UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

ORDER ON COMPLAINT COUNSEL'S MOTION TO STRIKE AND MOTION FOR LEAVE TO FILE A REPLY

I.

On June 29, 1999, Complaint Counsel filed its motion to strike portions of the Respondents' answer and all of the Respondents' additional defenses ("motion to strike"), asserting that they: (1) are irrelevant or immaterial, and serve only to confuse the issues; (2) are invalid as a matter of law; and/or (3) do not comply with Rule 3.12(b) which requires a concise statement of the facts constituting each ground for defense. Respondents filed their memorandum in opposition on July 23, 1999. Complaint Counsel, as the moving party, has failed to meet its burden of proof. Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.43(a). For reasons set forth below, Complaint Counsel's motion is DENIED.

II.

The Commission's Rules of Practice do not specifically provide for motions to strike, but the Commission has held that under appropriate circumstances such motions may be granted. *See Warner-Lambert Co.*, 82 F.T.C. 749 (1973); *Kroger Co.*, 1977 FTC LEXIS 70 (Oct. 18, 1977). However, motions to strike are generally disfavored. *Home Shopping Network, Inc., et al.*, 1995 FTC LEXIS 259 (July 24, 1995); *Volkswagen of America, Inc., et al.*, No. 9154, slip op. at 2 (July 8, 1981)(Mathias, J.).

Without a Rule of Practice governing motions to strike, others have sought guidance from Federal Rule of Civil Procedure 12(f) and cases which have construed Rule 12(f) in diverse ways. It is, therefore, not surprising that Commission precedent varies greatly on the appropriate standard for granting a motion to strike. Some cases have held that issues of law or fact which are irrelevant or immaterial can be resolved on a motion to strike, and other cases have held that it is inappropriate to resolve issues of law or fact on a motion to strike. *Compare Warner*, 82 F.T.C. 749 (upholding ALJ decision to strike defenses as irrelevant and frivolous); *Kroger*, 1977 FTC LEXIS 70 (striking defenses as insufficient as a matter of law); and *Volkswagen of America*, No. 9154, slip op. (striking defenses as injecting invalid and extraneous issues and as insufficient as a matter of law) *with Home Shopping Network*, 1995 FTC LEXIS 259 (refusing to strike defenses asserting legally sufficient issues and factual issues that should be determined on the merits); *General Motors Corp., et al.*, 1976 FTC LEXIS 237 (July 9, 1976)(refusing to strike defenses unless they are unquestionably insufficient as a matter of law); and *Volkswagen of America*, No. 9154, slip op. (refusing to strike defenses raising substantial questions of fact and law and defenses raising questions of law which cannot be deemed wholly frivolous, irrelevant, or immaterial).

Despite the divergence of precedent, one common principle which can be gleaned is that a motion to strike should be granted only if the answer contains assertions which are obviously irrelevant or immaterial or are clearly invalid as a matter of law. This is the first prong of the required analysis. What is lacking from this common principle is a second prong of the analysis which is discussed in *Warner*: whether the challenged defense would require lengthy discovery, result in considerable delay in the proceedings, or result in the introduction of irrelevant evidence at the hearing. *Warner*, 82 F.T.C. at 750. In other words, does allowing the defense to stand prejudice Complaint Counsel? Does the defense threaten an undue broadening of the issues in the case or impose a burden on Complaint Counsel? Although some decisions do not consider whether a defense, if allowed to stand, would prejudice Complaint Counsel, or even reject harm to Complaint Counsel as a factor, those that do consider possible prejudice are more persuasive. *Compare Home Shopping Network*, 1995 FTC LEXIS 259 (motions to strike will not be granted "unless their presence unduly prejudices the opposing party") and *Synchronal Corp. et al.*, 1992 FTC LEXIS 61, *1 (Mar. 5, 1992)("a motion to strike will be denied not only if there are disputed questions of fact or law but also when there is a showing that permitting the defense to stand would not prejudice the plaintiff") *with General Motors Corp.*, 1976 FTC LEXIS 237 (though some courts have held that the moving party must show that prejudice will

result if its motion is not granted, a showing of prejudice is not always necessary before a pleading can be stricken).

Articulating a clear standard will provide guidance. I therefore hold: a motion to strike defenses or portions of an answer will be granted when the answer or defense (1) is unmistakably unrelated or so immaterial as to have no bearing on the issues and (2) prejudices Complaint Counsel by threatening an undue broadening of the issues or by imposing a burden on Complaint Counsel. It is difficult to foresee any harm to Complaint Counsel when both prongs of this analysis are not satisfied. Applying this standard to the contested defenses, at this stage of the proceedings, I do not find that the challenged portions of the Answer meet both requirements.

Although I have let stand Respondents' numerous defenses, this should not be viewed as an open invitation to needlessly confuse and compound the issues, increase the scope of discovery, or prolong these proceedings. "[T]he mere fact that respondent alleges a matter as an affirmative defense does not necessarily open the door to unlimited discovery." *Ford Motor Co.*, 1976 FTC LEXIS 38, *2 (Dec. 3, 1976). Substantial or unnecessary expansion of discovery can best be dealt with through the Commission rules on discovery. Likewise, where there are legal disputes as to which the moving party contends there is no genuine issue of material fact, a motion for summary decision is appropriate.

III.

Complaint Counsel also moves to have portions of the answer stricken on the grounds they do not comply with FTC Rule 3.12(b) which requires a concise statement of the facts constituting each ground of defense and to have Respondents' blanket denials of the preamble stricken on the grounds that they are frivolous, extraneous, and unsupported by fact or law. A concise statement of the facts is required for a valid defense. Without commenting on the merits of whether these denials constitute valid defenses, there is no prejudice to Complaint Counsel, at the present time, in allowing these denials to stand.

IV.

For the foregoing reasons, the motion is DENIED. The Answer will stand in all respects, except that Respondents have withdrawn Additional Defenses L and Q.

In addition, Complaint Counsel has requested to file a reply brief in order to correct a statement by Respondents that Complaint Counsel allege is "legally misguided" and "factually incorrect." Based upon my holding herein, the reply brief would not be dispositive of the issues in the pending motion to

strike and will not be considered. Complaint Counsel's Motion for Leave to File a Reply to Respondents' Memorandum in Opposition to Complaint Counsel's Motion to Strike is, therefore, DENIED.

IT IS SO ORDERED.

D. Michael Chappell
Administrative Law Judge

Dated: August 31, 1999