

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

FEDERAL TRADE COMMISSION,	)	
	)	
Plaintiff,	)	Case No. 11 C 2485
	)	
v.	)	Judge Samuel Der-Yeghiayan
	)	
RICARDO JOSE LABRA, individually,	)	Magistrate Judge Michael T. Mason
	)	
Defendant.	)	
	)	

**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 the Court take immediate action to stop an online marketing scheme that uses fake news websites and false weight loss claims to deceive consumers into purchasing products. Over the last two years, Defendant Ricardo Jose Labra has created numerous websites manufactured to look like legitimate news sites but that are really phony reports and reviews of a range of dubious products, including acai berry weight loss supplements. He uses domain names and mastheads suggestive of real news organizations such as consumersnewspick.com and consumerstricksweekly or “News 9” and “News 6.” He features a reporter’s supposed independent review of how well the products work, as well as a “comments” section full of glowing consumer testimonials. He claims prominently that these reports have been seen on major news outlets, such as CNN and Fox News.

Nearly everything about Defendant’s “news” websites is fake. The websites are not maintained by news organizations. The reporter, the investigation, the independent review and

the consumer comments are all fabricated. Instead, the websites are advertisements Defendant uses to entice consumers to purchase products so that he can earn a commission from the merchants that sell the products online. Fake news site scams, such as Defendant's, have become such a widespread problem that organizations such as Consumer Reports and the Better Business Bureau have publicly warned about<sup>1</sup> and the FTC has received numerous complaints from victims of this type of scam. In addition to the phony news format of his websites, Defendant also makes blatant misrepresentations about the weight loss effects of the acai berry products he promotes. Just last year, a court in this district granted an order prohibiting essentially the same weight loss claims about acai berry related products.<sup>2</sup> Defendant's deceptive conduct has likely affected thousands of consumers.

The FTC asks this Court to halt Defendant's illegal practice immediately and to preserve the Court's ability to provide effective final relief by entering the FTC's Proposed Temporary Restraining Order ("TRO").<sup>3</sup>

## **II. DEFENDANT'S ILLEGAL BUSINESS PRACTICES**

Defendant Ricardo Jose Labra<sup>4</sup>, a resident of Grand Rapids, Michigan, operates an

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<sup>1</sup> See PX 1, Declaration of Douglas M. McKenney, FTC Investigator ("McKenney Dec.") ¶¶ 29(a), 31.

<sup>2</sup> See *FTC v. Central Coast Nutraceuticals, Inc.*, 10 C 4931 (N.D. Ill. Aug. 5, 2010) (Norgle, J.) (entered *ex parte* TRO for false claims regarding weight loss effects of acai berry supplements).

<sup>3</sup> This matter is one of ten cases filed by the FTC – including five in this district – against entities selling acai berry dietary supplements and other products through deceptively formatted fake news sites.

<sup>4</sup> 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, an action may be brought wherever a person "resides or transacts business." 15 U.S.C. § 53(b). Here, Defendant has

“affiliate marketing” business in which he uses the fake news sites and false claims about acai berry products described above to fraudulently generate sales for third-party merchants.

**A. Defendant’s Affiliate Marketing Operation**

Defendant is an affiliate marketer, sometimes known simply as an “affiliate,” an Internet-based marketer hired by a seller of goods (known as a “merchant”) to attract consumers to a merchant’s website.<sup>5</sup> The merchant pays the affiliate a commission when the affiliate successfully lures a consumer to the merchant’s website and the consumer purchases one of the featured products.<sup>6</sup> Defendant began affiliate marketing as early as May 2009, when he started registering numerous domain names and paying for them with his personal credit card.<sup>7</sup> He then created numerous websites with the fake news format described above.<sup>8</sup> Defendant’s websites feature acai berry weight loss products, as well as teeth whiteners, work-at-home plans, skin cream, and surplus auction sites, and pretend to offer independent reviews or tests of these products.<sup>9</sup> To attract consumers to his websites, Defendant spent over \$778,000 in

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transacted business in this district. *See* McKenney Dec., PX 1, ¶¶ 8-22 (describing Defendant’s websites viewed in district).

<sup>5</sup> *See* PX 1, McKenney Dec. ¶¶ 3-5, 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).

<sup>6</sup> *See* PX 1, McKenney Dec. ¶¶ 3-5 (background on affiliate marketing).

<sup>7</sup> *See* PX 2, Declaration of Keena R. Willis, (records of GoDaddy.com, Inc., an Internet Service Provider and domain registrar, showing Defendant’s registration of numerous domain names).

<sup>8</sup> *See* PX 1, McKenney Dec. ¶¶ 8-19, Atts. B-M (describing and showing captures Defendant’s fake news websites). Defendant also created websites that appeared to be consumer blogs but were also advertisements. *See id.* ¶¶ 20-22, Atts. N-P (describing and showing captures of several of Defendant’s “blog” websites).

<sup>9</sup> *See id.* Atts. B-M (showing captures of Defendant’s fake news websites).

approximately a year and a half to place ads for his websites on high volume websites throughout the Internet such as Fox.com, msnbc.com, and comcast.net, among many others; those ads reached over 3.4 billion consumers.<sup>10</sup> Over 700,000 consumers clicked on those ads and were brought to Defendant's websites, which then lead consumers to the merchant sites selling the featured products.<sup>11</sup>

### **B. Deceptive Fake News Format**

Defendant uses websites deceptively designed to give consumers the net impression that the sites contain objective news reports evaluating the featured products. Specifically, the websites:

- contain mastheads suggesting that the websites are affiliated with objective news organizations such as "News 3 Online," "News 6," and "Consumer News Pick;"<sup>12</sup>
- contain content categories frequently used on news websites such as "Home," "U.S.," "World," "Business," "Politics," "Health," "Opinion," and "Sports;"<sup>13</sup>
- employ logos of real news outlets such as ABC, Fox News, CBS, CNN, MSNBC, and USA Today;<sup>14</sup>
- represent that a "columnist" or "reporter" decided to investigate the worthiness a popular product or service, such as acai berry weight loss supplements or surplus auction websites, by performing an independent test or investigating an ordinary consumer's

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<sup>10</sup> See PX 3, Declaration of William G. Cronberger, Pulse 360, Inc. ¶¶ 2-3, (generally discussing ads placed by Defendant through the Pulse 360 network); PX 1, McKenney Dec. ¶ 24 (summarizing Pulse 360 data). Defendant creates attention-grabbing text for his ads that falsely insinuate a connection to a news story such as: "Reporter Loses 25lbs in 1 month!," "Warning! We Investigate this 'Hyped Up' Diet and are SHOCKED!" or "Acai Berry Diet EXPOSED." See, e.g., PX 1, McKenney Dec. Att. Q at 47.

<sup>11</sup> See PX 1, McKenney Dec. ¶ 24(b).

<sup>12</sup> See, e.g., *id.* Atts. C-E at 1 (showing mastheads at the top of the websites).

<sup>13</sup> See, e.g., *id.* Atts. C, E at 1 (showing content categories at the top of the websites).

<sup>14</sup> See, e.g., *id.* Atts C-E at 1 (showing logos at the top of the websites).

experience and reporting the results;<sup>15</sup> and

- includes a “comments” section containing what appear to be consumers’ testimonials depicting positive experiences with the products.<sup>16</sup>

Defendant’s news reports are completely fake. There are no independent tests or investigations; instead, the “reporters” are simply stock photographs and fictional names.<sup>17</sup> The supposed news organizations providing the report do not exist.<sup>18</sup> The ordinary consumer whose experience is featured is phony.<sup>19</sup> The consumer comments are also fabricated.<sup>20</sup> Defendant’s websites are simply paid advertising for third-party merchants that sell the products.<sup>21</sup>

Defendant fails to clearly disclose his connection to these merchants; rather, he goes to all lengths to create the impression of objectivity, including, ironically, by pretending the

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<sup>15</sup> See, e.g., *id.* Atts. C-E (reporter tests acai berry supplements); Att. F (reporter tests surplus auction website); Att. J (reporter investigates a local mom’s experience with skin cream).

<sup>16</sup> See, e.g., *id.* Att. C at 2-3, Att. D at 3-4, Att. E at 3-4.

<sup>17</sup> For example, Defendant uses the same stock photograph, *id.* ¶ 32, Att. X at 1, for columnist “Julie Ayers” on one fake news website, *id.* Att. E at 1, and writer “Johanna” on another, *id.* Att. F at 1. Reporter “James Field,” *id.* Att. E at 1, is also a stock photograph, *id.* Att. X at 2. “Health and Diet” reporters “Amy” and “Karin” on two different websites look like the same person, *compare id.* Att. C at 1 with *id.* Att. D at 1, which in actuality appears to be a French anchorwoman, Melissa Theuriau, *see id.* ¶ 30, Att. U (article titled “The face that launched a global ad scam”).

<sup>18</sup> Defendant registers his websites in his name and pays for them with personal credit cards. *See* PX 2, Willis Dec.

<sup>19</sup> For example, the before and after photographs of “Jen, a mom of 3 from Chicago, IL,” PX 1, McKenney Dec., Att. D at 1, are all stock photographs, *id.* ¶ 32, Att. X at 5-10. The photograph of the featured “Chicago Mom” who works from home, *id.* Att. H at 1, is also a stock photograph, *id.*, ¶ 32, Att. X at 11.

<sup>20</sup> Comments on Defendant’s websites are practically identical with only occasional minor variations. *E.g., compare id.* Att. D at 3-4 with *id.* Att. E 3-4. In addition, the dates of the consumer comments are automatically updated to make them look current every time a visitor visits the website. *E.g., compare id.* Att. B at 3-4 to *id.* Att. D at 3-4 (the same website captured on two different dates show identical comments with different entry dates).

<sup>21</sup> *See id.* ¶¶ 3-5.

“reporters” are conducting these independent reviews to “find out the truth” so consumers can avoid scams.<sup>22</sup> As discussed further below in Section III.A.1.a., fn.40, Defendant’s inclusion of the vague term “advertorial” in tiny, inconspicuous font at the top of his websites<sup>23</sup> does nothing to alter the net impression of his websites. Even if consumers understood what this term meant, it is buried between the websites’ prominent fake news imagery and text.<sup>24</sup>

### C. False Product Claims

In addition to using the fake news format to deceive consumers, Defendant also relies on false and unsubstantiated weight loss claims about the acai berry supplements he actively promotes. Defendant claims 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>25</sup> The “reporters” on Defendant’s websites purportedly conduct independent tests of the products and lose up to 32 pounds in just one month simply by ingesting the pills, with no special diet or exercise.<sup>26</sup> The websites also feature supposed factual accounts of local moms who lost shocking amounts of weight, such as 44 pounds in 30 days, doing the same thing.<sup>27</sup> Defendant

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<sup>22</sup> See, e.g., *id.* Atts. C-E at 1.

<sup>23</sup> See, e.g., *id.* Atts. C-E at 1.

<sup>24</sup> See *id.* On some of Defendant’s websites, he also inserts in extremely small type at the bottom of his websites a disclaimer that “the story, the photos, and the comments” are fictitious and that he receives compensation for clicks on or purchases of the featured products. See, e.g., *id.* Att. D at 4. As further discussed *infra* at fn.40, this disclosure appears well below where the consumer would form his or her purchasing decision, is barely noticeable and cannot undo the express representations made by Defendant in the body of his websites.

<sup>25</sup> See *id.* Atts. C-E.

<sup>26</sup> See *id.* Att. C (32 pounds in 4 weeks), Att. D (25 pounds in 4 weeks), Att. E (same).

<sup>27</sup> See *id.* Att. C (mom loses 44 pounds in 30 days), Att. D (mom loses 33 pounds in 6 weeks). Defendant also makes the same false claims about acai berry products on other websites Defendant has

further bolsters his claims by falsifying consumer comments raving about the products.<sup>28</sup>

Defendant's weight loss claims are indisputably false. There is no medical evidence whatsoever that acai berries or that any of the specific acai berry related products that Defendant markets can produce the type of weight loss that Defendant claims. 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 in Chicago, there are no scientific studies establishing that acai berries are effective in causing weight loss.<sup>29</sup> This is true regardless of whether acai berries are taken with any other product, including colon cleansing products.<sup>30</sup> The type of rapid, substantial weight loss Defendant claims can be achieved without exercise or dietary changes is simply impossible.<sup>31</sup>

**D. Consumers Have Been Harmed by Defendant's 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

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manufactured to look like the blogs of local moms writing about personal experiences using the products. *See, e.g., id.* ¶¶ 20-22, Atts. N-P (*Michelles-Diet-Success.com, Rachael's-Blog.com, RachaelGotSlim.com*). Regardless of the format Defendant uses to spread his false claims, they are all actionable.

<sup>28</sup> *See, e.g., id.* Att. E at 3-4 (“At least 5 of us have all done the acai diet . . . and we all lost a bunch of weight;” “one of her friends has lost like 12 pounds in 15 days;” “My best friend Jessica did the same diet and lost an incredible amount of weight;” “My wife used both these products, and the change in her is remarkable. She looks and feels wonderful . . .”).

<sup>29</sup> *See* PX 4, Declaration of Robert F. Kushner, M.D. (“Kushner Dec.”), ¶ 7.

<sup>30</sup> *See id.* ¶¶ 8, 10. Products with laxative effects, such as colon cleansers, have, at best, marginal and temporary weight loss effect due to the loss of waste or water weight. *See id.*

<sup>31</sup> *See id.* ¶¶ 9-11.

offered by Defendant.<sup>32</sup> Many consumers were charged between \$60 and \$100 for the products.<sup>33</sup> For example, one complaining consumer who signed up to try a teeth whitening product through “Consumer Weekly Digest,” which is the name of one of Defendant’s fake news publications,<sup>34</sup> was charged \$169.95 for what was supposed to be a \$0.99 trial.<sup>35</sup> The FTC has also received hundreds of complaints that reference the names of specific acai berry products Defendant has peddled.<sup>36</sup> This type of scam has become so widespread on the Internet that many legitimate news agencies or consumer organizations have provided public warnings about fake news websites like Defendant’s.<sup>37</sup> In light of the fact that Defendant has spent over \$778,000 for ads to attract consumers to his websites,<sup>38</sup> Defendant has almost certainly received multiple times that amount in ill-gotten commissions from this scheme.

### **III. ARGUMENT**

Defendant’s practices are clear violations of the FTC Act. To prevent further consumer injury and to preserve Defendant’s assets for restitution to victims, the FTC asks that this Court issue the proposed temporary restraining order. The order would prohibit Defendant’s ongoing

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<sup>32</sup> See PX 1, McKenney Dec., ¶ 27, Att. S (representative consumer complaints)

<sup>33</sup> See *id.* 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 *id.*

<sup>34</sup> See *id.* Att. L.

<sup>35</sup> See *id.* Att. S at 47-48.

<sup>36</sup> See, e.g., *id.* ¶ 28 (350 complaints referencing “AcaiPure,” 250 complaints reference “Acai Optimum,” 200 complaints referencing “Acai Max,” and 100 complaints referencing “LeanSpa,” all of which have been promoted on Defendant’s websites).

<sup>37</sup> See *id.* ¶¶ 29, 31 Atts. T, V.

<sup>38</sup> See *id.* ¶ 24(b).



illegal practices, preserve assets, and require an accounting of ill-gotten gains. Courts in this district have granted TROs with comparable relief in similar FTC actions.<sup>39</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). 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. *Febre*, 128 F.3d. at 534 (7th Cir. 1997); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989). To obtain a temporary restraining order, the FTC must merely demonstrate: (1) a likelihood of success on the merits, and that (2) the balance of 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 elements for a TRO here.

**1. There is a Strong Likelihood Defendant Has 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,

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<sup>39</sup> *See, e.g., FTC v. Central Coast Nutraceuticals, Inc.*, 10 C 4931 (N.D. Ill. Aug. 5, 2010) (Norgle, J.) (*ex parte* TRO and asset freeze for violations of FTC Act involving deceptive marketing and sale of dietary supplements); *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).

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. The materiality of health claims may be presumed. *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. The FTC is not required to prove intent to deceive or actual deception. *See Bay Area*, 423 F.3d at 635; *World Travel*, 861 F.2d at 1029; *FTC v. U.S. Sales Corp*, 785 F.Supp. 737, 748 (N.D. Ill. 1992).

Under the Seventh Circuit's test for injunctive relief, 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). Here, the FTC's evidence far exceeds this threshold. Defendant has violated the FTC Act by: (1) misrepresenting that his websites provide independent reviews of the products, and failing to adequately disclose that his websites were advertisements; and (2) making false product claims about acai berry products without having a reasonable basis for the claims.

**a. Defendant's Deceptive Website Format**

As described in Section II.B above, Defendant's websites are deceptively designed to give consumers the impression that the sites are objective news reports when, in fact, the websites are advertisements. "Courts look to the 'overall net impression' of consumers when deciding whether particular statements or omissions are deceptive." *FTC v. Am. Tax Relief LLC*, --- F.Supp.2d ---, No. 10 CV 6123, 2010 WL 4628080, at \*6 (N.D. Ill. Nov. 4, 2010) (Keyes, M.J.) (quoting *Kraft*, 970 F.2d at 315); *see also Nat'l Bakers Servs., Inc.*, 329 F.2d 365, 367 (7th

Cir. 1964) (“The important criterion in determining the meaning of an advertisement is the net impression that it is likely to make on the general populace.”). In determining the net impression conveyed by an advertisement, courts view the advertisement “as it would be seen by the public generally . . . 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) (citation omitted).

Here, Defendant’s 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 Defendant’s fake news websites mirrors those of legitimate news websites down to the very details, including the mastheads, content 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 CNN and Fox News. In fact, Defendant has not performed independent tests on the products, and the reporter, the featured consumer, the news organization, and the consumer comments are all completely fictional.<sup>40</sup> As explained above in Section II.D., consumers not only are *likely* to be deceived by

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<sup>40</sup> Defendant’s use of a well-hidden “advertorial” label is completely inadequate to cure his websites’ net impression. *See SEC v. Corp. Relations Group, Inc.*, No.6:99CV1222ORL28KRS, 2003 WL 25570113 at \*8 (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). In addition, the fact that Defendant has buried fine-print disclosures in some of his websites far from the account and comments he disclaims changes nothing. “Disclaimers or qualifications in any particular ad are not adequate to avoid liability 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) (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). Here, Defendant’s disclaimers are in small type hidden at the bottom of the websites well below his false claims. Indeed, the disclaimers do not address, let alone cure, the misrepresentations made about the acai berry claims and are, therefore, wholly deficient. *See FTC v. Phoenix Avatar, LLC*, 04 C 2897, 2004 WL 1746698, at \*10 (N.D. Ill. July 30, 2004) (Holderman, C.J.) (rejecting disclaimer defense, noting “disclaimer does not address, much less

these websites, they *have been* deceived. 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. Defendant’s False Product Claims**

In addition to Defendant’s deceptive website format, he also makes outright false claims that the promoted acai berry products will result in rapid and substantial weight loss, including up to 44 pounds in 4 weeks. The FTC may demonstrate the deceptive nature of advertising claims by either: (1) demonstrating the falsity of the claims; or (2) showing that the defendant lacked a reasonable basis for making the claims, *i.e.*, “substantiation.” *See, e.g., 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, 2004 WL 1746698, at \*10 (N.D. Ill. July 30, 2004) (Holderman, C.J.) (Entering injunction and finding that claims were false 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 . . .”).

Here, there is no medical evidence whatsoever that acai berries alone, or in combination with a companion product, can produce the type of weight loss that Defendant claims. Moreover weight loss of 44 pounds or more in 4 weeks, which Defendant claims can be achieved without exercise or dietary changes, simply is not possible from ingestion of any product. Regardless of whether Defendant makes these false claims on his fake news websites or his fake blogs, they are illegal. They would be illegal even if Defendant made it clear to consumers that his

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deny, the representations regarding weight loss and therefore cannot cure the deceptive representations”).

statements were only advertisements, which he did not. In short, Defendant's false and unsubstantiated weight loss claims, taken alone, give the FTC the requisite likelihood of success on the merits.<sup>41</sup>

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

Once the Commission has shown a likelihood of success on the merits, the Court must balance the equities, assigning "far greater weight" to the public interest than to any of Defendant's private concerns. *World Travel*, 861 F.2d 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").

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

The FTC requests that the Court issue the FTC's Proposed TRO, which is narrowly tailored to prohibit future law violations and preserves assets and documents to ensure that the Court can grant effective final relief.<sup>42</sup>

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<sup>41</sup> Courts in this district have repeatedly entered TROs under similar circumstances, *see supra* fn. 39, including an order last year on the basis of essentially the same false acai berry weight loss claims that are at issue here. *See FTC v. Central Coast Nutraceuticals, Inc.*, 10 C 4931 (N.D. Ill. Aug. 5, 2010) (Norgle, J.); *see also FTC v. AVS Marketing, Inc.*, 04 C 6915 (N.D. Ill. Oct. 27, 2004) (Moran, J.) (*Ex parte* TRO and asset freeze involving weight loss claims).

<sup>42</sup> A Proposed TRO has been submitted concurrently with the FTC's TRO Motion.

**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. As discussed above, Defendant has lured over 700,000 consumers to his deceptive websites where they have been bombarded with his misrepresentations and false claims. Many have undoubtedly purchased the products as a result of Defendant's illegal acts. In order to preserve the possibility of restitution for these victims, the FTC seeks the preservation of Defendant's assets and an immediate accounting.

A district court has "a duty to ensure that . . . assets . . . [are] available to make restitution to the injured customers" where 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 FTC's Proposed TRO require Defendant to preserve assets and provide the FTC with a completed financial statement and an accounting. 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 Necessary Relief**

The FTC's Proposed Order 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 by making weight loss claims about acai berry products, by misrepresenting that his websites are objective news reports, or by failing to clearly and conspicuously disclose that his websites are advertisements. Section IV requires him to post notice of the lawsuit on his 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. Section VIII requires Defendant to distribute the order to relevant people and entities, and Section IX addresses the means for service of the order. 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,

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DATED: April 13, 2011

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