

2006C107589 COPY

STATE OF TEXAS,
Plaintiff,

IN THE DISTRICT COURT OF

v.

BEXAR COUNTY, TEXAS

BIO PERFORMANCE, INC., AND
LOWELL MIMS and GUSTAVO
ROMERO, INDIVIDUALLY,
Defendants.

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73rd

JUDICIAL DISTRICT

EX PARTE TEMPORARY RESTRAINING ORDER

Plaintiff, State of Texas, has filed its Original Petition in this cause seeking a Temporary and Permanent Injunction against Lowell Mims, Gustavo Romero and Bio Performance, Inc. and in the same petition has presented its request for an Ex Parte Temporary Restraining Order. The Court FINDS that Defendants may be violating §§17.46(a) and (b) of the Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §17.41 *et. seq.* It appears from facts set forth in the Plaintiff's Original Petition and the exhibits and sworn affidavits attached thereto, that unless Defendants are immediately restrained from the acts prohibited below, Defendants will commit such acts before notice can be given and a hearing can be held on the State of Texas' request for a Temporary Injunction. Furthermore, Defendants will continue to use deception in obtaining money from consumers and may well dissipate and secrete their assets before a judgment for restitution can be rendered. Such injury would be irreparable because continued violations of the DTPA may well cause many more consumers to lose their money by deception. Given the likelihood of dissipation of Defendants' assets prior to rendition of a final judgment, the possibility of restitution for consumers will be remote unless an order freezing

certain assets is granted.

1. **IT IS THEREFORE ORDERED** that Defendants **Lowell Mims, Gustavo Romero and Bio Performance, Inc.** their officers, agents, servants, employees, attorneys and any other persons in active concert or participation with them, including, but not limited to financial institutions such as **TBank¹, JPMorgan Chase Bank², and Wells Fargo Bank** holding money or assets of any kind in the name and/or for the benefit of the above-named Defendants, who receive actual notice of this order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other devise, shall be restrained from engaging in the following acts or practices:

A. Transferring, spending, hypothecating, concealing, encumbering, withdrawing, removing, or allowing the transfer, removal, or withdrawal from any financial institution or from the jurisdiction of this Court, any money, stocks, bonds, assets, notes, equipment, funds, accounts receivable, policies of insurance, trust agreements, or other property, real, personal, or mixed, wherever situated, belonging to or owned by, in the possession or custody of, standing in the name of, or claimed by Defendants without further order of this Court, unless expressly stated otherwise herein;

B. Opening or causing to be opened any safe deposit boxes or storage facilities titled in the name of Defendants or subject to access, ownership or control by Defendants, without

¹Known accounts at TBank subject to this order include, but are not limited to, account numbers [REDACTED] and [REDACTED] standing in the name of Bio Performance, Inc. and account numbers [REDACTED] and [REDACTED] standing in the name of Gustavo Romero [with Gustavo Romero and Magdalena Sofia Muldoon as signatories].

²Known accounts at JPMorgan Chase bank subject to this order include, but are not limited to, account number [REDACTED] standing in the name of Bio Performance, Inc.

providing Plaintiff and the Court prior notice by motion seeking such access;

2. **IT IS ALSO ORDERED** that Defendants Lowell Mims and Gustavo Romero, their agents, relatives and persons in active concert or participation with them, are prohibited from transferring, spending, encumbering, withdrawing, or removing any sum of money from any accounts specifically referenced in paragraph 1.A. of this order or from any other such account(s) where monies or proceeds from the operation of Bio Performance, Inc. *have been* placed or deposited; however Defendants Lowell Mims and Gustavo Romero are not prohibited from expending monies for reasonable living expenses and attorney fees from other accounts standing in their names which [have not and] do not contain monies or proceeds from the operation of Bio Performance, Inc., or from monies earned by them or their family members by virtue of other employment or business ventures wholly unrelated to the operation of Bio Performance, Inc.

3. **IT IS FURTHER ORDERED** that Defendants Lowell Mims, Gustavo Romero and Bio Performance, Inc., their officers, agents, servants, employees, attorneys and any other persons in active concert or participation with them, who receives actual notice of this order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other devise, shall be restrained from engaging in the following acts or practices:

A. Transferring, concealing, destroying, or removing from the jurisdiction of this Court any books, records, documents, invoices or other written or computer generated materials relating to the business of Defendants currently or hereafter in Defendants' possession, custody or control except in response to further orders or subpoenas in this cause;

B. Selling, marketing, promoting, distributing, advertising or assisting or allowing others to sell, market, promote, distribute, or advertise, the sale of all Bio Performance products

by representing, expressly or by implication, that these products 1) will reduce the emissions of gasoline or diesel powered vehicles, 2) improve gasoline efficiency or fuel economy of gasoline or diesel powered vehicles, or 3) are safe and non-toxic;

C. Accepting or paying monies or remuneration of any type or character for, or in furtherance of, the sale, distribution, marketing, promotion, or advertising of all Bio Performance products where it is represented, expressly or by implication, that these products 1) will reduce the emissions of gasoline or diesel powered vehicles, 2) improve gasoline efficiency or fuel economy of gasoline or diesel powered vehicles, or 3) are safe and non-toxic;

D. Failing to conspicuously disclose on its website, in any written advertisement or solicitation, and in any oral communication with any consumer or prospective purchaser or buyer the following information in 13 Point Times New Roman Bold Font the following information: "Short term exposure, inhalation, ingestion, and dermal contact with Bio Performance products can cause hemolytic anemia, damage to the liver, and neurological damage";

E. Selling, distributing, sending, mailing, printing, giving, disseminating, advertising, referencing, or assisting or allowing any other person, entity or business affiliated with Defendants or subject to their control, directly or indirectly, to sell distribute, send, give, mail, print, advertise, reference, or disseminate, any materials that in any manner represent, expressly or by implication, that Bio Performance products 1) will reduce the emissions of gasoline or diesel powered vehicles, 2) improve gasoline efficiency or fuel economy of gasoline or diesel powered vehicles, or 3) are safe and non-toxic;

F. Representing, expressly or by implication, that Bio Performance products

increase or boost enzymatic reaction if used in fuel which is placed in vehicles or other fuel burning devices;

G. Failing to completely remove the following claims from any web site, promotional materials, or advertisements: 1) that Bio Performance products are non-toxic; 2) that Bio Performance products will result in reductions in emissions or "greenhouse gasses"; 3) that using Bio Performance products will result in improvement in fuel efficiency or fuel economy; 4) that Bio Performance products contain anything that will produce any "enzymatic" reactions;

H. Shipping product or promotional materials to any other sellers, distributors, or buyers of Defendants' products who fail to completely remove the following claims from any of their web sites, promotional materials, or advertisements: 1) that Bio Performance products are non-toxic; 2) that Bio Performance products will result in reductions in emissions or "greenhouse gasses"; 3) that using Bio Performance products will result in improvement in fuel efficiency or fuel economy; 4) that Bio Performance products contain anything that will produce any "enzymatic" reactions;

I. Failing to notify each and every agent, independent business owner, manager, area manager, or any other person who Defendants have reason to know or believe are marketing Bio Performance products of the specific terms of the court's injunction in this cause;

J. Failing to notify each and every agent, independent business owner, manager, area manager, or any other person who Defendants have reason to know or believe are marketing Bio Performance products that they should comply with this injunction if they in any manner market, advertise, or attempt to introduce into commerce any Bio Performance products.

4. **IT IS FURTHER ORDERED** that Defendants **Lowell Mims, Gustavo Romero and Bio**

Performance, Inc. advise any financial or brokerage institution, escrow agent, title company, storage facility, commodity trading company, business entity or person maintaining or having custody or control of any account or other asset of Defendants to within five (5) business days of the date of service of this Order, provide to counsel for the Plaintiff and the Defendants/account holders a statement or letter setting forth:

A. The identification of each account or asset titled in the name, individually or jointly, of Defendants, or held on behalf of, or for the benefit of, Defendants;

B. The balance of each such account, or a description and estimated value of such assets, as of the close of business on the day on which this Order is served, and, if the account or other asset has been closed or removed, the date closed or removed, the total funds removed in order to close the account, and the name of the person or entity to whom such account or other assets was remitted; and

C. The identification of any safe deposit box or storage facility that is either titled in the name individually or jointly, of Defendants, or is otherwise subject to access or control by Defendants;

5. **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that, as used in this Judgment, the following terms are defined as follows:

A. "Consumer" means an individual, partnership, corporation, or entity of any kind, including this state, or a subdivision or agency of this state who seeks or acquires, by purchase or lease, any goods or services;

B. "Defendant(s)" means **Lowell Mims, Gustavo Romero and Bio Performance, Inc.**, their successors, assigns, officers, agents, subcontractors, servants, employees, corporations and

any other persons in active concert or participation with them;

C. "Person" means an individual, sole proprietorship, firm, partnership, corporation, association, joint venture or other group, or business entity, however organized;

D. "Selling, marketing, promoting, distributing, and advertising" means any type of contact with a person for the purpose of requesting, persuading, or seeking any type of contribution, sponsorship, compensation, or anything of value from said person or entity for any reason whatsoever;

6. **IT IS FURTHER ORDERED** that Plaintiff shall be granted leave to take telephonic, video, written, and other depositions, together with subpoenas duces tecum, prior to any scheduled temporary injunction hearing or Defendants' answer date upon reasonable shortened notice to Defendants and their attorneys if known;

7. **IT IS FURTHER ORDERED** that Defendants in this cause be and hereby are commanded forthwith to comply with this Order from the date of entry until and to the fourteenth (14) day after entry or until further order of this Court, whichever is less.

8. The Clerk of the above-entitled Court shall forthwith issue an ex parte temporary restraining order in conformity with the law and the terms of this Order. This Order shall be effective without the execution and filing of a bond as Plaintiff, State of Texas is exempt from such bond under TEX. BUS. & COM. CODE ANN. §17.47(b).

[Handwritten initials]

Hearing on Plaintiff, State of Texas' Application for an Temporary Injunction is hereby set
for the 30 day of May 2006 at 8:30 o'clock, A m. *In the 73rd District Court
before Judge Andy Mireles
5th floor, SABA Courtroom.*
SIGNED this 16 day of May, 2006 at 8:45 o'clock, A m.

[Handwritten signature: Andy Mireles]
JUDGE PRESIDING