

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

UNITED STATES OF AMERICA,

Case No.: 4:21-cvaE 3.5NETA'(liac 0.0T*[C

Plaintiff,

v.

ERIC ANTHONY NEPUTE,
individually, and as
Owner of Quickwork LLC; and

QUICKWORK LLC,
a limited liability company,
also d/b/a WELLNESS WARRIOR,

Defendants.

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I. INTRODUCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure and Section 13 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53, the government seeks a preliminary injunction to stop Defendants from making deceptive and misleading statements that taking Vitamin D and zinc supplements can prevent or treat COVID-19, thus violating the FTC Act and the COVID-19 Consumer Protection Act.

In late 2019, a novel, highly contagious coronavirus began to sweep its way across the world. The disease it causes—COVID-19—has devastated communities everywhere. Tragically, as of April 2021, at least 550,000 Americans have died due to complications from COVID-19.

Seeking to profit from the fear caused by this global pandemic, Defendant ETJ0 Tc 0.0 54 Tw D(s)1 (wr)3 8 (..

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- “Boston University’s Dr. Michael Holick found . . . that people who have enough [V]itamin D are 54 percent less likely to catch coronavirus in the first place.” Compl. Ex. H.
- Other work performed by Dr. Holick demonstrates that “COVID-19 Patients who get enough [V]itamin D are 52% less likely to die” and “are at a 52 percent lower risk of dying of COVID-19 than people who are deficient. . . .”

These claims convey the impression that Vitamin D is scientifically proven to prevent or treat COVID-19. As set forth below and in the accompanying declaration of Dr. Richard van Breemen, these claims lack substantiation. Part V.A.1; Van Breemen Decl.

2. Claims About Zinc

Defendants have also disseminated advertisements representing that zinc treats or prevents BOD

- “[I]t’s been proven by NIH, World Health Organization, the CDC, the list goes on and on, that vaccines do not stop the spread of the virus.” Compl. Ex. G at 13:13-15.
- Nepute’s protocol, including Vitamin D and zinc, “actually works better . . . than any vaccine,” and customers do not “really need a vaccine.” Compl. Ex. F at 17:6-8.

Here, too, Defendants do not support their claims with adequate scientific substantiation.

not supported by competent and reliable scientific evidence.” . Defendants have nevertheless continued marketing their Vitamin D and zinc products as prophylactics and/or treatments for COVID-19. Defendants continue to post advertising videos to their various websites, and many of the videos containing the claims described in Part III.C above may still be viewed on the Wellness Warrior and/or Common Sense Health Nation Facebook page. Garrett Decl. ¶ 6.

IV. LEGAL STANDARD

Section 13 of the FTC Act, 15 U.S.C. § 53, provides two avenues for this Court to issue a preliminary injunction: Section 13(a) and Section 13(b). Under Section 13(b), the government² may file suit whenever it “has reason to believe that any person ... is violating, or is about to violate, any provision of law enforced by the [FTC].” 15 U.S.C. 53(b)(1). A Section 5(a) violation will support an injunction under Section 13(b). ., 931

F.2d 1312 (8th Cir. 1991) (affirming Section 13(b) injunction based on violation of Section 5(a)). In considering a preliminary injunction motion sought under Section 13(b), the courts consider two factors: (1) the likelihood of ultimate success on the merits, and (2) a balance of the equities.

69 F.3d 260, 267 (8th Cir.1995); ., No. 4:14-CV-

00815, 2014 WL 7238080 (W.D. Mo. Dec. 12, 2014), “[U]nder § 53(b), irreparable harm is presumed” c 414Td0Tdref0EMC BTw/P &MCID 62BDC -284 0d[-28472 92 w 1.mTj2/TT19.964 0d[9.96475

., No. 06-4671, 2007 WL 1266636, at *3 (D. Minn. Apr. 27, 2007) ((sjun

“shall” grant the injunction “[u]pon proper showing.” 15 U.S.C. § 53(a). While courts have

dire and irreparable harm to consumers persuaded by Defendants claims, as well as the urgent public interest in stopping the dissemination of false or deceptive information about how to treat and prevent COVID-19. Such equities significantly outweigh any economic harm that Defendants may suffer if their nutritional supplement sales drop because they can no longer use deceptive advertising to promote them.

A. The Government is Likely to Succeed on the Merits

To prove Defendants violated FTC Act Sections 5 and 12, the government must show that (i) “there is a representation, omission, or practice”; that (ii) “is likely to mislead consumers acting reasonably under the circumstances”; and (iii) is material.³ *See* *FTC v. Actavis*, 33 F.3d 1088, 1095 (9th Cir. 1994). The government is confident that it will prevail in this case. The filings in this case show that, to sell their Vitamin D and zinc supplements, Defendants have been making deceptive and misleading statements about how their products can treat, mitigate, or prevent COVID-19—statements that violate Sections 5 and 12 of the FTC, as well as the COVID-19 ACT.

1. Defendants’ Deceptive Advertising Is Not Based on Competent or Reliable Scientific Evidence

As set forth in Section III.C above, Defendants have made numerous claims regarding Vitamin D and zinc’s ability to treat COVID-19. Defendants have claimed, for example, that “Vitamin D[] will prevent [COVID-19] from infecting your body”; that zinc “stops viral proliferation”; and that Vitamin D and zinc “actually works better than any vaccine.”

Section III.C. Many of Defendants’ claims conflict with widely-accepted conclusions of public

³ While the Eighth Circuit has not squarely addressed the elements for these claims, other circuit courts and district courts within the Eighth Circuit have held that these elements apply. *See* *FTC v. Actavis*, 33 F.3d 1273 (11th Cir. 2003); *FTC v. Actavis*, 838 F.3d at 168; *FTC v. Actavis*, 777 F.3d at 490; *FTC v. Actavis*, 318 F.3d 1273 (11th Cir. 2003); *FTC v. Actavis*, 970 F.2d at 314; *FTC v. Actavis*, 2018 WL 5310414 (W.D. Mo. Sept. 10, 2018); *FTC v. Actavis*, 2011 WL 1930401, at *2; *FTC v. Actavis*, 645 F. Supp. 2d at 1190.

health experts— , the efficacy of the currently approved COVID-19 vaccines—and the Court may take judicial notice of such information where it deems appropriate.

The government also retained Dr. Richard van Breemen, PhD, an expert in pharmacology and medicinal chemistry from Oregon State University, to help the Court determine whether Defendants have legitimate bases for their claims regarding the efficacy and health benefits of Vitamin D and zinc supplements. Van Breemen Decl. ¶ 22. Dr. Van Breemen explains that practitioners of pharmacology and medicinal chemistry require randomized, controlled human clinical trials to show that an intervention treats, prevents, or reduces the risk of COVID- 19. ¶

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43. In sum, there is no competent and reliable evidence to substantiate any Defendants' claims regarding the efficacy of Vitamin D or zinc as a prophylactic or treatment for COVID-19.

Moreover, Defendants' claims about the benefits of ingesting Vitamin D and zinc supplements convey the impression that those claims are backed up by science. Defendants create this false impression this by citing to actual scientific studies and by referring to specific biological mechanisms through which Vitamin D and zinc supposedly treat and/or prevent COVID-19.

Section III.C; , Compl. Ex. G at 24:20-22 (Vitamin D "blocks the spike protein from the [human cell's] ACE-2 receptor"); 35:15-25 (Vitamin D can prevent "cytokine storm");

Van Breemen Decl. ¶¶ 36-37. "When assessing the meaning and representations conveyed by an advertisement [for Section 12 claims], the court must look to the advertisement's overall, net impression rather than the literal truth or falsity of the words in the advertisement,"

, 645 F. Supp. 2d 1167, 1189 (N.D. Ga. 2008), , 356 F. App'x 358 (11th Cir. 2009), and determine whether "at least a significant minority of reasonable consumers would likely interpret the ad to assert the claim," , 777

F.3d 478, 490 (D.C. Cir. 2015). Here, Defendants convey a false "net i(D)2 (.C)-3 vn(.C)-3 37TTw 0.211 (f)-2 (

that's out there that's shown to reduce the spread . . . to minimize the chances of getting infected.”

Compl. Ex. F at 16:1-4.

69 F.3d at 272. Where—as here—the government is likely to succeed on the merits, “the district court may ‘presume ... that the public interest will be served by interim relief.’” . (quoting ., 665 F.2d 1072, 1082 (D.C. Cir. 1981). Even absent this presumption, the public interest is clearly served by a preliminary injunction here.

The public interest in stopping Defendants from continuing to disseminate deceptive and misleading advertisements is substantial. The nation remains in the grip of a pandemic that claims the lives of thousands each day. Defendants’ promotion of unproven prevention and treatment strategies may discourage people from taking basic measures tha.002 Tw(r)-1 (o)-4 (ma)6 (t c)6 (.o(n)-o[(r (n

VI. CONCLUSION

For the reasons set forth above, the government respectfully requests that the Court grant the motion for a preliminary injunction and enter the accompanying proposed order.

Dated: April 15, 2021

Respectfully submitted,

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AMERICA:

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