsic evidence unnecessary when “possibility of deception [is] self-evident” from the face of an advertisement). Indeed, Defendants’ fake news articles expressly claim to report a “skeptical” reporter’s experience in using the featured product, stating that, for example, the reporter “conducted [her] own

study” and wanted to “find out for [herself] if this product could actually do everything that it claimed.”

Defendants’ inconspicuous disclaimers, which appear in the top heading and at the very bottom of the websites, do not negate the overwhelming takeaway claim that independent journalists have authored the content on Defendants’ websites and either have tested the products personally or report on ordinary consumers’ experiences. For a disclaimer to be effective, it must be “sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression.” *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989); *see also Cyberspace.com*, 453 F.3d at 1200 (“A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures.”). It is unlikely consumers will even notice Defendants’ fine print disclaimers, which are hidden in the top border and below the comments section on their websites. *See, e.g. FTC v. Brown Williamson Tobacco Corp.*, 778 F.2d 35, 42-43 (consumers unlikely to read fine print disclaimer in corner of cigarette ad) (D.D.C. Cir. 1985); *Floersheim v. FTC*, 411 F.2d 874 (9th Cir. 1969) (despite small print disclaimer on back of forms, the repeated use of the words “Washington D.C.” on debt-collection forms conveyed the deceptive impression of a government demand).

In addition, even if consumers notice and read these buried disclaimers, their language does nothing to clarify that Defendants’ websites are paid advertisements and only creates confusion. *See FTC v. Direct Mktg. Concepts*, 624 F. 3d at *24,

(finding that advertisers' disclaimers did not affect the meaning of informercials' specific health claims). The ambiguous word "advertorial" on the website means little, if anything, to consumers who notice it, and does not overcome the strong claims that the websites contain editorial content. *S.E.C. v. Corporate Relations Group, Inc.*, No. 6:99-CV-1222, 2003 WL 25570113 at *8 (M.D. Fla. Mar. 28, 2003), *aff'd*, 99 Fed. App'x 881 (11th Cir. 2004) (holding that the "advertorial" label on articles that promoted securities did not convey that discussed company paid for the articles). Similarly, the longer form disclosures at the bottom of Defendants' websites that advertise weight-loss products, which merely tell consumers that statements made are for "informational purposes only" and are not approved by the FDA, are inadequate. This disclaimer does not correct the overwhelming, and well-orchestrated, impression that the websites provide objective information, serving only to obfuscate. Further, although the statement on some websites that claims the website receives compensation for "clicks on and purchases of featured products" may communicate the commercial nature of the website, its obscure placement – several pages below the fake news article and the hyperlinks to purchase the featured products – ensures that no consumer will see this disclaimer and have the opportunity to contemplate its meaning.¹¹

¹¹ However, it may be the case that no disclaimer, even though sufficiently prominent and unambiguous, can overcome Defendants' strong claims that their websites provide independent news content and that tests demonstrate the effectiveness of featured products. Statement in Regard to Advertisements that Appear in Feature Article Format, 3 Trade Reg. Rep. (CCH) § 7559 (1967) ("... [I]n some instances the format of the advertisement may so exactly duplicate a news or feature article as to render the caption 'ADVERTISEMENT' meaningless

Defendants' false claims that their websites offer objective news content are material. *See, e.g., Cyberspace.com*, 453 F.3d 1196 at 1201. Knowing that Defendants' websites do *not* provide objective reviews of the featured products is important information that would affect the weight consumers give such information in deciding whether to purchase or use those products. *See, e.g., S.E.C. v. Corporate Relations Group, Inc.*, No. 6:99-CV-1222, 2003 WL 25570113 at *8, *aff'd*, 99 Fed. App'x 881 (finding the false impression that a paid promotion for securities is a news item is material information for investors). Moreover, when claims are express or deliberately implied, courts can presume materiality. *See Pantron*, 33 F.3d at 1095-96. Here, Defendants were meticulous in their simulation of a news format for their various websites and expressly told consumers that journalists had tested featured products; a presumption of materiality for Defendants' challenged claims is warranted.

2. Davidson is personally liable for injunctive and monetary relief.

An individual is subject to injunctive relief for a business entity's deceptive acts if the individual participated directly in the acts or practices or had authority to control the company involved in the unlawful practices. *FTC v. Check Investors*, No. 03-2115, 2003 U.S. Dist. LEXIS 26941 at *43-44 (D.N.J. July 30, 2003); *FTC v. Nat'l Credit Mgmt.*, 21 F. Supp. at 461; *FTC v. Nat'l Invention Serv.*, No. 97-3459, 1997 WL 718492 at *4 (D.N.J. Aug. 11, 2007); *Cyberspace.com*, 453 F.3d at 1202; *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir.

and incapable of curing the deception.”).

1997); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989).

“Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer.” *Amy Travel*, 875 F.2d at 573; *Publ’g Clearing House*, 104 F.3d at 1170-71. In general, an individual’s status as an officer gives rise to a presumption of ability to control a small, closely held corporation. *Standard Educators, Inc. v. FTC*, 475 F.2d 401, 403 (D.C. Cir. 1973); *Nat’l Invention Serv.*, 1997 WL 718492 at *4 (status as corporate officer establishes authority to control employees and therefore the company’s policies). More particularly, assuming the duties of an officer is probative of an individual’s participation or authority. *Amy Travel*, 875 F.2d at 573; *Five-Star Auto Club*, 97 F. Supp. 2d 502, 538 (S.D. N.Y. 2000).

An individual is liable for monetary relief for a business entity’s deceptive advertising if the individual: “(1) was a corporate officer with the capacity to make decisions regarding the challenged conduct, and (2) knew or should have known that there was no reasonable basis for the deceptive claims.” *Direct Mktg.*, 624 F.3d at *12 (citing *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir.1997). “The degree of participation in business affairs is probative of knowledge.” *Amy Travel*, 875 F.2d at 574 (citing *FTC v. Internat’l Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,725 at 69, 707-08, 1983 WL 1911 (N.D. Cal. 1983)).

Davidson satisfies both standards of liability. First, as Circa Direct’s chief

executive officer, and the only officer or member of Circa Direct identified in public filings, Davidson has authority to control the company. Second, Davidson directly controls Circa Direct's advertising, and therefore knew or should have known of the advertising's deceptive format and content. Indeed, Davidson appears to be the singular figure directing all aspects of Circa Direct's internet advertising business. He runs Circa Direct from his home in Margate, N.J. He has personally registered dozens of websites used by Circa Direct, including circadirect.com, to disseminate the company's deceptive advertising. He alone has negotiated deals on Circa Direct's behalf with companies to place advertisements on a broad range of websites. Perhaps most significantly, he directly controls Circa Direct through its purse strings: he has authorized millions of dollars in Circa Direct advertising, often using his own credit card. As the First Circuit described a defendant in upholding a finding of individual liability, Davidson "could have nipped the offending [advertising] in the bud." *Direct Mktg.*, 624 F.3d at **12-13. Instead, Davidson has caused Circa Direct to disseminate countless false and deceptive advertisements, and he is liable for this misconduct.

3. There Is a Reasonable Likelihood of Future Violations.

The courts consider several factors in deciding whether there is a reasonable likelihood of future violations absent injunctive relief, including "the isolated or recurrent nature of the refraction" and "the nature of Defendants' occupation." *Nat'l Credit Mgmt.*, 21 F.Supp. 2d at 446. When the law violations are based on systematic wrongdoing, as opposed to an isolated occurrence, courts have been

more willing to enjoin future conduct. *United States v. Richlyn Labs, Inc.*, 827 F. Supp. 1145, 1150 (E.D. Pa. 1992); *Commodity Futures Trading Comm'n v. Hunt*, 591 F. 2d 1211, 1219 (7th Cir. 1979) (“systematic and carefully preconceived” basis for injunction against soybean trader for Commodities Exchange Act violations).

In this case, the possibility of future violations is high. Defendants – registrants of more than 100 websites – are regular participants in the business of online marketing. Defendants’ law violations are hardly isolated in nature. For more than two years, Defendants systematically have exploited the same deceptive “fake news format” to hawk a range of products and make patently false weight-loss claims for at least a half dozen different dietary supplements. Their entrenched business interests in this form of deception make them very capable of future violations. Accordingly, to protect consumers from future harm, it is appropriate to issue the requested Order enjoining further violations of the FTC Act.

4. The Balance of Equities Favors Issuance of An Injunction

The public interest in halting Defendants’ continued use of fake news articles to make performance claims for a wide range of products, including false weight-loss claims, and in preserving assets for a meaningful monetary remedy far outweighs any interest Defendants may have in continuing to deceptively advertise these products. In balancing the hardships between the public and private interest, “the public interest should receive greater weight.” *FTC v. World Travel Vacation*

Brokers, 861 F.2d 1020, 1030 (7th Cir. 1988); *see also Affordable Media*, 179 F.3d at 1236 (“Obviously, the public interest in preserving the illicit proceeds . . . for restitution to the victims is great.”).

Here, the balance tips strongly in favor of issuance of the requested TRO. Defendants’ past law violations, which are systematic and pervasive, strongly suggest they will persist in defrauding consumers absent the requested injunctive relief. In contrast, “there is 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.” *World Wide Factors*, 882 F.2d at 347. The court has no obligation to protect ill-gotten profits or illegal business interests. *CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 143 (2d. Cir. 1977); *United States v. Diapulse Corp. of America*, 457 F. 2d 25, 29 (2d. Cir. 1972). The public interest thus strongly favors entry of the requested Order.

C. An Asset Preservation Order and Limited Expedited Discovery Is Necessary.

In addition to enjoining Defendants’ deceptive advertising practices, the FTC will seek a final order with monetary relief, including consumer redress or disgorgement of ill-gotten gains. To preserve the availability of funds to redress consumers and to determine the scope of the harm, the FTC asks that the Court issue a TRO that would prohibit unreasonable dissipation of assets; require Defendants to complete financial statements and provide an accounting of certain advertising activities and revenues; and subject Defendants to expedited discovery on limited topics. This temporary, equitable relief is necessary to protect the

Court's ability to enter full and final relief as sought in the complaint. "In a proceeding under section 13(b), the statutory grant of authority to the district court to issue permanent injunctions includes the power to order any ancillary equitable relief necessary to effectuate the exercise of the granted powers." *Amy Travel*, 875 F.2d at 571-72 (upholding asset freeze). The requested relief, which will not prevent Defendants from carrying out lawful business activities, is similar to (and, in many instances, more narrow than) that ordered in prior FTC cases in the District of New Jersey.¹² See note 7 *supra*.

The monetary harm from Defendants' practices is not insignificant, likely in the range of millions or possibly tens of millions, in light of the nearly \$7 million in advertising expenditures discovered thus far. Section III of the proposed TRO bars Defendants from dissipating assets other than those needed for their actual, ordinary, and necessary business or living expenses. This Section also requires Defendants to provide an accounting of their expenses during the pendency of the TRO. Such measures are necessary to preserve the possibility of

¹² The instant case is one of several new FTC actions, all seeking similar temporary relief, that attack fake news sites promoting, *inter alia*, acai berry-based weight-loss products. Two courts already have approved TROs. *FTC v. Dunlevy*, No. 1:11-cv-01226 (N.D. Ga. April 15, 2011) (TRO requiring asset preservation, accounting, and expedited discovery), *available at* FTC-000637; *FTC v. Vaughn*, No. 2:11-cv-00630 (W.D. Wash. Apr. 15, 2011) (stipulated TRO requiring asset preservation, accounting, and expedited discovery), *available at* FTC-000836. The other related cases are pending hearing or being filed today. These entered TROs cases are included in Volume VI of the Exhibits Supporting the FTC's Motion for TRO, Other Equitable Relief, and Order to Show Cause Why A Preliminary Injunction Should Not Issue.

the permanent monetary relief sought in the Commission's complaint, including but not limited to consumer redress to those harmed by Defendants' deceptive practices or disgorgement of Defendants' ill-gotten gains. *H.N. Singer*, 668 F.2d at 1111 (9th Cir. 1982) (upholding preliminary relief including individual and corporate asset freeze and accounting of assets and citing legislative history, S.Rep. 93-151, 30-31, for support that Congress contemplated courts entering such preliminary relief in "routine fraud" cases under Section 13); *In re Nat'l Credit Mgmt. Group, L.L.C.*, 21 F. Supp. 2d 424, 461-62 (D.N.J. 1998) (authorizing asset freeze and appointment of receiver under Section 13(b)). Indeed, once a court has determined the FTC is likely to prevail in a final determination on the merits, it has "a duty to ensure that . . . assets . . . [are] available to make restitution to the injured customers." *World Travel Vacation Brokers*, 861 F.2d at 1031 (emphasis added). See also *id.* at 1028 (allegations of false and deceptive advertising constitute a "routine fraud" case" under Section 13).

Section IV of the proposed TRO requires Defendants to complete financial statements and to provide an accounting that includes: identification of the products advertised by Defendants; revenues and profits obtained from such advertising; and contact information for persons who have supplied, provided fulfillment for, or paid for advertising of these products. Similarly, Section VI subjects Defendants to expedited discovery regarding Defendants' assets, the nature and location of documents regarding Defendants' business transactions, and the location of Defendants' business premises.

The large scale and virtually impenetrable nature of Defendants' business necessitates this relief. Defendants have spent millions of dollars to disseminate trillions of impressions of internet advertisements, but, short of compelling the requested disclosure from Defendants, there is no clear way to identify the full extent of where, how, and to what end Defendant has effected the dissemination of deceptive advertising.¹³ The disclosure of certain information and expedited discovery on limited matters fall well within the court's broad and flexible authority in equity to grant preliminary emergency relief in cases involving the public interest. *Porter*, 328 U.S. at 398; *FSLIC v. Dixon*, 835 F.2d 554, 562 (5th Cir. 1987); *Federal Express Corp. v. Federal Expresso, Inc.*, No. 97-CV-1219, 1997 U.S. Dist. LEXIS 19144, at * 6 (N.D.N.Y. Nov. 24, 1997) (early discovery "will be appropriate in some cases, such as those involving requests for a preliminary injunction") (quoting commentary to Fed. R. Civ. P. 26(d)); *Benham Jewelry Corp. v. Aron Basha Corp.*, No. 97 Civ. 3841, 1997 U.S. Dist. LEXIS 15957, at *58 (S.D.N.Y. July 18, 1997) (courts have broad powers to grant expedited discovery); *F.T.C. v. Vocational Guides, Inc.*, No. 3:01-0170, 2008 WL 4908769 (M.D. Tenn. November 12, 2008) (finding that financial disclosure and expedited discovery are in the public interest). *See also* Fed. R. Civ. P. 1, 26(d), 30(a), 33(a), and 34(b) (district courts may depart from normal discovery

¹³ A financial accounting, in combination with an injunction against unreasonable asset dissipation, helps to preserve assets for final relief. *See, e.g., SEC v. Bankers Alliance Corp.*, 881 F. Supp. 673, 676 (D.D.C. 1995); *SEC v. Parkersburg Wireless LLC*, 156 F.R.D. 529, 532 n. 3 (D. D.C. 1994).

provisions, including applicable time frames, to meet the discovery needs of particular cases). Moreover, the minimal burden that these provisions will impose on Defendants is more than justified by the volume of evidence demonstrating that they have disseminated deceptive advertisements in violation of the FTC Act.

VII. CONCLUSION

For the reasons delineated above, the Commission respectfully requests that the Court enter a Temporary Restraining Order and Order to Show Cause, including provisions for the preservation of assets and evidence, to halt Defendants' ongoing violations of the FTC Act and to protect the Court's ability to issue effective, final relief in this matter as it may deem appropriate.

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Respectfully submitted,

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