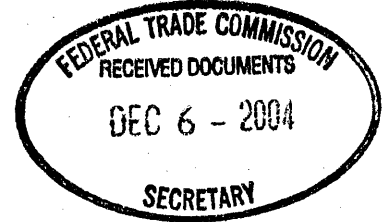


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)
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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 DENYING NON-PARTY ARENT FOX'S MOTION TO QUASH

I.

On November 22, 2004, non-party Arent Fox PLLC ("Arent Fox") filed a motion to quash a subpoena *duces tecum* from Complaint Counsel ("Motion"). On November 29, 2004, Complaint Counsel filed its opposition to the Motion ("Opposition"). For reasons set forth below, the Motion is **DENIED**.

II.

Arent Fox moves to quash the subpoena *duces tecum* issued by Complaint Counsel on November 1, 2004. Arent Fox argues that the documents requested by the subpoena are subject to the attorney-client and work product privileges and that the Court may limit disclosure of these privileged documents. Motion at 2-4. Arent Fox represents that Respondents have not indicated whether they wish to waive all claims of privilege. Motion at 4. Complaint Counsel argues that the work product privilege is inapplicable to ordinary business documents not shown to be prepared in anticipation of litigation and that Respondents' reliance on an advice of counsel defense waives the attorney-client privilege.

III.

The well recognized rule of *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) protects the work product of lawyers from discovery unless a substantial showing of necessity or justification is made. Under the Federal Trade Commission's rules, work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." 16 C.F.R. § 3.31(c)(3). Work product that reveals attorney-client communications or the attorneys' mental processes in evaluating the communications "cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981).

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Id.* at 389. The purpose of the attorney-client privilege is to facilitate full and frank disclosure between attorneys and clients. *Id.* The attorney-client privilege protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance." *Fisher v. United States*, 425 U.S. 391, 403 (1976). The "party claiming the privilege carries the burden of demonstrating that: (1) the attorney-client privilege applies; (2) the communications were protected by the privilege; and (3) the privilege was not waived." *United States v. Aramony*, 88 F.3d 1369, 1389 (4th Cir. 1996). The "burden is on the party opposing discovery to show that the attorney-client privilege applies, and mere conclusory statements will not suffice to meet that burden." *Allendale Mutual Ins. Co. v. Bull Data Systems, Inc.*, 152 F.R.D. 132, 139 (N.D. Ill. 1993); see also *United States v. White*, 950 F.2d 426, 430-31 (7th Cir. 1991); *Alexander v. FBI*, 192 F.R.D. 42, 45 (D.D.C. 2000).

The attorney-client privilege may be implicitly waived when advice of counsel is raised as a defense. *United States v. Workman*, 138 F.3d 1261, 1263 (8th Cir. 1998); *Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 615 (2d Cir. 1964). The attorney-client privilege cannot be used as both a shield and a sword. *Workman*, 138 F.3d at 1264; *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). "Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived." *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992).


In their Answer, Respondents state that they "relied on the advice of counsel" (Answer, ¶¶ 10, 16) in response to allegations that they "represented . . . that they possessed and relied upon a reasonable basis that substantiated the representations" made in the advertisements for PediaLoss and Fabulously Feminine (Complaint, ¶¶ 10, 16). In Respondents' preliminary witness list, paragraph one states that "[a] representative of [Arent Fox] may be called to testify, without limitation, to Respondents' claim that the challenged advertising was prepared and approved by Arent Fox." Opposition, Ex. B at ¶ 1. Respondents will not be permitted to rely on the defense of advice of counsel and call a law firm representative to testify regarding the preparation and approval of the advertising without allowing Complaint Counsel appropriate discovery. By relying on advice of counsel as a defense, Respondents waived the attorney-client privilege. Moreover, Complaint Counsel has demonstrated that it has a substantial need of the materials in the preparation of its case and it is unable without undue hardship to obtain the

substantial equivalent of the materials by other means as the information may not be available elsewhere. Accordingly, neither the work product nor the attorney-client privileges protect the documents from discovery.

IV.

As set forth above, non-party Arent Fox's motion to quash Complaint Counsel's subpoena *duces tecum* is **DENIED**. Arent Fox shall respond to Complaint Counsel's subpoena *duces tecum* within fifteen days of the date of this Order.

ORDERED:



Stephen J. McGuire
Chief Administrative Law Judge

Date: December 6, 2004

