

accounting of their businesses and finances is necessary to prevent ongoing harm to consumers and preserve the Court's ability to provide effective final relief.

II. PARTIES

A. Plaintiff

The FTC is an independent agency of United States Government created by the FTC Act, 15 U.S.C. § 401 et seq. The FTC enforces Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, which respectively prohibit fair or deceptive acts or practices in or affecting commerce and false advertisements (among other things) foods or drugs in or affecting commerce. Section (b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC, through its own attorneys, to initiate federal district court proceedings to enjoin violations of the FTC Act and secure appropriate equitable relief, including rescission of contracts and restitution, the refund of monies paid, and the disgorgement of ill-gotten gains.

B. Defendants

Defendants are Roca Labs, Inc. and Roca Labs Nutraceutical USA, Inc., and Don Juravin and George Whiting, the officers, owners, or operators of the companies (collectively, "Defendants"). See PX (Howe Dec.), Att. W-X (FTC000115-13¹) Since about 2009 (PX 2 (Parham Dec.), Att. H (28¹)), they have sold weight-loss supplements, the

¹ Throughout this Memorandum, we abbreviate specific FTC exhibit page references to the last three or four numerals in the "FTC" numbering in their bottom, right corners. These page references are shown in parentheses in the text.

On their websites, RocaLabs.com and mini-gastric-bypass.mn (“Roca Labs sites”) Defendants claim that taking Roca Labs Form will restrict a user’s stomach volume, creating a “gastric bypass effect.” PX 1, Att. A (008), Att. B (012-13), Att. O (085), Att. P (091), Att. V1 (114); PX 4, Att. C (504). By leaving only twenty percent of the stomach available for food intake for approximately to sixteen hours and reducing cravings, the products supposedly cause weight loss comparable to the results of bariatric surgery, including 21 pounds per month, and 100 pounds in seven to ten months:

How does it work?

NEW: a dose of the Roca Labs formula mixed with water and turns into 350cc stomach-sized red mixture. Successful user reports that when consumed in the morning, the Regimen creates a feeling that limiting functional stomach volume for the duration of your day. This result is achieved without surgical procedures, including cutting parts of the digestive system.

With limited stomach volume, you eat much less. . . . Bariatric surgery does not eliminate your cravings; Roca Labs Anticravings can reduce your urge for sweets and snacks and other foods that prevent weight loss success enhancing the loss of an additional 5 to 8 pounds a month! Learn more

PX 1, Att. B (012-13).

How much weight can I expect to lose?

The weight loss can be immediate with the Roca Labs’ regimen, just as if you had undergone a bariatric surgery, and within a few days the cravings should be diminished significantly. Depending on your commitment to the recommended rules for suggested use, a loss of 20 lb a month is possible; however, realistically, it may take 7 to 10 months to lose 100 lb.

PX 1, Att. B (013). See also PX 1, Att. D (023).

No Menus, No Diet Restrictions

Unlike weight loss pills or diet programs, Roca Labs® Formula does not require a strict menu or calorie restrictions. It practically FORCES you to eat HALF the food you ate before, so you will automatically lose weight without having to keep track of every calorie you consume.

PX 1, Att. C at (020). See also PX 4, Att. C (504).

The sites also feature videos of persons in lab coats reiterating the “gastric bypass effect,” a ninety-percent success rate, and rapid substantial weight loss. See, e.g., PX 1, Att. V1-V4 (114). For example, a video on the “success rate” begins:

Well I'm sure you're wondering, what is the success rate? Roca Labs' Formula is scientifically proven to have a 90% success rate. It will always achieve a gastric bypass effect by physically occupying your stomach, leaving only 20% available space for 10-16 hours. So you'll eat 50% less, and can spare your body as much as 2,000 unnecessary calories a day without feeling any urge to overeat. That equals 15 pounds a month.

PX 1, Att. V2 (114); see also Att. V3 (114).

The sites also tout the efficacy and safety of their products when used by children as young as six years old. Defendants claim that “many children have used the Formula successfully and safely,” with the same “gastric bypass effect”:

Roca Labs Natural Formula can help your child lose weight safely and naturally. Its active ingredients are natural healthy fibers, and it's safe for children ages 6 and up with a parent's supervision. It works by physically expanding in the stomach to leave only a very limited space available for food intake. Throughout the day, your child will eat HALF the food they used to, without hunger. The Formula has almost no flavor and adapts to the taste of your child's favorite non-carbonated, non-dairy drink.

PX 1, Att. E (029); see also Att. E (034-35).

Defendants also expressly claim their products' benefits are scientifically proven, stating, for example, that the Formula “has been used in Europe for 6 years, and is scientifically proven to have 90% success rate.” PX 1, Att. (091). See also PX 1, Att. V2 (114). Their webpages titled “Letter to your doctor” (PX 1, Att. F (039-42)) and “Medical Evidence for Success” (PX 1, Att. Q (0963)) feature a physician, Ross Finesmith, extolling the products' weight loss benefits based on his patients' and his own use. The

pages refer to “multiple medical studies” or “~~read~~ and scientific research” that supposedly prove the weight-loss benefits of the Formula~~ix~~ PX 1, Att. F (039); Att. Q (097). Indeed, nearly every aspect of the websites’ text ~~images~~—from the name Roca “Labs,” photos of lab workers, and caduceus symbols, to ~~reference~~ FDA approval of an ingredient—fortify the net impression that their ~~weight~~ loss claims are scientifically ~~proven~~. See, e.g., PX 1 Att. A (008-10), Att. B (012, 015-16), ~~Att~~E (029), Att. L (062), Att. M (067), Att. O (085-89); Att. V4 (114) at 2:04-2:25.

Unfortunately for consumers, Defendants ~~is~~ simply selling common, dietary fibers with exaggerated claims at a ~~grossly~~ inflated cost. Their ~~weight~~ loss claims lack any scientific basis, and are ~~often~~ flat out false. The FTC ~~retained~~ Dr. Steven Heymsfield, an expert in obesity treatment and ~~weight~~ loss, who reviewed information on Roca Labs’ websites about the products and their ~~ingredients~~, as well as numerous other published scientific articles on weight loss. PX ~~¶¶~~ 9-10 (693-95). He ~~found~~ no reliable scientific evidence to support Defendants’ ~~weight~~ loss claims of 21 pounds a month, or 100 pounds in seven to ten months~~d~~. ~~¶¶~~ 12-13 (696). According to Dr. Heymsfield, substantiating Defendants’ ~~weight~~ loss ~~claims~~ would require well-designed and properly conducted human clinical trials on Roca Labs’ actual products

Defendants will likely argue that some fibers in their products have been studied individually and shown to cause some weight loss; therefore aggregating those results supports their claims. But Dr. Heymsfield reviewed weight-loss studies on the individual ingredients and found very few that showed any effect. None of the results could in any way support the Defendants' extravagant claims. For example, clinical trials on glucomannan, one of the fibers in Roca Labs Formula, do not show weight loss comparable to Defendants' ad claims, and many show no weight loss at all:

The greatest weight loss reported in any trial that I am aware of, for glucomannan, was in the neighborhood of three and a half pounds in a month net of placebo, and those results were of questionable validity ... Meanwhile, at least 14 glucomannan trials that I am aware of showed less than one pound a month in weight loss, with several showing no loss at all.

Id. ¶ 59 (715). It is also invalid to assume that combining ingredients that individually may result in small amounts of weight loss will have an additive effect. ¶¶ 25, 37 (701, 704).

Because there is no reliable scientific evidence that Roca Labs users will lose substantial amounts of weight (or any weight at all), Defendants' claim that Roca Labs products have a ninety-percent success rate is also unsupported.

69-72 (717-18). Nor is there evidence that Defendants' products are safe and effective for weight loss in children as young as six years old. This would require clinical trials on children; one cannot simply extrapolate from use of a product in adults (even if the product were shown effective in adults, which is not the case here). 74, 85 (718, 721). Yet there are no known tests in which Roca Labs products or their combinations of ingredients were specifically tested for safety on children.

payments for the products in exchange for “inspirational and convincing” before-and-after videos. PX 1, Att. K (058-59). They do not disclose (or disclose adequately) on websites, YouTube, or in the videos themselves, that consumers were offered or received substantial financial rewards for providing the testimonials. PX 1, Att. B (013-14), I (050-53), O (085), and U (113).

Defendants also operate GastricBypass.me (PX 4 ¶ 12 (488), Att. J (559), Att. K (561)), a purportedly independent website providing information about bariatric surgery and “alternatives to surgery.” PX 1, Att. S (108) includes lengthy “Surgery Failures” and “Surgical Alternatives” pages. But, in fact, Roca Labs’ products are the only “alternative” the site favorably discusses. Using seemingly objective language, the site states that its “panel of experts” concluded that Roca Labs’ weight-loss pills are trustworthy “for the most part,” and that the Roca Labs “[m]edical claims are correct[.]” PX 1, Att. T (110-11). Defendants deceptively portray this site as an objective resource for consumers seeking information on gastric bypass surgery. They never disclose the material fact that they control GastricBypass.me and that they in fact sell the Roca Labs “alternative” discussed.

C. Defendants’ Deceptive and Unfair Practices During and After Product Purchase

1. Deceptive Privacy Promises During the “Qualification,” Health Questionnaire, and Ordering Process

Defendants strongly imply that consumers who decide to buy Roca Labs products must meet stringent medical criteria, further bolstering the impression from the ads that Defendants’ overpriced fiber supplement is a medically-sanctioned weight-loss intervention. Indeed, the site’s order page titled “Qualify & Order” and has videos about the

back reward / return policy[.]” The “terms” and other referenced documents are accessible at that point via hyperlinks in the statement, but not presented in the purchase process otherwise. PX 2 ¶¶ 8-9 (153) and Att. C9 (178).

Only after Defendants ship the products consumers learn some of the onerous terms, both physical and financial, of the “procedure.” The “Roca Labs Procedure Rules & Diet” enclosure shipped with the products contradicts the advertised message of “automatic” weight loss: it turns out consumers must stick to a nine-hour “Limited Eating Interval,” drink six half-liter bottles of water per day to “maintain the gastric bypass effect” and exercise at least thirty minutes five or more times per week. PX 2, Att. D3 (185-86). A “Thanks for purchasing” insert was purchasers that “[t]here are NO returns or refunds as

any negative statements, punishable by having to pay the “full price” for the products and other legal remedies:

You agree that regardless of your personal experience with RL, you will not disparage RL and/or any of its employees, products or services. This means that you will not speak, publish, cause to be published, print, review, blog, or otherwise write negatively about RL, its products or employees in any way. This encompasses all forms of media, including and especially the internet. This paragraph is to protect RL and its current and future customers from the harm of libelous or slanderous content in any form, and thus, your acceptance of the [Terms] prohibits you from taking any action that negatively impacts RL, its reputation, products, services, management, or employees. We make it clear that RL and its Regimen may not be for everyone, and in that regard, the foregoing clause is meant to prevent “one person from ruining it for everyone.” Should any customer violate this provision, as determined by RL in its sole discretion, you will be provided with seventy-two (72) hours to retract the content in question. If the content remains, RL would be obliged to seek all legal remedies to protect its name, products, current customers, and future customers.

If you breach this Agreement, as determined by RL in its sole discretion, all discounts will be waived and you agree to pay the full price for your product. In addition, we retain all legal rights and remedies against the breaching customer for breach of contract and any other appropriate causes of action.

PX 1, Att. N (077-78). The Terms further state that “[t]he full price for your custom Regimen and RL support is \$1580.” PX 1, Att.(076). Defendants represent that customers agree to this gag clause, and to promote RLabs and its products, in exchange for a “discounted” price (i.e., to \$480 advertised price), although it is highly unlikely that consumers were aware of, or agreed to such terms. The purported “full price for the

product is disclosed, pre-purchase, only in the Terms. The two-page, large-print “Summary” of the Terms – provided customers for the first time after purchase with their orders – also states, in pertinent part:

Discount Policy. We believe in our customers and that word of mouth is the best promotion. We are here to help you. You were given a discount off the unsubsidized price of \$1580 in exchange for your agreement to promote our products and when possible share your great success with us (keep the youtube videos coming). As part of this endorsement you also agree not to write any negative reviews about RLN or our products. In the event that you do not honor this agreement, you may immediately be charged the full price of \$1,580.

PX 2 ¶ 10 (154) and Att. D1 (181).

Defendants have threatened legal action against consumers who say they will complain, or who have complained, to Better Business Bureau (“BBB”); the FTC has obtained declarations from two such consumers. PX 5 (McGaha Dec.) (670-86); PX 6 Baker Dec. (687-89). Defendants have accused consumers who seek refunds of attempted “extortion,” and even threatened criminal charges. PX 5 ¶¶ 13-14 (672-73) and Exh. A-B thereto (677-79). One customer who posted about her negative experience with Defendants’ products and return policy faced a variety of outrageous legal threats from Defendants. WordPress, which hosted the blog, notified her that Roca Labs threatened it with a lawsuit about her posts, and to shut down her blog. PX 5 ¶ 18 (673).

These are not empty threats: RLI has actually sued parties based on negative comments. The FTC is aware of at least four customers Defendants have sued for violating

substantial sums on Roca Labs products that they would not otherwise buy. Prospective consumers searching online for information on Roca Labs products prior to purchasing likely did not see much truthful negative commentary on the price, side effects, return policy, or other aspects of Roca Labs products, because those comments were suppressed via the gag clause and related threats or enforcement. As set forth below, Defendants' use of the gag clause in connection with the sale of their products causes substantial injury to current and future purchasers, and should be enjoined.

IV. LEGAL ARGUMENT

Under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), a district court may order preliminary relief needed to ~~reach~~ permanent relief possible. *FTC v. Gem Merch. Corp.* 87 F.3d 466, 469 (11th Cir. 1996). To obtain such relief, the FTC must show that (1) it is likely to succeed on the merits, and (2) injunctive relief is in the public interest. The FTC need not show irreparable injury to obtain

2003); *FTC v. Gill*, 71 F. Supp. 2d 1030, 1045 (C.D. Cal. 1999). Section 12 of the FTC Act, 15 U.S.C. § 52, prohibits the dissemination of false advertisement in order to induce the purchase of food, drugs, devices, services, or cosmetics.¹¹ A false advertisement is one that is “misleading in a material respect.” 15 U.S.C. § 52, *FTC v. Pantron I Corp*, 33 F.3d 1088, 1099 (9th Cir. 1994).

In determining whether an advertiser made deceptive claims, a court must consider the overall net impression created by the advertisement, and whether consumers acting reasonably under the circumstances would interpret it to contain a particular message. *FTC v. National Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1189 (N.D. Ga. 2008), *aff’d* 356 Fed. Appx. 358 (11th Cir. 2009) (“NUG”); *FTC v. QT*, 448 F. Supp. 2d 908, 957-58 (N.D. Ill. 2006), *aff’d*, 512 F.3d 858 (7th Cir. 2008). A claim is material if it conveys information “that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product.” *FTC v. Cyberspace.com*, 453 F.3d 1196, 1201 (9th Cir. 1996) (quoting *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984)). Express claims, deliberately-implied claims used to induce the purchase of a product, and claims that “significantly involve health” are presumed material. *Pantron I*, 33 F.3d at 1095-96; *Kraft, Inc. v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992). As set forth below, Defendants’ representations about their

¹¹ *Roca Labs Formula and Anti-Cravings* are food and/or drugs for purposes of Section 12. See *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1266, 1272 (S.D. Fla. 1999) (weight-loss supplements, including one containing glucomannan, were a food and/or drug). Courts apply the same three-prong test to determine if a party has disseminated a “false advertisement” and Section 12 violations are violations of Section 5(a). 15 U.S.C. § 52 (see *FTC v. National Urological Grp., Inc.*, 645 F. Supp. 2d 1167, 1188 (N.D. Ga. 2008), *aff’d* 356 Fed. Appx. 358 (11th Cir. 2009); *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992)).

products' efficacy for weight loss, their privacy promises, and consumers' agreement to "full price" liability are likely to mislead consumers acting reasonably, and they are material.

1. Defendants' Weight-Loss Claims (Counts I, II)

As described above in Section III.A., Defendants' advertising and websites make express claims that:

- x Use of Roca Labs products enables the user to reduce food intake by fifty percent and to lose substantial amounts of weight quickly, including as much as 21 pounds in one month, and as much as 100 pounds in seven months, and that this is scientifically proven;
- x Ninety percent of users of Roca Labs products will lose substantial amounts of weight, and that this is scientifically proven;
- x Roca Labs products are comparable or superior to bariatric surgery in providing weight-loss benefits; and
- x Roca Labs products are safe and effective for weight loss in children as young as six years old.

The record shows that these claims are deceptive.

claims, including weight-loss claims, advertiser must possess “competent and reliable scientific evidence” to have a reasonable basis to assert a claim. *Amgen v. H. J. Hoag*, 645 F. Supp. 2d at 1190QT, 448 F. Supp. 2d at 90B; *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1274 (S.D. Fla. 1999). The FTC’s expert Dr. Heymsfield states that for weight-loss claims, in the relevant scientific community, competent and reliable scientific evidence means randomized, double-blind, placebo controlled human clinical trials on the product itself. PX 7 ¶¶ 23-26 (699-702). If a claim goes even further to suggest that a product’s effectiveness or superiority has been scientifically established or proven, the advertiser must have evidence sufficient to satisfy the relevant scientific community of the claim’s truth. See *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 491 (D.C. Cir. 2015). Dr. Heymsfield states that these “scientific proof” claims about weight loss also would require such clinical trials. PX 7 ¶¶ 23-27 (699-702), ¶¶ 89-92 (722-23).

As discussed in Section III.A., above, there are no such clinical studies on their products, and any studies on an individual ingredient show relatively small amounts of weight loss over short periods of time, not the rapid and sustained pounds dropping off that Defendants promise. Nor is there any evidence comparing the results of Defendants’ products to bariatric surgery, evaluating their safety and efficacy for children. Indeed, it is simply false to say that the weight loss and excess rate claims are “scientifically proven,” since there are no studies supporting them. Moreover, these claims, which were express and involve health, are presumptively material. Indeed, it’s unlikely that consumers would spend nearly \$500 on their weight-loss products if Defendants had not made these extreme claims, promising significant weight loss where all their attempts had failed, and promoting their

products as a viable alternative to invasive and potentially dangerous surgery. That these ads generated more than \$20 million in sales confirms their importance to consumers.

2. Defendants' Representations About Gastricbypass.me and Testimonialists (Counts IV, V)

Defendants misrepresented that Gastricbypass.me is an independent, objective resource for research and information related to bariatric surgery and alternatives to bariatric surgery for weight loss, and about Roca Labs products. PX 1, Att. S-T (107-11). They fail to disclose that they own this website and are reviewing their own products. PX 4 ¶ 12, Att. J (559), Att. K (561). Defendants have also failed to disclose, or failed to disclose adequately, that they offered or paid financial compensation to people for their testimonials or other postings about Defendants' products. PX 1, Att. I (050-53), Att. U (113). Consumers would reasonably rely on these material misrepresentations and omissions about the objectivity of the information presented to their detriment because they would be unable to give appropriate weight or credibility to the representations. Thus, Defendants' conduct is deceptive. See *FTC v. Standard Educ. Soc.*, 302 U.S. 112, 118 (1937) (use of fictitious testimonials to sell encyclopedias violated Sections 59; generally, 16 C.F.R. § 255.5 (FTC guidance that material connections between endorser and endorser that the audience may not reasonably expect must be fully disclosed)).

3. Defendants' Privacy Promises (Count V)

To induce consumers to enter private information to "qualify" to buy Roca Labs products, Defendants also represent that they keep that information confidential. PX 1, Att. M (067), Att. R (105); see also Att. N (73); PX 2, Att. C1 (162). In lawsuits filed against purchasers for violating the gag clause, however, Defendants' court filings have

included details from purchaser Health Application responses. PX 2 ¶¶ 12-13 (155), Att. M (372-73), N (397, 400, 402). In disputes over chargebacks, Defendants provided to payment processors and banks the ages, weights, heights, and sometimes purchasers' reasons why they needed and had the proper commitment to buy the products, including some of the very personal responses from consumers expressing why they needed to lose weight. PX 4 ¶ 17, Att. T (493-94). These actions blatantly violate Defendants' express privacy promise to the purchasers who reasonably entrusted their private health information, to their obvious detriment. Defendants' express privacy promises are false or misleading, and are presumed to be material, and their conduct is therefore deceptive under Section 5 of the FTC Act. See *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp.2d 502, 528 (S.D.N.Y. 2000) ("Consumer reliance on express claims is presumptively reasonable. It is reasonable to interpret express statements as intended to say exactly what they say."); *FTC v. Para-Link Int'l, Inc.*, 2001 U.S. Dist. LEXIS 17372, *13 (M.D. Fla. 2001) (preliminary injunction against sellers of paralegal training opportunities; material misrepresentations or omissions made to induce purchase of goods or services constitute deceptive acts or practices that violate Section 5(a)).¹²

¹² The FTC has taken action against companies that misrepresented their privacy practices, which resulted in settlements. See, e.g. *Facebook, Inc.*, FTC Dkt. No. C-4365 (2012) (consent order) (settling charges that website misrepresented that users could restrict profile information to specific groups); *Educational Rsch. Ctr. of Am., Inc.*, FTC Dkt. No. C-4067 (2003) (consent order) (settling charges that survey firm collected personal information from students, promised to share it only with educational institutions, but also shared with commercial entities for marketing)

see also *Cyberspace.com*, 453 F.3d at 1200-01 (9th Cir. 2006) (small-print disclosures on the back of check regarding a monthly fee not sufficient to defeat net impression that check was a refund or rebate). Moreover, claims about price are presumptively material. See *FTC v. Johnson*, 2015 U.S. Dist. LEXIS 42196, *23 (D. Ne. 2015) (information concerning cost of product is material); *FTC v. Lights of Am., Inc.*, 2013 U.S. Dist. LEXIS 133040, at *105 (C.D. Cal. 2013) (same). Defendants' "polite" representations made post-sale to purchasers to suppress their negative comments are therefore deceptive.

B. The FTC Is Likely to Succeed on the Merits of Its Unfairness Count (Count III)

Section 5 of the FTC Act prohibits "unfair" acts or practices in commerce, i.e., those that "cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(5). See, e.g., *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1363-68 (11th Cir. 1988) (affirming FTC finding that seller's unilateral breach of over 200,000 contracts was unfair). A practice that "unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking" is unfair. Unfairness Policy Statement appended to *International Harvester Co.*, 104 F.T.C. 949, 1074 (1984). This can include a seller's use, and efforts to enforce, certain contractual provisions to create such obstacles.¹³ Defendants' use of gag clauses, including notices, threats, and legal

¹³ Cf. Credit Practices Rule, Statement of Basis and Purpose, Fed. Reg. 7740, 7762-65, 7768-70 (1984) (prohibiting as unfair the use of certain provisions frequently included in consumer credit contracts; creditor threats to enforce them were commonplace; substantial injury caused by practices which flowed from inclusion of provisions in contracts).

Negative information would be especially useful for prospective Roca Labs purchasers in light of Defendants' deceptive product claims. By depriving prospective purchasers of truthful, critical customer accounts about their products and practices, Defendants' gag clause practices enable them to reduce the harm to their reputation even after they continually misrepresent the effectiveness of their goods. They have therefore likely been able to make sales they would have otherwise made, and charge their customers higher prices than they might have otherwise.¹⁵

Defendants recognize that negative reviews undermine their carefully crafted marketing campaign of promoting only positive information. They have devoted significant resources to suing a review site for allegedly inducing breaches of the gag clause (PX 2, Att. F (200-04, 222-31, Att. G (266)), suing purchasers for allegedly breaching it, threatening other purchasers for saying that they will complain publicly, and warning all purchasers post sale via package inserts that they are contractually bound not to make negative comments. These actions, on their face, evidence the fact that leakage of negative purchaser information into the marketplace harms the Defendants' business by reducing the volume of product that they can deceptively sell at a premium. They clearly believe that (and behave as if) negative purchaser comments cause, or are likely to cause, other consumers to doubt their deceptive

¹⁵ Cf. Statement of Basis and Purpose, Advertising of Ophthalmic Goods and Services, Fed. Reg. 23,992, 24,001 (1978) (“[E]conomic theory indicates that if price information is not available, or if it can be obtained only at high cost, consumers are deprived of the opportunity to satisfy their needs at the lowest available price. . . . [T]he lack of price information means that in many places prices will be higher than they would be if consumers could readily compare potential sources of supply.”).

claims, and thus be dissuaded from buying Defendants' overpriced mixture of commonly available dietary fibers.¹⁶

Similar restrictions prohibiting dissemination of truthful information by businesses aimed at competitors have been recognized to unfairly harm competition and consumers, including restraints on the dissemination of truthful information about products and services that relate to consumer health.¹⁷ The FTC has also long recognized that agreements between competitors to restrict truthful comparative advertising, including truthful criticism of competitors, harms competition in the marketplace.¹⁸ The FTC has challenged and prohibited these types of restrictions in numerous cases. See, e.g., *Polygram Holding, Inc.*, 136 F.T.C. 310, 354-55 (2003) (agreement between competing record companies barring truthful advertising of recordings not part

pressure)aff'd on other grounds635 F.3d 815 (6th Cir. 2011). Given the emergence of online reviews and other user-generated content as important sources of information on products and services in the marketplace, suppressing such information is as likely to constrain consumer choices and lead to higher prices as when companies do the same.

Research on consumer-generated online reviews supports the conclusion that restricting consumers' ability to share truthful, negative information in the marketplace, as Defendants' gag clause practices is likely to cause substantial injury. In the opinion of the FTC's expert, Professor Pavlou¹⁹, these practices are likely to negatively impact consumer welfare. PX 8 (Pavlou Dep.) 11, 16-19 (803, 806-07). Online reviews, including negative reviews, play an important informational role for consumers. PX 8 ¶¶ 13-14 (804-05). Manipulation of reviews, including their suppression, lowers their information value. PX 8 ¶ 15 (805). Defendants' practices, in Professor Pavlou's opinion, are likely to inflate consumers' perceptions of the quality of the Defendants and Roca Labs products, thus increasing consumers' willingness to buy the products and consumers are less likely to learn about previous purchasers' problems with Defendants and Roca Labs products, thus encouraging consumers to buy inappropriate products. See PX 8 ¶¶ 11, 16-19 (803, 806-07).

2. Not Reasonably Avoidable by Consumers Themselves

Defendants' gag clause practices cause injuries that are not reasonably avoidable by consumers themselves. Defendants' practices prevent customers from having any input into whether

¹⁹ Paul A. Pavlou, Ph.D., is the Milton F. Stauffer Professor of Information Technology and Strategy at the Fox School of Business at Temple University and the Fox School's Chief Research Officer and Associate Dean of Research, Doctoral Programs, and Strategic Initiatives. He is an expert in the field of information systems, with particular expertise in electronic commerce and emphasis on the study of consumer-generated online reviews. PX 8. ¶¶ 2-6 (799-800).

weight-loss success of its customers to generate business and attract new customers. To foster, encourage, and protect its customer relationship, Roca has developed a special incentive / discount program, where it rewards customers for positive reviews and to refrain from making any negative postings.” PX 21, AG (266). These gag clause practices are “injurious in [their] net effects,” “prevent consumers from effectively making their own decisions,” and “undermine[] an essential precondition to . . . free and informed consumer transaction[s].” Unfairness Policy Statement, 104 F.T.C. at 1073, 1074. Therefore, injunctive relief is necessary to halt this unfair practice.

C. Injunctive Relief is in the Public Interest

Defendants engaged in multiple deceptive business practices to the detriment of consumers nationwide. If their deceptive advertising continues during the litigation, consumers will likely pay Defendants millions of dollars more than they have to date for ineffective Roca Labs products that they could not otherwise buy. The proposed TRO is tailored to prohibit Defendants from marketing Roca Labs products using the deceptive weight-loss claims (TRO ¶ I) and endorsement practices (TRO ¶ III) described herein. These are similar to prohibitions that courts have entered in prior FTC deception cases. See, e.g. *FTC v. Health Formulas, LLC*, 2015 U.S. Dist. LEXIS 59387, *11-12, 40-43, 75 (D. Nev. 2015) (preliminary injunction against false and misleading weight-loss supplement claims); *FTC v. LeanSpa, LLC*, 2014 U.S. Dist. LEXIS 2575, *14-20 (D. Conn. 2014) (stipulated permanent injunction against deceptive weight loss and endorsement claims).

Defendants have also warned, threatened, and sued consumers for sharing, or telling Defendants that they will share, negative information about the Defendants and their

products, including truthful non-defamatory information. As described above, this conduct causes substantial injury. The Court should halt Defendants' unfair campaign to whitewash their reputation by suppressing purchasers' negative reviews and posts. Paragraph II(a) of the proposed TRO would prohibit this suppression of truthful information to gain an unfair advantage over consumers and distort their decisionmaking.

The Court should also enjoin Defendants from claiming that consumers would be liable for the "full" price of Roca Labs products if they speak out or breach the Terms. This pernicious falsehood is likely to chill consumers from publicly criticizing Defendants out of fear that Defendants will summarily impose significant financial liability on them. TRO Paragraph II(b) would halt this deception and deprive Defendants of its deterrent value.

Defendants without regard to Defendants' Terms of Health Formulas 2015 U.S. Dist. LEXIS 59387, at *103-04 (noninterference with consumer witnesses).

Proposed TRO Paragraph IV would bar Defendants from gratuitously disclosing purchasers' private health information in direct violation of their express promises made to induce consumers to do business with them. *FTC v. Wyndham Worldwide Corp.*

entities (TRO ¶ VII), order distribution and service on third parties (TRO ¶¶ IX, X), and scheduling and service matters relating to this (TRO ¶¶ XII-XV). Courts in other cases alleging FTC Act violations have granted similar, and often more extensive, relief. See, e.g., *Health Formula*, 2015 U.S. Dist. LEXIS 59387, at *78-80 (asset freeze), *83 (financial statements), *85-86 (consumer reports), *86 (record preservation), *104-07 (order distribution, service order, correspondence with FTC).

D. Defendants Juravin and Whiting Are Personally Liable

Individuals with “some knowledge” of a corporate entity’s FTC Act violations are liable if they directly participate in, or have the authority to control, the violations. *AB Mktg.*, 746 F.3d at 1233; *FTC v. Windward Mktg., Ltd.*, 1997 U.S. Dist. LEXIS 17114, *38 (N.D. Ga. 1997). Juravin’s and Whiting’s formal roles in RLI and RLNU, described in Section II.B., above, raise the presumption that they each have or have had the necessary authority to control the unlawful conduct alleged in this case.²⁰ See *Windward* at *38-39 (“An individual’s status as a corporate officer gives rise to a presumption of ability to control a small, closely-held corporation.”). Authority to control may be established by active involvement in business affairs and the making of corporate policy and by evidence that the

companies (PX 4 ¶ 13 (488-90)); registering trademarks (PX 4 ¶ 6 (484-85)); paying for search advertising (PX 4 ¶ 13(c-d), 14(b-c)(e) (489-91)); registering domain names (PX 4 ¶ 12 (486-88)); and obtaining merchant bank services to process credit card payments (PX 4 ¶¶ 14(a), 17 (490, 492)). Bank and credit card statements for RLI, RLNU, and related company accounts have routinely been directed to home addresses. PX 4 ¶¶ 13-14 (488-90). A former RLI employee has testified that Juravin trained employees about how to respond to customer inquiries and refund requests and instructed her to lie about her personal weight loss while using Roca Labs products when speaking to customers. PX 2, Att. K (313-15). Juravin has provided sworn verification and affidavits supporting RLI filings describing Defendants' gain cause practices. PX 2, Att. G (280), Att. H (285-88), Att. J (307-09), Att. M (385), Att. N (455), and PX Att. H (537-38). Given the limited number of Roca Labs products and sales channels, the consistency of deceptive Roca Labs advertising claims over several years (compare PX 4, Att. C (504) and PX 2, Att. K (319-21) to PX 1, Att. B (012-18), Att. C (020-21), and Att. F (091-93)), it is reasonable to infer from

Whiting's own recently-filed declaration in other litigation relating to Defendants' gag clause practices (PX 2, Att. E (197-98)) and other documents attributed to him, evidence his active involvement in the companies' affairs, and knowledge of the deceptive claims. Indeed, in letter to a payment processor in 2013, stated that RLI's company policy is to reinvest potential profits "to increase our sales and establish our reputation as the premiere provider of the nonsurgical alternative to gastric bypass surgery" and "using every available means of informing the public of our product as its proven benefits." PX 4, Att. R (642). This statement clearly indicates his knowledge of the core advertising message and specific weight-loss claims challenged here. Thus, Whiting is also likely individually liable for RLI and RLNU's corporate violations.

V. CONCLUSION

For the foregoing reasons, Plaintiff requests that the Court enter the attached TRO and Order to Show Cause, halting Defendants' deceptive and unfair conduct.

Date: September 24, 2015