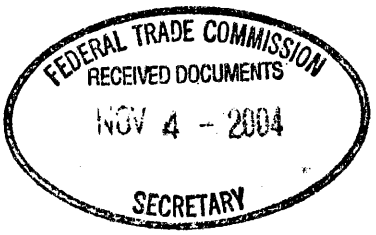
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of	)	
BASIC RESEARCH, LLC A.G. WATERHOUSE, LLC KLEIN-BECKER USA, LLC NUTRASPORT, LLC SOVAGE DERMALOGIC LABORATORIES, LLC BAN, LLC d/b/a BASIC RESEARCH, LLC OLD BASIC RESEARCH, LLC, BASIC RESEARCH, A.G. WATERHOUSE, KLEIN-BECKER USA, NUTRA SPORT, and SOVAGE DERMALOGIC LABORATORIES DENNIS GAY DANIEL B. MOWREY d/b/a AMERICAN PHYTOTHERAPY RESEARCH LABORATORY, and MITCHELL K. FRIEDLANDER, Respondents.	)	Docket No. 9318

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

I.

On August 20, 2004, Complaint Counsel filed a motion to strike Respondents' additional defenses ("Motion"). On September 10, 2004, Basic Research, L.L.C.; A.G.Waterhouse, L.L.C.; Klein-Becker USA, L.L.C.; Nutrasport, L.L.C.; Sovage Dermalogic Laboratories, L.L.C.; Ban, L.L.C., (collectively the "Corporate Respondents"); and Dennis Gay; Daniel B. Mowrey; and Mitchell Friedlander (collectively "Respondents") filed their opposition ("Opposition"). On September 28, 2004, Complaint Counsel filed its reply. On October 28, 2004, as directed by the Court, both parties filed supplemental briefs (Supp.) in order to adequately address the issues raised by the motion to strike.

II.

Complaint Counsel moved to strike the additional defenses alleged in Respondents' Answers on the grounds that the defenses do not satisfy the fact pleading requirement of Rule 3.12(b); that the defenses are invalid and untenable as a matter of law; and that the defenses are irrelevant and immaterial, serving only to needlessly compound and confuse the issues. Motion at 1. Respondents contend that motions to strike defenses are disfavored; that the defenses are not unrelated or immaterial to this proceeding; and that Complaint Counsel has not identified any undue prejudice to them as a consequence of the issues raised by Respondents' Answers.

III.

The Commission's Rules of Practice do not specifically provide for motions to strike, but the Commission has held that 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.

Respondents' defenses primarily challenge the Federal Trade Commission ("FTC") substantiation policy for dietary supplement and weight-loss claims. However, the issue to be litigated at the trial in this matter is whether Respondents violated the FTC Act's prohibition against false and misleading advertising. The FTC's policy statement therefore does not control the outcome of the case and is not the standard against which Respondents' claims will be judged, except insofar as the policy has been adopted by relevant laws and controlling cases. *Heintz v. Jenkins*, 514 U.S. 291, 298 (1995); *Goswami v. American Collections Enterprise, Inc.*, 377 F.3d 488, 493, n.1 (5th Cir. 2004); *Newman v. Boehm, Pearlstwin & Bright, Ltd.*, 119 F.3d 477, 481 n.2 (7th Cir. 1997); *Amrep Corp. v. FTC*, 768 F.2d 1171, 1178 (10th Cir. 1985). With this background, the various defenses will be addressed in turn.

Fifth Amendment Due Process

Complaint Counsel argues that Respondents' due process defense is not a valid affirmative defense to allegations that Respondents violated the FTC Act; Respondents have fair notice of the Commission's substantiation standard; Respondents' notice or vagueness argument is invalid as a matter of law; Respondents are being afforded due process through these proceedings; the Commission may regulate Respondents' conduct by adjudication without violating due process; and Respondents' due process challenge is unripe, improper, and conflicts with the weight of Commission precedent. Motion at 4-11; Complaint Counsel's Supp. at 10-15.

Respondents argue that due process is a valid defense; a Fifth Amendment defense to this administrative proceeding has been raised properly; and Complaint Counsel's Fifth Amendment argument has no merit. Opposition at 5-15; Respondents' Supp. at 17-24. Respondents initially argued that neither the Administrative Law Judge ("ALJ") nor the Commission had the authority to decide some of the issues raised by their defenses and that the motion to strike should be certified to the Commission. Opposition at 10-11. However, Respondents concede in their supplemental brief that "the ALJ may rule on the threshold issue of whether each defense is unmistakably unrelated or so immaterial as to have no bearing on the issues, and whether they prejudice Complaint Counsel by threatening an undue broadening of the issues or by imposing an undue burden." Respondents' Supp. at 12.

It has long been recognized that an agency may proceed by adjudication rather than rulemaking. *Weight Watchers Int'l, Inc. v. FTC*, 47 F.3d 990, 992 (9th Cir. 1994); *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1251 (2d Cir. 1979). Thus, the issue is whether this adjudicatory proceeding violates Respondents' due process rights. Complaint Counsel primarily argues the merits of Respondents' due process 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. Due process claims may be relevant to FTC adjudicatory proceedings and have been directly addressed by the Commission. *See, e.g., In re Trans Union Corp.*, 2000 FTC LEXIS 23, at *126-32 (Feb. 10, 2000), *petition for review denied*, 245 F.3d 809 (D.C. Cir. 2001) (finding that the Fair Credit Reporting Act was not unconstitutionally vague). Complaint Counsel has not demonstrated that the due process defense is unmistakably unrelated or so immaterial as to have no bearing on the issues raised by the Complaint and the proposed remedy. Determination of the merits of Respondents' Fifth Amendment due process defense must be deferred until a factual record has been developed. Accordingly, Complaint Counsel's motion to strike the Fifth Amendment due process defense pled by each of the Respondents is **DENIED**.

First Amendment

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).

Complaint Counsel argues that Respondents' First Amendment defense should be stricken because the First Amendment does not protect deceptive commercial speech; the First Amendment is not a valid affirmative defense to allegations of deceptive commercial speech; and entry of an Order will not violate the First Amendment. Motion at 11-15. Respondents contend that the First Amendment protects against prior restraints on protected commercial speech; the First Amendment is a valid defense to the FTC's substantiation doctrine; and the Commission's enforcement action against Respondents is unconstitutional and is ripe for adjudication. Opposition at 15-21. Respondents also allege that the ALJ does not have the authority to resolve whether the Commission's regulatory scheme and commercial speech standards violate the U.S. Constitution. Opposition at 16.

While Complaint Counsel is correct that deceptive speech is not entitled to First Amendment protection, Respondents raise the issue of whether the substantiation rules reach truthful commercial speech that would be protected by the First Amendment. Opposition at 19-20. Indeed, the Commission has directly addressed First Amendment defenses in a number of cases. *See, e.g., In re Jay Norris, Inc.*, 91 F.T.C. 751, 854 (May 2, 1978); *In re Rodale Press, Inc.*, 71 F.T.C. 1184, 1229-35 (June 20, 1967). Complaint Counsel has not demonstrated that on these facts the First Amendment defense is unmistakably unrelated or so immaterial as to have no bearing on the issues. Determination of the merits of Respondents' First Amendment defense must be deferred until a factual record has been developed. Accordingly, Complaint Counsel's motion to strike the First Amendment defense pled by each of the Respondents is **DENIED**.

Reason to Believe and Public Interest

Prior to issuing a Complaint, the Commission must have reason to believe that a party has been or is using any unfair method of competition or unfair or deceptive act or practice; and it must appear to the Commission that a proceeding by it would be in "the interest of the public." 15 U.S.C. § 45(b). As previously noted by the Commission:

> it has long been settled that the adequacy of the Commission's "reason to believe" a violation has occurred and its belief that a proceeding to stop it would be in the "public interest" are matters that go to the mental processes of the Commissioners and will not

> be reviewed by the courts. Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred.

In re Exxon Corp., 83 F.T.C. 1759, 1760 (1974). The Commission's reason to believe and public interest determinations may only be reviewed for abuse of discretion or in extraordinary circumstances. *Cotherman v. FTC*, 417 F.2d 587, 594 (5th Cir. 1969); *Hill Bros. v. FTC*, 9 F.2d 481, 484 (9th Cir. 1926); *Boise Cascade Corp. v. FTC*, 498 F. Supp. 772, 779 (D. Del. 1980).

Complaint Counsel argues that there are no extraordinary circumstances justifying these defenses in this case. Motion at 19. Respondents contend that the Commission's regulatory standards are inherently vague and unconstitutional and therefore the Commission's reason to believe and public interest determinations are inherently suspect. Opposition at 33.

Respondents have not presented facts sufficient to even suggest the extraordinary circumstances necessary to review the Commission's reason to believe and public interest determinations, but rather merely reiterate their objections to the FTC policy. Accordingly, Respondents' defenses pertaining to these arguments are deemed legally insufficient. Moreover, any attempts to discover the Commission's reason to believe and public interest determinations prejudices Complaint Counsel by unduly broadening discovery into improper areas such as the mental process of the Commission. *Boise Cascade*, 498 F. Supp. at 779. Accordingly, Complaint Counsel's motion to strike the reason to believe and public interest defenses pled by the Corporate Respondents and Mowrey is **GRANTED**.

APA Agency Action

Complaint Counsel argues that Respondents' Administrative Procedure Act ("APA") defenses of improper agency action and arbitrary and capricious agency action are not valid defenses to allegations that Respondents violated the FTC Act. Motion at 15-16. Respondents contend that the Commission's regulatory scheme governing Respondents' commercial speech constitutes final agency action; the defenses are adequately pled; and Respondents' APA defenses bear directly on the Commission's attempt to hold Respondents' liable for allegedly failing to comply with the Commission's substantiation doctrine. Opposition at 21-25.

Respondents indicate that the "gravamen" of their APA defenses "challenge the Commission's regulatory scheme governing dietary supplemental and weight-loss claims." Opposition at 22. However, the issue in this proceeding is Respondents' allegedly false and misleading advertising, not Complaint Counsel's policy statements. Respondents will be permitted to argue an APA violation as it is relevant to the allegations of the Complaint and the proposed remedy. Complaint Counsel has not demonstrated that these APA defenses are unmistakably unrelated or so immaterial as to have no bearing on the issues. Accordingly,

Complaint Counsel's motion to strike the APA defenses of improper agency action and arbitrary agency action pled by each of the Respondents is **DENIED**.

APA Unreasonable Delay

Complaint Counsel moves to strike Respondents' defense that the Commission unreasonably delayed bringing this case for political or otherwise improper reasons. Motion at 17. Complaint Counsel argues that this defense is unsupported by facts and that a four-year investigation is not unreasonable under the circumstances. Opposition at 17-18. Respondents argue that the unreasonable delay defense is proper and that filing of the Complaint was "coordinated and timed with the commencement of Congressional hearings." Opposition at 27. Respondents also argue that the delay has caused the case to become moot as the products at issue are no longer sold. Opposition at 27. However, the FTC may proceed with an adjudication even though the products at issue are no longer marketed. *Diener's, Inc. v. FTC*, 494 F.2d 1132, 1133 (D.C. Cir. 1974) (*per curium*); *Carter Products, Inc. v. FTC.*, 323 F.2d 523, 531 (7th Cir. 1963). Respondents' defense of delay threatens to unduly broadening discovery into improper areas such as the mental process of the Commission. *Boise Cascade*, 498 F. Supp. at 779. Accordingly, Complaint Counsel's motion to strike the unreasonable delay defense pled by the Corporate Respondents and Mowrey is **GRANTED**.

Puffery, Lack of Dissemination, Causation, or Interstate Commerce

Complaint Counsel seeks to strike Respondents' defenses of puffery, lack of dissemination, causation, and interstate commerce. Complaint Counsel argues that these defenses are negative defenses which directly deny the allegations of the Complaint and therefore should be stricken because they are not affirmative defenses. Motion at 21. Respondents contend that the FTC Rules of Practice do not limit defenses to FTC enforcement actions to affirmative defenses. Opposition at 34. Because these defenses directly deny the allegations of the Complaint, the defenses are not irrelevant or immaterial and will not broaden the issues or impose a burden on Complaint Counsel. Accordingly, Complaint Counsel's motion to strike the puffery defense pled by the Corporate Respondents and Mowrey, the lack of dissemination defense pled by Mowrey and Friedlander, and the lack of causation and lack of interstate commerce defenses pled by Mowrey is **DENIED**.

Laches and Equitable Estoppel

Complaint Counsel seeks to strike the laches and equitable estoppel defenses, arguing that equitable defenses cannot be asserted in a case brought by a government agency to enforce an Act of Congress on behalf of the public. Motion at 22. Respondents assert that laches and equitable estoppel are available to defendants in proceedings instituted by the Federal government under appropriate circumstances. Opposition at 35.

The equitable defenses of laches and equitable estoppel 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). Although there may be exceptions to this general rule, *see Phillip Morris*, 300 F. Supp.2d at 70, 74 n.17, Respondents Mowrey, Friedlander, and Gay 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 the laches and equitable estoppel defenses pled by Mowrey and Friedlander and the laches defense pled by Gay is **GRANTED**.

Inherently Unfair Complaint Allegations and Personal Bias

Respondent Friedlander alleges inherently unfair complaint allegations and personal bias on the part of former FTC Chairman Timothy J. Muris. Freidlander's Answer at 8-10. Complaint Counsel argues that this defense should be stricken as immaterial, impertinent, or scandalous. Motion at 23-24. Respondents contend that Friedlander's vagueness and personal bias defenses are relevant to the reason to believe and public interest determinations. Opposition at 38. The inherently unfair complaint allegations defense merely reiterates arguments ruled on in the July 20, 2004 Order Denying Motions for More Definite Statement and Motion to Dismiss the Complaint for Lack of Definiteness. In addition, as discussed above, the reason to believe and public interest determinations are irrelevant and immaterial and prejudice Complaint Counsel by threatening to unduly broaden discovery. Accordingly, Complaint Counsel's motion to strike the inherently unfair complaint allegations and personal bias defenses pled by Friedlander is **GRANTED**.

Denial of Preamble

Complaint Counsel seeks to strike the Corporate Respondents' denial of the preamble statements regrading reason to believe and public interest. The Corporate Respondents stated in their Answers that "[w]ith respect to the first paragraph of the Complaint, [the Respondent] denies that the Commission has reason to believe that Respondents have violated the provisions of the [FTC Act] and/or that this proceeding is in the public interest." Answers at 2. Accordingly, Complaint Counsel's motion to strike the denial of the preamble pled by the Corporate Respondents is **GRANTED** for the reasons set forth above regarding the reason to believe and public interest defenses.

IV.

As set forth above, Complaint Counsel's motion to strike Respondents' additional 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 4, 2004