

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

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	Case No. 11 C 2487
)	
v.)	Judge Bucklo
)	
AMBERVINE MARKETING LLC,)	Magistrate Judge Schenkier
a Minnesota limited liability company, <i>et al.</i> ,)	
)	
Defendants.)	

**FTC’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. For at least the past two years, Defendant Zachary Graham, and his companies Ambervine Marketing LLC and Encastle Inc., have operated numerous websites featuring phony news reports about acai berry weight loss supplements and other dubious products. Defendants craft the sites to look like legitimate news sites by using names such as “USAHealthNewsToday.org,” and by utilizing mastheads like “USA Health News.” The sites prominently claim that the reports have been “seen on” several major news outlets, including CNN and Fox News, and include a “comments” section with what appears to be glowing consumer testimonials. Defendants’ sites typically feature a purported news reporter’s account of study results showing dramatic weight loss – over 30 pounds in one month – through use of acai berry supplements.

Nearly everything about these “news” sites is fake. The websites are not maintained by news organizations. The reporter, study results, and comments from satisfied consumers all are fabricated. The claims about weight loss from acai berries are false: no evidence establishes that acai berries cause weight loss, and the dramatic weight loss Defendants describe is unachievable. Indeed, just last year, a court in this district issued a TRO and preliminary injunction enjoining false claims that acai berries cause weight loss.¹ The truth is Defendants’ websites are simply advertisements aimed at deceptively enticing consumers to purchase the featured products from third party websites recommended by Defendant. The FTC has received numerous complaints from consumers who, having been deceived by fake news sites like Defendants’, were charged \$60 to \$100 per month for the products. Defendants’ practices likely have affected thousands of consumers, and the conduct is ongoing.

The FTC respectfully asks this Court to bring Defendants’ harmful practices to a swift end by entering the FTC’s proposed TRO. The FTC’s proposed TRO is narrowly tailored to enjoin Defendants’ illegal practices and preserve the Court’s ability to provide effective final relief.²

II. DEFENDANTS’ ILLEGAL BUSINESS PRACTICES

Since at least 2009, Defendants have marketed acai berry weight loss supplements and other products through websites that are designed to look like the sites of objective news

¹ See *FTC v. Central Coast Nutraceuticals, Inc.*, No. 10 C 4931 (N.D. Ill.) (Norgle, J.) (*ex parte* TRO entered Aug. 6, 2010; stipulated preliminary injunction entered Sept. 17, 2010).

² This matter is one of ten cases filed by the FTC – including five in this district – against entities marketing acai berry dietary supplements and other products through deceptively formatted fake news sites.

Defendants further their illegal business in two key ways: (1) by utilizing the deceptive fake news format; and (2) by misrepresenting the weight loss effects of the acai berry products they promote.

A. Deceptive Fake News Format

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

- contain mastheads such as "USA Health News" and "KYNR News 9," suggesting that the sites are affiliated with objective news organizations;¹⁰
- contain subject tabs frequently used on news websites such as "World," "Politics," "Health" and "Sports;"¹¹
- employ logos of real news outlets including ABC, Fox News, CBS, CNN, USA Today and MSNBC;¹²
- include a news story supposedly written by a reporter who decided to investigate acai berry weight loss products, and who presents detailed study results about the featured products;¹³ and
- include a "comments" section containing what appear to be consumer

dated June 22, 2010).

¹⁰ See *id.*, ¶¶ 9, 14 & Att. B, p. 4 ("USA Health News") & Att. H, p. 1 ("KYNR News 9").

¹¹ In fact, it appears Defendants cut and pasted the subject tabs for "USA Health News" directly from CNN's website. Compare PX 1, McKenney Dec., Att. B, p. 4 ("USA Health News") with CNN's website at www.cnn.com.

¹² PX 1, McKenney Dec., ¶¶ 8-13 & Att. B, pp. 4-7, Att. C, pp. 3-6, Att. D, pp. 3-7, Att. E, pp. 3-7, Att. F, pp. 3-7, Att. G, pp. 3-7.

¹³ *Id.*

¹⁴ *Id.*, ¶¶ 10-14 & Att. D, pp. 5-6, Att. E, pp. 5-6, Att. F, pp. 5-6, Att. G, pp. 5-6, Att. H, pp. 3-5.

¹⁵ The news commentator pictured on “USA Health Reports” appears to be a prominent French news anchor. *Compare id.*, Att. B, p. 4 (USAHealthNewsToday.org website) *with id.* ¶ 28 & Att. M (article discussing use of French news anchor on fake news sites). The reporter “James Field” pictured on “KYNR News 9” is a stock photograph. *Compare id.*, Att. H, p. 1 (KYNR9.com website) *with id.*, ¶ 30 & Att. P (stock photo).

¹⁶ The same consumer comments appear repeatedly on “USA Health Reports” but the dates are changed to make the comments look current every time a consumer visits the website. *Compare id.* ¶ 10, Att. D, pp. 5-6 (ConsumerOnlineReports.org website as it appeared on March 10, 2011) *with id.* ¶ 13, Att. G, pp. 5-6 (same website on April 1, 2011).

¹⁷ *See* PX 1, McKenney (FTC Investigator) ¶¶ 3-5 & Att. A (discussion of affiliate marketing). Defendants’ fake news sites have touted a variety of acai berry products, including “LeanSpa Acai,” “Acai Weight Loss,” “Acai Maximum,” “Acai Lipo,” “Acai Slim,” and “Acai Thermo.” *See id.*, Att. B, pp. 5-6, Att. C, pp. 4-5, Att. D, pp. 4-5, Att. E, pp. 4-5, Att. F, pp. 4-5, Att. G, pp. 4-5.

¹⁸ Defendants have inserted a statement in extremely small type at the bottom of some, but not all, of their websites stating, in part: “[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.” *E.g., id.*, Att. E, p. 7. As explained *infra* at p. 11, n. 28, this statement, which appears well below where the consumer would form his or her purchasing decision, is not conspicuous and cannot undo the express representations made by Defendants in the body of their websites.

“study” in which “40 people of different body types tested the product” and the “average person” lost over 30 pounds in one month. Defendants claim further that combining the acai berry product with a colon cleanse product caused study participants to achieve even more dramatic weight loss. Defendants bolster these claims with sham consumer comments raving about the products.²⁰

Defendants’ weight loss claims are utterly false, and would constitute deceptive practices and false advertising even if Defendants eschewed their fake news format. 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 Defendants claim. The FTC has submitted testimony from a nutrition expert from Northwestern University establishing that: (1) there are no scientific studies establishing that acai berries are effective in causing weight loss; (2) any weight loss caused by companion products like colon cleanse products would be marginal, and would pale in comparison to Defendants’ claims; and (3) weight loss of twenty-five pounds or more in four weeks, which Defendants claim can be achieved without exercise or dietary changes, simply is not possible from ingestion of any product.²¹

C. Harm to Consumers

Defendants’ websites offer consumers an opportunity to obtain the featured acai berry products by clicking on links in Defendants’ fake news websites and visiting the websites of

²⁰ See PX 1, McKenney Dec. ¶¶ 8-13, Att. B, pp. 4-7, Att. C, pp. 3-6, Att. D, pp. 3-8, Att. E, pp. 3-8, Att. F, pp. 3-8, Att. G, pp. 3-8 (copies of websites).

²¹ See PX 2, Kushner Dec. ¶¶ 7-11. 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.*, ¶ 10. The FTC’s expert, Dr. Robert F. Kushner, is a Professor of Medicine at Northwestern University Feinberg School of Medicine, Clinical Director of the Northwestern Comprehensive Center on Obesity in Chicago, and Medical Director of the Center for Lifestyle Medicine in Chicago. *Id.*, ¶ 1.

²² *See, e.g.*, PX 1, McKenney Dec. ¶¶ 8-13, Att. B, pp. 4-7, Att. C, pp. 3-6, Att. D, pp. 3-8, Att. E, pp. 3-8, Att. F, pp. 3-8, Att. G, pp. 3-8 (offering “free trials” of products).

²³ *See id.*, ¶¶ 24-26 & Att. K (representative consumer complaints). Consumer complaints often fail to identify the specific fake news sites visited by the consumer, but see *id.*, Att. K, p. 1 (consumer complaint referencing Defendants’ “USA Health News” site).

²⁴ *Id.*, ¶ 25 & Att. K, pp. 3, 5, 9, 11, 13, 15, 21, 23, 27, 29. The complaints show that many consumers believed that they were receiving a “free trial” of the product and were unwittingly signed up for a recurring membership program resulting in monthly charges for the products. *See id.*

²⁵ *See id.*, ¶ 27 & Att. L (attaching various articu 0 T04.0002 Tc.0005lchawarnttac Tga opals” of products).

A. A Temporary Restraining Order Is Appropriate and Necessary Here.

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 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 these elements here.

1. There is a Strong Likelihood Defendants Have Violated the FTC Act

Defendants have engaged in multiple FTC Act violations. The FTC Act prohibits

FTC v. AVS Marketing, Inc., 04 C 6915 (N.D. Ill. Oct. 27, 2004) (Moran, J.) (*ex parte* TRO and asset freeze for deceptive marketing of “Himalayan Diet” supplements).

²⁷ Dietary supplements such as weight loss pills are a “food” and/or “drugs” for purposes of the statute. *See FTC v. SlimAmerica, Inc.*, 77 F.Supp.2d 1263, 1272 (S.D. Fla. 1999).

(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, 957-59 (N.D. Ill. 2006); *FTC v. Sabal*, 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998). The FTC is not required to prove intent to deceive. *See Bay Area*, 423 F.3d at 635.

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, Defendants have violated the FTC Act by: (1) making false claims about the acai berry products, and lacking a reasonable basis for the claims; and (2) misrepresenting that their websites provided independent reviews of the products, and failing to adequately disclose that the websites were advertisements.

a. Defendants’ False Product Claims

As described in § II.B above, Defendants’ websites promoting the acai berry products expressly misrepresent that the products will result in rapid and substantial weight loss, including as much as thirty pounds in four weeks. The FTC’s expert testimony establishes that: (1) there is no medical evidence whatsoever that acai berries alone, or in combination with a

²⁸ The fact that Defendants have buried disclaimers in some of their fake news sites is of no moment. “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. US Sales Corp.*, 785 F. Supp. 737, 751 (N.D. Ill. 1992); *see also FTC v. Direct Marketing Concepts, Inc.*, 624 F.3d 1, 12 (1st Cir. 2010). Here, Defendant’s disclaimers are in small type hidden at the bottom of the websites, well below the false claims made by Defendants.

²⁹ See PX 1, McKenney Dec. ¶¶ 16, 18, 21, 31-32 & Att. J, pp. 1-3, 18-19 (Google billing records and email correspondence) & Atts. Q-S (corporate and property records); PX 3, Miller Dec., Atts. A, E (Microsoft billing .6. ¶¶ 16, 14 .wfs.

3. 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 Defendants’ private concerns. *World Travel*

are objective news reports, and by failing to clearly and conspicuously disclose that their websites are advertisements.

2. Asset Preservation, Financial Statements, and Accounting

Part of the relief sought by the FTC in this case is restitution for the victims of Defendants' fraud. When a district court determines that it is "probable that the FTC [will] prevail in a final determination of the merits," it has "a duty" to ensure that defendants' assets are "available to make restitution to the injured consumers." *World Travel*, 861 F.2d at 1031. The order in this case should extend to individual assets as well as corporate assets because the Commission is likely to succeed in showing that all of the Defendants are liable for restitution. *See id.* (affirming freeze on individual assets); *see also FTC v. Datacom Mktg. Inc.*, No. 06 C

3. Additional Necessary Relief

The FTC's proposed TRO also contains provisions necessary for halting Defendants' illegal conduct and maintaining the *status quo*. Section V requires Defendants to post notice of the 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 are necessary provisions to stop Defendants' scam and to help identify the scope of unlawful practices, other participants, and the location of assets.

IV. CONCLUSION

³⁰ The FTC has submitted a proposed TRO with its motion.