

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

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FEDERAL TRADE COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	<b>Case No. 11-CV-02448</b>
	)	
	)	<b>Judge Joan B. Gottschall</b>
BEONY INTERNATIONAL LLC,	)	
a California Limited Liability Company,	)	<b>Magistrate Judge Geraldine Soat Brown</b>
	)	
MARIO MILANOVIC,	)	
individually and as an owner and/or	)	
member of Beony International LLC, and	)	
	)	
CODY ADAMS,	)	
individually,	)	
	)	
Defendants.	)	

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

**I. INTRODUCTION**

We ask that the Court take immediate action to stop an online scheme that uses fake news websites and false weight loss claims to deceive consumers into purchasing products. Since at least 2008, Defendants have operated numerous websites that appear to be legitimate news sites but actually feature phony investigative reports and reviews of a range of dubious products, including acai berry weight loss supplements. Defendants' domain names, such as channel6reports.com and healthnews10.com, suggest real news organizations and the sites display mastheads such as News 6 News Alerts and Health News Health Alerts. The sites often feature a supposed reporter's independent investigative report showing success with the products followed by a section full of glowing consumer "comments." The sites also prominently claim that the reports have been "seen on" several major news outlets, such as ABC and CNN.

Nearly everything about these "news" sites is fake. The websites are not maintained by news organizations. The reporter, the investigation, and the consumer comments all are fabricated. Instead, the websites are simply ads that deceptively entice consumers to purchase the featured products from the third-party websites, thereby generating commissions for Defendants. Fake news site scams, like those of Defendants, have become such a widespread problem that organizations such as Consumer Reports have publicly warned about them, and the FTC has received numerous complaints. Defendants' claims about dramatic weight loss from acai berries are false. Just last year, a court in this district prohibited essentially identical acai berry weight loss claims. *See FTC v. Central Coast Nutraceuticals, Inc.*, 10 C 4931 (N.D. Ill. Aug. 5, 2010) (Norgle, J.). Defendants have spent millions to disseminate their deceptive ads throughout the Internet, and their deceptive conduct likely has injured thousands of consumers.

The FTC asks this Court to halt Defendants' illegal practices and preserve the possibility of effective final relief by entering the FTC's proposed Temporary Restraining Order ("TRO").<sup>1</sup>

## **II. DEFENDANTS' ILLEGAL BUSINESS PRACTICES**

Defendants, Beony International LLC ("Beony), a California limited liability company,<sup>2</sup> its chief executive officer, Mario Milanovic ("Milanovic"),<sup>3</sup> San Diego, California, and its director of operations, Cody Adams,<sup>4</sup> Norman, Oklahoma, are "affiliate" marketers. Defendants use fake news websites and make false claims about acai berry and other products to make sales for third-party merchants and to generate commissions for themselves.<sup>5</sup>

### **A. Affiliate Marketing**

"Affiliate" marketers, or "affiliates," are Internet-based marketers hired by a seller of goods (known as a "merchant") to attract consumers to a merchant's website.<sup>6</sup> The merchant

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<sup>1</sup> This case is one of ten filed by the FTC – including five in this district – against sellers of acai berry dietary supplements and other products through deceptively formatted fake news sites.

<sup>2</sup> Plaintiff's Exhibit ("PX") 1 McKenney (FTC investigator) Att. X. Exhibits are identified by PX number followed by declarant name and paragraph and/or exhibit letter designation, as applicable. The name "McKenney" is sometimes omitted from the designation of PX 1.

<sup>3</sup> PX 2 Cronberger ¶ 4 Att. PULSE0021 (insertion order signed by Milanovic, CEO).

<sup>4</sup> PX 2 Cronberger ¶ 4 Att. PULSE0010 (insertion order signed by Adams, Director of Operations).

<sup>5</sup> The Court has personal jurisdiction over Defendants under the FTC Act's nationwide service of process provision, 15 U.S.C. § 53(b), because Defendants have 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.). Venue is proper wherever a person, partnership, or corporation, such as Defendants, "resides or transacts business." 15 U.S.C. § 53(b). *See* PX 1 McKenney ¶¶ 8-12, 14-18, 20-21 (at least seven different websites visited from Chicago FTC offices).

<sup>6</sup> *See* PX 1 McKenney ¶¶ 4,5 Att. A (background on affiliate marketing). *See generally* *1-800 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); PX 2 Cronberger ¶ 2 (describing affiliate marketing).

typically pays the affiliate for the number of consumers who visit the website and purchase from the merchant or participate in a free trial of merchant's product.<sup>7</sup> Defendants began affiliate marketing as early as September 2008 when Milanovic began purchasing advertising services and Adams paid to register domain names with their personal credit cards.<sup>8</sup> Defendants have used these domain names to display at least seven different fake news websites and a phony consumer blog.<sup>9</sup> In addition to acai berries, Defendants' websites, including fake news sites, have promoted work-at-home business opportunities, debt relief, anti-aging supplements, skin treatments, teeth whitening, electronic cigarettes, and flu vaccines.<sup>10</sup>

Defendants' sites, including fake news sites, are designed to prompt consumers to click on a link, and from there to visit a third-party website to purchase products, a process which generates commissions for Defendants.<sup>11</sup> Defendants have spent over \$13.75 million since September 2008 to place almost 28 billion online ads on high-volume websites such as

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<sup>7</sup> See PX 1 McKenney ¶¶ 4, 5, Att. A (affiliates are sometimes paid per click); See also PX 2 Cronberger ¶ 2 (ad service charges advertiser for number of consumers who click on advertiser's ads).

<sup>8</sup> See PX 1 McKenney ¶ 26 (Milanovic advertising payments), ¶ 25 (Adams registration payments).

<sup>9</sup> See PX 1 McKenney ¶¶ 9-15, 17-22 (fake news sites); ¶ 16 (fake blog). Defendants also operate UK fake news sites. See PX 1 McKenney Atts. H, K.

<sup>10</sup> PX 1 McKenney ¶ 24e.

<sup>11</sup> Defendants appear to be affiliate marketers of affiliate network CX Digital Media, formerly IncentaClick. As an affiliate network, CX maintains a relationship with merchants and pays affiliate marketers, like Defendants, a percentage of the product sales that it generates or based on the number of consumers that the affiliate draws to the merchant's websites. PX 1 McKenney Atts. A, G, ¶¶ 4-5, 12-13 (clicking Defendants' site leads first to CX site before being redirected to merchant site).

Weather.com, MSNBC, and USA Today.<sup>12</sup> Of that amount, Defendants paid over \$11.11 million when consumers clicked over 8.3 million times on at least 21 billion impressions of Defendants' acai berry ads, and thereby generated commissions for Defendants.<sup>13</sup> Defendants further their illegal business in two key ways: (1) utilizing the deceptive fake news format; and (2) misrepresenting that the acai berry products it promotes cause rapid, substantial weight loss.

**B. Defendants' Use of Deceptive Fake News Format**

Defendants' websites convey the net impression that they display legitimate objective news reports evaluating the featured products. Specifically, the sites:

- contain mastheads suggesting that the sites are affiliated with objective news organizations such as "Health 6 Beat Health News," "News 6 News Alerts," "Health News," "Health News Health Alerts," and the "Omaha Gazette."<sup>14</sup>
- contain subject tabs frequently used on news websites such as "Home," "U.S.," "World," "Business," "Politics," "Entertainment," "Opinion," and "Sports;"<sup>15</sup>
- employ logos of real news outlets such as ABC, Forbes, CBS News, CNN, and USA Today;<sup>16</sup>
- represent that a "reporter" or "columnist" decided to investigate a popular product or service, such as acai berry weight loss supplements or surplus auction websites,

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<sup>12</sup> The appearance of an advertiser's ad or link on a website is called an "impression." Pulse 360 charged Defendants on a "cost-per-click" basis (*i.e.*, each time a consumer clicked on a link appearing in an impression placed on the Internet by Pulse 360). *See* PX 2 Cronberger ¶¶ 2-3.

Defendants have paid Pulse 360 a total of \$14.33 million for ad services since September 2008. Of that total, Defendants paid \$13.75 million for more than 11 million clicks made by consumers on the nearly 28 billion impressions of Defendants' ads that Pulse 360 placed on the Internet. PX 1, McKenney ¶¶ 24, 25 Atts P, Q. (summarizing Pulse 360 data).

<sup>13</sup> PX 1 McKenney ¶¶ 24 c, d. Defendants also place ads for other products. PX 1 ¶ 24e.

<sup>14</sup> PX 1 McKenney Atts. B, p.1, C, p. 1, D, p. 1; F, p.1; H, p. 1; N, p. 1; O, p. 1.

<sup>15</sup> PX 1 McKenney Atts. F, p. 1; H, p. 1; N, p. 1 O, p. 1.

<sup>16</sup> PX 1 McKenney Atts. B-D, H, N, O.

by performing an independent test or investigating an ordinary consumer's experience and reporting the results;<sup>17</sup> and

- include a "comments" section containing what appear to be consumer testimonials depicting positive experiences with the products.<sup>18</sup>

Defendants' news reports are completely fake. There are no independent investigations; instead, the images of "reporters" are stock photographs with fictional names, sometimes used in multiple websites for different products.<sup>19</sup> The supposed news organizations do not exist.<sup>20</sup> The ordinary consumers are phony.<sup>21</sup> The consumer comments are also fabricated.<sup>22</sup>

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<sup>17</sup> PX 1 McKenney Atts. B-D, F, H ("reporter" investigates acai berries); I (blog describing consumer's acai berry experience); I-L ("ordinary mom" has success with teeth whitener); N, O ("reporter" investigates surplus auctions).

<sup>18</sup> PX 1 McKenney Atts. B-D, H, J-O.

<sup>19</sup> For example, reporter "Julie Ayers" who investigated Acai Max Cleanse and ColoPure is also "Helen Cohen" in a UK website who investigated Acai Max Cleanse and ProCleanse Gold. *Compare* PX 1 McKenney Atts. F, H. She is actually Melissa Theuriau, a French television news presenter. PX 1 Att. T (*The face that launched a global ad scam*). The image of reporter "Stacie Sandler" is used in depictions of three distinct investigations of two different acai berry supplements in combination with three different colon cleansing products. Despite using different products, she reports the same result during each investigation; each time, the "reporter" lost 25 pounds in 4 weeks, with no special diet or intense exercise. PX 1 Atts. B-D. The image of "reporter" James Field, *see* PX 1 Atts. B-D, F, who is also "reporter" Marc Gibson, PX 1 Atts. N, O, is a stock photo. *Compare* PX 1 Atts. B-D, F, N, O with and W, p. 2.

<sup>20</sup> The websites names were registered and purchased by Defendants alone and are not affiliated with any news entities. *See* PX 1 McKenney ¶ 22.

<sup>21</sup> For example, the image of Olivia, "a Lodon (*sic*) [UK] school teacher and full time mother" used by Defendants is also Amy, "a Chicago school teacher and full time mother." Both Olivia and Amy purportedly obtained whiter teeth with teeth whitening products promoted by Defendants. *Compare* PX 1 McKenney Atts. K (London) with J, L (Chicago). The image is a stock photo. *Compare* PX 1 Atts. J, K, L with W, p. 1 PX 1 Att. W, p. 1. The consumer in Defendants' fake blog, "Alyssa Johnson," Chicago, IL, is also Ella Regan, Huddersfield, in a UK fake news site. *Compare* PX 1 Att. I with Att. H.

<sup>22</sup> For example, comments from Defendants' websites are practically identical with occasional slight variations such as the name of the commenter. *E.g.*, PX 1 McKenney Att. B, p. 3 ((reporter Stacie comments) identical to Att. F, p. 3 (reporter Julie comments)). The dates of the consumer comments are automatically updated to make them look current when a viewer clicks on a link. *E.g.*, *compare* PX 1 Atts. B, p. 3 (captured 12/10/2010) and C, p. 3 (captured 1/28/2011) .

Defendants' websites are simply paid advertising for third-party merchants who sell the products.<sup>23</sup> Defendants fail to disclose a connection to these merchants, and, instead, create the impression of objectivity with websites that depict "reporters" who conduct "independent" investigations to "find out the truth" so that consumers can avoid scams.<sup>24</sup> Moreover, Defendants' display of the vague term "advertorial" or "advertisement" in tiny, inconspicuous print at the top of their websites<sup>25</sup> does not alter the net impression that the sites are objective news reports. Even if consumers understood what "advertorial" meant, it, like the term "advertisement" is buried between the websites' prominent fake news imagery and text.<sup>26</sup>

### **C. False Acai Berry Weight Loss Claims**

In addition to using the fake news format, Defendants also make false and unsubstantiated weight loss claims about the acai berry supplements that they actively promote.

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<sup>23</sup> See PX 1 McKenney ¶¶ 4, 5 (describing affiliate marketing). Ironically, some of Defendants' websites include a fine print disclosure admitting that the "page receives compensation for clicks or purchases of products featured on this site." *E.g.* PX 1 Att. B, p. 4.

<sup>24</sup> See, e.g., PX 1 McKenney Atts. B-D, F ("Acai Berry Diet Exposed: Miracle Diet or Scam?" The first page of the text states: "What better way to find out the truth than to conduct our own study?"); Atts. N, O ("Surplus Auctions Exposed: 95% Off Retail Possible?" The first page of the text states: "What better way to find the truth than to conduct our own study?").

<sup>25</sup> See, e.g., PX 1 McKenney Atts. B, C, D, F, J, L (Advertorial); N, O (Advertisement)

<sup>26</sup> Defendants have stated in fine print at the bottom of some of their websites, in part, that: "[t]his website, and any page on the website, is based loosely off a true story, but has been modified in multiple ways including, but not limited to: the story, the photos, and the comments. Thus, this page, and any page on this website, are not to be taken literally or as a non-fiction story. . . . This page receives compensation for clicks on or purchase of products featured on this site." (Defendants seem to omit the statement from their UK sites and job sites. (See PX 1 McKenney Atts. B -D (p. 4); J, p. 8; L, p. 6; N, p. 3; O, p. 4 and H, K (UK sites), M (job site)). This inconspicuous statement appears well below where consumers would form their purchasing decisions and beneath two other paragraphs of miscellaneous attempted disclaimers (such as a disavowal of network affiliation and explanation of shipping and handling charges). Under these circumstances, the statement cannot undo the express misrepresentations made in the body of the websites. See *infra* Note 42.

Defendants' claim that the acai berry supplement, usually in conjunction with a colon cleansing supplement, can cause dramatic weight loss in an extremely short time period.<sup>27</sup> On a typical fake news site, a reporter describes her personal experience in losing twenty-five pounds in four weeks without changing her diet or intense exercise.<sup>28</sup> The consumer in Defendants' fake blog claims she lost forty-seven pounds in three months.<sup>29</sup> Defendants bolster these claims with false consumer comments raving about the products.<sup>30</sup>

Defendants' weight loss claims are indisputably false. According to Northwestern University's Robert F. Kushner, M.D., a weight loss expert, no medical evidence whatsoever establishes that acai berries or that any of the specific acai berry products promoted by Defendants can produce the rapid, substantial weight loss that Defendants claim.<sup>31</sup> No scientific studies establish that acai berries are effective in causing weight loss.<sup>32</sup> This is true regardless of whether acai berries are taken alone or with any other product, including colon cleansing

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<sup>27</sup> See, PX 1 McKenney Atts.B-D, F, H, I.

<sup>28</sup> See, e.g., PX 1 McKenney p. 2 of Atts. B-D (reporter Stacie's results); F, p. 3 (Julie's results).

<sup>29</sup> Alyssa's Rachel (*sic*) Ray Blog, PX 1 McKenney Att. I. The blog also falsely suggests an endorsement from Rachael Ray, a Food Network television personality. PX3 Ray ¶ 7 (no approval or agreement for use of name or image in conjunction with sale and marketing of any acai berry related product).

<sup>30</sup> See, e.g., PX 1 McKenney Att. B, p. 3 (Diane: "Atleast (*sic*) 5 of us have all done the acai diet. . . and we all lost a bunch of weight;" Stephen: "even heard my mom talking about this diet a few days ago since one of her friends lost like 12 lbs in the first 15 days!"). P. 3 of Atts C, D, F (same).

<sup>31</sup> See PX 4 Kushner ¶¶ 7, 8, Att. A (curriculum vitae) (professor of Medicine at Northwestern University Feinberg School of Medicine and the Clinical Director of the Northwestern Comprehensive Center on Obesity in Chicago and Medical Director of the Center for Lifestyle Medicine in Chicago).

<sup>32</sup> See PX 4 Kushner ¶ 7.

products.<sup>33</sup> Achieving significant weight loss, such as twenty-five pounds or more in four weeks without changes in diet or exercise, like Defendants claim, is simply impossible.<sup>34</sup>

**D. Consumers Have Been Harmed by Defendants' Deceptive Practices**

The FTC has been flooded with complaints from consumers tricked into purchasing products, including acai berry weight loss products, through fake news websites like those of Defendants.<sup>35</sup> Many consumers were charged between \$60 and \$100 for the products.<sup>36</sup> Some of the victimized consumers recalled Defendants' fake news websites by name.<sup>37</sup> The FTC has also received numerous complaints referencing the names of specific acai berry products Defendants have peddled.<sup>38</sup> Fake news website scams have become so widespread that many legitimate news agencies or consumer organizations have provided public warnings about them.<sup>39</sup> Given that Defendants have spent over \$13 million to attract consumers to their websites, and more

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<sup>33</sup> Products with laxative effects, such as colon cleansers, may cause minimal and temporary weight loss, but it would be impossible to lose a significant amount of waste solely from taking a product with a laxative effect. PX 4 Kushner ¶ 10.

<sup>34</sup> See PX 4 Kushner ¶ 9 (negative energy balance caused by calorie restriction or increasing physical activity necessary for weight loss).

<sup>35</sup> See PX 1 McKenney Att. R.

<sup>36</sup> Many consumers complain that they believed that they were receiving a "free trial" of the product and were unwittingly signed up for a recurring membership program for the products resulting in monthly charges. See PX 1 McKenney Att. R, pp. 1, 3, 9, 11,13,17, 19, 21, 23, 27, 29, 31, 33.

<sup>37</sup> See, e.g., PX 1 McKenney Att. R, pp. 7, 29, 35.

<sup>38</sup> See, e.g., McKenney ¶ 28.

<sup>39</sup> See McKenney ¶¶ 29, 31 Atts. S, U (including *Consumer Reports* and Better Business Bureau).

than \$11 million for fake news sites and blogs touting acai berries,<sup>40</sup> Defendants have almost certainly received multiple times that amount in ill-gotten commissions.

### **III. ARGUMENT**

Defendants are blatantly violating the FTC Act. To prevent further consumer injury and to preserve Defendants' assets for restitution to victims, the FTC asks this Court to issue a TRO that would prohibit Defendants' ongoing illegal practices, protect assets, and require an accounting of ill-gotten gains. Courts in this district have granted TROs with comparable relief in similar FTC actions.<sup>41</sup>

#### **A. A Temporary Restraining Order Is Appropriate and Necessary**

A district court may issue injunctions to enjoin violations of the FTC Act. *See* 15 U.S.C. § 53(b); *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir. 1988). To obtain a TRO, the FTC must merely demonstrate: (1) a likelihood of success on the merits, and that (2) the balance the equities tips in its favor. *World Travel*, 861 F.2d at 1029. "[T]he FTC need not prove irreparable injury to obtain a preliminary injunction." *Kinney v. Int'l Union of Operating Eng'rs*, 994 F.2d 1271, 1277 (7th Cir. 1993). The FTC easily satisfies the TRO elements here.

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<sup>40</sup> *See* Note 12: PX 1 McKenney ¶¶ 24c, 24d.

<sup>41</sup> *See, e.g., FTC v. Central Coast Nutraceuticals, Inc.*, 10 C 4931 (N.D. Ill. Aug. 5, 2010) (Norgle, J.) (entering *ex parte* TRO for false claims regarding acai berry supplements); *FTC v. Atkinson*, 08C5666 (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.*, 07C 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*, 07C 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).

**1. There is a Strong Likelihood Defendants Have Violated 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 “any false advertisement . . . for the purpose of inducing, or which is likely to induce, . . . the purchase of food [or] drugs,” *id.* §§ 52, 55. An act or practice is deceptive if it involves a material misrepresentation or omission that is likely to mislead consumers acting reasonably under the circumstances, in a material respect. *FTC v. Kraft*, 970 F.2d 311, 314 (7th Cir. 1992); *see also FTC v. Bay Area Bus. Council*, 423 F.3d 627, 635 (7th Cir. 2005). Misrepresentations and omissions involving information likely to affect consumer choice are considered material. *Kraft*, 970 F.2d at 322. Health claims may be presumed to be material. *Id.* at 322-23. The failure to disclose a material fact, even without an affirmative misrepresentation, is equally deceptive. *See Bay Area*, 423 F.3d at 635; *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 575 (7th Cir. 1989). Proof of actual deception or intent to deceive is unnecessary. *See Bay Area*, 423 F.3d at 635; *World Travel*, 861 F.2d at 1029.

The threshold showing of likelihood of success is a “better than negligible” chance. *See Cooper v. Salazaar*, 196 F.3d 809, 813 (7th Cir. 1999). The FTC has far exceeded that threshold in demonstrating that Defendants have violated the FTC Act by: (1) misrepresenting that their websites provide independent reviews and failing to disclose adequately that the sites are ads; and (2) making false and unsubstantiated claims about acai berry products.

**a. Defendants’ Deceptive Website Format**

Defendants’ websites create the impression that they are objective news reports when, in fact, the sites are ads. The Court looks to the “overall, net impression” of an ad to determine whether the messages or claims it conveys are likely to mislead reasonable consumers. *FTC v. QT, Inc.*, 448 F. Supp 2d 908, 958 (N.D. Ill. 2006) (Denlow, M.J.). *See Kraft*, 970 F.2d at 314.

Defendants' websites overwhelmingly convey the net impression that objective news reporters have performed independent tests or investigations demonstrating the effectiveness of the featured products. The appearance of Defendants' fake news websites mirrors those of legitimate news websites down to the very details, including the mastheads, subject tabs, photos of supposed reporters, and even consumer comments. The websites claim the featured reports have been "seen on" major reputable news outlets such as ABC, Forbes, CBS News, CNN, and USA Today. Defendants have not performed independent tests, and the reporter, the featured consumer, the news organization, and the consumer comments are all completely fictional.<sup>42</sup> Not only are consumers *likely* to be deceived by these websites, they *have been* deceived.<sup>43</sup> Evidence that consumers were actually fooled is "significant support" for finding "a tendency to mislead." *See World Travel*, 861 F.2d at 1029-30.

**b. Defendants' False Weight Loss Claims**

Defendants also make express outright false claims that the promoted acai berry products will cause rapid, substantial weight loss, including as much as twenty-five pounds in four weeks.

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<sup>42</sup> Defendants' use of a well-hidden "advertisement" or "advertorial" label is inadequate to cure the websites' net impression. *See SEC v. Corp. Relations Group, Inc.*, No.6:99CV1222ORL28KRS, 2003 WL 25570113 (M.D. Fla. Mar. 28, 2003) ("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). That impression is not changed by the fine-print disclaimers about how the websites are "illustrative" and "not to be taken literally" that are buried in some of the sites far away from the news "reporter's" investigative account, beneath the consumer comments and other attempted disclosures. "Disclaimers 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." *FTC v. U.S. Sales Corp.*, 785 F.Supp. 737, 751 (N.D. Ill 1992); *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, 43 (D.C. Cir. 1985). Defendants' inadequate disclaimer does not undo the express misrepresentations made in the body of the websites.

<sup>43</sup> *See* Section II.D; McKenney ¶¶ 27, 28 Att. R. (generally, and p. 35 (web developer initially believed site was real news site)).

The FTC may demonstrate the deceptive nature of advertising claims by either: (1) demonstrating the falsity of the claims; or (2) showing that the Defendants lacked a reasonable basis for making the claims, *i.e.*, “substantiation.” *See, e.g., QT*, 448 F. Supp 2d at 957; *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 Phoenix Avatar*, Case No. 04 C 2897 (injunction against claims that were false because of no scientific evidence in medical community that product would cause any weight loss).

The FTC’s expert testimony shows that: (1) no medical evidence whatsoever establishes that acai berries alone, or in combination with a companion product, can produce the rapid, substantial weight loss that Defendants claim, and (2) achieving weight loss of twenty-five pounds in four weeks without exercise or dietary changes, like Defendants claim, simply is not possible from ingestion of any product. Courts in this district have repeatedly granted TROs under similar circumstances, including a TRO prohibiting nearly identical acai berry claims.<sup>44</sup>

## **2. The Equities Tip Decidedly in the FTC’s Favor**

Once the FTC has shown a likelihood of success on the merits, the Court must balance the equities, assigning “far greater weight” to the public interest than to Defendants’ private concerns. *World Travel*, 861 F.2d at 1029. The public equities compelling, as the public has a strong interest in halting Defendants’ deceptive conduct and preserving assets for effective final relief. Defendants, by contrast, have no legitimate interest in engaging in illegal conduct. *See FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) (“no oppressive hardship to

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<sup>44</sup> *See* note 41, including *Central Coast Nutraceuticals*, Case No. 10 C 4931 (Norgle, J.) (TRO prohibiting false acai berry claims).

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.

**3. Defendants Milanovic and Adams are Individually Liable**

Defendants Milanovic and Adams are individually liable and should be subject to the TRO. An individual defendant may be held liable for injunctive relief and monetary restitution under the FTC Act if the Court finds (1) that he participated directly in or had some measure of control over a corporation’s deceptive practices, and (2) that he had actual or constructive knowledge of the practices. *World Media Brokers*, 415 F.3d at 764; *Bay Area*, 423 F.3d at 636; *Amy Travel*, 875 F.2d at 573-74. Authority to control may be evidenced by “active involvement in the corporate affairs, including assuming the duties of a corporate officer.” *World Media Brokers*, 415 F.3d at 764 (citing *Amy Travel*, 875 F.2d at 573). The knowledge requirement is satisfied by a showing that the defendant (1) had actual knowledge of the deceptive acts or practices, (2) was recklessly indifferent to the truth or falsity of the representations, or (3) had an awareness of a high probability of fraud coupled with an intentional avoidance of the truth. *Id.*; *Bay Area*, 423 F.3d at 636; *Amy Travel*, 875 F.2d at 573. An individual’s “degree of participation in business affairs is probative of knowledge.” *Id.* The Commission does not need to prove subjective intent to defraud. *Id.*

Milanovic, Beony’s C.E.O., purchased millions of dollars in advertising services on its behalf with his personal credit cards, signed a contract for those services, and was informed through emails about the management of those accounts.<sup>45</sup> Adams, Beony’s Director of

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<sup>45</sup> PX 1 McKenney ¶¶ 24, 25; PX 2 Cronberger ¶ 4, Atts. PULSE0021, and attached emails.

Operations, purchased domain names with his personal credit cards,<sup>46</sup> signed a contract advertising services, and actively managed Beony's advertising accounts.<sup>47</sup>

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

The FTC requests that the Court issue the attached proposed TRO.<sup>48</sup> 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; *see also Febre*, 128 F.3d at 534. The proposed TRO would maintain the *status quo* by prohibiting future law violations and preserving assets and documents to ensure that the Court can grant effective final relief.

**1. Asset Preservation, Financial Statements, and Accounting**

Part of the relief sought by the FTC is restitution for the victims of Defendants' fraud. Defendants have lured over eleven million consumers to their deceptive websites, including over eight million to sites deceptively promoting acai berries, and no doubt tricked many consumers into purchasing products. To insure the possibility of restitution, the FTC seeks an order preserving Defendants' assets and an immediate accounting of them.

A district court has "a duty to ensure that . . . assets . . . [are] available to make restitution to injured customers" when the court determines that it is "probable that the FTC [will] prevail in a final determination of the merits." *World Travel*, 861 F.2d at 1031; *see also World Wide Factors*, 882 F.2d at 347; *Sabal*, 32 F. Supp 2d at 1009. Sections III and IV of the proposed TRO require Defendants to preserve assets and to provide the FTC with a completed financial

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<sup>46</sup> PX 1 McKenney ¶ 22 (account includes Milanovic contact: "mario@beony-international.com").

<sup>47</sup> PX 2 Cronberger ¶ 4 (emails (excluding PULSE0010, PULSE0021), most copied to Milanovic).

<sup>48</sup> A proposed TRO has been submitted to the Court with the FTC's motion.

statement and an accounting. These sections are necessary 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 Necessary Relief**

The FTC's Proposed Order also contains provisions necessary for halting Defendants' illegal conduct and maintaining the *status quo*. Sections I and II prohibit Defendants from further violating the FTC Act by making weight loss claims about acai berry products, by misrepresenting that the websites are objective news reports, or by failing to disclose clearly and conspicuously that the websites are advertisements. Section V requires Defendants to post notice of this lawsuit on their websites. Section VI requires Defendants to preserve records and report new business activity. Section VII allows for expedited discovery of information relevant to a preliminary injunction hearing. These provisions are necessary to stop Defendants' scam and to help identify the scope of unlawful practices, other participants, and the location of assets.

## **IV. CONCLUSION**

Defendants have caused and are likely to continue to cause substantial injury to the public through their 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,

DATED: April 13, 2011

/s/ John C. Hallerud

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