

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	Case No.: 2:11-cv-11618
)	
v.)	
)	Judge: Robert H. Cleland
)	(presiding)
COULOMB MEDIA, INC.,)	
a corporation, and)	
)	Laurie J. Michelson
CODY LOW aka JOE BROOKS,)	(referral)
an individual and an officer)	
of COULOMB MEDIA, INC.,)	
)	
Defendants.)	
)	

**PLAINTIFF’S MOTION FOR A TEMPORARY RESTRAINING ORDER WITH
OTHER EQUITABLE RELIEF AND ORDER TO SHOW CAUSE WHY A
PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

Plaintiff Federal Trade Commission (Commission) moves pursuant to Rule 65(b) of the Federal Rules of Civil Procedure for a Temporary Restraining Order with Other Equitable Relief and Order to Show Cause Why a Preliminary Injunction Should Not Issue.

As described in the Commission’s Complaint for Permanent Injunction and Other Equitable Relief, Defendants hold themselves out on several Internet Websites as representing a legitimate news organization that has investigated the weight-loss properties of a dietary

not promote weight loss and consumers who are misled lose hundreds of dollars. To put an immediate stop to these practices, the Commission asks that the Court schedule a hearing on this Motion as soon as practical.

WHEREFORE, the Commission brings this Motn a

UNITED STATES DISTRICT COURT

Concise Statement of the Issues Presented

1. Whether Defendants, who repeatedly make false claims on their Internet websites by exaggerating the weight-loss properties of a dietary supplement known as acai berry, and by misrepresenting other weight-loss products, violate Section 12 of the Federal Trade Commission Act, 15 U.S.C. § 52, which prohibits false claims for the purpose of inducing, or that are likely to induce, directly or indirectly, the purchase of food products.

2. Whether Defendants, who repeatedly make false claims on their Internet websites by claiming that they are a legitimate news organization that has investigated the weight-loss properties of acai berry among other products and services, and have not adequately disclosed their connection with the merchants that sell those products and services, violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which prohibits unfair or deceptive acts or practices.

3. Whether Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b) empowers this Court to issue injunctive relief stopping these practices and preserving assets pending a final adjudication on the merits.

Most Appropriate Authority for the Relief Sought

Section 13(b) of the Federal Trade Commission Act provides that “in proper cases the Commission may seek, and after proper proof, [a District Court] may issue, a permanent injunction” for violations of the FTC Act. 15 U.S.C. § 53(b). At least one Court in this District has found this grant to invoke the whole range of the Court’s equitable powers, including the power to grant provisional relief. *FTC v. Solar Michigan*, No. 86-cv-40368-FL, 1988 U.S. Dist. LEXIS 16797 at *2, (E.D. Mich. Sept. 27, 1988) (citing *FTC v. H. N. Singer, Inc.*, 688 F.2d 1107, 1113 (9 Cir. 1982) and *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432 (11th Cir. 1984)). In fact, as is discussed in this memo, many courts have taken this position.

FTC v. H.N. Singer, Inc 688 F.2d 1107 (9th Cir. 1982)..... iii, 9, 16

FTC v. Int'l Computer Concepts, 1994-2 Trade Cas. (CCH) ¶10,798
(N.D. Ohio 1994)

Kos Pharms., Inc. v. Arx Corp., 369 F.3d 700 (3^d Cir. 2004).8
Mitchell v. Robert DeMario Jewelry, Inc, 361 U.S. 288 (1960).. . . .10
Regina Corp. v. FTC, 322 F.2d 765 (3d Cir. 1976)

I. INTRODUCTION

Defendants Cody Low and Coulomb Medianb. (collectively, Low), have hosted dozens of fake-news websites designed to lure consumers into buying expensive but worthless products, often a weight-loss product called açai berry. In the internet vernacular, Low's business model is known as affiliate marketing, and Low is known as an affiliate.¹

Basically, affiliates advertise merchants' products on the internet with banner advertisements, websites, or both, that contain links to the merchants' order page. The merchant in turn compensates the affiliate based on either the volume of sales realized or on the number of visitors the affiliate manages to drive to the order page. In contrast to legitimate internet advertisers who engage in affiliate marketing, Low uses fraudulent websites purporting to be news outlets and claiming to have done investigations into the weight-loss properties of açai berry. A "reporter" claims to have tried the product herself and to have achieved remarkable results in a short time with no special diet and no strenuous exercise. Consumers are then offered links to merchant sites where they are offered free trial offers for açai berry and a colon cleanse product.

In fact, as will be discussed in greater detail in Section II, everything about Low's websites is fake. Dr. Robert F. Kushner, an expert in clinical nutrition at Northwestern University, has filed a declaration in support of this motion offering his opinion that consuming açai berry will not cause weight loss, and that the only healthy way to lose weight is by burning

¹ For a discussion of affiliate marketing, see generally 1-800 Contacts, Inc. v. Lens.com, Inc., No. 2:07-cv-591CW, 2010 U.S. Dist. EXIS 132389 (D. Utah Dec 14, 2010); Amazon.com, LLC v. N. State Dep't of Taxation & Fin., 913 N.Y.S.2d 129, 134 (N.Y. App. Div. 2010).

² PX 4 ¶ 8 (Kushner Dec.) (“[I]t is my opinion that acai berries will not cause any weight

sites promoting acai berry as just described, but others promote other dubious products sometimes using the fake-news format, sometimes not such as other weight-loss products, penny auctions, and work-at-home set ups.⁸

These deceptive practices violate Section 5 of the Federal Trade Commission Act⁹ and constitute false claims under Section 12 of the Act.¹⁰ To stop them, the Federal Trade Commission seeks injunctive relief under Section 13(b) of the Act prohibiting further deception.¹¹ To prevent further consumer injury, the Commission also seeks a noticed temporary restraining order in advance of a preliminary-injunction hearing and as soon as practical.¹² Finally, to preserve the possibility of meaningful final relief, the Commission also seeks an asset freeze that would prohibit Low from making any extraordinary asset transfers, together with financial disclosures and an accounting.¹³

II. THE PARTIES

A. Plaintiff

The **Federal Trade Commission** (Commission or FTC), is an independent agency of the

⁸ See PX 1 Attach. E-3 E-6 and E-8 E-9 (Kraus Dec.).

⁹ 15 U.S.C. § 45(a).

¹⁰ 15 U.S.C. § 52.

¹¹ 15 U.S.C. § 53(b).

¹² The Commission intends to attempt service of this motion on both Defendants along with service of process.

¹³ This matter is one of ten cases filed by the FTC, five of which are being filed in the Northern District of Illinois, against persons and entities that sell acai berry dietary supplements and other products through deceptively formatted news websites.

United States government created by the Federal Trade Commission Act (FTC Act).¹⁴ Its responsibilities include enforcing the FTC Act's prohibition on deceptive acts or practices,¹⁵ and its prohibitions on false advertisements for food, drugs, devices, services, or cosmetics.¹⁶ Section 13(b) of the FTC Act authorizes the Commission to bring suit in district court to enjoin violations of laws it enforces and to seek other appropriate equitable relief.¹⁷

B. Defendants

Defendant Coulomb Media, Inc., is a Michigan corporation with registered and mailing addresses at 776 Trombley Road, Grosse Pointe Park, Michigan 48230. It was incorporated by Cody Low on May 12, 2010.

Defendant Cody Low, aka Joe Brooks, not only incorporated Defendant Coulomb Media but is also its registered agent. He resides at 776 Trombley Road in Grosse Pointe Park. Prior to incorporating Coulomb Media, dating back to at least July of 2009, Low had already established an account with Name.com, a domain name registrar.¹⁸ In paying for banner advertising on Facebook, an individual identifying himself as Joe Brooks made two credit card payments with a credit card ending in the same four digits, one showing an address in San Francisco, California, the other showing an address in Miami, Florida.¹⁹ Both of these addresses

¹⁴ 15 U.S.C. §§ 41-58.

¹⁵ 15 U.S.C. § 45(a).

¹⁶ 15 U.S.C. § 52.

¹⁷ 15 U.S.C. § 53(b).

¹⁸ PX 2 ¶ 6 (McBeen Dec).

¹⁹ PX 3 ¶ 7 and Attach B (McGuire).

have two things in common with Low's residential address: all three begin with the same house number, and all three end with the 48230 zip code for Grosse Point Park. In all likelihood, Joe Brooks is Cody Low.

III. LOW'S DECEPTIVE INTERNET SCHEME

Typical of Low's websites is the News 6 Reports site appearing at Kraus Attachment F-1.²⁰ That page has a masthead announcing "NEWS 6 REPORTS" and "Consumer Report Daily Health News." Below that is an unattributed quote saying "I Went From Flabby to Fabulous in Under 4 Weeks, Here's How" Below that, the site claims "AS SEEN ON:

²⁰ As of April 11, 2011, the site was still accessible at www.new6reports.com. PX 1 ¶ 8 (Kraus Dec.). Note that although the page identifies itself as News 6 Reports, the "s" in news was omitted from the URL.

in anyway with CNN, WebTV, News Channel 7, ABC, NBC, CBS, U.S. News or FOX. CNN, WebTV, News Channel 7, ABC, NBC, CBS, U.S. News, FOX, and Consumer Reports are

images found on the first page at Kraus Attachments E-1 E-6 and F-2. What appears to be the same person is identified variously as Helen Cohen, Julia Miller, Rebecca Scott, Amy Conner, and Johanna. Uploading any of these images on Tin Eye (or typing in the URLs to the extent the websites are accessible) will identify this person as Michelle Theuriau; a Google search on Ms. Theuriau reveals that she is an anchorwoman on French television. In fact, Ms. Theuriau's image has been compromised so frequently that she has generated an on-line news article from New Zealand entitled *The Face* that launched a global ad scam.

IV. ARGUMENT

Low's deceptive Internet scheme clearly violates the FTC Act. To prevent further consumer injury and to preserve the possibility for effective final relief for injured consumers, the Commission asks that this Court issue the proposed temporary restraining order. The order would prohibit Low's ongoing deceptive practices, prevent any extraordinary transfers of assets,

²⁵ PX 1 Attach. H (Kraus Dec.), available at www.stuff.co.nz/technology/digital-living/4138888/. The Commission recognizes that some of the evidence presented here is hearsay, particularly the on-line article regarding Ms. Theuriau. However, the guarantees of trustworthiness seem particularly high, and as this Court has recently recognized, “[a] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits.” *Smith v. State Farm Fire and Casualty Co.*, 737 F. Supp. 2d 702, 707 (E.D. Mich. 2010) (quoting *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 396 (1981))). For this reason, courts in this jurisdiction and others have relied on hearsay materials in preliminary-injunction hearings. See, e.g., *Tenke*, 511 F.3d at 549 (affidavit); *State Farm*, 737 F. Supp. 2 at 709 (air quality assessment); *Guillermet v. Sec’y of Education*, 241 F. Supp. 2d 727, 740 (E.D. Mich. 2002) (affidavits and complaint allegations); see also *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 718 (3rd Cir. 2004) (citing multiple cases from other circuits). This principle can be no less applicable in the context of an application for a temporary restraining order to enforce federal law and preserve the possibility of effective final relief.

²⁶ 15 U.S.C. § 53(b).

demonstrate irreparable injury.”³² Rather, as this Court stated in *Solar Michigan*, under the public-interest standard, the FTC need only show that there is a substantial likelihood that the statute has been violated, and that “the asset freeze is reasonably necessary in order to preserve the possibility of complete and meaningful relief at the conclusion of litigation.”³³ Indeed, “a district court’s equitable powers are more flexible when the public interest is involved.”³⁴ The FTC easily satisfies the elements for a TRO.

1. Low’s Internet Scheme is Deceptive in Violation of Sections 5 and 12

Here, the Commission has easily shown a substantial likelihood of success on the merits. Low’s Internet scheme constitutes false product claims in violation of Section 12 of the FTC Act, deceptive acts or practices in violation of Section 5 of the Act, and material omissions also in violation of Section 5.

a. False and Unsubstantiated Product Claims

Section 12 of the FTC Act prohibits the dissemination of materially misleading advertisements for the purpose of inducing, or with the likelihood to induce, the purchase of food or drugs. The FTC may prove a violation by either showing that the claims are false or by

³² *World Travel*, 861 F.2d at 1029.

³³ *Solar Michigan*, 1988 U.S. Dist. LEXIS 16797, at *10.

³⁴ *United States v. Universal Mgmt. Servs.*, 191 F.3d 750, 761 (6th Cir. 1999) (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291 (1960)).

³⁵ 15 U.S.C. § 52(b). Violations of Section 12 also constitute violations of Section 5. *Id.*

³⁶ American Home Products Corp. v. FTC, 695 F.2d 681, 688 (1st Cir. 1982); see also, FTC v. QT, 448 F. Supp. 2d 908, 957 (N.D. 2006), aff'd, 512 F.3d 858 (7th Cir. 2008); FTC v. Sabal, 32 F. Supp. 1004, 1007 (N.D. 1998); FTC v. Direct Marketing Concepts, 624 F.3d 1, 7-8 (1st Cir. 2010); Removc.2800 0.0000 TD 1004, 1007 (N.D.

under Section 5 are well established. As set forth administratively in *Cliffdale Associates*,⁴² and as followed by courts in Section 13(b) litigation, Section 5 condemns deceptive any material representation, practice or omission, likely to mislead consumers acting reasonably under the circumstances.⁴³ The Commission need not show intent to deceive must it show individual reliance.⁴⁴ Rather, once the Commission shows that the representations were of the type ordinarily relied on by reasonably prudent persons, that they were widely disseminated, and that consumers purchased the product, the burden then shifts to the defendant to show there was no reliance.⁴⁵

Moreover, express claims and deliberately made implied claims are presumed material,⁴⁶ and “[w]here the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information to have an effect.”⁴⁷

Here, on any number of websites, Low has represented his organization as a legitimate

⁴² *In re Cliffdale Assoc.* 103 F.T.C. 110, 164-65 (1984).

⁴³ *World Travel*, 861 F.2d at 1029; *FTC v. Atlantex Assoc.* 1987-2 Trade Cas. (CCH) ¶ 67,788 at 59,252-53 (S.D. Fla. 1987); *Cliffdale Assoc.* 103 F.T.C. at 164-65 (1984); see also *FTC Deception Policy Statement*, appended to *Cliffdale*, 103 F.T.C. at 174-83 (1984) (hereinafter *Deception Policy Statement*).

⁴⁴ *World Travel* 861 F.2d at 1029 (citing *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3rd Cir. 1976), and *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3rd Cir. 1976)); *Security Rare Coin v. FTC*, 931 F.2d 1312, 1316 (3rd Cir. 1991).

⁴⁵ *World Travel* 861 F.2d at 1029 (citing *FTC v. Kito of Nevada, Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985)); *FTC v. Intl Diamond Corp.* 1983-2 Trade Cas. (CCH) ¶ 5,725 at 69,709 (N.D. Cal. 1983)

⁴⁶ *FTC v. Slim America* 7 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999); *In re Thompson Medical Corp.*, 104 F.T.C. 648, 816 (1984); *Deception Policy Statement*, 103 F.T.C. at 182.

⁴⁷ *Deception Policy Statement*, 103 F.T.C. at 182

news organization, when it is not. He reports that an investigative journalist tried the product and achieved remarkable weight loss, when no investigation has been done. His websites are

full of any number of express c. 008,287) 2.13907D0 (0.007) 14.6(8.0) 0250 2.100,000) Tj1 8.0200 9.0

⁴⁸ Id. at 176.

⁴⁹ See, e.g., *Transworld Accounts v. FTC*, 594 F.2d 212, 214 (8th Cir. 1979); *FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 532 (S.D.N.Y. 2000); *FTC v. U.S Oil & Gas*, No. 83-1702-CIV-WMH, 1987 U.S. Dist. EXIS 16137 at *47-48 (S.D. Fla. July 10, 1987).

⁵⁰ *Remotron*, 884 F.2d at 1497; *Beneficial Corp.*, 542 F.2d at 617 (3rd Cir. 1976); *FTC v. Davison & Assoc.*, 431 F. Supp. 2d 548, 560 (W.D. Pa. 2006).

⁵¹ *Remotron*, 884 F.2d at 1497; 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.

(continued...)

⁵⁶ Int'l Computer Concepts, 1994-2 Trade Cas. (CCH) ¶73404.

⁵⁷ See, e.g., FTC v. Network Servs. Pvt., Inc., 617 F.2d 1127, 11389 (9th Cir. 2010); FTC v. Bay Area Bus Council, 423 F.3d 627, 636 (7th Cir. 2005); FTC v. Freedom Communications, Inc., 401 F.3d 1192, 1207 (10th Cir. 2005).

⁵⁸ Standard Educators, Inc. v. FTC, 475 F.2d 401, 403 (D.C. Cir. 1973).

⁶² See, e.g., *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1230th Cir. 1999) (citing *FTC v. World Wide Factors, Ltd.*, 882 F.2d 334, 347 (9th Cir. 1989)); see also *World Travel*, 861 F.2d at 1029.

⁶³ *World Wide Factors*, 882 F.2d at 347.

Solar Michigan, 1988

final relief.⁶⁶

1. Asset Preservation, Financial Statements, and Accounting

Part of the relief sought by the Commission in this case is restitution for the victims of Low's fraud. Low has lured countless consumers to his websites, where they have been bombarded with his misrepresentations and false claims. In order to preserve the possibility of restitution for victims who were deceived into buying the products Low purported to review, the FTC seeks the preservation of Low's assets by prohibiting extraordinary transfers. Also, to identify assets and ill-gotten gains resulting from Low's false and deceptive practices, the Court should order financial disclosure and an accounting.

Other district courts in this circuit have found that an asset freeze to be appropriate, where, when coupled with a showing of likely success on the merits, there is a possibility that assets will be dissipated.⁶⁷ Other Courts are in accord. As the Seventh Circuit has stated, when a district court determines that it is "probable that the FTC [will] prevail in a final determination of the merits, [it has] a duty to ensure that . . . assets . . . [are] available to make restitution to injured customers."⁶⁸ Sections III and IV of the FTC's Proposed TRO require each Defendant to preserve assets and provide the FTC with a completed financial statement and an accounting, respectively. These sections are necessary and appropriate to locate ill-gotten gains and to prevent the concealment or dissipation of assets pending a final resolution of this litigation.

⁶⁶ A Proposed TRO has been filed with the Motion.

⁶⁷ *FSLIC v. Quinn*, 711 F. Supp. 366, 379 (N.D. Ohio 1989) (citing *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (6th Cir. 1989)).

⁶⁸ *World Travel*, 861 F.2d at 1031.

2. Prohibited Business Activities and Additional Relief

The FTC's Proposed TRO also contains provisions necessary for halting Low's illegal conduct and maintaining the status quo. Sections I and II prohibit Low from further violating the FTC Act, while Section V requires him to post notice of the lawsuit on his websites. Section VI requires each Defendant to preserve records and report new business activity. Section VII allows for expedited discovery of information relevant to a preliminary injunction hearing. These are necessary provisions to stop Low's scam and to help identify the scope of unlawful practices, other participants, and the location of assets.

V. CONCLUSION

For the foregoing reasons, this Court should enjoin Low's false and unsubstantiated claims concerning açai berry products, and enjoin Low's deceptive use of fake news websites. To identify assets and illegal gains resulting from Low's false and deceptive practices, the Court should order financial disclosure and an accounting. To prevent further consumer injury from occurring before a hearing on a preliminary injunction can be held, the Court should schedule a hearing on the Commission's motion for a Temporary Restraining Order as soon as is practical.

Date: April 15, 2011

Respectfully submitted,

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