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

In the Matter of	)	
DANIEL CHAPTER ONE, a corporation, and	)	DOCKET NO. 9329
JAMES FEIJO, Respondents.	)	

ORDER ON COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO PRECLUDE RESPONDENTS FROM INTRODUCING AT TRIAL EVIDENCE OF RESPONDENTS' "GOOD FAITH" AND NON-EXPERT OPINIONS ABOUT DANIEL CHAPTER ONE PRODUCTS AS A DEFENSE TO LIABILITY

I.

On March 16, 2009, pursuant to the Scheduling Order in this case, Complaint Counsel submitted a Motion *In Limine* and Memorandum to Preclude Respondents from Introducing at Trial Evidence of Respondents' "Good Faith" and Non-Expert Opinions About the DCO Products as a Defense to Liability ("Motion"). Respondents submitted their Opposition to the Motion on March 26, 2009 ("Opposition").

Having fully considered all arguments in the Motion and Opposition, and as further discussed below, the Motion is GRANTED in part and DENIED in part.

II.

A. Generally Applicable Standards

The admission of relevant evidence is governed by Commission Rule 3.43, which states in part: Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. 16 C.F.R. §3.43(b)(l). 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 by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. 16 C.F.R. §3.43(b)(l). *See also In Re Telebrands Corp.*, Docket No. 9313, 2004 FTC LEXIS 270, at *2 (April 26, 2004).

"Motion *in limine*" refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984); *see also In re Motor Up Corp.*, Docket 9291, 1999 FTC LEXIS 207, at *1 (August 5, 1999). Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the court's inherent authority to manage the course of trials. *Luce*, 469 U.S. at 41 n.4. The practice has also been used in Commission proceedings. *E.g.*, *In re Telebrands Corp.*, Docket 9313, 2004 FTC LEXIS 270 (April 26, 2004); *In re Dura Lube Corp.*, Docket 9292, 1999 FTC LEXIS 252 (Oct. 22, 1999).

Motions *in limine* are generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible. *Bouchard v. American Home Products*, 213 F. Supp. 2d 802, 810 (N.D. Ohio 2002); *Intermatic Inc. v. Toeppen*, No. 96 C 1982, 1998 U.S. Dist. LEXIS 15431, at *6 (N.D. Ill. February 28, 1998). Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *see also Sec. Exch. Comm'n v. U.S. Environmental, Inc.*, No. 94 Civ. 6608 (PKL)(AJP), 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. October 16, 2002). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *U.S. Environmental*, 2002 U.S. Dist. LEXIS 19701, at *6; *see, e.g., Veloso v. Western Bedding Supply Co., Inc.*, 281 F. Supp. 2d 743, 750 (D.N.J. 2003). *In limine* rulings are not binding on the trial judge, and the judge may change his mind during the course of a trial. *Ohler v. U.S.*, 529 U.S. 753, 758 n.3 (2000); *Luce*, 469 U.S. at 41 (stating that a motion *in limine* ruling "is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer"). "Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded." *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000); *Knotts v. Black & Decker, Inc.*, 204 F. Supp. 2d 1029, 1034 n.4 (N.D. Ohio 2002).

B. Arguments of the Parties

Complaint Counsel asserts that Respondents intend to defend against the allegation that Respondents lacked substantiation for their product claims by introducing evidence that they acted in good faith and believed that the claims were substantiated. As examples of such intended evidence, Complaint Counsel points to Respondents' witness list, which states as to Ms. Patricia Feijo, wife of Respondent James Feijo: "'We anticipate that Mrs. Feijo, trained in homeopathy, will testify about the nature of the DCO ministry, its basis on religious faith and on the efforts she went through to ensure that statements made about health and the supplements DCO [Daniel Chapter One] provides its followers complied with legal rules as she understood them.'" Motion, pp. 1-2, citing Respondents' Final Proposed Witness List, p. 2. Complaint Counsel also points to statements in Respondents' Opposition to Complaint Counsel's Motion for Summary

Decision that James Feijo, while a fitness coach, "'observed the relationship between various nutritional products, herbs and other dietary supplements and athletic performance . . . . Based on his readings of the Bible and his observations . . . [he] developed, created, and arranged for the production of various DCO Products." Motion, p. 2, citing Respondents' Memorandum in Opposition to Complaint Counsel's Motion for Summary Decision, pp. 7-8.

Complaint Counsel argues that subjective intent to deceive is not an element of an alleged violation of section 5 of the FTC Act, and therefore, a respondent's asserted "good faith" is irrelevant. Complaint Counsel also argues that Respondents made health related efficacy claims for the DCO products that, Respondents assert, cannot be substantiated except by competent and reliable scientific evidence, such as tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, including double-blind, placebo-controlled studies. Complaint Counsel argues that the Feijos are not offered as experts, have not conducted any such studies, and, are not qualified to give expert testimony. Furthermore, according to Complaint Counsel, the Feijos' non-expert opinions and observations about the efficacy of the DCO products do not constitute adequate substantiation for Respondents' claims. Therefore, such evidence should be precluded as irrelevant.

Respondents state that the testimony referred to by Complaint Counsel is not intended to offer good faith as a defense, but rather "to support Respondents' belief and argument that the claims Respondents made were in fact substantiated." Opposition, p. 2. "The testimony of how [Respondents] devised the statements, the material they relied upon to support the claims and the reliance on Biblical passages . . . all combine to substantiate the statements they make and the testimonials they intend to introduce at trial, and are offered as evidence of entirely different matters from a good faith defense." *Id.* James Feijo's testimony concerning "how the products were created, their relationship to Biblical texts and the Daniel Chapter One eating regimen taken form [sic] the Bible . . . [and] his experience in applying the principles that he drew on from biblical and scientific literature to athletes he coached and highly stressed individuals . . . is intended to support Respondents' assertion that they did in fact properly substantiate the statements they made about the herbs in their products." *Id.*, p. 3. Respondents also state that Complaint Counsel's proposed *in limine* order is so broad that it would preclude Respondents from introducing evidence as to how the challenged products were developed and how the messages about the products were created. Respondents contend that they would be deprived of due process if a witness were unable to testify to his or her belief "that the way Respondents approached their substantiation responsibilities complied with the law." *Id.*

III.

Subjective good faith is not a defense to whether a violation of the Act occurred. *Fed. Trade Comm'n v. Sabal,* 32 F. Supp. 2d 1004, 1007 (N.D. Ill. 1998); *In re National Credit Mgmt. Group, L.L.C.*, 21 F. Supp. 2d 424, 441 (D.N.J. 1998). Respondents represent in their Opposition that "the testimony intended by and on behalf of

Respondents referred to by Complaint Counsel is not intended to offer good faith as a defense[.]" Opposition, p. 2. Accordingly, to the extent that Respondents seek to introduce evidence of good faith as a defense to a violation of the FTC Act, such evidence will be precluded.

Complaint Counsel also seeks to preclude Respondents from introducing evidence of their good faith and of non-expert opinions as substantiation of the Challenged Products' disease claims. Because the Complaint alleges that Respondents lacked adequate substantiation for their claims about the DCO products, Complaint ¶ 16, the sources of substantiation relied upon by Respondents for their claims are relevant. Respondents "bear the burden of establishing what substantiation they relied on for th[eir] claim. The FTC has the burden of proving that [respondents'] purported substantiation is inadequate." *Fed. Trade Comm'n v. QT, Inc.*, 448 F. Supp. 2d 908, 961 (N.D. Ill. 2006), *aff'd,* 512 F.3d 858 (7th Cir. 2008).

The evidence sought to be excluded by Complaint Counsel's motion may encompass a broad range of different types of evidence that could properly be admitted for various reasons. It cannot be presumed, without the context of trial and a specific proffer of particular evidence, that all the proposed evidence referred to in Complaint Counsel's Motion and Respondents' Opposition is inadmissible on all potential grounds. The parties are reminded, however, under the Scheduling Order entered in this case: "Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 702." Scheduling Order, Additional Provision 21. An attempt to adduce expert witness opinion from a lay witness is improper. *In re Chicago Bridge & Iron Co.*, 2003 FTC LEXIS 98, Docket 9300 (June 12, 2003).

Having fully considered all arguments in the Motion and Opposition, Complaint Counsel's Motion is GRANTED to the extent that Respondents seek to introduce evidence of good faith as a defense to a violation of the Act. In all other respects, the Motion is DENIED. Other than the evidence which is being precluded herein, this Order shall not be construed as a ruling on the admissibility of evidence that may be offered at trial.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: April 20, 2009