

CAUSE NO. 2006CI07589

STATE OF TEXAS
Plaintiff,

v.

LOWELL MIMS and
GUSTAVO ROMERO, individually and
BIO PERFORMANCE, INC.,
Defendants.

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IN THE DISTRICT COURT OF

BEXAS COUNTY, TEXAS

73rd JUDICIAL DISTRICT

TEMPORARY INJUNCTION

On the 30th day of May, 2006, came on for hearing the above-entitled cause, in which the State of Texas is Plaintiff and Lowell Mims, Gustavo Romero and Bio Performance, Inc. are Defendants. Plaintiff and Defendants appeared by and through counsel at which time the parties announced ready for hearing.

Having read the pleadings and having heard and considered the evidence and argument of counsel, the court finds that:

1. Defendants sell, market and distribute Bio Performance Fuel products nationally which are advertised to a) increase the fuel economy/efficiency of gasoline or diesel powered vehicles, b) reduce pollutants and harmful emissions from gasoline or diesel powered vehicles, and c) are safe and non-toxic;
2. Defendants' Bio Performance Fuel Products do not increase the fuel economy/efficiency of gasoline or diesel powered vehicles;
3. Defendants' Bio Performance Fuel Products do not reduce pollutants and harmful emissions from gasoline or diesel powered vehicles;
4. Defendants' Bio Performance Fuel Products are in fact toxic and can be harmful to humans if ingested, inhaled, or if prolonged exposure to the products occur;

5. Defendants' advertisements, referenced above, which have been disseminated to thousands of persons on the Internet via Defendants' website and scores of other websites¹, are false, misleading and deceptive pursuant to the Texas Deceptive Trade Practices Act, TEX. BUS. & COM. CODE ANN. § 17.41 et seq. because they have the tendency to deceive consumers.

6. Defendants received approximately \$25,000,000 in the preceding 6 month period from persons who have joined their multi level marketing scheme and from consumers who have purchased Defendants' products. These monies were received under false pretenses in large part because of the false representations made by Defendants in their advertising of these products. These monies have been deposited in various financial institutions, such as TBank, JPMorgan Chase Bank, Wells Fargo Bank, Bear, Stearns & Company, and Bank of America.

7. It further appears to the Court that the individually named Defendants have transferred millions of dollars from Bio Performance, Inc. monies into their own personal accounts and as a result may have been unjustly enriched. There is an immediate and irreparable injury to the public at large if Defendants are not immediately enjoined. Plaintiff has no adequate remedy at law, and is likely to succeed on the merits of this case. The Court also finds that if assets currently in the name of Defendants or controlled by Defendants are not frozen pending final trial, that said assets are subject to secretion and dissipation by the Defendants which would render the payment of restitution to victims and disgorgement of ill-gotten gains impossible. For these reasons it appears to the Court that Plaintiff is entitled to the injunctive relief set forth in this Temporary Injunction.

8. **IT IS THEREFORE ORDERED** that Defendants **Lowell Mims, Gustavo Romero and Bio Performance, Inc.** their officers, agents, servants, employees, attorneys and any other persons

¹The evidence indicates that persons or entities who market Defendants' products are able to replicate Defendants' website and/or link up to Defendants' website such that dissemination of the false advertising is pervasive.

in active concert or participation with them, including, but not limited to persons and financial institutions such as John Jerome Lewis, Jim (James) Suggs as Trustee for the M. Family Trust and R. Family Trust, Magdalena Muldoon, Lisa Mims, TBank², JPMorgan Chase Bank³, Wells Fargo Bank⁴, Bear Stearns and Company⁵, Citibank, and Bank of America⁶ holding money or assets of any kind in the name and/or for the benefit of the above-named Defendants, who receive actual notice of this order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other devise, shall be restrained from engaging in the following acts or practices:

A. Transferring, spending, hypothecating, concealing, encumbering, withdrawing, removing, or allowing the transfer, removal, or withdrawal from any financial institution or from the jurisdiction of this Court, any money, stocks, bonds, assets, notes, equipment, funds, accounts receivable, policies of insurance, trust agreements, or other property, real, personal, or mixed,

²Known bank accounts subject to this order at TBank include account number 12001715 standing in the name of Bio Performance, Inc., account number 12001707 standing in the name of Bio Performance, Inc., account number 11001633 standing in the name of Gustavo Romero, account number 12501052 standing in the name of Gustavo Romero, account number 11001948 standing in the name of Lowell and Lisa Mims, account number 11001955 standing in the name of Lowell and Lisa Mims, and account number 12001780 standing in the name of MercArt USA LLC.

³Known accounts at JPMorgan Chase bank subject to this order include account number 703277475 standing in the name of Bio Performance, Inc., account number 703277723 standing in the name of Bio Performance, Inc. and account number 635752900 standing in the name of Gustavo Romero or Magdalena Muldoon.

⁴Known bank accounts subject to this order n Wells Fargo Bank is account number 788-4106597 standing in the name of Bio Performance, Inc.

⁵ Known financial accounts at Citibank, Bear Stearns and Company, and Bluffview Securities including Account # 615-10349 standing in the neme of Gustavo Romero and Magdalena Muldoon.

⁶Known accounts at Bank of America subject to this order include any accounts standing in the name of Jim (or James) Suggs as Trustee for Magdalena Muldoon and children [R. Family Trust (2006)], and as Trustee for Lisa Mims and children [M. Family Trust (2006)] including any "R. Family Trust" wherein on 5-9-06 the sum of \$400,000 was transferred via Fed wire debit via Bank of America from J.P. Chase bank account # 635752900 and any accounts standing in the name of Lowell Mims and/or Lisa Mims or any trust or other account set up by the Mims for the benefit of themselves or others.

wherever situated, belonging to or owned by, in the possession or custody of, standing in the name of, or claimed by Defendants or their wife and children or other extended family members without further order of this Court, unless expressly stated otherwise herein;

B. Opening or causing to be opened any safe deposit boxes or storage facilities titled in the name of Defendants or subject to access, ownership or control by Defendants, without providing Plaintiff and the Court prior notice by motion seeking such access;

9. **IT IS ALSO ORDERED** that Defendants **Lowell Mims, Gustavo Romero and Bio Performance, Inc.**, their agents, relatives and persons in active concert or participation with them, are prohibited from transferring, spending, encumbering, withdrawing, or removing any sum of money or assets from any accounts specifically referenced in paragraph 8 of this order or from any other such account(s) or assets where monies or proceeds from the operation of Bio Performance, Inc. *have been* placed or deposited or were used to purchase said asset(s); however Defendants Lowell Mims and Gustavo Romero are not prohibited from expending monies for reasonable living expenses and attorney fees from other accounts and assets standing in their names which have never had proceeds or monies from Bio Performance, Inc. deposited or placed in them and accounts which do not contain monies or proceeds from the operation of Bio Performance, Inc., or from monies earned by them or their family members by virtue of other employment or business ventures wholly unrelated to the operation of Bio Performance, Inc. Defendants are ordered not to sell any asset obtained by them which was purchased in whole or part with proceeds from the operation of Bio Performance, Inc. without leave of this court.

10. ~~John Jerome Lewis, attorney for Defendants, is hereby ORDERED to return the sum of \$ _____ paid to him in attorney fees by Gustavo Romero by depositing same within this court's registry on or before the close of business on June 8, 2006.~~

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11. **IT IS FURTHER ORDERED** that Defendants **Lowell Mims, Gustavo Romero and Bio Performance, Inc.**, their officers, agents, servants, employees, attorneys and any other persons in active concert or participation with them, who receives actual notice of this order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other devise, shall be restrained from engaging in the following acts or practices:

A. Transferring, concealing, destroying, or removing from the jurisdiction of this Court any books, records, documents, invoices or other written or computer generated materials relating to the business of Defendants currently or hereafter in Defendants' possession, custody or control except in response to further orders or subpoenas in this cause;

B. Selling, marketing, promoting, distributing, advertising or assisting or allowing others to sell, market, promote, distribute, or advertise, the sale of all Bio Performance products by representing, expressly or by implication, that these products 1) will reduce the emissions of gasoline or diesel powered vehicles, 2) improve gasoline efficiency or fuel economy of gasoline or diesel powered vehicles, or 3) are safe and non-toxic;

C. Accepting or paying monies or remuneration of any type or character for, or in furtherance of, the sale, distribution, marketing, promotion, or advertising of all Bio Performance products where it is represented, expressly or by implication, that these products 1) will reduce the emissions of gasoline or diesel powered vehicles, 2) improve gasoline efficiency or fuel economy of gasoline or diesel powered vehicles, or 3) are safe and non-toxic;

D. Failing to conspicuously disclose on its website, in any written advertisement or solicitation, and in any oral communication with any consumer or prospective purchaser or buyer the following information in 13 Point Times New Roman Bold Font the following information: "Short term exposure, inhalation, ingestion, and dermal contact with Bio

Performance products can cause hemolytic anemia, damage to the liver, and neurological damage”;

E. Selling, distributing, sending, mailing, printing, giving, disseminating, advertising, referencing, or assisting or allowing any other person, entity or business affiliated with Defendants or subject to their control, directly or indirectly, to sell distribute, send, give, mail, print, advertise, reference, or disseminate, any materials that in any manner represent, expressly or by implication, that Bio Performance products 1) will reduce the emissions of gasoline or diesel powered vehicles, 2) improve gasoline efficiency or fuel economy of gasoline or diesel powered vehicles, or 3) are safe and non-toxic;

F. Representing, expressly or by implication, that Bio Performance products increase or boost enzymatic reaction if used in fuel which is placed in vehicles or other fuel burning devices;

G. Failing to completely remove the following claims from any web site, promotional materials, or advertisements: 1) that Bio Performance products are non-toxic; 2) that Bio Performance products will result in reductions in emissions or “greenhouse gasses”; 3) that using Bio Performance products will result in improvement in fuel efficiency or fuel economy; 4) that Bio Performance products contain anything that will produce any “enzymatic” reactions;

H. Shipping product or promotional materials to any other sellers, distributors, or buyers of Defendants’ products who fail to completely remove the following claims from any of their web sites, promotional materials, or advertisements: 1) that Bio Performance products are non-toxic; 2) that Bio Performance products will result in reductions in emissions or “greenhouse gasses”; 3) that using Bio Performance products will result in improvement in fuel efficiency or fuel economy; 4) that Bio Performance products contain anything that will produce any “enzymatic” reactions;

I. Failing to notify each and every agent, independent business owner,

manager, area manager, or any other person who Defendants have reason to know or believe are marketing Bio Performance products of the specific terms of the court's injunction in this cause;

J. Failing to notify each and every agent, independent business owner, manager, area manager, or any other person who Defendants have reason to know or believe are marketing Bio Performance products that they should comply with this injunction if they in any manner market, advertise, or attempt to introduce into commerce any Bio Performance products.

12. **IT IS FURTHER ORDERED** that Defendants **Lowell Mims, Gustavo Romero and Bio Performance, Inc.** provide to Plaintiff within seven (7) days of the date of the signing of this order a statement or letter setting forth the following information for every financial or brokerage institution, escrow agent, title company, storage facility, commodity trading company, business entity or person maintaining or having custody or control of any account or other asset of Defendants [including any assets placed in the names of other persons or entities, such as a family trust]:

A. The identification of each account or asset titled in the name, individually or jointly, of Defendants, or held on behalf of, or for the benefit of, Defendants or their family members;

B. The balance of each such account, or a description and estimated value of such assets, as of the close of business on the day on which this Order is served, and, if the account or other asset has been closed or removed, the date closed or removed, the total funds removed in order to close the account, and the name of the person or entity to whom such account or other assets was remitted; and

C. The identification of any safe deposit box or storage facility that is either titled in the name individually or jointly, of Defendants, or is otherwise subject to access or control by Defendants;

13. **IT IS ALSO ORDERED** that TBank, Wells Fargo Bank, and JPMorgan Chase Bank may

deduct all normally charged administrative fees from any of the frozen accounts, including but not limited to being entitled to charge back returned items against amounts from time to time on deposit in Defendants' accounts maintained at such financial institutions, regardless of whether such amounts were deposited before or after issuance of the Ex Parte Temporary Restraining Order or this Order and regardless of whether the returned items relate to items deposited before or after issuance of the Ex Parte Temporary Restraining Order or this Order. Normal servicing charges may be assessed and deducted in the ordinary course of business. No such financial institution that honors a check or other item drawn on any account subject to this Court's orders shall be deemed to be in violation of this Ex Parte Temporary Restraining Order if such check or item is issued or paid either: (a) before issuance of the Ex Parte Temporary Restraining Order; (b) in a good faith belief that the Court has authorized such check or item to be honored; or (c) as the result of an innocent mistake made despite implementation of reasonable item handling procedures. Nothing contained in this Court's Orders shall prevent any such financial institution from terminating any cash management or depository services at any time and from time to time.

14. **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that, as used in this Judgment, the following terms are defined as follows:

A. "Consumer" means an individual, partnership, corporation, or entity of any kind, including this state, or a subdivision or agency of this state who seeks or acquires, by purchase or lease, any goods or services;

B. "Defendant(s)" means **Lowell Mims, Gustavo Romero and Bio Performance, Inc.**, their successors, assigns, officers, agents, subcontractors, servants, employees, corporations and any other persons in active concert or participation with them;

C. "Person" means an individual, sole proprietorship, firm, partnership, corporation,

association, joint venture or other group, or business entity, however organized;

D. "Selling, marketing, promoting, distributing, and advertising " means any type of contact with a person for the purpose of requesting, persuading, or seeking any type of contribution, sponsorship, compensation, or anything of value from said person or entity for any reason whatsoever;

15. **IT IS FURTHER ORDERED** that Defendants in this cause be and hereby are commanded forthwith to comply with this Order from the date of entry until trial.

16. The Clerk of the above-entitled Court shall forthwith issue such writs as are necessary to serve Defendants with this Temporary Injunction. This Temporary Injunction shall be effective immediately without the execution and filing of a bond as Plaintiff, State of Texas is exempt from such bond under TEX. BUS. & COM. CODE ANN. §17.47(b).

17. All of the foregoing is subject to further order of this Court. Final trial in this matter is set for the 18 day of Sept. (July), 2006.

SIGNED at San Antonio, Bexar County, Texas on this the 1 day of June of 2006, at 1:30 o'clock, P. m.

Audy Miles
DISTRICT JUDGE PRESIDING