IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 05-0907-CV-W-ODS
	)	
BABY-TENDA CORPORATION,	)	
	)	
Defendant.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT IN FAVOR OF PLAINTIFF DECLARING DEFENDANT VIOLATED 18 U.S.C. § 1341

Generally speaking, the Amended Complaint alleges Defendant, acting through its Distributors, falsely and fraudulently mailed sales material indicating the Consumer Product Safety Commission ("CPSC") or the National Highway Transportation Safety Administration ("NHTSA") sponsored seminars at which Defendant's products were sold. This conduct is alleged to constitute mail fraud in violation of 18 U.S.C. § 1341. The Amended Complaint also alleges Defendant misappropriated these agencies' logos by placing counterfeit versions on sales advertisements and literature in violation of 18 U.S.C. § 506.[1] The Government does not seek monetary relief; the only relief sought is equitable in nature.

A bench trial was held October 17-18, 2007. In summary, the Court concludes (1) the case is not moot, (2) some of the advertisements, solicitations and invitations disseminated by Defendant's Distributors violated 18 U.S.C. § 1341, (3) Defendant is liable for the content of the advertisements, solicitations and invitations disseminated by its Distributors, and (4) there is no cognizable danger the violations will recur, so injunctive relief is inappropriate.

[1]The Government also claimed Defendant's conduct violated 18 U.S.C. § 709, but the Court dismissed this claim on August 22, 2007.

I. FINDINGS OF FACT

To the extent any of these Findings of Fact constitute conclusions of law, they should be so construed.

1. Defendant Baby-Tenda Corporation ("Baby-Tenda") is a corporation organized and existing under the laws of Missouri, with its principal place of business in Kansas City, Missouri. Baby-Tenda also does business under the trademarked names "Babee-Tenda" and "Tenda."

2. David Jungerman is the sole shareholder and president of Baby-Tenda. Jungerman began selling baby furniture while in college in the 1950's and has been involved in the business ever since. Jungerman was first involved in selling and then manufacturing a competing product, but eventually acquired the Baby Tenda company and moved its production to Kansas City. He has been the sole shareholder, officer and director for over thirty-five years, and is still the day-to-day manager of the company.

3. Baby-Tenda's products are marketed to consumers primarily by a network of distributors. Currently, there are five distributors around the country. Distributors sell the furniture through presentations held in different cities in their respective territories on a rotating basis.

4. Baby-Tenda enters into a standard contract with its distributors that is entitled "Distributor Agreement."

5. Under the Distributor Agreement, Distributors must submit their advertising or promotional materials (including seminar invitations) to Baby-Tenda for prior approval. Defendant has exercised its rights under the Distributor Agreement by requesting, receiving, reviewing, and suggesting changes to distributors' promotional materials.

6. Baby-Tenda does not routinely receive or solicit the Distributors' promotional materials as suggested by the Distributor Agreement. However, Jungerman has attended and videotaped sales seminars conducted by distributors. Jungerman also monitors and discusses sales tactics through periodic conference calls with distributors. In these calls, he has approved or rejected ideas. Defendant also distributes sales ideas to distributors through a company newsletter.

7. The Distributor Agreement contains other provisions relating to Baby-Tenda's control over the Distributors, including provisions that

(a) give Baby-Tenda the power to terminate a distributor for a variety of reasons, including: failing to abide by the terms of the contract; filing bankruptcy; changing ownership of the distributorship; or failing to meet specified sales objectives,

(b) prohibit Distributors from dealing in competitors' products without written authorization while the Distributor Agreement is in effect,

(c) prohibit Distributors from competing with Baby-Tenda for two years after the Distributor Agreement is terminated, and

(d) prohibit Distributors from hiring employees without Baby-Tenda's consent, which may be withdrawn at any time (thereby effectively giving Baby-Tenda hiring and firing authority over the Distributors' employees).

8. The Distributor Agreement states that "[f]or all purposes herein, Distributor is an independent contractor."

9. Distributors are responsible for their expenses, including payment for mailing lists, advertisements, postage, and travel. Their profit is the difference between the amount they sell the product for and the cost as established by Baby-Tenda. In addition, Distributors can earn bonuses or "rebates" for high sales figures (although the Distributor Agreement does not provide for such bonuses).

10. Each Distributor is responsible for his own withholdings on the profit he makes and for all withholdings from those amounts. Each Distributor is also responsible for the payment of state sales tax on all Baby-Tenda items he sells. Distributors receive no health, retirement or any other type of benefit from Baby-Tenda. Accordingly, Baby-Tenda does not provide Distributors with a W-2 form (although it does provide a Form 1099 to report any bonuses that may have been earned).

11. Defendant recruits prospective distributors in part through its website. The website conveys Baby-Tenda's expectation that anyone it hires will sell its products in a very specific manner: by soliciting expectant parents via direct mail and conducting the live "safety seminars" described above.

12. For example, Defendant's website states, "[t]his is a product that has to be demonstrated," and lists a minimum cash requirement used for "[s]eminar display equipment, and mailing expense for initial shows." Baby-Tenda requires prospective distributors to "attend at least two live seminars prior to making an application to become a Distributor," adding, "[i]t is a waste of your and our time to proceed without the knowledge you can obtain at a seminar." The website adds that Baby-Tenda has "a proven program that works and we encourage new Distributors to use this program and not try to re-invent the wheel. After you are making money using our proven methods, we then are very open to your suggestions . . . ."

13. Distributors typically sell Baby-Tenda furniture through safety seminars. Expectant parents are invited to the seminars that are typically conducted in a hotel conference room. This sales method is not dictated by Baby-Tenda but is the method that the Distributors have found to be most effective. Previous sales/distribution methods included door-to-door sales, showrooms and telephone marketing.

14. Distributors send expectant parents invitations to the presentations through direct mail. In the invitations, the sales presentations are promoted as "safety seminars" for couples expecting children, but they are primarily sales presentations for Baby-Tenda products.

15. Distributors typically begin their seminars by discussing product recalls and baby safety and providing materials related to infant safety. Included in such materials is a listing of other sources, including websites that one can look to for additional safety information. A reference to CPSC recalls or the CPSC website is typically included in the information provided, as are educational or informational brochures produced and promulgated by the CPSC. The presentation soon turns to Baby-Tenda products specifically, which are touted as being safer than competing products. Attendees are given the opportunity to buy Baby-Tenda products at the conclusion of the seminar.

16. The seminar invitations differ from Distributor to Distributor but generally they will state the show time and location and provide a toll free number for additional information. The form of invitation that the Distributors have used for several years is a single sheet, post-card style invitation that contains a border and has a drawing of a

baby carriage in the lower left corner. The Distributors purchase the card stock for the invitations from Baby-Tenda because of the cost-savings associated with bulk printing (although they are free to obtain card stock elsewhere or use a different style of invitation).

17. Many of the invitations claim that the seminar is sponsored by the Advisory Council on Child Safety (the "Advisory Council"). This organization was created by and consists of Baby-Tenda Distributors. The Advisory Council has a website consisting of one page that explains the Advisory Council provides information about baby safety at baby safety classes, that such classes are funded through the sale of Baby-Tenda products, and that such products are offered for sale but there is no obligation to purchase. The website also lists other websites where information about child safety can be obtained. The Advisory Council's website is not identified on the invitations.

18. Some of the invitations are "tailored" to suggest some connection between the Advisory Council and the state in which the seminar is to take place. For instance, an invitation might refer to the "Advisory Council on Child Safety - Baby Tenda Michigan."

19. Boyd Hedleston, a Baby-Tenda distributor in Virginia, mailed seminar invitations claiming sponsorship by the CPSC and NHTSA from around July 2001 to around October 2004. These invitations stated that the seminars were "sponsored by Baby-Tenda Company in conjunction with the Consumer Product Safety Commission and the National Highway Traffic Safety Administration."

20. Hedleston knew that no government agency actually sponsored the seminars that his invitations said were co-sponsored by the CPSC and NHTSA. Hedleston included these claims of sponsorship so more people would come to his seminars.

21. Neither the CPSC nor NHTSA sponsored Hedleston's seminars. No government agency has ever sponsored any Baby-Tenda seminar or sales presentation.

22. During the approximately 40 months from July 2001 to October 2004 that Hedleston used the false language on his invitations, he advertised and conducted at least 80 seminars. Hedleston typically mailed 2,000 invitations for each seminar.

23. By letter dated July 21, 2005, the government informed Baby-Tenda that persons selling Baby-Tenda products were misappropriating the names and logos of the CPSC

and NHTSA in connection with sales presentations to customers. Jungerman responded by letter dated July 26, 2005 and admitted in this letter that Hedleston had sent seminar invitations with the false CPSC/NHTSA sponsorship claim. 24. The greater weight of the evidence does not support a finding that any other Distributor represented the CPSC, NHTSA, or any other governmental agency sponsored the sales seminars or endorsed the product. None of the other Distributors' invitations admitted into evidence contain such representations. The only evidence of such representations is testimony from some customers/attendees who relied solely upon their memory to describe the invitation's content. In many cases, the witness' memory is contradicted by the invitations actually admitted into evidence. The passage of time is another factor that casts doubt on the customers' memories.

25. The marketing methods employed by the Distributors/Baby-Tenda also gives the Court pause. During the seminars materials from the CPSC are distributed or discussed. The discussion and invitation also creates an impression that the proceedings or the product are sponsored or endorsed by an entity with a name that sounds suspiciously (and the Court believes deliberately) like a governmental agency. In fact, the Court finds the Advisory Council's name was crafted specifically to create the false impression that government endorsement exists. The combination of these tactics makes it completely understandable that customers might mistakenly believe the CPSC endorses the product being sold – but the Court cannot conclude this representation was actually made other than in Hedleston's advertisements.

26. Hedleston is no longer a Distributor.

27. The only materials distributed bearing the CPSC's seal were materials prepared by the CPSC and intended by the CPSC to be distributed to consumers. The CPSC seal was not used on any invitations.

28. The testimony of consumers notwithstanding, the greater weight of the evidence does not support a finding that any Distributors utilized counterfeit seals or logos of any governmental agency.[2]

29. Distributors typically collect invitations from those in attendance. This is done for marketing purposes: invitations have a code or sign indicating the method or geographic area of distribution, and collecting the invitations allows the Distributor to ascertain the effectiveness of the various distribution methods/locations.

30. Hedleston did not have a good faith basis for believing the CPSC or NHTSA co-sponsored his seminars. The basis for his belief was (1) he was distributing materials made available to the public by these agencies and (2) he took a training course on car seats from the NHTSA. This explanation is incredible on its face, and the Court does not credit Hedleston's assertion that he believed he was justified in making the representation.

II. CONCLUSIONS OF LAW

To the extent any of these Conclusions of Law constitute factual findings, they should be so construed.

A.

First, the Court must address its own jurisdiction. Though raised indirectly and not explicitly by the parties, the Court has an independent obligation to insure that it has jurisdiction over the case. Defendant insinuates the case is moot because (1) Hedleston is no longer a Distributor, (2) no other Distributor made the representations,

[2]In reaching this conclusion, the Court has not relied on the tape of Jungerman's telephone call with Tammy Collins and sustains the Government's objection to the introduction of that tape into evidence. On April 5, 2007, the Court concluded the tape was work product and denied the Government's discovery request. Defendant never subsequently provided the tape to the Government. Therefore, it would be unjust to allow Defendant to use the tape as evidence in this proceeding.

and (3) the misrepresentations have not been made since October 2004. The mootness doctrine is an outgrowth of Article III's case and controversy requirement. E.g., Lupiani v. Wal-Mart Stores, Inc., 435 F.3d 842, 847 (8th Cir. 2006). "Since Art[icle] III courts are precluded from issuing advisory opinions, it necessarily follows that they are impotent to decide questions that cannot affect the rights of litigants in the case before them." Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 127 (1974) (quotations omitted). However, mootness is not an issue when the defendant voluntarily ceases the challenged practice or act. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice unless it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources, 532 U.S. 598, 609 (2001) (internal quotations omitted, emphasis supplied); see also Adarand Constructors, Inc. v. Slater, 528 U.S. 216, 222 (2000). "The 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (quoting United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)). The Court cannot conclude it is "absolutely clear" that no other Distributor will issue invitations suggesting the CPSC co-sponsors a seminar or endorses the product. Therefore, the case is not moot.

B.

The use of the mails to distribute an invitation to a sales seminar that falsely represents government sponsorship or endorsement constitutes mail fraud. 18 U.S.C. § 1341. This point is not seriously contested. Based on the findings expressed in paragraphs 27 and 28, the Court concludes there have not been any violations of 18 U.S.C. § 506.

The real issue is whether Defendant is legally responsible for the conduct of its Distributor, Boyd Hedleston. Missouri follows the Restatement (Second) of Agency

when determining whether a party is liable under the doctrine of respondeat superior. E.g., J.M. v. Shell Oil Co., 922 S.W.2d 759, 764 (Mo. 1996) (en banc); Jones v. Brashears, 107 S.W.3d 441, 445 (Mo. Ct. App. 2003); Carter v. Wright, 949 S.W.2d 157, 160 (Mo. Ct. App. 1997). The factors listed in the Restatement and approved by the Missouri courts include:

1. the extent of control the principal may exercise over the work,
2. whether the servant is engaged in a distinct occupation or business,
3. whether the work is usually done under an employer's supervision or by a specialist without supervision,
4. the skill required,
5. who supplies the instrumentalities, tool, and location for doing the work,
6. the length of the relationship,
7. method of payment,
8. whether the work is part of the principal's normal activities,
9. the parties' intent, and
10. whether the principal is or is not in business.

At all times, however, "the touchstone is whether the party sought to be held liable has the control *or* right to control the conduct of another in the performance of an act." J.M., 922 S.W.2d at 764 (emphasis supplied). "'The determining factor is not whether respondent actually exercised control over the work . . . but whether respondent had the right to exercise that control.'" Carter, 949 S.W.2d at 160 (quoting Pratt v. Reed & Brown Hauling Co., 361 S.W.2d 57, 63 (Mo. Ct. App. 1962)). The ultimate determination is factual in nature. Jones, 107 S.W.3d at 445.

Defendant attempts to portray its Distributors as purely independent contractors, and there are some factors – including the method of payment and the parties' intent – that favor this conclusion. On the other hand, other factors suggest Defendant possesses more control than is typical for an independent contractor, including the ability to approve a Distributor's hiring decisions, effectively cause a Distributor to fire an employee, the exclusivity of the arrangement, and the extent of control over the manner in which the Distributor performs his or her functions. As relevant to this case, the Court

finds it particularly important that Distributors have a contractual obligation to obtain Defendant's approval for all advertising and solicitations. Defendant does not often exercise its power to receive, much less review and approve, these materials, but under Missouri law the exercise of this power does not matter. Defendant has the right to control many aspects of the Distributors' work, including particularly the right to control the content of the Distributors' advertisements and solicitations. The Court concludes the Distributors are Defendant's agents for these purposes, and Defendant is civilly responsible under a theory of respondeat superior for any wrongs – including Hedleston's fraudulent misrepresentations – connected to these materials.

Plaintiff devotes much attention – and the Court has briefly addressed – the confusion created by the Distributors' reference to the Advisory Council. As stated earlier, the Court believes the Advisory Council's name was carefully crafted to "sound like" the name of a government agency, specifically to create the false impression that government endorsement exists. Adding to effort to mislead consumers is the fact that the invitations are purportedly for "safety seminars" and purposely omit the fact that the true purpose of the event is to sell Defendant's products. The net effect is to create the false impression that the seminar is sponsored by a governmental or other agency and is devoted to baby safety. The Record demonstrates – and the Court finds – the effort has been successful, as evidenced by the testimony of attendees who were surprised, angry or disappointed that they had been lured to a sales meeting.

As deceitful and reprehensible as the Court finds this sales practice, it does not form an independent basis for relief. The Amended Complaint narrowly focuses on Defendant's misrepresentations about a connection between its product and government agencies. Even if the sales practice is deceptive or otherwise constitutes an unfair trade practice under the FTC Act or some other law, it does not provide a basis for granting Plaintiff relief in this case. These claims will have to be raised – if at all – in another suit.

C.

Finally, the Court considers the appropriate relief. The Government seeks only injunctive relief and does not seek monetary relief. The Court concludes injunctive relief is not necessary.

Hedleston was the only Distributor to make the offending misrepresentations, and the evidence easily establishes Defendant and the remaining Distributors are aware (and probably have always been aware) that such representations were improper. This raises serious doubt about the appropriateness of equitable relief. "Along with the court's power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct. . . . But the moving party must satisfy the court that relief is needed." United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). Thus, while the voluntary cessation of illegal conduct does not deprive the Court of jurisdiction over the case, it may affect the determination of the appropriate relief. "The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." Id.; see also Inland Oil & Transport Co. v. United States, 600 F.2d 725, 727 (8th Cir. 1979) (per curiam); Dyer v. Securities & Exchange Comm'n, 291 F.2d 774, 780-81 (8th Cir. 1961). In the absence of such danger, an injunction is not warranted.

The Court concludes there is nothing more than a possibility that Defendant, through its Distributors, will misrepresent the existence of an endorsement from government agencies. The practice was conducted by a single Distributor, whose misconduct was acknowledged once it was brought to Defendant's attention. Defendant and its Distributors acknowledge the impropriety of making representations of this sort. Finally, the offending Distributor is no longer Defendant's agent. There is no cognizable danger of recurrent violations of this sort, so an injunction is unnecessary. Beyond declaring Defendant is responsible for the violations of law, see 28 U.S.C. § 2201(a), no other relief is warranted.

III. CONCLUSION

The Court concludes Defendant violated 18 U.S.C. § 1341 but did not violate 18 U.S.C. § 506. Beyond this declaration, no further relief is warranted.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: November 7, 2007