FEDERAL TRADE COMMISSION, Plaintiff, vs. SILUETA DISTRIBUTORS, INC., a corporation, and STANLEY KLAVIR, individually and as an officer of said corporation, Defendants.

No. C 93-4141 SBA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1995 U.S. Dist. LEXIS 22254*; *1995-1 Trade Cas. (CCH) P70,918

February 23, 1995, Decided
February 24, 1995, Filed; February 27, 1995, Entered on Civil Docket

DISPOSITION: [*1] Plaintiff's motion for summary judgment GRANTED and defendants' cross-motion for summary judgment DENIED.

COUNSEL: For FEDERAL TRADE COMMISSION, Plaintiff: Sylvia Kundig, Federal Trade Commission, San Francisco, CA.

For SILUETA DIST INC, STANLEY KLAVIR, defendants: Daniel S. Wallis, Woodland Hills, CA.

JUDGES: SAUNDRA BROWN ARMSTRONG, United States District Judge.

OPINION BY: SAUNDRA BROWN ARMSTRONG

OPINION

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS-MOTION

Plaintiff Federal Trade Commission ("plaintiff") has brought this action against defendants Silueta Distributors, Inc. ("Silueta") and Stanley Klavir ("Klavir") (collectively "defendants"), alleging violations of Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act"), *15 U.S.C. §§ 45(a)*, *52*, which prohibit the dissemination of false and deceptive advertising. Plaintiff specifically alleges that defendants' advertisement of a cellulite elimination product on Spanish-language television was false and deceptive in violation of the FTC Act. It seeks a permanent injunction, restitution and disgorgement under Section 13(b) of the FTC Act, *15 U.S.C. § 53* [*2] *(b)*. It also seeks to impose individual liability on Klavir.

Presently before the Court are plaintiff's motion for summary judgment and defendants' cross-motion for summary judgment. In its motion, plaintiff maintains that the Court should find defendants liable as alleged and should award the relief it seeks. In large part, defendants do not oppose plaintiff's motion. Defendants only oppose the portions of the motion that seek to impose individual liability on Klavir and that seek a disgorgement remedy from the Court. In addition to asserting these grounds in opposition to plaintiff's motion, defendants also cross-move for summary judgment, requesting that the Court find Klavir is not individually liable and that plaintiff is not entitled to disgorgement.

Having read and considered all matters submitted in connection with these motions, and being fully informed, the Court hereby GRANTS plaintiff's motion for

summary judgment and DENIES defendants' cross-motion. [1]

1 Pursuant to Local Rule 220-1, the Court finds these motions appropriate for adjudication without oral argument.

[*3] ***FACTS***

Defendants promoted the sale of a product known as Sistema Silueta through advertisement broadcasts on KDTV, Channel 14, and on other Spanish-language stations across the country. Sistema Silueta consists of a moisture lotion and diuretic tablets. As shown below, the advertisement represents that Sistema Silueta will eliminate cellulite from the body and that consumer testimonials support this assertion.

The Sistema Silueta advertisement features an unidentified man sitting on the edge of a desk, positioned in front of book-lined shelves. The man states: "I would like to talk to you for a few moments. Sistema Silueta is the scientific miracle of the moment." (FTC Ex. 2 at 1.) During this introduction, there is a subscript which reads: "We do not specify a determined weight loss with this product." (FTC Ex. 2 at 1.) The subscript disappears as the man continues:

> Silueta is an astonishing treatment in two steps which penetrates the skin and attacks and dissolves the fat cells which are the cause of those ugly cellulite bumps, and later expels them from your body.

(*Id.*)

The commercial then switches to a swimsuit-clad woman who states:

> We [*4] all know that neither diets nor strenuous exercises can get rid of cellulite, but with Sistema Silueta I did achieve it when I applied it on those areas I wanted to reduce.

(FTC Ex. 2 at 1.) During the time the woman speaks, there is a subscript that reads: "To lose weight with this product, you need to eat less and follow the instructions." (*Id.*)

The advertisement then moves into its third phase, which is comprised of illustration and narration. The illustration is of an overweight woman's body in a swimsuit. The figure rubs a cream onto corpulent and bumpy thighs. The figure then transforms and becomes thin. The next illustration apparently represents fat cells. Arrows are depicted entering into the spaces between the fact cells and the cells become smaller. Then a liquid pours over the picture, apparently washing the residue away. During this illustration phase, the narration is as follows:

> Step number one -- the Silueta cream penetrates underneath the surface of the skin breaking those fat and cellulite deposits and converts them into liquids that step number two takes care of by expelling them from your body.

(FTC Ex. 2 at 1.)

The advertisement then [*5] returns to the unidentified man's office. He is now sitting behind the desk and the swimsuit-clad woman is perched on the edge of the desk. The woman states: "Nothing could be easier. Start today to get the figure you have always dreamed about." (FTC Ex. 2 at 1.) During this last scene, there is a subscript that reads: "Testimonials on file." (*Id.*)

At this point, the advertisement shows an 800 number. When a consumer calls the 800 number, the consumer is told that it is possible to order the Sistema Silueta products by C.O.D. Although the advertised cost of the Sistema Silueta regimen is $ 34.95 plus $ 5.00 shipping and handling, the C.O.D. cost of the regimen is $ 43.95.

STANDARD OF REVIEW

Under *Federal Rule of Civil Procedure 56*, summary judgment is warranted against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return [*6] a verdict for that party. *Anderson v. Liberty Lobby, Inc, 477 U.S. 242, 249, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).*

In opposing a summary judgment motion, the nonmoving party must come forward with specific facts demonstrating a genuine factual issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. "If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987)* (citations omitted). Instead, *Rule 56(e)* requires that the nonmoving party set forth, by affidavit or as otherwise provided in *Rule 56*, specific facts showing that there is a genuine issue for trial. *Id.* At least some "significant probative evidence tending to support the complaint" must be produced. *Id.* Legal memoranda and oral argument [*7] are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978)*, *cert. denied*, *440 U.S. 981, 60 L. Ed. 2d 241, 99 S. Ct. 1790 (1979)*. Furthermore, when the nonmoving party relies only on his or her own affidavits to oppose summary judgment, that party cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact. *Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993)*.

Thus, an opposition which fails to identify and reference triable facts is insufficient to preclude the Court's granting of a properly supported summary judgment motion. *See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538, 1545 (9th Cir. 1988)*. Nonetheless, any inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. *T.W. Elec. Serv. v. Pacific Elec. Contractors, 809 F.2d 626, 631 (9th Cir. 1987)*.

DISCUSSION

A. *LIABILITY*

1. *Sections 5(a) and 12 of the FTC* [*8] *Act*

a. *Legal Standards*

Section 5(a) of the FTC Act declares unlawful "unfair or deceptive acts or practices in or affecting commerce" and empowers the Federal Trade Commission (the "Commission") to prevent such acts or practices. *15 U.S.C. § 45(a)&(2)*; *F.T.C. v. Pantron I Corporation, 33 F.3d 1088, 1095 (9th Cir. 1994)*. Section 12 of the FTC Act is specifically directed to false advertising. *Pantron I, 33 F.3d at 1095*. This section prohibits the dissemination of "any false advertisement" in order to induce the purchase of "food, drugs, devices, or cosmetics." *15 U.S.C. § 52(a)(2)*; *Pantron I, 33 F.3d at 1095*. It also provides that the dissemination of any such false advertisement is an "unfair or deceptive act or practice in or affecting commerce" within the meaning of Section 5. *15 U.S.C. § 52(b)*; *Pantron I, 33 F.3d at 1095*. The FTC Act defines "false advertisement" as "an advertisement, other than labeling, which is misleading in a material respect." *15 U.S.C. § 55*; *Pantron I, 33 F.3d at 1095*.

The Ninth [*9] Circuit applies a three-part test to determine whether an advertisement is misleading and deceptive in violation of Section 12. *Pantron I, 33 F.3d at 1095*. An advertisement is misleading or deceptive if (1) there is a representation, omission, or practice that (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material. *Id.* (adopting test in *Cliffdale Assoc., Inc., 103 F.T.C. 110, 1984 FTC LEXIS 71, 164-65 (1984))*. Express product claims are presumed to be material. *Id.* Furthermore, the use of a consumer endorsement violates Section 5 if the endorsement misrepresents that the alleged results are what consumers typically achieve. *Cliffdale Assoc., 103 F.T.C. at 173*.

b. *Application*

FTC asserts that defendants' advertisement violated the FTC Act because it expressly and falsely represented that Sistema Silueta will eliminate cellulite, [2] that Sistema Silueta has caused cellulite elimination in actual use, [3] and that consumer testimonials support the conclusion that Sistema Silueta eliminates cellulite. [4] Because these representations were expressly made [*10] in the advertisement, the materiality of the representations is presumed. Furthermore, because these representations relate to the very reason a consumer would purchase the product (i.e., to eliminate cellulite), these representations, if false, would clearly mislead consumers acting reasonably under the circumstances. Thus, the only issue here is whether the representations

are false. As shown below, no genuine issue of fact exists that these representations are false, and therefore imposition of liability under the FTC Act is appropriate.

2 As to this misrepresentation, plaintiff points to the portion of the advertisement in which three representations are made. First, the portion in which the unidentified man states:

> Silueta is an astonishing treatment in two steps which penetrates the skin and attacks and dissolves the fat cells which are the cause of those ugly cellulite bumps, and later expels them from your body.

(FTC Ex. 2 at 1.) Second, the portion in which the unidentified swimsuit-clad woman states:

> We all know that neither diets nor strenuous exercises can get rid of cellulite, but with Sistema Silueta I did achieve it when I applied it on those areas I wanted to reduce.

(FTC Ex. 2 at 1.) Third, the illustration portion during which a voice states:

> Step number one -- the Silueta cream penetrates underneath the surface of the skin breaking those fat and cellulite deposits and converts them into liquids that step number two takes care of by expelling them from your body.

(FTC Ex. 2 at 1.)

[*11]

3 As to this misrepresentation, plaintiff points to the portion of the advertisement in which the unidentified swimsuit-clad woman states: "We all know that neither diets nor strenuous exercises can get rid of cellulite, but with Sistema Silueta I did achieve it when I applied on it on those areas I wanted to reduce." (FTC Ex. 2 at 1.)

4 As to this misrepresentation, plaintiff points to the portion of the advertisement in which a subscript provides: "Testimonials on file." (FTC Ex. 2 at 1.)

Plaintiff provides ample evidence by way of expert declaration testimony establishing that Sistema Silueta cannot eliminate cellulite. This evidence reveals that the "cream is nothing more than a moisturizer, the ingredients of which are those found in body lotions and creams generally." (Elias Decl. P 17; Stern Decl. PP 20-23.) Furthermore, the diuretic tablets contain an herbal diuretic that cannot cause the loss of cellulite, only water loss, which will be replaced immediately upon the ingestion of water. (Stern Decl. P 22.)

As to the other representations regarding cellulite loss by actual use [*12] and supporting testimonials, plaintiff has requested that defendants produce the testimonials or other evidence showing cellulite loss by actual use, but defendants have failed to produce any such evidence. Thus, plaintiff contends no evidence exists to support these representations.

Because defendants have presented no evidence contradicting plaintiff's contentions regarding any of the three representations, [5] no genuine issue of fact exists as to whether defendants' Sistema Silueta advertisement was false and violated the FTC Act. Thus, this Court GRANTS summary judgment in favor of plaintiff on this issue.

5 In fact, defendants have entirely failed to oppose this portion of plaintiff's motion, and consequently, in essence, concede that the motion should be granted.

2. *Klavir's Liability*

Klavir asserts that he is not individually liable for the violations because he did not know and should not have known of the misrepresentations. Klavir maintains that he bought Silueta from Juan Perez, who created [*13] the advertisement for Sistema Silueta. Klavir claims that Perez stated he had verified the statements in the advertisement and Klavir had no reasons to believe that Perez's verification was not accurate. Klavir claims that, except for products returned under the money-back guarantee, Klavir received no complaints about the product. Finally, he asserts that, as soon as plaintiff notified him of possible infractions of the FTC Act, defendants voluntarily stopped advertising the product. Based on these contentions, Klavir disclaims any individual liability in this case. For the reasons discussed below, the Court finds that Klavir's assertions with regard to Perez do not save him from the imposition of

individual liability under the FTC Act. Furthermore, the Court finds that Klavir has the requisite knowledge for individual liability to attach to him.

1. *Legal Standards*

The policy behind the imposition of individual liability is to ensure that an individual defendant does not benefit from deceptive activity and then hide behind the corporation. *F.T.C. v. Amy Travel Serv., 875 F.2d 564, 574 (7th Cir. 1989).* Individual liability for a corporation's violations [*14] of Section 5 can be predicated either on (1) having participated directly in the violative conduct, or (2) having had the authority to control the conduct. *Amy Travel Serv., 875 F.2d at 574*. The parties do not dispute Klavir's authority to control Silueta's conduct, as he is the sole owner of Silueta. Disputed here is the issue of whether Klavir must have had knowledge of the conduct before liability attached, as well as the issue of whether Klavir had this knowledge.

The Ninth Circuit has not decided whether knowledge of deceptiveness is required before a court may impose individual liability under the FTC Act. *Pantron I, 33 F.3d at 1103* (holding that the knowledge issue need not be decided because, even under the knowledge standard, imposition of individual liability was appropriate). Courts requiring a showing of knowledge before imposition of individual liability apply the following standard: The Commission must show that the individual defendant possessed one of the following: (1) actual knowledge of material misrepresentations, (2) reckless indifference to the truth or falsity of such misrepresentations, or (3) an awareness of a high probability of fraud [*15] along with an intentional avoidance of truth. *Pantron I, 33 F.3d at 1103* (quoting *Amy Travel Serv., 875 F.2d at 574*). In the case at bar, imposition of liability against Klavir is appropriate under this knowledge standard. Consequently, this Court need not reach the issue of whether knowledge is legally required before liability can be imposed.

2. *Application*

The evidence presented here reveals that 63 percent of the consumers who ordered Sistema Silueta returned the product. Such an extraordinarily high rate of return should have placed Klavir on notice that the product did not eliminate cellulite as claimed by the advertisements. *See Amy Travel Serv., 875 F.2d at 574-75* (high volume of consumer complaints and excessive credit card chargebacks were a signal to individual defendants that sales scripts contained misrepresentations). This evidence causes the Court to conclude that Klavir acted with a reckless indifference to the truth or falsity of the advertisement's misrepresentations, or, at a minimum, that Klavir had an awareness of a high probability of fraud and intentionally avoided the truth. [6] Consequently, the [*16] Court finds that imposition of individual liability on Klavir is appropriate, and therefore GRANTS plaintiff's motion and DENIES defendants' cross-motion as to this issue.

6 The Court notes that, in a footnote, Klavir argues that the high rate of return should not have put him on notice of any deception because he has consumer testimonials supporting the product. Because Klavir has failed to produce these testimonials in response to the government's request and in support of his opposition or cross-motion, Klavir's argument is meritless. Furthermore, the existence of some satisfied consumers is not a defense to liability. *Amy Travel Serv., 875 F.2d at 572*.

Before moving on, the Court addresses Klavir's assertions that his reasonable reliance on the alleged verification made by Perez saves him from individual liability. The Court finds Klavir's argument to be unpersuasive for several reasons. First, other than his own conclusory declaration testimony, Klavir provides no evidence in support of [*17] his assertions regarding Perez's verification. The declaration's lack of specific factual data causes it to be inadequate evidentiary support. *See Hansen, 7 F.3d at 138* (nonmoving party cannot oppose summary judgment by reliance on own conclusory declaration testimony that lacks specific factual data). Second, nothing in the record establishes Perez as a reliable source for an endorsement of Sistema Silueta. Third, it was unreasonable for Klavir to rely on Perez's alleged verification, as this took place during a sales transaction between Klavir and Perez. It is unlikely that Perez would have informed Klavir, a prospective purchaser, that the advertisement was deceptive. Fourth, the evidence reveals that the advertisement being challenged here was not the one created by Perez, but was one that was materially altered by Klavir. Klavir significantly edited the advertisement from an 1-minute running time to a 30-second running time. Finally, good faith reliance on another's representation is no defense to liability under the FTC Act. *Amy Travel Serv., 875 F.2d*

at 575.

B. *REMEDIES*

Under Section 13(b) of the FTC Act, plaintiff requests a [*18] permanent injunction, restitution and disgorgement. With regard to the amount of restitution, plaintiff requests $ 169,339.35, as 3,853 consumers paid $ 43.95 for the product. [7] Defendants do not oppose issuance of the permanent injunction or an award of $ 169,339.35 in restitution. Defendants, however, do oppose disgorgement of all unclaimed monies to the United States Treasury.

> 7 Actually, defendants shipped 10,399 units of the product, but 6,546 were returned.

Defendants argue that the Court cannot order disgorgement as a remedy under Section 13(b) of the FTC Act. Defendants rely on the Ninth Circuit's decision in *F.T.C. v. Figgie Int'l, Inc., 994 F.2d 595 (9th Cir. 1993)*, *cert. denied*, *510 U.S. 1110, 114 S. Ct. 1051, 127 L. Ed. 2d 373 (1994)*. This Court finds, however, that *Figgie* is not applicable to the instant action because *Figgie* involves Section 19(b) of the FTC Act, which specifically limits federal courts' equitable powers to provide redress to consumers, [*19] whereas this case involves Section 13(b), which does not limit federal courts' equitable powers to provide redress to consumers.

Section 19(b) of the FTC Act provides:

> The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds *necessary to redress injury to consumers* or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; *except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.*

15 U.S.C. § 57b(b) (emphasis added). As found by the Ninth Circuit in *Figgie*, the above-emphasized portions of Section 19(b) indicate that (1) Congress intended to limit the remedies available under Section 19(b) to those that provide redress to consumers, and (2) any monetary [*20] remedy authorized under Section 19(b) that accomplishes more than redress acts as prohibitive punitive damages. *994 F.2d at 607*.

In *Figgie*, the Ninth Circuit reversed the district courts' disgorgement remedy under Section 19(b) because it found that disgorgement which went beyond providing redress to consumers was not authorized under Section 19(b). The Ninth Circuit stated that Section 19(b) "authorizes only redress . . . to consumers,' and specifically prohibits the imposition of 'exemplary or punitive damages.'" *Figgie, 994 F.2d at 607* (quoting *15 U.S.C. § 57b(b)*). The Ninth Circuit went on to conclude: "If disgorgement of Figgie's receipts would exceed redress to consumers, then in the circumstances of this case requiring Figgie to pay the Commission the excess would be for purposes of punishing Figgie, not making redress to the consumers who bought heat detectors." *Id.* Consequently, because it found that Section 19(b) limited courts' equitable jurisdiction to providing redress to consumers and because disgorgement in the case before it exceeded redress, the Ninth Circuit disallowed disgorgement as prohibited under Section [*21] 19(b).

In the instant action, if plaintiff sought disgorgement under Section 19(b), the Court might have found, based on *Figgie*, defendants' objections to disgorgement to be persuasive. Plaintiff, however, does not seek disgorgement under Section 19(b), but under Section 13(b), which does not contain the limiting language found in Section 19(b). Furthermore, the Ninth Circuit's interpretation of Section 13(b) allows federal courts to broadly apply their equitable powers. Thus, as discussed more fully below, defendants' argument that Section 13(b) does not allow for disgorgement is not supported by the statute or its interpreting case law.

Section 13(b) provides that whenever the Commission has reason to believe a person is violating the FTC Act, *15 U.S.C. § 53(b)(1)*, and that enjoining such violation would be in the public interest, *15 U.S.C. § 53(b)(2)*, then the Commission "may bring suit . . . to enjoin" the violation. *15 U.S.C. § 53(b)*. As to the issuance of temporary injunctive relief, Section 13(b) provides, in pertinent part: "Upon a proper showing that,

weighing the equities and considering the Commission's [*22] likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond." *15 U.S.C. § 53(b)*. As to the issuance of permanent injunctive relief, Section 13(b) provides, in pertinent part: "That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business." *15 U.S.C. § 53(b)*. Section 13(b) therefore does not limit its remedies to those that provide redress to consumers and does not prohibit injunctive remedies that might act as punitive damages. Because Section 13(b) does not contain the same limiting language as Section 19(b), defendants' reliance on *Figgie* is inappropriate. [8]

8 The Court notes that Section 19(b) itself specifies that it is not intended to restrict any other provision of the FTC Act: "Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law." *15 U.S.C. § 57b(b)*. This supports a finding that Section 19(b) is not intended to restrict the remedies available under Section 13(b), and therefore supports the conclusion that Figgie's disgorgement analysis of Section 19(b) does not apply to Section 13(b).

[*23] Moreover, unlike Section 19(b), the Ninth Circuit has broadly interpreted Section 13(b). The Ninth Circuit has specifically stated in *Pantron I*, decided after *Figgie*, that Section 13(b) gives federal courts broad authority to fashion appropriate equitable remedies for violations of the FTC Act. *Pantron I, 33 F.3d at 1102*. Also in *Pantron I*, the Ninth Circuit reaffirmed its position in *F.T.C. v. H.N. Singer, Inc., 668 F.2d 1107 (9th Cir. 1982)*, that "the authority granted under 13(b) is not limited to the power to issue an injunction, but includes the authority to grant any ancillary relief necessary *to accomplish complete "justice.'" Id.* (quoting *H.N. Singer, 668 F.2d at 1113* (emphasis added)). In *H.N. Singer*, the Ninth Circuit considered whether Section 13(b) gave federal courts the power to freeze assets of those persons violating the FTC Act. In finding that the statute did provide for such power, the Ninth Circuit stated that Congress did not intend "to restrict the broad equitable jurisdiction apparently granted to [federal courts] by § 13(b)." *668 F.2d at 1113*. The *H.N. Singer* court continued: [*24] "We hold that Congress, when it gave [federal courts] authority to grant a permanent injunction against violations of any provision of law enforced by the Commission, also gave [federal courts] authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference." *Id.*

Hence, under the Ninth Circuit's broad interpretation of Section 13(b), Section 13(b) authorizes the Court to use the full range of its equitable powers. Disgorgement is an equitable remedy used to avoid unjust enrichment. *S.E.C. v. Rind, 991 F.2d 1486, 1493* (citing *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 570, 108 L. Ed. 2d 519, 110 S. Ct. 1339 (1990))*. The fact that disgorgement involves a claim for money does not detract from its equitable nature. *Id.* When authorizing disgorgement, "'the court is not awarding damages to which plaintiff is legally entitled but is exercising the chancellor's discretion to prevent unjust enrichment.'" *Id.* (quoting *S.E.C. v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 95 (2nd Cir. 1978))*. [*25] As Section 13(b) empowers federal courts to use broad equitable powers and as disgorgement is an equitable remedy used to prevent unjust enrichment, the Court finds that Section 13(b) authorizes the use of a disgorgement remedy under the appropriate circumstances.

The Court rules that, in this case, the disgorgement remedy sought by plaintiff is needed to avoid unjust enrichment of defendants. To allow defendants to recover any portion of the restitution amount awarded against them would, in essence, allow them to profit from their misdeeds. This Court must avoid such a result. *See Pantron I, 33 F.3d at 1102* (holding that district court abused its discretion in not requiring company and individual defendant to pay restitution or disgorgement, as such an award was necessary to avoid unjust enrichment and to protect consumers). Thus, the Court holds that, under the circumstances of this case, the disgorgement remedy sought by plaintiff is appropriately awardable under Section 13(b). It therefore finds that, as to the disgorgement issue, plaintiff prevails. [9]

9 The Court notes that the amount of disgorgement in this case should be relatively low, as defendants have provided plaintiff with the names and addresses of the 3,853 consumers

who purchased the product.

[*26] ***CONCLUSION***

Based on the foregoing, the Court GRANTS plaintiff's motion for summary judgment and DENIES defendants' cross- motion. The Court hereby issues the permanent injunction requested by plaintiff, the terms of which are contained in the attached "Final Judgment and Order for Permanent Injunction," received by the Court on September 12, 1994 and signed by the Court on this day. The Court holds defendants jointly and severally liable for the restitution amount of $ 169,339.35. Any unclaimed amount of the $ 169,339.35 shall be deposited into the United States Treasury as an equitable disgorgement remedy to prevent defendants' unjust enrichment.

IT IS SO ORDERED.

DATED: February *23*, 1995

SAUNDRA BROWN ARMSTRONG

United States District Judge