IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FEDERAL TRADE COMMISSION, et al.,	
Plaintiffs,	
v.	**CIVIL ACTION NO. 02-405-CB-M**
ACCENT MARKETING, INC., et al.,	
Defendants.	

ORDER

On June 11, 2002, this court granted the Motion of the Federal Trade Commission ("FTC") for a Temporary Restraining Order ("TRO") without notice to the defendants, pursuant to Fed.R.Civ.P. 65(b). That TRO provided, in pertinent part, that a hearing would be held on June 21, 2002, at which defendants could show cause why the court should not enter a preliminary injunction.[1]

On June 21, 2002, this court held a hearing on the preliminary injunction at which the FTC and all defendants were represented and offered evidence. At the conclusion of the hearing, the court ordered that the TRO would remain in effect until the court entered its order either granting a preliminary injunction or dissolving the TRO. The court allowed the parties an opportunity to file supplemental briefs. Defendants Accent Marketing, John Nolan White and Monarch Vending, as well as plaintiff FTC filed post-hearing briefs within the time allowed.

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[1] Despite reference to the hearing as defendant's opportunity to 'show cause,' the court notes that the burden of proof remains on the FTC to justify issuance of the preliminary injunction. However, the court considers all evidence previously submitted in support of the TRO, which the court had previously found to form a sufficient factual showing to allow entry of injunctive relief.

Preliminary Injunction Standard

Ordinarily, a party seeking a preliminary injunction must demonstrate that (1) it has a substantial likelihood of success on the merits, (2) the movant will suffer irreparable injury unless the injunction is issued, (3) the threatened injury to the movant outweighs the possible injury that the injunction may cause the opposing party, and (4) if issued, the injunction would not disserve the public interest. See *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318, 1326 (11th Cir. 2001)

The FTC argues that the court need only address factors 1), 3) and 4), above.[2] *The agency cites FTC v. University Health, Inc.*, 938 F.2d 1206, 1217 (11th Cir. 1991) for the proposition that irreparable injury is presumed in statutory enforcement actions. The court finds that this authority, though stated in an antitrust action in relation to a proposed merger, is nonetheless applicable in this case. However, the court also notes that plaintiff has demonstrated irreparable injury in this action.[3]

Likelihood of Success

The FTC Act prohibits the use of "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C.A. §§ 45(a). A representation is deceptive if it contains a material claim or omission that is likely to mislead consumers acting reasonably under the circumstances, to their

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The FTC states that the court need only address the likelihood of success and balancing of the equities. That last phrase is sometimes used to include the balance between the movant's interests and those of both the party to be enjoined and of the public. In the absence of citation to authority deleting the requirement to satisfy the fourth element, the court presumes that the agency uses that phrase to refer to both steps.

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Inter alia, the court notes that the FTC's purpose in bringing this suit is to prevent further fraud and to preserve the assets of the defendants for repayment to the defrauded customers. The court also notes evidence that defendant John Nolan White withdrew the entire balance of a bank account belonging to Accent Marketing after service of the TRO–which contained provisions for an asset freeze appointment of a receiver–upon the corporation.

detriment. See *FTC v. World Travel Vacation Brokers*, 861 F.2d 10220, 1029 (7th Cir. 1988); *FTC v. Atlantex Assocs.*, 1987 WL 20384, 1987-2 Trade Cas. (CCH) ¶67,788 at 59, 252 (S.D.Fla. 1987), *aff'd*, 872 F.2d 966 (11th Cir. 1989). A representation or omission is material if it is of the kind usually relied upon by a reasonably prudent person. See *FTC v. Slimamerica*, 77 F.Supp.2d 1263, 1272 (S.D.Fla. 1999).

> Naturally a lawyer in reading in printed lecture would note the failure of express or direct representation. It is doubtless true that a civil action for deceit or a criminal proceeding for obtaining money by false pretenses would not likely be sustained by a court. But the test of falsity in connection with this particular Act is different from that--it is the net impression which the advertisement is likely to make upon the general public. Charles of the Ritz Distributors Corporation v. Federal Trade Commission, 2d Cir., 143 F.2d 676. In determining the question of falsity, the advertisements must be considered in their entirety and as they would be read or understood by those to whom they appeal. Aronberg v. Federal Trade Commission, 7 Cir., 132 F.2d 165.

Federal Trade Commission v. National Health Aids, 108 F.Supp. 340 (D.Md. 1952).

The agency cites authority holding that it need not demonstrate that every reasonable consumer would be misled, nor indeed that any consumer was actually misled. *FTC v. Wilcox*, 926 F.Supp. 1091, 1099 (S.D.Fla. 1995). It offers authority holding that it need not prove actual reliance of each consumer, but instead that reliance is to be presumed from proof that the representations were material and widely disseminated, and that consumers purchased the products or services. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605-06 (9th Cir. 1993). Defendants do not contest these matters, and the court finds the agency's citations correctly state the burden upon the FTC. Nonetheless, the agency did produce evidence and testimony of actual reliance and of the materiality of the deceptive representations to their decision to purchase the business opportunity.

The FTC has promulgated regulations establishing certain minimum disclosure requirements

specifically designed for franchising and business opportunity ventures. 16 C.F.R. §436.1, et seq. The FTC has offered evidence that defendant failed to make several such mandatory disclosures. The agency's evidence also tended to proved that defendant's earnings representations were unreasonable and not based upon valid data. Defendants have failed to offer substantial evidence in rebuttal.[4] The failure to make the mandatory disclosures renders several of the defendants' representations, including particularly its representations concerning earnings and potential earnings, unfair and deceptive. 16 C.F.R. §436.2.

At the hearing, the FTC offered the testimony of one of its investigators, who detailed the results of her investigation; three individuals who had purchased various business opportunities from defendants; and the temporary receiver, who addressed the financial posture of the corporate defendants. The agency introduced additional documentary evidence through these witnesses. The three consumers addressed their dealings with the defendants and their employees, as well as describing their experiences in pursuing the vending machine venture they purchased from the defendants.

The most compelling testimony, however, came from a witness called by the defendants, Mr. J.C. McIntosh. The FTC had offered documentary evidence that the defendants provided 'references' to prospective customers, but that these references were paid by the defendants and

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[4] The inclusion of a single-page spreadsheet purporting to show annual earnings for a company called Gumusements, Inc. is insufficient to comply with these required disclosures. See e.g. 16 C.F.R. §436.1(b), (c), (d) and (e). The evidence also indicates that Gumusements was the company which invented and produced the vending machines defendant marketed to its customers. The company was not similarly situated to those customers, and its spreadsheet of dubious relevance to their situation. The FTC thus may be able to demonstrate at the trial on the merits that the inclusion of the spreadsheet was an additional deceptive act.

acted as salespersons for Accent. Defendants called Mr. J.C. McIntosh, one of these references. He testified that he presently had 42 vending machines which he purchased from Accent, and–in general terms[5]–stated that he was making a sufficient income.[6] In response to questions by the court, Mr. McIntosh admitted that he was paid for acting as a reference. He testified that he received regular weekly payments of $600 from Accent regardless of the number of calls received or the amount of time spent on each call. This represents an annual income in excess of $30,000.00.[7] Though he characterized these payments as reimbursement for his time spent in answering such calls[8], the court

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In the transcript of a call by an FTC investigator, Mr. McIntosh explained that his reticence to disclose his income from the vending machines arose from his desire to avoid tax liability on the cash income he received. He argued persuasively that the cash nature of the business made it attractive particularly for that reason. PX 26, p13 (transcript page 12).

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As noted below, McIntosh paid a fraction of what the customers were paying per machine, and purchased them without being restricted to minimum multi-machine purchases. His expenses, and thus his profits, were thus entirely different from those of the customers whom he purported to advise. Even his general claims of a comfortable income were thus inapplicable to the potential customers and thus misleading, particularly in connection with the earnings claims made by Accent.

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McIntosh also stated that he had received machines as bonuses, and was reimbursed for expenses, such as phone bills. It appears from the documentary evidence that the other 'references' were paid as well, though it s not clear whether or not they were all paid on the same basis or in the same amount. From the checks made out to one such other reference, it appears that she may have been paid on the basis of numbers of potential customers she talked to and/or the number of customers who thereafter purchased the business opportunity.

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Defendants used a limited number of such 'references,' apparently less than a dozen, and provided each potential customer with 2 or 3 references. Given the number of customer calls shown in the documents seized by the FTC, each 'reference' would have been used often. Also, Mr. McIntosh, one of the references, indicated to the FTC investigator that he had begun answering such calls for Accent recently, informally and on an occasional basis. "Oh, they [Accent] called me here three or four weeks ago and asked me if I'd mind taking a call every now and then. I told them, not at all, because they've been very decent to me." PX 26, p 14 (transcript page 13). Mr. McIntosh certainly did not disclose his relationship to Accent, and apparently spoke as he did to disguise and minimize that relationship.

finds that the FTC has established a substantial likelihood that, in the trial on the merits, they will succeed in establishing that the failure to disclose such a material, ongoing relationship with Accent was an unfair or deceptive trade practice.

Mr. McIntosh also testified that he had prior experience in vending machines, and had not purchased the 'business opportunity' offered by Accent, but instead had arranged a side deal to purchase the machines for a fraction of the price charged to Accent's ordinary customers. The FTC provided the court with transcripts of telephone calls made by FTC investigators posing as prospective customers. One of these is a transcript of a call to Mr. McIntosh. In that call, McIntosh states that he had originally purchased a route from Accent, and thereafter used their expansion program. (See PX 26 pp. 5, 16.) He told the investigator that Accent provided him his first 20 locations (*Id.* at p. 10) but testified at trial that he had prior experience with vending machines and had not purchased a route or used their location assistance.

The evidence concerning defendant's promises of location assistance was less clear. It was unquestionably shown that defendant's customers experienced considerable problems with the location assistance companies, but the evidence of defendants' knowledge of or responsibility for such problems was more equivocal. Nonetheless, it appeared that defendants promised location assistance without assuring that such assistance--provided by companies they recommended[9]--was adequate, and complied with defendant's representations. Further, there is the matter of the failure to disclose the relationship between defendant Accent and defendant Monarch, one of the locator

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9 Accent not only recommended particular locator services, but very strongly recommended that their customers utilize such a service.

services to which defendant Accent referred its customers.[10] Also, some but not all of Accent's advertisements appear to represent that the customers would be buying existing routes and/or pre-selected locations, but are only later informed that they will need to seek the assistance of locator services–at an additional fee. Defendants represented to potential customers that the locators had already performed a "site study" of the area and had already gained permission of businesses to place the machines.[11] Finally, many of the customers' complaints concerning location assistance companies addressed defendant Monarch, which was owned by defendant John Nolan White, and which conducted its business from the same offices as defendant Accent.

Based upon the documentary evidence submitted by the parties and upon the testimony adduced at the hearing, the court finds that the plaintiff FTC has established that it has a substantial likelihood of success on the merits. The FTC's evidence tends to show that the corporate defendants have engaged in numerous unfair and deceptive practices; as to the individuals, the evidence is sufficient to demonstrate that they both had knowledge of and control over such unfair and deceptive practices, and indeed that each of them participated in those practices directly. *See FTC v. Wolf*, 1996 U.S. Dist. LEXIS 1760 at *23-24 (S.D. Fla.).

Balancing of the Equities

As noted above, the evidence tends to show that defendants were guilty of false and deceptive practices, and that they deceived and thereby injured numerous consumers. The FTC seeks the

[10] In a taped conversation with an FTC investigator, one of Accent's telemarketers stated that Monarch was a completely separate company.

[11] They also began telling customers that they needed to decide quickly because the opportunities were sold on a first-come, first-served basis. There was no indication, however, that there was any limit on the number of customers defendant would accept in a given area, and the printed materials expressly stated that defendant did not sell protected routes or areas.

instant injunction to preserve the defendants' assets for redress of such injured parties, and also to prevent further injury to other consumers through continued fraud. The unfair and deceptive practices of which the FTC has offered evidence permeate the defendants' business dealings, so that it is impracticable to craft restrictions sufficiently broad to prevent further such practices and resultant injury to the public, while nonetheless allowing defendants to continue business operations in any form. Further, the court finds that there is a substantial risk of dissipation of assets if the asset freeze is lifted.

It appears that defendants have not complied with several requirements of the TRO entered by this court, including preparation and presentation of sworn financial statements. Further, as noted above, there is evidence which tends to show that, after service of the TRO on the corporation, John Nolan White withdrew the balance of an account belonging to defendant Accent, totaling more than $25,000, and that, despite the TRO's freeze on business and personal assets, has not turned over or accounted for such funds. The court cannot rely upon defendants to comply with the terms of any injunction which would allow them access to the assets of the corporate defendants or which would allow them to resume business under detailed restrictions.

The court recognizes that the appointment of a receiver and the freeze of assets effectively puts the defendants out of business, at least for the duration of the preliminary injunction. However, as the the FTC has demonstrated a likelihood that it will ultimately prove that the practices of that business are contrary to law and detrimental to the public,[12] the court finds that the equities, both

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As the FTC notes in its brief, the typical customer initially invests approximately $10,000 on the business opportunities offered by defendants, and that initial investment can be as high as $36,000 or more. Defendants' records indicate sales revenue of approximately $18 million over the last two years.

public and private, weigh in favor of issuance of the preliminary injunction.

Conclusion

For the reasons set forth above, it is hereby ordered that a Preliminary Injunction shall issue by separate order.

DONE this the 1st day of July, 2002.

CHIEF DISTRICT JUDGE