

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	Case No.
)	
v.)	
)	
DLXM LLC , also d/b/a DLX Marketing,)	
a New York limited liability company, and)	
)	
MICHAEL VOLOZIN , a/k/a Mikhail Volozin,)	
individually and as an officer or)	
director of DLXM LLC,)	
)	
Defendants.)	

**PLAINTIFF FEDERAL TRADE COMMISSION'S
MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF ITS MOTION FOR A TEMPORARY RESTRAINING
ORDER WITH ASSET PRESERVATION, AN ACCOUNTING, AND
OTHER EQUITABLE RELIEF AND ORDER TO SHOW CAUSE
WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

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INTRODUCTION

Defendants Michael (a/k/a Mikhail) Volozin (“Volozin”) and DLXM LLC (also d/b/a DLX Marketing) (“DLXM”) (collectively, the “Defendants”) deceptively advertise purported weight-loss products on the Internet, using fake news stories and false claims about the products’ effectiveness. Through this deceptive advertising, Defendants steer consumers to third-party merchants that pay Defendants for each consumer that clicks on the websites or purchases the products. The FTC brings this action to stop this deceptive advertising scheme and to prevent Defendants from dissipating assets to preserve this Court’s ability to order effective final relief.

Since at least early 2010, Defendants have deceptively advertised purported weight-loss products containing acai berry and purported colon cleanse products through websites designed to look like legitimate news reports. Typically, Defendants’ websites, with names such as Channel 8 Health News and Consumer Digest Weekly, prominently display the logos of major news sources, such as CNN and Fox News, followed by a “reporter’s” first-person account of her use of the featured dietary supplements. The “reporter” claims that by using the featured products, and without otherwise changing her diet and exercise, she experienced dramatic weight-loss of twenty-five pounds in four weeks. Throughout Defendants’ websites are links to further websites where consumers can order the advertised weight-loss products. The bottom of Defendants’ site contains comments and other testimonials about the products from alleged “consumers,” describing satisfactory results they supposedly obtained.

Nearly everything about Defendants’ sites is fake. There is no reporter, no investigation of the featured products, no dramatic weight loss, no satisfied customers who left comments, and no affiliation with a reputable news source. The photographs of the “reporters” are copied from other, legitimate news sources. The comments are manufactured. The weight loss claims are

not only false, but impossible: the amount of weight loss in the time frame and manner described simply cannot be achieved. Moreover, the sites' owners (the Defendants) are not news organizations and are not independent from the merchants of the featured products. Instead, the Defendants are affiliate marketers who receive commissions for luring consumers to the merchants' sites.

Thus, Defendants' fake news reports and false weight-loss claims violate Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a) and 52. Due to the fraudulent and ongoing nature of Defendants' advertisements, the FTC seeks immediate injunctive relief pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), consisting of: (1) an immediate halt to Defendants' deceptive advertising campaign; (2) an order preserving Defendants' assets; (3) an accounting of Defendants' assets; and (4) limited expedited discovery relating to Defendants' business assets and records.

STATEMENT OF FACTS¹

I. DEFENDANTS FALSELY CLAIM THAT THE ACAI BERRY PRODUCTS WILL RESULT IN RAPID AND SUBSTANTIAL WEIGHT LOSS.

On their websites, Defendants make false and unsubstantiated claims about the purported weight loss properties of products containing acai berry, alone or in combination with colon

¹ An Appendix of exhibits is filed in support of the FTC's Motion for a Temporary Restraining Order ("TRO") and incorporated herein by reference. Citations to the Appendix are "Exhibit [number], Attachment [letter] at [bates number]." Included in the Appendix are declarations from: (1) Robert F. Kushner, M.D. (Exh. 1); (2) FTC Investigator Florence M. Hogan (Exh. 2); (3) FTC Investigator Douglas M. McKenney (Exh. 3); (4) William G. Cronberger, Custodian of Records for Pulse 360, Inc., a national advertising network through which Defendants placed ads for this scheme (Exh. 4); (5) Debra M. Miller of Microsoft Corporation, whose search engine, Bing, is used by Defendants to place ads (Exh. 5); and (6) GoDaddy.com, Inc., the entity through which Defendants have registered their deceptive websites (Exh. 6). Exhibit 7 to the Appendix contains copies of TROs entered in prior FTC cases in this District and in the Southern District of New York.

cleanse products.² Through their investigative “reporters,” Defendants present detailed, first-person accounts about the purported benefits of the products featured on Defendants’ news sites. (See Exh. 2 at ¶¶ 7-10, 12-14, Att. D-J; Exh. 3 at ¶¶ 7-13, 15-16, Att. B-J, L-M). The “reporters” claim, for example, that they lost up to twenty-five pounds in four weeks simply by using a combination of the featured Acai Berry Products and Colon Cleanse Products, without reducing caloric intake or increasing physical activity.³

Defendants provide the following detailed testimonial from a featured investigative “reporter,” describing her week-to-week diary using a combination of the Acai Berry Products and the Colon Cleanse Products:

- **Week One** - After one week on the diet using both products I was surprised by the dramatic results. . . . On day 7 I got on the scale and couldn’t believe my eyes. I had lost 9 lbs. . . .
- **Week Two** - . . . I still managed to lose another 7 lbs, putting me at an unbelievable 16 lbs of weight loss, in just 2 weeks. I must admit that I’m starting to believe that this diet is more than just a gimmick.
- **Week Three** - After 3 weeks all my doubts and skepticism had absolutely vanished! I am down, 2 full dress sizes, after losing another 6 lbs. And I still have a ton of energy. . . .
- **Week Four** - After the fourth week, my final results were shocking. I lost an unbelievable 25 lbs since starting the Acai LeanSpa and ColoThin Advanced Cleanse diet! Actually everyone at Channel 8is [sic] kicking

² The purported weight loss products containing acai berries featured on Defendants’ websites include, but are not limited to, Acai Liquid Boost, Acai Slim Maxx, Acai LeanSpa, LeanSpa Acai, Acai Ultra, Acai Thermo, Acai Fuel Extreme, and Acai Advanced Trim (collectively, the “Acai Berry Products”). (See Exh. 2, Att. D at FTC-DLXM 37, Att. F at FTC-DLXM 70, Att. J at FTC-DLXM 111; Exh. 3, Att. B at FTC-DLXM 207, Att. C at FTC-DLXM 212, Att. E at FTC-DLXM 219, Att. G at FTC-DLXM 233, Att. H at FTC-DLXM 247, Att. L at FTC-DLXM 293). The purported colon cleanse products featured on Defendants’ websites include, but are not limited to, Digest It, ParaSlim, ColoThin Advanced Cleanse, ColoTrim, NatraPure, South Beach Java, and Advanced Trim (collectively, the “Colon Cleanse Products”). (See generally *id.*).

³ See Exh. 2, Att. J at FTC-DLXM 112; Exh. 3, Att. B at FTC-DLXM 208, Att. C at FTC-DLXM 213, Att. E at FTC-DLXM 220, Att. F at FTC-DLXM 224, Att. H at FTC-DLXM 248, Att. J at FTC-DLXM 277, Att. L at FTC-DLXM 294, Att. M at FTC-DLXM 297.

themselves for not having volunteered to be the guinea pig. . . . Given the results and the added health benefits I will continue to use the products indefinitely!

- **I Lost 25 lbs in 4 Weeks, No Special Diet, No Intense Exercise**
- **Conclusion:** Like us, here at Channel 8, you might be a little doubtful about the effects of this diet, but you need to try it for yourself; the results are real. . . . Follow the links to the free trials I have provided and know that you are getting a quality product that works; no strings attached!

(Exh. 3, Att. B at FTC-DLXM 208-09; *see also id.*, Att. C at FTC-DLXM 212-13, Att. E at FTC-DLXM 219-20, Att. F at FTC-DLXM 224-25, Att. H at FTC-DLXM 248-49, Att. J at FTC-DLXM 277-78; *see generally id.*, Att. L at FTC-DLXM 294-95, Att. M at FTC-DLXM 297-98).⁴

Immediately following the investigative reporter’s dramatic weight loss results, Defendants provide links to the featured Acai Berry Product and the featured Colon Cleanse Product, enticing consumers to “Click Here To Get a FREE TRIAL.” (*See generally id.*).

Designed to appear to be independent statements by ordinary consumers, the “comments” following the investigative “reports” buttress the purported weight-loss claims contained in the “reports” with statements such as:

- **Stephen says:** 4:24 PM January 19, 2011
I’ve been seeing acai diets all over. I even heard my mom talking about this diet a few days ago since one of her friends has lost like 12 lbs in the first 15 days! I definitely have to try this. thanks [sic].

⁴ These purported “results” from investigative “reporter” Julie Ayers are the same results presented by other “reporters” for other Acai Berry Products and Colon Cleanse Products. The only substantive change in the text of the results typically is the name of the featured products. (*Compare* Exh. 3, Att. B at FTC-DLXM 207-09 *with* Att. C at FTC-DLXM 212-13, Att. D at FTC-DLXM 215-16, Att. E at FTC-DLXM 219-220, Att. F at FTC-DLXM 223-25, Att. G at FTC-DLXM 233-35, Att. H at FTC-DLXM 247-49, Att. I at FTC-DLXM 262-64, Att. J at FTC-DLXM 276-78).

• **Davis says:**

6:05 PM January 19, 2011

This stuff is amazing! My best friend Jessica did the same diet and lost an incredible amount of weight . . . [sic] i couldn't believe it and had to do some research on my own which is how I found this news article. I can't believe they are offering free trials!⁵

The “reports” and the “comments,” both individually and taken together, make false and unsubstantiated claims about the purported weight loss properties of the Acai Berry Products.

Defendants’ weight loss claims are unsupportable – such dramatic weight loss is impossible, particularly based solely on the ingestion of the Acai Berry Product and the companion Colon Cleanse Product, according to Dr. Robert F. Kushner, an expert in the fields of obesity, obesity-related health risks, and body weight management and reduction. (*See generally* Exh. 1 at ¶¶ 6-10).⁶ Based on his review of the medical literature regarding weight loss and on his general knowledge of scholarship in the field, Dr. Kushner knows of no scientific studies that have established that acai berries are effective in causing weight loss. (*Id.* at ¶ 7). Dr. Kushner declared that “there is no credible medical evidence, or any medical evidence at all, to support the efficacy of acai berries as a weight loss agent in people.” (*Id.*). Specifically, Dr. Kushner stated that “acai berries will not cause substantial weight loss, regardless of the quantity, concentration, or purity of the berries consumed. In fact, it is my opinion that acai berries will not cause any weight loss absent a reduction in caloric intake or an increase in exercise.” (*Id.* at

⁵ Exh. 2, Att. F at FTC-DLXM 72; *see generally* Exh. 2, Att. D at FTC-DLXM 39, Att. H at FTC-DLXM 98; Exh. 3, Att. B at FTC-DLXM at 209-10, Att. C at FTC-DLXM 213-14, Att. D at FTC-DLXM 216-17, Att. E at FTC-DLXM 220-21, Att. F at FTC-DLXM 225-26, Att. G at FTC-DLXM 235-36, Att. H at FTC-DLXM 249-50, Att. I at FTC-DLXM 264-65, Att. J at FTC-DLXM 278.

⁶ Dr. Kushner received his Doctor of Medicine degree from the University of Illinois, trained as a Fellow in Clinical Nutrition at the University of Chicago Hospitals, and received a Master’s degree in Clinical Nutrition and Nutritional Biology from the University of Chicago. (Exh. 1 at ¶ 2). Dr. Kushner is a Professor of Medicine at Northwestern University Feinberg School of Medicine, directs a clinic on obesity at Northwestern, is a member of several professional societies focusing on nutrition and obesity, and has written several articles on obesity and weight management. (*Id.* at ¶¶ 1, 3-4).

¶ 8). For the reasons detailed in Dr. Kushner's declaration, Defendants' efficacy claims about the Acai Berry Products are false and wholly unsubstantiated.

II. DEFENDANTS DECEPTIVELY DESIGN THEIR WEBSITES TO LOOK LIKE OBJECTIVE NEWS REPORTS TO LURE CONSUMERS INTO ORDERING PRODUCTS.

In order to shroud these false promises about acai berries' weight loss properties with a cloak of legitimacy, Defendants created websites that look like objective news reports, including consumerdigestweekly.com, health8news.com, and health8news.net. (Exh. 6, Att. A at FTC-DLXM 376, 378-79, 381). Using these domain names, Defendants established two primary fake news sites - Consumer Digest Weekly and Channel 8 Health News (collectively, Defendants' "fake news sites") – that are designed to generate interest in the purported weight-loss products containing acai berry.

Defendants' fake news sites contain a number of representations that convey the net impression to consumers that the sites contain legitimate, investigative news reports. For example, Defendants' Channel 8 Health News site claims to be the "Leader in Today's Health News."⁷ Defendants' fake news sites often include the names and logos of major broadcast and cable television networks, such as CNN or Fox News, implying that the reports on Defendants' sites have been seen on these networks.⁸ Defendants, however, are not affiliated with these major broadcast and cable television networks, and their acai berry "reports" have not appeared on these outlets. Defendants also use "newsworthy" titles such as "Acai Berry Diet Exposed:

⁷ Exh. 2, Att. E at FTC-DLXM 55, Att. G at FTC-DLXM 81, Att. I at FTC-DLXM 103; Exh. 3, Att. B at FTC-DLXM 207, Att. C at FTC-DLXM 212, Att. D at FTC-DLXM 215, Att. E at FTC-DLXM 219, Att. F at FTC-DLXM 223, Att. G at FTC-DLXM 233, Att. H at FTC-DLXM 247, Att. I at FTC-DLXM 262, Att. J at FTC-DLXM 276.

⁸ Exh. 2, Att. J at FTC-DLXM 111; Exh. 3, Att. E at FTC-DLXM 219, Att. F at FTC-DLXM 223, Att. H at FTC-DLXM 247, Att. J at FTC-DLXM 276, Att. L at FTC-DLXM 293, Att. M at FTC-DLXM 296.

Miracle Diet or Scam?” and “BREAKING NEWS: A Surprising New Way to Burn Fat Quickly!” for their investigative “reports.” (See, e.g., Exh. 3, Att. E at FTC-DLXM 219, Att. F at FTC-DLXM 223).

Defendants’ fake news sites also display professional photographs of the featured investigative “reporters” who purportedly personally have used the weight-loss products containing acai berries and the colon cleanse products on themselves. (See generally Exh. 2, Att. D-J; Exh. 3, Att. B-M). Defendants, however, simply use stock photographs for the “reporters” featured on their news sites. (See generally Exh. 2 at ¶ 21, Att. S). For example, on the Channel 8 Health News websites, Defendants use pictures of two different women for the “reporter” Julie Ayers. (See, e.g., Exh. 3 at ¶ 8, Att. C-D). The first “Julie Ayers” is actually a picture of Melissa Theuriau, a French news anchor whose image several online marketers have misappropriated. (Exh. 2 at ¶ 22, Att. T; see also Exh. 3, Att. C at FTC-DLXM 212). Moreover, Defendants use Ms. Theuriau’s photo for “reporter” Samantha Whyte on their Consumer Digest Weekly websites. (See Exh. 2, Att. J; Exh. 3, Att. M). The second “Julie Ayers” is the same photograph Defendants use for their “reporter” Karen Lische. (Compare Exh. 3, Att. D-G with Exh. 2, Att. D-I).

The “reports” themselves purport to provide objective, first-person accounts authored by the investigative “reporters.”⁹ The investigative “reporters” claim to have used the various weight loss products featured in the “reports” and experienced dramatic weight loss. The investigative “reporters” claim that they lost up to twenty-five pounds in four weeks simply by

⁹ Exh. 2, Att. D at FTC-DLXM 37-38, Att. F at FTC-DLXM 70-71, Att. H at FTC-DLXM 96-97, Att. J at FTC-DLXM 111-12; Exh. 3, Att. B at FTC-DLXM 207-09, Att. C at FTC-DLXM 212-13, Att. D at FTC-DLXM 215-16, Att. E at FTC-DLXM 219-20, Att. F at FTC-DLXM 223-25, Att. G at FTC-DLXM 233-35, Att. H at FTC-DLXM 247-49, Att. I at FTC-DLXM 262-64, Att. J at FTC-DLXM 276-78, Att. L at FTC-DLXM 293-95, Att. M at FTC-DLXM 296-98.

using the featured Acai Berry Products, alone or in combination with the Colon Cleanse Products, without changing their diets or exercising.¹⁰ The content used by the Defendants in these “reports,” however, is not original. Rather, the purported objective “reports” authored by the investigative “reporters” are all substantially similar, regardless of the product purportedly used.¹¹ Oftentimes, the only change appearing in the body of the “report” is the name of the featured products. (*Compare* Exh. 3, Att. B *with* Att. C-G).

Following the purported investigative “reports” are “comments” made to appear to be independent statements made by ordinary consumers.¹² The comments appearing after Defendants’ investigative “reports,” however, were not left by actual consumers. Rather, Defendants recycle the same phony comments from one site to the next. (*See generally id.*; *see also* Exh. 2 at ¶ 19, Att. O-R).

Throughout the fake news sites, Defendants place links to the websites of the merchants selling the featured Acai Berry Products or Colon Cleanse Products that consumers can click either to purchase the featured products or to order a “free” trial.¹³ (*See, e.g.*, Exh. 3, Att. B-G).

¹⁰ *See* Exh. 2, Att. J at FTC-DLXM 112; Exh. 3, Att. B at FTC-DLXM 208, Att. C at FTC-DLXM 213, Att. E at FTC-DLXM 220, Att. F at FTC-DLXM 224, Att. H at FTC-DLXM 248, Att. J at FTC-DLXM 277, Att. L at FTC-DLXM 294, Att. M at FTC-DLXM 297.

¹¹ *Compare* Exh. 3, Att. B at FTC-DLXM 207-09 *with* Exh. 3, Att. C at FTC-DLXM 212-13, Att. D at FTC-DLXM 215-16, Att. E at FTC-DLXM 219-220, Att. F at FTC-DLXM 223-25, Att. G at FTC-DLXM 233-35, Att. H at FTC-DLXM 247-49, Att. I at FTC-DLXM 262-64, Att. J at FTC-DLXM 276-78.

¹² *See* Exh. 2, Att. D at FTC-DLXM 39, Att. F at FTC-DLXM 72, Att. H at FTC-DLXM 98; Exh. 3, Att. B at FTC-DLXM at 209-10, Att. C at FTC-DLXM 213-14, Att. D at FTC-DLXM 216-17, Att. E at FTC-DLXM 220-21, Att. F at FTC-DLXM 225-26, Att. G at FTC-DLXM 235-36, Att. H at FTC-DLXM 249-50, Att. I at FTC-DLXM 264-65, Att. J at FTC-DLXM 278-79.

¹³ In the body of their “reports,” Defendants claim that consumers only will have to pay a nominal fee for shipping – typically \$3 - \$4. Buried within their “Terms and Conditions” appearing at the bottom of their “reports” is a statement that consumers “will be charged \$99.96 (plus s&h)” upon clicking “Submit & Confirm” on the featured products’ websites. (*See, e.g.*, Exh. 2, Att. D at FTC-DLXM 38-40, Att. F at FTC-DLXM 71-73, Att. H at FTC-DLXM 97-99; Exh. 3, Att. F at FTC-DLXM 225-26, Att. H at FTC-DLXM 249-50, Att. J at FTC-DLXM 278-80).

Defendants design the fake news sites – featuring “newsworthy” headlines, the names and logos of major broadcast and cable television networks, the professional pictures of the investigative “reporters,” the “first-hand” accounts of dramatic weight-loss, and the “comments” left by ordinary consumers – to lure consumers into purchasing the merchants’ featured products, so that Defendants can be paid a commission. The Defendants’ websites convey the net impression to consumers that Defendants’ websites are legitimate news, when they are not.

At the very bottom of the fake news “reports” appearing on the Channel 8 Health News’ sites, Defendants hide, in much smaller font, an ineffective disclaimer, buried within their “Terms and Conditions,” that admits that the website “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.”¹⁴ Consumers are unlikely to read this disclaimer because they only are able to view it well after the results of dramatic weight loss contained in the “reports,” well after they have the opportunity to click links directing them to the Acai Berry Products and the Colon Cleanse Products, and well after the purported “comments” by consumers. Defendants’ Consumer Digest Weekly website contains no disclaimer whatsoever. (Exh. 2, Att. J; Exh. 3, Att. K-M).

¹⁴ Exh. 2, Att. D at FTC-DLXM 40, Att. F at FTC-DLXM 73, Att. H at FTC-DLXM 99; Exh. 3, Att. B at FTC-DLXM 210, Att. D at FTC-DLXM 218, Att. E at FTC-DLXM 222, Att. F at FTC-DLXM at 226, Att. G at FTC-DLXM 236, Att. H at FTC-DLXM 250, Att. I at FTC-DLXM 265, Att. J at FTC-DLXM 279; *but see* Exh. 3, Att. C.

III. DEFENDANTS LURE CONSUMERS TO THEIR FAKE NEWS SITES THROUGH INTERNET MARKETING.

Defendants are affiliate marketers. Defendants do not sell these phony products. Rather, the sellers of these products (the “merchants”) pay Defendants to drive traffic to the sellers’ websites. (See Exh. 3 at ¶¶ 3-5, Att. A). Defendants seek to increase their compensation as much as possible; and thus, they use various Internet marketing techniques to drive traffic to their fake news sites in order to attract consumers to the merchants’ websites selling the featured weight-loss products. Defendants place advertisements for their fake news sites through Pulse 360, Inc. (“Pulse 360”), a company that provides online advertising services. (See Exh. 4 at ¶¶ 2, 4-5). Through Pulse 360, Defendants have placed advertisements for their fake news sites on legitimate websites such as MSNBC, the Weather Channel, and local newspapers. (See Exh. 2 at ¶ 24, Att. U at FTC-DLXM 180-85; Exh. 3 at ¶ 11, Att. H at FTC-DLXM 245; *see generally* Exh. 4 at ¶¶ 4-5). For example, when a consumer searched the word “acai” on the Seattle Post-Intelligencer’s website (SeattlePI.com), two acai berry “reports” appeared under the heading “Ads by pulse360” on the SeattlePI.com search engine web page. (Exh. 3 at ¶ 11, Att. H at FTC-DLXM 245). The mere appearance of Defendants’ acai berry advertisements on a website is an “impression.” (Exh. 4 at ¶ 4m). From March 31, 2010 through September 10, 2010, there were over 40 million impressions of Defendants’ acai berry advertisements appearing on websites including Weather.com, MSNBC.com, and others. (Exh. 2 at ¶ 24b, Att. U).

The acai berry “reports,” appearing under the heading “Ads by pulse360,” both state the following:

Acai Berry EXPOSED:
Chicago Report
Chicago Warning: Health Reporter Discovers the Shocking Truth!

(Exh. 3 at ¶ 11, Att. H at FTC-DLXM 245) (emphasis in original). To the left of these headlines is a picture of a female “reporter.” (*Id.*). Rather than being led to a real news story by a legitimate health reporter, consumers click on the link and are taken to one of Defendants’ websites, using a URL such as health8news.com, further reinforcing the impression that Defendants’ site is a legitimate news site.¹⁵ (Exh. 3 at ¶ 11).

Defendants also advertise through Microsoft Corporation (“Microsoft”) on Bing, Microsoft’s search engine. (*See* Exh. 2 at ¶¶ 28-36; Exh. 5). Microsoft sells online ad space on Bing. (Exh. 2 at ¶ 29). Similar to Pulse 360, Microsoft records the number of “impressions” and “clicks” on Defendants’ acai berry advertisements. In 2010 alone, Defendants’ acai berry advertisements appeared through Bing over 6.4 million times. (Exh. 2 at ¶ 30a; Exh. 5, Att. A). Consumers clicked on these acai berry advertisements placed by Defendants 72,125 times and were directed to Defendants’ fake news sites – health8news.com, health8news.net, and consumerdigestweekly.com. (Exh. 2 at ¶ 30b; Exh. 5, Att. A).

The merchant rewards Defendants for each visitor or customer generated by the Defendants’ fake news sites. (*See generally* Exh. 3 at ¶ 4). Typically in affiliate marketing, an affiliate is paid a percentage of the product sale that it generates (“cost per sale” or “cost per action”). (*Id.*). In other cases, an affiliate is paid based on the number of consumers that the affiliate draws to the merchant’s website (“cost per click”). (*Id.*). To determine the amount of

¹⁵ Pulse 360 uses the term “clicks” to denote the number of times consumers clicked on Defendants’ acai berry advertisements and were directed to Defendants’ websites. (Exh. 4 at ¶¶ 4i, 4n). From March 31, 2010 through September 10, 2010, consumers clicked on Defendants’ acai berry advertisements appearing through the Pulse 360 advertising network at least 19,596 times. (Exh. 2 at ¶ 24c). Pulse 360 typically charges its advertising customers on a “cost-per-click” (CPC) basis, meaning that the advertising customer pays for the ad only if, in response to the ad, a consumer clicks on the link, and is taken to the advertiser’s website. (Exh. 4 at ¶ 4o). Pulse 360 charged Volozin at least \$20,856.94 for the 19,596 clicks on the acai berry advertisements on websites including Weather.com, MSNBC.com, and others from March 31, 2010 through September 10, 2010. (Exh. 2 at ¶ 24d).

reward for the affiliate, the merchant or the affiliate network tracks the number of consumers drawn to the merchant's site by the affiliate and/or the product purchases made by those consumers that can be attributed to the affiliate. (*Id.*).

ARGUMENT

I. SECTION 13(B) OF THE FTC ACT GIVES THIS COURT THE AUTHORITY TO ENJOIN VOLOZIN AND DLXM FROM DECEIVING CONSUMERS.

The FTC, an independent government agency, enforces the FTC Act, 15 U.S.C. § 41 *et seq.* Section 5 of the FTC Act prohibits unfair and deceptive acts and practices in or affecting commerce. 15 U.S.C. § 45. Section 13(b) of the FTC Act gives this Court the authority to grant the preliminary injunctive relief requested: (1) enjoining Defendants from deceiving consumers through their deceptive Internet advertising campaign; (2) preserving Defendants' assets; (3) ordering an accounting of Defendants' assets; and (4) providing limited expedited discovery relating to Defendants' business assets and records. 15 U.S.C. § 53(b).

Section 13(b) provides that "in proper cases the Commission may seek, and, after proper proof, the court may issue, a permanent injunction" against violations of "any provision of law enforced by the Federal Trade Commission." 15 U.S.C. § 53(b). *See, e.g., FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468 (11th Cir. 1996). This "unqualified grant of statutory authority . . . carries with it the full range of equitable remedies. . . ." *Id.*; *see also FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989). Thus, under Section 13(b), the Court may order temporary or preliminary relief that is necessary to preserve the possibility of effective final relief, including a TRO enjoining practices and expedited discovery, as requested here. *See Gem Merch.*, 87 F.3d at 468-70 (court's authority to exercise full equitable powers is appropriate to enforce consumer protection laws); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432 (11th Cir.

1984); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113-14 (9th Cir. 1982). Moreover, Section 13(b) authorizes courts to order relief beyond what is sought here. *See generally* *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 66 n.5-9 (2d Cir. 2006) (recognizing that Section 13(b) has been construed as implicitly authorizing ancillary relief including asset freezes).

Courts in this Circuit, including the Eastern District of New York, repeatedly have granted the FTC's requests for TROs and other preliminary relief pursuant to Section 13(b). *See* *FTC v. Consumer Health Benefits Ass'n*, No. 10-3551 (E.D.N.Y. Aug. 3, 2010); *FTC v. Classic Closeouts, LLC*, No. 09-2692 (E.D.N.Y. Jun. 29, 2009); *FTC v. Edge Solutions, Inc.*, No. 07-4087 (E.D.N.Y. Oct. 12, 2007) (TRO also granting expedited discovery); *FTC v. Medical Billers Network, Inc.*, No. 05-2014 (S.D.N.Y. Feb. 22, 2005) (TRO also granting expedited discovery); *FTC v. CHK Trading Corp.*, No. 04-8686 (S.D.N.Y. Nov. 10, 2004) (preliminary injunction order also granting expedited discovery and immediate accounting); *FTC v. Epixtar Corp.*, No. 03-8511 (S.D.N.Y. Oct. 29, 2003); *FTC v. Star Credit Servs., Inc.*, No. 02-4500 (E.D.N.Y. Aug. 16, 2002) (TRO also granting expedited discovery).¹⁶ Exercise of this broad, equitable authority is appropriate where, as here, the public interest is at stake. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *United States v. Laerdal Mfg. Corp.*, 73 F.3d 852, 857 (9th Cir. 1995); *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989).

¹⁶ *See also* the following cases where courts granted the FTC's requests for TROs and other preliminary relief: *FTC v. Quebec, Inc.*, No. 01-1872 (N.D.N.Y. Dec. 10, 2001) (TRO also granting expedited discovery); *FTC v. Blumstein*, No. 01-8987 (S.D.N.Y. Oct. 17, 2001); *FTC v. R & R Consultants, Inc.*, No. 01-1537 (N.D.N.Y. Oct. 10, 2001); *FTC v. Guzzetta*, No. 01-2335 (E.D.N.Y. Apr. 17, 2001); *FTC v. Ontario, Ltd.*, No. 00-906 (W.D.N.Y. Oct. 23, 2000, Nov. 2, 2000) (TRO also granting expedited discovery); *FTC v. First Capital Consumer Membership Servs., Inc.*, No. 00-905 (W.D.N.Y. Oct. 23, 2000); *FTC v. Navestar D.M., Inc.*, No. 00-6269 (W.D.N.Y. June 12, 2000); *FTC v. Mktg. & Vending Concepts, LLC*, No. 00-1131 (S.D.N.Y. Mar. 30, 2000) (TRO also granting expedited discovery); *FTC v. Target Vending Sys.*, No. 00-955 (S.D.N.Y. Feb. 11, 2000). (*See* Exh. 7).

II. THE FTC'S EVIDENCE MEETS THE STANDARD FOR ENTRY OF A TRO AND PRELIMINARY INJUNCTION TO STOP DEFENDANTS' FALSE CLAIMS.

A. The FTC Only Needs to Demonstrate Likely Ultimate Success on the Merits and a Tipping of the Balance of the Equities.

In the Second Circuit, this Court can grant preliminary injunctive relief under the FTC Act if: (1) the FTC is likely to ultimately succeed on the merits and (2) if the balance of equities tips in the FTC's favor. *See FTC v. Verity Int'l, Ltd.*, 194 F. Supp. 2d 270, 281 (S.D.N.Y. 2002); *FTC v. Crescent Publ'g Group, Inc.*, 129 F. Supp. 2d 311, 319 (S.D.N.Y. 2001); *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1090 (S.D.N.Y. 1977); *see also SEC v. Unifund Sal*, 910 F.2d 1028, 1036-37 (2d Cir. 1990); *United States v. Siemens Corp.*, 621 F.2d 499, 505 (2d Cir. 1980). Both factors overwhelmingly support the FTC's request here. The FTC proceeds "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest." *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975). Unlike in a private litigation, irreparable injury is presumed from violating Sections 5 and 12 and need not be proved. *Unifund Sal*, 910 F.2d at 1036; *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028-29 (7th Cir. 1988).

The requested preliminary relief sought here – an immediate halt to Defendants' deceptive advertising campaign, a preservation of Defendants' assets, an accounting, and limited expedited discovery – is intended to preserve the status quo by ensuring that the Defendants stop making false representations on their purported news sites and preserve assets and evidence. *See FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718, 720 (5th Cir. 1982) (ancillary relief granting preliminary injunction and preventing dissipation of assets or funds is used to preserve the status quo). Where, as here, the FTC only seeks prohibitory relief to preserve the status quo, the FTC

is only required to show “preliminarily, by affidavits or other proof, that it has a fair and tenable chance of ultimate success on the merits.” *Lancaster Colony Corp.*, 434 F. Supp. at 1090; *see also Unifund Sal*, 910 F.2d at 1040. As discussed below, the FTC has more than a “fair and tenable chance” of demonstrating that Defendants violated Sections 5 and 12 of the FTC Act and that a permanent injunction, including disgorgement or monetary restitution, is warranted.

1. The FTC Has Demonstrated a Likelihood of Success on the Merits that Defendants Violated Sections 5 and 12 of the FTC Act By Making False and Unsubstantiated Weight Loss Claims and By Using Fake News Sites.

Defendants violated Sections 5(a) and 12 of the FTC Act. Section 5(a) prohibits unfair or deceptive acts or practices in or affecting commerce. 15 U.S.C. § 45(a). An act or practice is deceptive, and thus in violation of Section 5(a), if it is likely to mislead the consumer acting reasonably under the circumstances to the consumer’s detriment. *See World Travel Vacation Brokers*, 861 F.2d at 1029; *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 104-05 (1984). Proof of actual consumer injury is not required. *In re Novartis Corp.*, No. 9279, 1999 FTC LEXIS 63, at *26 (May 27, 1999); *In re Kraft, Inc.*, 114 F.T.C. 40, 134 (1991). Moreover, the FTC does not have to prove the Defendants’ intent to defraud or deceive, or bad faith. *FTC v. Five-Star Auto Club*, 97 F. Supp. 2d 502, 526 (S.D.N.Y. 2000); *Crescent Publ’g Group*, 129 F. Supp. at 321, n.63.

Section 12(a) of the FTC Act, 15 U.S.C. § 52(a), prohibits the dissemination of any false advertisement in or affecting commerce for the purpose of inducing, or which is likely to induce, the purchase of food, drugs, devices, services, or cosmetics. For the purposes of Section 12, the Acai Berry Products are either a food or drug, as defined in Sections 15(a), (c), and (d) of the FTC Act, 15 U.S.C. § 55(a), (c), and (d) (defining “food” as, *inter alia*, “articles used for food or

drink for man or other animals” and “drug” as, *inter alia*, “articles (other than food) intended to affect the structure or any function of the body of man or other animals”).

To prevail under Sections 5(a) and 12, the FTC must demonstrate that: (1) there is a representation, omission, or practice that (2) is likely to mislead consumers acting reasonably under the circumstances and (3) is material. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994) (citing *In re Cliffdale Assocs.*, 103 F.T.C. at 164-65); *see also Verity*, 443 F.3d at 63; *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001); *Crescent Publ’g Group*, 129 F. Supp. 2d at 321; *Five-Star Auto Club*, 97 F. Supp. 2d at 526; *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 258 (E.D.N.Y. 1998). Defendants’ representations that consumers could lose up to twenty-five pounds in four weeks and that the results were verified by an independent news reporter’s experience and independent consumers’ experience are all false. Such claims are material to consumers because the main attribute advertised is weight loss and thus involves an issue important to consumers and likely to affect consumers’ product choice. *See Five Star Auto Club*, 97 F. Supp. 2d at 529 (quoting *Kraft, Inc., v. FTC*, 970 F.2d 311, 322 (7th Cir. 1992)); *Minuteman Press*, 53 F. Supp. 2d at 258; *see FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1272 (S.D. Fla. 1999). Moreover, claims involving “health, safety, or other areas with which the reasonable consumer would be concerned, [such as] . . . the purpose, safety, efficacy, or cost of the product . . . [or] its durability, performance, warranties, or quality,” such as the ones made here, also are presumed to be material as a matter of law. *Cliffdale Assocs.*, 103 F.T.C. at 190 (FTC’s Policy Statement on Deception); *see also Pantron I*, 33 F.3d at 1095-96 (citing *Cliffdale Assocs.* standard with approval); *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000).

Defendants’ advertisements violate the FTC Act in three ways. First, Defendants’ false and unsubstantiated weight loss claims violate Sections 5 and 12. False advertising includes

claims that have “a tendency to mislead, confuse or deceive.” *FTC v. Bronson Partners, LLC*, 564 F. Supp. 2d 124 (D. Conn. 2008) (quoting *Schering Corp. v. Pfizer, Inc.*, 189 F.3d 218, 229 (2d Cir. 1999)). Unsubstantiated claims lack a reasonable basis. *In re Thompson Medical Co.*, 104 F.T.C. 648, 818-19 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986) (objective product claims made without a “reasonable basis” are likely to mislead and are “deceptive” within the meaning of Section 5(a)); *In re National Dynamics Corp.*, 82 F.T.C. 488, 549-50 (1973) (making performance based claims without a reasonable basis in fact may be a deceptive act or practice); *In re Pfizer, Inc.*, 81 F.T.C. 23, 86 (1972) (making an affirmative product claim without a “reasonable basis” violates the FTC Act). See *FTC Policy Statement Regarding Advertising Substantiation* (“*Substantiation Statement*”), appended to *Thompson Medical Co.*, 104 F.T.C. at 839. Here, Defendants repeatedly have made materially false and unsubstantiated claims that the Acai Berry Products, alone or in combination with the Colon Cleanse Products, cause rapid and substantial weight loss and enable users to lose as much as twenty-five pounds in four weeks without the need to reduce caloric intake or increase physical activity. According to Dr. Kushner, “there is no credible medical evidence, or any medical evidence at all, to support the efficacy of acai berries as a weight loss agent in people.” (Exh. 1 at ¶ 7). Dr. Kushner further states that “acai berries will not cause any weight loss absent a reduction in caloric intake or an increase in exercise” and that this “holds true even if acai berries are consumed together with ingredients or products that have a laxative effect such as coffee or colon cleansers.” (*Id.* at ¶¶ 8, 10). Therefore, Defendants’ claims relating to the purported weight-loss benefits of the Acai Berry Products, alone or in combination with the Colon Cleanse Products, are false and unsubstantiated.

Second, Defendants violate the FTC Act by falsely claiming that their websites are objective news “reports,” that objective news “reporters” have performed independent tests demonstrating the effectiveness of the featured products, and that the “comments” following the investigative “reports” express the views of independent consumers. In determining whether Defendants have engaged in deception through their fake news sites, the Court must consider the net impression Defendants’ advertisements have on consumers. *See Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976); *FTC v. Atlantex Assocs.*, No. 87-0045, 1987 U.S. Dist. LEXIS 10911, at *29 (S.D. Fla. Nov. 25, 1987), *aff’d*, 872 F.2d 966 (11th Cir. 1989); *Thompson Medical Co.*, 104 F.T.C. at 788-90. Consumers are entitled to interpret reasonably each representation as meaning precisely what it purports to mean, and are under no obligation to doubt the veracity of a claim. *See Thompson Medical Co.*, 104 F.T.C. at 788 and n.6. Featuring “newsworthy” headlines, the names and logos of major broadcast and cable television networks, professional pictures of investigative “reporters,” “first-hand” accounts of dramatic weight loss, and the “comments” left by ordinary consumers, Defendants’ fake news sites convey the net impression that they are legitimate, objective investigative reports. However, nearly everything about the Defendants’ site is fake. There is no reporter, no investigation of the featured products, no dramatic weight loss, no satisfied consumers who left comments, and no affiliation with a reputable news source. Therefore, Defendants’ representations in their fake news sites violate Section 5.

Finally, Defendants violate Section 5 by failing to disclose, or disclose adequately, that their fake news sites have not been authored by an objective journalist, but are in fact paid

advertisements.¹⁷ Defendants attempt to avoid their misrepresentations through an ineffective disclaimer, in much smaller font, buried at the bottom of some of their fake news sites.

Defendants' marketing, however, only is effective if consumers believe that their sites contain legitimate news stories. Any effective disclaimers would render Defendants' advertising ineffective.

Attempts to disclaim false representations must be viewed critically. Because it is the net impression that determines whether a practice is illegal under the FTC Act, any disclaimer used in an effort to avoid liability must be "sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression." *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989). To be effective, a disclosure must meet a "clear and conspicuous" standard, and the Court should consider "the placement of the disclosure in an advertisement and its proximity to the claim it is qualifying; the prominence of the disclosures; whether items in other parts of the advertisement distract attention from the disclosure; [and] whether the advertisement is so lengthy that the disclosure needs to be repeated." *United States v. Locascio*, 357 F. Supp. 2d 536, 549 (E.D.N.Y. 2004) (citing the FTC's "Dot Com Disclosures: Information About Online Advertising"). Defendants' disclaimer is deficient because it is not clear and conspicuous (or is completely nonexistent) – it is written in small print; it is placed at the bottom of the website, away from the fake news article; and it is buried

¹⁷ Defendants' fake news reports are testimonials by their "reporters" on the purported weight loss benefits of the Acai Berry Products, and the "comments" after the "reports" are further endorsements of the featured products under the FTC's "Guides Concerning Use of Endorsements and Testimonials in Advertising." An endorser is one who delivers a message that "consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser." 16 C.F.R. § 255.0(b) (2010). Endorsements and testimonials are treated identically. *Id.* "Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser." *Id.* at § 255.1(a). "When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed." *Id.* at § 255.5. Here, neither the "reports" nor the "comments" reflect the "honest opinions, findings, beliefs, or experience" of an independent endorser.

within other text within the “Terms and Conditions.” Thus, when viewing Defendants’ websites as a whole, Defendants’ disclaimer fails to neutralize the net impression that Defendants’ sites are objective news sites and that comments about the benefits of the Acai Berry Products were left by actual consumers.

2. Defendant Volozin is Individually Liable for the Misrepresentations.

Volozin is liable and subject to injunctive relief for his own conduct, as well as DLXM’s conduct. An individual is liable for the acts of a corporate defendant if the individual participated directly in the unlawful activities or had the authority to control such activities and knew of the acts and practices. *See, e.g., Amy Travel*, 875 F.2d at 573; *Crescent Publ’g Group*, 129 F. Supp. 2d at 324. Direct participation or authority to control the company can be evidenced by “active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer.” *Amy Travel*, 875 F.2d at 573. To satisfy the knowledge requirement, the FTC “need not demonstrate . . . that the individual defendants possessed the intent to defraud.” *FTC v. Jordan Ashley, Inc.*, 1994-1 Trade Cas. (CCH) P70,570 at 72,096 (S.D. Fla. 1994). Rather, the knowledge requirement may be satisfied by showing “actual knowledge of the misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.” *Amy Travel*, 875 F.2d at 574; *see also Five-Star Auto Club*, 97 F. Supp. 2d at 535; *Minuteman Press*, 53 F. Supp. 2d at 259-60.

As a threshold matter, Volozin is liable under the FTC Act for his own misconduct. He registered and paid for the websites disseminating the deceptive advertisements.¹⁸ (Exh. 6, Att.

¹⁸ Volozin also registered two other websites – *acaipowertrim.com* and *clickaxis.com* – that advertise and sell acai berry products. (Exh. 2 at ¶¶ 16-17, Att. K-L; Exh. 6, Att. A at FTC-DLXM 382-83).

A at FTC-DLXM 376, 378-79, 381, 389, 395-96). He also paid for the deceptive advertisements appearing on Microsoft's Bing search engine and through Pulse 360. (See Exh. 2 at ¶¶ 25, 27, 35-36, Att. V, X; Exh. 4 at ¶ 5; Exh. 5, Att. F-G). Moreover, Volozin is liable for the acts of DLXM since he participated directly in, or had knowledge of and the authority to control, the company's unlawful acts and practices.¹⁹ In October 2009, Volozin began using the name DLXM for his business.²⁰ (Exh. 6, Att. A at FTC-DLXM 389). He is listed as the "primary user" on DLXM's account with Microsoft. (Exh. 2 at ¶ 34; Exh. 5, Att. E). Microsoft also communicated to Volozin its concerns regarding DLXM's "unsupported" claims and "misleading" news sites. (Exh. 2 at ¶ 33; Exh. 5, Att. D at FTC-DLXM 338, 369). Thus, Volozin knew, or should have known, about the deceptive claims for these products. As the "primary user" on DLXM's account and the one who paid for the deceptive advertisements, he also had the authority to control – or stop – them. Accordingly, he should be held individually liable for his own misconduct and for DLXM's wrongdoing and should be enjoined from violating the FTC Act.

¹⁹ Defendant DLXM was incorporated as a New York limited liability company on October 21, 2009. (Exh. 2 at ¶ 3, Att. A). According to the company's Articles of Organization, DLXM's office is in Richmond County, New York. (*Id.*, Att. A at FTC-DLXM 25). DLXM uses a Staten Island, New York address in connection with its business. (Exh. 2 at ¶ 35b; Exh. 5, Att. F-G; Exh. 6, Att. A at FTC-DLXM 376, 390-91, 393, 395-96).

²⁰ Prior to using the name DLXM, Volozin's business operated under the name Buckfifty, Inc. ("Buckfifty"). Volozin registered Buckfifty as a New York corporation in 2002, using a Staten Island, New York-based address. (Exh. 2 at ¶ 4, Att. B). Volozin initially registered his account with GoDaddy using the Buckfifty corporate name. (Exh. 6, Att. A at FTC-DLXM 389). Volozin later transferred Buckfifty's GoDaddy account to DLXM. (*Id.*). Volozin also used the first name Mikhail in connection with Buckfifty's business, and later DLXM's business. (Exh. 2 at ¶ 5, Att. C at FTC-DLXM 35, Att. V, Att. X). Volozin uses the same State Island-based address from Buckfifty in connection with his DLXM business activities. (Exh. 2 at ¶¶ 25, 27, Att. V, Att. X; Exh. 5, Att. F-G; Exh. 6, Att. A at FTC-DLXM 376, 390-91, 393, 395-96).

3. The Equities Strongly Weigh in Favor of Granting Injunctive Relief.

The public equities mandate preliminary injunctive relief. In weighing the equities, the Court may presume irreparable injury from the Defendants' violation of the FTC Act. *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir. 1984); *see also World Wide Factors*, 882 F.2d at 347 (upholding district court's grant of preliminary injunction and asset freeze and stating that "[b]ecause irreparable injury must be presumed in a statutory enforcement action, the district court need only to find some chance of probable success on the merits") (*quoting United States v. Odessa Union Warehouse Co-op.*, 833 F.2d 172, 176 (9th Cir. 1987)). Furthermore, "the public interest should receive greater weight" than Defendants' private concerns. *World Wide Factors*, 882 F.2d at 347 (noting that public equities include "effective relief" for the FTC). That is particularly true where, as here, the evidence shows that Defendants' enterprise is rooted in deception, for a "court of equity is under no duty 'to protect illegitimate profits or advance business which is conducted (illegally).'" *CFTC v. British American Commodity Options Corps.*, 560 F.3d 135, 143 (2d Cir. 1977) (*quoting FTC v. Thomsen-King & Co.*, 109 F.2d 516, 519 (7th Cir. 1940)).

Balanced against the strong public interest in protecting consumers against Defendants' deceptive practices, Defendants have no right to persist in their illegitimate business in violation of federal law. Here, it is very easy for Defendants to perpetuate their scheme and continue it. All they need is to register websites and design the deceptive content for their "news" stories – content that they can re-use with ease. The temporary and preliminary relief sought here would prohibit Defendants from engaging in these deceptive practices. It would stop them from disseminating false weight loss claims and from using fake news reports. The proposed injunctive relief is narrowly tailored to restrain Defendants from committing the specific acts

that they have committed and continue to commit in violation of Section 5(a) and Section 12 of the FTC Act. “[T]here is no oppressive hardship to defendants in requiring them to comply with the FTC Act, [or] refrain from fraudulent representation[s]” *World Wide Factors*, 882 F.2d at 347. Because the injunction will preclude only harmful illegal behavior, the public equities supporting the proposed injunctive relief outweigh any burden such relief imposes on the Defendants. *See, e.g., National Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 697 (1978).

B. A TRO Should Include An Asset Preservation, an Accounting, Limited Expedited Discovery, and Other Equitable Relief.

Defendants use fake news sites and false weight loss claims to drive consumers to certain merchants’ websites to purchase the Acai Berry Products and Colon Cleanse Products. The Defendants receive money for driving consumers to the merchants’ sites. The FTC seeks monetary restitution or disgorgement of whatever amounts Defendants received when using false claims and deceptive tactics to drive traffic to the merchants’ sites.

The requested TRO is designed to preserve the status quo, pending a hearing on preliminary injunctive relief. The proposed TRO would require that Defendants immediately cease their deceptive advertising practices. The proposed TRO also seeks to preserve Defendants’ assets, obtain an accounting, and allow for expedited discovery of Defendants’ assets because, as part of the permanent relief sought, the FTC seeks monetary restitution or the disgorgement of Defendants’ ill-gotten gains.

The FTC seeks an accounting, including the completion of financial disclosure forms, to determine whether, and to what extent, an asset freeze order may be appropriate at the preliminary injunction phase to preserve assets should disgorgement or monetary restitution be

warranted. *See, e.g., SEC v. Bankers Alliance Corp.*, 881 F. Supp. 673, 676-77 (D.D.C. 1995) (ordering an accounting); *SEC v. Parkersburg Wireless LLC*, 156 F.R.D. 529, 533-34 (D.D.C. 1994) (same). Similarly, the FTC seeks limited expedited discovery relating to the amount of funds Defendants wrongfully obtained from their fake news sites. Such discovery, in connection with the requested accounting, will enable the FTC to determine the extent of the asset freeze, if necessary, it ultimately may seek to prevent potential dissipation of Defendants' assets. Asset dissipation by the Defendants would thwart this Court's ability to preserve the possibility of effective final relief.

District courts are authorized to depart from normal discovery procedures and fashion discovery to meet discovery needs in particular cases. Rules 26(d), 33(a), and 34(b) of the Federal Rules of Civil Procedure authorize the Court to alter the standard provisions, including applicable time frames, that govern depositions and production of documents. This type of discovery order reflects the Court's broad and flexible authority in equity to grant preliminary emergency relief in cases involving the public interest. *See Warner Holding*, 328 U.S. at 398; *H.N. Singer*, 668 F.2d at 1112; *FTC v. Equifin Int'l, Inc.*, 1997 U.S. Dist. LEXIS 10288, at *40 (C.D. Cal. July 3, 1997) (courts may impose appropriate provisional remedies, including expedited discovery); *Federal Express Corp. v. Federal Expresso, Inc.*, 1997 U.S. Dist. LEXIS 19144, at *6 (N.D.N.Y. Nov. 24, 1997) (early discovery "will be appropriate in some cases, such as those involving requests for a preliminary injunction") (*quoting* commentary to Fed. R. Civ. P. 26(d)).

CONCLUSION

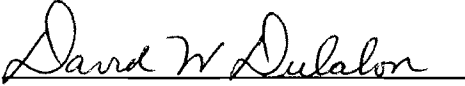
For the foregoing reasons, the FTC respectfully requests that the Court grant its motion for a Temporary Restraining Order, enjoining Defendants from engaging in the deceptive advertising of products containing acai berries, and ordering other equitable relief, including an accounting, an asset preservation, and limited expedited discovery.

Respectfully submitted,

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