

DAVID C. SHONKA
Acting General Counsel

VICTOR F. DEFRANCIS
KAREN JAGIELSKI
Federal Trade Commission
600 Pennsylvania Avenue, NJ-3212
Washington, DC 20580
202-326-3495, vdefrancis@ftc.gov
202-326-3259 (facsimile)

SUSAN J. STEELE
Chief, Civil Division
United States Attorney's Office
970 Broad Street, Suite 700
Newark, NJ 07102
(973) 645-2920, susan.steele@usdoj.gov
(973) 645-2702 (facsimile)

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

DAVID J. ROMEO, individually, and in his capacity as an officer of Stella Labs, LLC, and Nutraceuticals International, LLC; **STELLA LABS, LLC**, a limited liability company; **NUTRACEUTICALS INTERNATIONAL, LLC**, a limited liability company; **DEBORAH B. VICKERY**, individually, and as an employee of Stella Labs, LLC and Nutraceuticals International, LLC; **V. CRAIG PAYTON**, individually, and in his capacity as an officer of Stella Labs, LLC; and **ZOLTAN KLIVINYI**, individually, and in his capacity as an officer of Nutraceuticals International, LLC,

Defendants.

CASE NO. 09-1262 (WJM)

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF’S MOTION FOR AN ORDER TO SHOW CAUSE WHY A
PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

TABLE OF CONTENTS

I. SUMMARY. 1

II. JURISDICTION AND VENUE. 3

III. STATEMENT OF FACTS. 3

 A. THE PARTIES. 3

 1. Plaintiff. 3

 2. Defendants. 3

 B. DEFENDANTS’ COURSE OF CONDUCT. 6

 1. Defendants’ Shifting Corporate Identities. 6

 2. Defendants’ Trial Misconduct. 9

 C. DEFENDANTS’ DECEPTIVE BUSINESS PRACTICES. 11

 1. Defendants’ Misrepresentations Regarding the Efficacy of Hoodia. 11

 2. Defendant’s Misrepresentations Regarding the Scientific Evidence Demonstrating the Efficacy of Defendants’ Hoodia. 15

 3. Defendants’ False Claims Regarding the Content of their Hoodia. 16

IV. THE LAW SUPPORTS ENTRY OF AN INJUNCTION 18

 A. SECTION 13(b) OF THE FTC ACT AUTHORIZES THIS COURT TO GRANT THE REQUESTED RELIEF 19

B.	ENTRY OF A PRELIMINARY INJUNCTION PURSUANT TO THE FTC ACT IS PROPER IN THIS CASE..	20
1.	The Commission Has Demonstrated a Likelihood of Success on the Merits.	22
a.	Defendants Have Engaged in Deceptive Acts and Practices.	22
b.	Defendants Have Provided Others with the Means and Instrumentalities to Engage in Deceptive Practices	28
2.	The Balance of Equities Tips Decidedly in the Commission’s Favor and Supports Awarding the Requested Relief.	30
C.	THE INDIVIDUAL DEFENDANTS ARE PERSONALLY LIABLE FOR INJUNCTIVE RELIEF.	31
V.	CONCLUSION.	35

TABLE OF AUTHORITIES

CASES

Am. Can Co. v. Mansukhani, 742 F.2d 314 (7th Cir. 1984). 34

Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976). 27

CFTC v. British Am. Commodity Options Corp., 560 F.2d 135 (2d Cir. 1977). . . 30

CFTC v. Hunt, 591 F.2d 1211 (7th Cir. 1979).. 31

C. Howard Hunt Pen Co. v. FTC, 197 F.2d 273 (3d Cir. 1952). 28

FTC v. Affordable Media, LLC, 179 F.3d 1228 (9th Cir. 1999) 21, 30

FTC v. Amy Travel Serv., Inc., 875 F.2d 564 (7th Cir. 1989). 19, 32

FTC v. Bryant, No. 3:04-cv-897-J-32MMH, 2004 U.S. Dist. LEXIS 23315 (M.D. Fla. Oct. 4, 2004). 29

FTC v. Check Investors, Inc., 2003 U.S. Dist. LEXIS 26941
(D.N.J. July 30, 2003). 21

FTC v. Cyberspace.com, LLC, 453 F. 3d 1196 (9th Cir. 2006) 23, 32

FTC v. Figgie Int’l, Inc., 994 F.2d 595 (9th Cir. 1993).. 24, 27

FTC v. Five-Star Auto Club, Inc., 97 F. Supp. 2d 502 (S.D.N.Y. 2000).. . . . 28, 32

FTC v. Freecom Commc’ns, Inc., 401 F.3d 1192 (10th Cir. 2005) 33

FTC v. Gem Merch. Group, 87 F.3d 466 (11th Cir. 1996). 19, 32

FTC v. H.N. Singer, Inc., 668 F.2d 1107 (9th Cir. 1982). 19, 20

FTC v. Kitco of Nev., Inc., 612 F. Supp. 1282 (D. Minn. 1985). 27

FTC v. Magui Publishers, Inc., 1991-1 Trade Cas. (CCH) ¶ 69,425 (C.D. Cal. 1991). 29

FTC v. Nat’l Invention Servs., 1997 U.S. Dist. LEXIS 16777, (D.N.J. Aug. 11, 1997) 21, 32

FTC v. Nat’l Urological Group, Inc., 2008-1 Trade Cas. (CCH) ¶ 76,183 (N.D. Ga. 2008). 18

FTC v. Pac. Med. Clinics Mgmt., Inc., 1992-1 Trade Cas. (CCH) ¶ 69,777 (S.D. Cal. 1992). 18

FTC v. Pantron I Corp., 33 F.3d 1088 (9th Cir. 1994). 23, 24

FTC v. Pharmtech Research, Inc., 576 F. Supp. 294 (D.D.C. 1983). 18

FTC v. Publ’g Clearing House, Inc., 104 F.3d 1168 (9th Cir. 1997). 32

FTC v. QT, Inc., 448 F. Supp. 2d 908 (N.D. Ill. 2006). 24, 25

FTC v. Sec. Rare Coin & Bullion Corp., 931 F.2d 1312 (8th Cir. 1991) 27

FTC v. SlimAmerica, Inc., 77 F. Supp. 2d 1263 (S.D. Fla. 1999). 18, 25, 26

FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431 (11th Cir. 1984).. 19

FTC v. Wilcox, 926 F. Supp. 1091 (S.D. Fla. 1995) 24

FTC v. World Travel Vacation Brokers, 861 F.2d 1020 (7th Cir. 1988)
 20, 23, 27, 30

FTC v. World Wide Factors, Ltd., 882 F.2d 344 (9th Cir. 1989). 20, 23, 27, 30

In re Cliffdale Assocs., Inc., 103 F.T.C. 110 (1984). 23

In re Nat’l Credit Mgmt. Group, LLC, 21 F. Supp. 2d 424
 (D.N.J. 1998). 20, 21, 30, 32

Gellman v. FTC, 290 F.2d 666 (8th Cir. 1961) 28

Globe Cardboard Novelty Co. v. FTC, 192 F.2d 444 (3d Cir. 1951). 28

Koven v. FTC, No. 84-5337 (11th Cir. 1984). 22

Nat’l Soc’y of Prof. Eng’rs v. United States, 435 U.S. 679 (1978). 31

Novartis Corp. v. FTC, 223 F.3d 783 (D.C. Cir. 2000). 24

Porter v. Warner Holding Co., 328 U.S. 395 (1946). 20

Regina Corp. v. FTC, 322 F.2d 765 (3d Cir. 1963). 27, 28

Thompson Med. Co., Inc., 104 F.T.C. 648 (1984). 24

Standard Educators, Inc. v. FTC, 475 F.2d 401 (D.C. Cir. 1973). 32

Sterling Drug, Inc. v. FTC, 741 F.2d 1146 (9th Cir. 1984). 25, 26

United States v. Diapulse Corp. of Am., 457 F.2d 25 (2d Cir. 1972). 30

Waltham Watch Co. v. FTC, 318 F.2d 28 (7th Cir. 1963). 28

ORDERS

FTC v. Bernard Rann, et al., No. 00-2792 (D.N.J. June 9, 2000)..... 20

FTC v. Car Checkers of Am., Inc., No. 93-623 (D.N.J. Feb. 8, 1993).. 20

FTC v. Fax Corp. of Am., Inc., No. 90-983 (D.N.J. Mar. 19, 1990).. 20

FTC v. Michael P. McGowan, No. 96-3227 (D.N.J. July 1, 1996).. 20

FTC v. Screen Test U.S.A., Inc., No. 99-2371 (D.N.J. May 24, 1999). 20

FTC v. Sparta Chem, Inc., No. 96-3228 (D.N.J. Nov. 14, 2007) 20

STATUTES

15 U.S.C. § 45(a)..... 1, 3, 19, 22

15 U.S.C. § 52. 1, 3, 19, 22

15 U.S.C. § 53(b)..... 2, 3

15 U.S.C. § 55(a)(1).. 22

28 U.S.C. § 1331. 3

28 U.S.C. § 1337(a)..... 3

28 U.S.C. § 1345. 3

28 U.S.C. §§ 1391(b)-(c)..... 3

I. SUMMARY

Plaintiff Federal Trade Commission (“FTC” or “Commission”) moves this Court to enjoin Defendants’ deceptive and misleading marketing of a purported weight-loss product, *Hoodia gordonii* (“hoodia”). Defendants are a coterie of related individuals and businesses, namely, David J. Romeo, Stella Labs, LLC, Nutraceuticals International LLC, Deborah V. Vickery, V. Craig Payton, and Zoltan Klivinyi (collectively, “Defendants”), who use deceptive and false claims to market hoodia to trade customers, who, in turn, put Defendants’ purported hoodia into their own weight-loss products, package them with similarly deceptive and false claims, and market them to consumers throughout the United States. Perhaps worse, however, is that Defendants’ deception sometimes has gone beyond misleading others about hoodia’s alleged appetite and weight loss properties. Defendants have, on one or more occasions, sold a substance that they claimed was genuine hoodia when, in fact, it was not. Through the foregoing tactics, Defendants have enriched themselves by at least \$21 million.

The Commission has filed a six-count complaint charging Defendants with engaging in deceptive practices in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. (See “Complaint for Permanent Injunction and Other Equitable Relief,” filed concurrently with this motion). To prevent

Defendants from continuing to engage in these unlawful practices and to preserve the possibility of effective final relief in the form of disgorgement of Defendants' ill-gotten gains, the Commission seeks injunctive relief, as well as other equitable remedies, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). In this memorandum and accompanying proposed Order to Show Cause, the Commission requests that the Court direct the Defendants to show cause why a preliminary injunction should not issue pending a final decision in this matter.¹

¹ In support of this Motion, the FTC submits sworn declarations ("Decl.") attached alphabetically by author. In this memorandum, these declarations are designated with the identity of the declarant, paragraph number ("¶"), and, if relevant, exhibit ("Ex.") number. References to exhibits in the Complaint are designated "*FTC Cpt. Ex. __*".

II. JURISDICTION AND VENUE

This Court has subject matter jurisdiction over the FTC's claims pursuant to 15 U.S.C. §§ 45(a) and 53(b) and 28 U.S.C. §§ 1331, 1337(a), and 1345. Venue in this district is proper pursuant to 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b)-(c).

III. STATEMENT OF FACTS

A. THE PARTIES

1. Plaintiff

The FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The Commission enforces Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, which prohibit, respectively, deceptive acts or practices, and false advertisements for food, drugs, devices, cosmetics, or services, in or affecting commerce. The Commission, through its own attorneys, may initiate federal district court proceedings to enjoin violations of the FTC Act and to secure such other equitable relief, including restitution and disgorgement of ill-gotten gains, as may be appropriate in each case. 15 U.S.C. § 53(b).

2. Defendants

Defendant **David J. Romeo** ("Romeo") is the founder of Defendants Stella Labs, LLC and Nutraceuticals International, LLC. Although he is an owner or manager of both companies, he variously has held himself out as a mere salesman

or independent contractor for the companies.²

Defendant **Stella Labs, LLC** (“Stella Labs”) was a New Jersey limited liability company (“LLC”) formed on March 26, 2003, with its principal place of business at 625 From Road, Paramus, New Jersey 07652. (*FTC Cpt. Ex. B, p.1*; Farrell Decl., ¶ 10, Ex. E). Stella Labs sold a variety of dietary ingredients, including an ingredient purportedly derived from hoodia, to producers of finished dietary supplements, who then sell such products to the public. The company formally dissolved in August 2008.³ (Farrell Decl., ¶ 11, Ex. F).

Defendant **Nutraceuticals International, LLC** (“Nutraceuticals”) is a Delaware limited liability company that is registered in New Jersey as a foreign business entity. (Farrell Decl., ¶ 13, Ex. H). Nutraceuticals has a principal place of business at 11 Wallace Street, Elmwood Park, New Jersey 07652. *FTC Cpt. Ex. I, p. 2*. Nutraceuticals appears to be a successor corporation to Stella Labs.⁴ Like Defendant Stella Labs, it sells a variety of dietary ingredients, including hoodia, to producers of finished dietary supplements. *FTC Cpt. Ex. J, K, and L*.

Defendant **Deborah B. Vickery** (“Vickery”) was the Director, New Product

² See *infra* B.1.

³ See *infra* B.1.

⁴ See *infra* B.1.

Development, for Stella Labs and is the Director of Marketing for Nutraceuticals. (Farrell Decl., ¶ 22, Ex. L; ¶ 33, Ex. R, p. 114). V. Craig Payton testified that, at Stella Labs, Vickery created the advertisements and had primary responsibility for marketing. (Farrell Decl., ¶ 33, Ex. R, p. 114). In a written response to an February 2008 Civil Investigatory Demand (“CID”) issued by the Commission to Nutraceuticals, the company stated that Vickery is Nutraceuticals’ Director of Marketing, and “responsible for all marketing matters, design and placement of ads and promotions.” (Farrell Decl., ¶ 22, Ex. L).

Defendant **V. Craig Payton** (“Payton”) is the former Managing Director of Stella Labs. (*FTC Cpt., Ex. B, p. 19*). Payton has given conflicting assertions under oath as to the exact nature of the managerial role he performed for Stella Labs. In an investigational hearing pursuant to a February 7, 2008 Civil Investigatory Demand (“CID”) issued by the Commission to Stella Labs, Payton claimed that David Romeo set him up as the “nominal head” of Stella Labs. (Farrell Decl., ¶ 32, Ex. R, p. 32). In testimony for a lawsuit filed by Stella Labs against one of its customers, however, Payton stated that he was the “sole member” and “sole owner” of Stella Labs, and that Mr. Romeo was merely “involved” with the company. (Farrell Decl., ¶ 36, Ex. S, pp. 117, 135).

Defendant **Zoltan Klivinyi** (“Klivinyi”) is the Managing Director of

Nutraceuticals. In a written response to an April 2008 CID issued by the Commission to Nutraceuticals, the company identified “Zoltan Klivinyi” as its “Managing Director,” and stated that he is responsible for the overall supervision of Nutraceuticals. (Farrell Decl., ¶ 24, Ex. N, p. 4).

B. DEFENDANTS’ COURSE OF CONDUCT

1. Defendants’ Shifting Corporate Identities

The individual Defendants have attempted to minimize their personal liability for the acts described herein by creating various corporate entities and by concealing or minimizing their individual participation in those entities. For instance, Romeo, the mastermind behind the hoodia sales scheme, first set up Stella Labs in 2003 at the then-address of Global Nutrients, Inc., another company Romeo owned. (Farrell Decl., ¶ 10, Ex. E; ¶14, Ex. I). In fact, at least one of Stella Labs’ initial corporate bank accounts was opened with \$500 in cash and a \$50,000 check endorsed by Romeo, which was drawn on the account of Global Nutrients. (Farrell Decl., ¶¶ 44-45, E’s. W-X). In addition, Romeo identified himself on the same bank account as Stella Labs’ “Manager.”⁵ (Farrell Decl., ¶ 43, Ex. V).

Although the true head of Stella Labs, Romeo often has disguised the role he

⁵ Although Romeo is not listed anywhere on Stella Labs’ certificate of formation documents, Romeo’s mother is the registered agent for the company.

played at the company. These efforts have ranged from representing himself to potential Stella Labs' customers as a mere salesman for the company⁶ to giving irreconcilable statements under oath. For instance, in sworn court testimony, Romeo stated that he was a "sales manager" or "consultant" for Stella Labs, and that he did not have "any understanding with Mr. Payton whatsoever of any kind of remuneration with [his] work for Stella Labs after March of '07." (Farrell Decl., ¶38, Ex. S, p. 178). Despite this lack of "any" understanding, bank records show that from April through July 2007, Stella Labs wrote him checks for over \$1.89 million. (Farrell Decl., ¶46, Ex. Y, pp. 1-16).

Stella Labs held itself out as an "exclusive supplier" of a "clinically proven" weight loss product, hoodia,⁷ that its customers could use to market their own weight loss products. (*FTC Cpt. Ex. G*). Stella Labs' marketing literature promised that its South African hoodia, was "the real deal, the whole package! From South Africa, great price, high quality, and it has been Proven [e]ffective for Satiety, Energy, & Weight Loss." *FTC Cpt. Ex. H*. The marketing materials

⁶ For example, Romeo testified at an August 5, 2008 hearing in *Stella Labs v. CPMC, LLC, et al.*, No. 2:08-cv-00322 (D. N.J. Jan. 16, 2008) (Notice of Removal), that he was a "sales manager" and "consultant" for Stella Labs. (Farrell Decl., ¶ 38, Ex. S, p. 177).

⁷ Hoodia is a succulent plant native to southern Africa. The import and export of hoodia is regulated under the Convention of International Trade in Endangered Species of Wild Fauna and Flora.

further claimed that Stella Labs was the only company whose hoodia was approved in the U.S. by the U.S. Food and Drug Administration (“FDA”).⁸ *FTC Cpt. Ex. B*, p. 17.

In March of 2007, in furtherance of an investigation of Stella Labs and its claims surrounding hoodia, the Commission issued a CID to the company. (Farrell Decl., ¶ 16, Ex. J). Stella Labs completed its response to the Commission’s CID on May 1, 2007. Shortly afterward, however, Stella Labs ceased operations. (Farrell Decl., ¶ 35, Ex. R, p. 38).

Upon further investigation, however, the Commission staff determined that Romeo reinvented Stella Labs as Nutraceuticals. The Commission learned, for example, that Romeo is a signatory to at least one bank account in Nutraceuticals’ name. (Farrell Decl., ¶ 51, Ex. EE). Furthermore, both Romeo and Stella Labs deposited checks for nearly two hundred thousand dollars into at least one of Nutraceuticals’ bank accounts. (Farrell Decl., ¶¶ 53-57, Exs. GG – KK.).

Moreover, the “Contacts” section of one of Stella Labs’ website advertisements linked to the homepage of Nutraceuticals. (Farrell Decl., ¶¶ 6-9, Ex. D). Nutraceuticals’ website identified Vickery, Stella Labs’ head of New Product Development and director of marketing, as its Director of Marketing and

⁸ The FDA does not “approve” hoodia. *See infra* note 16.

Product Development. (Farrell Decl., ¶ 22, Ex. L). At least four other employees of Stella Labs also appeared to work for Nutraceuticals. (Farrell Decl., ¶ 34, Ex. R, pp. 28, 30; ¶ 24, Ex. N, p. 3; ¶ 58, Ex. LL, pp. 1-5). Lastly, Payton, Stella Labs' Managing Director, testified at an investigational hearing that Romeo controlled Stella Labs and that Romeo told him that he was going to create Nutraceuticals after Stella Labs shut down its business operations. (Farrell Decl., ¶ 32, Ex R, p. 35).

Accordingly, in February and April, 2008, the Commission issued two CIDs to Nutraceuticals seeking copies of its hoodia advertisements, substantiation for its weight-loss claims for hoodia, and other information relating to the company's sale of hoodia. (Farrell Decl., ¶ 19, Ex. K; ¶ 23, Ex. M.) Nutraceuticals substantially complied with these requests by July 2008. *Id.*

2. Defendants' Trial Misconduct

Defendants' assertions under oath in a civil dispute cast serious doubt on the likelihood that they voluntarily will preserve documents during the pendency of the FTC's action against them.

Even though the company allegedly had ceased operations by 2008, Stella Labs maintained a lawsuit in New Jersey against CPMC, LLC and Robert Brewer. *See Stella Labs v. CPMC, LLC, et al.*, Civil Action No. 2:08-cv-00322 (D.N.J.)

(the “CPMC Litigation”). (Farrell Decl., ¶ 36, Ex. S). In that case, Stella Labs claimed that CPMC had failed to pay it \$852,000 for three shipments of hoodia that CPMC allegedly had ordered. CPMC maintained that it never ordered the hoodia and, in any event, the product shipped was not genuine hoodia. In the midst of pretrial discovery, allegations arose that several emails Stella Labs had introduced as evidence against CPMC had been fabricated. The Court held a hearing on the issue on August 5, 2008. An expert for CPMC testified that, in his opinion, the emails in question contained the hallmarks of forgery, but the forgery could not be conclusively established without analyzing the computers from which the emails were sent. (*See generally* Farrell Decl., ¶ 36 and transcript of August 5, 2008 hearing, Ex. S).

The Court, therefore, sought to determine the location of the computers from which Stella Labs had sent the emails in question. To that end, Defendants Payton and Romeo testified on behalf of Stella Labs. Payton testified that although he was not sure whether Stella Labs’ computers were all placed in a storage unit,⁹ if they were, they were gone. (Farrell Decl., ¶ 37, Ex. S, pp. 118-122). Defendant

⁹ Records from Extra Space Storage, where Stella Labs kept its business records, shows that David Romeo signed the “move out” receipt from the storage unit on 1/28/08. (Farrell Decl., ¶¶ 28-29, Ex. Q). Payton also stated that Romeo removed everything from the storage units. (Farrell Decl., ¶ 35, Ex. R, p. 121-122).

Romeo testified that, although the email in question would have been stored on his laptop computer, his laptop had “fried,” and so he threw the laptop away in the dumpster at an A&P grocery store. (Farrell Decl., ¶ 39, Ex. S pp. 186-187, 195-196). At the conclusion of the hearing, the Court ordered Stella Labs to find one of its computers within 30 days, and observed that:

“But to say it’s [the email’s] genuine, but sorry, the computer’s in the dumpster at A&P, doesn’t cut it So there were six computers at Stella Labs, surely one of them is not in the dumpster at the A&P.”

(Farrell Decl., ¶ 40, Ex. S, pp. 239-240). Prior to the thirty day deadline, however, the parties settled, and the case was dismissed with prejudice on September 11, 2008.

C. DEFENDANTS’ DECEPTIVE BUSINESS PRACTICES

1. Defendants’ Misrepresentations Regarding the Efficacy Of Hoodia

The Defendants, through Stella Labs and Nutraceuticals, have marketed hoodia to supplement manufacturers who produce finished products for sale to consumers. The Defendants advertised hoodia at trade shows, in print advertisements distributed to trade customers, and on the Internet, as an effective weight-loss and appetite suppression product, claiming that it would cause its users to lose substantial amounts of weight. *FTC Cpt. Exs. A-H*. In addition, the Defendants provided their trade customers with materials involving hoodia that

they claimed clinically proved hoodia’s weight-loss and appetite suppression properties. *Id.* Further, the Defendants offered to help their trade customers with “marketing research and product branding services to customers intending to launch new dietary supplement brands to market.”¹⁰

Stella Labs and Nutraceuticals have made a variety of similar claims about hoodia, albeit in slightly different ways. Stella Labs’ marketing materials made a number of efficacy claims about hoodia, including, among other things, that it causes substantial weight loss:

- “Hoodia supplements taken daily can reduce calorie intake by 1000 calories a day; inducing weight loss by taking away the feeling of hunger; without limiting food intake, changing the diet, or the addition of an exercise regimen.” *FTC Cpt. Ex. A, p. 2; FTC Cpt. Ex. B, p. 4; FTC Cpt. Ex. C.*
- “Hoodia works by tricking the brain into thinking the body is full even if it is not. When a person eats, the body produces glucose which sends a signal to the hypothalamus of the brain indicating the body has been nourished; thus the feeling of hunger subsides. Hoodia acts on the body in the same way, only the signals are 100,000 times more potent than glucose, completely eliminating the feeling of hunger for extended periods.” *FTC Cpt. Ex. B, p. 3; FTC Cpt. Ex. C;*

that it reduces caloric intake by 1,000 to 2,000 calories a day:

- **“WHAT IS THE SCIENCE BEHIND IT?**
 When South African scientists were testing the Hoodia plant, they discovered the plant contained a previously

¹⁰ See *FTC Cpt. Ex. K.*

unknown molecule. Results of human clinical trials in Britain suggest that this active ingredient could reduce the appetite by up to 2,000 calories a day.” *FTC Cpt. Ex. A, p. 4; FTC Cpt. Ex., p. 11*;

and that it is effective in the treatment of obesity:

- **“Hoodia [g]ordonii: The world’s best chance at a cure for obesity.** Hoodia is a new and powerful nutritional supplement for suppressing the appetite. . . There are no side effects from the usage of Hoodia, other than lack of hunger and weight loss.” *FTC Cpt. Ex. B, p. 7.*

Nutraceuticals’ business practices are, not surprisingly, similar to those of Stella Labs. Like Stella, Nutraceuticals markets hoodia to trade customers, utilizing a variety of appetite suppression claims such as:

- “[Hoodia] is used by the San Bushmen for the suppression of appetite in times of little food, they also say it provides an uplifting in mood, increases sexual stamina, and leaves on [sic] with a feeling of nourished energy, as if you have eaten a full meal and you can continue about you [sic] day. *FTC Cpt. Ex. I, p. 1.*
- . . . plants grown outside South Africa has [sic] little to no active steroidal glycosides which is what leads to Hoodia’s ability increase [sic] ATP levels i [sic] the hypothalamus of the brain lending [sic] to an effect of energy sensing satiety and the suppression of the feeling of hunger. When the body is satisfied, it does not want for food. *FTC Cpt. Ex. I, p. 1.*

In its CID requests to both Stella Labs and Nutraceuticals, the Commission asked both companies to provide substantiation for their representations. In their response, Stella Labs and Nutraceuticals provided the Commission with a variety

of disparate materials, including printouts from commercial websites selling hoodia, an animal study involving injections of what is believed to be the active ingredient of hoodia into the brains of rats, a book written by a medical doctor on the prevalence of fake hoodia in the marketplace, and a U.S. Patent application. (Blonz Decl., ¶ 11, Ex. B).

The FTC has consulted with Dr. Edward R. Blonz to determine whether any of the materials provided by Stella Labs and Nutraceuticals, or any other materials, substantiate the Defendants' efficacy claims about hoodia. Dr. Blonz is an expert in the fields of nutrition, dietary supplements, obesity, fad diets, and body weight management and reduction. (Blonz Decl., ¶ 10). According to Dr. Blonz, all the materials provided by Stella and Nutraceuticals share one thing in common: none of them substantiate the claims that the companies have made about hoodia. Dr. Blonz refutes the entirety of Defendants' purported substantiation for the efficacy of hoodia, and confirms that none of the materials "substantiate the effects from the use of Hoodia by humans." (Blonz Decl., ¶ 22).

Dr. Blonz's analysis goes even further, however, than refuting the Defendants' purported substantiation. Dr. Blonz has conducted a review of published scientific data in two separate databases to determine whether *any* scientific evidence exists in support of the Defendants' claims about hoodia. Dr.

Blonz concludes after this review that “a search of the scientific literature . . . failed to locate any published, peer-reviewed studies examining hoodia gordonii as a weight-loss agent in humans.” (Blonz Decl., ¶ 23).

The Defendants’ weight-loss and appetite suppression claims are unsubstantiated and, therefore, constitute deceptive practices and false advertisements.

2. Defendants’ Misrepresentations Regarding the Scientific Evidence Demonstrating the Efficacy of Defendants’ Hoodia

Both Stella Labs’ and Nutraceuticals’ marketing materials repeatedly claim that their hoodia has been proven effective by clinical studies. Stella Labs claimed, for example, that it possessed clinical studies proving that the use of hoodia reduces caloric intake by 1,000 to 2,000 calories a day:

- “The first human trials [of hoodia] involved a morbidly obese group of people allowed only to read, watch television, and eat. Half were given Hoodia; the other half, placebo. Fifteen days later, the Hoodia group had reduced their calorie intake by 1,000 calories a day. (The average American man consumes about 2,600 calories a day; a woman about 1,900).” *FTC Cpt. Ex. B, p. 5; FTC Cpt. Ex. C.*

For its part, Nutraceuticals’ literature actively promotes that its “scientific research” demonstrates that hoodia suppresses the appetite, resulting in weight loss. For example, Nutraceuticals’ marketing materials claim:

- “A Brain Research study conducted in 2004 by David [sic]

McLean and Lu-Guang Lou of Brown Medical School Hallett Center for Diabetes and Endocrinology, showed the first conclusive evidence of Hoodia’s ability to initiate the suppression of hunger and thirst.” *FTC Cpt. Ex. J.*

As detailed above in Section III.C.1, the scientific studies Defendants have provided to the Commission do not support the efficacy claims made for Hoodia. As Dr. Blonz has made clear, no credible scientific studies exist that support such claims.

3. Defendants’ False Claims Regarding the Content of their Hoodia

Stella Labs’ marketing materials claim repeatedly that the product that Stella Labs sells as *Hoodia gordonii* is authentic *Hoodia gordonii*:

- THE ORIGIN OF OUR HOODIA
Our Hoodia is grown from seedlings on approved farms in South Africa with the knowledge and help of the San People. *FTC Cpt. Ex. F.*

Stella Labs also touts the “exclusivity” of its supply of South African hoodia:

- Retail customers are asking for Hoodia that works... Stella Labs has an exclusive supply of Authentic South African Hoodia. THERE IS NO SUBSTITUTE! *FTC Cpt. Ex. G.*

The FTC has concluded, however, that on one or more occasions, such claims were false. Ikhlas Kahn, Ph.D. (“Dr. Kahn”) is Assistant Director of the National Center for Natural Products Research at the University of Mississippi (“University”); a Research Professor in the University’s Research Institute of

Pharmaceutical Sciences; University Professor of Pharmacognosy; the University's Program Director of FDA Programs; and a Research Professor and Coordinator for Natural Products Research in the Center for Water and Wetland Resources. (Kahn Decl., ¶ 3). He has authored or co-authored and published more than three hundred scientific research papers in peer-reviewed journals relating to dietary and botanical substances, including several on the analysis of hoodia. (Kahn Decl., ¶ 6). Dr. Kahn is an expert in the field of natural products chemistry and the application of analytical tools in the evaluation of quality and safety of dietary supplements such as hoodia. (Kahn Decl., ¶ 7).

Dr. Kahn used two different analytical techniques to evaluate four different samples of Defendants' hoodia products.¹¹ (Kahn Decl., ¶ 10). According to Dr. Kahn's analysis, the substance that the Defendants identified and sold to its supplement manufacturers as authentic hoodia was not, in fact, hoodia.¹² (Kahn Decl., ¶ 11). Therefore, not only have Defendants misled their trade customers with claims about hoodia, but they have made false claims as to the very identity of

¹¹ See Farrell Decl., ¶ 59-63 and accompanying exhibits.

¹² Defendants are well-aware of allegations that they were selling fake hoodia. In addition to the CPMC litigation, discussed *supra* at III.B, Stella Labs also was sued in Florida by one of its customers, alleging that it did not receive genuine hoodia. See *Vital Pharmaceuticals, Inc. v. Stella Labs, LLC*, Case No. 06-cv-60648-KAM (S.D. Fla. 2006).

their product.

IV. THE LAW SUPPORTS ENTRY OF AN INJUNCTION

For more than 50 years, the FTC has brought actions to halt bogus supplement schemes like the one challenged here. *See Koch v. FTC*, 206 F.2d 311 (6th Cir. 1953) (upholding Commission findings concerning substance that purportedly cured cancer and other diseases); *see also FTC v. Pac. Med. Clinics Mgmt., Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,777 (S.D. Cal. 1992) (preliminary and permanent injunction issued in connection with weight loss program featuring tablets promised to “burn fat”); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263 (S.D. Fla. 1999) (TRO, preliminary, and permanent injunction issued in connection with sale of weight loss program); *FTC v. Nat’l Urological Group, Inc.*, 2008-1 Trade Cas. (CCH) ¶ 76,183 (N.D. Ga. 2008) (preliminary and permanent injunction issued in connection with weight loss supplement scheme); *FTC v. Pharmtech Research, Inc.*, 576 F. Supp. 294 (D.D.C. 1983) (preliminary injunction issued in connection with sale of product promoted for cancer risk-reduction). Defendants have defrauded consumers by claiming that their hoodia, among other things, causes weight loss, suppresses appetite, and treats obesity. And if that were not enough, defendant Stella Labs has sold a substance it claimed was authentic hoodia when it was not hoodia at all.

All these actions, detailed in the Commission’s six-count complaint, are deceptive and violate Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52. (See “Complaint for Permanent and Other Equitable Relief,” filed concurrently). Set forth below, this memorandum discusses why (1) this Court has the authority to grant the requested injunctive relief; (2) the evidence demonstrates that the Commission is likely to succeed on the merits; and (3) the equities of protecting the public support entry of a preliminary injunction.

A. SECTION 13(b) OF THE FTC ACT AUTHORIZES THIS COURT TO GRANT THE REQUESTED RELIEF

Because “Section 13(b) [of the FTC Act] gives the Commission the authority to seek, and gives the district court the authority to grant, permanent injunctions [i]t also has authority to grant whatever preliminary injunctions are justified by the usual equitable standards.” *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111-13 (9th Cir. 1982). This “unqualified grant of statutory authority . . . carries with it the full range of equitable remedies . . .” *FTC v. Gem Merch. Group*, 87 F.3d 466, 468 (11th Cir. 1996); accord *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431 (11th Cir. 1984) (*per curiam*); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989).

The power of the Court pursuant to Section 13(b) is not limited to injunctive relief; rather, it includes the authority to grant any ancillary relief necessary to

accomplish complete justice and preserve assets for rescission and restitution. *Singer*, 668 F.2d at 1112-14. The exercise of this broad equitable authority is particularly appropriate where, as here, the public interest is at stake. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989). Federal courts in this district have granted motions for preliminary injunctive relief in FTC cases.¹³

B. ENTRY OF A PRELIMINARY INJUNCTION PURSUANT TO THE FTC ACT IS PROPER IN THIS CASE

The standard for determining whether preliminary injunctive relief is appropriate in Section 13(b) cases differs from that typically applied in private litigation. To determine whether to grant a preliminary injunction under Section 13(b) of the FTC Act, “a court must: (1) determine the likelihood that the Commission will ultimately succeed on the merits, and (2) balance the equities” of private and public interest. *FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1029 (7th Cir. 1988) (citation omitted); *In re Nat’l Credit Mgmt. Group, LLC*, 21 F. Supp. 2d 424, 438-40 (D.N.J. 1998).

¹³ Cases in which the District of New Jersey has granted the FTC such preliminary injunctive relief include: *FTC v. Sparta Chem, Inc.*, No. 96-3228 (D.N.J. Nov. 14, 2007); *FTC v. Bernard Rann, et al.*, No. 00-2792 (D.N.J. June 9, 2000); *FTC v. Screen Test U.S.A., Inc.*, No. 99-2371 (D.N.J. May 24, 1999); *FTC v. McGowan*, No. 96-3227 (D.N.J. July 1, 1996); *FTC v. Car Checkers of Am., Inc.*, No. 93-623 (D.N.J. Feb. 8, 1993); *FTC v. Fax Corp. of Am., Inc.*, No. 90-983 (D.N.J. Mar. 19, 1990).

It is not necessary for the Commission to show irreparable injury. Harm to the public is presumed. *World Wide Factors*, 882 F.2d at 346-47; *see FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999) (noting that Section 13(b) “places a lighter burden on the Commission than that imposed on private litigants by the traditional equity standard; the Commission need not show irreparable harm”) (internal citations omitted); *FTC v. Check Investors, Inc.*, Civ.A. 03-2115, 2003 U.S. Dist. LEXIS 26941, at *13 (D.N.J. July 30, 2003) (where FTC seeks injunctive relief that is authorized by statute, irreparable injury is presumed); *FTC v. Nat’l Invention Servs.*, Civ.A. 97-3459, 1997 U.S. Dist. LEXIS 16777, at *11 (D.N.J. Aug. 11, 1997) (“‘irreparable injury’ . . . [is] presumed from the fact that a federal regulatory statute has apparently been violated”); *see also In re Nat’l Credit Mgmt.*, 21 F. Supp. 2d at 439 (FTC need not show irreparable harm, but rather only must “establish [that] ‘probable cause exists . . . and that there is some reasonable likelihood of future violations,’” a standard akin to the traditional requirement of proving the “likelihood of success on the merits”) (citations omitted).

The FTC has alleged that Defendants have engaged, and continue to engage, in deceptive acts or practices that violate Sections 5 and 12 of the FTC Act. As set forth in this memorandum and the accompanying exhibits, the Commission has

presented substantial evidence that it will ultimately succeed on the merits. Indeed, the facts presented above show that the FTC exceeds the standard for likelihood of success on the merits. Moreover, the equities weigh heavily in favor of granting the requested preliminary relief because of the deceptive conduct repeatedly and knowingly engaged in by Defendants over the past five years. Thus, the evidence provided in Section III.B *supra* satisfies the required two-prong test.

1. The Commission Has Demonstrated a Likelihood of Success on the Merits

a. Defendants Have Engaged in Deceptive Acts and Practices

The Commission has satisfied the first prong of the Court’s analysis and demonstrated a likelihood of success in establishing that Defendants have repeatedly violated both Sections 5(a) and 12 of the FTC Act, which prohibit deceptive acts or practices and false advertising for food and drugs. 15 U.S.C. §§ 45(a) and 52.¹⁴ To establish liability under the FTC Act, the Commission must establish that: (1) there was a representation; (2) the representation was likely to mislead consumers acting reasonably under the circumstances; and (3) the

¹⁴ The Act defines “false advertisement” for purposes of Section 12 as “an advertisement, other than labeling, which is misleading in a material respect.” 15 U.S.C. § 55(a)(1). Section 12 further provides that the dissemination of any such false advertisement is an “unfair or deceptive act or practice in or affecting commerce” within the meaning of Section 5. 15 U.S.C. § 52(b).

representation was material. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994) (adopting standard in *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-65 (1980), *appeal dismissed sub nom, Koven v. FTC*, No. 84-5337 (11th Cir. 1984)); *see also World Travel Vacation Brokers*, 861 F.2d at 1029.

As set forth the FTC's complaint and Section III.C, Defendants have made several representations or claims, including the following:

- Stella Labs' hoodia causes substantial weight loss; causes users to reduce caloric intake by 1,000 to 2,000 calories; reduces appetite sufficiently to cause substantial weight loss in humans; and is an effective treatment for obesity, *see FTC Cpt.*, Count I;
- Nutraceuticals' hoodia reduces appetite, thereby causing weight loss in humans, *see FTC Cpt.*, Count II;
- Stella Labs' hoodia is clinically proven to enable its users to reduce caloric intake by 1,000 to 2,000 calories a day, *see FTC Cpt.*, Count III;
- Scientific research demonstrates that Nutraceuticals' hoodia suppresses the appetite, resulting in weight loss, *see FTC Cpt.*, Count IV; and
- Stella Labs' *Hoodia gordonii* is authentic *Hoodia gordonii* and Stella Labs' *Hoodia gordonii* is the only FDA-approved *Hoodia gordonii* in the United States, *see FTC Cpt.*, Count V.

All of the foregoing representations or claims are material. First, a claim is considered material if it "involves information that is important to consumers and, hence, [is] likely to affect their choice of, or conduct regarding a product." *FTC v.*

Cyberspace.com, LLC, 453 F. 3d 1196, 1201 (9th Cir. 2006) (quoting *Cliffdale Assocs.*, 103 F.T.C. at 165). Defendants' claims go to the purpose and efficacy of the product – whether hoodia can help consumers lose weight. *See Novartis*, 223 F.3d at 786 (applying presumption of materiality where claim “involved both a health matter and the products' purpose and efficacy”); *see generally 1983 FTC Policy Statement on Deception*, appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984).

Second, defendants claims are express; thus, they are material. Express claims, or deliberately made implied claims, used to induce the purchase of a particular product or service, are presumed to be material. *Thompson Med. Co., Inc.*, 104 F.T.C. 648, 816 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986); *Pantron I Corp.*, 33 F.3d at 1095-96 (“Express product claims are presumed to be material.”). *See also FTC v. Wilcox*, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995) (citation omitted); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 604 (9th Cir. 1993).

The FTC has alleged that the weight-loss and appetite suppression claims made in Counts I and II of the complaint were either unsubstantiated at the time they were made and/or false. To show that a claim is unsubstantiated, the FTC must show that the Defendants lacked a reasonable basis for asserting that the claim was true. *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 959 (N.D. Ill. 2006), *aff'd*,

512 F.3d 858 (7th Cir. 2008). For health related claims, in order to have a reasonable basis to make the claim at issue, the defendant must possess “competent and reliable scientific evidence” to substantiate the claim. *Id.* at 961, *citing Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1156-57 (9th Cir. 1984). Courts have held that with medical, health-related claims, a well-conducted, placebo-controlled, randomized, double-blind study constitutes competent and reliable scientific evidence. *See, e.g., QT*, 448 F. Supp. 2d at 962; *SlimAmerica*, 776 F.Supp. 2d at 1274.

Dr. Blonz’s affidavit points out that Defendants do not, in fact, possess any reliable scientific evidence to support their weight-loss and appetite suppression representations about hoodia. (Blonz Decl., ¶ 22). Moreover, according to Dr. Blonz, there is no scientific research demonstrating that hoodia reduces caloric intake, suppresses appetite, or causes weight loss. (Blonz Decl., ¶ 23). As a result, the claims set forth in Counts I and II of the complaint are either unsubstantiated and/or false.

In Counts III and IV, the FTC has alleged that the Defendants falsely claimed that clinical studies and scientific tests proved or demonstrate that hoodia enables users to reduce their caloric intakes by 1,000 to 2,000 calories per day (Count III) and that hoodia suppresses the appetite, resulting in weight loss (Count

IV). As Dr. Blonz points out, there are no scientific studies in the literature showing that hoodia enables users to reduce their caloric intake by 1,000 to 2,000 calories per day and no scientific research demonstrating that hoodia suppresses the appetite in humans, resulting in weight loss. As a result, the establishment claims set forth in Counts III and IV are false. *See Sterling Drug*, 741 F.2d at 762 (“[W]hen an advertiser represents in its ads that there is a particular level of support for a claim, the absence of that support makes the claim false.”); *see also SlimAmerica*, 77 F. Supp. 2d at 1274 (finding defendants’ claim that clinical studies validated their weight loss and body size reduction claims was false).

Lastly, the FTC has alleged in Count V that Defendants’ claims about the authenticity of their hoodia and that their hoodia is “FDA approved” are false. According to Dr. Kahn, the samples he tested¹⁵ at the request of the FTC were not authentic *Hoodia gordonii*. (Kahn Decl., ¶ 11). Thus, on at least one occasion, Defendants misrepresented their product as authentic hoodia. Moreover, the FDA does not approve dietary supplements.¹⁶ Therefore, the FTC has shown a

¹⁵ The subject samples were purchased from Stella Labs. *See* Brewer Decl., ¶ 4 and Farrell Decl., ¶¶ 60 - 62.

¹⁶ Under the Dietary Supplement Health and Education Act of 1994, the FDA generally does not “approve” dietary supplements or their ingredients. *See* Pub. L. No. 103-417, 108 Stat. 4325 (codified as amended in scattered sections of 21 and 42 U.S.C.).

likelihood of success on its allegations in Count V as well.

With respect to all of the foregoing misrepresentations, the FTC need not prove that they were done with an intent to defraud or deceive, or were made in bad faith. *See World Travel Vacation Brokers*, 861 F.2d at 1029; *see also Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963). Nor does the Commission need to show actual reliance by consumers. *See Figgie*, 994 F.2d at 605-06 (citing *FTC v. Kitco of Nev., Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985)) (“Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the statutory goals of [Section 13(b).]”); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991) (“[T]he FTC need merely show that the misrepresentations or omissions were of a kind usually relied upon by reasonable and prudent persons, that they were widely disseminated, and that the injured consumers actually purchased the defendants’ product.”) (citation omitted). Further, whether material promises are expressly misleading or impliedly misleading is of no consequence to the legal analysis. *Figgie*, 994 F.2d at 604 (There is “nothing in statute or case law which protects from liability those who merely imply their deceptive claims; there is no such loophole.”).

In sum, Defendants misrepresentations about hoodia are systematic and widespread, and the Commission has set forth why they are unsubstantiated and/or false. Thus, the Commission has demonstrated a likelihood of success on the merits.

b. Defendants Have Provided Others with the Means and Instrumentalities to Engage in Deceptive Practices

Providing others with the means and instrumentalities to engage in deceptive practices is itself a violation of Section 5. *See, e.g., Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963) (“Those who put into the hands of others the means by which they may mislead the public, are themselves guilty of a violation of Section 5 of the Federal Trade Commission Act.”); *Gellman v. FTC*, 290 F.2d 666 (8th Cir. 1961) (citing *Peerless Prods., Inc. v. FTC*, 284 F.2d 825, 826-27 (7th Cir. 1960)); *C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273 (3d Cir. 1952); *Globe Cardboard Novelty Co. v. FTC*, 192 F.2d 444 (3d Cir. 1951); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 530 (S.D.N.Y. 2000) (citing *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963)) (“One who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act.”). It is immaterial to a means and instrumentalities count whether the purchasers of

Defendants' hoodia themselves were deceived. *See FTC v. Magui Publishers, Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,425 (C.D. Cal. 1991) (wholesaler violated FTC Act by supplying retailers with reproductions of art that retailers sold to unsuspecting customers, even though retailers themselves were not deceived).

Defendants have provided their trade customers with hoodia, purported scientific studies demonstrating its efficacy, and a collection of ready-made misrepresentations regarding its efficacy that its trade customers could use, in turn, to market their own dietary products containing hoodia. *See* Section III(B), *supra*. By providing their trade customers with hoodia and the marketing tools needed to foist it on unsuspecting consumers, Defendants have provided their customers with the means and instrumentalities to engage in unfair and deceptive practices. *See FTC v. Bryant*, No. 3:04-cv-897-J-32MMH, 2004 U.S. Dist. LEXIS 23315 (M.D. Fla. Oct. 4, 2004) (enjoining defendants from providing the means and instrumentalities to deceive where defendants had provided customers with deceptive brochures and sample advertisements, instructed them to place the sample ads in newspapers and magazines, and to send the misleading brochures to consumers who responded to the ads).

2. The Balance of Equities Tips Decidedly in the Commission's Favor and Supports Awarding the Requested Relief

In balancing the equities between the parties, the public equities must be given far greater weight. *Affordable Media*, 179 F.3d at 1236 (“Obviously, the public interest in preserving illicit proceeds of the media unit scheme for restitution to the victims is great”); *World Travel Vacation Brokers*, 861 F.2d at 1030; *Nat’l Credit Mgmt.*, 21 F. Supp. 2d at 460 (“The Defendants do not have the right to persist in conduct that violates Federal or state law”). Where, as here, Defendants “can have no vested interest in a business activity found to be illegal,” *United States v. Diapulse Corp.*, 457 F.2d 25, 29 (2d Cir. 1972) (internal quotations and citations omitted), a balance of equities tips decidedly toward granting the requested relief. *See also CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 143 (2d Cir. 1977) (quoting *FTC v. Thomsen-King & Co.*, 109 F.2d 516, 519 (7th Cir. 1940)) (“[a] court of equity is under no duty ‘to protect illegitimate profits or advance business which is conducted illegally’”).

As noted above, Defendants have continued to deceptively market hoodia notwithstanding that there is no substantiation in support of their claims and that civil lawsuits have raised questions as to whether Defendants are, in fact, selling authentic hoodia. Only the entry of the requested preliminary injunctive relief will prevent Defendants from continuing to deceive and harm the public during the

pendency of this litigation.¹⁷ Absent the relief sought here, Defendants' illegal conduct will continue unabated, with foreseeable ongoing consumer injury.

In contrast, the private equities in this case are not compelling. Compliance with the law is hardly an unreasonable burden. *See World Wide Factors*, 882 F.2d at 347 (stating "there is 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"). Because the injunction will preclude only harmful, illegal behavior, the public equities supporting the proposed injunctive relief outweigh any burden imposed by such relief on the Defendants. *See, e.g., Nat'l Soc'y of Prof. Eng'rs. v. United States*, 435 U.S. 679, 697 (1978).

**C. THE INDIVIDUAL DEFENDANTS ARE PERSONALLY
LIABLE FOR INJUNCTIVE RELIEF**

The standard for determining whether an individual is subject to injunctive relief for the acts of a business entity is whether the individual participated directly in the acts or practices or had authority to control the company involved in the

¹⁷ Past misconduct is highly suggestive of the likelihood of future law violations and further balances the equities in favor of injunctive relief, especially where there is a pattern of misrepresentations as opposed to an isolated occurrence. *CFTC v. Hunt*, 591 F.2d 1211, 1220 (7th Cir.), *cert. denied*, 442 U.S. 921 (1979). Along with Defendants' misrepresentations regarding hoodia, their closure of Stella Labs in light of the FTC inquiry, and their questionable tactics in the CPMC Litigation demonstrate Defendants' propensity for misconduct in the future absent an injunctive order.

unlawful practices. *See Cyberspace*, 453 F.3d at 1202; *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *Amy Travel*, 875 F.2d at 573; *Gem Merch. Group*, 87 F.3d at 470 (citation omitted), *In re Nat'l Credit Mgmt.*, 21 F.Supp. 2d at 461; *Nat'l Invention Serv.*, 1997 U.S. Dist. LEXIS 16777, at *12-13. “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; *Publ'g Clearing House*, 104 F.3d at 1170-71. In general, an individual’s status as an officer gives rise to a presumption of ability to control a small, closely held corporation. *Standard Educators, Inc. v. FTC*, 475 F.2d 401, 403 (D.C. Cir.), *cert. denied*, 414 U.S. 828 (1973). More particularly, assuming the duties of an officer is probative of an individual’s participation or authority. *Amy Travel*, 875 F.2d at 573; *Five-Star Auto Club*, 97 F. Supp. 2d at 538.

Each of the individual defendants, Romeo, Vickery, Payton, and Klivinyi, are liable for injunctive relief in this case. All of the individual defendants’ participation in the unlawful activities of Stella Labs and Nutraceuticals exceeds the standard for individual liability because they participated directly in the unlawful acts or had the authority to control them.

As discussed *supra* III.B, despite his attempts to conceal his leadership of

Stella Labs and Nutraceuticals, defendant Romeo both participated in the unlawful acts and had the authority to control them. He testified on behalf of Stella Labs in court, set up bank accounts in Stella Labs' name, and participated in the creation of Nutraceuticals. Payton testified that Romeo told him he was going to create Nutraceuticals. (Farrell Decl., ¶ 32, Ex R, p. 35). Lastly, Romeo's knowledge and participation in the unlawful conduct at issue is betrayed by his efforts to shut down Stella Labs during the pendency of the FTC's investigation of the company.

For his part, Payton has acknowledged in Court that he had authority to control Stella Labs, going so far as to state that he was the sole member of the company. (Farrell Decl., ¶ 36, Ex. S, pp. 117, 135.)¹⁸ At other times, Payton has suggested that Romeo was the one in charge. In any event, Payton's conflicting assertions about his role at Stella Labs under oath speak to his own efforts to conceal his participation in the dubious enterprise.

Vickery, at the helm of advertising and marketing for both Stella Labs and Nutraceuticals, participated or played a direct role in creating the misrepresentations in the marketing materials for the company. Nutraceuticals

¹⁸ Even though Payton's role with respect to Nutraceuticals is unclear, his participation in Stella Labs' operations is a sufficient basis for injunctive relief against him. *See FTC v. Freecom Commcns., Inc.*, 401 F.3d 1192, 1204 (10th Cir. 2005) ("A showing of participation or control justifies injunctive relief against an individual if in the public interest, notwithstanding the fact business operations and/or deceptive acts and practices may have ceased.").

acknowledged to the Commission that she was the Director of Marketing for the company. (Farrell Decl., ¶ 22, Ex. L). There can be little doubt that she either herself crafted the deceptive claims or approved their dissemination.

Finally, Klivinyi has claimed in sworn documentation before the Commission that he is the “Managing Director” for Nutraceuticals. (Farrell Decl., ¶ 24, Ex. N, p. 4). As the “Managing Director” for the company, he, like the other individual defendants, cannot possibly claim that he did not know of the unlawful conduct or did not participate in or have the authority to control the unlawful acts.

V. CONCLUSION

Defendants have deceptively advertised hoodia, lined their own pockets, and caused thousands of consumers to be misled in the process. To put an immediate end to this egregious conduct, this Court should direct the Defendants to show cause why a preliminary injunction should not issue.

Dated: April 6, 2009

Respectfully submitted,

DAVID C. SHONKA
Acting General Counsel

s/ Victor F. DeFrancis
VICTOR F. DeFRANCIS (VD9363)
KAREN JAGIELSKI (KJ2103)
Federal Trade Commission
Room NJ-3212
Washington, DC 20580
202-326-2509 (voice)
202-326-3259 (facsimile)
vdefrancis@ftc.gov

SUSAN J. STEELE
Chief, Civil Division
United States Attorney's Office
970 Broad Street, Suite 700
Newark, NJ 07102
(973) 645-2920 (voice)
(973) 645-2702 (facsimile)
susan.steele@usdoj.gov

Attorneys for Plaintiff