

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

_____)	
FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	
)	
SPEAR SYSTEMS, INC., a Wyoming corporation;)	
)	
BRUCE PARKER, individually, and as an officer)	
or director of Spear Systems, Inc.;)	
)	Case No. 07 C 5597
LISA KIMSEY, individually, and as an officer)	
of Spear Systems, Inc.;)	Judge Wayne R. Andersen
)	
XAVIER RATELLE, individually, doing)	Magistrate Judge Michael T. Mason
business as eHealthyLife.com, and as an officer)	
or director of 9151-1154 Quebec, Inc., 9064-)	
9252 Quebec, Inc., and HBE, Inc.;)	
)	
ABARAGIDAN GNANENDRAN, individually,)	
and doing business as eHealthyLife.com;)	
)	
9151-1154 QUEBEC, INC. d/b/a Q WEB,)	
a Quebec corporation;)	
)	
9064-9252 QUEBEC, INC., a Quebec corporation;)	
and)	
)	
HBE, INC., a St. Kitts and Nevis corporation,)	
)	
Defendants.)	
_____)	

**PLAINTIFF FEDERAL TRADE COMMISSION’S MOTION
FOR ENTRY OF DEFAULT JUDGMENT AGAINST
DEFENDANTS XAVIER RATELLE, ABARAGIDAN GNANENDRAN,
9151-1154 QUEBEC, INC., 9064-9252 QUEBEC, INC., AND HBE, INC.**

This case involves the deceptive marketing and sale of dietary supplements on Internet Web sites utilizing a flood of illegal “spam” email messages. The Court entered default against

Defendants Abaragidan Gnanendran, 9151-1154 Quebec, Inc. d/b/a Q Web, 9064-9252 Quebec, Inc., and HBE, Inc. on October 30, 2008. Default was entered against Defendant Xavier Ratelle on January 8, 2009. Plaintiff Federal Trade Commission (“FTC”) now respectfully moves this Court, pursuant to Rule 55(b) of the Federal Rules of Civil Procedure, for entry of default judgment against Xavier Ratelle, Abaragidan Gnanendran, 9151-1154 Quebec, Inc. d/b/a Q Web, 9064-9252 Quebec, Inc., and HBE, Inc.

A proposed default judgment and order for permanent injunction and monetary relief is attached hereto as Exhibit 1. The FTC’s Amended Complaint in this matter is attached as Exhibit 2. An affidavit and supporting documentation establishing the FTC’s claim for equitable monetary relief are attached as Exhibit 3. In support of its motion, the FTC states as follows:

Background

1. The FTC filed this action on October 3, 2007. The FTC alleged that Defendants Spear Systems, Inc., Bruce Parker, Lisa Kimsey, and Xavier Ratelle violated the FTC Act, 15 U.S.C. § 45(a), and the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM”), 15 U.S.C. § 7701 *et seq.* On May 15, 2008, the FTC filed an Amended Complaint, adding four additional defendants: Abaragidan Gnanendran, 9151-1154 Quebec, Inc. d/b/a Q Web, 9064-9252 Quebec, Inc., and HBE, Inc. Among other things, the FTC’s Amended Complaint alleged that:

- Defendants Ratelle, Gnanendran, 9151-1154 Quebec, Inc., 9064-9252 Quebec, Inc., and HBE, Inc. (“Quebec Defendants”) marketed and sold a variety of dietary supplement products since at least June 2006 (*see* Exhibit 2, Amd. Cmpl., at ¶ 31);
- one line of products marketed by the Quebec Defendants under a variety of different names such as HoodiaLife and HoodiaPlus purported to contain hoodia

gordonii and cause substantial weight loss by suppressing appetite (the “Hoodia Products”) (*id.*);

- Defendants also marketed products under a variety of different names such as HGHLife and HGHPlus that they claimed caused the body to produce human growth hormone and caused a variety of physiological changes to the user (the “HGH Products”) (*id.*);
- Defendants advertised and sold the Hoodia Products and HGH Products for \$55.95, plus \$9.99 shipping and handling, on dozens of Internet Web sites and sold Defendants’ products via credit card (*id.* ¶¶ 31, 33);
- Defendants’ Web sites were marketed by commercial e-mail messages (*id.* ¶ 32);
- Defendants made false representations about their Hoodia Products that were deceptive, constituted false advertising, and lacked reasonable substantiation, in violation of the FTC Act, including that the Hoodia Products caused rapid and substantial weight loss (*id.* ¶¶ 50-51);
- Defendants made false representations about their HGH Products that were deceptive, constituted false advertising, and lacked reasonable substantiation, in violation of the FTC Act, including that the HGH Products contained human growth hormone and/or caused a significantly meaningful increase in a consumer’s growth hormone levels (*id.* ¶¶ 52-53);
- Defendants initiated the transmission of commercial e-mail messages that contained, or were accompanied by, header information that was materially false or materially misleading in violation of CAN-SPAM (*id.* ¶¶ 62-63);
- Defendants initiated the transmission of commercial e-mail messages that contained subject headings that would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message in violation of CAN-SPAM (*id.* ¶¶ 64-65);
- Defendants initiated the transmission of commercial e-mail messages that violated CAN-SPAM by failing to provide: (a) clear and conspicuous notice of the opportunity to decline to receive further commercial e-mail messages from the sender; and (b) a valid physical postal address of the sender (*id.* ¶¶ 66-69); and
- Defendants Ratelle and Gnanendran formulated, directed, controlled, or participated in the acts or practices set forth in the Complaint (*id.* ¶¶ 9-10).

2. On October 3, 2007, the FTC moved for an *ex parte* temporary restraining order (“TRO”) against Defendants. In support of its motion for a TRO, the FTC submitted 13 declarations (*see* Docket Entries #10-11), including:

- a declaration of FTC Investigator Douglas M. McKenney, who made three undercover purchases of Defendants’ products by credit card (PX 1);
- a declaration of Gerhard P. Baumann, M.D., a Professor of Medicine at Northwestern University, and Chief of the Endocrinology and Metabolism Section of the Jesse Brown VA Medical Center, Lakeside Division, who reviewed the claims made about the HGH Products marketed by Defendants and found, among other things, that “the product has no physiological effect on the user” (PX 2 ¶ 27);
- a declaration of Robert F. Kushner, M.D., a Professor of Medicine at Northwestern University Feinberg School of Medicine and Medical Director of the Wellness Institute of Northwestern Memorial Hospital, who reviewed the claims made about the Hoodia Products marketed by Defendants and found, among other things, that the Hoodia Products “will not cause any weight loss absent a reduction in caloric intake or an increase in exercise” (PX 3 ¶ 16); and
- a declaration of Brent Dylan-Rudy Deterding, a senior firewall engineer with SecureWorks, Inc., identifying the CAN-SPAM violations contained in the spam messages initiated by Defendants (PX 13).

The Court granted the FTC’s *ex parte* motion for a temporary restraining order against Defendants, enjoining further misrepresentations and ordering that Defendants’ assets be frozen. (*See* Docket Entry #14.)

3. On May 23, 2008, the Court entered a Stipulated Order for Permanent Injunction and Final Judgment with respect to Defendants Spear Systems, Inc., Bruce Parker, and Lisa Kimsey. (*See* Docket Entry #67.)

4. On October 30, 2008, the Court granted the FTC’s motion for default against Defendants Abaragidan Gnanendran, 9151-1154 Quebec, Inc. d/b/a Q Web, 9064-9252 Quebec,

Inc., and HBE, Inc. (*See* Docket Entry #76.) The Court granted the FTC’s motion for default against Defendant Xavier Ratelle on January 8, 2009. (*See* Docket Entry #85.)

Legal Standards

5. At the default stage, the “well-pleaded allegations of the complaint relating to liability are taken as true.” *Yang v. Hardin*, 37 F.3d 282, 286 (7th Cir. 1994). *See also Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc.*, 722 F.2d 1319, 1323 (7th Cir. 1983). As such, Defendants are liable for: (a) misrepresentations and false advertisements regarding their HGH Products and Hoodia Products violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52 (*see* Exhibit 2, Amd. Cmplt., at ¶¶ 31, 50-53); and (b) various violations of CAN-SPAM (*see id.* ¶¶ 32, 62-68).

6. To address deceptive acts or practices under the FTC Act, the court may issue a permanent injunction, as well as “any ancillary equitable relief necessary to effectuate the exercise of the granted powers.” *FTC v. Febre*, 128 F.3d 530, 534 (7th 1997) (quoting *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989)). A violation of CAN-SPAM “shall be enforced by the [FTC] as if the violation . . . were an unfair or deceptive act or practice proscribed under the [FTC Act].” 15 U.S.C. § 7706(a). *See also FTC v. Phoenix Avatar, LLC*, No. 04 C 2897, 2004 WL 1746698, at *11 (N.D. Ill. July 30, 2004).

FTC’s Proposed Permanent Injunction

7. The FTC seeks a permanent injunction in this matter reasonably tailored to Defendants’ law violations. The FTC’s proposed final order contains injunctive provisions that enjoin Defendants from making misrepresentations regarding any product or service, including,

but not limited to, Hoodia or HGH products. (*See* Exhibit 1, Proposed Order, § I, at pp. 9-10.)¹

The FTC additionally seeks an injunctive provision that enjoins Defendants from further violating CAN-SPAM. (*See id.* § II, at pp. 11.)

8. In addition to injunctive conduct provisions, equitable monetary relief is also appropriate here. In an action brought under the FTC Act, the court may “order repayment of money for consumer redress as restitution or recession.” *Febre*, 128 F.3d at 534. The usual method for calculating restitution in such circumstances is determining “the full amount lost by consumers.” *Id.* at 536. Here, the full amount lost by consumers is \$3,701,088.33.

Consumers purchased Defendants’ Hoodia and HGH Products via credit cards. (Exhibit 2, Amd. Cmplt., at ¶ 20.) The FTC has attached to this motion the sworn declaration of FTC Investigator Douglas McKenney. (*See* Exhibit 3.) Mr. McKenney reviewed records that were provided to the FTC from two companies that processed the FTC’s undercover credit card purchases of herbal products, First Data Corporation and InterSphere Payments, Ltd., and from Visa U.S.A., Inc. These records indicate that consumers bought Defendants’ herbal products from three merchant accounts as follows:

- between March 2006 and January 2007, Defendants’ customers paid \$611,353.34 in credit card sales for Defendants’ products from the “Herbal Sales” merchant account (*see id.* ¶ 9);
- between January and June 2007, Defendants’ customers paid \$672,170.99 in credit card sales for Defendants’ products from the “IP-Ehealthylife.com” merchant account (*id.* ¶ 13); and

¹ In crafting permanent injunctions, the court may “issue multi-product orders, so called ‘fencing-in’ orders, that extend beyond violations of the [FTC Act] to prevent violators from engaging in similar deceptive practices in the future.” *Kraft, Inc. v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992).

- between June and September 2007, Defendants' customers paid \$2,417,564.00 in credit card sales for Defendants products from the "IP-Onlinesales.com" merchant account (*id.* ¶¶ 17, 22).²

In determining these numbers, Mr. McKenney identified the amount consumers paid to Defendants and deducted the amount of sales that were returned to consumers from the credit card charges. (*See* Exhibit 3 ¶ 3.) The FTC therefore seeks equitable monetary relief in the total amount of \$3,701,088.33.³

9. The remainder of the FTC's proposed permanent injunction consists of standard record-keeping and monitoring provisions aimed at ensuring compliance. (*See* Exhibit 1, Proposed Order, § V-IX.) In matters brought pursuant to the FTC Act, the court may issue a permanent injunction, as well as "any ancillary equitable relief necessary to effectuate the exercise of the granted powers." *See Febre*, 128 F.3d at 534 (quoting *Amy Travel*, 875 F.2d at 572). Courts "may order record-keeping and monitoring to ensure compliance with a permanent injunction." *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1018 (N.D. Ind. 2000). *See also FTC v. US Sales Corp.*, 785 F. Supp. 737, 753-54 (N.D. Ill. 1992). The provisions contained in the proposed order submitted to this Court mirror provisions contained in other final

² The credit card charges may include purchases of other products sold by Defendants on Internet Web sites, including replica watches and pharmaceutical drugs. (*See* Exhibit 2, Amd. Cmpl., at ¶ 31.) These products were marketed through commercial e-mail messages that violated CAN-SPAM in multiple ways. (*Id.* ¶¶ 32, 40-45.) Thus, even if some of the credit card sales comprise profits from sales of non-herbal products, it is proper to disgorge the profits which were generated from the violations of CAN-SPAM. *See, e.g., FTC v. QT Inc.*, 512 F.3d 858, 863 (7th Cir. 2008) ("Disgorging profits is an appropriate remedy [in FTC matter].").

³ Pursuant to the Preliminary Injunction Order entered by the Court on October 25, 2007, certain third parties are holding certain assets on behalf of Defendants. The FTC's proposed order requires the third parties holding Defendants' funds to transfer the funds to the FTC in partial satisfaction of the monetary judgment. (*See* Exhibit 1, Proposed Order, § IV, at pp. 12-13.)

FTC default orders approved by this Court. *See FTC v. Sili Neutraceuticals, LLC*, 07 C 4541 (N.D. Ill. Jan. 23, 2008) (Coar, J.) (default judgment involving violations of FTC Act and CAN-SPAM); *FTC v. Global Web Promotions Pty., Ltd.*, 04 C 3022 (N.D. Ill. June 16, 2005) (Aspen, J.) (default judgment involving violations of FTC Act and CAN-SPAM). The provisions are also substantially similar to the order provisions contained in the stipulated permanent injunction entered by this Court on May 23, 2008 as to Defendants Spear Systems, Inc., Bruce Parker, and Lisa Kimsey. (*See* Docket Entry #67.)

9. Defendants Xavier Ratelle and Abaragidan Gnanendran are individually liable for the law violations and are jointly and severally liable for the equitable monetary relief. Individuals are liable under the FTC Act for corporate practices where the individual: (1) participated directly in the practices or acts or had authority to control them; and (2) had or should have had knowledge or awareness of the acts. *See FTC v. World Media Brokers*, 415 F.3d 758, 764 (7th Cir. 2005); *Amy Travel*, 875 F.2d at 573-74. Here, Ratelle is a principle officer of the companies involved in this operation. (*See* Exhibit 2, Amd. Cmplt., at ¶ 9.)⁴ Both Ratelle and Gnanendran have formulated, directed, controlled, or participated in the acts or practices set forth in the complaint. (*Id.* ¶¶ 9-10.) Indeed, the FTC has amassed significant evidence of Ratelle and Gnanendran's involvement in this scheme. This evidence includes that: (1) Ratelle signed an agreement on behalf of Defendant 9154-1154 Quebec, Inc. d/b/a Q Web to process credit card transactions for Defendants' products (*see* Exhibit 3, McKenney Dec. ¶ 8,

⁴ The companies – 9151-1154 Quebec, Inc. d/b/a Q Web, 9064-9252 Quebec, Inc., and HBE, Inc. – operated as a common enterprise by sharing officers, employees, office locations, and commingling funds in furtherance of Defendants' scheme. (*See* Exhibit 2, Amd. Cmplt. ¶ 14.) Therefore, the companies are jointly and severally liable for the injuries caused by their violations of the FTC Act and CAN-SPAM. *See, e.g., FTC v. Bay Area Bus. Council*, 423 F.3d 627, 635 (7th Cir. 2005).

Att. C); (2) Ratelle signed an agreement on behalf of HBE, Inc. to process credit card transactions for herbal products which provided for proceeds to be deposited into a bank account in the name of 9064-9252 Quebec, Inc. (*id.* ¶ 12, Att. E); (3) Gnanendran and Ratelle purchased herbal products from a manufacturer (*id.* ¶ 24, Att. H); (4) Gnanendran and Ratelle arranged for the fulfillment of the herbal products that they sold (*id.* ¶ 25, Att. I); and (5) Ratelle purchased domain names for websites used to sell the herbal products (*id.* ¶ 26, Att. J).

WHEREFORE, Plaintiff FTC respectfully requests that the Court enter a default judgment against Defendants Xavier Ratelle, Abaragidan Gnanendran, 9151-1154 Quebec, Inc. d/b/a Q Web, 9064-9252 Quebec, Inc., and HBE, Inc. that includes a permanent injunction, and equitable monetary relief in the amount of \$3,701,088.33. A proposed Default Judgment and Order for Permanent Injunction and Monetary Relief is provided with this Motion.

Respectfully submitted,

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