IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA Plaintiff, v. QVC, INC. Defendant/Third-Party Plaintiff, v. VITAQUEST INTERNATIONAL, INC. et al., Third Party Defendants	:	CIVIL ACTION NO. 04-1276

MEMORANDUM AND ORDER

Fullam, Sr. J. February 8th, 2005

The United States has sued QVC Inc. ("QVC"), alleging violations of the FTC Act, 15 U.S.C. § 45 *et seq*. QVC sells consumer products via television. QVC alleges that each vendor screens the on-air claims with a QVC executive before the program airs, that each vendor signs a contract that warrants that all claims made to promote the product are true, and that each vendor promises to indemnify QVC against any harm that may arise from the breach of those warranties. The products in question in this case include "For Women Only", "Lite Bites" and "Bee-Alive," allegedly designed to assist in weight loss and maintain health. The Government asserts that QVC violated an FTC order to cease certain advertising practices stemming from on-air claims made in support of those products while being sold by QVC. QVC, seeking to shift potential liability, filed suit against the third party defendants who market and advertise the products in question. Specifically, QVC asserts claims of breach of contract, promissory estoppel, and both common law and contractual indemnity. The third party defendants have moved to dismiss and strike the third-party complaint, and the Government has moved to strike the third-party complaint. Those motions will be granted in part and denied in part.

The claims of breach of contract and promissory estoppel must survive the motion to dismiss. Viewing the pleadings in the light most favorable to QVC, the material elements of both claims have been sufficiently pled. Contrary to the third-party defendants' argument, the facts alleged in those claims and the relief demanded by QVC are broader than the claims made with respect to indemnification; thus the breach of contract and promissory estoppel claims are more than a mere reshuffling of the indemnity claims and constitute viable causes of action in their own right.

The issues of common law and contractual indemnification present a closer question. There is no federal common law right to indemnification and public policy dictates against recognizing such a right. *See FTC v. Hang-Ups Enterprises Inc.,* 1995 WL 914179 (C.D. Cal. Sept. 27 1995)(holding that Congress did not intend to create a common law right to indemnification in consumer redress actions); *see also* S. Rep. 91-151, 93rd Cong., 1st Sess., p. 29 (1973)(noting that allowing a right to indemnification would hamper the Commission's ability to secure consent orders). To the extent QVC asserts a common law right to indemnification the motion to dismiss is granted.

As for contractual indemnification, I start from the principle that the purpose of the FTC Act is consumer protection, not punishment. *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963). As a result, allowing indemnification in the context of the FTC Act does not undermine public policy to the same extent as in the securities law setting, where the focus is assigning liability and punishing wrongdoing. In fact, indemnification may very well bring culpable parties into this case. In addition, there is a tendency in the law to honor the arms-length transactions of parties and to consider the parties to a contract to be in the best position to assign future liability. The language of the indemnification contracts in this case is expansive and contemplates a wide range of coverage. For example, the Vitaquest contract states that Vitaquest will indemnify QVC against "any and all damages, claims, costs [or] expenses(including reasonable attorney's fees)..." resulting from a breach. Similarly, the "Bee-Alive" agreement covers "claims, actions, suits, costs, liabilities, damages and expenses...", and is certainly broad enough to encompass government enforcement actions.

Finally, the third party defendants argue that the Court should strike the third party complaint due to improper impleading and jurisdiction issues. Since the indemnification claims directly relate to the Government’s case, Federal Rule of Civil Procedure 14 applies. While the addition of claims may complicate the FTC enforcement action, an analysis of the circumstances unique to this case, including the overlap of issues and the possibility of inconsistent judgments, leads me to conclude that these claims should remain. *Scott v. Walter Kidde Portable Equipment*, 2002 WL 1880521 (E.D. Pa. Aug. 12, 2002). Also, the exercise of supplemental jurisdiction is proper in this case because there are no novel or complex issues of state law in play and the overlap of issues means that state law will not predominate.

In sum, to the extent the motion to dismiss seeks to remove common law indemnification claims, the motion is granted. However, as to claims of contractual indemnification, breach of contract and promissory estoppel the motion is denied. The motion to strike the complaint is denied. Finally, the motion of Dr. Lieberman, to the extent it is not rendered moot by the resolution of the third-party defendants’ motion, is denied on the merits.

An Order follows.

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ORDER

AND NOW, this 8th day of February, 2005, upon consideration of third party defendant's motion to dismiss and strike the complaint, and the responses thereto,

IT IS HEREBY ORDERED that the motions are granted in part and denied in part. It is further ORDERED:

1. All claims relating to common law indemnification are dismissed with prejudice.
2. In all other respects the motions to dismiss are DENIED.
3. To the extent it is not rendered moot by the disposition of the motions to dismiss, the Government's motion to strike the complaint is denied.

/s/ John P. Fullam
John P. Fullam, Sr. J.