

11 18 2015

ORIGINAL

reasons and as more fully explained below, ECM's request to stay the Commission's Order should be denied.

II. THE COMMISSION SHOULD DENY RESPONDENT'S REQUEST FOR STAY

A. The Applicable Legal Standard for Evaluating a Stay Application.

Under Commission Rule 3.56(c) the Commission evaluates four factors in determining whether to grant a stay: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) why the stay is in the public interest. 16 C.F.R. § 3.56(c); *Toys "R" Us, Inc.*, 126 F.T.C. 695, 696 (1998). In considering the stay factors, the probability of success is inversely proportional to the balancing of the equities (the remaining three factors). *In the Matter of California Dental Ass'n*, No. 9259, 1996 FTC LEXIS 277, at *10 (May 22, 1996); see also *N. Texas Specialty Physicians*, 141 F.T.C. 456, 453 & n.2 (2006) (citing *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153-54 (6th Cir. 1991)). But this inverse relationship is not without its limits. To justify the granting of a stay, the movant is always required to demonstrate more than the mere "possibility" of success on the merits. *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153-54 (6th Cir. 1991); *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 261 n. 4. (6th Cir. 1977). Even if a movant demonstrates irreparable harm, the movant must still show, at a minimum, "serious questions going to the merits." *Michigan Coal.*, 945 F.2d at 154 (all citations and quotations omitted). Serious questions arise when the case presents application of difficult legal questions to a complex factual record. See *California Dental*, 1996 FTC LEXIS 277, at *9-10 (the Commission will stay its own order only when it has ruled on "an admittedly difficult legal question and when the equities of the case suggest that the status quo

should be maintained.” *Toys “R” Us*, 126 F.T.C. at 697; *Texas Specialty Physicians*, 141 F.T.C. at 457-58. However, “renewal” of arguments alone, without more, is “insufficient to justify the grant of a stay.” *Novartis Corp.*, 128 F.T.C. 233, 234 (1999); *Toys “R” Us, Inc.*, 126 F.T.C. at 697; *Detroit Auto Dealers*, 1995 FTC LEXIS 256, at *4 (Aug. 23, 1995).

Even assuming movant raises serious questions going to the merits, the balance of the remaining three equitable factors—harm to the movant, the harm to the other party, and the public interest—must be strongly in the movant’s favor. *Texas Specialty Physicians*, 141 F.T.C. at 457-58 & n.2 (citing *California Dental*, 1996 FTC LEXIS 277, at *10). To show it will be harmed, the movant must demonstrate that denial of a stay would cause it *irreparable harm*. *Id.* Conclusory or unsupported assertions of harm do not suffice. *Novartis Corp.*, 128 F.T.C. at 235 (citing *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (internal quotation marks omitted)). Finally, the Commission considers the last two factors—harm to consumers and the public interest—together. For the reasons more fully explained below, ECM has failed to meet its legal burden to justify a stay. It cannot demonstrate a serious question going to the merits, or that the balancing of the equities requires maintaining the status quo.

B. ECM Fails to Meet Even the Minimum Requirement for Showing a Serious Question On the Merits.

ECM bases its argument that this case presents serious questions on two unsustainable constitutional arguments that the Commission’s Opinion and Order violate its First Amendment and Due Process Rights. Neither argument, however, raises serious questions going to the merit

1. ECM's First Amendment Argument Fails Both Legally and Factually.

ECM first complains that the Commission's Opinion and Order violate its First Amendment rights. (Stay App. 126.) The First Amendment, however, does not protect deceptive and misleading speech. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). Thus, for ECM to have a colorable First Amendment argument, it must show that its claims are not deceptive or misleading. Therefore, ECM's First Amendment argument entirely upon the contention that unqualified biodegradable claims are not deceptive. However, appellate courts review the underlying findings for constitutional issues under the same deferential standard as other factual findings. *Wonderful v. FTC*, 777 F.3d 478, 499-500 (D.C. Cir. 2015)

Specifically, a circuit court will only set aside the Commission's factual findings if substantial evidence does not support them. *Id.* at 490 ("the findings of the Commission as to the facts, if supported by evidence, shall be conclusive"). That standard is "essentially identical" to the familiar "substantial evidence" test under the Administrative Procedure Act. *Id.* (internal citations omitted). This standard applies equally to constitutional questions. *Id.* at 499-500 ("In imposing liability against petitioner, the Commission found that POVs are entitled to no First Amendment protection because they are 'deceptive and misleading. Petitioners ask us to review that finding de novo in light of the First Amendment context, and to reverse the Commission's decision to impose liability. Our precedents, however, call for reviewing the Commission's factual finding of a deceptive claim under the ordinary (and deferential) substantial evidence standard, even in the First Amendment context." (citing *Novartis Corp. v. FTC*, 223 F.3d 783, 787 n.4 (D.C. Cir. 2000); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 n.3 (D.C. Cir. 1985); see also *Kraft, Inc. v. FTC*, 970 F.2d 311, 316 (7th Cir. 1992) (cited in *Novartis Corp.*, 223 F.3d at 787 n.4))

Under the substantial evidence test, a reviewing court will not set aside the Commission's decision unless, considering the record as a whole, it could not reach the same conclusion. *See Schering-Plough v. FTC*, 402 F.3d 1056, 1063 (11th Cir. 2005) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."). This standard is deferential to the Commission's expertise in claim interpretation and findings of deception. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Thompson Med. Co. v. FTC*, 791 F.2d 189, 194 (D.C. Cir. 1986); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1496 (1st Cir. 1989). Addressing this issue, the Supreme Court has frequently stated that reviewing courts must give the Commission's judgment great weight, particularly with respect to determinations of allegedly deceptive advertising. *FTC v. Colgate-Palmolive Co.*, 380 U.S. at 385 ("

235. In granting the stay, the Commission determined that it based that finding on “a complex factual record.” *Id.*

unqualified biodegradable claim implies complete decomposition within five years, as opposed to one year. Having raised no due process concerns, warrant reconsideration on appeal, and certainly none that rise to the level of “serious questions going to the merits,” ECM’s stay applications should be denied.

C. Even if ECM Satisfied the Threshold Requirement, the Balance of the Equities are Not in ECM’s Favor.

As the Commission has explained, this is an inverse relationship between the likelihood of success and the balancing of the remaining three equitable factors: harm to the movant, the harm to the other party, and the public interest. *At Texas Specialty Physicians*, 141 F.T.C. at 457-58 & n.2 (citing *California Dental*, 1996 FTCLEXIS 277, at *10). Because ECM has made no showing of success on the merits, stay application does not warrant further consideration. However, even if ECM satisfied the minimal threshold showing, it must still demonstrate that the weight of the remaining factors strongly warrants stay. *Id.* The equities, however, are decidedly against a stay.

1. ECM Will Not Suffer Irreparable Harm.

ECM bears the burden of demonstrating that denial of a stay will cause irreparable harm. Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. *See Toys “R” Us*, 126 F.T.C. at 698; *California Dental*, 1996 FTC LEXIS 277, at *7. A party seeking a stay must show with particularity that the alleged injury is substantial and likely to occur absent a stay. *Id.* Instead, ECM merely asserts

prohibits all biodegradable claims because we reject ECM's contention that there is no scientific means to provide a rate or extent qualification." (Comm'n Op. 157.)

Moreover, ECM's assertions of constitutional harm do nothing to tilt the equities in its favor. As discussed above, the Commission considered and rejected ECM's constitutional arguments.

2. Immediate Implementation of the Order is Required to Protect Consumers and the Public Interest.

Because Complaint Counsel represents the public interest, the Commission analyzes the third and fourth factors together. *See Novartis*, 128 F.T.C. at 236. Both the harm to consumers and the public interest weigh heavily against ECM. The Commission found that ECM's violations of the law were serious, repeated, and deliberate. (Comm'n Op. 65.) There is every reason to believe that absent the Commission's Order, ECM will continue along the same path. ECM's current arguments (that an unqualified biodegradable claim only conveys some amorphous inherent biodegradable message) and its CEO's supporting declaration (in which he makes unsubstantiated and likely false assertions) do not justify the Commission's

III. CONCLUSION

For the reasons stated above, Complaint Counsel respectfully requests that the Commission deny ECM's request for a stay of the Order pending the appeal.

Dated: November 18, 2015

Respectfully Submitted,

/s/ Katherine Johnson

Katherine Johnson

Elisa Jillson

Federal Trade Commission
Bureau of Consumer Protection
Division of Enforcement
600 Pennsylvania Ave., N.W., ~~00528~~
Washington, D.C. 20580
Telephone: (202) 328185; 3001
Facsimile: (202) 328259

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2015, I caused a true and correct copy of the foregoing to be served as follows:

One electronic copy and one copy through the FTC's filing system to the Office of the Secretary.

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W. Room H159
Washington, DC 20580
Email: ~~secretary~~@ftc.gov

One electronic copy to Counsel for the Respondent:

Jonathan W. Emord
Emord & Associates, P.C.
11808 Wolf Run Lane
Clifton, VA 20124
Email: jemord@emord.com

Peter Arhangelsky
Emord & Associates, P.C.
3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Email: parhangelsky@emord.com

Eric J. Awerbuch
Emord & Associates, P.C.
3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Email: eawerbuch@emord.com

Bethany Kennedy
Emord & Associates, P.C.
3210 S. Gilbert Road, Suite 4
Chandler, AZ 85286
Email: bkennedy@emord.com

Date: November 18, 2015

/s/ Katherine Johnson
Katherine Johnson (kjohnson3@ftc.gov)
Elisa Jillson (ejillson@ftc.gov)
Federal Trade Commission
600 Pennsylvania Ave., N.W. ~~0528~~
Washington, DC 20580
Phone: 202~~326~~-2185;3001
Fax: 202~~326~~-3197

Notice of Electronic Service

I hereby certify that on November 18, 2015, I filed an electronic copy of the foregoing Complaint Counsel's Opposition to Respondent's Motion for Stay Pending Judicial Appeal, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on November 18, 2015, I served via E-Service an electronic copy of the foregoing Complaint Counsel's Opposition to Respondent's Motion for Stay Pending Judicial Appeal, upon:

Jonathan Emord
Emord & Associates, P.C.
jemord@emord.com
Respondent

Peter Arhangelsky
Emord & Associates, P.C.
parhangelsky@emord.com
Respondent

Lou Caputo
Emord & Associates, P.C.
lcaputo@emord.com
Respondent

Katherine Johnson
Complaint Counsel
Federal Trade Commission
kjohnson3@ftc.gov
Complaint

Elisa Jillson
Complaint Counsel
Federal Trade Commission
ejillson@ftc.gov
Complaint

Jonathan Cohen
Federal Trade Commission, Bureau of Consumer Protection, Enforcement Division
jcohen2@ftc.gov
Complaint

Joshua Millard
Attorney
Federal Trade Commission
jmillard@ftc.gov
Complaint

Benjamin Theisman
Attorney

Federal Trade Commission
btheisman@ftc.gov
Complaint

Eric Awerbuch
Emord & Associates
eawerbuch@emord.com
Respondent

Arturo DeCastro
Attorney
Federal Trade Commission
adecastro@ftc.gov
Complaint

Bethany Kennedy
Ms.
Emord & Associates, P.C.
bkennedy@emord.com
Respondent

Katherine Johnson
Attorney