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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	Case No. CV 12-09631 DDP (MANx)
)	
Plaintiff,)	
)	ORDER DENYING PLAINTIFF'S MOTION
v.)	FOR PRELIMINARY INJUNCTION
)	
THE ZAKEN CORP., a)	
California corporation also)	
d/b/a The Zaken Corproation,)	
QuickSell and QuickSell and)	
TIRAN ZAKEN, individually)	
and as an officer of The)	[Dkt. No. 8]
Zaken Corp.,)	
)	
Defendants.)	
_____)	

Presently before the court is Plaintiff's Motion for a Preliminary Injunction. Having heard oral argument and considered the submissions of the parties, the court denies the motion and adopts the following order.

I. Background

Defendants (collectively, "Zaken") offer a "Wealth Building Home Business Plan" to consumers.¹ (Declaration of Dani Stagg, Ex. D at 44.) For \$148.00, plus shipping, purchasers become Associates

¹ This order uses the term "consumer" and "purchaser" interchangeably.

1 of QuikSell Liquidations and receive a "kit" including instructions
2 on how to locate excess inventories, "'[i]nsider' secret
3 techniques," "powerful and proven strategies," "a simple seven-word
4 phrase that instantly pays [purchasers] cash profits," and other
5 information. (Id. at 57-58, 97.) Zaken also offers purchasers
6 additional "tools" for an additional charge. (Stagg Dec., Ex. E.
7 at 85-86.)

8 Under Zaken's plan, consumers identify businesses seeking to
9 liquidate excess inventory. Consumers then notify Zaken, which may
10 proceed to negotiate an acquisition of the excess merchandise. If
11 Zaken is successful in 1) buying the products identified by the
12 consumer and 2) reselling the products at a profit, then Zaken pays
13 purchasers fifty percent of the net proceeds. (Id. at 52-53.)
14 Zaken advertises a "realistic ballpark figure" estimate that "2 to
15 4 hours a week working this business will earn [participants] an
16 average of \$3,000 to \$6,0000." (Stagg Dec. Ex. D. at 61.)

17 Effective March 1, 2012, the Federal Trade Commission
18 broadened the scope of its "Business Opportunity Rule," 16 CFR §
19 437.0 et seq., the earliest form of which was first promulgated in
20 1978. 76 FR 76816. Prior versions of the rule regulated and
21 imposed certain disclosure requirements upon the sale of business
22 opportunities, but only those costing over \$500. 76 FR 76818. The
23 2012 revision eliminated this monetary threshold. 76 FR 76821.
24 The 2012 changes also seek "to address the sale of deceptive work-
25 at home schemes, where unfair and deceptive practices have been
26 both prevalent and persistent." 76 FR 76826. The FTC elaborated
27 that "[s]ellers of fraudulent work-at-home opportunities deceive
28 their victims with promises of an ongoing relationship in which the

1 seller will buy the output that business opportunity purchasers
2 produce, often misrepresenting to purchasers that there is a market
3 for the purchasers' goods and services," and that these schemes
4 "frequently dupe consumers with false earnings claims." Id.

5 On November 9, 2012, Plaintiff ("the government") filed a
6 complaint against Defendants for violations of the Business
7 Opportunity Rule.² Plaintiff now seeks a preliminary injunction
8 enjoining Zaken from violating the Business Opportunity Rule ("the
9 Rule") and ordering Defendants to preserve their assets.

10 Defendants oppose the motion on the ground that the Rule is not
11 applicable to them.

12 **II. Legal Standard**

13 Typically, a private party seeking a preliminary injunction
14 must show (1) that he is likely to succeed on the merits, (2) that
15 he is likely to suffer irreparable harm in the absence of
16 preliminary relief, (3) that the balance of equities tips in his
17 favor, and (4) that an injunction is in the public interest.

18 Winter v. Natural Res. Defense Counsel, 555 U.S. 7, 20 (2008).

19 Preliminary relief may be warranted where a party (1) shows a
20 combination of probable success on the merits and the possibility
21 of irreparable harm, or (2) raises serious questions and the
22 balance of hardships tips in favor of a TRO. See Arcamuzi v.
23 Continental Air Lines, Inc., 819 F.2d 935, 937 (9th Cir. 1987).

24 "These two formulations represent two points on a sliding scale in
25 which the required degree of irreparable harm increases as the
26 probability of success decreases." Id. Under both formulations,

27
28 ² The Complaint also alleges that Defendants have violated
Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

1 the party must demonstrate a "fair chance of success on the merits"
2 and a "significant threat of irreparable injury."³ Id.

3 Here, however, Section 13(b) of the Federal Trade Commission
4 Act imposes a more lenient standard upon the plaintiff. Federal
5 Trade Commission v. Affordable Media, 179 F.3d 1228, 1233 (9th Cir.
6 1999). In a statutory enforcement action such as this one,
7 irreparable injury is presumed. Federal Trade Commission v. World
8 Wide Factors, Ltd., 882 F.2d 344, 347 (9th Cir. 1989). Plaintiff,
9 therefore, need not show irreparable harm. Affordable Media, 179
10 F.3d at 1233. Thus, as the parties appear to agree, the only issue
11 here is whether the government has shown a likelihood of success on
12 the merits.

13 **III. Discussion**

14 Defendants contend that Plaintiffs cannot demonstrate a
15 likelihood of success on the merits because Defendants do not offer
16 a "business opportunity," and therefore do not fall within the
17 ambit of the Business Opportunity Rule. "[A]n agency's
18 interpretation of its own regulations is controlling unless plainly
19 erroneous or inconsistent with the regulations being interpreted."
20 Long Island Care at home, Ltd. v. Coke, 551 U.S. 158, 171 (2007)
21 (internal quotations and alterations omitted). The Rule defines a
22 business opportunity as a commercial arrangement in which:

- 23 (1) A seller solicits a prospective purchaser to enter
24 into a new business; and

25
26 ³ Even under the "serious interests" sliding scale test, a
27 plaintiff must satisfy the four Winter factors and demonstrate
28 "that there is a likelihood of irreparable injury and that the
injunction is in the public interest." Alliance for the Wild
Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

1 (2) The prospective purchaser makes a required payment;
2 and

3 (3) The seller, expressly or by implication, orally or in
4 writing, represents that the seller or one or more
5 designated persons will:

6 (i) Provide locations for the use or operation of
7 equipment, displays, vending machines, or similar
8 devices, owned, leased, controlled, or paid for by the
9 purchaser; or

10 (ii) Provide outlets, accounts, or customers, including,
11 but not limited to, Internet outlets, accounts, or
12 customers, for the purchaser's goods or services; or

13 (iii) Buy back any or all of the goods or services that
14 the purchaser makes, produces, fabricates, grows, breeds,
15 modifies, or provides, including but not limited to
16 providing payment for such services as, for example,
17 stuffing envelopes from the purchaser's home.

18 16 C.F.R. § 437.1(c). "Providing outlets, accounts, or customers
19 means furnishing the prospective purchaser with existing or
20 potential locations, outlets, accounts, or customers . . . or
21 otherwise assisting the prospective purchaser in obtaining his or
22 her own locations, outlets, accounts or customers" 16
23 C.F.R. § 437.1(m). General advice about business development and
24 training does not constitute "providing locations, outlets,
25 accounts, or customers." Id.

26 As an initial matter, Plaintiff has not established that
27 Defendants represents that it will take any action that might fall
28 under the third prong of the Rule. By Plaintiff's own description,
Zaken represents that it "will attempt to negotiate a deal with the
located company. If that deal is completed and [Zaken] can sell
the merchandise at a profit," then Zaken will pay the consumer a
portion of the profits. (Mot. at 12 (emphases added)). While the
Rule encompasses even implicit representations that a seller will
take certain actions covered by Section 437.1(c)(ii) and (iii), the

1 record as currently presented to the court establishes only that
2 Zaken represents that it may take such action.⁴

3 A. "Outlets" or "Customers"

4 The representation issue aside, the government argues that
5 Defendants' scheme falls under 16 C.F.R. § 437.1(c)(ii) because
6 Defendants promise that Zaken will itself serve as purchasers'
7 customer. (Reply at 6.) Zaken argues that it is not consumers'
8 "customer" because it never buys anything from them. (Surreply at
9 5.)

10 "When a statute does not define a term, a court should
11 construe that term in accordance with its 'ordinary, contemporary,
12 common meaning.'" Cleveland v. City of Los Angeles, 420 F.3d 981,
13 988 (9th Cir. 2005) (quoting San Jose Christian College v. City of
14 Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004).). Courts may
15 look to dictionary definitions to determine the "plain meaning" of
16 a term. Id. at 1034. A customer is "one who purchases a commodity
17 or service," or "one who frequents any place of sale for the sake
18 of purchasing," or "one who customarily purchases from a particular
19 tradesman." Merriam-Webster Online Dictionary, Merriam-Webster,
20 Inc., [http:// www.merriam-webster.com](http://www.merriam-webster.com) (May 2013); Oxford English
21 Dictionary Online, Oxford University Press, [http:// www.oed.com](http://www.oed.com)
22 (May 2013).

23 With these definitions in mind, the court agrees that Zaken
24 is not consumers' "customer." The ordinary meaning of the term
25 "customer" requires a purchase of some sort. Zaken, however, never
26 purchases a service from consumers. Consumers, or "lead finders,"

27
28 ⁴ Whether those actions constitute conduct falling within the
Rule is a separate question, discussed below.

1 as Zaken styles them, do not necessarily receive or require
2 anything of value in exchange for the information they share with
3 Zaken.⁵ In some cases, the consumers' efforts will not result in
4 any purchase, sale, or exchange of any kind. Even when the
5 consumer's efforts do ultimately result in purchases and sales of
6 goods, the consumer is not a party to any of those transactions.
7 Under such circumstances, Zaken's contingency arrangement with
8 consumers does not render it a "customer" under the Rule.

9 The government also argues that Zaken promises consumers
10 "outlets for the excess merchandise that prospective purchasers
11 identify." (Reply at 6.) This argument refers not to Zaken itself
12 as the outlet, but rather to third-party inventory buyers. While
13 the government is correct that these outlets for excess merchandise
14 are critical to the success of consumers' businesses, the Rule
15 clearly states that a purveyor such as Zaken must represent that it
16 will provide outlets for consumers' goods or services. The excess
17 merchandise for which Zaken arguably provides an "outlet" does not
18 belong to consumers.

19 B. "Buyback"

20 Even if Zaken does not provide customers or outlets to
21 consumers, its offer may nevertheless fall under the Rule if it
22 represents that it will "buy back" any of the services that the
23 consumer provides. 16 C.F.R. § 437.1(c)(iii). While neither the
24 regulation nor its motivating statement of purpose provides any
25 insight as to how one might "buy back" a service, the regulation
26 itself provides one example of an arrangement falling under the

27
28 ⁵ It remains unclear at this stage whether consumers can or do
share information with liquidators other than Zaken.

1 Rule.⁶ Where a purveyor of an opportunity provides a consumer with
2 envelopes and printed material, then "provid[es] payment" to the
3 consumer for the service of stuffing the envelopes, the Rule
4 applies. Id. As discussed above, however, Zaken does not offer to
5 "provide payment" to consumers in exchange for any service or good.
6 Rather, Zaken in essence offers consumers an incentive to provide
7 information that may or may not yield them some ultimate benefit.
8 The government's attempt to apply the Rule to the contingency
9 arrangement between Zaken and its purchasers is therefore
10 inconsistent with 16 C.F.R. § 437.1(c)(iii), which requires, at the
11 very least, that a seller of a business opportunity pay the
12 purchaser for performing a service.

13 **IV. Conclusion**

14 For the reasons stated above, Plaintiff has not demonstrated a
15 likelihood of success on the merits. Plaintiff's Motion for a
16 Preliminary Injunction is therefore DENIED, without prejudice.⁷

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18
19 IT IS SO ORDERED.

20
21
22 Dated: July 31, 2013


23 DEAN D. PREGERSON
24 United States District Judge

25 _____
26 ⁶ Such an arrangement would likely not entail a "buy back" of
27 services alone, as the purveyor typically would provide the
consumer with physical materials before buying them back in
assembled form.

28 ⁷ This order shall not be read to apply to other relief
Plaintiff may seek outside the Business Opportunity Rule.