

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

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

PHOENIX AVATAR, LLC doing business
as AVATAR NUTRITION,

DJL, LLC,

DANIEL J. LIN,

MARK M. SADEK,

JAMES LIN, and

CHRISTOPHER M. CHUNG
doing business as A I T HERBAL
MARKETING,

Defendants.

Case No. 04C 2897

Judge Holderman

Magistrate Judge Schenkier

**PRELIMINARY INJUNCTION WITH ASSET FREEZE AND OTHER EQUITABLE
RELIEF AS TO DEFENDANTS PHOENIX AVATAR, LLC, AND DJL, LLC**

Plaintiff, Federal Trade Commission (“Commission” or “FTC”), pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b) and 57b, filed a Complaint for Injunctive and Other Equitable Relief, including consumer redress, and applied *ex parte* for a Temporary Restraining Order with Asset Freeze, Other Equitable Relief, and Order to Show Cause Why a Preliminary Injunction Should Not Issue (“TRO”) pursuant to Rule 65 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 65.

The TRO having been granted and served with the Complaint and Summons on all Defendants, and the Court having considered all pleadings, memoranda, declarations, and other exhibits filed herein, and being fully advised in the premises, it is now **ORDERED, ADJUDGED, AND DECREED** as follows:

FINDINGS OF FACT

1. This Court has jurisdiction over the subject matter of this case and over all parties hereto;
2. Venue, process, and service of process are proper;
3. There is good cause to believe that Defendants have engaged in and are likely to engage in acts and practices that violate Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52, and the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”), 15 U.S.C. § 7701, *et seq.*;
4. In light of the foregoing findings, the Commission is likely to prevail on the merits of this action;
5. There is good cause to believe that immediate and irreparable harm will result from the Defendants’ ongoing violations of Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52, and the CAN-SPAM Act, 15 U.S.C. § 7701, *et seq.*, absent entry of this Order
6. 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 sale, transfer, assignment, or other disposition or concealment by Defendants of their assets or records unless Defendants are immediately restrained and enjoined by Order of this Court. The evidence set forth in the FTC’s *Ex Parte* Motion for Temporary Restraining

Order with Asset Freeze, Other Equitable Relief, and Order to Show Cause Why a Preliminary Injunction Should Not Issue, and in the accompanying legal memorandum, declarations and exhibits, show that Defendants have engaged in a concerted course of illegal activity in connection with the marketing, advertising, and sale of purported weight-loss patches in violation of Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52, and the CAN-SPAM Act, 15 U.S.C. § 7701, *et seq.* Defendants have repeatedly concealed their true identity; thus, there is good cause to believe that Defendants will attempt to conceal the scope of their deliberate illegal actions to avoid returning their ill-gotten gains to consumers injured by their unlawful practices if not restrained from doing so by Order of this Court;

7. There is good cause for issuing this Order pursuant to Federal Rule of Civil Procedure 65(b), Fed. R. Civ. P. 65(b);

8. Weighing the equities and considering the Commissions's likelihood of ultimate success, this preliminary injunction, asset freeze, and other relief are in the public interest; and

9. No security is required of any agency of the United States for the issuance of a preliminary injunction. *See* Fed. R. Civ. P. 65(c).

DEFINITIONS

1. “**Asset**” or “**Assets**” means any legal or equitable interest in, right to, or claim to, any real and/or personal property, including without limitation, chattels, goods, instruments, equipment, fixtures, general intangibles, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, contracts, receivables, shares of stock, and all cash, wherever located.

2. “**Assisting others**” means: (1) performing customer service functions including, but not limited to, receiving or responding to consumer complaints, receiving identifying and

financial information from consumers, and communicating with consumers; (2) developing, providing or arranging for the development or provision of marketing materials, including, but not limited to, Web site and commercial electronic message content; (3) providing names of, or arranging for the provision of, names of potential customers; (4) performing marketing services of any kind; or (5) acting as an officer or director of a business entity.

3. **“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 profession to yield accurate and reliable results.

4. **“Customer”** means any person who has paid, or may be required to pay, for goods or services offered for sale or sold by Defendants.

5. **“Defendant”** or **“Defendants”** means Phoenix Avatar, LLC, doing business as Avatar Nutrition, and DJL, LLC, and each of them, by whatever names each may be known.

6. **“Document”** is synonymous in meaning and equal in scope to the term, as defined 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 is a separate document within the meaning of this term.

7. **“Financial Institution”** means any bank, savings and loan institution, credit union, or any financial depository of any kind, including, but not limited to, any brokerage house, trustee, broker-dealer, escrow agent, title company, commodity trading company, or precious

metal dealer.

8. **“Material”** means likely to affect a person’s choice of, or conduct regarding, goods or services.

9. **“Person”** means a natural person, an organization or other legal entity, including a corporation, partnership, sole proprietorship, limited liability company, association, cooperative, or any other group or combination acting as an entity.

10. **“Plaintiff”** means the Federal Trade Commission (“Commission”).

11. **“Web site”** means a set of electronic documents, usually a home page and subordinate pages, readily viewable on a computer by anyone with access to the Web, standard software, and knowledge of the web site’s location or address.

12. **“Weight-loss products”** 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, Med Diet Patch and Slim Form Diet Patch, or any other substantially similar product.

I. PROHIBITED BUSINESS ACTIVITIES PURSUANT TO THE FTC ACT

IT IS THEREFORE ORDERED that Defendants, and their officers, agents, directors, servants, employees, salespersons, independent contractors, attorneys, 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, whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, are hereby preliminarily restrained and enjoined from making, or assisting others in making, expressly or by implication, including through the use of a trade name

or endorsement, any false or misleading oral or written statement or representation in connection with the marketing, advertising, promotion, offering for sale, sale or provision of any weight-loss products, or any other products or services, including, but not limited to:

- A. Representing that the Med Diet Patch, Slim Form Diet Patch, or any other diet patch, causes weight loss;
- B. Misrepresenting that any product, or any ingredient contained in it, increases metabolism, decreases appetite, and/or reduces food cravings;
- C. Misrepresenting that any product, or any ingredient contained in it, is effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease;
- D. Making any representation about the health benefits, performance, efficacy, or safety of any product unless, at the time of making such representation, Defendants possess and rely upon competent and reliable scientific evidence that substantiates the representation;
- E. Misrepresenting any other fact material to a consumer's decision to purchase any product;
- F. Assisting others who violate any provision of Paragraphs A through E of this Section.

**II. PROHIBITED BUSINESS ACTIVITIES UNDER THE
CONTROLLING THE ASSAULT OF NON-SOLICITED
PORNOGRAPHY AND MARKETING ACT OF 2003**

IT IS FURTHER ORDERED that Defendants, and their officers, agents, directors, servants, employees, salespersons, independent contractors, attorneys, 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, whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, are hereby preliminarily restrained and enjoined from violating, or assisting others in violating, the provisions contained in Sections 5 and 6 of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”), 15 U.S.C. §§ 7704 and 7705, as currently promulgated or as it may hereafter be amended, or any rule, regulation, or requirement adopted pursuant thereto, including, but not limited to, initiating the transmission of a commercial electronic mail message that:

- A. Contains, or is accompanied by, false or misleading header information in violation of Section 5(a)(1) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(1);
- B. Fails to include a clear and conspicuous notice of the opportunity to decline to receive further electronic mail messages from the sender, in violation of Section 5(a)(5)(ii) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(5)(ii); and/or
- C. Fails to include a valid physical postal address of the sender in violation of Section 5(a)(5)(iii) of the CAN-SPAM Act, 15 U.S.C. § 7704(a)(5)(iii).

III. ASSET FREEZE

IT IS FURTHER ORDERED that Defendants, and their officers, agents, directors, servants, employees, salespersons, independent contractors, attorneys, 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, whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, except as agreed to by counsel for the Commission, or as directed by further order of the Court, are hereby preliminarily 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;
2. owned or controlled by, or held, in whole or in part, for the benefit of, or subject to access by, or belonging to, any Defendant; or
3. in the actual or constructive possession of, or owned or controlled by, or subject to access by, or belonging to, any corporation, partnership, trust or any other entity directly or indirectly owned, managed, or controlled by, or under common control with, any Defendant, including, but not limited to, any assets held by or for any Defendant at any bank or savings and loan institution, or with any broker-dealer, escrow agent, title company, commodity trading company, precious metal dealer, payment service provider, or other financial institution or depository of any kind including, but not limited to, assets at the following:

- a. National City Bank;
- b. First Data Corporation;
- c. E*TRADE;
- d. Genesis Discoveries, LLC;
- e. BAC Florida Bank;
- f. Lynk Systems, Inc.;

- g. American Express Company;
- h. Discover Bank;
- i. PaySystems; and
- j. PayPal, Inc.

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. Transferring any funds or other assets subject to this Order for attorney's fees or living expenses, except from accounts or other assets identified by prior written notice to the Commission; provided that no attorney's fees or living expenses, other than those set forth in Subsection E of this Section, and only in accordance with the procedures set forth in Subsection E of this Section, shall be paid from funds or other assets subject to this Order until the financial statements and accounting required by Section X are provided to counsel for the Commission;

E. Notwithstanding the above, any Defendant may pay from his personal funds reasonable, usual, ordinary, and necessary living expenses and attorney's fees, not to exceed \$1,000, prior to the submission of the financial statements and accounting required by Section X. No such expenses, however, shall be paid from funds subject to this Order except from cash on the person of any Defendant, or from an account designated by prior written notice to counsel for the Commission; and

F. The funds, property and assets affected by this Section 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. DUTIES OF ASSET HOLDERS

IT IS FURTHER ORDERED that, pending determination of the Commission's request for a permanent injunction, any financial institution, or any person or other entity served with a copy of this Order, or who otherwise has actual 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, any Defendant or other party subject to Section III above;
2. in any account maintained in the name of, or subject to withdrawal by, any Defendant or other party subject to Section III above;
3. that are subject to access or use by, or under the signatory power of, any Defendant or other party subject to Section III above;

B. Deny access to any safe deposit boxes that are either:

1. titled in the name, individually or jointly, of any Defendant or other party subject to Section III above; or

2. subject to access by any Defendant or other party subject to Section III above;

C. Provide to counsel for the Commission, within three (3) business 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, any Defendant or other party subject to Section 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, any Defendant or other party subject to Section 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;

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

E. The Commission is granted leave, pursuant to Fed. R. Civ. P. 45, to subpoena documents immediately from any such financial institution, account custodian, or other entity concerning the nature, location, status, and extent of Defendants' assets, as well as compliance with this Order, and such financial institution, account custodian or other entity shall respond to such subpoena within five (5) business days after service.

V. REPATRIATION OF FOREIGN ASSETS AND DOCUMENTS

IT IS FURTHER ORDERED that, if not already performed, within three (3) business days following entry of this Order, Defendants shall:

A. Take such steps as are necessary to repatriate to the United States all documents and assets that are located outside of such territory and are held by or for Defendants or are under Defendants' direct or indirect control, jointly, severally, or individually;

B. Provide Plaintiff with a full accounting of all documents and assets that are located outside of the territory of the United States or that have been transferred to the territory of the United States pursuant to Subsection A above and are held by or for any Defendant or are under any Defendant's direct or indirect control, jointly, severally, or individually, including the names and addresses of any foreign or domestic financial institution or other entity holding the assets, along with the account numbers and balances;

C. Hold and retain all repatriated documents and assets and prevent any transfer, disposition, or dissipation whatsoever of any such documents or assets; and

D. Provide Plaintiff access to Defendants' records and documents held by financial institutions or other entities outside the territorial United States, by signing and delivering to Plaintiff's counsel the Consent to Release of Financial Records previously attached to the TRO entered in this matter as **Attachment A**.

VI. RECORD KEEPING/MAINTAINING BUSINESS RECORDS

IT IS FURTHER ORDERED that Defendants, and their officers, agents, directors, servants, employees, salespersons, independent contractors, attorneys, 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, whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, are hereby preliminarily restrained and enjoined from:

A. Failing to make and keep books, records, accounts, bank statements, current accountants' reports, general ledgers, general journals, cash receipts ledgers, cash disbursements ledgers and source documents, documents indicating title to real or personal property, and any other data which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of Defendants; and

B. 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 or services, 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 Defendants or other entities directly or indirectly under the control of Defendants.

VII. DISTRIBUTION OF ORDER BY DEFENDANTS

IT IS FURTHER ORDERED that Defendants shall immediately provide a copy of this Order to each affiliate, partner, division, sales entity, successor, assign, officer, director, employee, independent contractor, agent, attorney, ad broker, fulfillment house, and representative of any Defendant. Within five (5) calendar days following service of this Order by Plaintiff, Defendants shall serve on Plaintiff an affidavit identifying the name, title, address, telephone number, date of service, and manner of service of each person or entity Defendants served with a copy of this Order in compliance with this provision.

VIII. SERVICE OF ORDER

IT IS FURTHER ORDERED that copies of this Order may be served by facsimile transmission, personal or overnight delivery, or by U.S. Mail, by agents and employees of the Commission or any state, federal or international law enforcement agency, or by private process server, on: (1) Defendants; (2) any financial institution, entity, or person that holds, controls, or maintains custody of any documents or assets of any Defendant, or that held, controlled, or maintained custody of any documents or assets of any Defendant; or (3) any other person or entity that may be subject to any provision of this Order. Service upon any branch or office of any financial institution or entity shall effect service upon the entire financial institution or entity.

IX. CREDIT REPORTS

IT IS FURTHER ORDERED that pursuant to Section 604(a)(1) 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 the Commission.

X. FINANCIAL REPORTS AND ACCOUNTING

IT IS FURTHER ORDERED that, if they have not done so already in compliance with the TRO previously entered in this matter, each Defendant, within forty-eight (48) hours after entry of this Order, shall provide to counsel for the Commission:

A. A completed financial statement accurate as of the date of service of this Order upon such Defendant, in the form previously submitted with the TRO entered in this matter as **Attachment B** for individuals and **Attachment C** for businesses, as the case may be, signed under penalty of perjury.

B. A completed statement, verified under oath, of all payments, transfers, or assignments of funds, assets, or property worth \$5,000 or more since August 1, 2003. Such statement shall include: (a) the amount transferred or assigned; (b) the name of each transferee or assignee; (c) the date of the assignment or transfer; and (d) the type and amount of consideration paid by or to the Defendant. Each statement shall specify the name and address of each financial institution and brokerage firm at which Defendant has accounts or safe deposit boxes. Said statements shall include assets held in foreign as well as domestic accounts; and

C. A detailed accounting of:

1. the names and active ingredients of all products advertised, marketed, promoted, offered for sale, distributed, or sold, by, for, or on behalf of Defendants;
2. gross revenues and net profits obtained from the sale of each product identified in Subsection X.C.1. above, from inception of sales through the date of issuance of this Order; and

3. the full name, address, telephone number, e-mail address, Web site address, and identification number or code (including affiliate monikers) of each person who advertised, marketed, promoted, offered for sale, distributed, or sold any product for or on behalf of Defendants.

XI. EXPEDITED DISCOVERY

IT IS FURTHER ORDERED that, notwithstanding the provisions of Federal Rules of Civil Procedure 26(d) and (f) and 30(a)(2)(C), and pursuant to Federal Rules of Civil Procedure 30(a), 34, and 45, the parties are granted leave, at any time after service of this Order, to:

A. Take the deposition, on three (3) calendar days' notice, of any person, whether or not a party, for the purpose of discovering the nature, location, status, and extent of the assets of Defendants, or their affiliates or subsidiaries; the nature and location of documents reflecting Defendants' business transactions, or the business transactions of Defendants' affiliates or subsidiaries; the location of any premises where Defendants, directly or through any third party, conduct business operations; Defendants' whereabouts; and/or the applicability of any evidentiary privileges to this action. The limitations and conditions set forth in Fed. R. Civ. P. 30(a)(2)(B) and 31(a)(2)(B) regarding subsequent depositions of an individual shall not apply to depositions taken pursuant to this Section. Any such depositions taken pursuant to this Section shall not be counted toward the ten (10) deposition limit set forth in Fed. R. Civ. P. 30(a)(2)(A) and 31(a)(2)(A). Service of discovery upon a party, taken pursuant to this Section, shall be sufficient if made by facsimile or by overnight delivery; and

B. Demand the production of documents, on five (5) calendar days' notice, from any person, whether or not a party, relating to the nature, status, or extent of Defendants' assets, or of

their affiliates or subsidiaries; the location of documents reflecting the business transactions of Defendants, or of their affiliates or subsidiaries; the location of any premises where Defendants, directly or through any third party, conduct business operations; Defendants' whereabouts; and/or the applicability of any evidentiary privileges to this action, provided that twenty four (24) hours' notice shall be deemed sufficient for the production of any such documents that are maintained or stored only as electronic data.

XII. CREATION OF OTHER BUSINESSES

IT IS FURTHER ORDERED that Defendants are hereby preliminarily restrained and enjoined from creating, operating, or controlling any business entity, whether newly-formed or previously inactive, including any partnership, limited partnership, joint venture, sole proprietorship, or corporation, without first providing the Commission with a written statement disclosing: (1) the name of the business entity; (2) the address and telephone number of the business entity; (3) the names of the business entity's officers, directors, principals, managers, and employees; and (4) a detailed description of the business entity's intended activities.

XIII. CORRESPONDENCE WITH AND NOTICE TO PLAINTIFF

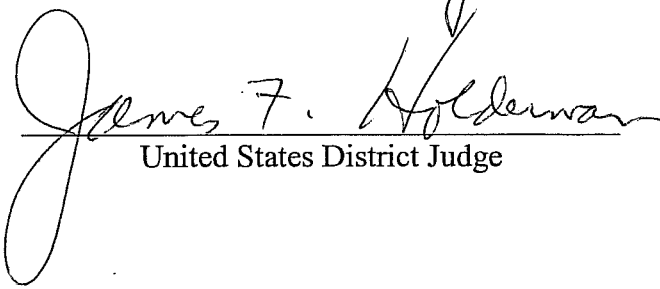
IT IS FURTHER ORDERED that, for purposes of this Order, all correspondence and pleadings to the Commission shall be addressed to:

Steven M. Wernikoff, Esq.
Federal Trade Commission
55 East Monroe Street, Suite 1860
Chicago, Illinois 60603
(312) 960-5600 [facsimile]

XIV. RETENTION OF JURISDICTION

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

IT IS SO ORDERED, this 6th day of May, 2004, at 10:50a.m.


United States District Judge