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

OCT 27 2004

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

AVS MARKETING, INC., and

WILLIAM R. HEID,

Defendants.

JUDGE MORAN

MAGISTRATE JUDGE
GERALDINE SOAT BROWN

CIVIL NO.

04C 6915

~~(PROPOSED)~~

**EX PARTE TEMPORARY RESTRAINING ORDER WITH AN ASSET FREEZE,
AN ACCOUNTING, EXPEDITED DISCOVERY, AND ORDER FOR DEFENDANTS
TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

Plaintiff Federal Trade Commission ("FTC" or "Commission"), having filed its complaint for a permanent injunction and other equitable relief in this matter pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC ACT"), 15 U.S.C. § 53(b), and having moved *ex parte* for a temporary restraining order with an asset freeze, an accounting, expedited discovery and other equitable relief, and for an order to show cause why a preliminary injunction should not be granted pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 65, and the Court having considered the complaint, declarations, exhibits, and memorandum of law filed in support thereof, finds that:

1. This Court has jurisdiction over the subject matter of this case, and there is good cause to believe it will have jurisdiction over all the parties hereto;

2. Venue properly lies with this Court;
3. There is good cause to believe that Defendants AVS Marketing, Inc. and William R. Heid have violated Sections 5(a) and 12 of the Federal Trade Commission Act (“FTC Act”), as amended, 15 U.S.C. §§ 45(a), and 52, and that the Commission is therefore likely to prevail on the merits of this action;
4. There is good cause to believe that immediate and irreparable harm will result from Defendants’ ongoing violations of Section 5(a) and 12 of the FTC Act unless Defendants are restrained and enjoined by order of this Court;
5. There is good cause to believe that immediate and irreparable damage to the Court's ability to grant effective final relief for consumers in the form of monetary redress will occur from the transfer, disposition or concealment by Defendants of their assets or business records unless Defendants are immediately restrained and enjoined by Order of this Court, and that in accordance with Fed. R. Civ. P. 65(b), the interests of justice therefore require that the Commission's Motion be heard *ex parte* without prior notice to Defendants;
6. Good cause exists for ordering Defendants to provide an accounting of their business as set forth herein and permitting the Commission to take expedited discovery;
7. Weighing the equities and considering the Commission's likelihood of ultimate success, a temporary restraining order with an asset freeze, accounting, expedited discovery, and other equitable relief, is in the public interest; and
8. No security is required of an agency of the United States for issuance of a restraining order. *See* Fed. R. Civ. P. 65(c).

IT IS THEREFORE ORDERED AS FOLLOWS:

I. DEFINITIONS

For the purposes of this Order, the following definitions shall apply:

- A. “Defendants” shall refer to AVS Marketing, Inc. and William R. Heid, and each of them, and any entity through which they do business.
- B. “Weight-loss product” shall refer to any product that is advertised, marketed, promoted, offered for sale, distributed, or sold with express or implied representations that the product will or may cause weight loss in humans, including, but not limited to, Himalayan Diet Breakthrough.
- C. “Competent and reliable scientific evidence” means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the professions to yield accurate and reliable results.
- D. “Document(s)” or “record(s)” shall refer to:
 - 1. The original or a true copy of any written, typed, printed, electronically stored, transcribed, taped, recorded, filmed, punched, or graphic matter or other data compilations of any kind, including, but not limited to, letters, email or other correspondence, messages, memoranda, interoffice communications, notes, reports, summaries, manuals, magnetic tapes or discs, tabulations, books, records, checks, invoices, work papers, journals, ledgers, statements, returns, reports, schedules, or files; and

2. Any information stored on any desktop personal computer (“PC”) and workstations, laptops, notebooks, and other portable computers, whether assigned to individuals or in pools of computers available for shared use; and home computers used for work-related purposes; backup disks and tapes, archive disks and tapes, and other forms of offline storage, whether stored onsite with the computer used to generate them, stored offsite in another company facility or stored offsite by a third-party, such as in a disaster recovery center; and computers and related offline storage used by Defendants’ associates, who include persons who are not employees of the company or who do not work on company premises.

E. “Asset(s)” means any legal or equitable interest in, right to, or claim to, any real and personal property, including but not limited to chattels, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, mail or other deliveries, shares of stock, lists of consumer names, inventory, checks, notes, accounts, credits, receivables, funds, monies, and all cash, wherever located, and shall include both existing assets and assets acquired after the date of entry of this Order.

F. “Assisting” means providing any of the following goods or services to any person or entity: (a) formulating or providing, or arranging for the formulation or provision of, any good or service related to any weight-loss product; (b) formulating or providing, or arranging for the formulation or provision of, any advertising materials, marketing materials, or sales scripts; (c) hiring, recruiting,

or training personnel; (d) advising or consulting others on the commencement or management of a business venture; (e) providing names of, or assisting in the generation of, potential customers; (f) performing customer service functions, including but not limited to, receiving or responding to consumer complaints; or (g) performing marketing services of any kind.

- G. The terms “and” and “or” in this Order shall be construed conjunctively or disjunctively, as necessary, to make the applicable sentence or phrase inclusive rather than exclusive.
- H. The term “including” shall mean “including without limitation.”

II. PROHIBITED BUSINESS ACTIVITIES

IT IS FURTHER ORDERED that Defendants and their officers, directors, agents, servants, employees, salespersons, distributors, corporations, subsidiaries, affiliates, successors, assigns, and those persons or entities in active concert or participation with them who receive actual notice of this Order by personal service, facsimile, or otherwise, are hereby enjoined from:

- A. making, or assisting others in making, expressly or by implication, any material false or misleading oral or written statement or representation in connection with the advertising, marketing, promotion, offer for sale, distribution, or sale of any product or service, including but not limited to:
 - 1. Representing, expressly or by implication, including through the use of a trade name or endorsements, that any weight-loss product, or any ingredient contained in it:
 - a. causes rapid or substantial weight loss without the need to reduce

- caloric intake or increase exercise;
 - b. causes substantial weight loss even if users eat substantial amounts of high calorie foods;
 - c. causes substantial weight loss by burning body fat, or by preventing the absorption or formation of body fat;
 - d. works for all users; or
 - e. enables users to safely lose as much as 37 pounds in 8 weeks.
2. Misrepresenting, expressly or by implication, including through the use of a trade name or endorsements, that any weight-loss product, or any ingredient contained in it, causes rapid or substantial weight loss, or any specific amount of weight loss;
 3. Making any representation, in any manner, expressly or by implication, including through the use of a trade name or endorsements, regarding the efficacy of any dietary supplement, pill, serum, or weight-loss product unless, at the time of making such representation, Defendants possess and rely upon competent and reliable scientific evidence that substantiates the representation;
 4. Misrepresenting, in any manner, expressly or by implication, including through the use of endorsements, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research; and
 5. Misrepresenting any other fact material to a consumer's decision to purchase any product.

For the purposes of this Paragraph A, the term “endorsement” shall mean as defined in 16 C.F.R. § 255.0(b).

- B. Processing orders for weight-loss products, including without limitation Himalayan Diet Breakthrough, or processing, depositing, or cashing any payment received from any consumer for weight-loss products, including without limitation Himalayan Diet breakthrough, pending determination of the Commission’s request for a preliminary injunction, or further order of this Court.

III. ASSET FREEZE

IT IS FURTHER ORDERED that Defendants and their officers, directors, agents, servants, employees, salespersons, distributors, corporations, subsidiaries, affiliates, successors, assigns, and those persons or entities in active concert or participation with them who receive actual notice of this Order by personal service, facsimile, or otherwise, are hereby temporarily restrained and enjoined from directly or indirectly:

- A. Selling, liquidating, assigning, transferring, converting, loaning, encumbering, pledging, concealing, dissipating, spending, withdrawing, or otherwise disposing of any funds, real or personal property, or other assets, or any interest therein, wherever located, including any assets outside the territorial United States, which are:
1. in the actual or constructive possession of any Defendant; or
 2. owned or controlled by, or held, in whole or in part for the benefit of, or subject to access by, or belong to, any Defendant; or
 3. in the actual or constructive possession of, or owned or controlled by, or

subject to access by, or belong to, any corporation, partnership, trust or other entity directly or indirectly under the control of any Defendant.

- B. Opening or causing to be opened any safe deposit boxes titled in the name of any Defendant, or subject to access by any Defendant.
- C. Incurring charges on any credit card issued in the name, singly or jointly, of any Defendant.
- D. Notwithstanding the above, Defendant Heid may, upon compliance with Section VI.B of this Order, pay from his individual personal funds reasonable, usual, ordinary, and necessary living expenses, subject to prior written agreement with the Commission as to the amount released, the applicable time period, and the applicable account or source of funds;
- E. Transferring any funds or other assets subject to this Order for attorneys' fees or living expenses, except from accounts or other assets identified by prior written notice to the Commission and prior approval by the Court; *provided* that no attorneys' fees or living expenses, other than those set forth in Paragraph D above, and only in accordance with the procedures set forth in Paragraph D above, shall be paid from funds or other assets subject to this Order unless and until the financial statements required by Section VI.B, below, are provided to counsel for the Commission.

IT IS FURTHER ORDERED that the funds, property and assets affected by this Paragraph shall include both existing assets and assets acquired after the effective date of this Order, including without limitation, those acquired by loan or gift. Defendants shall hold all

assets, including without limitation, payments, loans, and gifts, received after service of this Order.

IV. RETENTION OF ASSETS BY THIRD PARTIES

IT IS FURTHER ORDERED that, pending determination of the Commission's request for a preliminary injunction, any bank, savings and loan, financial or brokerage institution, fund, escrow agent, trustee, mail receipt facility, or other person or entity served with a copy of this Order, or who otherwise has actual or constructive knowledge of this Order, that has possession, custody, or control of any account, asset, or document held on behalf of, or relating or belonging to, any Defendant, shall:

- A. Hold and retain within such entity's or person's control, and prohibit the withdrawal, removal, assignment, transfer, pledge, hypothecation, encumbrance, disbursement, dissipation, conversion, sale, liquidation, or other disposal of any funds, documents, property, or other assets held by or under such entity's or person's control:
1. on behalf of, or for the benefit of, AVS Marketing, Inc., William R. Heid, or any other party subject to Paragraph III above;
 2. in any account maintained in the name of, or subject to withdrawal by, AVS Marketing, Inc., William R. Heid, or any other party subject to Paragraph III above; or
 3. that are subject to access or use by, or under the signatory power of, AVS Marketing, Inc., William R. Heid, or any other party subject to Paragraph III above.

- B. Deny access to any safe deposit boxes that are either:
1. titled in the name, individually or jointly, of AVS Marketing, Inc., William R. Heid, or any other party subject to Paragraph III above; or
 2. subject to access by AVS Marketing, Inc., William R. Heid, or any other party subject to Paragraph III above.
- C. Provide to counsel for the Commission, within three (3) days, a statement setting forth:
1. the identification of each account or asset titled in the name, individually or jointly, or held on behalf of, or for the benefit of, AVS Marketing, Inc., William R. Heid, or any other party subject to Paragraph III above, whether in whole or in part;
 2. the balance of each such account, or a description of the nature and value of such asset;
 3. the identification of any safe deposit box that is either titled in the name of, individually or jointly, or is otherwise subject to access or control by, AVS Marketing, Inc., William R. Heid, or any other party subject to Paragraph III above, whether in whole or in part; and
 4. if the account, safe deposit box, or other asset has been closed or removed, the date closed or removed and the balance on said date.

The accounts subject to this provision include existing assets and assets deposited after the effective date of this Order. This Paragraph shall not prohibit transfers in accordance with any provision of this Order, or any further order of the Court.

V. PRESERVATION OF RECORDS AND OTHER EVIDENCE

IT IS FURTHER ORDERED that Defendants, and their officers, directors, agents, servants, employees, salespersons, distributors, corporations, subsidiaries, affiliates, successors, assigns, and those persons or entities in active concert or participation with them who receive actual notice of this Order by personal service, facsimile, or otherwise, are hereby enjoined from:

- A. Destroying, erasing, mutilating, concealing, altering, transferring or otherwise disposing of, in any manner, directly or indirectly, contracts, agreements, customer files, customer lists, customer addresses and telephone numbers, correspondence, advertisements, brochures, sales material, training material, sales presentations, documents evidencing or referring to Defendants' products, data, computer tapes, disks, or other computerized records, books, written or printed records, handwritten notes, telephone logs, "verification" or "compliance" tapes or other audio or video tape recordings, receipt books, invoices, postal receipts, ledgers, personal and business canceled checks and check registers, bank statements, appointment books, copies of federal, state or local business or personal income or property tax returns, and other documents or records of any kind, including electronically-stored materials, that relate to the business practices or business or personal finances of any Defendant or other entity directly or indirectly under the control of any Defendant;
- B. Failing to create and maintain books, records, and accounts which, in reasonable detail, accurately, fairly, and completely reflect the incomes, assets, disbursements, transactions and use of monies by any Defendant or other entity

directly or indirectly under the control of any Defendant; and

- C. Selling, renting, leasing, transferring, or otherwise disclosing the name, address, telephone number, credit card number, bank account number, email address, or other identifying information of any person who paid any money to any defendant, at any time prior to entry of this order, in connection with the purchase of any product or service. *Provided*, however, that Defendants may disclose such identifying information to a law enforcement agency or as required by any law, regulation, or court order.

VI. ACCOUNTING PROVISIONS

IT IS FURTHER ORDERED that, within three (3) days after entry of this Order,

- A. Defendants shall serve on the Commission a detailed accounting of:
1. the names and active ingredients of all products advertised, marketed, promoted, offered for sale, distributed, or sold by Defendants, and their officers, directors, agents, servants, employees, salespersons, distributors, corporations, subsidiaries, affiliates, successors, or assigns;
 2. all gross revenues obtained from the sale of each product, stated separately for each, from inception of sales through the date of the issuance of this Order;
 3. all net profits obtained from the sale of each product, stated separately for each, from inception of sales through the date of the issuance of this Order;
 4. the total amount of each product sold, stated separately for each; and

5. the full names, addresses, telephone numbers, and email addresses of all purchasers of each product, stated separately for each, and the amount each purchaser paid for such product(s).
- B. Within three (3) days after service with this Order, Defendants shall prepare and provide to the Commission a complete and accurate individual or corporate financial statement, as the case may be, signed under penalty of perjury, on the forms attached to this Order as **Attachments A and B**, respectively.
- C. Defendants shall further provide counsel for the Commission with a statement, verified under oath, of all transfers and assignments of assets and property worth \$5,000 or more since January 1, 2004, that shall include the amount or value transferred or assigned, the name and address of the transferee or assignee, the date of the transfer or assignment, and the type and amount of consideration paid to any Defendant. Each statement shall specify where applicable the name and address of each financial institution and brokerage firm, both domestic and foreign, at which the Defendant has an account or safe deposit boxes, and the account number or other identification of each such account or safe deposit box.

VII. EXPEDITED DISCOVERY

IT IS FURTHER ORDERED that the Commission is granted leave at any time after service of this Order to demand the production of documents from any person or entity relating to the nature, status, extent, location or other relevant information relating to the Defendants' assets, income, personal or business financial records or the location of a Defendant. Forty-eight (48) hours notice shall be deemed sufficient for any such production of documents from the

Defendants and three (3) business days notice shall be deemed sufficient for any such production of documents from any other person or entity, including but not limited to any bank, savings and loan, financial or brokerage institution, fund, escrow agent, or trustee. The production of documents submitted pursuant to this provision shall not in any way waive Plaintiff's rights to seek the production of additional documents.

VIII. CONSUMER REPORTS

IT IS FURTHER ORDERED that pursuant to Section 604 of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(1), any consumer reporting agency may furnish a consumer report concerning any Defendant to Plaintiff.

IX. DISTRIBUTION OF ORDER BY DEFENDANTS

IT IS FURTHER ORDERED that Defendants shall immediately provide a copy of this Order to each affiliate, subsidiary, division, sales entity, successor, assign, officer, director, employee, independent contractor, agent, attorney, ad broker, advertising agency, fulfillment house, call center, domain registrar, mail receipt facility, and representative of the Defendants, and within ten (10) calendar days following service of this Order by the FTC, Defendants shall provide the FTC with an affidavit identifying the names, titles, addresses, and telephone numbers of the persons and entities that Defendants have served with a copy of this Order in compliance with this provision.

X. SERVICE OF THIS ORDER BY PLAINTIFF

IT IS FURTHER ORDERED that copies of this Order may be served by facsimile transmission, personal or overnight delivery, or U.S. Mail, by employees of the Federal Trade Commission, employees of any other law enforcement agency, or agents of any process servers

retained by the Federal Trade Commission, on (1) Defendants, (2) any financial or brokerage institution, entity or person that holds, controls, or maintains custody of any account or asset of any Defendant, or (3) any other person or entity that may be subject to any provision of this Order, including, but not limited to, commercial mail boxes. Service upon any branch or office of any entity shall effect service upon the entire entity.

XI. ORDER TO SHOW CAUSE REGARDING PRELIMINARY INJUNCTION

IT IS FURTHER ORDERED, pursuant to Fed. R. Civ. P. 65(b), that Defendants shall appear before this Court on the 8th day of November, 2004 at 9:00 a.m., to show cause, if there is any, why this Court should not enter a Preliminary Injunction, pending final ruling on the Complaint against Defendants, enjoining them from further violations of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, continuing the freeze of their assets, and imposing such additional relief as may be appropriate.

XII. SERVICE OF ANSWERING AFFIDAVITS, MEMORANDA, AND EVIDENCE

IT IS FURTHER ORDERED that:

- A. Defendants shall file any answering affidavits, pleadings, or legal memoranda with the Court and serve the same on counsel for the Commission no later than three (3) business days prior to the Preliminary Injunction hearing in this matter. The Commission may file responsive or supplemental pleadings, materials, affidavits, or memoranda with the Court and serve the same on counsel for Defendants no later than one (1) business day prior to the preliminary injunction hearing in this matter. *Provided* that service shall be performed by personal or overnight delivery or by facsimile, and documents shall be delivered so that they

shall be received by the other parties no later than 4 p.m. local time on the appropriate dates listed in this Paragraph.

- B. Any party who desires to present live testimony at the preliminary injunction hearing in this matter shall file with this Court and serve on all opposing parties, no later than three (3) business days prior to the preliminary injunction hearing in this matter, a witness list that shall include the name, address, and telephone number of any such witness, and either a summary of, or the witness' declaration revealing the substance of, such witness' expected testimony. *Provided* that service shall be performed by personal or overnight delivery or by facsimile, and documents shall be delivered so that they shall be received by the other parties no later than 4 p.m. local time on the date listed in the previous sentence.

XIII. SERVICE UPON PLAINTIFF

IT IS FURTHER ORDERED, with regard to any correspondence, pleadings, or notifications related to this Order, service on the Commission shall be performed by delivery to:

Guy G. Ward
David A. O'Toole
Federal Trade Commission
55 E. Monroe Street, Suite 1860
Chicago, Illinois 60603
(312) 960-5634

or by facsimile transmission to (312) 960-5600.

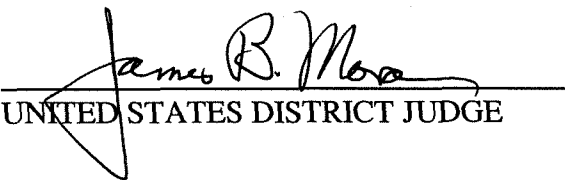
XIV. DURATION OF TEMPORARY RESTRAINING ORDER

IT IS FURTHER ORDERED that the Temporary Restraining Order granted herein shall expire on 8th day of November, 2004, at 11:59 p.m. local time, unless within such time the Order, for good cause shown, is extended, or unless, as to any Defendant, the Defendant consents that it should be extended for a longer period of time.

XV. RETENTION OF JURISDICTION

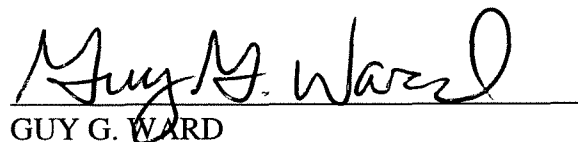
IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

IT IS SO ORDERED, this 28th day of October, 2004 at 4:45 p.m.
a.m./p.m..


UNITED STATES DISTRICT JUDGE

PRESENTED BY:

WILLIAM E. KOVACIC
General Counsel



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