

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

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JAMES N. HATTEN, Clerk
By:  Deputy Clerk

FEDERAL TRADE COMMISSION,)

Plaintiff,)

v.)

CHARLES DUNLEVY, individually)

Defendant.)

Case No.

1:11-CV-1226

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

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I. INTRODUCTION

Plaintiff Federal Trade Commission (“FTC”) having filed its Complaint for Injunctive and Other Equitable Relief, moves this Court, pursuant to Sections 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), for a temporary restraining order (“TRO”) to halt Defendant’s deceptive business practices.

Since at least October 2009, Defendant Charles Dunlevy (“Defendant”) has been engaged in the deceptive advertising of acai berry and colon cleanse products, falsely claiming that rapid substantial weight loss can be achieved through the use of these products. Defendant is an affiliate marketer who advertises for merchants selling acai berry and colon cleanse products, and he profits financially by driving Internet traffic to these merchants where the products can be purchased. In order to lure consumers, Defendant advertises these products with teaser ads and phony news reporting websites featuring phony investigative reporters who claim they have personally experienced rapid and substantial weight loss after taking the acai berry and colon cleanse products. Furthering the deception, Defendant’s websites also contain fake comments from alleged enthusiastic consumers. However, Defendant fails to disclose, or to disclose adequately, that he is a paid advertiser for the merchants who sell the acai berry and colon cleanser products.

Defendant's practices are deceptive and violate Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52 in three ways. First, the efficacy claims of rapid and substantial weight loss by using acai berry and colon cleanse products are completely false. Defendant is misrepresenting that rapid and substantial weight loss- often 25 pounds in four weeks- can be achieved through the combined use of the acai berry and colon cleanse products he advertises. Weight loss through the use of acai berry and colon cleanse products is impossible in the time frame and manner described on Defendant's news sites. Second, Defendant is misrepresenting that his web sites provide objective investigative reports authored by reporters who are conducting independent tests of the products and that real consumers have commented on the products. These news reports, the reporters, their reported weight loss experiences and the consumer comments are completely fabricated. Finally, Defendant fails to disclose, or adequately disclose his material connection to the merchants. Unbeknownst to the consuming public, the sole purpose of Defendant's web sites is to advertise the featured acai berry products and for Defendant to be compensated for the number of clicks on and purchases of products made through Defendant's sites. Defendant's web sites fail to disclose, or disclose inadequately, that Defendant receives commissions when consumers purchase the products or sign up for "free trials" on the product-selling sites. For

all these reasons, therefore, temporary injunctive relief is necessary and justified.

Additionally, Plaintiff FTC moves for immediate production of Defendants's records related to his affiliate marketing of the acai berry and companion products and the financial documents that reveal locations and amounts of assets held by Defendant, including the completion of a financial disclosure form. Such relief is critical to preserving the status quo, and protecting any unlawfully obtained assets pending a preliminary injunction hearing. Finally, Plaintiff moves for an order that requires Defendant to show cause why a preliminary injunction should not issue.

The FTC's Motion for TRO is supported by strong and compelling evidence, including declarations and records from a variety of sources: FTC investigators Michael Liggins and Douglas McKenney, weight loss expert Robert F. Kushner, M.D. of Northwestern University, and Pulse 360, Inc., GoDaddy.com, Microsoft, and Yahoo! Inc.

II. THE PARTIES

A. Federal Trade Commission

Plaintiff **Federal Trade Commission** is an independent agency of the U.S. government created by the FTC Act.¹ Section 5(a) of the FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce. Section 13(b) of the FTC

¹ 15 U.S.C. §§ 41-58 (2006).

Act² authorizes the FTC to initiate federal district court proceedings to enjoin violations of the FTC Act and to secure such ancillary equitable relief as may be appropriate in each case, including a preliminary injunction with an asset freeze.³

B. Defendant

Charles Dunlevy (“Defendant”), is an affiliate marketer advertising acai berry weight loss products nationwide to consumers through his Internet websites.⁴ Acting alone or in concert with others, Defendant has formulated, directed, controlled, or participated in the unlawful acts set forth in the FTC’s Complaint. Defendant has advertised, marketed, distributed, or sold purported weight-loss products containing acai berries, such as Acai Max, Acai Max Cleanse, and Acai Optimum (collectively, the “acai berry products”), and companion products, such as LiquiBoost Colon Cleanse, Pure Cleanse, and Advanced Cleanse (collectively, the “colon cleanse products”), to consumers nationwide via the Internet.⁵

III. DEFENDANT’S BUSINESS PRACTICES

Since at least October 2009, Defendant Dunlevy has been placing

² 15 U.S.C. § 53(b).

³ *AT&T Broadband v. Tech Commc’ns, Inc.*, 381 F. 3d 1309, 1316-17 (11th Cir. 2004); *see also FTC v. U.S. Oil & Gas Corp.*, 748 F. 2d 1431, 1434 (11th Cir. 1984).

⁴ Exs.1-6.

⁵ Exs. 1-6.

advertisements via the Internet to target consumers on a nationwide basis⁶ and has been operating multiple websites deceptively designed to resemble investigative news reports on acai berry and colon cleanse product causing weight loss.⁷ Defendant is an affiliate marketer who provides advertising for the merchants of acai berry and colon cleanse products.⁸ To attract consumers to his websites, he places teaser ads on search engines and websites on the Internet,⁹ designed to appear when a consumer uses particular search terms, such as the term “acai berry.” Through such enticing headlines as “Acai Berry Revealed: Scam or Miracle Diet?” his advertisements invite the reader to “[r]ead our shocking report” about acai berry.¹⁰ These eye-catching advertisements provide the links where consumers can click through to his phony news reporting websites.¹¹

The phony news reports on his websites claim to have uncovered the truth about weight loss claims being made about acai berry products, such as whether there is any truth to the claim that acai berry is attributable to “4 Times More Fat

⁶ Ex. 1, ¶¶ 5-16; Exs.3-5.

⁷ Ex. 1, ¶¶ 14-16, Atts.A, C-H; Exs. 3-5.

⁸ Ex. 1, ¶ 8, Atts. D, F, H.

⁹ Ex. 1, ¶¶ 6, 15-16, Att. B; Exs. 3-5.

¹⁰ Ex. 1, ¶ , Atts. C-D.

¹¹ Ex. 1, ¶¶ 6, 15-16, Att.B; Ex. 3, ¶¶ 2-3; Ex. 4.

Loss Than Exercise.”¹² To add to the deception, Defendant’s websites claim they are, for example, “News 6” or “Consumer News Reporter,” and purport to feature investigative reporters, further suggesting that the site belongs to an objective news report, not to a paid advertiser. Additionally, the words “as seen on” are imprinted in front of the names and logos of recognizable news reporting companies, ABC, Fox News, CBS, CNN, USA Today, and Consumer Report,¹³ implying that the news sites are legitimate objective news sources. The fake news reports generally include a short summary of the phony story that is being reported, such as:

“Health and Diet writer, Amy Martin of the Health 9 News put the Acai Berry/Colon Cleanse Diet to the test. She was on the program for four weeks to test it out and see what all the hype was about. And, the results were shocking[sic] She lost 25 lbs in 4 weeks.”¹⁴

Next to the summary is a phony story detailing the experience of the alleged reporter who says she has personally undertaken her own investigation and confirmed that a particular acai berry product really causes weight loss.¹⁵ This

¹² Ex. 1, ¶ 7, Atts. C-K.

¹³ Ex. 1, ¶ 7, Atts. C-K.

¹⁴ Ex. 1, ¶ 7; Atts. C- D, I.

¹⁵ Ex. 1, ¶ 9, Atts. C - K.

alleged reporter claims that she used the product, and rapidly lost substantial weight without changing her diet or exercising.¹⁶ The reporter's dramatic weight loss experience is chronicled in her blog spanning four weeks and incredibly, no matter which products are tested by the alleged reporter, the same results are described in a similar or identical manner - a loss of 25 pounds in four weeks.¹⁷ These amazing stories of weight loss on Defendant's websites are false and unsubstantiated.¹⁸

Following the reporter's blog, a series of consumer testimonials also report weight loss. Upon closer review, however, these comments appear to be copies of comments that appear to be contrived because they can be located on multiple websites for various acai products.¹⁹

Defendant is compensated for his success in driving the Internet traffic to the merchants selling the products.²⁰ As such, his objective is to direct the consuming

¹⁶ According to Defendant's websites, some of the products allegedly tested by the reporters include Acai Max, LiquiBoost Colon Cleanse, Acai Max Cleanse, Pure Cleanse, Acai Optimum, and Advanced Cleanse. Ex. 1, ¶ 7; Atts. C-D, I.

¹⁷ Ex. 1, ¶ 7, Atts. C-K.

¹⁸ Ex. 2, ¶¶ 8-10.

¹⁹ Ex. 1, ¶¶ 10-11.

²⁰ Ex. 1, ¶ 8, Ex. 6, ¶ 3.

public to his websites and encourage them to click on the advertised product links. Defendant profits financially each time a consumer shows interest in the product and clicks through to purchase one of the products he advertises on his websites.²¹ However, Defendant fails to disclose or to disclose adequately the material connection he has to the merchants and that the content in his websites consists of paid advertisements and is not an objective report authored by an objective journalist who conducted an independent test of the products.

Defendant Dunlevy is the person behind the deceptive advertising on these phony news reporting websites. He paid for the placement of the Internet advertising at issue.²² He has also registered the Internet domain names where the deceptive advertisements were placed.²³ For each of these domain names, Defendant is the billing, administrative and technical contact, and he made payment for the domain registration.²⁴

IV. THIS COURT HAS THE AUTHORITY TO GRANT THE RELIEF REQUESTED

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC to

²¹ Ex. 1, ¶ 8; Ex. 6, ¶ 3.

²² Ex. 1, ¶¶ 14-16; Exs. 3 - 5.

²³ Ex. 1, ¶ 5, Att. A

²⁴ Ex. 1, ¶ 5, Att. A.

bring suit in federal district court whenever it has reason to believe that a party “is violating, or is about to violate, any provision of the law enforced by the Federal Trade Commission and that enjoining such conduct is in the public interest.”²⁵

The second proviso of Section 13(b), under which this action is brought, provides that, “in proper cases the FTC may seek and, after proper proof, the court may issue, a permanent injunction.” It is this proviso that gives the FTC authority to bring a permanent injunction action in district court.²⁶

By permitting the FTC to bring a permanent injunction action, Congress also gave the district court power to order whatever preliminary relief may be needed to make permanent relief possible, including preliminary injunctions, temporary restraining orders, and other ancillary, equitable relief.²⁷

²⁵ A copy of § 13(b) is contained in Volume I, filed herewith. Section 13(b) consists of two distinct parts. The first portion of the statute, through and including the first proviso, is concerned with provisional injunctive relief in aid of an administrative complaint. This portion of 13(b), which is inapplicable to the current action, gives authority for the issuance of temporary restraining orders and preliminary injunctions after a proper showing by the FTC and notice to the defendants. The instant action is brought under the second portion of § 13(b), which concerns actions for permanent injunction.

²⁶ See *FTC v. Gem Merch. Corp.*, 87 F. 3d 466, 468 (11th Cir. 1996); *FTC v. U.S. Oil & Gas Corp.*, 748 F. 2d 1431, 1433 (11th Cir. 1984).

²⁷ *U.S. Oil & Gas*, 748 F.2d at 1434 (quoting *FTC v. H. N. Singer, Inc.*, 668 F. 2d 1107,1113 (9th Cir. 1982)).

Courts have consistently held that it is appropriate to invoke the remedies of Section 13(b) in cases where there is routine fraud or a straightforward deceptive practice. The second proviso of Section 13(b) empowers courts to exercise the full breadth of their equitable authority:

Congress, when it gave the district court authority to grant a permanent injunction against violations of any provisions of law enforced by the Commission, also gave the district court authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference.²⁸

To bring an immediate halt to unlawful, injurious trade practices and to preserve the availability of effective permanent injunctive relief, the district court may issue a temporary restraining order, including a freeze or preservation of assets and a preliminary injunction during the pendency of an action for permanent as part of its inherent equitable authority.²⁹

A case such as this one clearly qualifies as a “proper case” under the second proviso of Section 13(b). Where, as here, there is evidence of straightforward deceptive practices or routine fraud, courts have consistently held that the remedies

²⁸ *U.S. Oil & Gas*, 748 F.2d at 1434 (quoting *Singer*, 668 F. 2d at 1113); see also *Gem Merch. Corp.*, 87 F. 3d at 469.

²⁹ *In re Vuitton et Fils S.A.*, 606 F.2d 1, 3-4 (2d Cir. 1979).

of Section 13(b) are warranted.³⁰ Courts have applied the remedies of Section 13(b) to these types of “proper cases” for a permanent injunction by granting the FTC temporary restraining orders and other forms of ancillary relief.³¹

V. ENTRY OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION IS APPROPRIATE

The FTC has submitted evidence that clearly demonstrates: 1) Defendant’s deceptive advertising of acai berries and its purported ability to cause substantial and rapid weight loss, 2) Defendant’s use of a phony news reporting website, and 3) Defendant’s failure to disclose, or to adequately disclose, the material connection between Defendant and the merchants selling the advertised products.

³⁰ *FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1026-28 (7th Cir. 1988).

³¹ *FTC v. USA Financial, LLC*, No. 10-12152, 2011 U.S. App. LEXIS 3774, at *13 (11th Cir. Feb. 25, 2011); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432 (11th Cir. 1984); *See Gem Merch.*, 87 F. 3d at 469 (“a district court may order preliminary relief, including an asset freeze, that may be needed to make permanent relief possible”); Orders attached in Volume I are: *FTC v. U.S. Work Alliance*, No. 08-2053 (N.D. Ga. July 8, 2008); *FTC v. Direct Connection Consulting, Inc.*, No. 08-1739 (N.D. Ga. May 14, 2008); *FTC v. Holiday Enterprises, Inc.*, No. 06-2939 (N.D. Ga. Dec. 7, 2006); *FTC v. Prophet 3H, Inc.*, No. 06-1692 (N.D. Ga. July 18, 2006); *FTC v. Stewart Finance Co.*, No. 03-2648 (N.D. Ga. Sept. 12, 2003); *FTC v. Engle*, No. 03-1072 (N.D. Ga. Apr. 23, 2003); *FTC v. Landers*, No. 00-1582 (N.D. Ga. June 23, 2000); *FTC v. Amn. Urological Corp.*, No. 98-2199 (N.D. Ga. Aug. 3, 1998); and *FTC v. MJS Financial Services, Inc.*, No. 97-3087 (N.D. Ga. Oct. 9, 1997).

Section 13(b) was designed to combat such practices. The standard for awarding preliminary relief in such enforcement actions is lower than that required for private litigants. Courts consider two factors in determining whether to grant preliminary injunctive relief under Section 13(b): (1) the likelihood of success on the merits and (2) the balance of equities.³² Irreparable injury need not be shown.³³ Harm to the public interest is presumed in a statutory enforcement action.³⁴ Moreover, in demonstrating its “likelihood of ultimate success,” the FTC is not required to show a strong probability of success, although the evidence presented in this matter does make such a showing. Rather, because irreparable injury is presumed in a statutory enforcement action the FTC needs only show that

³² See *FTC v. University Health, Inc.*, 938 F.2d 1206, 1217-18 (11th Cir. 1991)(applying same two-part test in case subject to first proviso of Section 13(b) of FTC Act); *World Travel Vacation Brokers*, 861 F. 2d at 1029 (7th Cir. 1988); *World Wide Factors*, 882 F. 2d at 346-47 (9th Cir. 1989); *FTC v. Career Info. Serv.*, No. 1:96-CV-1464, 1996 U.S. Dist. LEXIS 21207, at *10-11 (N.D. Ga. June 21, 1996).

³³ *University Health*, 938 F.2d at 1217-18; *Career Info. Serv.*, 1996 U.S. Dist. LEXIS 21207, at *11; see also, *c.f.*, *Gresham v. Windrush Partners, Ltd.*, 730 F. 2d 1417, 1423 (11th Cir. 1984).

³⁴ *World Wide Factors*, 882 F. 2d at 347; *FTC v. Warner Commc'ns.*, 742 F. 2d 1156, 1159 (9th Cir. 1984); *FTC v. Career Info. Serv.*, No. 1:96-CV-1464, 1996 U.S. Dist. LEXIS 21207, at *11 (N.D. Ga. June 21, 1996); see *FTC v. University Health, Inc.*, 938 F.2d 1206, 1217-18 (11th Cir. 1991).

it has “some chance of probable success on the merits.”³⁵

A. The FTC Has Demonstrated a Likelihood of Success on the Merits

The compelling evidence submitted, including copies of the Defendant’s phony investigative news web sites, Defendant’s Internet advertising, and declarations from web hosting and Internet domain registration companies (Yahoo!, GoDaddy.com, Microsoft, Pulse 360), weight loss expert Robert Kushner, M.D., and FTC Investigator Michael Liggins, clearly demonstrates the substantial likelihood that the FTC will succeed in establishing that the Defendant’s acai berry advertising scheme violates Sections 5 and 12 of the FTC Act.

Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), provides “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” Additionally, Section 12 of the FTC Act, 15 U.S.C. § 52, prohibits the dissemination of false advertisements for food, drugs, devices, services, or cosmetics in or affecting commerce. A violation of Section 12- dissemination of false advertising- is an unfair deceptive

³⁵ *World Wide Factors*, 882 F. 2d at 346-347; *U.S. v. Odessa Union Warehouse Co-op*, 833 F. 2d 172, 176 (9th Cir. 1987).

act or practice and, therefore, constitutes a violation of Section 5(a)."³⁶

To prove deception under Sections 5(a) and 12, the FTC must demonstrate that: (1) there is a representation, omission, or practice, (2) that is likely to mislead consumers acting reasonably under the circumstances, and (3) that the representation, omission, or practice is material.³⁷ In determining whether a practice is likely to mislead, the fact finder must consider the overall, common sense, net-impression of the practice on a reasonable consumer.³⁸ An advertiser is responsible for all claims, express and implied, that are reasonably conveyed by the ad.³⁹ Express claims, or deliberately-made claims, used to induce the purchase of a particular product or service are presumed to be material.⁴⁰ A "material" misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product or service.⁴¹ The advertiser is strictly liable for

³⁶ *FTC v. Nat'l Urological*, 645 F. Supp. 2d 1167, 1187 (N.D. Ga. 2008).

³⁷ *USA Financial*, 2011 U.S. App. LEXIS 3774, at *5 (quoting *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003)).

³⁸ *Tashman*, 318 F.3d at 1283.

³⁹ *See Sears, Roebuck & Co.*, 95 F.T.C. 406, 511 (1980), *aff'd*, 676 F.2d 385 (9th Cir. 1982).

⁴⁰ *FTC v. Holiday Enter., Inc.*, No. 1:06-CV-2939, 2008 U.S. Dist. LEXIS 35858, at *17 (N.D. Ga. Feb. 5, 2008).

⁴¹ *Kraft, Inc. v. FTC*, 970 F. 2d 311, 323-24 (7th Cir. 1992); *see FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1190 (N.D. Ga. 2008).

violations of the FTC Act. Neither intent to deceive nor evidence that consumers have actually been misled is required for a finding of liability in an FTC action.⁴²

Defendant violates Sections 5 and 12 of the FTC Act, by: (1) making false and unsubstantiated product claims; (2) misrepresenting the phony news reports as objective reporting; and (3) failing to disclose or disclose adequately his connection to the merchants of the acai and colon cleanse products:

1. False and Unsubstantiated Product Claims

Defendant is violating Sections 5 and 12 of the FTC Act by making false and unsubstantiated product claims by representing that rapid and substantial weight loss can be achieved when taking a combination of acai berry products and colon cleanse products. Defendant's deceptive representations are material as a matter of law. Claims made that "significantly involve health, safety, or other issues that would concern reasonable customers" are to be presumptively material.⁴³ Defendant must have adequate substantiation and a reasonable basis for making his claims, and because Defendant's advertising involves making health

⁴² *FTC v. Windward Mktg.*, 1:96-CV-615-FMH; 1997 U.S. Dist. LEXIS 17114, at *28 (N.D. Ga. Oct. 1, 1997).

⁴³ *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp.2d 1167, 1190 (N.D. Ga. 2008), *aff'd* 356 Fed. Appx. 358; 2009 U.S. App. LEXIS 27388; 2009-2 Trade Cas. (CCH) P76,838 (11th Cir. 2009) (quoting *FTC v. QT, Inc.*, 448 F. Supp. 2d at 960, 965-66.)

claims about weight loss, this reasonable basis must consist of “competent and reliable scientific evidence” defined as “test, analyses, research, studies, or other evidence based upon the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.”⁴⁴ Anecdotal evidence, such as consumer testimonials, is generally inadequate to substantiate efficacy claims.⁴⁵ Regardless, a fake experience described in a phony news report would not pass muster.

Weight loss expert, Robert F. Kushner, M. D. of Northwestern University, stated that he searched and reviewed the medical literature in the field and could find no scientific studies that show acai berries are effective in causing significant weight loss, and, in fact, he states acai berries do not cause any weight loss.⁴⁶

⁴⁴ *FTC v. Nat’l Urological*, 645 F.Supp.2d at 1190; *FTC v. QT, Inc.*, 448 F.Supp. 2d 908, 961-963 (N.D. Ill. 2006); *see, e.g. Brake Guard Products, Inc.*, 125 F.T.C. 138 (1998); *ABS Tech Sciences, Inc.*, 126 F.T.C. 229 (1998); *FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995); *FTC v. Removatron International Corp.*, 111 F.T.C. 206 (1988), *aff’d* 884 F.2d 1489 (1st Cir. 1989); *FTC v. Thompson Med.* 104 F.T.C. 648, 1984 FTC LEXIS, at *388 (Nov. 23, 1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

⁴⁵ *See, e.g., Removatron*, 111 F.T.C. at 302; *Original Marketing, Inc.*, 120 F.T.C. 278 (1995); 1995 FTC LEXIS 227, at *19 (Aug. 9, 1995).

⁴⁶ Ex. 2, ¶ 7.

According to Dr. Kushner, “[t]here is no evidence that acai berries are an appetite suppressant, burn calories or otherwise work to cause weight loss. Indeed, there is no credible medical evidence, or any medical evidence at all, to support the efficacy of acai berries as a weight loss agent in people”⁴⁷ Dr. Kushner states it is his opinion that “acai berries will not cause substantial weight loss regardless of the quantity, concentration or purity of the berries consumed, and that “acai berries will not cause any weight loss absent a reduction in caloric intake or an increase in exercise.”⁴⁸

2. Misrepresentations of the Fake News Reporting Websites

Defendant misrepresents that his websites are objective news reports with reporters who have performed independent tests demonstrating the efficacy of the acai berry and colon cleanse products, and that consumer testimonials are real. These misrepresentations are material because they give the weight loss claims added credibility.

a. Objective news report

Defendant misrepresents that his fake new sites are objective new reports. The evidence described in Section III shows that these sites are run by Defendant,

⁴⁷ Ex. 2, ¶ 7.

⁴⁸ Ex. 2, ¶ 8.

a paid affiliate marketer, not a news reporting agency.⁴⁹ The name of the woman depicted as the reporters in the sites is misrepresented.⁵⁰ A comparison of the reporters' photos in three of Defendant's phony news sites shows an identical photo of the same person identified as either "Julia Miller of the News 6 team" or "Amy Martin of the Health 9 News" is used, but different names are given to the reporter.⁵¹ In fact, the woman's name is Melissa Theuriau, who is a French journalist.⁵² Finally, while the fake news sites employ logos of real news outlets such as ABC, CNN, and Fox News, they have no affiliation with those sites.⁵³

b. Independent tests

Defendant's websites are also set up to mislead the consuming public that the information is being reported by an objective reporter who has tested the

⁴⁹ Ex. 1, ¶¶ 5, 8, Att. A; Ex. 6, ¶ 3.

⁵⁰ Ex. 1, ¶ 13.

⁵¹ Ex. 1, ¶¶ 7, 13, Atts. C - K.

⁵² Ex. 1, ¶ 13.

⁵³ In fact, the Defendant's websites even concede their non-affiliation with legitimate news sources, albeit in an inadequately disclosed fine print disclosure buried at the bottom of the site stating, "We are not affiliated in any way with CNN, WebTV, News Channel 7, ABC, NBC, CBS, U.S. News or FOX." Unfortunately, the disclosure is buried in a location where consumers will easily miss it.

products personally on herself, such as:⁵⁴

The Acai Berry Diet is the latest dieting trend to hit the market. . . It seems you cannot visit a web site or blog without coming across stoy [sic] after story of amazing weight loss success. Here at Health 9 News, we of course had our doubts because we hadn't seen any concrete proof that these claims were truthful. We figured the best way to find out for sure was to conduct our own unbiased test of the Acai products. To begin our study, I decided that I would be the test subject. . .

Following the reports, the reporter purports to chronicle her weekly progress losing 25 pounds in four weeks after she began taking the acai product and colon cleanse products.⁵⁵ In three different blogs, the reporter marvels during the first week that this is the first time she has weighed under 140 (or 145) pounds in a long time.⁵⁶ The image of the same woman⁵⁷ is used in several of Defendant's websites, each time testing a different combination of acai berry product and colon cleanse product and losing 25 pounds in four weeks.⁵⁸ Naturally, consumers would be swayed if they believed the claims were based on an independent test conducted by an unbiased and credible news source.

⁵⁴ Ex. 1, ¶ 7, Atts. C, D, I

⁵⁵ Ex. 1, ¶ 7, Atts. C - K

⁵⁶ Ex. 1, ¶ 7, Atts. C - K

⁵⁷ Ex. 1, ¶ 13 (This image was found over 100 times on various Internet sites)

⁵⁸ Ex. 1, ¶ 7, Atts. C - K

c. Comments

Defendant Dunlevy's fake news sites also misrepresent that satisfied consumers have left comments at the bottom of the site regarding the featured products. The fake news sites generally include a section reserved for viewer comments at the end of the story, purporting to be posted by consumers who have tried or are interested in the reviewed products.⁵⁹ Some of the comments buttress claims made in the fake news report by describing the weight losses by the consumers allegedly posting comments. Like the rest of the content on the fake news sites, the comments are recycled from one site to the next. A careful review of these alleged comments shows that the very same comments can be found in more than one website, right down to the time of posting and the typographical errors found in the comments.⁶⁰

3. Failure to Disclose Connection to Sellers

In light of the affirmative claims made about weight loss, it is deceptive and in violation of Section 5 of the FTC Act for Defendant to fail to disclose or to disclose adequately the material connection he has to the merchants of the products he advertises. As discussed above, Defendant is an affiliate marketer who benefits

⁵⁹ Ex. 1, ¶¶ 7, 10-12, Atts. C - K

⁶⁰ Ex. 1, ¶ 10, Atts. C - K

financially from the amount of Internet traffic he sends to merchant sites, and it is this “material connection” with the sellers that should have been disclosed adequately. To be effective, disclosures must be clear and conspicuous.⁶¹ According to the FTC’s Guides Concerning the Use of Endorsements and Testimonials (Guides”), “[w]hen there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed.”⁶² Advertisers cannot use fine print to contradict other statements in an ad or to clear up misimpressions the ad would otherwise leave.⁶³

A review of three of Defendant’s websites shows that across the board he fails to make adequate disclosure of his “material connections” to the seller. In some instances, no disclosure is made⁶⁴ and, in others, Defendant may use the “Terms and Conditions,” which are found at the bottom of the websites in a belated

⁶¹ See *Thompson Medical Co.*, 104 F.T.C. at 409 (disclosures should be clear and prominent); *FTC v. EdebitPay, LLC*, No. 07-4880, 2011 U.S. Dist. LEXIS 15750, at *18 (C.D. Cal. Feb. 3, 2011).

⁶² 16 C.F.R. Part 255.5

⁶³ See *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 183 (1984); *FTC v. Cyberspace.com*, 453 F.3d 1196, 1200 (9th Cir. 2006).

⁶⁴ Ex. 1, ¶ 7, Atts. E - H, J-K

attempt to disclose that he “receives compensation for the clicks on or purchases of products on this site.”⁶⁵ It is also here that Defendant has attempted to clean up his other false claims made in the main body of the websites. However, none of these disclosures made in the “Terms and Conditions” are provided in a clear and conspicuous manner.

The required “material connection” disclosures, as well as the other disclosures, are woefully inadequate, when viewed by their prominence, presentation, placement, and proximity. The disclosures are not prominently displayed on the website, being buried at the end of the site in the “Terms and Conditions”, and appearing only one time, after the consumer has multiple opportunities to click hyperlinks to go to websites where orders can be placed. Additionally, Defendant Dunlevy’s disclosures are made in a light-colored font that blends into the light-colored background, further assuring the disclosures will be overlooked by consumers. As inadequately presented, these disclosures do not cure the false weight loss claims and other misrepresentations that are made much more prominently and repeatedly elsewhere in these fake news sites.

B. The Balance of Equities Mandates a Temporary Restraining Order and Preliminary Injunction

⁶⁵ Ex. 1, ¶ , Atts. C - D, I

The balance of equities mandates temporary and preliminary relief in this case. Where, as in the instant matter, public and private equities are at issue, public equities far outweigh private equities.⁶⁶ Defendant “can have no vested interest in a business activity found to be illegal.”⁶⁷ Defendant’s past conduct “gives rise to the inference that there is a reasonable likelihood of future violations” of the FTC Act.⁶⁸ Defendant has systematically deceived consumers with multiple Web sites promoting rapid and substantial weight loss using acai berries and colon cleansers, and his scheme continues unabated. When enacting Section 13(b), Congress intended to serve the public interest by protecting victims from the effects of deceptive trade practices “as quickly as possible.”⁶⁹ By temporarily and preliminarily enjoining Defendant’s illegal practices, this Court will effectuate Congress’ intent in enacting Section 13(b).

⁶⁶ *World Wide Factors*, 882 F. 2d at 347.

⁶⁷ *U.S. v. Diapulse Corp. of Am.*, 457 F. 2d 25, 29 (2d Cir. 1972); *U.S. v. Blue Ribbon Smoked Fish*, 179 F. Supp. 2d 30, 54 (E.D.N.Y. 2001).

⁶⁸ *CFTC v. Hunt*, 591 F. 2d 1211, 1220 (7th Cir. 1979) (“Once a violation is demonstrated, the moving party need only show that there is some reasonable likelihood of future violations”); *FTC v. USA Beverages*, 2005 U.S. Dist. LEXIS 39075 at *22 (S.D. Fla. 2005)(citing *SEC v. R.J. Allen & Assoc., Inc.*, 386 F. Supp. 866, 877 (S.D. Fla. 1974).

⁶⁹ *World Travel Vacation Brokers*, 861 F. 2d at 1028; *see also FTC v. Southwest Sunsites, Inc.*, 665 F. 2d 711, 719 (5th Cir. 1982).

VI. A TRO INCLUDING INJUNCTIVE RELIEF, ASSET PRESERVATION, AND IMMEDIATE PRODUCTION OF DOCUMENTS IS NECESSARY

Defendant's business is purely fraudulent based on multiple false representations, and his deceptive practices should be immediately halted. The injunctive relief sought by the FTC simply orders Defendant to obey Sections 5(a) and 12 of the FTC Act. This relief would serve the public interest by stopping the long-standing deceptive scheme perpetrated by the Defendant and preventing further harm to members of the public. In addition to injunctive relief, the FTC asks this Court to require Defendants to immediately produce certain documents and information. The FTC seeks monetary equitable relief as a part of the final relief in this case. To ensure the possibility of such relief, an asset preservation order is designed to preserve the status quo.

An asset preservation order on Defendant's assets is essential here to prevent the dissipation of assets during the pendency of litigation. An asset preservation is a proper equitable remedy to assure the availability of permanent relief,⁷⁰ and is within the well established power of a district court to issue a 'freeze order' in a

⁷⁰ *Gem Merch.*, 87 F. 3d at 469; *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F. 3d 982, 987 (11th Cir. 1995); *U.S. Oil & Gas*, 748 F. 2d at 1423-34;

§13(b) action.⁷¹ Defendant's pervasive and ongoing deception demonstrates his willingness to engage in wrongdoing. The possibility of a large monetary judgment depriving Defendant of the fruits of his illicit labor provides Defendant with ample incentive to conceal or dissipate otherwise recoverable assets. As a result, the FTC is seeking an asset preservation order that would allow the majority of Defendant's assets to be preserved, but at the same time allow a designated sum for Defendant's living expenses.

The FTC also asks this Court to require Defendant, prior to the preliminary injunction hearing, to complete a financial statement, which is attached to the proposed Temporary Restraining Order and to produce a detailed accounting of all products advertised, marketed, promoted, offered for sale, distributed, or sold since January 1, 2008. Such production is necessary to quickly determine: (1) the full scope of Defendant's law violations and (2) the total amount of unjust enrichment Defendant has benefitted.

VII. CONCLUSION

Defendant makes false and unsubstantiated claims about the efficacy of acai berry products in achieving rapid and substantial weight loss. Defendant also misrepresents to the consuming public that his web sites are objective news reports

⁷¹ *Gem Merch.*, 87 F. 3d at 469.

with objective new reporters who have performed independent tests demonstrating the effectiveness of the Acai Berry Products and Colon Cleanse Products. In truth, the consumers are viewing phony news reports made by phony investigative reporters, supported by fake postings of comments. Finally, while Defendant misrepresents to the consuming public that the content of his web sites has been authored by an objective journalist, he fails to disclose or to adequately disclose the content is simply a paid advertisement for the products. Therefore, the FTC requests that this Court issue the proposed Temporary Restraining Order which will halt Defendant's fraudulent practices, preserve assets to be used for consumer restitution, grant Plaintiff FTC the right to expedited access to Defendant's documents and data, require Defendant to produce financial information, including completion of financial disclosure documents and a business accounting of his affiliate marketing activity, and require Defendant to show cause why a preliminary injunction should not issue.

The undersigned counsel of record certifies this document was prepared in the font and point selections approved by the court pursuant to LR5.1B.

Respectfully submitted,
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