

**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,	)	
	)	Case No. 04C 2897
DJL, LLC,	)	
	)	Judge James F. Holderman
DANIEL J. LIN,	)	
	)	Magistrate Judge Sidney I. Schenkier
MARK M. SADEK,	)	
	)	
JAMES LIN, and	)	
	)	
CHRISTOPHER M. CHUNG	)	
doing business as A I T HERBAL	)	
MARKETING,	)	
	)	
Defendants.	)	
	)	

**DEFAULT JUDGMENT AND ORDER FOR  
PERMANENT INJUNCTION AND MONETARY RELIEF  
AS TO DEFENDANTS PHOENIX AVATAR, LLC AND DJL, LLC**

On April 23, 2004, 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, and the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM”), 15 U.S.C. § 7706(a), filed a Complaint for Injunctive and Other Equitable Relief against Defendants Phoenix Avatar, LLC (“Phoenix Avatar”); DJL, LLC (“DJL”), Daniel J. Lin; Mark M. Sadek; James Lin; and Christopher M. Chung.

The FTC now has moved for entry of a default judgment on all counts of the Complaint against Defendants Phoenix Avatar and DJL, pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure. The FTC's Motion for Entry of Default Judgment Against Defendants Phoenix Avatar and DJL is hereby granted, and **IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** as follows:

### FINDINGS

1. This Court has jurisdiction over the subject matter of this case and the parties hereto.
2. Venue, process, and service of process are proper.
3. Defendants Phoenix Avatar and DJL have engaged in activities in or affecting commerce, as "commerce" is defined in 15 U.S.C. § 44.
4. This action was instituted by the FTC under Sections 5, 12, 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 45, 52, 53(b), 57b and CAN-SPAM, 15 U.S.C. § 7706(a). The Commission seeks permanent injunctive relief and monetary and other equitable relief for deceptive acts or practices by Defendants Phoenix Avatar and DJL in connection with the sale of diet patch products and the initiation of commercial e-mail messages in violation of CAN-SPAM. Pursuant to Sections 13(b) and 19, 15 U.S.C. §§ 53(b) and 57b, the FTC has the authority to seek the relief it has requested.
5. The Complaint states a claim upon which relief may be granted against Defendants Phoenix Avatar and DJL under Sections 5, 12, 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 45, 52, 53(b) and 57b.

6. Defendants Phoenix Avatar and DJL were served with the Complaint and Summons as required by Rule 4 of the Federal Rules of Civil Procedure.

7. Defendants Phoenix Avatar and DJL have failed to file an answer to the Complaint within the time set forth by Rule 12(a) of the Federal Rules of Civil Procedure, or to otherwise defend this action. The FTC is therefore entitled to a default judgment pursuant to Rule 55(b) of the Federal Rules of Civil Procedure.

8. The Court now finds that, in connection with the advertising, marketing, and sale of diet patches, Defendants Phoenix Avatar and DJL violated Sections 5(a) and 12 of the FTC Act, 15 U.S.C. § 45(a) and 52, by falsely representing, expressly or by implication, that their diet patches:

- (A) cause substantial weight loss, including as much as six pounds per week;  
and/or
- (B) increase metabolism, decrease appetite, and reduce food cravings, thereby enabling users to lose substantial weight.

9. The Court further finds that, in connection with the advertising, marketing, and sale of diet patches, Defendants Phoenix Avatar and DJL violated Sections 5(a) and 12 of the FTC Act, 15 U.S.C. § 45(a) and 52, by making representations, expressly or by implication, that their diet patches enable users to lose substantial weight when Defendants Phoenix Avatar and DJL did not possess and rely upon a reasonable basis that substantiated the representations.

10. The Court further finds that in numerous instances, Defendants Phoenix Avatar and DJL have initiated the transmission, to protected computers, of commercial e-mail messages

that contained, or were accompanied by, header information that is materially false or materially misleading in violation of Section 5(a)(1) of CAN-SPAM, 15 U.S.C. § 7704(a)(1).

11. The Court further finds that in numerous instances, Defendants Phoenix Avatar and DJL have initiated the transmission of commercial e-mail messages to protected computers that fail to provide:

- (A) clear and conspicuous notice of the opportunity to decline to receive further commercial electronic mail messages from the sender; and/or
- (B) a valid physical postal address of the sender,

in violation of Section 5(a)(5)(A) of CAN-SPAM, 15 U.S.C. § 7704(a)(5)(A).

12. It is proper in this case to issue a permanent injunction prohibiting Defendants Phoenix Avatar and DJL from making, or assisting in making, false or misleading statements or representations in connection with the advertising, marketing, offering for sale, or sale of any good or service, or from further violations of CAN-SPAM. *See FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988).

13. It is proper in this case to enter a monetary judgment against Defendants Phoenix Avatar and DJL resulting from injury to consumers caused by Defendants' violations of the FTC Act and CAN-SPAM. *See Febre*, 128 F.3d at 534; *World Travel*, 861 F.2d at 1026.

14. Defendants Phoenix Avatar and DJL caused injury in the amount of at least \$230,000.

15. Entry of this Order is in the public interest.

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

8. **“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.

9. **“Weight-loss products”** shall refer to any products that are 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, “Slim Form Patch,” “Med Diet Patch,” or any other substantially similar products.

## **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 permanently 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; and
- F. Assisting others who violate any provision of Paragraphs A through E of this Section.

## **II. PROHIBITED BUSINESS ACTIVITIES UNDER CAN-SPAM**

**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 permanently restrained and enjoined from violating, or assisting others in violating, the provisions contained in 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. MONETARY RELIEF**

**IT IS FURTHER ORDERED** that

- A. Judgment is hereby entered against Defendants, jointly and severally, in the amount of two hundred and thirty thousand dollars (\$230,000).
- B. Any and all funds paid pursuant to Subsection A of this Section shall be deposited into a fund administered by the FTC or its agent to be used for equitable relief, including, but not limited to, consumer redress and any attendant expenses for the administration of any redress



fund. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, the FTC may apply any remaining funds for other equitable relief (including consumer information remedies) as it determines to be reasonably related to the Defendants' practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited to the Treasury as disgorgement. Defendants shall have no right to challenge the FTC's choice of remedies under this Subsection.

#### **IV. COMPLIANCE MONITORING**

**IT IS FURTHER ORDERED** that, for the purpose of monitoring and investigating compliance with any provision of this Order:

A. Within ten (10) days of receipt of written notice from a representative of the Commission, Defendants each shall submit additional written reports, sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and/or provide entry during normal business hours to any business location in such defendant's possession or direct or indirect control to inspect the business operation;

B. In addition, the Commission is authorized to monitor compliance with this Order by all other lawful means, including but not limited to the following:

1. obtaining discovery from any person, without further leave of Court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36 and 45;
2. posing as consumers and suppliers to Defendants, Defendants' employees, or any other entity managed or controlled in whole or in part by any Defendant, without the necessity of identification or prior notice; and

C. Defendants shall permit representatives of the Commission to interview any employer, consultant, independent contractor, representative, agent, or employee who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have counsel present.

*Provided, however,* that nothing in this Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to obtain any documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).

## V. MONITORING COMPLIANCE WITH SALES PERSONNEL

**IT IS FURTHER ORDERED** that Defendants are hereby permanently restrained and enjoined from:

A. Failing to take reasonable steps sufficient to monitor and ensure that all employees and independent contractors engaged in sales or other customer service functions comply with Sections I and II of this Order;

B. Failing to investigate promptly and fully any consumer complaint received by any business to which this Section applies; and

C. Failing to take corrective action with respect to any sales person whom any defendant determines is not complying with this Order, which may include training, disciplining, and/or terminating such sales person.

## **VI. DISTRIBUTION OF ORDER BY DEFENDANTS**

**IT IS FURTHER ORDERED** that, for a period of five (5) years from the date of entry of this Order, Defendants must deliver a copy of this Order to all principals, officers, directors, and managers. Defendants must also deliver copies of this Order to all of its employees, agents, and representatives who engage in conduct related to the subject matter of this Order. For current personnel, delivery shall be within five (5) days of service of this Order upon Defendant. For new personnel, delivery shall occur prior to them assuming their responsibilities. Defendants must secure a signed and dated statement acknowledging receipt of the Order, within thirty days of delivery, from all persons receiving a copy of the Order pursuant to this Section VI.

## **VII. COMPLIANCE REPORTING BY DEFENDANTS**

**IT IS FURTHER ORDERED** that, in order that compliance with the provisions of this Order may be monitored:

(A) For a period of five (5) years from the date of entry of this Order, Defendants shall notify the Commission of any changes in corporate structure that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the filing of a bankruptcy petition; or a change in the corporate name or address, at least thirty (30) days prior to such change, *provided* that, with respect to any proposed change in the corporation about which the Defendant learns less than thirty (30) days prior to the date such

action is to take place, Defendant shall notify the Commission as soon as is practicable after obtaining such knowledge.

(B) One hundred eighty (180) days after the date of entry of this Order, Defendants shall provide a written report to the FTC, sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Order. This report shall include, but not be limited to:

- (1) A copy of each acknowledgment of receipt of this Order, obtained pursuant to Section VI of this Order; and
- (2) Any other changes required to be reported under subparagraph A of this Section.

(C) For the purposes of this Order, Defendants shall, unless otherwise directed by the Commission's authorized representatives, mail all written notifications to the Commission to:

Associate/Regional Director  
Federal Trade Commission  
55 E. Monroe St., #1860  
Chicago, IL 60603  
Re: *FTC v. Phoenix Avatar, et al.*, Civil Action No. 04C 2897 (N.D. Ill.)

(D) For purposes of the compliance reporting and monitoring required by this Order, the Commission is authorized to communicate directly with Defendants unless represented by counsel.

## VIII. RECORD KEEPING PROVISIONS

**IT IS FURTHER ORDERED** that, for a period of eight (8) years from the date of entry of this Order, Defendants, and those persons in active concert or participation with them who

receive actual notice of this Order by personal service or otherwise, are hereby restrained and enjoined from failing to create and retain the following records:

- A. Accounting records that reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;
- B. Records accurately reflecting: the name, address, and telephone number of each person employed in any capacity by such business, including as an independent contractor; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;
- C. Customer files containing the names, addresses, telephone numbers, dollar amounts paid, quantity of items or services purchased, and description of items or services purchased, to the extent such information is obtained in the ordinary course of business;
- D. Complaint and refund requests (whether received directly, indirectly, or through any third party), and any responses to those complaints or refund requests; and
- E. Copies of all sales scripts, training materials, advertisements, or other marketing materials.

#### **IX. TRANSFER OF CUSTOMER LISTS**

**IT IS FURTHER ORDERED** that Defendants, their successors, assigns, officers, agents, servants, employees, and all other persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby restrained and enjoined from 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 submitted such information to Defendants as a result of, derived from, or otherwise related to the activities alleged to be in violation of the FTC Act in Counts I through IV of the Commission's Complaint; *provided, however*, that Defendants, their successors, assigns, officers, agents, servants, employees, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, may disclose such information to a law enforcement agency, to the Commission, or as required by any law, regulation, or court order.

**X. ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANTS**

**IT IS FURTHER ORDERED** that Defendants, within five (5) business days of receipt of this Order as entered by the Court, must submit to the Commission a truthful sworn statement acknowledging receipt of this Order

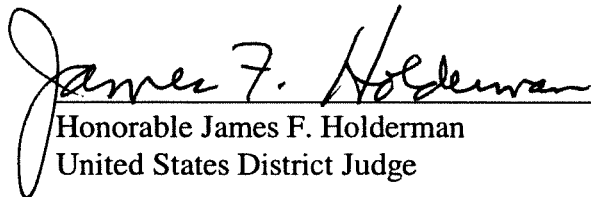
**XI. ENTRY OF THIS JUDGMENT**

**IT IS FURTHER ORDERED** that, as there is no just reason for delay of entry of this judgment, pursuant to Fed. R. Civ. P. 54(b), the clerk shall enter this Order immediately.

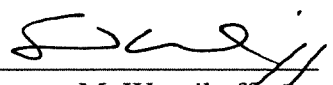
**XII. RETENTION OF JURISDICTION**

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

**IT IS SO ORDERED**, this 29<sup>th</sup> day of March, 2005

  
Honorable James F. Holderman  
United States District Judge

Respectfully submitted by:

  
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Jason K. Bowler  
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