

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE DISTRICT OF PUERTO RICO**

3
4 **MCS ADVANTAGE, INC., et al.,**

5 **Plaintiffs,**

6 **v.**

CIVIL NO. 19-2035 (GAG-MEL)

7 **MMM HEALTHCARE, LLC, et al.,**

8 **Defendants**

9
10 **OPINION AND ORDER ADOPTING REPORT AND RECOMMENDATION AND**
11 **DENYING PRELIMINARY INJUNCTION**

12 Pending before the Court is MCS Advantage, Inc. and MCS Healthcare Holdings, LLC
13 (collectively, “MCS”)’s motion for a temporary restraining order and preliminary injunction at
14 Docket No. 12. Plaintiffs’ request for temporary restraining order was denied at Docket No. 13. As
15 to the preliminary injunction, Plaintiffs seeks to restrain defendants Castellana Physician Services,
16 LLC (“Castellana”); InSalud, Inc. (“InSalud”); PHM Multisalud, LLC (“PHM”); Island Medical
17 Group Corp. (“IMG”); East Coast Medical Services, Inc. (“ECMS”); Villa de Los Santos Advantage,
18 Inc. (“VLSA”); Grupo Médico Geriátrico de Puerto Rico, Inc. (“GMG”), and other unnamed
19 companies from publishing an allegedly false and/or misleading advertisement campaign about
20 MCS. (Docket No. 12). Plaintiffs do not seek to enjoin defendants MMM Healthcare, LLC
21 (“MMM”) and MMM Holdings, LLC. (Docket No. 12 at 1, 9 n. 3). MCS primarily contends that
22 it is likely to succeed on the merits of its false advertising claim under the Lanham Act. See 15
23 U.S.C. § 1125(a).

Civil No. 19-2035 (GAG-BJM)

1 Defendant responded in opposition arguing that Plaintiffs' request for preliminary injunction
2 is moot because the challenged advertisements ceased in early November and will not continue.
3 (Docket Nos. 19; 37; 40; 41 and 77).

4 The matter was referred to Magistrate Judge Bruce McGiverin for a hearing and Report and
5 Recommendation. An evidentiary hearing was held on November 26 and 27, 2019 before Magistrate
6 Judge McGiverin. On December 3, 2019, Magistrate Judge McGiverin issued a Report and
7 Recommendation concluding that the preliminary injunction should be denied. (Docket No. 94).
8 Plaintiffs objected to the Report and Recommendation (Docket No. 97) and Defendants replied in
9 opposition to Plaintiffs' objections (Docket No. 100). The Court has reviewed Magistrate Judge
10 McGiverin's Report and Recommendation at Docket No. 94 and hereby **ADOPTS** the same in its
11 entirety.

12 **I. Standard of Review**

13 A district court may refer pending motions to a magistrate judge for a report and
14 recommendation. See 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b); L. Cv. R. 72(a). Any party
15 adversely affected by the report and recommendation issued may file written objections within
16 fourteen (14) days of being served with the report and recommendation. Fed. R. Civ. P. 72(d).¹ A
17 party that files a timely objection is entitled to a *de novo* determination of "those portions of the
18 report or specified proposed findings or recommendations to which specific objection is made."
19 Sylva v. Culebra Dive Shop, 389 F.Supp.2d 189, 191-92 (D.P.R. 2005) (citing United States v.
20 Raddatz, 447 U.S. 667, 673 (1980)); see also Vega-Feliciano v. Doctors' Ctr. Hosp., Inc., 100 F.
21 Supp. 3d 113, 116 (D.P.R. 2015). "The district court need not consider frivolous, conclusive, or
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24 ¹ In the present case, the time-period for filing objections to the report and recommendation were shortened.
See Docket No. 6.

Civil No. 19-2035 (GAG-BJM)

1 general objections.” Rivera-García v. United States, Civ. No. 06–1004 (PG), 2008 WL 3287236, *1
2 (D.P.R. Aug. 7, 2008). Finally, in conducting its review, the court is free to “accept, reject, or
3 modify, in whole or in part, the findings or recommendations made by the magistrate-judge.” 28
4 U.S.C. § 636(a)(b)(1); see also Templeman v. Chris Craft Corp., 770 F.2d 245, 247 (1st Cir. 1985).

II. Discussion

6 In his Report and Recommendation, Judge McGiverin discusses and applies the factors that
7 must be weighed by the Court when ruling upon a motion for preliminary injunction. The Report
8 and Recommendation did “not address the parties’ heated dispute over whether any of defendants’
9 statements were false or misleading under the Lanham Act, since MCS’s bid for a preliminary
10 injunction stumbles at the “irreparable harm” hurdle.” (Docket No. 94 at 10). In this regard, Judge
11 McGiverin found that “the evidence that defendants are likely to repeat the challenged statements—
12 even after the filing of this suit, the ceasing of the campaign, and the representation by defendants’
13 counsel that defendants will not distribute advertisements similar to those challenged here—is
14 scant.” (Docket No. 94 at 11-12; see also Transcript of Preliminary Injunction Hearing, Docket
15 No.102 at 215-16). More so, upon analysis of the applicable First Circuit case law, he found that
16 because MCS had failed to “demonstrate the prospect of future harm, the essential prerequisite for
17 equitable relief, it cannot succeed on its motion.” Id. at 13 (quoting Steir v. Girl Scouts of the USA,
18 383 F.3d 7, 16 (1st Cir. 2004). Additionally, as to the merits of the Complaint, he reasoned that
19 “[b]oth MCS and defendants offered significant evidence going to the likelihood of success.” Id. at
20 12.

21 MCS’s objections to the Report and Recommendation can be summarized as follow, that:
22 (1) the alleged false advertising has not ceased because MMM continues to run digital
23 advertisements in social media platforms such as Facebook and LinkedIn and refuses to remove said
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Civil No. 19-2035 (GAG-BJM)

1 advertisements; (2) their original preliminary injunction (Docket No. 12) encompassed, under its
2 definition of “Campaign,” a request to restrain MMM and its advertisements; (3) Defendants refusal
3 to reach a formal agreement as to the cessation of the alleged false advertisements demonstrates that
4 there is a likelihood of recurrence, and (4) the Magistrate Judge erred in applying the standard for
5 showing irreparable harm. (Docket No. 97).

6 Defendants posit, in opposition to Plaintiffs’ objections, that the Report and
7 Recommendation properly establishes that the advertisements have ceased running and there is “zero
8 chance” that they would run again. (Docket No. 100). It is worth noting that, in addition to Judge
9 McGiverin’s reasoning, Defendants aver that MCS presented no risk of future irreparable harm
10 because the enrollment period for 2020 Medicare Advantage plans—which is the program subject
11 of the advertaintments in question—ended on December 7, 2019. Id. As to the advertisement still
12 running on certain social media platforms, Defendants contend that Magistrate Judge McGivern
13 correctly found that this advertisement was not included in MCS’s request for preliminary injunction
14 and, thus, not bear on the issue of irreparable harm.

15 MCS timely objections are noted. After reviewing the record, the preliminary injunction
16 hearing transcripts (Docket Nos. 102; 103) and all pertinent submissions, this Court does not find
17 that Magistrate Judge McGiverin erred in his findings of fact and/or legal analysis. The Magistrate
18 Judge correctly applied standard for showing irreparable harm, see González-Droz v. González-
19 Colón, 573 F.3d 75 (1st Cir. 2009), and promptly entertained all other issues of fact raised in
20 Plaintiffs’ objection. See Transcript of Preliminary Injunction Hearing, Docket No. 103 at 349-352.

21 Thus, the present Report and Recommendation survives a *de novo* review. As to the alleged
22 false advertainment still running, Plaintiffs have renewed its motion for preliminary injunctive relief
23 (Docket No. 98) which will be addressed by the Court when all briefing deadlines have elapsed.
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