

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PANDA HERBAL INTERNATIONAL, INC. : CIVIL ACTION
:
v. :
:
JOHN F. LUBY, et al. : NO. 05-2943

MEMORANDUM AND ORDER

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE February 21, 2006

On January 24, 2006, after holding a three-day preliminary injunction hearing and considering the parties' post-hearing submissions, the undersigned denied the Plaintiff's motion to preliminarily enjoin the Defendants from using the trademarks, "Turning Point," and "Turning Point Weight Loss," and the name "Viable Herbal Solutions." I found that the Plaintiff failed to establish a likelihood of success on the merits with respect to the "Viable Herbal Solutions" name, and with respect to the Turning Point marks, although the Plaintiff established a likelihood of success, I found that the Plaintiff had failed to establish confusion to the public or that the public interest would be best served by the issuance of such relief. Moreover, in weighing the harm each would suffer by the grant or denial of the requested relief, I concluded that the interests tipped heavily in favor of denying the motion.

The Plaintiff has now filed a motion for reconsideration with respect to the court's decision regarding the Turning Point marks.¹ "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied, 476 U.S. 1171 (1986). Therefore, a motion for reconsideration will only be granted when: (1) there has been an intervening change in

¹Because the Plaintiff challenges only the Court's decision with respect to the Turning Point marks in the Motion for Reconsideration, the Court will limit its discussion to those marks.

the law, (2) evidence, previously unavailable, has emerged, or (3) when there is a need to correct a clear error of law or prevent a manifest injustice. Reich v. Compton, 834 F.Supp. 73, 755 (E.D. Pa. 1993)(citing Dodge v. Susquehanna Univ., 796 F.Supp. 829, 830 (M.D. Pa. 1992)).

Here, the Plaintiff argues that the court erred in its analysis with respect to the Turning Point marks. As previously stated, Plaintiff has established a likelihood of success on the merits with respect to the Turning Point mark claims. Having done so, we must also assume that he has suffered irreparable injury. See S & R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 378 (3d Cir.1992)(trademark infringement amounts to irreparable injury as a matter of law). We note however, that unlike the facts presented in Jiffy Lube, there is uncontested testimony in this case that the Plaintiff was not using the Turning Point marks. In fact, the evidence is that the Plaintiff walked away from the herbal business, turning it over to Luby.

Considering the facts of this case, we believe that the other factors in the injunction analysis favor the Defendants, and when all of the factors are examined as a whole, the Plaintiff has failed to establish the necessity for injunctive relief.

As explained in the Memorandum denying the preliminary injunction, the Plaintiff has failed to establish that he would suffer a greater loss if the court were to deny the injunction than the Defendants would suffer with the grant of such relief. In sum, the testimony at the hearing established that for the past four/five years, after Everett Farr, Panda's principal, walked away from the herbal business, he has allowed Luby to utilize the Turning Point marks. The court is completely unimpressed with Plaintiff's reliance on Luby's outstanding American Express bill to bolster the harm he is suffering. The court is concerned with Luby's use of the Turning Point marks, and the harm caused by such use. The American Express debt is irrelevant to this

consideration.

Moreover, the Plaintiff has failed to establish that the public interest is best served by the issuance of the injunction. First, in the motion for reconsideration, Panda argues that Luby's use of the Turning Point marks results in public confusion. There is absolutely no evidence that Luby's use of the marks has resulted in any confusion. The uncontested evidence is that Farr let Luby use the Turning Point names and has not been in the herbal business for more than four years.

In addressing the public interest in the motion for reconsideration, the Plaintiff again falls back on an FTC Order that was entered into by Panda several years ago. Yet, the Plaintiff has not established that Luby has violated the consent decree. Although the FTC mandated certain labeling requirements for all of Panda's herbal products, the FTC's investigation focused on two specific Panda products: Herbal Outlook and HerbVeil 8 (Plaintiff's Exhibit 22), not Turning Point or Turning Point Weight Loss. In addition, Farr has not asserted that Luby's labeling of the Turning Point herbs violates the FTC's requirements. As we noted in the original Memorandum, Farr has shown no concern for compliance with the Consent Decree since its entry in March of 2001. His new-found interest in overseeing compliance with the Order is underwhelming.

We noted in the earlier Memorandum that the Third Circuit has held that "the tool of the preliminary injunction should be reserved for 'extraordinary' situations." Adams, 204 F.3d at 487 (citing Sampson v. Murray, 415 U.S. 61, 88, 92 (1974)). The Plaintiff has presented nothing in its Motion for Reconsideration to cause this court to change its view – this is not one of those "extraordinary situations."

An appropriate Order follows.

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ORDER

AND NOW, this 21 day of February, 2006, upon
consideration of the Plaintiff's Motion for Reconsideration, the response, thereto, and for the
reasons stated in the accompanying Memorandum, IT IS HEREBY ORDERED that the Motion
for Reconsideration is DENIED.

BY THE COURT:

/s/ Jacob P. Hart, MJ

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE