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<sup>2</sup> See *FTC v. Central Coast Nutraceuticals, Inc.*, 10 C 4931 (N.D. Ill. Aug. 5, 2010) (Norgle, J.).

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

<sup>4</sup> The Court has personal jurisdiction over Defendant under the FTC Act's nationwide

**A. Defendant is Responsible for his Fake News Websites**

Defendant is an affiliate marketer, often known simply as an “affiliate.” An affiliate is an Internet-based marketer hired by a seller of goods (known as a “merchant”) to attract consumers to the merchant’s website.<sup>5</sup> *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). An affiliate posts advertisements on high-volume websites, attracting consumers to the affiliate’s website, where links lead to the merchant’s website. Consumers then click through to the merchant’s website, and often purchase or order a “free trial” of the merchant’s products, resulting in the payment of a commission to the affiliate.<sup>6</sup>

Defendant began affiliate marketing through the websites described above (the “fake news websites”) in March 2010, when he set up an account with NameCheap, a domain registration services company. Defendant since has registered at least one dozen fake news websites, including [consumer6-reports.com](http://consumer6-reports.com), [consumers6report.com](http://consumers6report.com), and [health6-report.com](http://health6-report.com).<sup>7</sup>

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<sup>4</sup>(...continued)

an action may be brought wherever a person “resides or transacts business.” 15 U.S.C. § 53(b). Here, Defendant has transacted business in this district. *See* McKenney Dec., PX1, ¶¶ 8-31 (describing Defendant’s websites viewed in district) and ¶¶ 37-40 (describing Defendant’s use of hosting server located in Chicago).

<sup>5</sup> *See* McKenney Dec., PX1, ¶ 4.

<sup>6</sup> *See id.* ¶¶ 4-5; *see also id.*, Att. A.

<sup>7</sup> *See* Declaration of Sergio Hernandez, Custodian of Records for NameCheap, Inc., PX2, Att. A, at NC000001, NC000007-14 (showing Defendant’s registration of NameCheap account and registration of several websites); *see also id.*, Att. A, at NC000011-12, NC000022 (showing Defendant’s registration of [consumer6-reports.com](http://consumer6-reports.com)), NC000011, 25 (showing Defendant’s registration of [consumers6report.com](http://consumers6report.com)), and NC000014-15 (showing Defendant’s registration of [health6-report.com](http://health6-report.com)); McKenney Dec., PX1, Atts. B-I (showing captures of Defendant’s fake news websites).

Shortly after registering his first fake news website, Defendant began posting advertisements on Microsoft's Bing search engine. Through Bing, Defendant bid for advertisements that would appear in response to a search for terms such as "acai," "acai berry," and "acai berry diet."<sup>8</sup> Thus, a search for these terms would yield search results that included one of Defendant's links, promising, "Avoid the Acai Berry Scam. Read the Real Story Behind the Acai Berry and Colon Cleanse Diet."<sup>9</sup> These links lead to Defendant's fake news websites, where a reporter claims she enjoyed dramatic weight loss by ingesting a featured acai berry product and a companion product, generally a colon cleanser. These websites also include links to the merchant's websites, where a "free trial" of the featured acai berry products can be ordered.<sup>10</sup>

## **B. Defendant's Deceptive Conduct**

On his fake news websites, Defendant makes false weight loss claims in a deceptive format that suggests that he is an independent journalist.

### **1. False Product Claims**

Defendant makes false and unsubstantiated weight loss claims about acai berry products. For example, Defendant claims that by taking the product Pure Acai Flush with LeanSpa Cleanse, a companion product, the (fictitious) reporter "Lost 25lbs in 4 Weeks, No Special Diet,

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<sup>8</sup> See Declaration of Debra M. Miller ("Miller Dec."), PX3, Att. D (showing "TL Advertising" bids on particular search terms); see also McKenney Dec., PX1, Att. B, at 1 (showing Defendant's advertisement for health6-report.com in right-hand banner among results of search for "acai"); Miller Dec., PX3, Att. C (showing that Defendant is responsible for "TL Advertising" account).

<sup>9</sup> See McKenney Dec., PX1, ¶ 8 and Att. B, at 1.

<sup>10</sup> See generally *id.*, Att. B (showing Bing advertisement, Defendant's fake news websites, and merchant websites).

No Intense Exercise,” “lost 25lbs in 4 weeks,” and “lost an unbelievable 25 lbs since starting the Acai Berry and Colon Cleanse diet!”<sup>11</sup>

There is no medical evidence whatsoever that the acai berry products that Defendant markets can produce the claimed weight loss. 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, no scientific studies, and no medical evidence, establish that ingestion of acai berries causes weight loss.<sup>12</sup> Dr. Kushner also attests that any weight loss caused by colon cleanse products would be marginal, and would pale in comparison to the weight loss that Defendant claims is possible.<sup>13</sup> Weight loss of twenty-five pounds in four weeks, which Defendant claims can be achieved without exercise or dietary changes, simply is not possible by dietary means.<sup>14</sup>

## 2. Deceptive Format

Defendant presents these patently false product claims under the deceptive guise of an investigative report by an objective news organization. Defendant fabricates objective news organizations, like “Consumer News Reporter”<sup>15</sup> and “News 6,”<sup>16</sup> using mastheads, headlines,

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<sup>11</sup> See *id.*, Att. B, at 3-4. Lest the message be lost, Defendant itemizes the weight loss, claiming that, the reporter lost nine pounds in the first week, leaving her “under 140 lbs for the first time in years!,” then lost seven pounds, six pounds, and three pounds in the next three weeks. *Id.*, Att. B, at 4.

<sup>12</sup> See Declaration of Robert F. Kushner, PX4, ¶¶ 1, 7-10.

<sup>13</sup> According to Dr. Kushner, products with laxative effects, such as colon cleansers, have, at best, a marginal and temporary weight loss effect. See *id.*, ¶ 10.

<sup>14</sup> See *id.*, ¶ 9.

<sup>15</sup> See, e.g., McKenney Dec., PX1, ¶ 14 & Att. D, at 1.

<sup>16</sup> See, e.g., *id.*, Att. B, at 3.

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<sup>17</sup> See Declaration of Wendy J. Wintman (“Wintman Dec.”), PX5, ¶¶ 5-8 (attesting that *Consumer Reports* has not authorized use of its trademark on Defendant’s websites).

<sup>18</sup> Defendant registered his websites in his name, with no mention of any such news entities, *see generally* PX2, Att. A, at NC000001-90, and paid for advertisements leading to these websites with his personal credit card, *see* Miller Dec., PX3, Att. C.

<sup>19</sup> Compare McKenney Dec., PX1, ¶ 14 & Att. D, at 1 (on [consumers6-report.com](http://consumers6-report.com), identifying photographed reporter as “Julia Millar”) *with id.*, ¶ 8 & Att. B, at 3 (on [health6-report.com](http://health6-report.com), identifying reporter as “Julia Miller”). The image Defendant uses on [consumers6-report.com](http://consumers6-report.com) is most

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<sup>23</sup> Compare McKenney Dec., PX1, Att. B, at 5-6 (listing comments on [health6-report.com](http://health6-report.com)) with *id.*, PX1, Att. C, at 3-4 (listing identical comments on [consumer6-reports.com](http://consumer6-reports.com)). The only variations between the fake news websites' comments further prove their falsity. The date stamps for the comments are perpetually refreshed, so that no comment appears to be more than two days old. Compare *id.*, Att. B, at 5 (listing comment from "Diane," as made on March 24, 2011 at 11:33 a.m., when website was accessed on March 25, 2011) with *id.*, Att. E, at 5 (listing identical comment, also from "Diane," on same website, as made on March 20, 2011 at 11:33 a.m., when the site was accessed on March 21, 2011). On [health6-report.com](http://health6-report.com), "Julia," the reporter, responds to consumers' comments, "Yay! glad to see it's helped and that my story is getting out there! good luck!" See *id.*, Att. B, at 5. The same response on [consumeracaiberrycleanse.com](http://consumeracaiberrycleanse.com) is made by "Stephanie," the reporter on that website. See *id.*, Att. I, at 5.

<sup>24</sup> See McKenney Dec., PX1, Att. B, at 3. Defendant's inclusion of the vague term "Advertorial" in small type at the top of some of his websites, see, e.g., *id.*, Att. D, at 1, does not effectively disclose the fact that those websites are paid advertisements. This term is undefined and, even if consumers understood what it meant, it is easily missed. Defendant's use of buried, fine-print disclosures that "the story, the photos, and the comments" are fictitious and that he receives compensation from the merchants whose products he peddles, see, e.g., *id.*, Att. B, at 6, is likewise insufficient. These

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<sup>25</sup> See McKenney Dec., PX1, ¶¶ 33-36 & Atts. J-L.

<sup>26</sup> *Id.* Numerous consumers have taken Defendant's fake news websites for actual news reports. See, e.g., *id.*, ¶¶ 34-35 Atts. K-L.

<sup>27</sup> See





“for the purpose of inducing, or which is likely to induce, . . . the purchase of food [or] drugs,” *id.* §§ 52, 55(a)(1). An act or practice is deceptive under the FTC Act if it 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) (collecting cases); *see also FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005); *FTC v. World Media Brokers*, 415 F.3d 758, 763 (7th Cir. 2005). The failure to disclose a material fact, even without an affirmative misrepresentation, is equally deceptive. *See Bay Area*, 423 F.3d at 635; *Amy Travel*, 875 F.2d at 573. The FTC is not required to prove intent to deceive or actual deception. *World Travel*, 861 F.2d at 1029; *Bay Area*, 423 F.3d at 635; *see also FTC v. U.S. Sales Corp.*, 785 F. Supp. 737, 753 (N.D. Ill. 1992). A misrepresentation or omission is material if it is likely to affect consumer choice. *Kraft*, 970 F.2d at 322. The materiality of health claims may be presumed. *Id.* at 322-23.

**a. False Product Claims**

Defendant’s legion misrepresentations include false claims that the acai berry products he

twenty-five pounds in four weeks, without any change in exercise or dietary habits. These claims are false, given that weight loss of that magnitude in that time frame is impossible by dietary means alone. Defendant's claims also are baseless, as acai berries have no known weight loss properties. Defendant's false and unsubstantiated weight loss claims are deceptive even without his use of a deceptive fake news format, and thus give the FTC the requisite likelihood of success on the merits.<sup>30</sup>

**b. Misrepresentations**

Defendant does not limit himself to weight loss claims: he also misrepresents that his featured products have been vetted by an independent investigative report on behalf of an objective news organization and by consumers whose comments attest to the products' efficacy. In determining the likelihood of deception, courts look to the "net impression" created by the advertisement. *Kraft*, 970 F.2d at 314; *Nat'l Bakers Servs., Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964). To discern net impression, courts view an advertisement "as it would be seen by the

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<sup>30</sup> In addition to entering TROs against deceptive practices generally, *see n. 29 supra*, Courts in this district have entered TROs on based on false weight loss claims about acai berry products, *see FTC v. Central Coast Nutraceuticals, Inc.*, 10 C 4931 (N.D. Ill. Aug. 5, 2010) (Norgle, J.), and other dietary supplements, *see FTC v. AVS Marketing, Inc.*, 04 C 6915 (N.D. Ill. Oct. 27, 2004) (Moran, J.).

consumer the impression that the reviewed products have been tested by credible and disinterested third parties. These explanations bolster Defendant's similarly deceptive false and unsubstantiated weight loss claims, *see World Travel*, 861 F.2d at 1030, making them all the more material to the average consumer. In fact, Defendant has performed no tests on the products he purports to review, while the reporter, the news organization, and the comments all are completely fictitious.

**c. Failure to Disclose**

Finally, Defendant fails to disclose adequately his connection to the merchants whose products he advertises. Throughout his websites, Defendant deceptively represents that he is independent from the merchants whose products he markets. Nearly every representation on his websites contributes to this net impression. While proof of actual consumer deception is unnecessary, the deceptive nature of these websites is borne out by consumer complaints<sup>31</sup> and numerous legitimate news stories uncovering the deception.<sup>32</sup> *See id.* at 1029-30 ("Evidence that some customers actually misunderstood the thrust of the message is significant support for the finding of a tendency to mislead." (internal quotation marks, brackets, and citation omitted)).<sup>33</sup>

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<sup>31</sup> *See* nn. 25-26 *supra*.

<sup>32</sup> *See* n. 27 *supra*.

<sup>33</sup> Defendant's occasional use of buried disclosures about the true nature of his websites, *see* n. 24 *supra*, is insufficient to cure their deceptive format. His "Advertorial" label, even when used, is woefully inadequate. *See SEC v. Corp. Relations Group, Inc.*, No. 6:99CV1222ORL28KRS, 2003 WL 25570113 (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). Moreover, "[d]isclaimers or qualifications in any particular ad are not adequate unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression." *U.S. Sales Corp.*, 785 F. Supp. at 753 (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). Thus, Defendant's fine-print  
(continued...)

In sum, the Commission’s evidence far outstrips the required “negligible” chance of success on the merits, and indeed establishes that Defendant perpetrated the deceptive practices alleged.

**2. The Equities Tip Decidedly in the Commission’s Favor**

Once the Commission has shown a likelihood of success on the merits, the Court must balance the equities, giving “far greater weight” to the public interest than to any of Defendant’s private concerns. *Id.* 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”); *Sabal*, 32 F. Supp. 2d at 1009.

**C. This Court Should Enter the FTC’s Narrowly Tailored Proposed TRO**

In fashioning appropriate injunctive relief, this Court has authority “to grant any ancillary relief necessary to accomplish complete justice[.]” *World Travel*, 861 F.2d at 1026 (quotation marks and citation omitted); *see also Febre*, 128 F.3d at 534 (district court has authority in FTC action to “order any ancillary equitable relief necessary to effectuate the exercise of the granted powers” (quoting *Amy Travel*, 875 F.2d at 572)). The FTC requests that the Court issue a TRO

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<sup>33</sup>(...continued)  
disclosures, hidden far from representations they disclaim, also fail.

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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. 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**