

**IN THE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	Judge Matthew F. Kennelly
)	
IMM INTERACTIVE, INC., a New York Corporation formerly known as INTERMARK COMMUNICATIONS, INC., also d/b/a COPEAC and INTERMARK MEDIA,)	Magistrate Judge Jeffrey T. Gilbert
)	
Defendant.)	
)	

**MEMORANDUM IN SUPPORT OF MOTION FOR A TEMPORARY
RESTRICITING ORDER AND OTHER EQUABLE RELIEF AND ORDER TO
HOWEVER PRELIMINARY INJUNCTION HOLD NOTE**

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 year, Defendant IMM Interactive, Inc. has operated numerous websites featuring phony investigative reports and reviews of a range of dubious products, including acai berry weight loss supplements. Defendant crafts the sites to look like legitimate news sites by using domain names such as channel9healthbeat.com and nbsnewsat6.com, and by displaying mastheads such as "NBS News" or "News 9." The sites also prominently claim that the reports have been "seen on" several major news outlets, including ABC and CNN. Defendant's websites often feature a supposed reporter's independent investigative report of losing twenty-five pounds after using an acai berry supplement for four weeks. The report is followed by a section full of glowing consumer "comments" about the product.

¹ This matter is one of ten cases filed by the FTC, including five cases in this district, against

²(...continued)
(Kendall, J.); *FTC v. Bay Area Bus. Council, Inc.*, No. 02 C 5762, 2003 WL 21003711, at *2 (N.D. Ill.

⁷ See PX 3, Cronberger (Pulse 360) Dec. ¶¶ 2-3 (discussing ads placed by Defendant through Pulse 360 network); PX 4, Nashed (AdBlade) Dec. ¶¶ 2-5, Att. A at 16-18 (discussing ads placed by Defendant through AdBlade network); PX 1, McKenney (FTC Investigator) Dec. ¶¶ 12-14, Att. G (summarizing Pulse 360 data). Defendant creates attention-grabbing text for its ads that falsely insinuate a connection to a news story, such as the following ad that appeared in the Evanston Review: •Acai Berry EXPOSED (Chicago Report) ... Chicago Warning: Health Reporter Discovers the Shocking Truth. *id.*

¹² See, e.g., *id.* ¶¶ 7, 9, 11, Att. B at pp. 1-2, Att. D at pp. 1-2, Att. F at pp. 1-2.

¹³ See, e.g., *id.* ¶¶ 7, 9, 11, Att. B at p. 3, Att. D at p. 3, Att. F at p. 3.

¹⁴ For example, the “columnist” Stacie Sandler is depicted in two of Defendant’s websites with photos of two entirely different people. Compare *id.* ¶ 9, Att. D at p. 1 (nbsnewsat6.com website) *id.* ¶ 11, Att. F at p. 1 (consumerproductsdaily.com website). In addition, one photo identified by Defendant as its “reporter” Julia Miller appears to be the image of a prominent French news anchor. Compare *id.* ¶ 8, Att. C at p. 5 (channel9healthbeat.com website) *id.* ¶ 19, Att. K (article discussing use of French news anchor on fake news sites).

¹⁵ For example, comments contained in at least three different websites operated by Defendant are identical. Compare *id.* ¶ 7, Att. B at p. 3 (channel9healthbeat.com website) *id.* ¶ 9, Att. D at p. 3 (nbsnewsat6.com website) and ¶ 11, Att. F at p. 3 (consumerproductsdaily.com website). In addition, the dates of the consumer comments are automatically updated to make them look current every time a visitor visits the website. Compare *id.* ¶ 9, Att. D at p. 3 (nbsnewsat6.com website dated March 16, 2012) with *id.* ¶ 10, Att. E at p. 3 (nbsnewsat6.com website dated December 10, 2010).

¹⁶ See *id.* ¶¶ 3-5, Att. A (discussion of affiliate marketing). Defendant’s news sites have touted a variety of acai berry products, including “Acai Optimum,” “LeanSpa Acai,” “Pure Acai Select,” and “Acai Reduce.” See *id.* ¶¶ 7-11, Atts. B-F.

DcaiSee *id.*

¹⁷(...continued)

(See *id.* ¶¶ 9-11, Att. D at p. 4, ¶ , Att. F at p. 4.) As explained at p.10, n. 25, this statement, which appears well below the links to the merchant sites where consumers are invited to obtain the products, is

A. A Preliminary Injunction

A district court may issue injunctions to enjoin violations of the FTC Act, 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. *Zunney v. Int'l Union of Operating Eng'rs*, 994 F.2d 1271, 1277 (7th Cir. 1993). The FTC easily satisfies the TRO elements here.

1. The FTC Act

The FTC Act prohibits •unfair or deceptive acts or practices in or affecting commerceŽ 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] drugsŽ 15 U.S.C. § 52m 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. *See FTC v. Kraft*, 970 F.2d 311, 314 (7th Cir. 1992); *see also FTC v. Bay Area Bus. Council*, 423 F.3d 627, 635 (7th Cir. 2005). Misrepresentations and omissions involving information likely to affect consumer choice are considered material. *Kraft*, 970 F.2d at 322. Health claims may be presumed material.

²⁵(...continued)

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 Neutraceuticals, LLC*, 07C 4541 (N.D. Ill. Aug. 13, 2007) (Kennedy, 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); *FTC v. Phoenix Avatar LLC, et al.*, No. 04 C 2897 (N.D. Ill. April 23, 2004) (Holderman, J.) (same).

The threshold showing of likelihood of success is a "better than negligible" chance. *Cooper v. Salazaar*, 196 F.3d 809, 813 (7th Cir. 1999). The FTC has far exceeded that threshold in demonstrating that Defendant has violated the FTC Act by: (1) making false and

objective news reports when, in fact, the sites are ads. Courts look to the overall, net impression of an ad to determine whether the messages or claims it conveys are likely to mislead reasonable consumers, 448 F. Supp. 2d at 958. See also *Kraft*, 970 F.2d at 314. To discern the net impression, courts view the advertisement as it would be seen by the public generally including those who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions. See *Onez Indus., Inc. v. FTC*, 278 F.2d 337, 342 (7th Cir. 1960) (citation omitted). See also *FTC v. Crescent Pub. Group, Inc.*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) (when evaluating the likelihood that an advertisement has misled consumers, it is appropriate to look not at the most sophisticated, but the least sophisticated consumer).

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 by including the mastheads, subject tabs, photos of supposed reporters, and even consumer comments. The websites claim the featured reports have been seen on major reputable news outlets such as ABC, Fox News, CBS, CNN, USA Today and Consumer Reports. In fact, Defendant has not performed independent tests on the products, and the reporter, the news organization, and the comments all are completely fictional. As explained above, at § II.C, consumers not only likely to be deceived by these sites, they have been deceived by Defendant's websites.

²⁶ Defendant's occasional use of buried disclaimers in some of its sites is insufficient to cure the deceptive nature of the sites. 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.

(continued...)

²⁶(...continued)
1992); see also *FTC v. Direct Marketing Concepts, Inc.*, 624 F.3d 1, 12 (1st Cir. 2010). Defendants use a well-hidden •advertorialŽ label is inadequate to cure the websites• net impression. *FTC v. Corp.*

status quo by prohibiting future law violations and preserving assets and documents to ensure that the Court can grant effective final relief.

1. ~~PBIA~~

The FTC's Proposed TRO contains provisions necessary to stop Defendant's illegal conduct. Particularly, Sections I and II prohibit Defendant from further violating the FTC Act by making false weight loss claims about acai berry products, by misrepresenting that its sites are objective news reports, and by failing to clearly and conspicuously disclose that its websites are advertisements.

2. ~~Asset Freeze~~

Part of the relief sought by the FTC in this case is restitution for the victims of Defendant's 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 the assets of the corporate defendant [are] available to make restitution to the injured customers. *Travel*, 861 F.2d at 1031; *see also Phoenix Avatar*, 2004 WL 1746698, at *15 (granting preliminary injunction with asset freeze in matter involving false claims about dietary supplements).

Here, Defendant has lured over a million consumers to its deceptive websites, and numerous consumers have been tricked into purchasing products due to Defendant's misrepresentations and false claims. In order to protect the possibility of restitution for these victims, the FTC seeks to preserve Defendant's assets. Particularly, Section I of the Proposed TRO would prohibit Defendant from utilizing assets except for reasonable, usual and ordinary business expenses. Additionally, Section IV would require Defendant to provide the FTC with a completed financial statement and an accounting. These provisions are necessary and appropriate to determine the amount of money lost by consumers, the amount of Defendant's ill-

gotten gains, and to prevent the concealment or dissipation of assets pending a final resolution of this litigation.