

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

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

THOU LEE, individually and also doing business
as TL ADVERTISING, an unincorporated assumed
business name,

Defendant.

Case No. 11-cv-2486

Judge Joan B. Gottschall

Magistrate Judge Michael T. Mason

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

I. INTRODUCTION

The Federal Trade Commission asks that this Court immediately halt an online marketing scheme that has spread false weight loss claims to millions of consumers. For the past year, Defendant Thou Lee has deceptively marketed acai berry products, which he claims cause weight loss, through websites designed to look like objective news reports.¹ Defendant uses domain names like consumer6-reports.com and health6-report.com, claims that the reports are "seen on" major news outlets such as CNN and Fox News, and employs a masthead, entitled Consumer News Reporter or News 6, all of which suggest an actual news publication. Defendant's websites include a reporter's account that she lost twenty-five pounds by taking the

¹ See Declaration of Douglas M. McKenney (hereinafter "McKenney Dec."), attached hereto as Plaintiff's Exhibit ("PX") 1, ¶ 8 and Att. B, at 3-6, one of Defendant's websites.

featured products for four weeks. In a “comments” section after the account, consumers attest to the amazing results they enjoyed thanks to the products.

Nearly everything about these websites is fake. The websites are not maintained by news organizations. The reporter, trial of the products, and comments from satisfied consumers all are fabricated. In fact, the websites are advertisements placed by Defendant to attract consumers to buy the products. In addition to using a deceptive fake news format, Defendant falsely claims that the products cause weight loss. No evidence establishes that acai berries cause weight loss, and the dramatic weight loss Defendant describes is unachievable. The FTC recently has sought and obtained injunctions in this district against false and unsubstantiated weight loss claims about similar acai berry products.²

The FTC asks this Court to halt Defendant’s ongoing scheme immediately, and to preserve the Court’s ability to provide effective final relief, by entering the FTC’s proposed Temporary Restraining Order (“TRO”).³

II. DEFENDANT’S ILLEGAL BUSINESS PRACTICES

Thou Lee, a resident of Saint Paul, Minnesota, is an “affiliate marketer” who has set up the websites described above, and has paid for advertisements leading to those websites.⁴

² See *FTC v. Central Coast Nutraceuticals, Inc.*, 10 C 4931 (N.D. Ill. Aug. 5, 2010) (Norgle, J.).

³ This matter is one of ten cases filed by the FTC, including five cases in this district, against persons and entities selling acai berry dietary supplements and other products through deceptively formatted fake news websites.

⁴ The Court has personal jurisdiction over Defendant under the FTC Act’s nationwide service of process provision, 15 U.S.C. § 53(b), because Defendant has minimum contacts with the United States, see *FTC v. Cleverlink Trading Ltd.*, No. 05 C 2889, 2006 WL 1735276, at *4 (N.D. Ill. June 19, 2006) (Kendall, J.); *FTC v. Bay Area Bus. Council, Inc.*, No. 02 C 5762, 2003 WL 21003711, at *2 (N.D. Ill. May 1, 2003) (Darrah, J.). Moreover, under the venue provision contained in the FTC Act, (continued...)

A. Defendant is Responsible for his Fake News Websites

Defendant is an affiliate marketer, often known simply as an “affiliate.” An affiliate is an Internet-based marketer hired by a seller of goods (known as a “merchant”) to attract consumers to the merchant’s website.⁵ *See generally I-800 Contacts, Inc. v. Lens.com, Inc.*, --- F. Supp. 2d ----, No. 2:07-cv-591 CW, 2010 WL 5150800, at *4 (D. Utah Dec. 14, 2010) (discussing affiliate marketing); *see also Amazon.com, LLC v. N.Y. State Dep’t of Taxation & Fin.*, 913 N.Y.S.2d 129, 134 (N.Y. App. Div. 2010) (same). An affiliate posts advertisements on high-volume websites, attracting consumers to the affiliate’s website, where links lead to the merchant’s website. Consumers then click through to the merchant’s website, and often purchase or order a “free trial” of the merchant’s products, resulting in the payment of a commission to the affiliate.⁶

Defendant began affiliate marketing through the websites described above (the “fake news websites”) in March 2010, when he set up an account with NameCheap, a domain registration services company. Defendant since has registered at least one dozen fake news websites, including consumer6-reports.com, consumers6report.com, and health6-report.com.⁷

⁴(...continued)

an action may be brought wherever a person “resides or transacts business.” 15 U.S.C. § 53(b). Here, Defendant has transacted business in this district. *See* McKenney Dec., PX1, ¶¶ 8-31 (describing Defendant’s websites viewed in district) *and* ¶¶ 37-40 (describing Defendant’s use of hosting server located in Chicago).

⁵ *See* McKenney Dec., PX1, ¶ 4.

⁶ *See id.* ¶¶ 4-5; *see also id.*, Att. A.

⁷ *See* Declaration of Sergio Hernandez, Custodian of Records for NameCheap, Inc., PX2, Att. A, at NC000001, NC000007-14 (showing Defendant’s registration of NameCheap account and registration of several websites); *see also id.*, Att. A, at NC000011-12, NC000022 (showing Defendant’s registration of consumer6-reports.com), NC000011, 25 (showing Defendant’s registration of consumers6report.com), *and* NC000014-15 (showing Defendant’s registration of health6-report.com); McKenney Dec., PX1, Atts. B-I (showing captures of Defendant’s fake news websites).

Shortly after registering his first fake news website, Defendant began posting advertisements on Microsoft's Bing search engine. Through Bing, Defendant bid for advertisements that would appear in response to a search for terms such as "acai," "acai berry," and "acai berry diet."⁸ Thus, a search for these terms would yield search results that included one of Defendant's links, promising, "Avoid the Acai Berry Scam. Read the Real Story Behind the Acai Berry and Colon Cleanse Diet."⁹ These links lead to Defendant's fake news websites, where a reporter claims she enjoyed dramatic weight loss by ingesting a featured acai berry product and a companion product, generally a colon cleanser. These websites also include links to the merchant's websites, where a "free trial" of the featured acai berry products can be ordered.¹⁰

B. Defendant's Deceptive Conduct

On his fake news websites, Defendant makes false weight loss claims in a deceptive format that suggests that he is an independent journalist.

1. False Product Claims

Defendant makes false and unsubstantiated weight loss claims about acai berry products. For example, Defendant claims that by taking the product Pure Acai Flush with LeanSpa Cleanse, a companion product, the (fictitious) reporter "Lost 25lbs in 4 Weeks, No Special Diet,

⁸ See Declaration of Debra M. Miller ("Miller Dec."), PX3, Att. D (showing "TL Advertising" bids on particular search terms); see also McKenney Dec., PX1, Att. B, at 1 (showing Defendant's advertisement for health6-report.com in right-hand banner among results of search for "acai"); Miller Dec., PX3, Att. C (showing that Defendant is responsible for "TL Advertising" account).

⁹ See McKenney Dec., PX1, ¶ 8 and Att. B, at 1.

¹⁰ See generally *id.*, Att. B (showing Bing advertisement, Defendant's fake news websites, and merchant websites).

No Intense Exercise,” “lost 25lbs in 4 weeks,” and “lost an unbelievable 25 lbs since starting the Acai Berry and Colon Cleanse diet!”¹¹

There is no medical evidence whatsoever that the acai berry products that Defendant markets can produce the claimed weight loss. According to weight loss expert Robert F. Kushner, Professor of Medicine at Northwestern University Feinberg School of Medicine and the Clinical Director of the Northwestern Comprehensive Center on Obesity, no scientific studies, and no medical evidence, establish that ingestion of acai berries causes weight loss.¹² Dr. Kushner also attests that any weight loss caused by colon cleanse products would be marginal, and would pale in comparison to the weight loss that Defendant claims is possible.¹³ Weight loss of twenty-five pounds in four weeks, which Defendant claims can be achieved without exercise or dietary changes, simply is not possible by dietary means.¹⁴

2. Deceptive Format

Defendant presents these patently false product claims under the deceptive guise of an investigative report by an objective news organization. Defendant fabricates objective news organizations, like “Consumer News Reporter”¹⁵ and “News 6,”¹⁶ using mastheads, headlines,

¹¹ See *id.*, Att. B, at 3-4. Lest the message be lost, Defendant itemizes the weight loss, claiming that, the reporter lost nine pounds in the first week, leaving her “under 140 lbs for the first time in years!,” then lost seven pounds, six pounds, and three pounds in the next three weeks. *Id.*, Att. B, at 4.

¹² See Declaration of Robert F. Kushner, PX4, ¶¶ 1, 7-10.

¹³ According to Dr. Kushner, products with laxative effects, such as colon cleansers, have, at best, a marginal and temporary weight loss effect. See *id.*, ¶ 10.

¹⁴ See *id.*, ¶ 9.

¹⁵ See, e.g., McKenney Dec., PX1, ¶ 14 & Att. D, at 1.

¹⁶ See, e.g., *id.*, Att. B, at 3.

and other staples of an actual news organization, and misappropriating the logos of legitimate news outlets like *Consumer Reports*.¹⁷ Defendant's "news organizations" do not exist.¹⁸

Further, Defendant's "investigative reporter" is no more than a stock photograph and a fictitious name.¹⁹

Moreover, while Defendant's websites purport to "put these products to the test," there is no test. On Defendant's site health6-report.com, Julia Miller purportedly tests two products on herself,²⁰ while, on consumeracaiberrycleanse.com, another one of Defendant's websites, a different reporter named Stephanie Allen tests two different products, but gives a report that repeats Miller's account verbatim.²¹ Indeed, Defendant advances the same report, with the same results, through at least three different reporters for at least eight different combinations of products.²² "Comments" on Defendant's websites, praising the virtues of the marketed products,

¹⁷ See Declaration of Wendy J. Wintman ("Wintman Dec."), PX5, ¶¶ 5-8 (attesting that *Consumer Reports* has not authorized use of its trademark on Defendant's websites).

¹⁸ Defendant registered his websites in his name, with no mention of any such news entities, *see generally* PX2, Att. A, at NC000001-90, and paid for advertisements leading to these websites with his personal credit card, *see* Miller Dec., PX3, Att. C.

¹⁹ Compare McKenney Dec., PX1, ¶ 14 & Att. D, at 1 (on consumers6-report.com, identifying photographed reporter as "Julia Millar") *with id.*, ¶ 8 & Att. B, at 3 (on health6-report.com, identifying reporter as "Julia Miller"). The image Defendant uses on consumers6-report.com is most likely of Melissa Theuriau, a French news anchor. *See* McKenney Dec., PX1, ¶ 42 & Att. R.

²⁰ *See* McKenney Dec., PX1, Att. B, at 3.

²¹ *See id.*, ¶ 29 & Att. I, at 3; *see also* PX2, Att. A, at NC000009, 31, 82 (showing Defendant's registration of consumeracaiberrycleanse.com).

²² Compare McKenney Dec., PX1, ¶ 8 & Att. B, at 3-4 (featuring Pure Acai Flush and LeanSpa Cleanse) *with id.*, ¶ 11 & Att. C, at 1-2 (featuring Pure Acai Flush and Zen Cleanse); *id.*, ¶ 14 & Att. D, at 1-2 (LeanSpa Acai and MaxCleansePro); *id.*, ¶ 17 & Att. E, at 3-4 (Fusion5 Acai and Zen Cleanse); *id.*, ¶ 20 & Att. F, at 3-4 (LeanSpa Acai and LeanSpa Cleanse); *id.*, ¶ 23 & Att. G, at 3-4 (LeanSpa Acai and Get Slim Cleanse); *id.*, ¶ 26 & Att. H, at 1-2 (Get Slim Acai and Natures [*sic*] Colon Rescue); *and id.*, ¶ 29 & Att. I, at 3-4 (Acai Max Cleanse and Natures Colon Rescue).

likewise are imaginary, and are repeated word-for-word on each of Defendant's acai berry related websites.²³

Defendant's misrepresentations further obscure his connection to the merchants whose products he markets. Defendant is paid based on the number of consumers who, enticed by Defendant's false claims and fake news websites, purchase the merchants' products. But rather than disclosing this relationship, Defendant poses as an objective news source. Reinforcing this impression, the websites note that the reporter was "skeptical" of the merchants' claims but that she "put the[] products to the test," reasoning, "[w]hat better way to find out the truth than to conduct our own study?" In sum, the websites claim that "[t]he benefits of the Acai berry diet beat all of our initial skepticism," driving home the impression of objectivity.²⁴

Defendant's deception has harmed consumers. Consumers have filed complaints that they were tricked into purchasing the acai berry products touted in fake news websites, including

²³ Compare McKenney Dec., PX1, Att. B, at 5-6 (listing comments on health6-report.com) with *id.*, PX1, Att. C, at 3-4 (listing identical comments on consumer6-reports.com). The only variations between the fake news websites' comments further prove their falsity. The date stamps for the comments are perpetually refreshed, so that no comment appears to be more than two days old. Compare *id.*, Att. B, at 5 (listing comment from "Diane," as made on March 24, 2011 at 11:33 a.m., when website was accessed on March 25, 2011) with *id.*, Att. E, at 5 (listing identical comment, also from "Diane," on same website, as made on March 20, 2011 at 11:33 a.m., when the site was accessed on March 21, 2011). On health6-report.com, "Julia," the reporter, responds to consumers' comments, "Yay! glad to see it's helped and that my story is getting out there! good luck!" See *id.*, Att. B, at 5. The same response on consumeracaiberrycleanse.com is made by "Stephanie," the reporter on that website. See *id.*, Att. I, at 5.

²⁴ See McKenney Dec., PX1, Att. B, at 3. Defendant's inclusion of the vague term "Advertorial" in small type at the top of some of his websites, see, e.g., *id.*, Att. D, at 1, does not effectively disclose the fact that those websites are paid advertisements. This term is undefined and, even if consumers understood what it meant, it is easily missed. Defendant's use of buried, fine-print disclosures that "the story, the photos, and the comments" are fictitious and that he receives compensation from the merchants whose products he peddles, see, e.g., *id.*, Att. B, at 6, is likewise insufficient. These miniscule disclosures, placed far from the claims they disavow and beyond links to merchants' websites, do not change the impression of objectivity left by Defendant's websites, and cannot disclaim express representations in the body of Defendant's websites.

Defendant's websites.²⁵ Many consumers were charged between \$60 and \$100 for the products.²⁶ Real news outlets also have been inundated with complaints.²⁷ Yet, Defendant's scheme continues: to date, he has spent over \$67,000 to post advertisements to over three million consumers, nearly one hundred thousand of whom have been attracted to his deceptive fake news websites.²⁸

III. ARGUMENT

Defendant has violated multiple provisions of the Federal Trade Commission Act (the "FTC Act"). To prevent further injury to innocent consumers and to preserve Defendant's assets for eventual restitution to victimized consumers, the FTC asks that this Court issue the proposed TRO. That order would prohibit Defendant's ongoing illegal practices, preserve his assets, and require an accounting of his ill-gotten gains, thereby ensuring this Court's ability to provide effective final relief. Courts in this district have granted similar TROs in FTC actions.²⁹

²⁵ See McKenney Dec., PX1, ¶¶ 33-36 & Atts. J-L.

²⁶ *Id.* Numerous consumers have taken Defendant's fake news websites for actual news reports. See, e.g., *id.*, ¶¶ 34-35 Atts. K-L.

²⁷ See Wintman Dec., PX5, at ¶ 10. These complaints have led real news outlets to publish alerts about fake news websites. *Id.* Att. A; see also McKenney Dec., PX1, ¶¶ 41-42 & Atts. Q-R.

²⁸ See McKenney Dec., PX1, ¶ 43 & Att. S; see also Miller Dec., PX3, Atts. A & B.

²⁹ See, e.g., *FTC v. Central Coast Nutraceuticals, Inc.*, 10 C 4931 (N.D. Ill. Aug. 5, 2010) (Norgle, J.); *FTC v. Atkinson*, 08 C 5666 (N.D. Ill. Oct. 6, 2008) (Kendall, J.) (*ex parte* TRO and asset freeze for violations of FTC Act involving deceptive sale of pharmaceuticals and dietary supplements); *FTC v. Spear Systems, Inc.*, 07 C 5597 (N.D. Ill. Oct. 5, 2007) (Andersen, J.) (*ex parte* TRO and asset freeze for violations of FTC Act involving sale of dietary supplement); *FTC v. Sili Nutraceuticals, LLC*, 07 C 4541 (N.D. Ill. Aug. 13, 2007) (Kennelly, J.) (same); *FTC v. Harry*, 04 C 4790 (N.D. Ill. July 27, 2004) (Manning, J.) (same); *FTC v. AVS Marketing, Inc.*, 04 C 6915 (N.D. Ill. Oct. 27, 2004) (Moran, J.) (same).

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

The FTC Act provides that “in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” 15 U.S.C. § 53(b). Once the Commission invokes a federal court’s equitable powers, the full breadth of the court’s authority is available, including the power to grant such ancillary final relief as restitution. *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989). The court also may enter a temporary restraining order, a preliminary injunction, and whatever additional preliminary relief is necessary to preserve the possibility of providing effective final relief. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988); *see also Amy Travel*, 875 F.2d at 571-72. Such ancillary relief may include an order to preserve assets for eventual restitution to victimized consumers. *World Travel*, 861 F.2d at 1031.

B. A Temporary Restraining Order is Appropriate and Necessary

To grant temporary injunctive relief in an FTC Act case, the district court must:

- (1) determine the likelihood that the Commission ultimately will succeed on the merits, and
- (2) balance the equities. *Id.* at 1029. Under this “public interest” test, “it is not necessary for the FTC to demonstrate irreparable injury.” *Id.* The FTC easily satisfies the TRO elements here.

1. Defendants Have Violated Sections 5 and 12 of the FTC Act

The Seventh Circuit requires proof of a “better than negligible” likelihood of success on the merits. *See Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999). Here, the Commission’s evidence far surpasses that threshold. Defendant presents false weight loss claims and makes several material misrepresentations through a deceptive format, all in violation of the FTC Act.

The FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce” generally, 15 U.S.C. § 45(a), and the dissemination of a materially misleading advertisement

“for the purpose of inducing, or which is likely to induce, . . . the purchase of food [or] drugs,” *id.* §§ 52, 55(a)(1). An act or practice is deceptive under the FTC Act if it is “likely to mislead consumers, acting reasonably under the circumstances, in a material respect.” *FTC v. Kraft*, 970 F.2d 311, 314 (7th Cir. 1992) (collecting cases); *see also FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. World Media Brokers*, 415 F.3d 758, 763 (7th Cir. 2005). The failure to disclose a material fact, even without an affirmative misrepresentation, is equally deceptive. *See Bay Area*, 423 F.3d at 635; *Amy Travel*, 875 F.2d at 573. The FTC is not required to prove intent to deceive or actual deception. *World Travel*, 861 F.2d at 1029; *Bay Area*, 423 F.3d at 635; *see also FTC v. U.S. Sales Corp.*, 785 F. Supp. 737, 753 (N.D. Ill. 1992). A misrepresentation or omission is material if it is likely to affect consumer choice. *Kraft*, 970 F.2d at 322. The materiality of health claims may be presumed. *Id.* at 322-23.

a. False Product Claims

Defendant’s legion misrepresentations include false claims that the acai berry products he features will cause rapid and substantial weight loss. Advertising claims are deceptive if: (1) they are false; or (2) the defendant lacks a reasonable basis, *i.e.*, substantiation, for making them. *See FTC v. QT*, 448 F. Supp. 2d 908, 958-59 (N.D. Ill. 2006); *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998). Injunctive relief against false or unsubstantiated weight loss claims is particularly proper. *See FTC v. Phoenix Avatar, LLC*, No. 04 C 2897, 2003 WL 1746698, at *10 (N.D. Ill. July 30, 2004) (Holderman, C.J.) (entering injunction where “there is no scientific evidence relied upon by the medical community that would suggest that the [advertised product] the defendants sold or advertised . . . would cause any weight loss, increase metabolism, or decrease appetite”). Here, no matter which acai berry products Defendant advertises, he claims that ingestion of the products causes dramatic weight loss, including up to

twenty-five pounds in four weeks, without any change in exercise or dietary habits. These claims are false, given that weight loss of that magnitude in that time frame is impossible by dietary means alone. Defendant's claims also are baseless, as acai berries have no known weight loss properties. Defendant's false and unsubstantiated weight loss claims are deceptive even without his use of a deceptive fake news format, and thus give the FTC the requisite likelihood of success on the merits.³⁰

b. Misrepresentations

Defendant does not limit himself to weight loss claims: he also misrepresents that his featured products have been vetted by an independent investigative report on behalf of an objective news organization and by consumers whose comments attest to the products' efficacy. In determining the likelihood of deception, courts look to the "net impression" created by the advertisement. *Kraft*, 970 F.2d at 314; *Nat'l Bakers Servs., Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964). To discern net impression, courts view an advertisement "as it would be seen by the public generally," which includes those "who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions." *Niresk Indus., Inc. v. FTC*, 278 F.2d 337, 342 (7th Cir. 1960) (quoting *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942)). Defendant poses as a news organization, assuring consumers of the legitimacy of his report, while the report itself sets forth a detailed account of the reporter's trial of the featured products, and her spectacular results. The fake consumer comments reinforce the credibility of the investigative report above. The misrepresentations, taken together, give the reasonable

³⁰ In addition to entering TROs against deceptive practices generally, *see n. 29 supra*, Courts in this district have entered TROs on based on false weight loss claims about acai berry products, *see FTC v. Central Coast Nutraceuticals, Inc.*, 10 C 4931 (N.D. Ill. Aug. 5, 2010) (Norgle, J.), and other dietary supplements, *see FTC v. AVS Marketing, Inc.*, 04 C 6915 (N.D. Ill. Oct. 27, 2004) (Moran, J.).

consumer the impression that the reviewed products have been tested by credible and disinterested third parties. These explanations bolster Defendant's similarly deceptive false and unsubstantiated weight loss claims, *see World Travel*, 861 F.2d at 1030, making them all the more material to the average consumer. In fact, Defendant has performed no tests on the products he purports to review, while the reporter, the news organization, and the comments all are completely fictitious.

c. Failure to Disclose

Finally, Defendant fails to disclose adequately his connection to the merchants whose products he advertises. Throughout his websites, Defendant deceptively represents that he is independent from the merchants whose products he markets. Nearly every representation on his websites contributes to this net impression. While proof of actual consumer deception is unnecessary, the deceptive nature of these websites is borne out by consumer complaints³¹ and numerous legitimate news stories uncovering the deception.³² *See id.* at 1029-30 ("Evidence that some customers actually misunderstood the thrust of the message is significant support for the finding of a tendency to mislead." (internal quotation marks, brackets, and citation omitted)).³³

³¹ *See* nn. 25-26 *supra*.

³² *See* n. 27 *supra*.

³³ Defendant's occasional use of buried disclosures about the true nature of his websites, *see* n. 24 *supra*, is insufficient to cure their deceptive format. His "Advertorial" label, even when used, is woefully inadequate. *See SEC v. Corp. Relations Group, Inc.*, No. 6:99CV1222ORL28KRS, 2003 WL 25570113 (M.D. Fla. Mar. 28, 2003) ("The 'advertorial' label on some, but not all, of the articles does not clearly convey the fact that the Defendants were paid . . . for the promotions."), *aff'd*, 99 Fed. App'x 881 (11th Cir. 2004) (unpublished table decision). Moreover, "[d]isclaimers or qualifications in any particular ad are not adequate unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression." *U.S. Sales Corp.*, 785 F. Supp. at 753 (citation omitted); *see also FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42-43 (D.C. Cir. 1985). Thus, Defendant's fine-print
(continued...)

In sum, the Commission's evidence far outstrips the required "negligible" chance of success on the merits, and indeed establishes that Defendant perpetrated the deceptive practices alleged.

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

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

C. This Court Should Enter the FTC's Narrowly Tailored Proposed TRO

In fashioning appropriate injunctive relief, this Court has authority "to grant any ancillary relief necessary to accomplish complete justice[.]" *World Travel*, 861 F.2d at 1026 (quotation marks and citation omitted); *see also Febre*, 128 F.3d at 534 (district court has authority in FTC action to "order any ancillary equitable relief necessary to effectuate the exercise of the granted powers" (quoting *Amy Travel*, 875 F.2d at 572)). The FTC requests that the Court issue a TRO

³³(...continued)
disclosures, hidden far from representations they disclaim, also fail.

that, by prohibiting future law violations and preserving assets and documents, preserves the status quo and ensures that the Court can grant effective final relief.³⁴

1. Asset Preservation, Financial Statements, and Accounting

Part of the relief sought by the FTC in this case is restitution for the victims of Defendant's fraud. Defendant has posted advertisements that have reached over three million consumers, nearly one hundred thousand of whom have been lured to Defendant's websites, where they have been bombarded with his misrepresentations and false claims. In order to preserve the possibility of restitution for victims who were deceived into buying the products Defendant purports to review, the FTC seeks the preservation of Defendant's assets and an immediate accounting.

When a district court determines that it is "probable that the FTC [will] prevail in a final determination of the merits," it has "a duty to ensure that . . . assets . . . [are] available to make restitution to the injured customers." *World Travel*, 861 F.2d at 1031. Sections III and IV of the FTC's Proposed TRO require Defendant to preserve assets and provide the FTC with a completed financial statement and an accounting, respectively. These sections are necessary and appropriate to locate ill-gotten gains and to prevent the concealment or dissipation of assets pending a final resolution of this litigation.

2. Prohibited Business Activities and Additional Relief

The FTC's Proposed TRO also contains provisions necessary for halting Defendant's illegal conduct and maintaining the status quo. Sections I and II prohibit Defendant from further violating the FTC Act, while Section V requires him to post notice of the lawsuit on his

³⁴ A proposed TRO has been filed concurrently herewith.

websites. Section VI requires Defendant to preserve records and report new business activity. Section VII allows for expedited discovery of information relevant to a preliminary injunction hearing. These are necessary provisions to stop Defendant's scam and to help identify the scope of unlawful practices, other participants, and the location of assets.

IV. CONCLUSION

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

Respectfully submitted,

WILLARD K. TOM
General Counsel

DATED: April 13, 2011

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