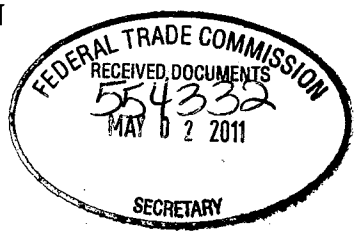
ORIGINAL

UNITED STATES OF AMERICA
THE FEDERAL TRADE COMMISSION



In the Matter of	)	
POM WONDERFUL LLC and ROLL GLOBAL LLC, as successor in interest to Roll International Corporation, companies and	)	**Docket No. 9344** **Public Document**
STEWART A. RESNICK, LYNDA RAE RESNICK, and MATTHEW TUPPER, individually and as officers of the companies.	)	

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION *IN LIMINE* TO EXCLUDE POM ADVERTISEMENTS PUBLISHED PRIOR TO 2006

The Respondents move *in limine* to exclude all POM advertisements disseminated prior to 2006[1] ("pre-2006 advertisements") arguing that 1) Complaint Counsel did not identify the pre-2006 advertisements in its complaint and 2) the pre-2006 advertisements are inadmissible under Rule of.Practice 3.43 ("Rule 3.43") as insufficiently probative, irrelevant, unreliable, and needlessly cumulative. As set forth below, however, Complaint Counsel's complaint and discovery responses provided ample notice of the types of claims and advertisements alleged to have violated the FTC Act, and its proposed exhibit list now clearly identifies the pre-2006 advertisements that it intends to challenge. Because the pre-2006 advertisements are relevant, material, reliable, and noncumulative evidence probative of liability and the need for injunctive

[1] The Respondents did not identify any specific pre-2006 advertisements that they contend would be inadmissible, but seek to exclude all pre-2006 advertisements.

relief, the motion *in limine* to categorically exclude the pre-2006 advertisements should be denied.

DISCUSSION

A motion *in limine* is "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *In re Daniel Chapter One*, 2009 FTC LEXIS 85 at *18 (F.T.C. Apr. 20, 2009) (internal quotation marks omitted). "Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds." *Id.* at 19; *see also In re POM Wonderful LLC*, No. 9344, Order Granting Consent Mot. to Amend Scheduling Order (F.T.C. Apr. 20, 2011). A court can reserve judgment until the hearing to evaluate the motion in the appropriate factual context. *Daniel Chapter One*, 2009 FTC LEXIS 85 at *20.

I. Respondents Had Sufficient Notice of the Challenged Claims and the Pre-2006 Advertisements That Complaint Counsel Intends to Challenge

Respondents assert that Complaint Counsel is attempting to use "unpled" advertisements or has "improperly refused to commit to the specific claims and advertisements that it will challenge at trial." (Resp'ts Mot. *in Limine* to Exclude POM Advertisements Published Prior to 2006 ("Resp'ts Mot. *in Limine*") at 3, 9.) Complaint Counsel was not required to plead every advertisement in the complaint, and the complaint contained "[a] clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law." Rule of Practice 3.11(b)(2); (Compl. ¶¶ 6, 9-22, Exs. A-H (alleging that the Respondents violated § 5(a) and § 12 of the FTC Act by making false or unsubstantiated health claims concerning the treatment, prevention, or the reduction of risk of prostate cancer, erectile dysfunction, and heart disease)); (*see also* Ex B, *In re Basic Research,*

LLC, No. 9318, at *2 (F.T.C. July 20, 2004) (denying motions for a more definite statement and stating that complaints are designed to give a respondent fair notice of what the claim is and the grounds upon which it rests)). The Respondents' concern that thousands of pre-2006 advertisements will be at issue during the hearing is unfounded. In response to POM's broad interrogatories, Complaint Counsel's responses reasonably identified the types of claims that were being challenged with citations to pre-2006 advertisements. The Respondents have had ample opportunity to prepare its defense to these advertisements. Indeed, the Respondents' expert, Dr. Ronald Butters, purported to analyze how contemporary speakers of American English would have normally construed and understood a pre-2006 advertisement from a linguistic perspective. After fact discovery, Complaint Counsel's proposed exhibit list further reduced the number of pre-2006 advertisements at issue to six distinct advertisements.[2] (Ex. A, pre-2006 advertisements from Complaint Counsel's proposed exhibit list ("selected pre-2006 advertisements").) The Respondents had adequate notice of the types of claims at issue and the six pre-2006 advertisements that Complaint Counsel intends to challenge.

II. The Selected Pre-2006 Advertisements Are Relevant, Material, and Reliable Evidence

Under Rule 3.43(b),

> [r]elevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based

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[2] Because Respondents did not have a complete dissemination schedule for the pre-2006 time period, Complaint Counsel has listed copies of these six advertisements on its proposed exhibit list in order to show dissemination or to have complete deposition records. For two of these six advertisements, the proposed exhibit list also contains a similar version with different text. Complaint Counsel intends to use the six advertisements in Exhibit A absent any issue over admissibility.

> on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule of Practice 3.43(b).

A) The Selected Pre-2006 Advertisements Are Probative of Liability

The selected pre-2006 advertisements contain the types of health claims primarily concerning heart disease that Complaint Counsel asserts are false or unsubstantiated; for example, one advertisement discusses the risk of heart disease and states that "[o]ur scientific research shows that pomegranate juice is 8 times better than green tea at preventing formation of oxidized (sticky) LDL" and that "a clinical pilot study shows that an 8 oz. glass of POM Wonderful 100% Pomegranate Juice, [consumed] daily, reduces plaque in the arteries up to 30%." (Ex. A. at CX0029_0002.) This is relevant, material, and reliable evidence probative of liability under the FTC Act. Additionally, the selected pre-2006 advertisements, some of which were disseminated in national publications like Prevention, Fitness, or Rolling Stone, reflect the Respondents' intent over time to advertise their health claims to particular consumer segments. Although not required to establish a violation, "evidence of intent to make a claim may support a finding that the claims were indeed made." *In re Telebrands Corp.*, No. 9313, 2004 WL 3155567, at *35 (F.T.C. Sept. 15, 2004) (internal quotation marks omitted).

B) The Selected Pre-2006 Advertisements Are Not Cumulative

Because the net impression of an advertisement is a fact specific inquiry, the selected pre-2006 advertisements are not needlessly cumulative of other advertisements alleged to have made similar claims. "The primary evidence of the claims an advertisement conveys to reasonable consumers is the advertisement itself." *In re Daniel Chapter One*, No. 9329, 2009 WL 2584873, at *66 (F.T.C. Aug. 5, 2009). For each advertisement, a court "looks to the

overall net impression created by the advertisement as a whole, by examining the interaction of all of the different elements in the advertisement, rather than focusing on the individual elements in isolation." *Id.* "Assessing the overall net impression of an advertisement includes examining the interaction of such elements as language and visual images." *Id.* at 67. The Respondents' assertion that the pre-2006 advertisements would "potentially contaminate any findings of fact and conclusions of law . . ." or create an unmanageable trial is absurd. (Resp'ts Mot. *in Limine* at 2, 9.) Complaint Counsel challenges six highly relevant pre-2006 advertisements, and the court is capable of making specific fact and legal determinations as to each advertisement's meaning. For example, *Daniel Chapter One* considered each advertisement and made specific findings as to whether the advertisement made the challenged claims. 2009 WL 2584873, at *19-38 (analyzing the net impression of the website advertising, the BioGuide, the cancer newsletter, and etc. to determine whether a cancer treatment claim was made). In this case, such an inquiry into a small number of pre-2006 advertisements would not result in any significant confusion, delay, or waste.

C) The Selected Pre-2006 Advertisements Are Probative of the Need for Injunctive Relief

The Respondents also assert that the pre-2006 advertisements are "too remote in time to be probative of whether an injunction should now [be] issue[d]." (Resp'ts Mot. *in Limine* at 5.) The Respondents argue that the principles of statute of limitation under § 19 of the FTC Act [3] and laches bar all pre-2006 advertisements. However, they concede that no statute of limitations applies to claims brought under § 5 and § 12 of the FTC Act. (Resp'ts Mot. *in Limine* at 8.)

[3] Respondents also cite 28 U.S.C. § 2462; this section is inapplicable here as it involves actions to enforce civil penalties.

Section 19's statute of limitations does not apply to other sections of the FTC Act. (Ex. C, *F.T.C. v. Braswell*, No. CV 03-3700DT, at *16-17 (C.D. Cal. Nov. 10, 2003). Moreover, "laches is not available against the federal government when it undertakes to enforce a public right or to protect the public interest." *F.T.C. v. Bronson Partners, LLC*, No. 3:04CV1866, 2006 WL 197357, at *1 (D. Conn. Jan. 25, 2006).

Indeed, the selected pre-2006 advertisements are probative of the need for and scope of permanent injunctive relief. An injunction's purpose is to enjoin the illegal conduct and prevent future violations. *See F.T.C. v. Colgate-Palmolive*, 380 U.S. 374, 394 (1965). Once liability has been found, "the appropriate remedy is an order requiring respondents to cease and desist from such act or practice." *Daniel Chapter One*, 2009 WL 2584873, at *101 (noting that there is "considerable discretion in fashioning an appropriate remedial order, subject to the constraint that the order must bear a reasonable relationship to the unlawful acts or practices"). In determining whether an injunction is appropriate, a court looks for a cognizable danger of a recurrent violation, *F.T.C. v. Neovi*, No. 06-CV-1952, 2009 WL 56130, at *7 (S.D. Cal. 2009), *aff'd*, 604 F.3d 1150 (9th Cir. 2010), and can consider several factors including

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

F.T.C. v. Direct Mktg. Concepts, Inc., 648 F. Supp. 2d 202, 212 (D. Mass. 2009), *aff'd*, 624 F.3d 1 (1st Cir. 2010) (noting that "after the FTC had expressed concern about the apparent misleading nature of [the defendants'] Coral Calcium infomercial, the defendants launched the Supreme Greens infomercial . . . without having substantiation for the disease claims made in

that infomercial") (internal quotation marks omitted). "The commission of past illegal conduct is highly suggestive of the likelihood of future violations." *Id.*

The selected pre-2006 advertisements are directly relevant to the complaint's allegations and, in conjunction with more recent advertisements, illustrate the severity, intent, and duration of the Respondents' conduct in disseminating allegedly false or unsubstantiated health claims. (*See* Ex. A.)[4] The Respondents contend that pre-2006 advertisements are not relevant because they were "discontinued many years ago." (Resp'ts Mot. *in Limine* at 5.) However, discontinuation of impermissible conduct does not obviate liability or the need for remedy. *See F.T.C. v. Bronson Partners, LLC*, 674 F. Supp. 2d 373, 393 (D. Conn. 2009) (finding that a permanent injunction was proper despite representations that the challenged products were no longer sold because there was the risk of similar deceptive practices with a new product, which would harm consumers). Moreover, discontinuation of an advertisement does not foreclose future use. In fact, the Respondents have disseminated discontinued executions again. (*See e.g.*, Ex. D, Tr. of Jan. 14, 2011 Dep. of Michael Perdigao at 127-28 (stating that "some of the old executions started running again in 2008" because "they felt that those were better than any of the newly developed concepts . . .").) For example, although with different copy, an advertisement with the "Cheat Death" tagline was disseminated in 2005 and in 2008.

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[4] In addition to a cease and desist, the court may order fencing-in relief when appropriate, and past conduct is relevant to the court's analysis. "Fencing-in remedies are designed to prevent future unlawful conduct" and "are broader than the conduct that is declared unlawful and may extend to multiple products." *Daniel Chapter One*, 2009 WL 2584873, at *103 (internal quotation marks omitted). "Factors that courts may consider in determining whether fencing-in relief is justified in light of a defendant's violation of the FTC Act include: any history of prior violations, the deliberateness and seriousness of the violation, and the degree of transferability of the unlawful behavior to other products. Courts should consider the circumstances of the violation as a whole, and not merely the presence or absence of any one factor." *Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d at 213.

Respondents also argue that all pre-2006 advertisements are unreliable evidence to support injunctive relief because nutrition science has changed over time, and contemporaneous evidence like documents or witnesses "becomes harder to locate and interpret with the passing of time." (Resp'ts Mot. *in Limine* at 5.) This argument is nonsensical. Experts routinely evaluate the scientific substantiation available at the time a claim was made, and the Respondents offer no reason why this case would be any exception. *See Daniel Chapter One*, 2009 WL 2584873, at *83 (noting that a court will consider whether the advertiser possessed a reasonable basis to substantiate the claims at the time the claims were made). Given the significant number of documents produced and more than twenty-five depositions of current and former employees and other parties involved with the Respondents' activities over the past decade, credible evidence applicable to the selected pre-2006 advertisements exists and can be utilized by the court. The selected pre-2006 advertisements are probative of liability and the appropriateness of injunctive relief, and therefore the Respondents do not meet the motion *in limine* standard of being "clearly inadmissible on all potential grounds." *Daniel Chapter One*, 2009 FTC LEXIS 85 at *19.

CONCLUSION

Because the complaint provided ample notice of the challenged claims, and the six distinct selected pre-2006 advertisements were identified to the Respondents in a timely fashion allowing them to prepare their defense, and are relevant, material, reliable, and noncumulative evidence probative of liability and injunctive relief, the court should deny the motion *in limine*.[5]

[5] If the court determines that any selected pre-2006 advertisement is clearly inadmissible, Complaint Counsel respectfully requests that the court's order identify the specific advertisements being excluded.

Respectfully submitted,

Dated: May 2, 2011

/s/ Andrew Wone

Andrew Wone
Federal Trade Commission
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NJ-3212
Washington, DC 20580
Telephone: (202) 326-2934
Fax: (202) 326-3259
Email: awone@ftc.gov

CERTIFICATE OF SERVICE

I certify that on May 2, 2011, I caused the filing and service of Complaint Counsel's Opposition to Respondents' Motion *in limine* to Exclude POM Advertisements Published Prior to 2006 as set forth below:

One electronic copy via the FTC E-Filing System to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-159
Washington, DC 20580

One paper copy via hand delivery and one electronic copy via email to:

The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., NW, Room H-110
Washington, DC 20580
Email: oalj@ftc.gov

One electronic copy via email to:

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Attorneys for Respondents

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Roll Law Group
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Attorneys for Respondents

Bertram Fields, Esq.
Greenberg Glusker
bfields@greenbergglusker.com
Attorney for Stewart and Linda Resnick

Date: May 2, 2011

/s/ Andrew Wone
Andrew Wone
Complaint Counsel

Exhibit A

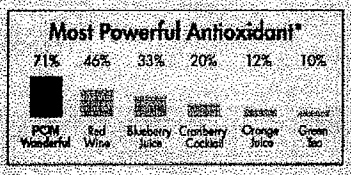
VMS ID: 03102286
RUN DATE: 10/[illegible]03

Drink and be healthy.

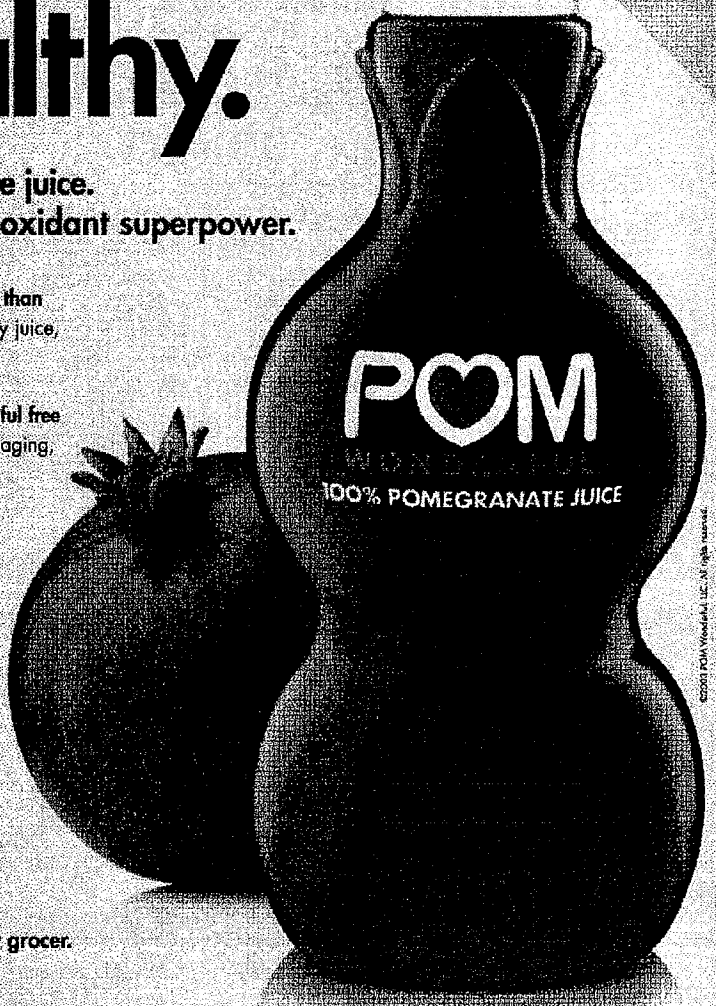
NEW

100% all-natural pomegranate juice.
The delicious, refreshing antioxidant superpower.

- **More naturally occurring antioxidant power than any other drink,** including red wine, blueberry juice, cranberry juice, orange juice and green tea.
- **Antioxidants guard your body against harmful free radicals** that can cause heart disease, premature aging, Alzheimer's disease, even cancer.



- **Medical studies have shown that drinking 8oz. of POM Wonderful** pomegranate juice daily minimizes factors that lead to atherosclerosis (plaque buildup in the arteries), a major cause of heart disease.



In the refrigerated produce section of your grocer.
www.pomwonderful.com

*Chart compares ability of various juices to eliminate harmful free radicals; units are % of free radicals eliminated. Source: Aviram, M., Technion Faculty of Medicine. Data on file.

MFR. COUPON | EXP. 02.29.04

SAVE $1.00

on any flavor, any size

POM Wonderful®

100% Pomegranate · Pomegranate Tangerine
Pomegranate Blueberry · Pomegranate Cherry

In the refrigerated produce section

RETAILER: We will reimburse you the face value of this coupon plus 8 cents handling provided you and the consumer have complied with the terms of this offer. Invoice proving purchase of sufficient stock of the brand to cover redeemed coupons must be shown on request. Any other application may constitute fraud. Coupon void where prohibited, taxed or restricted. Customer must pay any sales tax. Cash value 1/20¢. Any transmission of this coupon is expressly prohibited. Mail coupons to: POM Wonderful, LLC, CMS Dept. 24159, One Lowes Drive, Del Rio, TX 78840. POM Wonderful is a registered trademark of POM Wonderful, LLC. ©2003 POM Wonderful, LLC. All rights reserved.

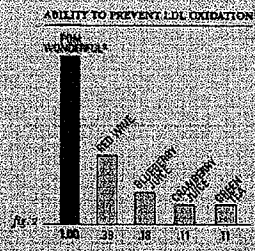
5 24150 20076 4 (8100) 8 41012

VMS-0000198

CX0016

CX0016_0001

advertisement



level of antioxidants than any other drink, is a real Antioxidant Superpower.™

Our Research: Heartening

We've been working with a number of top scientists, including a Nobel Laureate, for 6 years now and our seven published, peer-reviewed papers reveal heartening results. Here's the story: Free radicals are the culprits that turn LDL – or "bad" cholesterol – into that sticky stuff that becomes the plaque that clogs your arteries. Our scientific research shows that pomegranate juice is 8 times better than green tea at preventing formation of oxidized (sticky) LDL.[1] And a clinical pilot study shows that an 8 oz. glass of POM Wonderful 100% Pomegranate Juice, consumed daily, reduces plaque in the arteries up to 30%.[2]

The Heart Stopping Truth

Remember: heart disease is America's number one killer. For women as well as men. 98% of heart attacks are due to atherosclerosis, or too much plaque in the arteries. That same plaque increases your chance of stroke. One final scary statistic: half of patients who have a severe heart attack have normal cholesterol levels. In other words, we're all at risk.

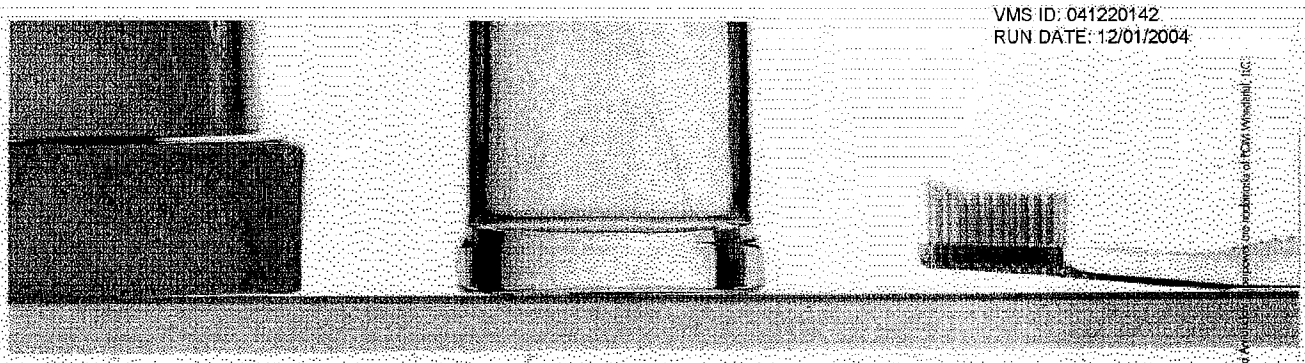
Just a Glass a Day

To keep your heart healthy: exercise regularly. Eat a healthy diet. And drink 8 ounces of POM Wonderful Pomegranate Juice. Make every day a good day to be alive.

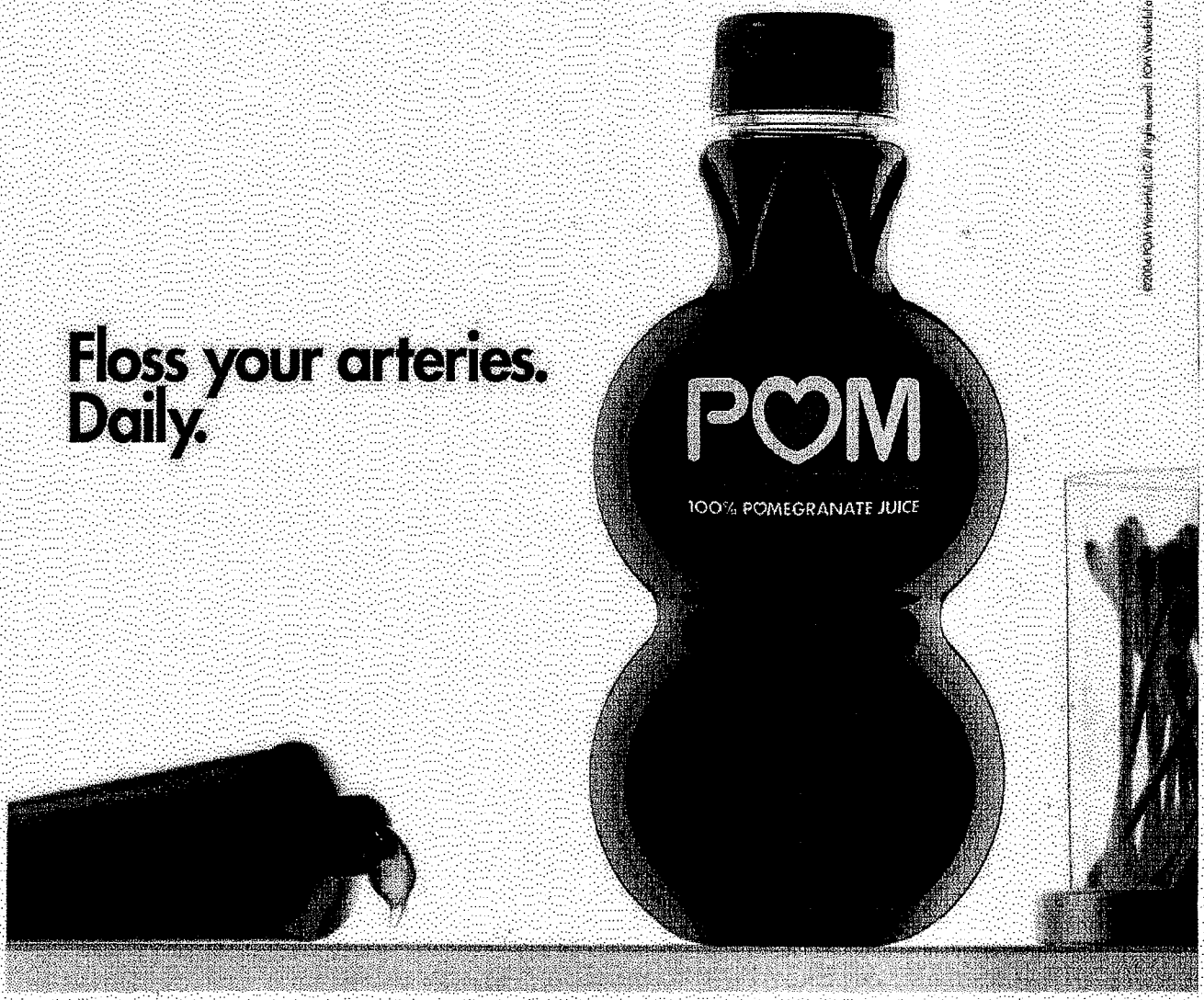
[1]Aviram, M., Drugs Under Experimental and Clinical Research, 2002. Indexed values, based on relative amounts of oxidized LDL created. [2]Aviram, M., Clinical Nutrition, 2004.

POM Wonderful Pomegranate Juice™ is the Antioxidant Superpower.™ Drink a glass a day!

For more medical research on the Antioxidant Superpower, visit pomwonderful.com



Floss your arteries. Daily.



Clogged arteries lead to heart trouble. It's that simple. That's where we come in. Delicious POM Wonderful Pomegranate Juice has more naturally occurring antioxidants than any other drink. These antioxidants fight free radicals—molecules that are the cause of sticky, artery clogging plaque. Just eight ounces a day can reduce plaque by up to 30%!* So every day: wash your face, brush your teeth, and drink your POM Wonderful.

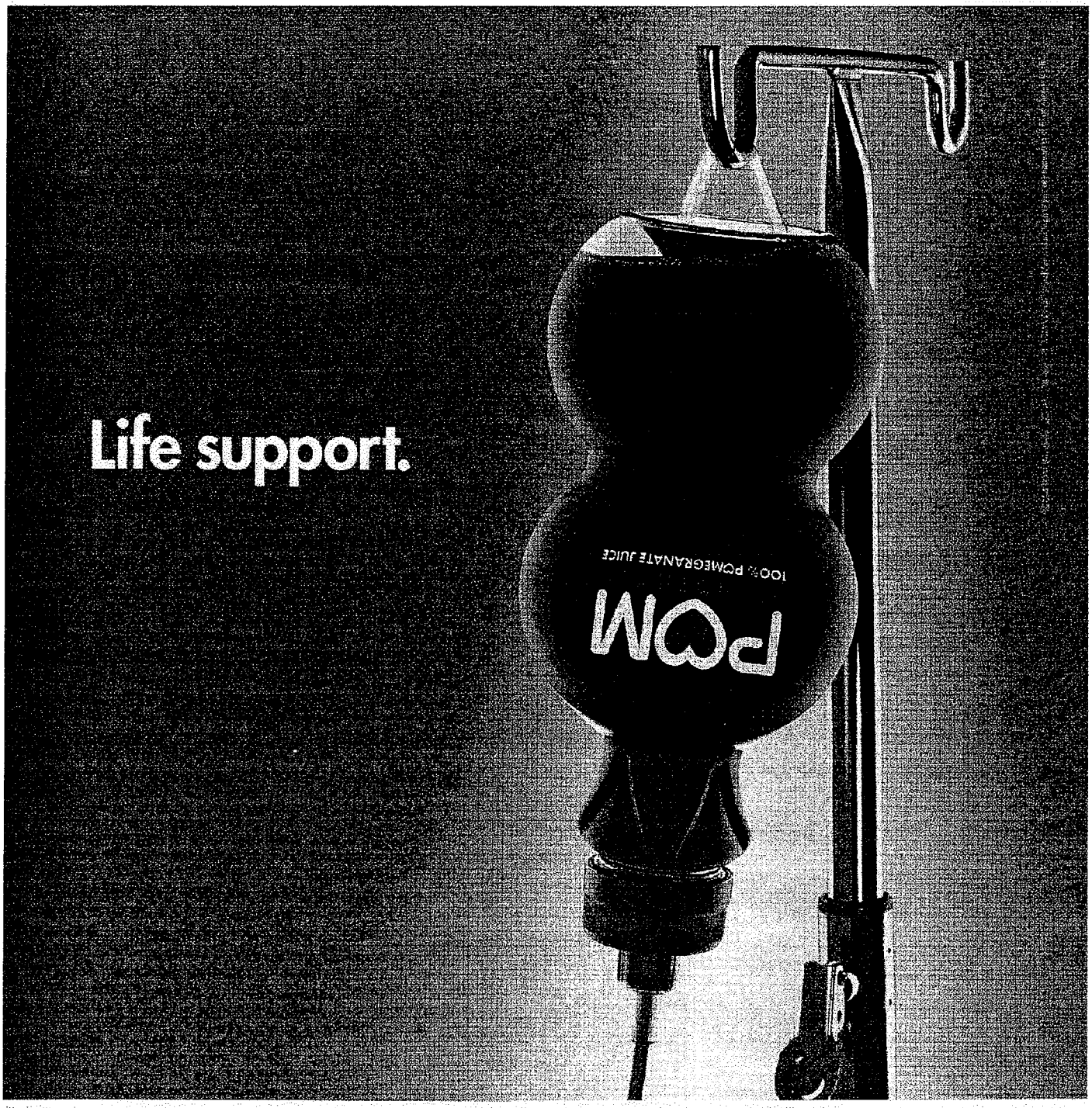
POM WONDERFUL

POM Wonderful Pomegranate Juice. The Antioxidant Superpower.

*Aviram, M., Clinical Nutrition, 2004. Based on clinical pilot study.

VMS-0000212

CX0031_0001

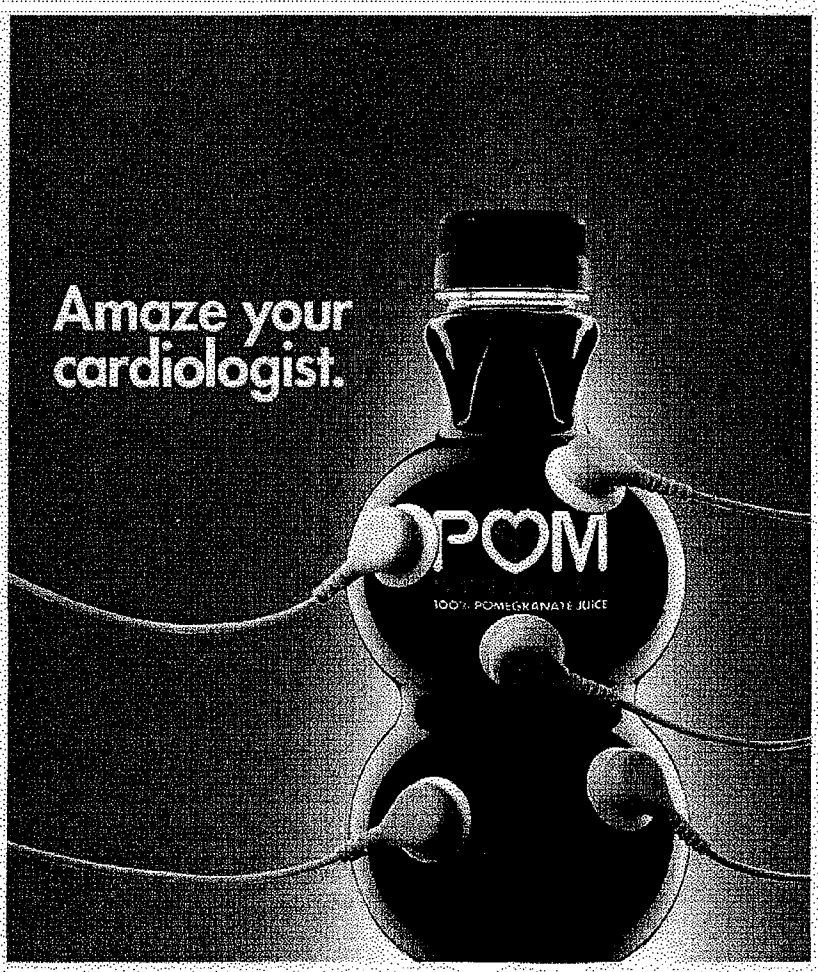


POM Wonderful Pomegranate Juice fills your body with what it needs. On top of being refreshing and delicious, this amazing juice has more naturally occurring antioxidants than any other drink. These antioxidants fight hard against free radicals that can cause heart disease, premature aging, Alzheimer's, even cancer. Just drink eight ounces a day and you'll be on life support—in a good way.

POM Wonderful Pomegranate Juice. The Antioxidant Superpower.™

POM WONDERFUL®

pomwonderful.com



Ace your EKG: just drink 8 ounces of delicious POM Wonderful Pomegranate Juice a day. It has more naturally occurring antioxidants than any other drink. Antioxidants fight free radicals... nasty little molecules that can cause sticky, artery clogging plaque. A glass a day can reduce plaque by up to 30%!* Trust us, your cardiologist will be amazed.

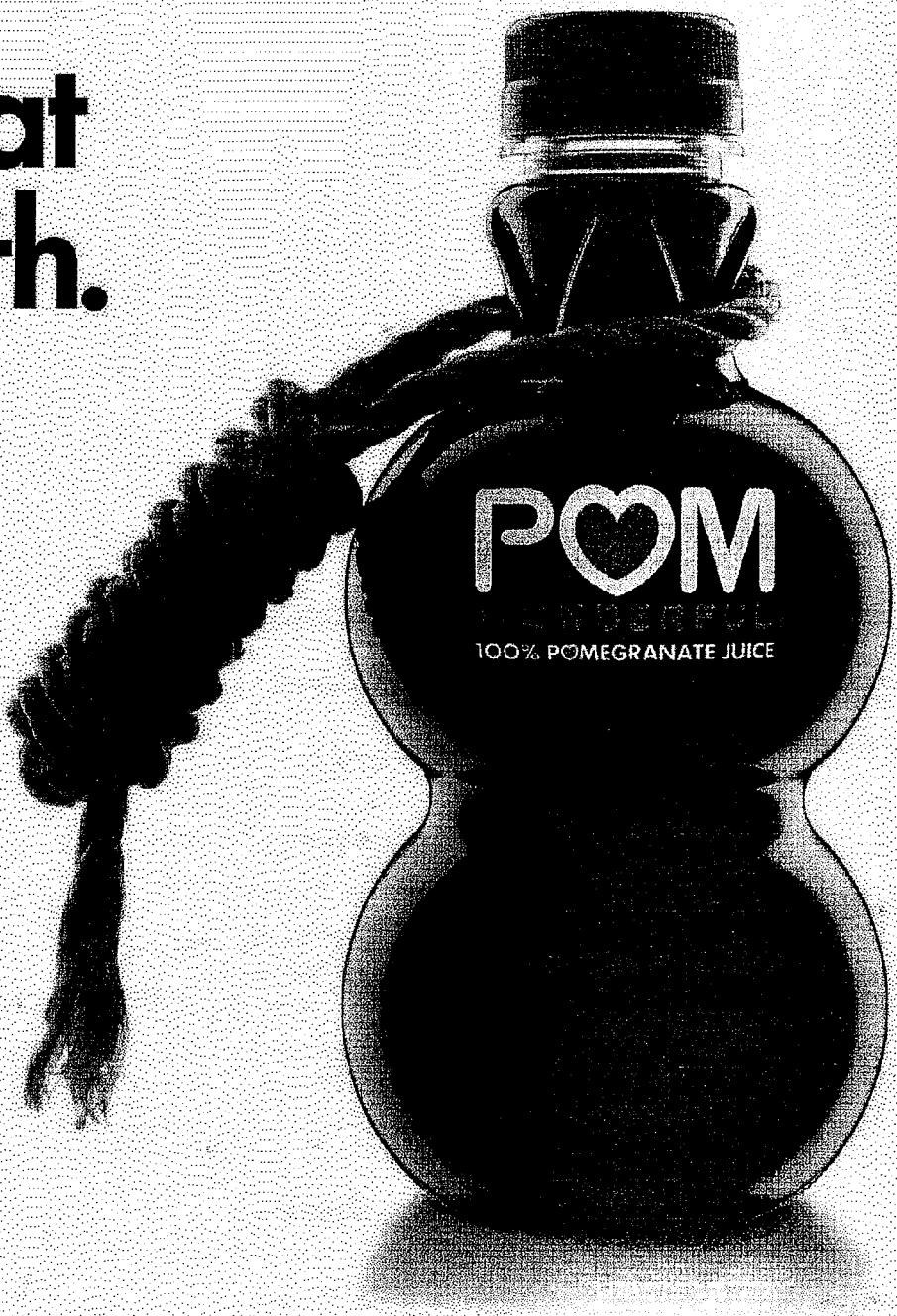
POM Wonderful Pomegranate Juice. The Antioxidant Superpower.

*Avigan, M., Clinical Nutrition, 2004. Based on a pilot study.

POM WONDERFUL

pomwonderful.com

Cheat death.



Dying is so dead. Drink to life with POM Wonderful Pomegranate Juice, the world's most powerful antioxidant. It has more antioxidants than any other drink and can help prevent premature aging, heart disease, stroke, Alzheimer's, even cancer. Eight ounces a day is all you need. The sooner you drink it, the longer you will enjoy it.

POM Wonderful Pomegranate Juice. The Antioxidant Superpower.™

POM WONDERFUL®

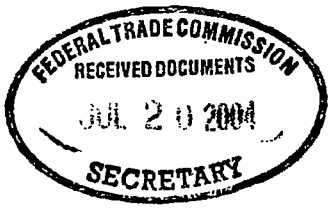
pomwonderful.com

VMS-0000221

CX0036_0001

Exhibit B

UNITED STATES OF AMERICA
BEFORE 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	)	
SÖVAGE DERMALOGIC LABORATORIES, LLC	)	
BAN, LLC d/b/a BASIC RESEARCH, LLC	)	
OLD BASIC RESEARCH, LLC,	)	Docket No. 9318
BASIC RESEARCH, A.G. WATERHOUSE,	)	
KLEIN-BECKER USA, NUTRA SPORT, and	)	
SÖVAGE DERMALOGIC LABORATORIES	)	
DENNIS GAY	)	
DANIEL B. MOWREY d/b/a AMERICAN	)	
PHYTOTHERAPY RESEARCH LABORATORY, and	)	
MITCHELL K. FRIEDLANDER,	)	
Respondents.	)	
	)	

ORDER DENYING MOTIONS FOR A MORE DEFINITE STATEMENT AND MOTION TO DISMISS THE COMPLAINT FOR LACK OF DEFINITENESS

I. PROCEDURAL BACKGROUND

On June 28, 2004, Respondents Basic Research, LLC; A.G.Waterhouse, LLC; Klein-Becker USA, LLC; Nutrasport, LLC; Sövage Dermalogic Laboratories, LLC; Ban, LLC; Dennis Gay; and Daniel B. Mowrey (collectively referred to as "Respondents") filed a Motion for More Definite Statement ("Motion"). On June 29, 2004, Respondent Mitchell Friedlander ("Respondent Friedlander") filed a *pro se* motion to join the Respondents' Motion for More Definite Statement. On July 6, 2004, Respondent Friedlander filed a Motion to Dismiss the Complaint for Lack of Definiteness which is virtually identical to Respondents' Motion for More Definite Statement. On July 8, 2004, Complaint Counsel filed its opposition to the pending motions ("Opposition").

On July 13, 2004, Respondents and Respondent Friedlander filed motions for leave to file a reply brief and on the same date filed reply briefs, which were virtually identical to each other. On July 19, 2004, Complaint Counsel filed its opposition to Respondents' motions for leave to file reply briefs. Respondents have failed to demonstrate that a reply would be necessary or useful and therefore, pursuant to Commission Rule 3.22(c), the motions for leave to file reply briefs are DENIED.

For the reasons set forth below, the motions for a more definite statement are DENIED and Respondent Friedlander's motion to dismiss complaint for lack of definiteness is DENIED.

II. ARGUMENTS OF THE PARTIES

Respondents claim that the Complaint fails to provide a clear and concise statement sufficient to inform each Respondent with reasonable definiteness about the types of specific acts or practices alleged to have violated the Federal Trade Commission Act ("FTC Act"). Respondents argue that the use of the terms "reasonable basis," "rapid," "substantial," "clinical testing," "visibly obvious," "causes," and "unfair" in the Complaint has left them "incapable of framing appropriate and full responses and pleading adequate defenses." Motion at 3.

Complaint Counsel responds that the Complaint meets and exceeds the notice pleading requirements as set out in Commission Rule 3.11. Opposition at 6. Complaint Counsel argues that the Complaint presents a clear and concise factual statement sufficient to inform Respondents with reasonable definiteness of the practices alleged to have violated the FTC Act; that the Complaint identifies each Respondent, the individuals, and entities alleged to violate the FTC Act; that the Complaint details the specific acts, statements, and practices that allegedly violate the law for the six products through quotes from Respondents' marketing materials; that the Complaint uses Respondents' own advertising material terminology in the factual allegations; and that the challenge to the definiteness of established legal terms is easily remedied by a modicum of research. Opposition at 2, 4, 6, 7.

III. MOTION FOR MORE DEFINITE STATEMENT STANDARD

Respondents' motions for more definite statement are filed pursuant to Section 3.11(c) of the Commission's Rules of Practice which authorizes the filing of a motion for more definite statement. 16 C.F.R. § 3.11(c). *See, e.g., In re Weight Watchers Int'l, Inc.*, 1993 FTC LEXIS 300, *1 (Oct. 27, 1993); *In re Diran M. Seropian*, 1991 FTC LEXIS 306, *1 (July 3, 1991). Although Respondent Friedlander's motion is captioned as a motion to dismiss complaint for lack of definiteness, in substance it is a motion for more definite statement and will be treated as such. *See Mitchell v. E-Z Way Towers, Inc.*, 269 F.2d 126, 129-30 (5th Cir. 1959) (comparing motion for more definite statement with motion to dismiss for failure to state a claim).

Section 3.11(b)(2) of the Rules sets forth that the Commission's complaint shall contain a "clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law." 16 C.F.R. § 3.11(b)(2). This rule requires only that the complaint contain a factual statement sufficiently clear and concise to inform respondent with reasonable definiteness of the types of acts or practices alleged to be in violation of law, and to enable respondent to frame a responsive answer. *In re Schering-Plough Corp.*, 2001 FTC LEXIS 198, *11 (Oct. 31, 2001). "Commission complaints, like those in the federal courts, are designed only to give a respondent 'fair notice of what . . . the claim is and the grounds upon which it rests.'" *Id.* (*quoting Conley v.*

Gibson, 355 U.S. 41, 47 (1957)).

"Under Section 3.11(b) of the Federal Trade Rules of Practice, a motion for a more definite statement is not granted unless the complaint is ambiguous or more information is necessary in order to enable the respondents to prepare a responsive answer to the complaint." *In re Red Apple Companies, Inc.*, 1994 FTC LEXIS 90, *1 (June 21, 1994); *see also In re Fruehauf Trailer Co.*, 53 F.T.C. 1269, 1270 (1956); *In re Kroger Company*, 1977 FTC LEXIS 133, *1 (Aug. 12, 1977). Rule 3.11(c) is similar to Federal Rule of Civil Procedure 12(e) which allows for a more definite statement only where the pleading "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Fed. R. Civ. P. 12(e).

IV. ANALYSIS

The Complaint alleges that Respondents marketed certain dietary supplements with unsubstantiated claims for fat loss and/or weight loss and that they falsely represented that some of these products were clinically proven to be effective, in violation of Sections 5(a) and 12 of the FTC Act. Complaint ¶¶ 11, 16, 19, 22, 24, 26, 30, 32, 35, 39, 41, 43, 44. The Complaint quotes extensively from Respondents' marketing materials and identifies the individuals, entities, representations, and practices alleged to violate the FTC Act. *See* Complaint ¶¶ 13, 27, 36.

Respondents object to the terms "reasonable basis," "rapid," "substantial," "clinical testing," "visibly obvious," "causes," and "unfair" as used in the Complaint. According to Complaint Counsel, these terms have legal significance, are used in their ordinary meaning, or are the same or similar to terms used in Respondents' own advertising.

Complaint Counsel contends that the terms "reasonable basis" and "unfair" are legal terms defined by case law. Under Section 5 of the FTC Act, Respondents must have a reasonable basis for making objective claims before claims are disseminated. *See, e.g. In re Pfizer, Inc.*, 81 F.T.C. 23 (1972); *In re Removatron Int'l Corp.*, 111 F.T.C. 206 (1988), *aff'd* 884 F.2d 1489 (1st Cir. 1989). Similarly, the term "unfair" is used by the relevant portions of the FTC Act itself which defines "unfair acts and practices." 15 U.S.C. 45(n). Respondents have failed to demonstrate that the terms "reasonable basis" or "unfair" as used in the Complaint are not sufficient to inform Respondents of the types of acts or practices alleged with reasonable definiteness as required by Rule 3.11.

Complaint Counsel contends that the term "causes" is used to describe the effect of using each product as described in Respondents' advertising and is used in its ordinary meaning. Respondents have failed to demonstrate that the term "causes" as used in the Complaint is not sufficient to inform Respondents of the types of acts or practices alleged with reasonable definiteness as required by Rule 3.11.

Complaint Counsel contends that the terms "rapid," "substantial," "clinical testing," and "visibly obvious" are the same or similar to terms used in Respondents' advertising and that

these terms are used in their ordinary meanings. Respondents have failed to demonstrate that the terms "rapid," "substantial," "clinical testing," and "visibly obvious" as used in the Complaint are not sufficient to inform Respondents of the types of acts or practices alleged with reasonable definiteness as required by Rule 3.11.

Respondents rely on *McHenry v. Renne* to support their argument for more definite statement. 84 F.3d 1172 (9th Cir. 1996). In *McHenry*, the complaint subject to the motion for a more definite statement was over fifty pages long, redundant, and mixed with allegations of relevant facts, irrelevant facts, stories, and political arguments that "read like a magazine story." *Id.* at 1174-76. It did not inform the defendants of the crimes and violations which they were accused. *Id.* The Complaint filed by Complaint Counsel in this case does not suffer from those defects.

Section 3.12(b)(1) of the Commission's Rules sets forth that "[a]n anwer in which the allegations of a complaint are contested shall contain: (i) A concise statement of the facts constituting each ground of defense; (ii) Specific admission, denial, or explanation of each fact alleged in the complaint or, if the respondent is without knowledge thereof, a statement to that effect. Allegations of a complaint not thus answered shall be deemed to have been admitted." 16 C.F.R. 3.12(b)(1). The Complaint is sufficiently detailed in nature to allow Respondents to file an Answer pursuant to 3.12(b)(1). Any necessary clarification of these terms may be obtained during the normal course of discovery.

VI. CONCLUSION

For the above stated reasons, Respondents' motions for a more definite statement are DENIED. Respondent Friedlander's motion to dismiss the complaint for lack of definiteness is DENIED. Respondents' Answers will be due, pursuant to Commission Rule 3.12(a), within ten (10) days of the date of this Order.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: July 20, 2004

Exhibit C

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"),

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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.

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[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 July 14, 2003, Defendant Braswell[3] filed a Motion to Stay Proceeding Pending Resolution of Criminal Charges and a Memorandum of Points and Authorities in support thereof.

On July 14, 2003, Defendant Tepper filed a Motion to Dismiss Complaint.

On July 16, 2003, the Commission and Defendants filed a Joint Stipulation to Extend Time to File Answer and to File Rule 16(b) Scheduling Order.

On July 17, 2003, Defendants filed an Amended Motion to Stay Proceedings Pending Resolution of Criminal Charges and a Memorandum of Points and Authorities in support thereof.

August 4, 2003, Defendant Tepper filed a Joinder in Defendants' Motion to Stay Proceeding Pending Resolution of Criminal Charges.

On August 25, 2003, Defendants filed Pro Hac Vice applications on behalf of Christopher R. Cooper and Randall J. Turk.

On September 11, 2003, Defendant Braswell, JOL, G.B. Data Systems, GVI and Theraceuticals filed a Joinder in Defendant Tepper's Motion to Dismiss Complaint.

On September 15, 2003, a Non-Resident Attorney Application was filed by Mark Stancil on behalf of A. Glenn Braswell.

On September 15, 2003, this Court entered an Order Denying Defendant A. Glenn Braswell's Motion to Stay Proceeding Pending Resolution of Criminal Charges.

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[3] The Motion notes: "This motion is being filed on behalf of Mr. Braswell only. Were the motion to be granted, however, it would make little sense to have the case proceed solely against the corporate defendants. The corporate defendants therefore join this motion."

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

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[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.)

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[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

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[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.

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[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

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[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.

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[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

Exhibit D

UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of,	)	
	)	
POM WONDERFUL LLC and	)	
ROLL INTERNATIONAL CORP.,	)	
companies, and	)	
	)	DOCKET NO. 9344
STEWART A. RESNICK,	)	
LYNDA RAE RESNICK, and	)	
MATTHEW TUPPER, individually	)	
and as officers of the	)	
companies	)	
	)	
	)	
Respondents.	)	
	)	

CONFIDENTIAL DEPOSITION

OF MICHAEL PERDIGAO

DATE & TIME: Friday, January 14, 2011
9:05 a.m. - 6:06 p.m.

LOCATION: 10877 Wilshire Boulevard
Suite 700
Los Angeles, California

REPORTER: Christina Kim-Campos, CSR
Certificate No. 12598

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had an edge?
A. Well, that's somebody's definition, but why it's provocative and interesting is it's an unusual visual, with a broken noose around the neck of a bottle, and it's -- it's going to extreme puffery in terms of the fact that our product is so healthy that this bottle was able to cheat death.
Q. And do you recall who decided that POM should follow this strategy, in developing an edge a la cheat death?
A. No.
Q. Do you know why POM wanted to develop an edge, a la cheat death?
A. I think you always want to have an edge with your advertising. You want to be provocative and interesting, and it's hard to cut through the clutter. A lot of people are advertising.
Q. Do you know whether POM received any complaints from consumers when the cheat death ad was originally disseminated?
MR. ZAFFOS: Objection. Calls for speculation.
THE WITNESS: I don't know. I wasn't part of the company.
///

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BY MR. WONE:
Q. I'm sorry. Did you finish your answer?
A. I don't 'cause I wasn't part of the company when this ad started running.
Q. Do you know why POM decided to go back to an ad similar to the cheat death ad?
MR. ZAFFOS: Objection to form.
THE WITNESS: No. I don't -- I don't think that's accurate. I don't know that they went back to cheat death.
BY MR. WONE:
Q. Could you read the fourth bullet in that same section on page ending in 6952?
A. "Q2 outdoor - go back to old campaign and pick the hard-hitting executions like 'Cheat Death.'"
Q. Do you know whether POM went back to the old campaign and picked hard-hitting executions like cheat death?
A. Yeah. They -- we started running the -- what I refer to as the dressed bottle campaign, and some of the old executions started running again in 2008.
Q. And why did POM go back to using that old campaign, which included hard-hitting executions

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like cheat death?
A. I think they felt that those were better than any of the newly developed concepts, that they didn't have anything better.
Q. And what is your understanding of how these old ads, including the hard hitting executions like cheat death were better than --
A. Oh, that's a subjective call. That's on marketing. And others determined that those were better than the options, so they wanted to continue using those.
Q. Did Ms. Resnick determine that using the old campaign, like hard hitting executions such as cheat death were better alternatives?
A. Yes, she ultimately agreed. Mm-hmm.
Q. Did Matt -- did Mr. Tupper reach that same conclusion as Ms. Resnick?
A. Yes.
Q. And in the same section on the page ending 6952, could you read the last bullet, Mr. Perdigao?
A. "Be on WebMD and other sites that are tied to our target consumer."
Q. You previously described what your understanding of what Web MD is. Can you explain how WebMD would be tied to POM's target consumer in

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relation to its 2008 -- POM's 2008 plan for POM Juice?
A. In general, it's tied because we're targeting healthy people and people that have an interest in staying healthy.
Q. And can you describe what was POM's target consumer for the 2008 plan?
MR. ZAFFOS: Objection. Calls for speculation, objection to form.
THE WITNESS: No, not specifically. Each execution that we get has a different description of -- each creative brief has a different description of who that specific ad is targeting.
BY MR. WONE:
Q. And do you recall what creative brief, do you recall the creative brief that you received for this 2008 plan?
A. I don't.
Q. Do you -- do you know what other sites the -- this document was referring to, that are tied to POM's target consumer?
A. I don't.
Q. And turning to page RESP006953 in the POMx Supplements section, the second bullet of the "Retail Package" heading, can you please read that