

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
Case No. 07-80138-CR-MARRA/VITUNAC(S)

UNITED STATES OF AMERICA,

Plaintiff,

-versus -

FRANK SARCONA

aka Frank Sarcone,  
aka Dave Johnson,

Defendant.

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GOVERNMENT'S RESPONSE TO  
THE STANDING DISCOVERY ORDER

The United States hereby files this response to the Standing Discovery Order. This response also complies with Local Rule 88.10 and Federal Rule of Criminal Procedure 16, and is numbered to correspond with Local Rule 88.10.

- A. 1. The government had previously served 4 volumes of statements by the defendant made while he was in the Grand Jury. The United States has also served a copy of the defendant's FTC September 4, 2007 deposition and the excerpt of his appearance before the Court on September 6, 2007 (we only have the excerpt at this time).

Undercover audio recording(s) of statements made by the defendant can be obtained by making arrangements with undersigned counsel. Specifically, these tapes can be reviewed at the discovery conference as set forth in paragraph A 6 below. Copies of these tapes can be obtained by providing 8 blank audio tapes to undersigned counsel. These tapes will be used for copying and then returned forthwith..

2. The government is unaware of any oral statements made by the defendant before or after arrest in response to interrogation by any person then known to the defendant to be a government agent that the government intends to use at trial. HOWEVER, the undersigned is inquiring into the

possibility that statements were made, and upon such discovery they will be turned over.

3. The defendant testified before the Grand Jury; George Forgione testified before the Grand Jury.
4. The NCIC record of the defendant will be supplied.
5. Books, papers, documents, photographs, tangible objects, buildings or places which the government intends to use as evidence at trial to prove its case in chief, or were obtained or belonging to the defendant may be inspected at a mutually convenient time at the Office of the United States Attorney, 500 Australian Avenue South, West Palm Beach, Florida, Suite 400. Please call the undersigned to set up a date and time that is convenient to both parties. Tentatively, a conference is set for **TUESDAY OCTOBER 16, 2007 at 1:30 PM.** Please call the undersigned with 48 hours notice if you intend to review the evidence at this date and time.

PLEASE NOTE THAT DEFENSE COUNSEL AND HIS INVESTIGATOR HAVE PREVIOUSLY STARTED TO REVIEW ITEMS. THERE IS NO WAY THIS DISCOVERY CONFERENCE CAN BE COMPLETED IN ONE AFTERNOON (OVER 100 BOXES OF RECORDS AND A FILE CABINET OF ITEMS).

The attachments to this discovery response are not copies of all the books, papers, documents, etc., that the government intends to introduce at trial.

6. A laboratory analysis of the substance seized in connection with this case will be made available to you upon receipt by this office (in brief it found that the pills contained chitosan). Please note that handwriting exemplars were taken but not examined.
- B. DEMAND FOR RECIPROCAL DISCOVERY: The United States requests the disclosure and production of materials enumerated as items 1, 2 and 3 of Section B of the Standing Discovery Order. This request is also made pursuant to Rule 16(b) of the Federal Rules of Criminal Procedure.
- C. The government will disclose any information or material which may be favorable on the issues of guilt or punishment within the scope of Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976). **A REVIEW OF THE LIPOBAN RECORDS REVEALS THAT SOME PERSONS LOST AN AMOUNT OF WEIGHT; SOME PERSONS RECEIVED REFUNDS; SOME PERSONS RECEIVED PROMOTIONAL SURVEY REWARDS, AND SOME PERSONS WERE SATISFIED WITH THE PRODUCT. MAYA DID SIGN AN AGREEMENT WITH THE DEFENDANTS.** Moreover, the

defendants have supplied exhibits which may be termed favorable (at least in some light), for example the Fat Blocker book and the Vanson study. Ms. Coopersmith created some of the procedures used in the refund scheme.

- D. The government will disclose any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective government witnesses, within the scope of Giglio v. United States, 405 U.S. 150 (1972), or Napue v. Illinois, 360 U.S. 264 (1959). **To the extent that there have been some employees/participants who have not been indicted and may be required to testify for the government (by subpoena or otherwise) e.g. Tina Bivona, Kathy Brock, Ginger Coopersmith, Melodie Farr, Derek Smith.** In understanding the nature of the benefit, Ms. Coopersmith had a rental agreement with Forgione/Lipoban which was in reality was not for rental but a salary increase (upon which she did not pay taxes). Ms. Bivona may be considered by some as a no show employee receiving a small salary and health benefits. Ms. Brock was a nominee on the Virgin Island home and may have lied in the mortgage application as to funds; she was also the office manager. Ms. Farr was a nominee on the above house and **may** have misrepresented income and assets on the loan (we are still looking at that loan to be able to better answer this question). Derek Smith was a nominee on bank accounts for Sarcona and may have assisted both defendants in laundering funds.
- E. The government will disclose any prior convictions of any alleged co-conspirator, accomplice or informant who will testify for the government at trial. **Ginger Coopersmith has a prior conviction, it will be provided when received.**
- F. No defendant was identified in a lineup, show up, photo spread or similar identification proceedings.
- G. The government has advised its agents and officers involved in this case to preserve all rough notes.
- H. The government will timely advise the defendant of its intent, if any, to introduce during its case in chief proof of evidence pursuant to F.R.E. 404(b). You are hereby on notice that all evidence made available to you for inspection, as well as all statements disclosed herein or in any future discovery letter, may be offered in the trial of this cause, under F.R.E. 404(b) or otherwise (including the inextricably-intertwined doctrine).

In addition, the government may introduce under Rule 404(b) evidence underlying the defendant's past criminal activity that has resulted in arrests and/or convictions and which is summarized in the attached court

documents. **Specifically, the government may introduce evidence relating to the SLIMAMERICA cases as well as the other fraudulent activities outlined by Judge Ferguson in his final order.**

- I. The defendant **is an aggrieved person**, as defined in Title 18, United States Code, Section 2510(11), of any electronic surveillance. The United States obtained copies of some of the defendant's e-mails pursuant to Grand Jury subpoena. They will be supplied to the defendant, as received by the government, on disk.
- J. The government has ordered transcribed the Grand Jury testimony of all witnesses who will testify for the government at the trial of this cause.
- K. Lipoban and Carboban pills were recovered by the government (whether they are contraband may be an issue at this trial not as to their substance but as to their distribution).
- L. The government does not know of any automobile, vessel, or aircraft allegedly used in the commission of this offense that is in the government's possession. However, both a boat and car were seized as assets of the fraud (the car belonging to Lipoban; the boat purportedly belonging to defendant Forgione). The car has been forfeited.
- M. The government is not aware of any latent fingerprints or palm prints which have been identified by a government expert as those of the defendant.
- N. To date, the government has not received a request for disclosure of the subject-matter of expert testimony that the government reasonably expects to offer at trial. HOWEVER, the government intends to offer the expert testimony of the efficacy of chitosan (or lack thereof). The United States expects to have Dr. Blonz testify. As the government advised counsel, Blonz' CV and statement are part of the revised SlimAmerica case file. His statement, served upon the defendant in connection with that case, can be found on Pacer as an exhibit in support of the FTC. In brief, according to the statement, he believes that the purported large weight loss cannot be achieved without diet and exercise and that the claims made as to the weight losses are false. Moreover, the United States will rely, in part, upon the Fat Blocker, cited by the defendants, as to the amount of weight which can be lost, and the need for diet and exercise. The United States will also rely upon Vanson's study as to the lack evidence as to long term usage, the need for diet and exercise, the amount of weight to be lost, as well as possible physical harm to users. The United States will also obtain the testimony of an FDA employee notably Amy Egan and/or Eric Coleman regarding Lipoban as a dietary supplement and the misbranding of the product.

- O. The government will make every possible effort in good faith to stipulate to all facts or points of law the truth and existence of which is not contested and the early resolution of which will expedite trial. These stipulations will be discussed at the discovery conference.
- P. At the discovery conference scheduled in Section A.5, above, the government will seek written stipulations to agreed facts in this case, to be signed by the defendant and defense counsel.

The government is aware of its continuing duty to disclose such newly discovered additional information required by the Standing Discovery Order, Rule 16(c) of the Federal Rules of Criminal Procedure, Brady, Giglio, Napue, and the obligation to assure a fair trial.

In addition to the request made above by the government pursuant to both Section B of the Standing Discovery Order and Rule 16(b) of the Federal Rules of Criminal Procedure, in accordance with Rule 12.1 of the Federal Rules of Criminal Procedure, the government hereby demands Notice of Alibi defense; the approximate time, date, and place of the offense was:

See the dates and the identified bank in the indictment .

The attachments to this response are numerous. Please contact the undersigned Assistant United States Attorney if any pages are not readable or appear to be missing.

Respectfully submitted,

R. ALEXANDER ACOSTA  
UNITED STATES ATTORNEY

By: s/Kerry S. Baron  
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#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 5, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and hand delivered the attachments to: SAMUEL J. SMARGON, Esq., Assistant Federal Public Defender, One East Broward

Boulevard, Suite 1100, Fort Lauderdale, Florida 33301.

s/KERRY S. BARON  
KERRY S. BARON  
ASSISTANT UNITED STATES ATTORNEY