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1 **I. INTRODUCTION**

2 Plaintiff, Federal Trade Commission (“FTC”), moves this Court for a Temporary Restraining
 3 Order (“TRO”) to halt ongoing consumer harm caused by Defendant Tanner Garret Vaughn’s fake
 4 news websites, which deceptively advertise bogus weight loss supplements and other products or
 5 services sold by third-party online merchants who compensate Defendant for his misrepresentations.
 6 The FTC brings this action under Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15
 7 U.S.C. § 53(b), and Fed. R. Civ. P. 65(b). This Memorandum and its exhibits support the FTC’s
 8 motion. **Immediately after filing the TRO pleadings, the FTC will commence efforts to notify**
 9 **Defendant of the FTC’s request for entry of a TRO and of any TRO hearing subsequently**
 10 **scheduled by this Court.**

11 **II. THE PARTIES**

12 **A. Plaintiff Federal Trade Commission**

13 The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits deceptive
 14 acts or practices in or affecting commerce, and Section 12 of the FTC Act, 15 U.S.C. § 52, which bars
 15 false advertisements for food, drugs, devices, services, or cosmetics in or affecting commerce. The
 16 FTC may initiate district court proceedings to enjoin violations of the FTC Act and secure other
 17 equitable relief including restitution and disgorgement. 15 U.S.C. §§ 53(b) and 56(a)(2)(A).

18 **B. Defendant Tanner Garret Vaughn**

19 Defendant Tanner Garrett Vaughn deceptively advertises products and services through at least
 20 two fake news websites: BreakingNewsat6.com, which has advertised acai berry supplements, colon
 21 cleansers, and other weight loss products containing hoodia¹ or HCG;² and Channel9NewsReport.com,
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25 ¹ The merchant site selling “Pure Hoodia Select” states that hoodia is a “succulent herb” from Africa,
 26 where “the San Bushmen natives” use it to “curb their hunger and thirst during nomadic hunting trips.” Plaintiff’s
 TRO Exhibit (“TRO Exh.”) 1, p. 105.

27 ² HCG is an acronym for “human chorionic gonadotropin,” which is sold in supplement form by the “hCG
 28 Activator” website most recently promoted by Defendant on BreakingNewsat6.com. The merchant site states that
 HCG “allows the body to burn excess bodyfat [sic] by using that fat as a food source.” TRO Exh. 1, p. 120.

1 which promotes an online surplus, or “penny” auction.³ He receives compensation to advertise these
 2 items, which are actually sold to consumers by third party merchants to whose websites Defendant
 3 provides links from his own sites.

4 Defendant conducts business under his own name and two corporate names, Lead Expose, Inc.,
 5 and Uptown Media, Inc. Defendant has served as vice president of Lead Expose, a defunct West
 6 Virginia company that he helped to incorporate in 2008.⁴ Uptown Media, Inc., is an inactive
 7 Washington company,⁵ but it continues to be identified as the “owner” of Defendant’s websites.⁶

8 **III. DEFENDANT’S DECEPTIVE ADVERTISING PRACTICES**

9 **A. Background on Affiliate Marketing**

10 Defendant functions as an “affiliate marketer,” or “affiliate,” of the seller as they work together
 11 to defraud consumers.⁷ His fake news sites provide the bait to lure consumers to merchants’ websites
 12 that deceptively sell weight loss supplements or other items. In exchange for driving Internet traffic to
 13 the sellers’ sites, Defendant is compensated, either directly by the seller or by a third party
 14 representing the seller.⁸

15 Affiliates are not new in the world of Internet commerce. Traditionally, an affiliate may have
 16 run banner advertisements on behalf of merchant websites. Consumers who clicked on those banner
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19 ³ Channel9NewsReport.com claims that “BigDeal” and other auction sites it has promoted “get[] their
 20 items from warehouse closeouts, surplus auction, and liquidation clearance auctions,” which allows them to undercut
 21 standard retail prices. TRO Exh. 1, p. 87.

22 ⁴ Defendant registered the website www.leadexpose.com in April 2008 through domain registrar
 23 GoDaddy.com. TRO Exh. 1, p. 2, ¶ 8; p. 19. Although this site remains live and Defendant continues to use an
 24 email address associated with the company, *see* TRO Exh. 1, p. 204 (column headed “E-Mail”), the West Virginia
 25 Secretary of State revoked Lead Expose’s corporate charter in November 2010. TRO Exh. 1, p. 2, ¶ 6c; p. 14.

26 ⁵ TRO Exh. 1, p. 2, ¶ 7; p. 17.

27 ⁶ TRO Exh. 1, pp. 36, 46, 66, 80, 90, 104, 119.

28 ⁷ The FTC also enforces against the sellers of these products and services, challenging claims about the
 efficacy of these items as well as the terms and conditions of purchasing them. *See, e.g., FTC v. Jeremy Johnson*,
 No. 2:10-cv-02203 (D. Nev. filed Dec. 21, 2010); *FTC v. Central Coast Nutraceuticals, Inc.*, No. 10c-4931 (N.D. Ill.
 filed Aug. 5, 2010).

⁸ TRO Exh. 1, p. 1, ¶ 4.

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⁹ TRO Exh. 1, p. 1, ¶ 5.

¹⁰ TRO Exh. 1, pp. 1-2, ¶ 5.

¹¹ *Id.*

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¹⁷ For example, on March 10, 2011, the “reporter” on BreakingNewsat6.com claimed that after daily use for four weeks of Acai Lipo and Max Cleanse Pro, she lost twenty five pounds, without any “special diet” or “intense exercise.” TRO Exh. 1, p. 78. In contrast, claims made on the Acai Lipo-seller website, accessed through a link on BreakingNewsat6.com and captured the same day, we

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²⁵ TRO Exh. 1, pp. 8-10, ¶¶ 33-40; pp. 157-75, 180-203 (describing search results for key phrases used on BreakingNewsat6.com and Channel9NewsReport.com that show the same language appearing on several other websites promoting similar products and services).

²⁶ TRO Exh. 1, pp. 64-65.

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³¹ TRO Exh. 1, pp. 6-7, ¶¶ 24-30; *compare* TRO Exh. 1, pp. 35-36, 65-66, 79-80, 103-04 (captures of Defendant’s sites) *with* TRO Exh. 1, pp. 130-31, 134, 137-38, 142-43 (other fake news sites).

³² *Compare, e.g.*, TRO Exh. 1, pp. 103-04 (Mar. 17, 2011, capture of BreakingNewsat6.com), *and* TRO Exh. 1, pp. 89-90 (Mar. 10, 2011, capture of Channel9NewsReport.com), *with* TRO Exh. 1, pp. 130-31, 134, 137-38, 142-43 (other fake news sites).

³³ *Compare* TRO Exh. 1, pp. 103-04 (Mar. 17, 2011, capture of BreakingNewsat6.com, advertising “Pure Hoodia Select” and “Max Cleanse Pro”), *with* TRO Exh. 1, pp. 65-66 (Jan. 12, 2011, capture of BreakingNewsat6.com, advertising “Slim Acai” and “Get Slim Colon Cleanse”); *compare* TRO Exh. 1, pp. 89–90 (Mar. 10, 2011, capture of Channel9NewsReport.com, advertising “BigDeal”) *with* TRO Exh. 1, pp. 45-46 (Jan. 5, 2011, capture of Channel9NewsReport.com, advertising “xBids”).

³⁴ *See, e.g.*, TRO Exh. 1, p. 45 (Jan. 5, 2011, capture of Channel9NewsReport.com, referencing 177 comments); TRO Exh. 1, p. 65 (Jan. 12, 2011, capture of BreakingNewsat6.com, referencing 177 comments); TRO Exh. 1, p. 89 (Mar. 10, 2011, capture of Channel9NewsReport.com, referencing 177 comments); TRO Exh. 1, p. 103 (Mar. 17, 2011, capture of BreakingNewsat6.com, referencing 177 comments).

³⁵ *See supra* note 23 and accompanying text.

³⁶ *See, e.g.*, TRO Exh. 1, p. 77 (capture of BreakingNewsat6.com); TRO Exh. 1, p. 87 (capture of Channel9NewsReport.com).

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, and the results mentioned on this page, although achievable for some, are

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³⁷ See, e.g., TRO Exh. 1, p. 80 (capture of Breaking Newsat6.com, third paragraph of Terms and Conditions); TRO Exh. 1, p. 90 (capture of Channel9NewsReport.com).

³⁸ See *infra* pp. 17-18.

³⁹ See, e.g., TRO Exh. 1, p. 78.

⁴⁰ As noted above, Defendant has marketed acai berry products under the names “Slim Acai” and “Acai Lipo” (collectively, “acai berry products”) and colon cleanse products under the names “Get Slim Colon Cleanse” and “Max Pro Cleanse” (collectively, “colon cleanse products”). See, e.g., TRO Exh. 1, pp. 77-86 (Mar. 10, 2011, capture of BreakingNewsat6.com). His foray into hoodia supplements and, most recently, “hCG Activator” and “South Beach Java,” came too late for Dr. Blonz to obtain the products and analyze their ingredients.

1 nutrition and dietary supplements and their impact on health.⁴¹ After reviewing the applicable
 2 scientific literature as well as the contents of acai berry and colon cleanse products advertised by
 3 Defendant, Dr. Blonz concluded that “any statement that any level of intake of [the Products] or both
 4 Products, whether taken individually or in combination, can result in the claimed rate of weight loss
 5 without dieting or intense exercise is false.”⁴²

6 In support of his findings, Dr. Blonz analyzed the ingredients in an acai berry product
 7 purchased through a link on BreakingNewsat6.com and concluded that “[t]here is not one study in the
 8 scientific literature reporting any effect of the acai berry or an acai berry extract, on weight loss in
 9 humans.”⁴³ He reached a similar conclusion after examining the contents of the Max Cleanse Pro
 10 supplements purchased through a link on Defendant’s site,⁴⁴ stating that “[a]ny statement that [Max
 11 Cleanse Pro], when taken by itself or in combination with other ingredients in The Products, can bring
 12 about the claimed rate of weight loss is false and unsubstantiated in the scientific literature.”⁴⁵ As to
 13 the purported consumer comments on BreakingNewsat6.com that tout the results of using acai berry
 14 and colon cleanse products, Dr. Blonz states that “[t]estimonials from consumers do not constitute
 15 scientific evidence of product efficacy.”⁴⁶

16 Dr. Blonz placed Defendant’s weight loss claims in context by analyzing the caloric
 17 requirements necessary for an average-sized adult to lose twenty five pounds in four weeks.
 18 According to his calculations, he or she would have to take in 3,125 fewer calories per day to
 19 accomplish this rate of weight loss.⁴⁷ To achieve this caloric “deficit,” a 200-pound person would have
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21 ⁴¹ TRO Exh. 3, p. 241, ¶ 1.

22 ⁴² TRO Exh. 3, p. 243, ¶ 4.

23 ⁴³ TRO Exh. 3, pp. 246-47, ¶ 16. Dr. Blonz analyzed a product called “Acai Reduce,” which was received
 24 after placing an order on the “Acai Lipo” merchant site. Promptly after it arrived, FTC staff sent the package,
 unopened, directly to Dr. Blonz. See TRO Exh. 1, p. 4, ¶¶ 14-15; pp. 73-76.

25 ⁴⁴ After the box containing the Max Cleanse Pro supplements arrived, FTC staff shipped it to Dr. Blonz.
 26 TRO Exh. 1, p. 5, ¶ 19; pp. 111-15.

27 ⁴⁵ TRO Exh. 3, p. 256, ¶ 40.

28 ⁴⁶ TRO Exh. 3, p. 264, ¶ 58.

⁴⁷ TRO Exh. 3, p. 260, ¶ 51c.

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⁴⁸ TRO Exh. 3, p. 260, ¶ 51d.

⁴⁹ TRO Exh. 3, pp. 260-61, ¶ 51e.

⁵⁰ TRO Exh. 3, p. 261, ¶ 51f.

⁵¹ See *supra* note 13 and surrounding text; see also TRO Exh. 1, pp. 1-2; ¶¶ 4-5; TRO Exh. 2, pp. 237-39, ¶¶ 2, 4-5.

⁵² See *supra* note 14 and surrounding text; see also TRO Exh. 1, pp. 1-2, ¶5.

⁵³ TRO Exh. 1, p. 12, ¶ 44. However, as noted above, see *supra* note 20, Defendant operates several websites, and the money Defendant has paid to Pulse 360 has not funded advertising only for BreakingNewsat6.com and Channel9NewsReport.com. Client payments to Pulse 360 are deposited into what functions like an escrow account, which Pulse 360 can later draw upon to fund ads the client requests be placed. See TRO Exh. 2, p. 239, ¶ 4o (defining “Revenue”), ¶ 5b (defining “Amount”). As a result, the FTC cannot yet link Defendant’s Pulse 360 payments to specific ads placed for his fake news sites.

⁵⁴ This is the most recent data produced to the FTC by Pulse 360. TRO Exh. 1, p. 12, ¶ 44.

1 Defendant's payments, between June and August 2010, Pulse 360 placed more than 41 million
2 "impressions" of ads for BreakingNewsat6.com on its network of websites, which represents the
3 number of times that consumers could have viewed advertising for this site.⁵⁵ Pulse 360 also placed
4 nearly 347 million impressions of ads for Channel9NewsReport.com between June and September
5 2010.⁵⁶ Defendant provided the text and images to Pulse 360 to be used for such impressions.⁵⁷

6 As a result of these impressions, consumers actually clicked on ads for BreakingNewsat6.com,
7 taking them directly to the site, more than 16,100 times in just June through August 2010.⁵⁸ And from
8 June through September 2010, consumers clicked on ads for Channel9NewsReport.com and were
9 taken to the site on more than 70,700 occasions.⁵⁹ Although this data does not establish how many
10 consumers then clicked on a link to a merchant website embedded in one of Defendant's fake news
11 sites and purchased a product or service, it is a reasonable proxy for how many consumers viewed
12 Defendant's deceptive representations and may have relied upon them to their detriment.

13 **IV. ARGUMENT**

14 The FTC has successfully brought actions to halt bogus weight loss and other advertising
15 scams like the one challenged here.⁶⁰ As in these earlier cases, Defendant's affiliate marketing tactics
16 are deceptive and violate Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. The FTC
17 seeks a preliminary injunction and other equitable relief to redress the consumer injury that has been

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19 ⁵⁵ TRO Exh. 1, p. 11, ¶ 42a; pp. 204-05 (column headed "Impressions"; total figure on p. 205); TRO Exh.
20 2, p. 239, ¶ 4m (defining the term "Impressions").

21 ⁵⁶ TRO Exh. 1, p. 11, ¶ 43a; pp. 218-33 (column headed "Impressions"; total figure on p. 233).

22 ⁵⁷ See TRO Exh 2, p. 237, ¶ 2) (explaining that "the advertiser selects the text and images used in the ads
that appear with each impression").

23 ⁵⁸ TRO Exh. 1, p. 12, ¶ 42b; pp. 204-05 (column headed "Clicks"; total figure on p. 205); TRO Exh. 2, p.
24 239, ¶ 4n (defining the term "Clicks").

25 ⁵⁹ TRO Exh. 1, p. 11, ¶ 43b; pp. 218-33 (column headed "Clicks"; total figure on p. 233).

26 ⁶⁰ See, e.g., *FTC v. Medlab, Inc.*, 615 F. Supp. 2d 1068 (N.D. Cal. 2009) (permanent injunction issued in
27 connection with "The New Skinny Pill," a supplement which defendants claimed could cause rapid and substantial
weight loss without diet or exercise); *FTC v. Nat'l Urological Grp., Inc.*, 2008 U.S. Dist. LEXIS 44145, 2008-1
28 Trade Cas. (CCH) ¶ 76,183 (N.D. Ga. 2008) (preliminary and permanent injunction issued in connection with
weight loss supplement scheme); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263 (S.D. Fla. 1999) (TRO,
preliminary, and permanent injunction issued in connection with the sale of weight loss program); *FTC v. Pac. Med.
Clinics Mgmt., Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,777 (S.D. Cal. 1992) (preliminary and permanent injunction
issued in connection with weight loss program featuring tablets promised to "burn fat").

1 caused, and will continue to be caused, by Defendant’s deceptive and illegal practices. To prevent
 2 Defendant from committing further violations pending resolution of this action and to prevent further
 3 harm to consumers, the FTC also seeks a TRO that would immediately halt Defendant’s deceptive
 4 marketing practices.

5 Section A, below, sets forth the FTC’s authority to seek, and this Court’s authority to grant,
 6 temporary and preliminary injunctive relief in this law enforcement action. Section B describes how
 7 the FTC’s evidence meets the standard for issuing a preliminary injunction in a government
 8 enforcement action. Finally, Section C explains why the requested ancillary relief – asset preservation,
 9 an accounting of assets, and limited expedited discovery – is necessary to secure disgorgement and
 10 potentially to provide redress to injured consumers.

11 **A. Section 13(b) of the FTC Act Authorizes the Requested Injunctive Relief.**

12 This Court has authority to grant the requested temporary and preliminary injunctive relief
 13 pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b); 28 U.S.C. § 1651(a); and Fed. R. Civ. P.
 14 65(b). Section 13(b) of the FTC Act specifically authorizes a district court to grant permanent
 15 injunctions to enjoin violations of the FTC Act in “proper cases,”⁶¹ including any matter involving a
 16 violation of a law the FTC enforces.⁶² A fraud case such as this one, replete with misrepresentations of
 17 material facts in violation of Sections 5(a) and 12 of the FTC Act, clearly qualifies as a “proper case”
 18 for injunctive relief under Section 13(b).⁶³ Injunctive relief is appropriate even if a defendant has
 19 ceased its illegal activities if there is “cognizable danger of recurrent violation.”⁶⁴ The commission of
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22 ⁶¹ The FTC proceeds here, as in *FTC v. H.N. Singer*, 668 F.2d 1107 (9th Cir. 1982), under the second
 23 proviso of Section 13(b). Cases brought under this proviso are not subject to the conditions set forth in the first
 24 proviso of Section 13(b) for the issuance of preliminary injunctions in aid of administrative proceedings. *Singer*,
 25 668 F.2d at 1111 (routine fraud cases may be brought under second proviso, without being conditioned on first
 26 proviso requirement that the FTC institute an administrative proceeding); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d
 27 1431, 1434 (11th Cir. 1984) (“Congress did not limit the court’s powers under the [second and] final proviso of
 28 [Section] 13(b)”).

⁶² *FTC v. Evans Products Co.*, 775 F.2d 1084, 1086-87 (9th Cir. 1985); *Singer*, 668 F.2d at 1113; *FTC v. Pac. Med. Clinics Mgmt, Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,777 at 67,587 (S.D. Cal. 1992).

⁶³ *Singer*, 668 F.2d at 1111; see *SlimAmerica*, 77 F. Supp. 2d at 1275.

⁶⁴ *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

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⁶⁵ *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979); see also *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 212 (D. Mass. 2009), *aff'd*, 624 F.3d 1 (1st Cir. 2010); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1017 (N.D. Ind. 2000); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 536 (S.D.N.Y. 2000).

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⁷⁰ *Id.* at 346; *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999); *see also United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 175 (9th Cir. 1987) (where injunction is authorized by statute, enforcing agency need not show irreparable injury).

⁷¹ *Odessa Union*, 883 F.2d at 176.

⁷² *See SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975).

⁷³ *Affordable Media*, 179 F.3d at 1236 (quoting *World Wide Factors*, 882 F.2d at 347).

⁷⁴ 15 U.S.C. § 52. For purposes of Section 12, a false advertisement is defined as “an advertisement, other than labeling, which is misleading in a material respect.” 15 U.S.C. § 55.

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⁸³ *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1152 (9th Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

⁸⁴ *Pantron*, 33 F.3d at 1096 & n.22; *see QT, Inc.*, 448 F. Supp. 2d at 957-58.

⁸⁵ *Pantron*, 33 F.3d at 1096 & n.22; *see QT, Inc.*, 448 F. Supp. 2d at 957-58; *see also FTC Policy Statement on Deception* (appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 175 n.4 (1984)); *Tashman*, 318 F.3d at 1277; *FTC v. US Sales Corp.*, 785 F. Supp. 737, 748 (N.D. Ill. 1992) (“Apart from challenging the truthfulness of an advertiser’s representations, the FTC may challenge the representation as unsubstantiated if the advertiser lacked a reasonable basis for its claims”).

⁸⁶ *Cyberspace.com*, 453 F.3d at 1201 (quoting *Cliffdale Assocs.*, 103 F.T.C. at 165).

⁸⁷ *Pantron*, 33 F.3d at 1095-96.

⁸⁸ The presumption of materiality for intentional implied claims has been accepted by circuit courts. *See, e.g., Novartis Corp. v. FTC*, 223 F.3d 783, 786-87 (D.C. Cir. 2000); *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *cf. FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 604 (9th Cir. 1993) (no loophole for implied deceptive claims), *cert. denied*, 510 U.S. 1110 (1994).

⁸⁹ *Kraft*, 970 F.2d at 322-23 (deceptive health claims are material).

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19 ⁹¹ See *Kraft*, 970 F.2d at 319.

20 ⁹² *FTC v. Simeon Mgmt. Corp.*, 532 F.2d 708, 716 (9th Cir. 1976).

21 ⁹³ *Sterling*, 741 F.2d at 1154; *Simeon Mgmt. Corp.*, 579 F.2d at 1145.

22 ⁹⁴ *Removatron*, 884 F.2d at 1497.

23 ⁹⁵ *Cyberspace.com*, 453 F.3d at 1200 (reviewing cases where deception found because fine print
24 disclosures inadequate to qualify claim or disclose material information); *FTC v. Direct Mktg. Concepts, Inc.*, 624
25 F.3d 1, 12 (1st Cir. 2010) (“[D]isclaimers or qualifications in any particular ad are not adequate to avoid liability
26 unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and leave an
27 accurate impression.”) (quoting *Removatron*, 884 F.2d at 1497); *FTC v. Brown & Williamson Tobacco Corp.*, 778
28 F.2d 35, 43 (D.C. Cir. 1985) (advertisement’s description of cigarette tar content deceptive despite fine print
disclosure at the bottom of the ad); *FTC v. Porter & Deitsch*, 605 F.2d 294, 301 (7th Cir. 1979) (upholding FTC
finding that disclosures “buried in small print” were inadequate to qualify weight loss claims in advertising); *Gill*, 71
F. Supp. 2d at 1044 (disclaimers in contract for credit repair services insufficient to counteract advertising claims
about the service); *Medlab*, 615 F. Supp. 2d at 1077 (disclosures appearing at the bottom of advertisement in
minuscule print insufficient to cure deceptive representations appearing in body of advertisement); *FTC v.*
Edebitpay, LLC, No. CV-07-4480 ODW, 2011 U.S. Dist. LEXIS 15750, at *19-20 (C.D. Cal. Feb. 3, 2011)
(defendants’ disclosures in “small font in a footnote at the bottom of the webpage” or buried in hyperlinked terms

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and conditions violated order requiring defendants to clearly and conspicuously disclose materials terms of marketing products and services).

⁹⁶ *Pantron*, 33 F.3d at 1096 (citing *Thompson Med. Co.*

1 reasonable basis for asserting that the claim was true.⁹⁸ For an advertiser to have a “reasonable basis”
2 for a representation, it must have had substantiation for the representation prior to making it in an
3 advertisement.⁹⁹ The necessary level of prior substantiation varies depending on the nature of the
4 representation.¹⁰⁰ For health-related claims, in order to have a reasonable basis to make the claim at
5 issue, an advertiser must possess “competent and reliable scientific evidence” to substantiate the
6 claims.¹⁰¹ Courts have held that with medical, health-related claims, a well-conducted, placebo-
7 controlled, randomized, double-blind study constitutes competent and reliable scientific evidence.¹⁰²

8 Here, Defendant has made both materially false and unsubstantiated claims on
9 BreakingNewsat6.com that the acai berry products, alone or in combination with the colon cleanse
10 products, cause rapid and substantial weight loss, enabling users to lose as much as twenty five pounds
11 in four weeks without the need to reduce caloric intake or increase physical activity. As Dr. Blonz
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17 ⁹⁸ *Id.* at 1096 (quoting *Thompson Med.*, 104 F.T.C. at 819); *QT, Inc.*, 448 F. Supp. 2d at 959. A
18 representation that lacks a reasonable basis is also considered false. *FTC Policy Statement on Deception*; see also
19 *Tashman*, 318 F.3d at 1277; *FTC v. US Sales Corp.*, 785 F. Supp. 737, 748 (N.D. Ill. 1992) (“the FTC may challenge
[a] representation as unsubstantiated if the advertiser lacked a reasonable basis for its claims.”) *op. modified on other*
grounds, No. 91-C-3893, 1992 WL 104819 (N.D. Ill. May 6, 1992).

20 ⁹⁹ *QT, Inc.*, 448 F. Supp. 2d at 959 (“Defendants have the burden of establishing what substantiation they
21 relied on for their product claims.”); *Thompson Med.*, 104 F.T.C. 648, app. at 839 (1984) (FTC Policy Statement
Regarding Advertising Substantiation, or “Policy Statement on Advertising Substantiation”).

22 ¹⁰⁰ *Thompson Med.*, 104 F.T.C. at 819.

23 ¹⁰¹ See, e.g., *Direct Mktg. Concepts*, 569 F. Supp. 2d at 300, 303-04 (requiring “competent and reliable
24 scientific evidence” to substantiate efficacy claims of dietary supplement, including weight loss claims); *Nat’l*
Urological Grp., 2008 U.S. Dist. LEXIS 44145 at *43-44 (same); *SlimAmerica*, 77 F. Supp. 2d at 1274 (“Scientific
25 validation of the defendants’ product claims requires a double blind study of the combination of ingredients used in
[the weight loss product.]”); *Porter & Dietsch, Inc.*, 90 F.T.C. 770, 885 (1977) (claims that any food, drug, or device
26 can help a user achieve any result, such as weight loss, require “competent scientific or medical tests or studies”),
aff’d as modified, 605 F.2d 294 (7th Cir. 1979).

27 ¹⁰² See, e.g., *QT*, 448 F. Supp. 2d at 962; *SlimAmerica*, 77 F. Supp. 2d at 1274.

28 ¹⁰³ TRO Exh. 3, p. 243, ¶ 4.

¹⁰⁴ TRO Exh. 3, p. 261, ¶ 51f.

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¹⁰⁵ TRO Exh. 3, p. 243, ¶ 5.

1 order is well within the Court's authority.¹¹⁵ The Court has the discretion to freeze a defendant's assets
 2 once the Court determines that the FTC is likely to prevail on the merits and restitution would be an
 3 appropriate final remedy.¹¹⁶ "A party seeking an asset freeze must show a likelihood of dissipation of
 4 the claimed assets, or other inability to recover monetary damages, if relief is not granted."¹¹⁷ Where a
 5 defendant's business is permeated with fraud, the court may conclude that there is a likelihood of
 6 defendant attempting to dissipate or conceal assets while the action is pending and may grant an asset
 7 freeze.¹¹⁸ Further, an asset freeze is appropriate where, as here, the FTC's objective is "to obtain
 8 restitution of monies fraudulently obtained."¹¹⁹

9 The FTC's evidence is sufficient to show that in the absence of an asset freeze, Defendant is
 10 likely to dissipate assets. Defendant's business practices are rife with deception. Moreover,
 11 Defendant has recently dissipated a substantial amount of assets to further his deception of consumers.
 12 Of the more than \$221,000 Defendant paid to Pulse360 to place ads to drive consumers to his
 13 deceptive websites between May 2009 and February 2011, more than half was spent very recently, in
 14 the first two months of this year.¹²⁰ Defendant's Facebook page shows that he has recently purchased a
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17 ¹¹⁵ See *Singer*, 668 F.2d at 1113 ("[Section] 13(b) provides a basis for an order freezing assets."); *U.S. Oil*
 18 *& Gas*, 748 F.2d at 1432-35. Asset freezes have been ordered in many other actions brought by the FTC. See, e.g.,
 19 *Affordable Media*, 179 F.3d at 1232 (describing district court issuance of *ex parte* TRO with asset freeze and
 20 repatriation); *FTC v. Advanced Mgmt. Servs. NW LLC*, CV-10-148-LRS (E.D. Wash. May 10, 2010); *FTC v. MCS*
 21 *Programs, LLC*, C09-5380RBL (W.D. Wash. June 26, 2009); *FTC v. Bargains & Deals Magazine LLC*, C01-1610P
 (W.D. Wash. Oct. 11, 2001); *FTC v. Canada Prepaid Legal Servs., Inc.*, CV00-2080 (W.D. Wash. Dec. 11, 2000);
 22 *FTC v. Fortuna Alliance LLC*, C96-799M (W.D. Wash. May 24, 1996); *FTC v. US Foreclosure Relief Corp.*, SA-
 23 CV09-768 JVS (MLGX) (C.D. Cal. July 7, 2009); *FTC v. Gov't Careers, Inc.*, No. 721-TUC-DCB (D. Ariz. July
 24 27, 2009); and *FTC v. Dinamica Financiera LLC*, 09-CV-03554 (C.D. Cal. May 20, 2009).

25 ¹¹⁶ See *World Travel*, 861 F.2d at 1031 (upholding preliminary injunction freezing assets where an
 26 appropriate remedy would be restitution).

27 ¹¹⁷ *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009). There, the Ninth Circuit overruled its
 28 holding in *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989), that the petitioner needed to show only a
 "possibility of dissipation" when seeking an asset freeze. The *Johnson* court based its new "likelihood of
 dissipation" standard on *Winter v. Natural Res. Defense Council, Inc.*, 129 S.Ct. 365, 374 (2008) (moving party must
 show a "likelihood" rather than the mere "possibility" of irreparable harm).

¹¹⁸ See, e.g., *World Travel*, 861 F.2d at 1031; *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2d
 Cir. 1972); *SEC v. R.J. Allen & Assocs.*, 386 F. Supp. 866, 881 (S.D. Fla. 1974).

¹¹⁹ *Singer*, 668 F.2d at 1113.

¹²⁰ February 2011 is the latest month for which Pulse360 produced data. TRO Exh. 1, p. 12, ¶ 44.

1 new car and has taken, or plans to take, trips to California, Hawaii, and the Bahamas.¹²¹ His conduct
 2 shows that he will likely continue to dissipate assets unless and until he is required by court order to
 3 stop. Further asset dissipation by the Defendant would thwart this Court's ability to preserve the
 4 possibility of effective final relief.

5 The proposed asset freeze will not pose an undue burden on Defendant, as the relief requested
 6 is narrowly tailored to preserve the status quo. In addition, the relief requested would permit
 7 Defendant to dissipate assets needed to pay "actual, ordinary and necessary business or living
 8 expenses," by agreement with counsel for the FTC.¹²²

9 b. Limited Expedited Discovery and Other Ancillary Relief are
 10 Appropriate.

11 The FTC also seeks limited expedited discovery relating to Defendant's unjust enrichment
 12 from the merchants whose products and services Defendant promoted on his fake news sites. In
 13 conjunction with the requested accounting, limited expedited discovery will enable the FTC to
 14 determine whether it will seek as part of a preliminary injunction a comprehensive asset freeze to
 15 prevent dissipation of Defendant's assets. Moreover, the prompt and full disclosure of the scope and
 16 financial status of Defendant's business operations is necessary to ensure that the Court is fully
 17 advised regarding: (1) the nature, extent, status and location of Defendant's assets; (2) the nature and
 18 location of documents reflecting Defendant's business transactions; (3) the scope of Defendant's
 19 business activities, including where he conducts these activities (especially important in light of the
 20 defunct status of two of Defendant's corporations and his use of a maildrop box for business and
 21 personal use); and (4) the existence of any additional fake news sites operated by Defendant.¹²³ For
 22 these reasons, the proposed Order requires that Defendant produce certain financial records and
 23 information on short notice, and requires financial institutions served with the order to disclose
 24 whether they are holding any of Defendant's assets.

25 District courts are authorized to depart from normal discovery procedures and fashion
 26 discovery to meet discovery needs in particular cases. Fed. R. Civ. P. 26(d), 33(a), and 34(b) authorize

27 ¹²¹ TRO Exh. 1, p. 12, ¶ 46.

28 ¹²² Proposed Temporary Restraining Order, pp. 5-6, § III.C.

¹²³ Defendant may use domain name registrars other than GoDaddy.com.

1 the Court to alter the standard provisions, including applicable time frames, that govern depositions
 2 and production of documents. This type of discovery order reflects the Court's broad and flexible
 3 authority in equity to grant preliminary emergency relief in cases involving the public interest.¹²⁴

4 The requested relief is necessary to identify and preserve assets Defendant wrongfully obtained
 5 from consumers. Any hardship on Defendant caused by the relief sought is greatly outweighed by the
 6 public's interest in preserving evidence and assets obtained through Defendant's unlawful practices.

7 **V. CONCLUSION**

8 Plaintiff urges this Court to issue the proposed TRO, including an order preserving Defendant's
 9 assets, permitting limited expedited discovery, and directing Defendant to show cause why a
 10 preliminary injunction should not issue. The compelling evidence of deception in this case justifies
 11 the burden that a TRO would impose on Defendant. Absent such immediate relief, Defendant will
 12 continue – and possibly expand – his deceptive practices. Moreover, the TRO is subject to prompt
 13 reconsideration and modification, if warranted, thereby minimizing the potential harm to Defendant.
 14

15 Dated: April 13, 2011

Respectfully Submitted,

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 27 ¹²⁴ See *Porter*, 328 U.S. at 398 (if public interest is involved, court's equitable powers are broader and
 28 more flexible than if only private controversy is at stake); *Singer*, 668 F.2d at 1112; *FTC v. Equifin Int'l, Inc.*, No.
 CV 97-4526-DT, 1997 U.S. Dist. LEXIS 10288, at *40 (C.D. Cal. July 3, 1997) (courts may impose appropriate
 provisional remedies, including expedited discovery); *Fed. Express Corp. v. Fed. Express, Inc.*, No. 97-CV-1219,
 1997 U.S. Dist. LEXIS 19144, at *6 (N.D.N.Y. Nov. 24, 1997) (early discovery "will be appropriate in some cases,
 such as those involving requests for a preliminary injunction") (quoting commentary to Fed. R. Civ. P. 26(d)).