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

In the Matter of	)	
DYNAMIC HEALTH OF FLORIDA, LLC CHHABRA GROUP, LLC DBS LABORATORIES, LLC VINEET K. CHHABRA aka VINCENT K. CHHABRA, and JONATHAN BARASH, Respondent.	)	Docket No. 9317

ORDER ON COMPLAINT COUNSEL'S MOTION TO STRIKE RESPONDENTS' DEFENSES

I.

On October 20, 2004, Complaint Counsel filed a motion to strike Respondents' defenses ("Motion"). On November 1, 2004, Respondents Dynamic Health of Florida, LLC, Chhabra Group, LLC, and Vincent Chhabra (collectively referred to as "Dynamic Health" or "Respondents") filed their opposition ("Opposition").

II.

Complaint Counsel moved to strike the first through fifth defenses asserted in Respondents' Answers on the grounds that the defenses inject irrelevant or immaterial issues; assert defenses that are insufficient as a matter of law; and would prejudice Complaint Counsel by threatening an undue broadening of the issues. Motion at 1. Respondents contend that motions to strike are disfavored and that the defenses pled by Respondents are relevant and pertinent to the proceeding.

III.

A.

The Commission's Rules of Practice do not specifically provide for motions to strike, but under appropriate circumstances such motions may be granted. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 137, at *2 (Sept. 14, 2000); *In re Warner-Lambert Co.*, 82 F.T.C. 749

(Mar. 2, 1973). However, motions to strike are generally disfavored. *In re Dura Lube Corp.*, 1999 FTC LEXIS 251, at *1 (Aug. 31, 1999); *In re Home Shopping Network, Inc.*, 1995 FTC LEXIS 259, at *4 (July 24, 1995).

In *Dura Lube*, it was noted that "Commission precedent varies greatly on the appropriate standard for granting a motion to strike. Some cases have held that issues of law or fact which are irrelevant or immaterial can be resolved on a motion to strike, and other cases have held that it is inappropriate to resolve issues of law or fact on a motion to strike." 1999 FTC LEXIS 251, at *2 (citations omitted). The standard that was articulated in *Dura Lube* was that "a motion to strike defenses or portions of an answer will be granted when the answer or defense (1) is unmistakably unrelated or so immaterial as to have no bearing on the issues and (2) prejudices Complaint Counsel by threatening an undue broadening of the issues or by imposing a burden on Complaint Counsel." 1999 FTC LEXIS 251, at *4-5; *see also Hoechst Marion Roussel*, 2000 FTC LEXIS 137, at *3.

B.

The first defense raised by Respondents is whether the representations at issue qualify as protected commercial speech under the First Amendment while the second defense raised by Respondents is whether the Complaint places greater restrictions than necessary on commercial speech. Answer at 6. Complaint Counsel argues that the Complaint only challenges misleading claims which are not entitled to First Amendment protection and that the FTC's requirement of prior substantiation does not infringe constitutionally protected speech. Motion at 3-5. Respondents contend that whether the statements in question are false and misleading is relevant and that the government must demonstrate that it is utilizing the lest restrictive means of regulating commercial speech pursuant to the recent Supreme Court case of *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002). Opposition at 2-4.

It is axiomatic that truthful commercial speech is protected by the First Amendment but that the government may limit forms of communication more likely to deceive the public than to inform it. *Central Hudson Gas & Electric Corp. v. Public Services Comm'n*, 447 U.S. 350, 384 (1980); *see also Edenfield v. Fane*, 507 U.S. 761, 768 (1993). Prior cases have refused to strike the First Amendment as a defense while other cases have stricken the defense. *Compare Home Shopping Network*, 1995 FTC LEXIS 259, at *1-2 *and In re Kroger Co.*, 1977 FTC LEXIS 70, at *4-5 (Oct. 18, 1977) *with In re Metagenics, Inc.*, 1995 FTC LEXIS 2, at *2-3 (Jan. 5, 1995).

While deceptive speech is not entitled to First Amendment protection, Respondents may challenge whether the speech at issue is deceptive and whether it violates the First Amendment under *Thompson*, as Respondents contend. However, it is not appropriate to reach the merits of the First Amendment arguments at this stage of the proceedings. Complaint Counsel has not demonstrated that these defenses are unmistakably unrelated or so immaterial as to have no bearing on the issues. Accordingly, Complaint Counsel's motion to strike Respondents' first and second defenses is **DENIED**.

C.

The third defense raised by Respondents is whether Congress intended the FTC to have authority to penalize advertising statements that are permissible under the Dietary Supplement Health and Education Act ("DSHEA"). Answer at 7. Complaint Counsel argues that this defense is irrelevant and that whether Respondents' claims are consistent with the DSHEA has no bearing on the legality of Respondents' claims under the FTC Act. Opposition at 6-8. Respondents contend that the merits of the arguments should not be decided in a motion to strike and that proper application of the FTC Act must be determined in conjunction with other statutes. Opposition at 4-6.

Complaint Counsel primarily argues the merits of Respondents' third defense. At this stage in the proceedings, however, that determination is premature. The question presented by the motion to strike is whether Respondents' defenses are unmistakably unrelated or so immaterial as to have no bearing on the issues and prejudice Complaint Counsel. *Dura Lube*, 1999 FTC LEXIS 251, at *4-5. The parties have cited no cases regarding the relationship between the FTC Act and the DSHEA and a motion to strike is not the appropriate stage of the proceedings to determine this relationship. Complaint Counsel has not demonstrated that this defense is unmistakably unrelated or so immaterial as to have no bearing on the issues raised by the Complaint and the proposed remedy. Accordingly, Complaint Counsel's motion to strike Respondents' third defense is **DENIED**.

D.

The fourth defense raised by Respondents is entrapment by estoppel. Answer at 7. Complaint Counsel argues that equitable doctrines are not applicable as a defense to an action brought by the government in the public interest and that the FDA statement allegedly relied upon by Respondents contained the caveat that "[m]anufacturers are responsible for determining whether claims for their products can be appropriately substantiated." Motion at 9. Respondents contend that the defense of entrapment by estoppel may be raised against the government and that an FDA statement indicated that claims related to a dietary supplement can be adequately substantiated by evidence relating to the ingredients in the supplement, rather than the specific formulation utilized in the supplement itself. Opposition at 6-9.

Equitable defenses generally cannot be asserted against the government when the government is acting in the public interest. *United States v. Summerlin*, 310 U.S. 414, 416 (1939); *United States v. Phillip Morris Inc.*, 300 F. Supp.2d 61, 65 (D.D.C. 2004). The cases cited by Respondents involve criminal actions or actions where respondents claimed to have been misled by the *responsible* administrative agency. Although there may be exceptions to the general rule that equitable defenses cannot be asserted against the government, *see Phillip Morris*, 300 F. Supp.2d at 70, 74 n.17, Respondents have not demonstrated any exceptional circumstances that would justify departure from the general rule. Moreover, allowing this defense would impose a burden on Complaint Counsel by unduly broadening the scope of discovery and issues involved in the case. Accordingly, Complaint Counsel's motion to strike Respondents' fourth defense is **GRANTED**.

E.

The fifth defense raised by Respondents challenges the merits of the FTC's complaint. Answer at 7. Complaint Counsel argue that this defense should be stricken because it does not include a concise statement of facts. Motion at 10. Respondents contend that their Answer specifically denies several of the allegations set out in the Complaint. Opposition at 9. Because this defenses directly denies the allegations of the Complaint, the defense is relevant and material and will not broaden the issues or impose a burden on Complaint Counsel. Accordingly, Complaint Counsel's motion to strike Respondents' fifth defense is **DENIED**.

IV.

As set forth above, Complaint Counsel's motion to strike Respondents' defenses is **GRANTED in part and DENIED in part**.

The parties are reminded that allowing these defenses is not an open invitation to needlessly confuse and compound the issues, increase the scope of discovery, or prolong these proceedings. *Dura Lube*, 1999 FTC LEXIS 251, at *5. The "mere fact that respondent alleges a matter as an affirmative defense does not necessarily open the door to unlimited discovery." *In re Ford Motor Co.*, 1976 FTC LEXIS 38, at *2 (Dec. 3, 1976). Pursuant to Rule 3.31(c), discovery shall be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to any pending defenses. 16 C.F.R. § 3.31(c)(1). Once the factual record is established, the merits of Respondents' defenses may be addressed.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: November 9, 2004