

I certify the foregoing to be a true and correct copy of the original.
SHERYL L. LOESCH, Clerk
United States District Court
Middle District of Florida

By: N.L. Hester
Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED
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CLERK OF DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

FEDERAL TRADE COMMISSION,

Plaintiff,

CIV

v.

Case No.

99-1485-CIV-ORL-18A

DAVID M. ROTHBART, individually and
doing business as MEDIMAX, INC.

Defendant.

~~(PROPOSED)~~ **EX PARTE TEMPORARY RESTRAINING ORDER WITH ASSET
FREEZE, ORDER REQUIRING AN ACCOUNTING, ORDER PERMITTING
EXPEDITED DISCOVERY, AND ORDER TO SHOW CAUSE WHY A
PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), has filed a complaint for permanent injunction and other relief, including redress for consumers, pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), and has moved ex parte for a temporary restraining order with asset freeze, an order requiring an accounting, an order permitting expedited discovery, and other relief. The Court has considered the pleadings, declarations, exhibits, and memorandum filed in

support thereof, and finds that:

1. This Court has jurisdiction of the subject matter of this case and there is good cause to believe it will have jurisdiction over all parties hereto;
2. There is good cause to believe that defendant David M. Rothbart ("Rothbart"), individually and doing business as Medimax, Inc. ("Medimax") (collectively "defendant"), has engaged, and is likely to continue to engage, in deceptive acts and practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and false advertising in violation of Section 12 of the FTC Act, 15 U.S.C. § 52, and that therefore the Commission has demonstrated a substantial likelihood of prevailing on the merits in this action;
3. There is good cause to believe that immediate and irreparable harm will result from defendant's ongoing violations of Section 5(a) and 12 of the FTC Act unless defendant is restrained and enjoined by order of this Court;
4. 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 result from the sale, transfer, assignment, or other disposition or concealment by defendant of his assets or records unless defendant is immediately restrained and enjoined by order of this Court, and that, in accordance with Local Rule 4.05, the interest of justice requires that the Commission's motion be heard without prior notice to defendant;
5. Good cause exists for ordering defendant to provide an accounting of his

business as set forth herein and permitting the Commission to take expedited discovery;

7. After weighing the equities and considering the Commission's likelihood of ultimate success, a temporary restraining order is in the public interest; and

8. No security is required of any agency of the United States for issuance of a restraining order. Fed. R. Civ. P. 65(c).

ORDER

I. DEFINITIONS

1. "Human immunodeficiency virus" ("HIV") shall refer to all types or strains of the virus that causes acquired immunodeficiency syndrome ("AIDS"), an infectious disease characterized by immune system failure.

2. "HIV tests" 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 detect the presence of HIV in any human, including the "HIV 1 / 2 Whole Blood Test" and any other substantially similar product.

II. PROHIBITED BUSINESS ACTIVITIES

IT IS HEREBY ORDERED that defendant and his officers, agents, servants, employees, and attorneys, and all other persons or entities in active concert or participation with him, and each of them, are hereby restrained and enjoined from engaging, participating, or assisting in any manner whatsoever, directly or indirectly, in the advertising, marketing, promotion, offer for sale, distribution, or sale of any HIV test.

IT IS FURTHER ORDERED that defendant and his officers, agents, servants,

employees, and attorneys, and all other persons or entities in active concert or participation with him, and each of them, are hereby 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 HIV tests, including but not limited to:

- A. Misrepresenting, in any manner, directly or by implication, the accuracy of any HIV test.
- B. Misrepresenting, directly or by implication, that the Food and Drug Administration ("FDA") or any other national or international public health body has reviewed, evaluated, is affiliated with, or otherwise endorses or supports, any HIV test.
- C. Misrepresenting any other fact material to a consumer's decision to purchase any HIV test.

III. PRESERVATION OF RECORDS AND OTHER EVIDENCE

IT IS FURTHER ORDERED that the defendant, and his officers, agents, servants, employees, and attorneys, and all other persons or entities in active concert or participation with him, and each of them, and any other person or entity served with a copy 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, any HIV test advertised, marketed, promoted, offered for sale, distributed, sold or purchased by defendant.

- 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 the accuracy of defendant's HIV tests, 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 defendant or other entity directly or indirectly under the control of defendant; and
- C. Failing to create and maintain books, records, and accounts which, in reasonable detail, accurately, fairly, and completely reflect the incomes,

disbursements, transactions and use of monies by defendant or other entity directly or indirectly under the control of defendant.

IV. ASSET FREEZE

IT IS FURTHER ORDERED that defendant, and his officers, agents, servants, employees, and attorneys, and all other persons and entities in active concert or participation with him, and each of them, and any other person or entity served with a copy 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 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, 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 defendant.
- B. Opening or causing to be opened any safe deposit boxes titled in the name

of defendant, or subject to access by defendant.

- C. Incurring charges on any credit card issued in the name, singly or jointly, of defendant.
- D. 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 Subparagraph E, and only in accordance with the procedures set forth in Subparagraph E, shall be paid from funds or other assets subject to this Order until the financial statements required by Paragraph VII, *infra*, are served upon counsel for the Commission.
- E. Notwithstanding the above, defendant may pay from his personal funds reasonable, usual, ordinary, and necessary living expenses, not to exceed \$1,000, prior to the submission of the financial statements required by Paragraph VII, *infra*. No such living expenses, however, shall be paid from funds subject to this Order except from cash on the person of defendant, or from an account designated by prior written notice 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. Defendant shall

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

V. 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 institution, credit union, financial institution, brokerage house, escrow agent, title company, commodity trading company, common carrier, storage company, trustee, or any person or other entity served with a copy of this Order 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, defendant or other party subject to Paragraph IV above;
 - 2. in any account maintained in the name of, or subject to withdrawal by, any defendant or other party subject to Paragraph IV above;
 - 3. that are subject to access or use by, or under the signatory power of, defendant or other party subject to Paragraph IV above;
- B. Deny access to any safe deposit boxes that are either:
 - a. titled in the name, individually or jointly, of defendant or other

party subject to Paragraph IV above; or

- b. subject to access by defendant or other party subject to Paragraph IV above.

C. Provide to counsel for the Commission, within three days, a statement setting forth:

- a. the identification of each account or asset titled in the name, individually or jointly, or held on behalf of, or for the benefit of, defendant or other party subject to Paragraph IV above, whether in whole or in part;
- b. the balance of each such account, or a description of the nature and value of such asset;
- c. 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, defendant or other party subject to Paragraph IV above, whether in whole or in part; and
- d. 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.

For the purposes of this Order, all correspondence to the Commission shall be addressed to:

Darren A. Bowie, Esq.
Karen Jagielski, Esq.
Federal Trade Commission
600 Pennsylvania Ave., NW, Room S-4002
Washington, DC 20580
tel. (202) 326-2018, -2509; facsimile (202) 326-3259

Provided further, that this Paragraph shall not prohibit transfers in accordance with any provision of this Order, or any further order of the Court.

VI. SERVICE OF ORDER

IT IS FURTHER ORDERED that copies of this Order and the initial pleadings and papers filed in this matter may be served by employees or agents of the Commission, including without limitation private process servers, and by employees or agents of any other law enforcement agency, upon defendant, any agent or employee of defendant, any bank, savings and loan institution, credit union, financial institution, brokerage house, escrow agent, title company, commodity trading company, common carrier, storage company, trust, trustee, or any other person, partnership, corporation, or other legal entity that may be in possession of any records, assets, property, or property right of defendant, or that may be subject to any provision of this Order.

VII. ACCOUNTING PROVISIONS

IT IS FURTHER ORDERED that by November 30, 1999, at 10:00 Eastern time,

- A. Defendant shall serve on the Commission through service on the United States Attorney's Office for the Middle District of Florida, 201 Federal

Building, 80 North Hughey Ave., Orlando, Florida 32801, Attn: Anita M.

Cream, Assistant U.S. Attorney, a detailed accounting of:

- (1) all gross revenues obtained from the sale of HIV tests from inception of sales through the date of the issuance of this Order;
- (2) all net profits obtained from the sale of HIV tests from inception of sales through the date of the issuance of this Order;
- (3) the total number of HIV tests sold by defendant;
- (4) the full names, addresses, and telephone numbers of all purchasers of HIV tests from defendant, and the number of tests purchased by each purchaser;
- (5) the full names, addresses, and telephone numbers of all individuals or entities who supplied HIV tests to defendant, including without limitation all manufacturers and mid-level distributors.

B. Defendant shall prepare and deliver to the counsel for the Commission a completed financial statement including all information requested in Department of Treasury Collection Information Statement for Individuals (Form 433-A), and Department of Treasury Collection Information Statement for Businesses (Form 433-B), which are accurate as of the date and time of service of this Order.

C. Defendant 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 November 1, 1998, 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 the 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.

VIII. EXPEDITED DISCOVERY

IT IS FURTHER ORDERED that in light of the need to promptly ascertain the possible consumer injury caused by defendant's deceptive practices and false advertising as alleged by plaintiff, the need to identify assets and documents subject to this Order, and the need to monitor compliance with this Order, the Commission is granted leave to conduct certain expedited discovery, and that, commencing with the time and date of this Order, in lieu of the time periods, notice provisions, and other requirements of Rules 26, 30, 34, and 45 of the Federal Rules of Civil Procedure, and Local Rules 3.02-3.04, expedited discovery shall proceed as follows:

- A. Pursuant to Fed. R. Civ. P. 30 and 45, and Local Rule 3.02, the Commission may take depositions upon oral examination of any party regarding defendant's sale, distribution, or purchase of HIV tests; the status and location of defendant's HIV tests; the nature, location, status,

and extent of defendant's assets; the status and location of documents reflecting defendant's business transactions; and compliance with this Order, on two days notice of any such deposition. Depositions may be taken Monday through Saturday. Deposition transcripts that have not been signed by the witness may be used for purposes of the hearing on the order to show cause why a preliminary injunction should not issue.

This Subparagraph shall not be construed in any manner to preclude the right of plaintiff to take subsequent depositions of the same witnesses on the merits of this action. Any deposition taken pursuant to this Subparagraph is in addition to, and not subject to, the presumptive limits on depositions set forth in Fed. R. Civ. P. 30(a)(2)(A).

- B. Pursuant to Fed. R. Civ. P. 34(b) and 45, the defendant and any other party shall produce all documents relating to defendant's sale, distribution or purchase of HIV tests; the status and location of defendant's HIV tests; the nature, location, status, and extent of defendant's assets; the status and location of documents reflecting defendant's business transactions; and compliance with this Order, that are requested by the Commission, within five (5) days of service of such request, with production of documents made to such person or place as counsel for the Commission may direct in writing.

IX. 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 defendant to plaintiff.

X. DURATION OF TEMPORARY RESTRAINING ORDER

IT IS FURTHER ORDERED that this Order shall expire on December 2, 1999, at 11:59 p.m. unless within such time the Order, for good cause shown, is extended, or unless the defendant consents that it should be extended for a longer period of time.

XI. HEARING ON PRELIMINARY INJUNCTION

IT IS FURTHER ORDERED that defendant shall appear before this Court on the 2nd day of December, 1999, at 12:00 o'clock p.m., to show cause, if any there be, why this Court should not enter a preliminary injunction against defendant, pending final ruling on the Complaint, enjoining him from further violations of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, continuing the relief provided herein and the freeze of his assets, and imposing such additional relief as may be appropriate.

XII. PLEADINGS REGARDING PRELIMINARY INJUNCTION HEARING

IT IS FURTHER ORDERED that:

- A. Defendants shall file with the Court and serve counsel for the Commission any response to the Order to Show Cause Why a Preliminary Injunction

Should Not Issue, including all declarations, exhibits, memoranda, and other evidence, not less than seventy-two (72) hours prior to the hearing on order to show cause why a preliminary injunction should not issue.

Defendants shall serve copies of all such materials on the Commission, by hand, by facsimile transmission, or by overnight delivery service to the address (or facsimile number) listed in Paragraph V or to such other address as counsel for the Commission shall set forth in writing.

Provided, that if the defendants choose to serve the Commission via overnight delivery, the documents shall be delivered so that they shall be received by the Commission at least seventy-two (72) hours prior to the hearing.

- B. The Commission shall file with the Court and serve on defendants any supplemental memoranda, declarations, materials, or other evidence not less than twenty-four (24) hours prior to the hearing on the Order to Show Cause Why a Preliminary Injunction Should Not Issue. The Commission shall serve copies of all such materials on counsel for each defendant by hand, by facsimile transmission, or by overnight delivery service.

Provided, that if the Commission chooses to serve any defendant via overnight delivery, the documents shall be delivered so that they shall be received by that defendant at least twenty-four (24) hours prior to the hearing.

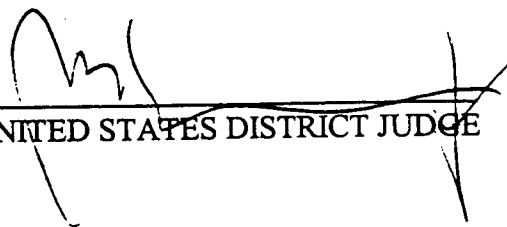
C. Any party who desires to present live testimony at the hearing shall file a motion requesting leave to present live testimony, and serve such motion on all opposing parties, not less than seventy-two (72) hours prior to the hearing on the order to show cause why a preliminary injunction should issue. In addition, the request shall set forth a witness list that shall include the name, address, and telephone number of any such witness, and either a summary of the witness' expected testimony, or the witness' declaration revealing the substance of such witness' expected testimony. *Provided*, that if service is via overnight delivery, the documents shall be delivered so that they shall be received by all parties at least seventy-two (72) hours prior to the hearing. Any party opposing a request to present live testimony shall file its written opposition, and serve such motion on all parties, not less than twenty-four (24) hours prior to the hearing on the order to show cause why a preliminary injunction should issue. Any party opposing a request to present live testimony also shall file its witness list, and serve such witness list on all parties, not less than twenty-four (24) hours prior to the hearing on the order to show cause why a preliminary injunction should issue. For purposes of this Subparagraph, service shall be by hand, by facsimile transmission, or by overnight delivery service. *Provided*, that if service is via overnight delivery, the documents shall be delivered so that they shall be received by all parties at least twenty-four

(24) hours prior to the hearing.

XIII. RETENTION OF JURISDICTION

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

IT IS SO ORDERED, this 27 day of Nov, 1999,
at 1:30 p.m.


UNITED STATES DISTRICT JUDGE