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 PURPORTED CONSUMER SATISFACTION 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 Purported Consumer Satisfaction 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 Corp.*, 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. Feb. 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. United States*, 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 states that Respondents' exhibit list includes a section on "testimonials," and includes 34 such documents. *See* Respondents' Final Proposed Exhibit List, pp. 1-2, Exhibits R8-a through R8-ah. Complaint Counsel also points to Respondents' witness list, which includes a category of witnesses expected to testify: "With regard to their belief about their experience with DCO [Daniel Chapter One] products. . ." *See* Respondents' Final Proposed Witness List, pp. 4-5. Complaint Counsel also challenges certain of Respondents' proposed witnesses who are expected to testify "with regard to the operation of the Daniel Chapter One Ministry, including the collection and dissemination of information and the management of ministry programs." Respondents' Final Proposed Witness List, pp. 2-4. Complaint Counsel contends that despite the general language used to describe the testimony, the specific descriptions of certain witnesses' testimony include "testimonial" evidence about how the products have

affected their lives, or the lives of others of which the witness is aware. Motion, pp. 2-3 and n.3.

Complaint Counsel contends that evidence of consumer satisfaction is irrelevant to whether a violation of the FTC Act occurred. Complaint Counsel further argues that consumer satisfaction evidence is not necessary as "extrinsic evidence" to prove the meaning of Respondents' advertisements at issue, because the meaning is sufficiently clear on the face of the ads. Finally, Complaint Counsel asserts that the evidence should be excluded prior to trial because consumer testimonials do not constitute adequate substantiation for health-related efficacy claims, which require competent and reliable scientific evidence.

Respondents state that none of the exhibits or witnesses to which Complaint Counsel objects is offered for the purpose of showing consumer satisfaction or substantiation, but for other matters. Opposition, pp. 2-3. Respondents contend that at least some of the challenged testimony is being offered to show that DCO is a ministry and that those who listen to their programs, access the website, and use the products are "members of a unique religious constituency," Opposition, p. 2, with a common religious orientation and view of health and healing, based in the Bible. Opposition, p. 4. According to Respondents, Complaint Counsel's proposed *in limine* order is overbroad, because it would preclude broad categories of evidence that may be relevant to other issues, such as: (1) whether DCO is an non-profit entity that is exempt from the FTC Act; (2) what impression Respondents' messages about their products conveyed to members of their community, at whom Respondents assert their messages were directed; and (3) as to at least one witness, whether Respondents authored certain representations on the DCO website.

III.

Evidence of customer satisfaction is not relevant to determining whether the claims made are deceptive. *Fed. Trade Comm'n v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989) ("the existence of [satisfied] customers is not relevant to determining whether consumers were deceived and the magistrate was correct to exclude [such evidence]"); *In re Horizon Corp.*, 97 F.T.C. 464, 1981 FTC LEXIS 47, at *37 (May 15, 1981) (stating: "It is not a defense to a charge of deception under Section 5 that some customers were satisfied with the product."). *See also Independent Directory Corp. v. Fed. Trade Comm'n*, 188 F.2d 468, 471 (2d Cir. 1951) (holding that evidence of consumer satisfaction was properly excluded because "[t]he fact that petitioners had satisfied customers was entirely irrelevant").

Moreover, non-scientific, consumer testimonials of product effectiveness are generally considered inadequate substantiation. *Fed. Trade Comm'n v. QT, Inc.*, 512 F.3d 858, 862 (7th Cir. 2008); *Fed. Trade Comm'n v. Natural Solution, Inc.*, Case No. CV 06-6112-JFW (JTLx), 2007 U.S. Dist. LEXIS 60783, at *15 (C.D. Cal. Aug. 7, 2007); *In re Warner-Lambert Co.*, 86 F.T.C. 1398, 1496 (1975), *aff'd,* 562 F.2d 749 (D.C. Cir. 1977) (stating: "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).

Respondents state "none of the written testimonials or witnesses to which Complaint Counsel objects is offered for the purpose of 'introducing evidence of satisfied consumers to show the claims were not deceptive and evidence of consumer testimonials to show the claims were not unsubstantiated.'" Respondents' Opposition, p. 2. Accordingly, such evidence may not be offered for those purposes. However, it cannot be presumed, without the context of trial and a specific proffer of evidence, that all the proposed evidence referred to in Complaint Counsel's Motion and Respondents' Opposition is inadmissible on all potential grounds.

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 satisfied consumers to show the claims were not deceptive and evidence of consumer testimonials to show the claims were not unsubstantiated. 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 proffered at trial.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: April 20, 2009