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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AMERICAN BULLION, INC.,)	Case No. CV 14-01873 DDP (ASx)
)	
Plaintiff,)	ORDER GRANTING PLAINTIFF'S MOTION
)	FOR PRELIMINARY INJUNCTION
v.)	
)	
REGAL ASSETS, LLC; TYLER)	
GALLAGHER, AN INDIVIDUAL;)	[Dkt. 47]
KELLY FELIZ, AN INDIVIDUAL,)	
)	
Defendants.)	
)	

Presently before the court is Plaintiff American Bullion Inc. ("American Bullion")'s Motion for Preliminary Injunction. Having considered the submissions of the parties and heard oral argument, the court grants the motion and adopts the following order.

I. Background

American Bullion and Defendant Regal Assets, LLC ("Regal") are business competitors in the field of adding gold and other precious metals to individual retirement accounts.¹ (Complaint ¶¶ 1,17.) They also convert existing retirement accounts into precious

¹ Defendant Gallagher is alleged to be Regal's Chief Executive Officer, owner, and/or alter ego. (Compl. ¶¶ 10, 12.)

1 metals. (Id.) American Bullion generates business by relying on
2 word of mouth, but also by promoting itself online. (Id. ¶ 17.)

3 Regal advertises its services online via third-party
4 affiliates, who are paid for referred business. (Compl. ¶¶ 20,
5 23.) Plaintiff alleges that Defendants Regal and Gallagher
6 (collectively, "Defendants") have created and are operating several
7 such affiliate websites. (Compl. ¶ 26.) Although the websites
8 operated by Defendants purport to contain independent consumer
9 reviews, Plaintiff contends that, in reality, Defendants provide
10 content to the affiliates and use affiliate websites to falsely
11 advertise Regal and to disparage Plaintiff. (Comp. ¶ 23.)
12 Plaintiff alleges that the websites are in no way independent, and
13 that Defendants do not publicly disclose their connection to the
14 websites. (Compl. ¶ 25.)

15 Reviews on the websites praise Defendants, give negative
16 reviews about Plaintiff's services, and disseminate false
17 statements about Plaintiff. (Compl. ¶ 45.) Some of the affiliate
18 websites, for example, claim that Plaintiff was a defendant in a
19 lawsuit accusing it of fraud, and that Plaintiff was found guilty
20 and later sued by the U.S. Commodities Futures Trading Commission.
21 (Compl. ¶ 37; Ex. 4.) Plaintiff contends that this is false, and
22 that a business with a similar name, American Bullion Exchange, was
23 in fact the party found guilty in that action. (Compl. ¶ 38.)

24 Many of the websites also allegedly use Plaintiff's name to
25 misdirect potential customers. (Compl. ¶ 40.) Plaintiff asserts
26 that the websites urge customers to "click here to visit American
27 Bullion," but are then linked to Regal's website instead of to
28 American Bullion. (Id.) Plaintiff further alleges that it

1 requested Defendants remove the materials and stop the
2 dissemination of false information, to no avail. (Compl. ¶ 41.)

3 The Complaint alleges causes of action for false and
4 misleading advertising under the Lanham Act, 15 U.S.C. 1125(a), and
5 state law, as well as state law causes of action for unfair
6 competition, unfair business practices, trade libel, defamation,
7 and intentional interference with prospective economic advantage.
8 Plaintiffs now move for a preliminary injunction compelling
9 Defendants to remove the offending online content, post statements
10 describing the inaccuracies of the removed content, suspend
11 payments to any affiliates continuing to display the alleged
12 misrepresentations, and make certain disclosures to new customers
13 referred to Regal through the affiliate marketing program.

14 **II. Legal Standard**

15 A private party seeking a preliminary injunction must show
16 that: (i) it is likely to succeed on the merits; (ii) it will
17 suffer irreparable harm in the absence of preliminary relief; (iii)
18 the balancing of the hardships and equities between the parties
19 that would result from the issuance or denial of the injunction
20 tips in its favor; and (iv) an injunction will be in the public
21 interest. Winter v. Natural Res. Defense Counsel, 555 U.S. 7, 20
22 (2008). Preliminary relief may be warranted where a party: (i)
23 shows a combination of probable success on the merits and the
24 possibility of irreparable harm; or (ii) raises serious questions
25 on such matters and shows that the balance of hardships tips in
26 favor of an injunction. See Arcamuzi v. Continental Air Lines,
27 Inc., 819 F.2d 935, 937 (9th Cir. 1987). "These two formulations
28 represent two points on a sliding scale in which the required

1 degree of irreparable harm increases as the probability of success
2 decreases." Id. Under both formulations, the party must
3 demonstrate a "fair chance of success on the merits" and a
4 "significant threat of irreparable injury" absent the issuance of
5 the requested injunctive relief.² Id.

6 **III. Discussion**

7 A. Likelihood of Success on the Merits

8 Defendants argue that American Bullion cannot demonstrate a
9 likelihood of success on the merits because neither Regal nor
10 Gallagher is responsible for the offending content on the Regal
11 affiliate websites. (Opposition at 7-11.)

12 Under Regal's Affiliate Program Agreement ("the Affiliate
13 Agreement" or "Agreement"), affiliates, who are ostensibly
14 independent contractors, receive commissions for generating leads
15 for Regal and for facilitating transactions on Regal's site.
16 (Affiliate Agreement, Declaration of Aaron Wais in Support of
17 Motion, Ex. 1 at 3, 4-5, 11.) Affiliates, in turn, are required
18 to, among other things:

- 19 • "Promote" Regal (Agreement ¶ 7);
- 20 • "[P]lace dedicated and relevant content on [the
21 affiliate's] sites or offers directing users to the lead
22 capture form or dedicated links provided [by Regal]
23 (Agreement ¶ 7(b));³ and

24
25 ² Even under the "serious interests" sliding scale test, a
26 plaintiff must satisfy the four Winter factors and demonstrate
27 "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).

28 ³ Regal provides affiliates with approved content, including
forms, links, banners, "swipe files," marketing materials, "and
(continued...)

1 • "[C]onsent[] to [Regal] monitoring the Affiliate's sites
2 or offers to determine continued compliance"
3 (Agreement ¶ 7(e).)

4 The Affiliate Agreement also places numerous restrictions upon
5 affiliates. Some of these provisions state that:

- 6 • Affiliates may not perform similar services for any of
7 Regal's competitors (Agreement ¶ 20(c));
- 8 • Upon termination of the Agreement by either party,
9 affiliates "may NOT conduct any business or services
10 directly or indirectly related to the sales of precious
11 metals" for a period of five years (Agreement ¶ 20(c));
- 12 • Affiliates may not display "content that is not
13 acceptable to [Regal] or inconsistent with the image that
14 [Regal] wishes to create" (Agreement ¶ 4);
- 15 • Regal retains "absolute discretion" to terminate
16 affiliates from the program at will, "for any reason
17 whatsoever." (Id.); and
- 18 • Affiliates must immediately forfeit all commissions
19 generated upon suspension or termination from the
20 program. (Agreement ¶ 1.)

21 In support of Regal's contention that it is not responsible
22 for content on affiliate sites, Defendant Gallagher states that
23 Regal affiliates are independent contractors, and that neither he
24 nor Regal owns or controls affiliates. (Declaration of Tyler
25 Gallagher ¶ 11.) Gallagher further declares that Regal does not
26 provide any review content to affiliates, most of whom disclose

27
28 ³(...continued)
other advertising material." (Agreement ¶ 7(c).)

1 that they are independently owned and receive compensation from the
2 companies they review and recommend. (Id. ¶¶ 14-15.) According to
3 Gallagher, Regal polices its affiliates closely, and forbids them
4 to use aliases or fake photographs. (Id. ¶¶ 20, 39, 44-45, 49.)
5 Gallagher also states that, despite the clear language limiting
6 affiliates' dealings in the precious metals industry, affiliates
7 are free to send leads to Regal's competitors. (Gallagher Decl. ¶
8 11.)

9 Gallagher also denies that Regal provides any of the
10 purportedly independent content displayed on affiliate websites.
11 (Gallagher Decl. ¶ 29.) Gallagher asserts that Regal only
12 provides: (1) a "cookied" version of the Regal site, essentially a
13 clone of the Regal site with the affiliate's specific telephone
14 number and a number identifying the particular affiliate to Regal;
15 (2) a "lead capture form," (3) banners and text ads, (4) e-mail
16 templates known as "swipe files," (5) images and videos, and (6)
17 charts.⁴ (Id. ¶¶ 30-37.)

18 "A principal is liable for his agent's negligence 'in the
19 transaction of the business of the agency,' . . . or where the
20 principal has authorized or ratified the agent's conduct." Ogala v.
21 Chevron Corp., No. 14-cv-173-SC, 2014 WL 2089901 *3 (N.D. Cal. May
22 19, 2014) (citing Cal Civ. Code §§ 2338, 2339). "An agent is one
23 who acts on the principal's behalf and subject to the principal's
24 control. To form an agency relationship, both the principal and
25 the agent must manifest assent to the principal's right to control
26

27 ⁴ Several of the exhibits described in Gallagher's
28 declaration, including Exhibits M, N, P, and Q, are either
mislabelled or not attached to the declaration.

1 the agent." United States v. Bonds, 608 F.3d 495, 506 (9th Cir.
2 2010) (internal alteration, quotation marks, and citation omitted).
3 "Actual control is not necessary[;] as long as there is an
4 agreement that the principal has the right to control the agent, an
5 agency relationship exists." Western Sugar Co-op v. Archer-
6 Daniels-Midland Co., No. CV 11-3473, 2012 WL 3101659 * 5 (C.D. Cal.
7 Jul. 31, 2012).

8 As an initial matter, the terms "independent contractor" and
9 "agent" are not mutually exclusive. An independent contractor may
10 also be an agent. Bonds, 608 F.3d at 505. In addition, "[t]he
11 substance of the parties' relationship, not the label they give it,
12 determines the existence of agency." United States v. Cyberheat,
13 Inc., No. CV-05-457 TUC, 2007 WL 686678 at * 13 (D. Ariz. Mar. 2,
14 2007); See also Parallel Synthesis Techs., Inc. v. DeRisi, No.
15 5:13-cv-05968-PSG, 2014 WL 4748611 at *4 (N.D. Cal. Sept. 23,
16 2014). The Affiliate Agreement's pronouncement and Gallagher's
17 corresponding statement that affiliates are independent contractors
18 are therefore of no moment.

19 Furthermore, Plaintiff points to a host of evidence that
20 appears to contradict Gallagher's sworn statements. Though
21 Gallagher declares that Regal does not provide any review content
22 to affiliates, an alleged "Regal Affiliate recruitment site"⁵
23 includes a template for reviews of American Bullion, which conclude
24 with language recommending that viewers use Regal instead. (Third
25 Declaration of James Berkley (Dkt. 132), Ex. 124 at 3. P.168=70)

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28 ⁵ www.trustgoldira.com.

1 Further, and contrary to Gallagher's assertion that Regal only
2 provides a narrow, limited set of content to affiliates, Regal's
3 official affiliate recruitment page, regalgoldaffiliates.com,
4 offered to create an entire, custom "Done for You" site for
5 affiliates, including themes, plugins, and original content.
6 (Berkley Decl. III, Ex. 85 at 2.) The "swipe file" content
7 admittedly provided by Gallagher to affiliates has also appeared on
8 web sites as recently as September 14, 2014, and includes false
9 narratives, such as that the purported author, who in reality is a
10 made-up persona, is "happy to tell you that after countless months
11 of research, I have found the most reputable company I
12 have worked with them personally, and couldn't be more pleased . .
13 . . I urge you to get in contact with Regal Assets." . (Id., Ex.
14 105; Gallagher Decl., Ex. O.) Notwithstanding Gallagher's claim
15 that Regal polices its affiliates, websites touting Regal and
16 purporting to be authored by industry experts, such as the
17 aforementioned, entirely fictitious "Reeves Jameson," remain
18 active. (E.g., Berkley Decl. III, Ex. 88.)

19 Plaintiff has demonstrated a likelihood of success on the
20 merits. There appears to be little dispute that Lanham Act
21 violations, at the very least, have occurred. While Defendants
22 seek to foist responsibility for those violations upon Regal
23 affiliates, the record before the court indicates that those
24 affiliates are Defendants' agents. Gallagher's assertions
25 regarding affiliates' independence are belied by other evidence.
26 Most significantly, the Affiliate Agreement grants Regal nearly
27 complete control over its affiliates. Regal enjoys unbridled
28 authority over affiliates' website content, much of which is

1 provided by Regal itself. All affiliate content must conform to
2 the "image" that Regal wishes to create and be otherwise acceptable
3 to Regal. Failure to hew to Regal's strictures carries significant
4 consequences for affiliates who, because they are barred from doing
5 any other business in the precious metals field, depend entirely
6 upon Regal for their income in the precious metals industry.
7 Affiliates' need to stay in Regal's good graces is intensified by
8 the post-agreement five-year ban on affiliates' business in the
9 industry, which further solidifies Regal's control. Under such
10 circumstances, Regal affiliates can hardly be characterized as
11 truly independent. Rather, affiliates are essentially captive
12 shills for Regal, obligated to generate leads and sales for Regal
13 by regurgitating Regal-generated content and toeing the party line,
14 at pain of excommunication from the entire field. By entering into
15 the Affiliate Agreement, both Regal and its affiliates
16 unequivocally manifested assent to Regal's control. Accordingly,
17 Regal, as master to its servant affiliates, is responsible for
18 their actions.

19 B. Remaining Factors

20 1. Irreparable Harm

21 Regal contends that American Bullion has failed to demonstrate
22 a likelihood of irreparable harm because (1) customers' stated
23 preferences for Regal over American Bullion are insufficient to
24 establish harm and (2) the allegedly wrongful conduct has ceased.
25 It is well established that damage to goodwill or loss of control
26 over business reputation can constitute irreparable harm. Herb
27 Reed Enters., LLC v. Florida Entm't Mgmt., Inc., 736 F.3d 1239,
28 1250 (9th Cir. 2013). As Regal itself acknowledges, American

1 Bullion has provided evidence of lost sales. American Bullion
2 received feedback from at least twenty-four consumers who chose not
3 do business with American Bullion, but did provide feedback as to
4 why they avoided American Bullion's Services. (Declaration of
5 Richard Warren in Support of Motion, ¶ 12.) Of those consumers,
6 nearly all opted to deal with Regal instead. (Id.) Several
7 consumers highlighted reviews touting Regal, bad reviews of
8 American Bullion, and references to nonparty American Bullion
9 Exchange as motivating forces behind their decisions to use Regal
10 rather than American Bullion. (Id.)

11 Regal's contention that these testimonials are not numerous
12 enough to establish a likelihood of irreparable harm is not
13 persuasive. Nor, as discussed above, does it appear to the court
14 that wrongful acts have ceased. False narratives apparently
15 originating in Regal's "swipe files" continue to appear online, as
16 does content purportedly authored and promulgated by the entirely
17 fictitious "Reeves Jameson" persona utilized by Regal's agents.
18 American Bullion has therefore demonstrated a likelihood of
19 continuing irreparable harm.

20 2. Balance of Equities and the Public Interest

21 This court must consider the effect on both parties of
22 granting or withholding the requested relief and pay "particular
23 regard" to the public's interest. Winter, 555 U.S. at 24. The
24 court acknowledges that American Bullion seeks a wide-ranging
25 injunction. The alternative injunction ordered by the court,
26 however, does not unduly burden Regal. Regal's primary argument is
27 that its affiliates are independent contractors, not employees.
28 That argument is unpersuasive, for the reasons described above.

1 Regal's contention that its affiliates will abandon Regal in favor
2 of competitors also carries little weight in light of the strict
3 provisions of the Affiliate Agreement, which would prevent
4 affiliates from working against Regal's interests for a period of
5 at least five years.

6 The deleterious effects of denying American Bullion any
7 relief, in contrast, would be severe, as it has already
8 lost sales and goodwill as a result of the wrongful acts alleged
9 and those acts and effects appear to be continuing. Regal's public
10 interest arguments again focus on the rights of ostensibly
11 independent affiliates who are, in fact, Regal's agents. Though
12 Regal contends for the first time that the statements at issue here
13 have not been proven to be false or deceptive, that argument is at
14 odds with Regal's apparent acknowledgment that, at the very least,
15 American Bullion is not related to American Bullion Exchange and
16 that Reeves Jameson does not exist.⁶ The public interest will be
17 well served by an injunction preventing deceptive or confusing
18 advertising. See Homeland Housewares LLC v. Euro-Pro Operating
19 LLC, No. CV 14-3954 DDP, 2014 WL 4187982 at *6 (C.D. Cal. Aug. 22,
20 2014).

21 The court further notes that nothing in this order or the
22 accompanying injunction deprives Regal of its ability to make use
23 of affiliates. To be clear, there is nothing inherently wrongful
24 about affiliate marketing arrangements. Nor are affiliates,

25
26 ⁶ Regal's argument in this context is particularly puzzling
27 given its failure to make similar contentions with respect to
28 American Bullion's likelihood of success on the merits. As
explained above, Regal argues not that the statements are not false
or deceptive, but only that independent third parties are
responsible for the statements.

1 including online affiliates, necessarily agents of the business
2 with which they contract or otherwise form a relationship. See,
3 e.g., Routt v. Amazon.com, Inc., - Fed. Appx. -, 2014 4252287 (9th
4 Cir. Aug. 29, 2014) (unpublished disposition). Only a fact-
5 specific inquiry can reveal whether an affiliate in name is truly
6 independent or, as is the case here, is so locked-in and
7 subservient to the interests of an associated enterprise as to
8 function as an agent or extension of that business.

9 **IV. Conclusion**

10 For the reasons stated above, Plaintiff's Motion for
11 Preliminary Injunction is GRANTED. An injunction shall issue by
12 separate order of this court. In the event Regal modifies its
13 Affiliate Agreement or otherwise establishes a new, non-controlling
14 relationship with its current agents, the court will consider
15 modifying the terms of the accompanying preliminary injunction.

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20 IT IS SO ORDERED.

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23 Dated: November 17, 2014

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DEAN D. PREGERSON
United States District Judge