

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of)
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)
DURA LUBE CORPORATION,)
AMERICAN DIRECT MARKETING, INC.,)
HOWE LABORATORIES, INC.,)
CRESCENT MANUFACTURING, INC.,)
NATIONAL COMMUNICATIONS CORPORATION) Docket No. 9292
THE MEDIA GROUP, INC.,)
corporations, and)
HERMAN S. HOWARD,)
SCOTT HOWARD,)
individually and as officers)
of the corporations.)

**ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINT COUNSEL'S MOTION IN LIMINE**

I.

On August 23, 1999, Complaint Counsel filed a Motion *in Limine* to Exclude Evidence of Consumer Satisfaction. As grounds for the motion, Complaint Counsel assert that evidence concerning consumer satisfaction with DURA LUBE engine treatment products is no defense to a Commission action for deceptive practices and therefore should be excluded as irrelevant. Respondents filed their memorandum in opposition on September 2, 1999, asserting that the evidence sought to be excluded could entail a broad range of different types of evidence and could be properly admitted for a number of reasons. For reasons set forth below, Complaint Counsel's motion is GRANTED in part and DENIED in part.

II.

The focus of Complaint Counsel's motion is to exclude evidence concerning consumer satisfaction with DURA LUBE engine treatment products as irrelevant. A secondary goal Complaint

Counsel seek to achieve is to “streamline discovery [and] reduce the number and scope of depositions.” While a motion *in limine* is the appropriate means through which to exclude inadmissible evidence at trial, it is not appropriately used as a means to curtail discovery. *See Luce v. United States*, 469 U.S. 38, 40 n.2 (1984) (“Motion *in limine*” refers “to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.”). *See also Provident Life & Accident Ins. Co. v. Adie*, 176 F.R.D. 246, 250 (E.D. Mich. 1997) (“Motions *in limine* typically involve matters which ought to be excluded from the jury’s consideration due to some possibility of prejudice or as a result of previous rulings by the court.”); *Kansas v. Quick*, 597 P.2d 1108, 1112 (Kan. 1979) (“The purpose of a motion *in limine* is to assure all parties a fair and impartial trial by prohibiting inadmissible evidence, prejudicial statements, and improper questions by counsel.”).

It is beyond dispute that the scope of discovery is broader than the standards for the admissibility of evidence at trial. Accordingly, Complaint Counsel’s use of a motion *in limine* to limit discovery is procedurally improper. To the extent Complaint Counsel’s motion is granted, this order should not be read as limiting discovery.

III.

Complaint Counsel seek to exclude at trial evidence concerning consumer satisfaction with DURA LUBE engine treatment products. In support of the motion, Complaint Counsel assert that evidence of consumer satisfaction is no defense to a Commission action for deceptive practices, that such evidence cannot be used to show that Respondents’ advertising claims are not false or deceptive, and that such evidence cannot be used as evidence of product efficacy.

Respondents respond that there are many ways they may use consumer communications evidence that would be relevant and admissible. These include: consumer testimonials used in DURA LUBE advertising, correspondence relating to consumer impressions of DURA LUBE advertising; consumer communications to Respondents which may show whether or not Respondents had reason to be aware that their product was falling short of the advertising claims they were making; consumer testimonials which may show that the testimonials used as part of DURA LUBE advertising reflected the typical or ordinary experiences of consumers who used DURA LUBE; and consumer communications to show what message was being conveyed to DURA LUBE customers from the advertising and product labeling.

IV.

The evidence sought to be excluded by this motion may entail a broad range of different types of evidence that could properly be admitted for various reasons. I cannot issue an order at this juncture which would exclude a broad range of evidence which may turn out to be admissible at trial. *See*

Spencer v. Sea-Land Service, Inc., 1999 U.S. Dist. LEXIS 12608, *3 (S.D.N.Y. Aug. 13, 1999) (motion *in limine* premature where there were a number of possible bases for introduction of evidence); *Midwest Builder Distributing, Inc.*, 1998 U.S. Dist. LEXIS 9092, *7 (N.D. Ill. June 10, 1998) (motion *in limine* premature where discovery may develop facts providing a basis for introduction of evidence).

However, it is well settled that evidence of consumer satisfaction cannot be used as evidence of product efficacy. "Anecdotal evidence, such as testimonials by satisfied patients or statements by doctors that, based on their experience, they 'believe' a drug is effective do not constitute adequate and well-controlled investigations and cannot, therefore, provide substantial evidence of effectiveness." *Simeon Management Corp., et al. v. FTC*, 579 F.2d 1137, 1143 (9th Cir. 1978). *Accord Warner-Lambert*, 86 F.T.C.1398, 1496 (1975), *aff'd* 562 F.2d 749 (D.C. Cir. 1977) ("Since there may be a divergence between what the user *thinks* the product will do for him and what the product actually does (or does not do), evidence of consumer beliefs has little probative value for determining whether" a product works in the manner claimed.); *Removatron Int'l Corp.*, 111 F.T.C. 206, 302 (1988) (Testimonials from satisfied customers do not amount to valid scientific tests establishing a product's effectiveness.).

Accordingly, to the limited extent that Respondents seek to introduce consumer evidence to show that their product is effective, Complaint Counsel's motion is GRANTED.

In all other respects, the motion is DENIED without prejudice. As the factual and legal issues for trial are refined and the bases for which either party seeks to introduce evidence from consumers become clear, the parties may file specifically tailored motions *in limine*.

It is SO ORDERED.



D. Michael Chappell
Administrative Law Judge

Dated: October 22, 1999