

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FILED by P D.C.
NOV - 8 2004
CLARENCE MADDOX
CLERK U.S. DIST. CT.
S. D. OF FLA. MIAMI

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

FEMINA, INC.,
a Florida corporation, and

HUSNAIN MIRZA,
individually and as an officer and
director of Femina, Inc.

Defendants.

CIVIL NO. **04-61467**

CIVIL ACTION

MAGISTRATE
BANDSTRA

**TEMPORARY RESTRAINING ORDER WITH 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 for a temporary restraining order with 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. There is good cause to believe that Defendants Femina, Inc., and Husnain Mirza have engaged and are likely to engage in acts and practices that violate 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.
3. 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.
4. 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.
5. Weighing the equities and considering the Commission's likelihood of ultimate success, a temporary restraining order with an accounting, expedited discovery, and other equitable relief, is in the public interest.
6. Fed. R. Civ. P. 65 (c) does not require security of the United States or an officer or agency thereof.

IT IS THEREFORE ORDERED AS FOLLOWS:

I. DEFINITIONS

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

- A. "Defendants" shall refer to Femina, Inc. and Husnain Mirza, 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 "Silhouette Patch," "1-2-3 Reduce Fat," "Fat Seltzer Reduce," or any other substantially similar product.
- 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)" is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a), and includes writings, drawings, graphs, charts, photographs, audio and video recordings, computer records, and other data compilations from which information can be obtained and translated, if necessary, through detection devices into reasonably usable form. A draft or non-identical copy of a document is a separate document within the meaning of the term.
- 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 chattel, 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, and all cash, wherever located, and shall include both existing assets and assets acquired after the date of entry of this Order.
- F. 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.
- G. 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 temporarily

restrained and enjoined from making, or assisting others in making, directly 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 weight-loss product, including but not limited to:

- A. Misrepresenting, expressly or by implication, including but not limited to, through the use of a trade name or endorsements, that any weight-loss product, or any ingredient contained in it:
 - 1. causes substantial weight loss by blocking the absorption of fat;
 - 2. causes substantial weight loss by eliminating fat;
 - 3. causes substantial weight loss, including as much as one to two pounds per week, by wearing the product or rubbing the product on the skin;
 - 4. enables users to lose rapid and substantial weight; eliminates cellulite; controls metabolism; or eliminates accumulated fat;
 - 5. causes rapid and permanent weight loss;
 - 6. causes fat to be absorbed and eliminated through the urine; or
 - 7. causes weight loss without the need to maintain or go on a diet, or to exercise.
- B. 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;
- C. 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 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;
- D. 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

- E. Misrepresenting any other fact material to a consumer's decision to purchase any weight-loss product.

For the purposes of this Paragraph, the term "endorsement" is defined in 16 C.F.R. § 255.0(b), and includes any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group or institution.

III. 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 temporarily restrained and 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' weight-loss 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, e-mail 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 Silhouette Patch, 1-2-3 Reduce Fat, Fat Seltzer Reduce, or other weight-loss product.
- Provided*, however, that Defendants may disclose such identifying information to a law enforcement agency or as required by any law, regulation, or court order.

IV. 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' business activities, 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.

V. 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 weight-loss 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. the names, addresses, and phone numbers of the manufacturer, supplier, and distributor of each of the products identified in 1, and a copy of all promotional and informational material provided by such manufacturer, supplier, and distributor, or independently obtained by Defendants;
 3. all gross revenues, listed separately, obtained from the sale of (a) Silhouette Patch, (b) 1-2-3 Reduce Fat, (c) Fat Seltzer Reduce, and (d) any other weight-loss products identified in 1, from inception of sales through the date of the issuance of this Order;
 4. all net profits, listed separately, obtained from the sale of (a) Silhouette Patch, (b) 1-2-3 Reduce Fat, (c) Fat Seltzer Reduce, and (d) any other weight-loss products identified in 1, from inception of sales through the date of the issuance of this Order;
 5. the total number of units sold, listed separately, of (a) Silhouette Patch, (b) 1-2-3 Reduce Fat, (c) Fat Seltzer Reduce, and (d) any other weight-loss products identified in 1; and
 6. the full names, addresses, and telephone numbers of all purchasers, listed separately, of (a) Silhouette Patch, (b) 1-2-3 Reduce Fat, (c) Fat Seltzer Reduce, and (d) any other weight-loss products identified in 1, 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. Within three (3) days after service of this Order, Defendants shall further provide counsel for the Commission with a statement, verified under oath, of all transfers and assignments of assets and property worth \$1,000 or more since January 1, 2003, 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, asset, or safe deposit boxes, and the account number or other identification of each such account, asset, or safe deposit box.

VI. CONSUMER REPORTS

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

VII. 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.

XIII. 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 15 day of November, 2004 at 9:30 .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, and imposing such additional relief as may be appropriate.

IX. 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 Subparagraph.
- 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.

X. 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:

Harold E. Kirtz
Federal Trade Commission
Suite 1500
225 Peachtree Street
Atlanta, GA 30303
(404) 656-1357

or by facsimile transmission to (404) 656-1379.

XI. DURATION OF TEMPORARY RESTRAINING ORDER

IT IS FURTHER ORDERED that the Temporary Restraining Order granted herein shall expire on 18 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.

XII. RETENTION OF JURISDICTION

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

IT IS SO ORDERED, this 8 day of November, 2004 at 9:40

a.m. p.m.

Cecilia M. Alford
UNITED STATES DISTRICT JUDGE