UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of DYNAMIC HEALTH OF FLORIDA, LLC, CHHABRA GROUP, LLC, and VINEET K. CHHABRA aka VINCENT K. CHHABRA, Respondents.	PUBLIC DOCUMENT Docket No. 9317

To: Stephen J. McGuire
Chief Administrative Law Judge

OPPOSITION TO NON-PARTY ARENT FOX PLLC'S MOTION TO QUASH

Complaint counsel hereby opposes the motion to quash filed by Arent Fox PLLC, former counsel to respondents. Arent Fox moves to quash the subpoena served upon it by complaint counsel, citing work product and attorney-client privileges. The motion should be denied. The documents at issue were not created in anticipation of litigation, as required to invoke the work product privilege. Further, the attorney-client privilege has been waived by respondents, because they have asserted reliance on advice of counsel as part of their defense. In support of its opposition, complaint counsel submits as follows:

I. BACKGROUND

The complaint in this matter alleges that respondents made unsubstantiated and false representations for two dietary supplements, Pedia Loss and Fabulously Feminine. It is evident from multiple statements made by respondents that they intend to rely on an "advice of counsel" defense in opposing these charges. First, in June 2004, a representative for respondents testified

before Congress that Arent Fox wrote the advertising for Pedia Loss.[1] Second, in their answer to the complaint, respondents asserted that their representations were made in reliance "on the advice of counsel." Answer of Respondents Dynamic Health of Florida, LLC; Chhabra Group, LLC; and Vincent K. Chhabra to the Complaint of the Federal Trade Commission, ¶ 10 (re: Pedia Loss allegation) and ¶ 16 (re: Fabulously Feminine allegation) (July 23, 2004). Third, respondents' preliminary witness list states that they will call a representative of Arent Fox to testify in support of their assertion that the challenged advertising was prepared and approved by Arent Fox.[2] Accordingly, on November 1, 2004, complaint counsel issued a subpoena to Arent Fox, seeking:

---

[1] Exhibit A consists of pertinent pages of the transcript of a Congressional hearing held before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce on June 16, 2004. The 565-page transcript of the hearing is available online at: http://a257.g.akamaitech.net/7/257/2422/07sep20041200/www.access.gpo.gov/congress/house/pdf/108hrg/95442.pdf. During the hearing, the following colloquy took place between Representative Sterns and Guy Regalado, a former officer of respondent Dynamic Health:

Mr. Stearns:	Who wrote this ad that is here touting PediaLoss as this great all natural product for a child obesity?
Mr. Regalado:	Erin Fox [sic], a legal firm here in Washington, D.C.
Mr. Stearns:	Did you have anything to do with it at all?
Mr. Regalado:	No. I asked them what I was allowed to say. They basically wrote the content.
Mr. Sterns:	Now you are part of Dynamic Health, are you?
Mr. Regalado:	Right. Was.
Mr. Sterns:	Was? And when you were with Dynamic Health, did you do the distribution of this product and marketing?
Mr. Regalado:	Did the marketing and distribution. I was the Vice President of Sales and Marketing, this is correct.

"Erin Fox" is, of course, a misspelling of Arent Fox.

[2] Respondents' Preliminary Witness List is attached as Exhibit B.

> All documents and communications referring or relating to advice or counsel provided by Arent Fox in connection with the formulation, development, manufacture, testing, labeling, advertising, marketing, promotion, offering for sale, sale, fulfillment, or customer service of Pedia Loss, Fabulously Feminine, or any other dietary supplement product for female sexual health or children's weight sold, or proposed to be sold, by Vincent K. Chhabra a/k/a/ Vincent K. Chhabra, Dynamic Health of Florida, LLC, DBS Laboratories, LLC, or any other entity owned in whole or in part by any of them.

This specification was tailored to seek documents that would permit complaint counsel to test the *bona fides* of respondents' assertion that they relied on the advice of counsel in connection with the challenged practices, and to obtain information pertaining to advertising content purportedly created by Arent Fox.

By motion dated November 19, 2004, Arent Fox filed a motion to quash the subpoena. In support of its motion, Arent Fox cites attorney-client and work product privileges. Attached to the motion is a privilege log identifying seventeen (17) documents that Arent Fox believes are responsive to the subpoena. The log asserts that all seventeen (17) documents are subject to both attorney client *and* work product privileges. The log contains a column entitled "description," but in most cases, the description simply identifies the form of the communication, describing it as, for example, an "an email [or fax, or] containing attorney/client communication."

II. LEGAL ARGUMENT

A. The Work Product Privilege Is Inapplicable to Ordinary Business Documents Not Shown to Be Prepared In Anticipation of Litigation

The work product privilege is not applicable to the documents identified in the Arent Fox privilege log. Pursuant to the Federal Rules, the work product privilege applies only to "documents and tangible things . . . prepared in anticipation of litigation or for trial." F. R. Civ. P. 26 (b)(3). The burden of establishing that a document was generated *in anticipation of*

litigation rests upon the party opposing discovery. *Holmes v. Pension Plan of Bethlehem Steele*, 213 F.3d 124, 138 (3rd Cir. 2000); *Toledo Edison Co. v. G.A. Tech., Inc.*, 847 F.2d 335, 339 (6th Cir. 1988). Such a showing must be made by deposition, affidavit, or in any other manner in which facts are established in pretrial proceedings. *Toledo Edison, supra*, 847 F.2d at 339. As one court has noted:

> The concept of "anticipation of litigation" embodies both a temporal and a motivational aspect. To be "in anticipation of" litigation, a document must have been prepared before or during the time of litigation. That temporal element, standing alone, is insufficient in and of itself. The document must also have been prepared for purposes of the litigation, and not for some other purpose.

Frederic C. Ambrose v. Steelcase, Inc., 2003 U.S. Dist. LEXIS 26036, [*8] (W.D. Mich.). A document is prepared in anticipation of litigation when, in light of the nature of the document and the factual situation in the particular case, it can fairly be said to have been prepared or obtained because of the prospect of litigation. *John Doe Co. v. U.S.*, 2003 U.S. App. Lexis 22572, [*5] (2d Cir.); *United States v. Adlman, 134 F.3d 1194, 1202* (2d Cir. 1998). Work-product protection is not available for documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation. *John Doe, supra.* "A litigant must demonstrate that documents were created 'with a specific claim supported by concrete facts which would likely lead to litigation in mind,' . . . not merely assembled in the ordinary course of business or for other nonlitigation purposes." *Linde Thomson v. Res. Trust Corp.*, 5 F.3rd 1508, 1515 (D.C. Cir. 1993); *see also, G. D. Searle & Co. v. Simon*, 816 F.2d 397, 401 (8th Cir. 1986), *cert. denied*, 484 U.S. 917 (1987). The mere fact that litigation does eventually ensue does not, by itself, cloak materials; courts

look to whether, in light of the factual context, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. *Leo Logan v. Commercial Union Ins.*, 96 F.3d 971, 976 (7th Cir. 1996).

Arent Fox has not met its burden of demonstrating that the documents identified on its privilege log constitute attorney work product prepared in anticipation of litigation. While the motion contains the conclusory assertion that the materials on the log were created in anticipation of litigation, the privilege log does not contain any information that corroborates this assertion; none of the entries in the "description" column of the log refers to pending or anticipated litigation. Further, the evidence as a whole supports the conclusion that the documents were prepared in the ordinary course of business, not in anticipation of litigation. The materials cited in Arent Fox's privilege log are dated between January and July 2003--that is, shortly before ads for Pedia Loss and Fabulously Feminine were first disseminated. Complaint counsel was not aware of the existence of these products at that time and certainly was not planning any litigation; indeed, civil investigative demands in the pre-complaint investigation were not issued until November 12, 2003.

Respondents have argued to Congress that counsel prepared the advertising, have asserted in their answer that they relied on advice of counsel regarding their advertising, and have indicated that they intend to call a representative of Arent Fox with regard to their claim that the advertising was prepared and approved by that firm. Documents prepared by counsel that pertain to whether advertising is consistent with applicable law, in the absence of any pending litigation, are "ordinary course of business" documents that do not enjoy work product immunity. As there is no factual information to support the conclusion that the documents on

the Arent Fox log were prepared in anticipation of litigation, the motion to quash the subpoena based upon the work product privilege should be denied. *See General Motors Corp.*, 1978 FTC Lexis 515 (Order Ruling on GMAC's Request for Reconsideration of Ruling) (ALJ Parker) and 1978 FTC Lexis 540 (Order Ruling on GMAC's Claims of Privilege) (ALJ Parker) (these two orders require production of document 600473; the first order notes that this document s not entitled to work product privilege because it was not "written in contemplation of litigation"); *see also John Doe, supra*; *Holmes v. Pension Plan, supra.*

B. Respondents' Reliance on an Advice of Counsel Defense Waives the Attorney-Client Privilege

Arent Fox also asserts that the documents on its log also are exempt from production pursuant to the attorney-client privilege. Respondents, however, have waived the privilege by asserting good faith reliance on advice of counsel.

Waiver of attorney-client privilege occurs where a party asserts a claim that, in fairness, requires examination of protected communications. *See Weizmann Inst. of Science v. Neschis*, 2004 U.S. Dist Lexis 4254, [*10] (S.D.N.Y.). Courts have often held that a defendant waives attorney-client privilege when it cites good faith or advice of counsel as part of a defense. *E.g.*, *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1990) *cert. denied,* 502 U.S. 813 (1991) (defendant's invocation of "good-faith" defense to securities fraud placed his knowledge of the law in issue, thus waiving the attorney-client privilege); *Cox v. Adm'r U.S. Steel & Carnegie,* 17 F.3d 1386, 1419 (11th Cir. 1994) (assertion of good faith defense to Labor Relations charges by USX waived attorney-client privilege), *modified on other grounds*, 30 F.3d 1347 (1994); *Cuervo v. Snell*, 1999 Bankr. LEXIS 406, [*2-3] (Bankr. S.D. Ohio) (bankruptcy defendent

who asserts advice of counsel as defense waives privilege); *Kansas Food Packers v. Corpak*, 2000 U.S. Dist. LEXIS 19813, [*7-8] (D. Kan.) (defendant in malicious prosecution suit who asserted reliance on advice of counsel defense waived privilege); *Dentsply Int'l. v. Great White, Inc.*, 2000 U.S. Dist Lexis 13108, [*8] (M.D. PA. Sept. 1, 2000) (where defendant asserts advice of counsel defense in patent infringement action, privilege is waived).

Commission law is consistent with this federal court precedent. *See Orkin Exterminating Co., Inc.,* D. 9176 (Nov. 30, 1984 Order Ruling on Complaint Counsel's Motion to Compel) (stating, "waiver of privilege can occur when a party asserts as an essential element of his defense reliance on the advice of counsel")[3]; *Herbert R. Gibson, Sr.*, 1977 FTC Lexis 114, [*7] (Order Denying Motion to Quash) (ALJ von Brand) ("where it is likely that a party will introduce evidence pertaining to confidential communications between attorney and client, fairness demands that the party introducing such evidence be allowed discovery with respect to matters material to that testimony").

Good faith does not immunize advertisers, such as respondents, from liability for misrepresentations. *See Orkin Exterminating Co., Inc.*, 108 F.T.C. 263, [*40] (1986), *FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1029 (7th Cir. 1988); *FTC v. Pioneer Enterprises, Inc.*, 1992 U.S. Dist. LEXIS 19699 (D. Nev. 1992). Nonetheless, some courts have held that good faith may be relevant to the scope of injunctive relief, noting that good faith is relevant to the analysis of whether there is a risk of recurrent violation. *E.g., FTC v. A. Glenn Braswell* (Civ. 03-3700DT PJWx) (CD Cal.) (Nov. 10, 2003 Order Re Motion to Strike)

---

[3] Attached as Exhibit C.

(holding that good faith is relevant to whether a permanent injunction should order)[4]; *FTC v. Hang-Up Art Enterprises, Inc.*, 1995 U.S. Dist Lexis 21444 (C.D. Cal.) (same).

If this court permits respondents to argue that they relied in good faith upon advice of counsel, complaint counsel must have the opportunity to challenge the *bona fides* of this defense. The documents sought by the subpoena are highly relevant to this analysis. Accordingly, complaint counsel urges this court to deny the motion to quash. *E.g.*, *Dentsply, supra* (permitting discovery of documents ordinarily protected by the attorney-client privilege, where defendant asserted that it had relied on advice of counsel that it was not infringing plaintiff's patent); *John Doe, supra.*

III. CONCLUSION

For the reasons set forth above, complaint counsel respectfully requests that the Administrative Law Judge deny the motion to quash and direct production of the requested documents.

Respectfully submitted,

Janet M. Evans
Sydney K. Knight
Division of Advertising Practices
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Mail drop NJ-3212
Washington, D.C. 20580
jevans@ftc.gov
(202) 326-2125
fax: (202) 326-3259

[4] Attached as Exhibit D.

Exhibit A

PARENTS BE AWARE: HEALTH CONCERNS ABOUT DIETARY SUPPLEMENTS FOR OVERWEIGHT CHILDREN

HEARING

BEFORE THE

SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON ENERGY AND
COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

JUNE 16, 2004

Serial No. 108-93

Printed for the use of the Committee on Energy and Commerce

Available via the World Wide Web: http://www.access.gpo.gov/congress/house

Mr. BARASH. David Wood is a formulator or owns a manufacturing company in Ohio.

Mr. STEARNS. Did you have relationship with David Wood?

Mr. BARASH. I met him once.

Mr. STEARNS. And was he used as a credentialed person for the product?

Mr. BARASH. Him and Brian Newsome of Delta Body——

Mr. STEARNS. Okay. So David would be used——

Mr. BARASH. [continuing] are the ones who formulated the product.

Mr. STEARNS. Yes. Okay. So David Wood formulate the product?

Mr. BARASH. Yes. That was formulated before I became—got into the picture.

Mr. STEARNS. Yes. We cannot seem to get a hold of David Wood. We have been unable to find him anywhere. So we had this dubious distinction that David Wood who formulated your product, we cannot find him. We have no way to verify that the ingredients that are in the product have been researched and yet we have a list of products that the ingredients are being used in based upon someone that we cannot find and has not been credentialed. Is that accurate? Is that an accurate statement?

Mr. BARASH. I have no idea what——

Mr. STEARNS. Okay. When you met him, did you have the impression he was the authority for these ingredients?

Mr. BARASH. It was my understanding from Brian Newsome at Delta Body Systems that the two of them had discussions in formulating this product for Dynamic Health and for the purchase order that Dynamic Health placed with Delta Body Systems.

Mr. STEARNS. Okay.

Mr. Regalado, who wrote this ad that is here touting PediaLoss as this great all natural product for a child obesity?

Mr. REGALADO. Erin Fox, a legal firm here in Washington, D.C.

Mr. STEARNS. Did you have anything to do with it at all?

Mr. REGALADO. No. I asked them what I was allowed to say. They basically wrote the content.

Mr. STEARNS. Now you are part of Dynamic Health, are you?

Mr. REGALADO. Right. Was.

Mr. STEARNS. Was? And when you were with Dynamic Health, did you do the distribution of this product and marketing?

Mr. REGALADO. Did the marketing and distribution. I was the Vice President of Sales and Marketing, that is correct.

Mr. STEARNS. What do you think of the conversation I had relative to David Wood? Did you ever met David Wood?

Mr. REGALADO. No. I was not aware of the name or the person or his function until Jonathan and I completed the questionnaire requested from this Commission.

Mr. STEARNS. Did you ever question the ingredients or the credentials of David Wood who made up the formula for this?

Mr. REGALADO. No, I did not because rather than worrying about David Wood from my perspective, I wanted to know about the product for marketing purposes. And we had a technical data abstract and studies on the ingredients from a Dr. Guzman. And after reviewing that information, I felt that I had marketing materials to work with. That information assured us that it was safe, it was ef-

fective. And, in fact, one of the doctors that sat here did indicate that there were ingredients in there that had possible weight loss activities.

So based on reviewing that information, we felt that it was a viable product.

Mr. STEARNS. Do you have a medical degree?

Mr. REGALADO. No.

Mr. STEARNS. Mr. Barash, do you have a medical degree?

Mr. BARASH. No.

Mr. STEARNS. Are either one of you registered a dietician?

Mr. REGALADO. No.

Mr. STEARNS. Okay. Prior to arranging for this product to be advertized and sold on the market, did you give this formulation to any medical doctor or registered dietician to review?

Mr. REGALADO. Well, that was Dr. Guzman. He reviewed it. He gave us the technical abstracts, which was submitted to Kelli Andrews, a Ms. Kelli Andrews with the Commission.

Mr. STEARNS. Okay.

Mr. REGALADO. The technical data abstract and the studies were submitted to the Commission.

Mr. STEARNS. Now this Dr. Guzman you said, did you ever check Dr. Guzman's credentials?

Mr. REGALADO. Not myself personally, no.

Mr. STEARNS. Did you, Mr. Barash?

Mr. BARASH. No, I did not. He was recommended from the manufacturer that I had selected.

Mr. STEARNS. To your knowledge did Dr. Guzman ever do a study on this product?

Mr. BARASH. He did not do a study. He did the research reference on the ingredients.

Mr. STEARNS. And what does that mean?

Mr. BARASH. What he did was do detailed—he looked up detailed information on each one of the ingredients and wrote a technical abstract that was about 500 pages.

Mr. STEARNS. Were there any studies done on kids?

Mr. BARASH. For the formulation?

Mr. STEARNS. Yes.

Mr. BARASH. No.

Mr. STEARNS. Okay. So basically we really do not have, I think it has been brought out by this testimony, Mr. Chairman, for this particular product there is no credential to any information on PediaLoss and everything that they claim on this website cannot be corroborated.

And I yield back.

Mr. GREENWOOD. The Chair thanks the gentleman.

The gentleman from Oregon is recognized for 10 minutes.

Mr. WALDEN. Thank you, Mr. Chairman.

Mr. Rayman, Ms. Kaye had represented to the committee that there was never Skinny Pill for Kids, there never was one. Could you turn to tab 15 in the book? I will wait until you get there.

Mr. RAYMAN. That is the purchase order?

Mr. WALDEN. Yes. Does that evidence that a purchase order for 2,000 bottles of Skinny Pill for Kids was made?

Exhibit B

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
DYNAMIC HEALTH OF FLORIDA, LLC, CHHABRA GROUP, LLC, DBS LABORATORIES, LLC, Limited liability companies,	)	
VINCENT K. CHHABRA, Individually and as an officer of Dynamic Health of Florida, LLC, And Chhabra Group, LLC, and	)	DOCKET NO. 9317
JONATHAN BARASH, Individually and as an officer of DBS Laboratories, LLC.	)	

RESPONDENTS VINCENT CHHABRA, DYNAMIC HEALTH OF SOUTH FLORIDA, LLC, AND CHHABRA GROUP, LLC'S PRELIMINARY WITNESS LIST

Pursuant to the August 2, 2004 *Scheduling Order*, Respondents' counsel submits its Preliminary Witness List to complaint counsel. As Respondents' counsel, I may obtain additional information, and may modify this list, including adding witnesses and/or modifying the scope of testimony. Respondents' counsel reserves the right to call additional witnesses for rebuttal and to call witnesses listed on complaint counsel's witness list(s), once submitted.

Fact Witnesses

Respondents' counsel may call one or more of the following witnesses (or, where applicable, yet to be identified representatives of the following entities to testify, by deposition or live testimony, in this matter:

1. Arent Fox Kintern Plotkin & Kahn PLLC ("Arent Fox"). A representative of this firm may be called to testify, without limitation, to Respondents' claim that the challenged advertising was prepared and approved by Arent Fox.

2. Barash, Jonathan. Mr. Barash was manager of DBS Laboratories LLC and assisted in the development, marketing, and/or sale of the challenged products. He may be called to testify, without limitation, regarding Respondents' involvement in the advertising, marketing, offering for sale, sale, and distribution of the challenged products; the development, advertising, marketing, offering for sale, sale, and distribution of those products; and/or the substantiation for advertising, labeling, marketing, and sales claims for the products.

3. Chhabra, Vincent. Mr. Chhabra may be called to testify, without limitation, regarding his involvement in the advertising, marketing, offering for sale, sale, and distribution of the challenged products; the development, advertising, marketing, offering for sale, sale, and distribution of those products; and/or the substantiation for advertising, labeling, marketing, and sales claims.

4. Chhabra International, Ltd. This entity participated in the development and management of Respondents' dietary supplement business. A representative of this entity may be called to testify, without limitation, regarding Respondents' involvement in the advertising, marketing, offering for sale, sale, and distribution of the challenged products; the development, advertising,

marketing, offering for sale, sale, and distribution of those products; and/or the substantiation for advertising, labeling, marketing, and sales claims.

5. Chhabra Group, LLC. Chhabra Group participated in some of the media purchases for Respondents' dietary supplements. A representative of Chhabra Group may be called to testify, without limitation, regarding Respondents' involvement in the advertising, marketing, offering for sale, sale, and distribution of the challenged products; the development, advertising, marketing, offering for sale, sale, and distribution of those products; and/or the substantiation for advertising, labeling, marketing, and sales claims.

6. CG Fulfillment. CGT Fulfillment participated in the fulfilling orders for Respondents' dietary supplements. A representative of CG Fulfillment may be called to testify, without limitation, regarding Respondents' involvement in the sale and distribution of the challenged products.

7. Chhabra Internet Support Center LLC. This entity may have provided call center and customer service functions related to Respondents' dietary supplements. A representative of Chhabra Internet Support Center LLC may be called to testify, without limitation, regarding Respondents' involvement in the advertising, sale, and distribution of the challenged products.

8. Chhabra Internet Fulfillment Services LLC. This entity participated in fulfillment services for Respondents' dietary supplements. A representative of Chhabra Internet Support Center LLC may be called to testify, without limitation, regarding Respondents' involvement in the advertising, sale, and distribution of the challenged products.

9. Cohen, Lewis. Mr. Cohen is an employee of an entity that Mr. Chhabra has a relationship with. Mr. Cohen may be called to testify, without limitation, regarding Respondents' involvement in the advertising, sale, and distribution of the challenged products.

10. Dynamic Health of Florida, LLC. A representative of Respondent Dynamic Health of Florida, LLC may be called to testify, without limitation, regarding Respondents' involvement in the advertising, marketing, offering for sale, sale, and distribution of the challenged products; the development, advertising, marketing, offering for sale, sale, and distribution of those products; and the substantiation for advertising, labeling, marketing, and sales claims.

11. Guzman, Dr. Alberto. Dr. Guzman provided services to Respondents in connection with substantiation of claims. He may be called to testify, without limitation, regarding Respondents' involvement in the advertising, marketing, offering for sale, sale, and distribution of the challenged products; the development, advertising, marketing, offering for sale, sale, and distribution of those products; and the substantiation for advertising, labeling, marketing, and sales claims.

12. Highland Laboratories. Highland Laboratories is a manufacturer of dietary supplements. A representative of Highland may be called to testify, without limitations, regarding Respondents' involvement in the purchase, marketing, and sale of the challenged products, and the substantiation for the advertising and marketing claims.

13. Hill, Knowlton & Samcor. Hill, Knowlton & Samcor provided public relations services in connection with the target products. A representative of Hill, Knowlton may be called to testify, without limitation, regarding its involvement in the advertising and marketing of the challenged products.

14. Kreating, LLC. Kreating participated in the creation of advertising, labeling, and packaging for the challenged products. A representative of Kreating may be called to testify, without limitation, regarding the Respondents' involvement in these activities and regarding the development, advertising, marketing, offering for sale, sale, and distribution of those products.

15. Metability of Florida, LLC. Metability of Florida has provided web-hosting and software services. A representative of Metability may be called to testify, without limitation, regarding Respondents' involvement in the advertising, marketing, offering for sale, sale, and distribution of the target products via the Internet.

16. Nutrition Formulators. This entity is a manufacturer of some of Respondents' dietary supplements. A representative of Nutrition Formulators may be called to testify, without limitation, regarding Respondents' involvement in the purchase, marketing, and sale of the challenged products, and the substantiation for the advertising and marketing claims.

17. Pharmachem Laboratories, Inc. This is a vendor of nutritional materials. A representative of Pharmachem may be called to testify, without limitation, regarding Respondents' involvement in the purchase, marketing, and sale of the challenged products, and the substantiation for the advertising and marketing claims.

18. Regalado, Guy. Mr. Regalado is associated with the products that are subject of this lawsuit. He may be called to testify, without limitation, regarding Respondents' involvement in the advertising, marketing, offering for sale, sale, and distribution of the challenged products; the development, advertising, marketing, offering for sale, sale, and distribution of those products; and the substantiation for advertising, labeling, marketing, and sales claims.

19. Reinbergs, John. Mr. Reinbergs was involved with the challenged products. He may be called to testify, without limitation, regarding Respondents' involvement in the advertising, marketing, offering for sale, sale, and distribution of the challenged products; the development, advertising, marketing, offering for sale, sale, and distribution of those products; and the substantiation for advertising, labeling, marketing, and sales claims.

20. Swatt, Randy. Ms. Swatt may have been involved with the challenged products. She may be called to testify, without limitation, regarding Respondents' involvement in the advertising, marketing, offering for sale, sale, and distribution of the challenged products; the development, advertising, marketing, offering for sale, sale, and distribution of those products; and the substantiation for advertising, labeling, marketing, and sales claims.

21. Trant, Dr. Aileen. Dr. Trant is the Director of Research for Daily Wellness, marketer of Women's ArginMax. She may be called to testify, without limitation, to the ingredients in Women's ArginMax.

22. Wood, David. Mr. Wood may have assisted in the development of the dietary supplements sold by Respondents. He may be called to testify, without limitation, regarding Respondents' involvement in the advertising, marketing, offering for sale, sale, and distribution of the challenged products; the development, advertising, marketing, offering for sale, sale, and distribution of those products; and the substantiation for advertising, labeling, marketing, and sales claims.

Expert Witnesses

Pursuant to the August 2, 2004 Scheduling Order, Respondents' counsel will attempt to identify its expert witnesses by November 15, 2004.

Respectfully submitted,

\s\Max Kravitz

Max Kravitz (0023765)
KRAVITZ & KRAVITZ
145 E. Rich Street
Columbus, OH 43215
Tel: (614) 464-2000
Fax: (614) 464-2002
Email: mkravitz@kravitzlawnet.com

CERTIFICATE OF SERVICE

This is to certify that on October 25, 2004, I caused a copy of the attached:

RESPONDENTS VINCENT CHHABRA, DYNAMIC HEALTH OF SOUTH FLORIDA, LLC, AND CHHABRA GROUP, LLC'S PRELIMINARY WITNESS LIST to be served upon the following persons by email and/or U.S. First Class Mail:

Janet Evans
Syd Knight
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Via email (10/25/04) & U.S. mail (10/26/04)

DBS Laboratories LLC
1485 North Park Dr.,
Weston, FL 33326
Via ordinary mail (10/26/04)

This 25th day of October, 2004.

\s\Max Kravitz

[redacted]vitz

Exhibit C

PRF 1

PRF 2

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the matter of ORKIN EXTERMINATING COMPANY, INC., a corporation.	)	Docket No. 9176

ORDER RULING ON COMPLAINT COUNSEL'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Complaint counsel by motion filed October 30, 1984, has moved for an order compelling the production of certain documents responsive to complaint counsel's first subpoena duces tecum withheld by respondent on claim of attorney-client and work product privilege. Respondent has opposed this motion by answer filed November 13, 1984.

On August 10, 1984, complaint counsel's first subpoena duces tecum was issued to respondent to be returned September 21, 1984. Respondent did not file a motion to quash, and by agreement, documents were made available to complaint counsel commencing September 24, 1984. Later, on October 17, 1984, respondent provided complaint counsel with a listing of documents being withheld on the basis of attorney-client privilege and work product privilege. Complaint counsel now seeks production of all documents included in this listing. Complaint counsel asserts that respondent has waived any attorney-client or work product privilege that may have existed by placing in issue the advice it has received from its attorneys concerning its increasing of

annual fees in pre-1975 contracts, and by disclosing attorney-client communications on the same subject matter on a number of occasions and to numerous persons. [1]

The generally accepted statement of the attorney-client privilege was set forth by Judge Wyzanski in United States v. United Shoe Machinery Corp., 89 F. Supp 357, 358-359 (D. Mass. 1950). One essential condition of the attorney-client privilege is that it has not been waived by the client. See 8 Wigmore, Evidence, § 2292 at 554 (McNaughton rev. 1961) Waiver of the privilege can occur when a party asserts as an essential element of his defense reliance upon the advice of counsel. Russell v. Curtin Matheson Scientific, Inc., 493 F. Supp. 456, 458 (S.D. Texas 1980); American Standard, Inc. v. Bendix Corp., 80 F.R.D. 706, 709-710 (W.D. Mo. 1978); Panter v. Marshall Field & Co., 80 F.R.D. 718 (N.D. Ill. 1978) [2] Also, the privilege is waived where a party voluntarily discloses documents containing

---

[1] Complaint counsel seeks production of the withheld documents on the additional ground of respondent's tardiness in supplying the listing of withheld documents - delay from September 24, 1984 until October 17, 1984. Respondent by letter timely advised complaint counsel on September 24, 1984 that it was withholding certain documents on the grounds of attorney-client privilege and work product privilege. The delay of some twenty-three days in providing the listing of the withheld documents does not warrant censure, especially since respondent was responding in apparent good faith to what appears to be a rather broad subpoena.

[2] In Panter v. Marshall Field & Co. the court held:

> Where, as here, a party asserts as an essential element of his defense reliance upon the advice of counsel, we believe the party waives the attorney-client privilege

(footnote continued)

communications with counsel concerning the matter about which advice or counsel was sought. United States v. Gurtner, 474 F.2d 297, 299 (9th Cir. 1973); United States v. American Tel. and Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980); Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 460 (N.D. Cal. 1978); Transamerica Computer Co., Inc. v. IBM Corp., 573 F.2d 646, 650-651 (9th Cir. 1978).

The general rule is that a partial disclosure of communications subject to the attorney-client privilege constitutes a waiver as to all such communications on the same subject matter. 8 Wigmore, Evidence, § 2327 at 636; [3] United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982); Bierman v.

---

[2] (continued from previous page)

> with respect to all communications, whether written or oral, to or from counsel concerning the transactions for which counsel's advice was sought. Broad v. Rockwell International Corp., CCH Fed.Sec. L.Rep. ¶95,894 (N.D. Tex. 1977); Haymes v. Smith, 73 F.R.D. 572 (W.D.N.Y. 1976); Garfinkle v. Arcata National Corp., 64 F.R.D. 688 (S.D.N.Y. 1974); Smith v. Bentley, 9 F.R.D. 489 (S.D.N.Y. 1949). See Trans World Airlines, Inc. v. Hughes, 332 F.2d 602 (2d Cir. 1964); Handgards, Inc. v. Johnson & Johnson, 413 F.Supp. 926 (N.D. Cal. 1976).

80 F.R.D. at 721.

[3] 8 Wigmore, Evidence, § 2327, pp. 635-636 (McNaughton rev. 1961) states:

> "In deciding [waiver], regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of

(footnote continued)

Marcus, 122 F. Supp 250, 252 (D.N.J. 1954); Detection Systems, Inc. v. Pittway Corp., 96 F.R.D. 152, 156 (W.D.N.Y. 1982); Haymes v. Smith, 73 F.R.D. 572, 577 (W.D.N.Y. 1976); Burlington Industries v. Exxon Corp., 65 F.R.D. 26, 46 (D. Md. 1974). Any other rule would permit selective disclosure by a party which might give a biased view of the facts. The courts have consistently held that, given a waiver, ". . . production of all the correspondence or the remainder of the consultations about the same subject can be demanded." Haymes v. Smith, 73 F.R.D. at 576. Once a privilege is waived, it is waived for all related subject matter. As the court said in Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146 (D.S.C. 1974):

> A waiver of the privilege as to all communications ordinarily follows from the voluntary waiver even if made with limitations of one or more similar communications. Thus, if a client, through his attorney, voluntarily waives certain communications, but guarded with a specific written or oral assertion at the time of the waiver that it is not its intention to waive the privilege as to the remainder of all similar communications, the privilege, as to

---

3 (continued from previous page)

> fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final."

> the remaining undisclosed communications, is nevertheless waived. (Emphasis in original.)

397 F. Supp. at 1162.

In the instant matter, the question as to whether respondent has affirmatively placed in issue its reliance on the advice of counsel respecting the price increase on pre-1975 contracts has two bases. Complaint counsel quotes the following statement from respondent's Motion For Issuance Of An Order Requiring Access To Documents, filed hereon on June 28, 1984:

> Orkin was then aware that its pre-1975 contracts were silent regarding its right to raise the initial renewal fees stated therein. Accordingly, Orkin sought an opinion from outside legal counsel on this question, and it was advised that such an increase would be permissible.
>
> . . . .
>
> In short, Orkin has dealt in the utmost good faith with all of its termite control contract customers in connection with increasing their annual renewal fees. With regard to its pre-1975 contract customers, for whom the Commission purports to seek relief in this proceeding, Orkin raised its annual renewal fees only one time in 1980 after experiencing years of substantially escalating costs, receiving an outside legal opinion that it had the contractural right to do so, and giving prior notice to the affected customers.

(Motion at 4, 6)

Complaint counsel also references respondents answers to complaint counsel's first set of interrogatories as evidence respondent intends to rely in this proceeding on advice it received from counsel:

INTERROGATORY NO. 14

Does Orkin contend that it obtained legal counsel concerning the duration of its obligation to perform at the annual fees specified in pre-1975 contracts or pre-1975 guarantees, prior to raising those annual fees?

RESPONSE

Yes

INTERROGATORY NO. 15

Does Orkin contend that it relied on the legal counsel described in Interrogatory 14 in raising the annual fees of customers holding pre-1975 guarantees above the annual fees specified in those customers' contracts?

RESPONSE

Yes, along with other considerations.

INTERROGATORY NO. 16

Does Orkin contend that it relied on the legal counsel described in Interrogatory 14 in raising the annual fees of customers holding pre-1975 guarantees above the annual fees specified in those customers' guarantees?

RESPONSE

Yes, along with other considerations.

Respondent, in its answer to complaint counsel's motion seeking production of documents, argues that it has not plead its reliance on the advice of counsel in raising the annual renewal fees on its pre-1975 contracts as a defense to the complaint; that respondent's reliance on the advice of counsel has been "injected" into this proceeding not due to any affirmative action of respondent, but in response to complaint counsel's own

discovery. Thus, according to respondent, it would be improper and unfair to strip respondent of its attorney-client privilege. (Answer at 4)

Respondent's argument overlooks the significant fact that it voluntarily disclosed its reliance on the advice of counsel in its Motion For Issuance Of An Order Requiring Access To Documents. This was not a part of complaint counsel's discovery. Further, respondent has not disavowed the possibility of relying on the advice of counsel in defense of the complaint allegations, which it could have done very simply and forthrightly in its answer to complaint counsel's present motion.

There is another and more certain basis on which to conclude that respondent has waived any attorney-client privilege respecting documents containing communications with counsel concerning its pre-1975 contracts and the price increase at issue.

As set forth by complaint counsel, respondent on numerous occasions has voluntarily disclosed its attorney-client communications concerning its attorneys' advice. On May 14, 1981, James Schneider, General Counsel of Rollins, provided complaint counsel with copies of two memoranda written by counsel. The first, entitled "Enforceability of Renewable Contracts," dated December 6, 1978, was written by Bob Finch of the law firm of Arnall, Golden & Gregory of Atlanta, Georgia. (Exhibit 5, complaint counsel's Motion) In no fewer than 21 letters sent to third parties, Mr. Schneider has cited the research of Arnall, Golden and Gregory as support for the

propriety of respondent's raising of annual fees. (See Exhibits 16, 17, complaint counsel's Motion) The second memorandum Mr. Schneider provided to complaint counsel is dated February 3, 1981, and was written by Mitchell B. Haigler of the law firm of Rhodes, Vickers & Hart of Tallahassee, Florida. (Exhibit 6, complaint counsel's Motion)

These two memoranda provided to complaint counsel [4] were also provided by Mr. Schneider to the office of the Attorney General of the State of Tennessee. (See Exhibits 7, 8, complaint counsel's Motion)

Respondent has also disclosed an internal memorandum dated December 20, 1978, from James Schneider to Gary Rollins concerning "Increase of Pre-1975 Guarantee Renewal Payments." (Exhibit 9, complaint counsel's Motion) This memorandum was disclosed in a previous litigation. Knox v. Orkin Exterminating Company, Inc., Civil Action No. C-71007, (Superior Court of Fulton County, Georgia). During that proceeding David S. Walker, who represented the plaintiff, Mr. Neil C. Knox, filed a request for production of documents. Documents were made available at his office for Mr. Walker's review. Mr. Walker designated certain of those documents for copying and he later received them, including the Schneider memorandum. (Exhibits 9, 10, complaint counsel's Motion)

---

[4] The fact that respondent provided these two legal memoranda to complaint counsel is an indication that respondent may utilize such attorney advice in defense of the complaint allegations.

Mr. Schneider's memorandum of December 20, 1978, has also been introduced by the State of Louisiana in the public record of State of Louisiana v. Orkin Exterminating Company, Case No. 83-2166 (Dist. Ct. for the Parish of Orleans). (Exhibits 11-13, complaint counsel's Motion) The publication of Mr. Schneider's memorandum in court without objection confirms respondent's waiver. (See International Harvester Company, Dkt. 9147 at 2 (ALJ Order 9/29/81)).

Letters written by Mr. Schneider also indicate respondent's willingness to disclose attorney-client communications concerning its increase in renewal fees. In letters to Roger W. Giles, Assistant Attorney General of the State of Arkansas, and to Millard Rowlette, Deputy County Attorney for Pima County, Arizona, Mr. Schneider wrote:

> As discussed, Orkin has received legal opinions from counsel in separate states as well as the opinion of the Law Department concerning the appropriateness of the renewal increase for its pre-1975 customers and I will be happy, if you desire, to provide you copies of such opinions as well as relevant case authority in support thereof.

(Exhibits 14, 15, complaint counsel's Motion)

Respondent's disclosure of attorney-client communications by description in letters and by actual disclosure of those communications in numerous instances establishes a waiver of any attorney-client privilege respondent may have had in respect to the advice it received from counsel concerning the price increase on pre-1975 contracts. In fact, respondent's acts in stating on numerous occasions its reliance on the advice it received from

its attorneys and making available copies of such advice reveals a clear intention to waive any attorney-client privilege which may have existed as to this subject matter. It is difficult to be persuaded that the subject matter of its attorneys' advice should remain confidential after respondent has revealed such advice voluntarily and relied upon such advice in its dealings with law enforcement officials, in litigation, and in responding to complaints from the public. See In re Horowitz, 482 F.2d 72, 82 (2d Cir. 1973); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich 1954). "The reason for prohibiting disclosure ceases when the client does not appear to have been desirous of secrecy." 8 Wigmore, Evidence, § 2311 at 599 (McNaughton rev. 1961) In the instant matter respondent has failed to demonstrate that appropriate steps were taken to keep this material confidential. [5] In fact, the opposite is true, respondent has expressed a willingness to make such advice available. (See Exhibits 14, 15, complaint counsel's Motion.)

Respondent contends that if there be waiver, it should apply only to the three documents containing legal opinions of counsel that have been revealed. (Respondent's Answer at 5-8) Precedent is contrary to respondent's position. As has been stated, the general rule is that a partial disclosure of confidential

---

[5] "The burden is on the [claimant of the privilege] to demonstrate that confidentiality was expected in the handling of these communications, and that it was reasonably careful to keep this confidential information protected from general disclosure." Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980)

communications constitutes a waiver as to all such communications on the same subject matter. (See pp. 3-4, supra.)

Complaint counsel also seeks documents withheld on the claim of work product privilege. The Commission's Rules of Practice provide for discovery of work product materials upon a showing that the party seeking discovery has substantial need of the materials in the preparation for trial and is unable to obtain the substantial equivalent of the materials by other means. (§3.31(b)(3)). As indicated in the Commission's rule, the work product privilege is a qualified privilege (see McCormick On Evidence, 2d Ed., pp. 204-209) that may be overcome by a showing of substantial need and inability to obtain the substantial equivalent of the materials by other means. In this respect the Commission's rule is almost identical to the first paragraph of Rule 26(b)(3) of the Federal Rules of Civil Procedure. Under the federal rules, placing advice of counsel in issue makes work product discoverable. American Standard, Inc. v. Bendix Corp., supra; Panter v. Marshall Field & Co., 80 F.R.D. at 725-726; Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926 (N.D. Cal. 1976); Bird v. Penn Central Company, 61 F.R.D. 43 (E.D. Penn 1973).

The work product of counsel in formulating or relying upon counsel's advice would be relevant to testing the assertion by respondent that it relied in good faith upon such advice in increasing price on its pre-1975 contracts. Complaint counsel cannot obtain the substantial equivalent of this work product from any other source. However, respondent's intention to rely

upon its attorneys' advice in this litigation is not clear, and waiver of attorney-client privilege does not necessarily constitute a waiver of work product privilege. Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. at 929; United States v. American Tel. and Tel. Co., 642 F.2d at 1299. Thus, complaint counsel's need for such materials has not been demonstrated at this juncture. At a later stage of this proceeding complaint counsel may renew this request for work product if it appears warranted in light of respondent's defense intentions as this matter develops.

Respondent is hereby ordered to turn over to complaint counsel all listed documents on which a claim of attorney-client privilege has been asserted. Respondent is authorized to excise from the listed documents any information that does not relate to attorney advice in respect to the pre-1975 price increase. Further, if respondent requests, the documents can be turned over to the undersigned for in camera examination to determine if all the documents on the listing should be made available to complaint counsel pursuant to this ruling. Accordingly,

IT IS ORDERED that complaint counsel's Motion To Compel Production Of Documents is GRANTED to the extent set forth hereinabove.

Ernest G. Barnes
Administrative Law Judge

Dated: November 30, 1984

EXHIBIT D

ATTACHMENT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

A. GLENN BRASWELL, JOL MANAGEMENT CO., G.B. DATA SYSTEMS, INC., GERO VITA INTERNATIONAL, INC., THERACEUTICALS, INC., AND RON TEPPER

Defendants.

CASE NO. CV 03-3700DT (PJWx)

ORDER **DENYING IN PART AND GRANTING IN PART** PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION TO STRIKE VARIOUS AFFIRMATIVE DEFENSES OF DEFENDANTS A. GLENN BRASWELL, JOL MANAGEMENT CO., G.B. DATA SYSTEMS, INC., THERACEUTICALS, INC.

I. Background

A. Factual Summary

This action is brought by Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), which is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The Commission brings this action against Defendants A. Glenn Braswell, ("Braswell"), JOL Management Co., ("JOL"), G.B. Data Systems, Inc., Gero Vita International, Inc., ("GVI"),

42

Theraceuticals, Inc., ("Theraceuticals"), and Ron Tepper ("Tepper") - all of which are hereinafter collectively referred to as the "Braswell Common Enterprise."

The Commission brings this action under Section 13(b) of the Federal Trade Commission Act ("FTC Act"), to secure a permanent injunction, restitution, disgorgement, and other equitable relief against the Braswell Common Enterprise for engaging in deceptive acts or practices and false advertising in connection with the advertising, marketing, and sale of products purporting to treat, prevent, and or cure such conditions as respiratory illnesses, diabetes, dementia, obesity, and impotence, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. See Complaint for Permanent Injunction and Other Equitable Relief (hereinafter "Complaint") at 1-2.

The Commission alleges the following facts in its Complaint:

For over twenty-five years, Braswell has marketed dietary supplements and other health-related products through a frequently changing group of interrelated companies. See Complaint at ¶ 5. Defendants Braswell, JOL, G.B. Data Systems, GVI, Theraceuticals, and Tepper operate a common business enterprise. Id. at ¶ 11. They share and have shared officers, employees, and office locations; have commingled funds; and are commonly controlled and have participated in a common scheme to engage in deceptive acts and practices, making them jointly and severally liable for said acts and practices. Id.

The Braswell Common Enterprise is one of the largest direct marketers of dietary supplements and other health-related products in the United States, with total sales since 1998 exceeding $798 million. See Complaint at ¶ 13. The Braswell Common Enterprise uses direct mail solicitations to generate business. See Complaint at ¶ 14. It purchases or rents consumer names and

addresses from brokers, targeting persons aged 40 to 60, and mails advertising to these consumers. Id.

New and repeat purchasers receive multi-page advertisements that describe various medical conditions and detail various remedies - often purportedly based on "scientific breakthroughs" or "long lost but newly discovered" formulas. Id. Defendants claim that their products will cure, treat, or alleviate these conditions in glossy, multi-page brochures that typically feature "expert" medical or scientific endorsers, consumer testimonials, and frequent references to "scientific" evidence that purport to substantiate the efficacy and benefits of the products. Id.

Purchasers also receive a "subscription" to the *Journal of Longevity*, which appears to be a legitimate medical journal with scientific articles written by medical professionals but which is, in fact, promotional advertising prepared and disseminated by Defendants. Id. Consumers can purchase the advertised products via mail order, telephone, or electronically on Defendants' website, www.gvi.com. Id.

Defendants' advertisements contain a return address in Toronto, Canada, to which consumers send their orders via mail. See Complaint at ¶ 15. In fact, Defendants have no employees in Canada and all such mail orders are sent from the Canadian mail drop address to Defendants' offices in the United States for fulfillment. Id.

Among the products that Defendants have advertised, labeled, offered for sale, sold and distributed in recent years are: Lung Support Formula, Gero Vita G.H.3, and Testerex, all marketed since at least 1998; ChitoPlex, marketed since at least 1999; AntiBetic Pancreas Tonic, marketed since at least 2000; and Theraceuticals GH3 Romanian Youth Formula, marketed since at least 2001. See

Complaint at ¶ 16. Like their other products, Defendants advertise and offer these products for sale through direct mail advertising, including the *Journal of Longevity*, and through their website, www.giv.com. Id.

In its Complaint, the Commission details the specific claims made for each product, indicating the symptoms that each product cures or alleviates, and includes testimonials from consumers indicating their endorsement for the products. See generally, Complaint at 6-31.

Defendants have represented, either expressly or by implication, that Lung Support cures or significantly alleviates certain lung diseases and respiratory problems, reverses existing lung damage in persons with emphysema, prevents breathing problems for otherwise healthy persons, and is clinically proven to eliminate or cure allergies, asthma, colds, and other illnesses and conditions. See Complaint at ¶ 29. The representations made with regards to Lung Support are false or were not substantiated at the time the representations were made, constituting a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. See Complaint at ¶ 30.

Defendants have represented, either expressly or by implication, that AntiBetic can cure Type I and Type II diabetes, is an effective or superior alternative to insulin or other medications for the treatment of diabetes, and is clinically proven to regenerate or repair the pancreatic beta cells that produce insulin and to lower blood sugar levels in persons with diabetes. See Complaint at ¶ 31. The representations made with regards to AntiBetic are false or were not substantiated at the time the representations were made, constituting a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. See Complaint at ¶ 32.

Defendants have represented, either expressly or by implication, that G.H.3 is clinically proven to reverse and prevent age-related memory loss, dementia, and Alzheimer's disease, and can increase life spans by 29%. See Complaint at ¶ 33. The representations made with regards to G.H.3 are false or were not substantiated at the time the representations were made, constituting a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. See Complaint at ¶ 34.

Defendants have represented, either expressly or by implication, that ChitoPlex enables consumers to lose substantial weight without the need for a restricted calorie diet or exercise, reverse obesity, and is proven to cause weight loss based on a 1994 double-blind, placebo-controlled chitosan study conducted in Finland that resulted in chitosan subjects losing an average of 15 pounds in four weeks while consuming their normal diet. See Complaint at ¶ 35. The representations made with regards to ChitoPlex are false or were not substantiated at the time the representations were made, constituting a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. See Complaint at ¶ 36.

The Defendants have represented, either expressly or by implication, that Testerex is effective in treating impotence or erectile dysfunction in 62-95% of users, and is safe with no harmful side effects. See Complaint at ¶ 37. The representations made with regards to Testerex are false or were not substantiated at the time the representations were made, constituting a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. See Complaint at ¶ 34.

Through the use of the statements contained in advertisements, Defendants have represented, directly or by implication that all Gero Vita products

have been scientifically tested and proven to be effective, when in truth and in fact, they have not been. See Complaint at ¶¶ 39-40. Therefore, the making of these representations constitutes a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. Id. at ¶ 40.

Defendants have represented, expressly or by implications, that the *New Life Nutrition* magazine is an independent publication and not paid commercial advertising, when in truth and in fact, the *New Life Nutrition* magazine is not an independent publication, and is paid commercial advertising written and disseminated by Defendants for the purpose of selling their products. See Complaint at ¶¶ 41-42. Therefore, the making of these representations constitutes a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. Id. at ¶ 42.

Defendants have represented, expressly or by implication, that the Council on Natural Nutrition is an independent organization that has expertise in the examination and evaluation of nutritional health products, and that the Council conferred its exclusive Golden Nutrition Award on three of Defendants' products, including G.H.3, and ChitoPlex, based upon its senior scientific editors' independent, objective, and valid examination and evaluation of thousands of nutritional health products, using procedures generally accepted by experts in the relevant fields to yield accurate and reliable results. See Complaint at ¶ 43.

In truth and in fact, the Council on Natural Nutrition is not an independent organization that has expertise in the examination or evaluation of nutritional health products, and it did not confer its exclusive Golden Nutrition Award on the Defendants' products, including G.H.3, and ChitoPlex, based upon

its senior scientific editors' independent, objective, and valid examination and evaluation of thousands of nutritional health products, using procedures generally accepted by experts in the relevant fields to yield accurate and reliable results. See Complaint at ¶ 44. The Council on Natural Nutrition was established by Defendants and has been used by Defendants for the purpose of selling their products. Id.

In addition, the Council on Natural Nutrition does not have a staff of "senior scientific editors" with expertise in evaluating health-related products, and at least one of the "senior scientific editors" is or was an employee of Defendants with no scientific training in the examination or evaluation of nutritional health products. Id. The making of these representations constitutes a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. Id.

Defendants have represented, expressly or by implication, that Dr. Ronald Lawrence, Director of the Council on Natural Nutrition, has endorsed Defendants' products, including G.H 3 and ChitoPlex, based upon his independent, objective evaluation of the products. See Complaint at ¶ 45. Defendants have failed to disclose that Dr. Lawrence and the Council on Natural Nutrition have material connections to Defendants. Id. Among other things, Dr. Lawrence is a paid endorser of Defendants' products and is or was a member of Defendant G.B. Data Systems' Board of Directors. Id.

The Council on Natural Nutrition is or was an organization established by Defendants and is or was used for the purpose of advertising and promoting their products. Id. Therefore, the failure to disclose these facts, in light of the representations made, constitutes a deceptive practice, and the making of

false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. Id.

Consumers throughout the United States have suffered and continue to suffer substantial monetary loss as a result of the Defendants' unlawful acts or practices. See Complaint at ¶ 46. In addition, Defendants have been unjustly enriched as a result of their unlawful practices. Id. Absent relief, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest. Id.

B. Procedural Summary

On May 27, 2003, the Commission filed its Complaint for Permanent Injunction and Other Equitable Relief in the United States District Court for the Central District of California against Defendants.[1]

On May 28, 2003, the Commission filed Pro Hac Vice applications on behalf of Theodore H. Hoppock, Jill F. Dash, Mamie Kresses, David P. Frankel, and Rosemary Rosso.

On June 17, 2003, the Commission and Defendant Tepper[2] filed a Stipulation to Extend Time to Respond to Complaint.

[1] The named Defendants in the Complaint include A. Glenn Braswell, JOL Management Co., G.B. Data Systems, Inc., Gero Vita International, Inc., Theraceuticals, Inc., and Ron Tepper.

[2] The stipulation was by and between Plaintiff Federal Trade Commission and Ron Tepper. The parties stipulated that the time in which Defendant Tepper could respond to the Complaint was extended for 27 days.

On September 15, 2003, this Court entered an Order Denying Defendant Ron Tepper's Motion to Dismiss Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(1), 12(b)(6), 9(b) & 9(f).

On September 25, 2003, Defendant Tepper filed an Answer to Complaint and Affirmative Defenses. In the Answer, Defendant Tepper made a Demand for Trial by Jury.

On September 26, 2003, Defendant A. Glenn Braswell, JOL Management Co., G.B. Data Systems, Inc., and Theraceuticals, Inc. filed an Answer and Affirmative Defenses Memorandum.

On October 3, 2003, this Court filed an Order Setting Scheduling Conference for December 1, 2003.

On October 17, 2003, Plaintiff filed a Motion to Strike Various Affirmative Defenses of Defendants A. Glenn Braswell, JOL Management Co., G.B. Data Systems, Inc., Theraceuticals, Inc., and Ron Tepper ("Motion to Strike"), which is before this Court.[4]

II. Discussion

A. Standard

Federal Rule of Civil Procedure 12(f) provides that "[u]pon motion made by a party . . . the court may order stricken from any pleading any insufficient defense, or any redundant . . . matter." (FED.R.CIV.P. 12(f)). A Rule

[4] The FTC's Motion to Strike requests that this Court strike eight affirmative defenses plus two additional statements raised in the Answer filed by A. Glenn Braswell, JOL Management Co., G.B. Data Systems, Inc., Gero Vita International, Inc. and Theraceuticals, Inc. In addition, in the same Motion to Strike, the FTC requests that this Court strike nine affirmative defenses plus two additional statements raised in Defendant Ron Tepper's Answer. (See Motion to Strike at 1.)

12(f) motion to strike is "proper when a defense is insufficient as a matter of law." (See FTC v. Medicor, LLC, 2001 WL 765628, *1 (C.D.Cal.) (citing Schwarzer, Tashima & Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial* ¶ 9:378 (2001)). It is the moving party's burden to establish the following: (1) the absence of questions of fact; (2) that any questions of law are beyond dispute; (3) that there is no set of circumstances under which the challenged defense could succeed; and (4) presentation of the defense would prejudice the moving party. (See Schwarzer, at ¶¶ 9:381, 9:375, 9:407.) Thus, a motion to strike will not be granted if the insufficiency of the defense is not clearly apparent, or if it raises factual issues that should be determined by a hearing on the merits. (See Medicor, 2001 WL 765628 at *1 (citing 5A C. Wright & A. Miller, Federal Practice and Procedure (2d ed. 1990) § 1381 at 678)). The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial . . ." Id. (citing Sidney-Vinstein v. A.H. Robins Co, 697 F.2d 880, 885 (9th Cir. 1983).

B. Analysis

The FTC seeks to strike eight of ten affirmative defenses asserted by Defendants. (See Answer and Affirmative Defenses of Defendant A. Glenn Braswell, JOL Management Co., G.B. Data Systems, Inc., and Theraceuticals, Inc. ("Answer") at 13-14). This Court addresses each of these below. At the outset, though, this Court notes the high threshold involved in striking an affirmative defense. (See Standard, supra.) To a large extent, in seeking to strike certain affirmative defenses, the FTC is asking this Court to determine factual issues and the merits of the defenses and/or claims asserted. However, at this juncture of the litigation, this Court cannot do so. Nonetheless, it should also be noted that while

this Court may not strike the defense at this time, Defendants will still be required to ultimately prove the merits of the defense.

1. This Court Denies the FTC's Motion to Strike Defendants' First Affirmative Defense of Good Faith to the Extent it is Asserted Against the Granting of a Permanent Injunction

The FTC argues that Defendants' affirmative defense of good faith must be stricken because "the law is well-established that good faith is not a defense to the FTC Act." (See Motion to Strike at 4.) This Court agrees that good faith may not be offered as an affirmative defense to a violation of section 5 of the FTC Act. However, to the extent that the affirmative defense is asserted *against the granting of a permanent injunction*, it is permitted.

A careful reading of the case law makes it clear that while good faith is not relevant to whether the actual violation of section 5 of the FTC Act occurred, it *is* relevant to the issue of whether a permanent injunction is appropriate. (See Medicor, 2001 WL 765628 at **2-3; Hang-Ups, 1995 WL 914179 at *3). This is because the granting of a permanent injunction requires that "there exist some cognizable danger of recurrent violation." (See Hang-Ups, 1995 WL 914179 at *3 (citing United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)). The determination of whether the alleged violations are likely to recur, requires the court to look at: (1) the deliberateness . . . of the present violation, and (2) the violator's past record." (See id. (citing Sears, Roebuck & Co. v. FTC, Id.676 F.2d 385, 392 (9th Cir. 1982)). As the court in Hang-Ups noted, "good faith on the part of the defendant[s] could be determinative of the first factor and therefore preclude injunctive relief." (See Hang-Ups, 1995 WL 914179 at *3.)

Since the FTC is seeking a permanent injunction against Defendants (see Complaint at 1-2), the issue of whether the wrongful acts were "deliberate" is indeed relevant to the issue of whether a permanent injunction is appropriate. (See Complaint at 1-2.) This Court declines the FTC's invitation to ignore the Medicor and Hang-Ups decision and denies the FTC's Motion to Strike Corporate Defendants' good faith affirmative defense *to the extent it is asserted against the granting of a permanent injunction.*[5]

2. This Court Denies the FTC's Motion to Strike Defendants' Second Affirmative Defense of Laches.

The FTC moves to strike Defendants' laches affirmative defense because "it is well established that laches is not a defense to a civil suit to enforce a public right or to protect a public interest." (See Motion to Strike at 4.) In response, Defendants argue that the law is, in fact, not well-settled, and that the laches defense requires a factual determination making it inappropriate to strike it at this juncture. (See Opposition at 8-9.)

---

[5] The FTC cites numerous cases that purportedly support the proposition that good faith is not a defense to violations of section 5 of the FTC Act. However, the FTC's argument is not wholly persuasive for several reasons. First, while the FTC gives great weight to decisions from several other jurisdictions, it gives short shrift to two cases within this jurisdiction that expressly upheld the assertion of a good faith defense against an FTC complaint seeking permanent injunctive relief and individual liability (i.e. the Medicor and Hang-Ups decisions). Second, although the FTC suggests otherwise, the ultimate outcome of the Medicore case is irrelevant to whether the affirmative defense is sufficient to survive a motion to strike. Third, in support of its position, the FTC cites Hang-Ups; however, as both parties noted in their Oppositions, it is clear that the quotation used was taken *completely out of context.*

Traditionally, the doctrine of laches has not been available against the government in a suit by it to enforce a public right or protect a public interest. (See Hang-Ups 1995 WL 914179 at *4 (quoting United States v. Ruby Co., 588 F.2d 697, 705 n.10 (9th Cir. 1978)). However, laches "may be a defense against the government if 'affirmative misconduct' by the government is shown." (Id. (quoting Ruby, 588 F.2d at 705 n.10)). The applicability of laches against the government is determined on a case-by-case basis. (See Hang-Ups, 1995 WL 914179 at *4 (noting that "[t]he facts of the case should decide whether there has been affirmative misconduct by the government such that laches might apply"); Occidental Life Ins. Co. of California v. E.E.O.C., 432 U.S. 355, 373 (1977) (determined on a case-by-case basis)).

Based on the above, the granting of the FTC's Motion to Strike this affirmative defense under Fed.R.Civ.P. 12(f) is improper because (1) it is not beyond dispute whether the laches defense is applicable; (2) there would be a set of circumstances under which the laches defense could succeed; and (3) even if the laches defense does apply, a potential question of fact regarding the presence of "affirmative misconduct" by the government exists. In addition, while the FTC argues that Defendants have conceded that they do not intend to allege bad faith or improper purpose and that Defendants' assertion that affirmative misconduct may be present is "nothing but bare bones conclusory allegations," Defendants vigorously reject this assertion, and note that the FTC's suggestion that Defendants have conceded the absence of affirmative misconduct in prior pleadings is "absurd." (See Opposition at 9.) This further supports this Court's decision not to strike Defendants' affirmative defense of laches at this time.

3. This Court Grants the FTC's Motion to Strike Defendants' Third Affirmative Defense of Failure to Exhaust Administrative Remedies

The FTC argues that Defendants' third affirmative defense, failure to exhaust administrative remedies, must be stricken for several reasons. First, "[t]he plain reading of 13(b) of the FTC Act . . . makes clear that the Commission is not required to pursue its case administratively prior to invoking this Court's jurisdiction." (See Motion to Strike at 5.) Second, the FTC argues that the FTC's authority to bring Section 13 (b) actions directly in federal court has been examined and upheld by numerous courts. (Id.)

The right to bring Section 13(b) actions directly in federal court has indeed been examined and upheld by numerous district and appellate courts. (See Motion to Strike at 5 (citing United States v. JS & S Group, Inc., 716 F.2d 451 (7th Cir. 1983) (holding that the FTC may seek a permanent injunction in federal court . . . without having first instituted administrative proceedings))). This authority was restated in the Ninth Circuit in FTC v. Pantron I Corp., where the court held that Section 13(b) "gives the federal courts broad authority to fashion appropriate remedies for violations of the [FTC] Act." (See Pantron, 33 F.3d 1312, 1314-15 (9th Cir. 1994)). The language of the FTC Act states: "Whenever the Commission has reason to believe . . . that any person, partnership, or corporation is violating or is about to violate, any provision of law enforced by the Federal Trade Commission . . . the Commission may . . . bring suit in a district court of the United States to enjoin any such act or practice. (See 15 U.S.C. § 53(b)(1) (2003)).

Contrary to Defendants' argument, there is no requirement in either Section 13(b) or Section 53(b) that administrative remedies be exhausted before

the FTC is authorized to bring suit in a district court of the United States. Further, the lack of any case law to the contrary leads this Court to grant the FTC's Motion to Strike Defendants' affirmative defense of failure to exhaust administrative remedies.

4. This Court Grants the FTC's Motion to Strike Defendants' Fourth Affirmative Defense of Statute of Limitations

Defendants argue that the FTC's claims under Section 13(b) are subject to the three-year statute of limitations present in Section 19 of the FTC Act. (See Opposition at 10-11.) The gist of Defendants' argument is that since ancillary relief in the form of consumer relief is available under Section 13(b), claims under Section 13(b) must at least comply with the consumer relief provisions of Section 19, including the three-year statute of limitations. (See Opposition at 13-14.) In contrast, the FTC contends that, in addition to case law, the clear language of Section 19 precludes the application of the three-year statute of limitations to actions brought under Section 13(b). (See Motion to Strike at 7.)

Under Section 13(b), ancillary equitable relief, including rescission of contracts and monetary relief in the form of consumer redress and disgorgement for violations of the FTC Act is authorized. (See e.g., Pantron I Corp., 33 F.3d 1088 (9th Cir. 1994); FTC v. Silueta Dist., Inc., 1995 WL 215313, *7 (N.D. Cal. 1995) (noting that the Ninth Circuit's interpretation of Section 13(b) allows federal courts to broadly apply their equitable powers)). Although Section 13(b) does not explicitly state or refer to any statute of limitations (see Motion to Strike at 7), several courts have held that "the three-year statute of limitations contained in Section 19 of the FTC Act is *not* applicable to Section 13(b) cases." (See FTC Minuteman Press, 53 F.Supp.2d 248 (E.D. N.Y. 1998); United States v. Building

Inspector of America, Inc., 894 F. Supp. 507, 514 (D. Mass. 1995)).[6] Section 19 provides in relevant part: "Remedies in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. *Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.*"

Based on the absence of language in Section 13(b) indicating the presence of a statute of limitations and the clear language in Section 19, this Court finds that the FTC's Motion to Strike Defendants' statute of limitations affirmative defense should be granted.

5. This Court Denies the FTC's Motion to Strike Defendants' Fifth Affirmative Defense of Offset/Setoff

In seeking to strike the affirmative defense of offset/setoff, the FTC argues that the appropriate measure of equitable monetary relief pursuant to Section 13(b) of the FTC Act is the full amount lost by consumers without regard to Defendants' profits and with a deduction only for refunds already made. (See Motion to Strike at 8 (citing FTC v. Febre, 128 F.3d 530, 536 (7th Cir. 1997)). Defendants respond that "the FTC's objections to offset of monetary relief are premature and unsupported." (See Opposition at 15.) Moreover, Defendants argue that the determination of whether benefits received by consumers can be considered in determining relief is a factual matter. (Id. at 18.)

Based on the numerous cases cited by both parties in support of their respective positions, this Court finds that a determination as to the applicability of

---

[6] As the FTC notes in its Reply, "the Commission determined to pursue this case in federal court, pursuant to 13(b) *rather than through . . . Section 19(a)(2) . . . a decision . . . within its sound discretion.*" (See Reply at 5 n.4.)

this affirmative defense at this time is premature. In other words, the law that an offset/setoff is not allowed is not "beyond dispute." In fact, while the FTC argues that *no* deductions are proper, the FTC's own case law demonstrates that the types of "offset/setoff" sought by Defendants are frequently deducted from overall judgments. For example, in Medicor,[7] the court affirmed the $16.6 million disgorgement judgment only after noting that the FTC "presented the declaration of an accountant indicating that *refunds, charge backs, and returns have been deducted*. (See Medicor, 217 F.Supp.2d at 1057-58 (emphasis added)). In FTC v. Amy Travel Serv. Inc.,[8] the court actually affirmed a reduction for consumers who received a benefit. (See Amy, 875 F.2d 564, 572 (7th Cir. 1989) (noting that "the magistrate correctly acknowledged the existence of satisfied customers in computing the amount of defendants' liability–customers who actually took vacation trips were excluded when the magistrate computed the amount of restitution awarded")). Finally, in FTC v. SlimAmerica, Inc., the court affirmed an $8.4 million redress judgment and stated, "[t]he appropriate measure for redress is [the] aggregate amount paid by consumers, less *refunds* made by defendants." (See SlimAmerica, 77 F.Supp.2d 1263, 1275-76 (S.D. Fla. 1999)).

Based on the above, it is clear that at least some types of deductions Defendants request have been permitted. This is not to say that this Court will allow them here. Rather, this Court must assess this issue in light of the particular facts of this case as compared to the facts of these other cases. Thus, this Court denies the FTC's Motion to Dismiss Defendants' offset/setoff affirmative defense.

---

[7] See Motion to Strike at 9.

[8] See FTC's Motion to Strike at 9.

6. This Court Grants the FTC's Motion to Strike Defendants' Sixth Affirmative Defense of First Amendment Violation

Defendants incorporate the arguments explained in Defendant Tepper's Motion to Dismiss the Complaint and further assert that the FTC's theory "that a statement is false or misleading simply because the speaker lacked substantiation at the time the statement was made is unconstitutional." (See Opposition at 20.) In response, the FTC argues that this affirmative defense must be stricken. This Court agrees with the FTC.

First, this Court has already ruled that "the mere initiation of this lawsuit does not restrict in any way the [Defendant's] ability to engage in truthful, non-misleading speech . . . At this time, this Court finds that the Commission's allegations, if proven, will establish that Defendants have engaged in commercial speech that is either false or misleading, neither of which would result in the infringement of [Defendants'] First Amendment right of freedom of speech." (See Motion to Strike at 10 (citing Order Denying Defendant Ron Tepper's Motion to Dismiss Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), 9(b) & 9(f) at 19 (Sept. 15, 2003))). As such, This Court finds that Defendants' affirmative defense must be stricken because the issue has already been decided by this Court. (See FED.R.CIV.P. 12(f) (noting that "upon motion made by a party . . . the court may order stricken from any pleading any insufficient defense, or any redundant . . . matter")).

Further, as the FTC argues, the FTC's advertising substantiation requirements have been upheld by numerous circuits, including the Ninth Circuit in Sears, Roebuck & Co. v. FTC, where the court rejected Sears' argument that its First Amendment rights had been violated. (See Sears, 676 F.2d 385, 399-400 (9th Cir. 1982)). The court stated: "The Commission may require prior reasonable

substantiation of product performance claims after finding violations of the [FTC] Act, without offending the First Amendment." (Id.) Thus, a violation of the First Amendment does not result from the mere initiation of a lawsuit.

7. This Court Denies the FTC's Motion to Strike Defendants' Seventh Affirmative Defense of Waiver

Defendants assert that assessing the scope of consumer harm is an issue that cannot be addressed until after "the evidence is in." (See Opposition at 22.) In other words, Defendants argue that there is a significant issue of fact that is unresolved at this stage of the pleadings, making it inappropriate to strike Defendants' affirmative defense. In response, the FTC argues that if the FTC is able to prove that "consumers' purchasing decisions were founded, in part, on false, deceptive or unsubstantiated claims, then such claims are clearly actionable under longstanding and well-established precedent, irrespective of whether consumers entered into contracts." (See Motion to Strike at 12.) Again, based on the parties' own contentions, it is clear that the determination before this Court is premature at the pleading stage.

The FTC Act may be violated if a defendant "induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract." (See Resort Rental Car Sys., Inc., 518 F.2d 962, 964 (9th Cir. 1975)). Since the determination of whether a waiver is present hinges on a finding of deception, this question of fact requires this Court to deny the FTC's Motion to Strike Defendants' affirmative defense of waiver.

8. This Court Grants the FTC's Motion to Strike Defendants' Eighth Affirmative Defense That an Adequate Remedy at Law for Consumer Relief Exists

Defendants' eighth affirmative defense is that injunctive relief is not appropriate in this case because there is an adequate remedy at law." (See Opposition at 23.) Defendants argue once more that "consumer relief claims must be pursued under Section 19," and the FTC should not "be encouraged to circumvent the conditions Congress placed upon suits seeking consumer relief in Section 19 of the FTC Act." (See Opposition at 23.)[9] In response, the FTC cites Hang-Ups, where the court found that the "existence of legal remedies for individual consumers under state law does not bar the FTC from seeking equitable relief under the FTC Act; to find otherwise would nullify much of the FTC Act." (See Hang-Ups, 1995 WL 914179 at *4.)

This Court agrees with the rationale in Hang-Ups, and therefore finds that Defendants' affirmative defense of "adequate remedy at law" must be stricken as insufficient.

9. Defendants' Ability to Assert Additional Affirmative Defenses is Governed by FED.R.CIV.P. 15

The FTC seeks to prevent Defendants from asserting additional defenses in violation of Federal Rule of Civil Procedure 12(b). (See Motion to Strike at 17.) Specifically, it takes issue with Defendants' statement in their Answer that they "reserve the right to *assert additional affirmative defenses* that

---

[9] Again, this Court notes that restrictions placed on Section 19 are not relevant as the FTC has chosen to pursue this cause of action under Section 13(b) of the FTC Act.

become apparent during discovery." (See Answer at 14 (emphasis added)). This Court agrees with the FTC that Defendants' right, if any, to assert additional affirmative defenses is governed by Fed. R. Civ. P. 15 and an appropriate request to seek leave to amend the Answer to do so.

10. To the Extent that the Relief Sought by the FTC is Limited to a Permanent Injunction and Other Ancillary Relief Under Section 13(b), Defendants' Request for a Jury Trial is Denied

Defendants argue that they are entitled to a trial by jury because the relief sought by the FTC is "so significant that it cannot fairly be said [to be] a request for prospective injunctive relief." (See Opposition at 25.) In response, the FTC contends that Defendants have no right to a jury trial under Section 13(b) because the relief sought is limited to "a permanent injunction and other equitable ancillary relief derived from the Court's authority to issue such a permanent injunction, pursuant to Section 13(b) of the FTC Act." (See Motion to Strike at 18 (citing FTC v. H.N. Singer, Inc., 1982 WL 1907 **38-39 (N.D. Cal. 1982); Hang-Ups, 1995 WL 914179 at *3).

This Court agrees with the FTC that the cases cited by it make clear that there is no right to a trial by jury in an action under Section 13(b) of the FTC Act, where the monetary relief the FTC seeks is not punitive, but rather is ancillary to the requested injunctive relief.[10] To the extent that Defendants believe such monetary relief may become unlimited or punitive in nature, the FTC is bound by its representations that it "would limit its request for monetary relief to the amount paid by consumers, less any refunds," and more importantly, it is bound by the equitable nature of the relief sought.

---

[10] This Court also notes that Defendants have cited no case law in support of their argument to the contrary.

III. Conclusion

Based on the foregoing, this Court **Denies** the FTC's Motion to Strike Defendants' **First, Second, Fifth and Seventh** affirmative defenses. This Court **Grants** the FTC's Motion to Strike as to Defendants' **Third, Fourth, Sixth, and Eighth** affirmative defenses. This Court finds that Defendants' ability to assert additional affirmative defenses is governed by FED.R.CIV.P. 15. This Court further finds that, to the extent that the relief sought by the FTC is limited to a permanent injunction and other ancillary relief under Section 13(b), Defendants' request for a jury trial is denied.

IT IS SO ORDERED.

DATED: NOV 10 2003

DICKRAN TEVRIZIAN

Dickran Tevrizian, Judge
United States District Court

CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of November, 2004 filed and served the attached **OPPOSITION TO NON-PARTY ARENT FOX PLLC'S MOTION TO QUASH** upon the following as set forth below:

(1) the original and one (1) paper copy filed by hand delivery and one electronic copy via email to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room H-159
Washington, D.C. 20580
E-mail: secretary@ftc.gov

(2) two (2) paper copies served by hand delivery to:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Pennsylvania Ave., N.W. Room H-112
Washington, D.C. 20580

(3) one (1) electronic copy via email and one (1) paper copy via first class mail to:

Max Kravitz, Esq.
Kravitz & Kravitz LLC
145 East Rich Street
Columbus, OH 43215
mkravitz@kravitzlawnet.com
614-464-2000
fax: 614-464-2002

(4) one (1) electronic copy via email and one (1) paper copy via first class mail to:

James A. Kaminski
Arent Fox, PLLC
1050 Connecticut Avenue
Washington, D.C. 20009
Kaminski.James@arentfox.com

I further certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original, and that a paper copy with an original signature is being filed with the Secretary of the Commission on the same day by other means.

Janet M. Evans