

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta
DEC 13 2007
JAMES [Signature]

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

Prophet 3H, Inc., et al.

Defendants

Civil Action No. 06-CV-1692

~~PROPOSED~~
STIPULATED JUDGMENT
AND ORDER FOR
PERMANENT
INJUNCTION AS TO
DEFENDANT
VICTOR MCLAIN

This matter comes before the Court on a stipulation of Plaintiff Federal Trade Commission ("Commission" or "FTC") and Defendant Victor McLain ("Defendant").

On July 18, 2006, the FTC filed a Complaint for a Permanent Injunction and Other Relief (Doc. 1), including rescission of contracts, restitution to consumers, and disgorgement pursuant to Sections 13(b) and 19(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b(a), and applied *ex parte* for a Temporary Restraining Order pursuant to Rule 65 of the Federal Rules of Civil Procedure (Doc. 2). The Commission charged that Defendant Victor McLain, together with other named defendants, engaged in deceptive acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a), and the Commission's Rule entitled Disclosure Requirements and Prohibitions Concerning

Franchise and Business Opportunity Ventures (the "Franchise Rule"), 16 C.F.R. Part 436, in the marketing and sale of a business opportunity to become an affiliate in a healthcare network and a provider of healthcare services. On July 18, 2006 - the same day the Complaint was filed - the Court issued a Temporary Restraining Order ("TRO") (Doc. 7) with an asset freeze, appointment of a Receiver, and other ancillary equitable relief. On August 2, 2006, upon stipulation of the parties, the Court entered an Extended TRO (Doc. 21). In addition to continuing the relief in the TRO, the Extended TRO prohibited Defendants from making misrepresentations regarding the sale of herbal tea products. On September 13, 2006, upon stipulation of the parties, the Court entered a Preliminary Injunction continuing the relief contained in the Extended TRO (Doc. 24). The Commission has filed an Amended Complaint concurrently with this proposed Stipulated Judgment.

The Commission and Defendant hereby stipulate to the entry of, and request the Court to enter, this Stipulated Judgment and Order for Permanent Injunction ("Final Order") to resolve all matters of dispute between them in this action.

IT IS THEREFORE STIPULATED, AGREED, AND ORDERED as follows:

1. This Court has jurisdiction of the subject matter of this case and jurisdiction over the Defendant.
2. Venue in this District is proper under 15 U.S.C. § 53(b) and 28 U.S.C. §§ 1391(b).
3. The activities of Defendant are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
4. The Complaint and Amended Complaint state a claim upon which relief might be granted against Defendant under Sections 5(a), 13(b), and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 52, 53(b), and 57b, and the Franchise Rule, 16 C.F.R. Part 436.
5. Defendant has entered into this Final Order freely and without coercion. Defendant further acknowledges that he has read the provisions of this Final Order and is prepared to abide by them.
6. The Plaintiff and Defendant have agreed that the entry of this Final Order resolves all matters of dispute between them arising from the Complaint and Amended Complaint in this action, up to the date of entry of this Final Order.
7. Defendant waives all rights to seek appellate review or otherwise challenge or contest the validity of this Final Order. Defendant further waives and

releases any claim he may have against the Commission, its employees, representatives, or agents.

8. Defendant agrees that this Final Order does not entitle Defendant to seek or to obtain attorneys' fees as a prevailing party under the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended by Pub. L. 104-121, 110 Stat. 847, 863-864 (1996), and Defendant further waives any rights to attorneys' fees that may arise under said provision of law.

9. This Final Order is in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law.

10. Entry of this Final Order is in the public interest.

11. This Final Order is for settlement purposes only, and does not constitute an admission by Defendant that the law has been violated as alleged in the Complaint and Amended Complaint, or that the facts as alleged in the Complaint and Amended Complaint, other than jurisdictional facts, are true. However, for the purposes of bankruptcy proceedings, this Final Order is governed by Section III.F.

DEFINITIONS

1. "Advertising" and "promotion" mean any written or verbal statement, illustration or depiction designed to effect a sale or create interest in the purchasing of goods or services, whether it appears in a brochure, newspaper, magazine,

pamphlet, leaflet, circular, mailer, book insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, packaging, package insert, label, film, slide, radio, television or cable television, audio program transmitted over a telephone system, program-length commercial (“infomercial”), the Internet, email, press release, video news release, or in any other medium;

2. “Assets” 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, inventory, checks, notes, leaseholds, effects, contracts, mail or other deliveries, shares of stock, lists of consumer names, accounts, credits, premises, receivables, funds, and cash, wherever located, whether in the United States or abroad;

3. “Business Opportunity Rule” means the FTC Trade Regulation Rule titled “Disclosure Requirements and Prohibitions Concerning Business Opportunities” codified at 16 C.F.R. Part 437, or as it may be amended;

4. “Business venture” means any written or oral business arrangement, however denominated, regardless of whether covered by the Franchise Rule or Business Opportunity Rule, which consists of the payment of any consideration for:

- A. the right or means to offer, sell, or distribute goods or services (regardless of whether identified by a trademark, service mark, trade name, advertising, or other commercial symbol); and
- B. more than nominal assistance to any person or entity in connection with or incident to the establishment, maintenance, or operation of a new business or the entry by an existing business into a new line or type of business;

5. “Corporate Defendants” means Prophet 3H, Inc.; Prophet 3H, LLC; Georgia Home Health Care License and Certification Institute, Inc.; Healthcare State License and Certification Institute, Inc.; M7 Holdings, LLC; and any affiliates, fictitious names, d/b/a’s, subsidiaries, successors, or assigns of the aforementioned entities;

6. “Document” is synonymous in meaning and equal in scope to the usage of the term in Fed. R. Civ. P. 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 the term;

7. “Endorsement” means as defined in 16 C.F.R. § 255.0(b);

8. **“Food” and “drug” shall mean “food” and “drug” as defined in Section 15 of the FTC Act, 15 U.S.C. § 55;**
9. **“Franchise Rule” means the FTC Trade Regulation Rule titled “Disclosure Requirements and Prohibitions Concerning Franchising” codified at 16 C.F.R. Part 436, or as it may be amended;**
10. **“Healthcare business venture” shall mean any business venture involving the sale or provision of goods or services for which a health benefit is claimed, or whose profits directly or indirectly rely upon the provision of health-related goods or services. Health-related goods or services include, but are not limited to, drugs, dietary supplements, and the provision and management of home health care services, nursing home care services, assisted living services, nurse staffing services, medical billing services, medical record management services, health care consulting services, health care client solicitation services, and services reimbursable through Federal or state Medicaid programs;**
11. **“Individual Defendant” and “Defendant” mean Victor McLain;**
12. **“Named Defendants” means Victor McLain; Alexander McLain; Jeffrey W. McLain; Prophet 3H, Inc.; Prophet 3H, LLC; Georgia Home Health Care License and Certification Institute, Inc.; Healthcare State License and**

Certification Institute, Inc.; M7 Holdings, LLC; and any affiliates, fictitious names, d/b/a's, subsidiaries, successors, or assigns of the aforementioned entities;

13. "Receiver" shall mean Kevin O'Halloran and Newbridge Management, LLC, the Receiver appointed by the Court in this matter over Receivership Defendants;

14. "Receivership Defendants" shall mean the Corporate Defendants; and

15. "Receivership Estate" shall mean all monies and property of any kind, real or personal, owned, controlled by, or owed to the Receiver by virtue of any and all court orders in this subject suit, *FTC v. Prophet 3H, et al.*

ORDER

I. PROHIBITION AGAINST VIOLATION OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

IT IS THEREFORE ORDERED that, in connection with the offering for sale or selling of any business venture or healthcare business venture, Defendant, and his agents, employees, officers, corporations, successors, assigns, and all persons or entities in active concert or participation with him who receive actual notice of this Order, by personal service or otherwise, are hereby permanently restrained and enjoined from making any material misrepresentation or assisting others in making any material misrepresentation, either expressly or by

implication, to any prospective purchaser of a business venture or healthcare business venture, including, but not limited to, the following:

A. That the Defendant's healthcare business ventures do not violate federal or state laws regarding:

1. The filing of false or misleading information;
2. The use of a non-profit entity under Section 501(c)(3) of the Internal Revenue Service tax code;
3. The offering of inducements to Medicaid beneficiaries to influence their selection of a particular provider;
4. The giving or acceptance of remuneration by healthcare providers in return for the referral of a person for whom the provider, by supplying services, will receive Medicaid reimbursement;
5. The use of identity information without the authorization of the subject of the information; or
6. The filing of false statements in relation to healthcare matters;

B. That consumers who purchase a business venture will earn substantial income; or

C. That consumers who purchase a business venture will receive significant assistance in the operation of their business, including, but not limited to:

1. Legal and technical assistance, including mentoring, with the formation, development, and operation of purchasers' business ventures; or
2. Assistance obtaining clients, accounts, or locations for their business ventures.

II. PROHIBITION AGAINST VIOLATION OF THE FRANCHISE RULE AND BUSINESS OPPORTUNITY RULE

IT IS THEREFORE ORDERED that Defendant, and his agents, employees, officers, corporations, successors, assigns, and those persons in active concert or participation with him who receive actual notice of this Order by personal service or otherwise, are hereby restrained and enjoined from violating or assisting others to violate any provisions of the Franchise Rule or Business Opportunity Rule by, including, but not limited to:

A. Failing to provide a prospective franchisee or business opportunity purchaser with a complete, accurate, and up-to-date disclosure document as prescribed by the Franchise Rule or Business Opportunity Rule;

B. Failing to provide each prospective franchisee or business opportunity purchaser with complete and accurate documentation for any earnings or financial performance representations, as required by the Franchise Rule or Business Opportunity Rule;

C. Failing to have a reasonable basis for any earnings or financial performance representation at the time such representation is made, as required by the Franchise Rule or Business Opportunity Rule; or

D. Failing to disclose in a clear and conspicuous manner, in immediate conjunction with any earnings or financial performance representation, that material which constitutes a reasonable basis for the earnings or financial performance representation is available to a prospective franchisee or business opportunity purchaser, as required by the Franchise Rule or Business Opportunity Rule.

III. MONETARY JUDGMENT

IT IS FURTHER ORDERED that:

A. Judgment in the amount of one hundred, twenty-five thousand, nine hundred dollars (\$125,900.00) is entered against Defendant jointly and severally with the other Named Defendants in this matter, *provided, however*, that all of this amount shall be suspended.

B. The Defendant relinquishes all right and control over all assets in the possession of the Receiver and all such assets that the Receiver may obtain pursuant to any powers granted to the Receiver by Order of this Court.

C. The Commission's agreement to this Final Order is expressly premised upon the financial condition of the Individual Defendant as represented in his sworn deposition of September 12, 2006, his sworn Declaration, dated July 24, 2007, his sworn financial statement, dated July 30, 2007, all information supplied by him or his attorney to the Receiver and FTC, and all findings of the Receiver with respect to the frozen assets of the Defendant (collectively, "Asset Information"). The Commission has expressly relied on the Asset Information in negotiating and consenting to this Final Order. If, upon motion by the Commission, this Court finds that the Defendant, in executing his financial statement, providing financial information to the Receiver or the FTC, or testifying at his deposition, has (i) materially misrepresented the value of any asset that should have been disclosed in the statement that the Individual Defendant executed; (ii) materially misrepresented his financial condition by failing to disclose any asset that should have been disclosed in the statement that the Individual Defendant executed; or (iii) made any other material misrepresentation or omission in the Individual Defendant's financial statement, information provided to the Receiver or the FTC, or testimony at his deposition, the Court shall enter the full suspended judgment set forth in Subparagraph "A," above, against the Individual Defendant, and said judgment shall be immediately due and payable.

D. In accordance with 31 U.S.C. § 7701, the Defendant is hereby required, unless he has done so already, to furnish to the Commission his taxpayer identifying numbers (social security numbers or employer identification numbers)

which shall be used for purposes of collecting and reporting on any delinquent amount arising out of Defendant's relationship with the government.

E. The Defendant is further required, unless he has done so already, to provide the Commission with clear, legible and full-size photocopies of all valid driver's licenses he possesses, which will be used for reporting and compliance purposes.

F. The Defendant agrees that the facts as alleged in the Complaint and Amended Complaint filed in this action shall be taken as true solely for the purpose of a nondischargeability complaint in any bankruptcy proceeding.

G. Proceedings instituted under this Section are in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law, including any other proceedings the Commission may initiate to enforce this Order.

IV. COMMISSION'S USE OF MONETARY JUDGMENT

IT IS FURTHER ORDERED that all funds paid to the Commission or its agents pursuant to Court Order in this litigation shall be deposited into a fund administered by the Commission 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 Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendant's practices alleged in the Complaint and Amended Complaint. Any funds not used for such equitable relief shall be deposited to the United States

Treasury as disgorgement. Defendant shall have no right to challenge the Commission's choice of remedies under this Section.

V. LIFTING OF THE ASSET FREEZE

IT IS FURTHER ORDERED that:

The freeze of the Defendant's assets set forth in the Preliminary Injunction Order, entered by this Court on September 13, 2006, shall be lifted with respect to the Defendant.

VI. ACKNOWLEDGMENT OF RECEIPT OF ORDER

IT IS FURTHER ORDERED that within five (5) business days of receipt of this Order as entered by the Court, the Individual Defendant shall submit to the Commission a truthful sworn statement that shall acknowledge receipt of this Order.

VII. DISTRIBUTION OF ORDER BY DEFENDANT

IT IS FURTHER ORDERED that for a period of five (5) years from the date of entry of this Order, the Defendant shall deliver copies of the Order as directed below:

- A. For any business that the Defendant controls, directly or indirectly, or in which the Defendant has a majority ownership interest, the Defendant must deliver a copy of this Order to all principals, officers, directors, and managers of that business. The Defendant must also deliver copies of this Order to all employees, agents, and representatives of that business who engage in conduct related to the

provisions of Sections "I" through "II" of this Order involving the marketing of business ventures. For current personnel, delivery shall be within (5) days of service of this Order upon the Defendant. For new personnel, delivery shall occur prior to them assuming their responsibilities.

- B. For any business where the Defendant is not a principal, officer, director, manager, or owner or holder of a majority ownership interest but otherwise engages in conduct related to the provisions of Sections "I" through "II" of this Order, the Defendant must deliver a copy of this Order to all principals and managers of such business before engaging in such conduct.
- C. The Defendant 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 Part.

VIII. COMPLIANCE REPORTING BY DEFENDANT

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,
 - 1. The Defendant shall notify the Commission of the following:
 - a. Any changes in residence, mailing addresses, and telephone numbers of the Defendant, within ten (10) days of the date of such change;
 - b. Any changes in employment status (including self-employment) of the Defendant, and any change in the

ownership of the Defendant in any business entity, within ten (10) days of the date of such change. Such notice shall include the name and address of each business that the Defendant is affiliated with, employed by, creates or forms, or performs services for; a statement of the nature of the business; and a statement of the Defendant's duties and responsibilities in connection with the business or employment; and

- c. Any changes in the Defendant's name or use of any aliases or fictitious names; and

2. The Defendant shall notify the Commission of any changes in corporate structure of any business entity that engages in any acts or practices related to the provisions of Sections "I" through "II" of this Order involving the marketing of business ventures that the Defendant directly or indirectly controls, or in which he has an ownership interest (other than a minority ownership interest in a publicly traded entity that has filed a registration statement with the Securities and Exchange Commission), 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; 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 days after the date of entry of this Order, the Defendant 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. The then-current residence address, mailing addresses, and telephone numbers of the Defendant;
2. The then-current employment and business addresses and telephone numbers of the Defendant, a description of the business activities of each such employer or business, and the title and responsibilities of the Defendant, for each such employer or business;
3. A copy of each acknowledgment of receipt of this Order, obtained pursuant to Section VII.C of this Order; and
4. Any other changes required to be reported under subparagraph A of this Section.

C. For the purposes of this Order, the Defendant shall, unless otherwise directed by a representative of the Commission, identify all written notifications to the FTC as provided in reference to FTC v. Prophet 3H, Inc., et al., United States District Court for the Northern District of Georgia, Case No. CV 06-1692, and mail them to:

Associate Director
Division of Enforcement
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

D. For purposes of the compliance reporting and monitoring required by this Order, the Commission is authorized to communicate directly with the Defendant.

IX. 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, the Defendant 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: Defendant, Defendant's employees, or any other entity managed or controlled in whole or in part by Defendant, without the necessity of identification or prior notice; and

C. Defendant 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)).

X. RECORD-KEEPING PROVISIONS

IT IS FURTHER ORDERED that, for a period of eight (8) years from the date of entry of this Order, in connection with any business covered by the provisions of this Order that the Defendant directly or indirectly manages (other than as a manager of a single retail unit, wholesale unit, or warehouse owned and operated by a publicly traded entity that has filed a registration statement with the Securities and Exchange Commission), controls or has a majority ownership interest in, Defendant and his agents, employees, officers, corporations, successors, and assigns, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile 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. Personnel 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, phone 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. Copies of any complaints and refund requests (whether received directly, indirectly or through any third party) and any responses to those complaints or requests;

E. Copies of any sales scripts, training materials, advertisements, or other marketing materials, including e-mail and Internet websites or web pages, regarding any good, service, company or web site, which are disseminated by Defendant to any person; and

F. All records and documents necessary to demonstrate fully their compliance with each provision of this Order, including, but not limited to, copies of acknowledgments of receipt of this Order, required by Section VII.C of this Order, and all reports submitted to the FTC pursuant to Section VIII.

XI. PROHIBITIONS INVOLVING CONSUMER LISTS

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 them who receive actual notice of this Order by personal service, facsimile, or otherwise, are hereby permanently 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 paid any money to any Defendant, at any time prior to July 18, 2006, in connection with the advertising, promotion, marketing, offering for sale, or sale of any good or service; provided, however, that the Defendant may disclose such identifying information to a law enforcement agency, or as required by any law, regulation or court order.

XII. COOPERATION WITH RECEIVER

IT IS FURTHER ORDERED, that Defendant shall cooperate fully with the Receiver in: (A) pursuing any and all claims by the receivership against third parties; (B) assisting the Receiver in defending any and all actions or claims brought against the receivership by third parties; and (C) executing any documents necessary to transfer assets or ownership interests to the Receiver pursuant to the terms of this Order.

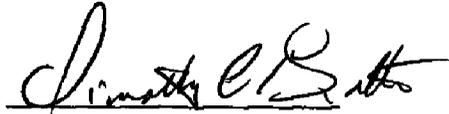
XIII. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification and enforcement of this Order.

XIV. COMPLETE SETTLEMENT

The parties hereby consent to entry of the foregoing Order which shall constitute a final judgment and order in this matter. The parties further stipulate and agree that the entry of the foregoing order shall constitute a full, complete, and final settlement of this action.

SO ORDERED, this 13th day of December, 2007



Timothy C. Batten, Sr.
United States District Judge
United States District Court for
The Northern District of Georgia

**STIPULATED BY:
FOR THE PLAINTIFF:**

William Blumenthal
General Counsel



Date: 12 Dec 07

PHILIP TUMMINIO
Attorneys for Plaintiff
Federal Trade Commission
Room 286
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-2004
(202) 326-3395 (facsimile)
ptumminio@ftc.gov

FOR THE DEFENDANT:



Date: 10-18-07

VICTOR MCLAIN
Defendant

Shibani Bakshi
Ga. Bar No. 642668
Federal Trade Commission
225 Peachtree Street, NW, Ste 1500
Atlanta, GA 30303
(404) 656-1390
(404) 656-1379 (facsimile)
sbakshi@ftc.gov



Date: 10/13/07
ROBERT P. MARCOVITCH
Attorney for Defendant
Ga. Bar No. 469979
Robert P. Marcovitch, LLC
75 Fourteenth St., Ste 2500
Atlanta, GA 30309
(404) 815-7171
(404) 815-8757 (facsimile)
Bobmarcovitch@bellsouth.net