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DC CLIENT ALERT

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FEDERAL TRADE SECRETS LEGISLATION INTRODUCED

By Richard J. Oparil

Bipartisan legislation introduced in the House and Senate would allow companies to bring trade secret theft cases in federal court. The Defend Trade Secrets Act would create a uniform standard for trade secrets and allow federal courts to grant injunctions "to preserve evidence, prevent disclosure, and account for the economic harm to American companies whose trade secrets are stolen," according to a fact sheet accompanying the bills. The legislation is modeled on the Uniform Trade Secrets Act adopted by many states.

Currently, trade secret theft cases can only be brought at the federal level by the Department of Justice, which lacks the resources to prosecute many such cases. Individual states allow civil actions for the theft but "state courts are not well-suited to working across state and national boundaries to facilitate discovery, serve defendants or witnesses, or prevent a party from leaving the country," the fact sheet states.

CRIMINAL SANCTIONS SOUGHT AGAINST DIETARY SUPPLEMENT BUSINESSMAN

The Department of Justice has asked the District Court in Montana to hold Toby McAdam, the owner of dietary

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supplement businesses, in criminal contempt and to imprison and fine him for continuing to sell and advertise products contrary to a 2010 consent order.

In 2010, the government alleged that his supplement products were in fact unapproved drugs used to treat diseases such as cancer, asthma and arthritis. McAdam agreed to a consent order in which he was enjoined from, among other things, selling any dietary supplement until he received approval from the Food and Drug Administration (FDA). He also agreed not to make improper health claims on product labels. The order also required McAdam to retain an independent labeling expert to confirm that the labels complied with law.

The government alleged that McAdam violated the consent order by continuing to advertise and sell products that were intended to affect the structure and function of the human body and to cure, prevent or treat diseases. In 2013, the Court held McAdam in civil contempt for violating the 2010 consent order. McAdam was ordered to stop making and selling any drug or dietary supplement product, shut down his website and Facebook page and remove all products from Amazon.com. Earlier this year, the U.S. Court of Appeals affirmed the contempt order.

The government now asserts that McAdam has continued to violate the orders by selling supplements and drugs and failing to close down his business and online sites. McAdam allegedly sold dietary supplements (Lugol's Iodine and Bloodroot Immune Support Capsules) to undercover FDA employees through Amazon.com. The government wants the Court to hold McAdam in criminal contempt and to punish him with prison time and a fine.

In a press release, the Principal Deputy Assistant Attorney General said the Justice Department "will aggressively pursue those who violate court orders imposed to protect public health and prevent false product claims."

UNITED STATES FILES COMPLAINT AGAINST THREE WISCONSIN DIETARY SUPPLEMENT MANUFACTURERS

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The Department of Justice filed a complaint alleging that three Wisconsin dietary supplement companies violated the FDA's current good manufacturing practices (cGMPs) and were misbranding their products. The companies sell products to retail stores, healthcare professionals and directly to consumers.

The complaint alleged that the firms were violating the federal Food, Drug and Cosmetic Act (FDCA) by failing to establish specifications to ensure the identity and potency of the ingredients in dietary supplements. The complaint also alleged that the products were misbranded because they did not identify the part of the plant from which the ingredients were derived, list the number of servings per container or identify the serving size. The supplements at issue included Atrium brands Chole-Sterin, Di-Acid Stim, Ocu-Comp and Super-Flex; Aspen brand Flexile-Plus; and Nutri-Pak brands Glucobiotic Supreme and Ocu-Comp.

The government also announced that the defendants agreed to settle the litigation and be bound by a consent decree that prohibits them from violating the FDCA. The consent decree requires the manufacturer to cease all operations. If the defendants wish to resume manufacturing in the future, the FDA first must determine that their manufacturing practices have come into compliance with the law. The settlement requires court approval.

FEDERAL CIRCUIT FINDS THAT AN OBVIOUSNESS DEFENSE TO PATENT INFRINGEMENT REQUIRES USE OF ANALOGOUS PRIOR ART

The Court of Appeals for the Federal Circuit has reiterated that a patent can only be found invalid for obviousness based on prior art that is analogous to the invention. In*Circuit Check Inc. v. QXQ Inc.* (available here), the Court reversed a District Court decision throwing out a jury verdict that the defendant infringed the plaintiff's patent on a component of a machine used to test circuit boards.

The District Court found that concepts like rock carving known to "any layman" would render the patent obvious.

> The Federal Circuit disagreed because the District Court ignored the rule that invalidating prior art must be in an area "analogous to the invention." Something is not analogous just because it is known to a layperson or one of ordinary skill if the art is not "reasonably pertinent to the particular problem the inventor is trying to solve." The Federal Circuit found that an inventor would not have looked to rock carving in developing a circuit board testing invention. The prior art was not in the same field of invention.