

COMPLAINT NUMBER	19/247
AWAP	19/002
COMPLAINANT	AFT Pharmaceuticals Ltd
ADVERTISER	John Appleton Associates Ltd
ADVERTISEMENTS	Lypo-Spheric Vitamin C Out of Home, Website and Television
DATE OF MEETING	20 September 2019
OUTCOME	Settled in part and Upheld in part Advertisements removed or to be removed

ASA COMPETITOR COMPLAINT

SUMMARY OF DECISION

Description of the Advertisements

There were six advertisements for Lypo-Spheric Vitamin C, a product which is distributed by John Appleton Associates Ltd, that were the subject of this complaint. Three of the advertisements were on the John Appleton website. The advertisements are described as follows:

1. **Outdoor sandwich board** – with the following text:
Lypo-Spheric Vitamin C – The Vitamin C that the world is talking about – “Every Human needs optimal Vitamin C every day – This is a spectacular product” Dr Thomas Levy MD JD – Author of 3 best-selling books on Vitamin C – Get yours today!
2. **Pamphlet** – with the following text:
“I am convinced that Lypo-Spheric vitamin C far surpasses any traditional oral vitamin C supplement. Thomas Levy MD JD- (acclaimed author of ‘Curing the Incurable’)
3. **Website radio advertisement** – with the following statement:
“This is Dr Thomas Levy, an American cardiologist and author of several best-selling books of Vitamin C. Many people ask me which form of Vitamin C I use. For me, it is Lypo-Spheric Vitamin C. This is a spectacular product. There is nothing else like it.”
4. **Website advertisement** – On John Appleton’s website there is a link to an excerpt from ‘Curing the Incurable’, a book by Dr Thomas Levy. The book claims that properly dosed Vitamin C will cure acute polio and hepatitis and reverse and almost always prevent other conditions such as cancer and heart disease.
5. **Television advertisement** – Family Health Diary TVC warns “Be aware of imitations – there is only one Lypo-Spheric Vitamin C”.
6. **Website advertisement**- John Appleton’s website directs customers to the LivOn Labs’ website for more information, including a study by S Hickey et al called “Pharmacokinetics of oral vitamin C”. The study claims:

- LivOn Labs liposome-encapsulated vitamin C nearly doubled bioavailability over that thought possible from studies published by the National Institutes of Health, and
- Scientifically proven to raise Vitamin C plasma levels 2x previously thought possible

Summary of the Written Complaint

The Complainant, AFT Pharmaceuticals Ltd, said the advertisements were misleading and socially irresponsible, for several reasons. These reasons included the following:

- The outdoor **sandwich board**, the **pamphlet** and the **website radio advertisement** contained an endorsement by a medical doctor, Dr Levy. Such endorsements are not permitted under the Therapeutic and Health Advertising Code.
- The John Appleton **website advertisement** included a link to an excerpt from a book by Dr Levy called “Curing the Incurable”. This excerpt contains unsubstantiated claims, including “...modern medicine does not seem to be aware that properly dosed vitamin C will reliably and quickly cure nearly all cases of acute polio and acute hepatitis” and “...properly dosed vitamin C can reverse and almost always prevent other significant medical conditions such as cancer and heart disease...”
- The **television advertisement** includes the warning “Be aware of imitations – there is only one Lypo-Spheric Vitamin C”. This statement, in the context of the advertisement as a whole, makes a misleading claim that other liposomal Vitamin C products are mere imitations and Lypo-Spheric vitamin C is the best option on the market.
- The John Appleton **website advertisement** directs customers to the LivOn Labs’ website for more information. This information includes a study by *Hickey S, Roberts H, Miller N (2008) which is titled “Pharmacokinetics of oral vitamin C”*. The description of the article is written as “Authors found that LivOn Lab’s liposome-encapsulated vitamin C nearly doubled bioavailability over that thought possible from studies published by the National Institutes of Health”. In addition, the Advertiser claims it is “Scientifically proven to raise Vitamin C Plasma levels 2x previously thought possible”. The Complainant said these claims are misleading and unable to be substantiated.

The Complainant also said many of the online shopping websites are employing the statement: “Recent clinical trials by world-renowned Vitamin C expert and pharmacologist, Steve Hickey, PhD, show that Lypo-Spheric vitamin C is able to produce serum levels of Vitamin C nearly double those thought theoretically possible with any oral form of Vitamin C”.

Summary of the Advertiser’s Written Response

The Advertiser, John Appleton Associates Ltd, responded to each aspect of the complaint in turn:

1. **Outdoor sandwich board** – The Advertiser proposed to amend the signage to include the wording “American cardiologist” when referencing Dr Levy.
2. **Pamphlet** – The Advertiser proposed to amend the signage to include the wording “American cardiologist” when referencing Dr Levy, to inform retail outlets that existing pamphlets are to be disposed of and to print amended pamphlets that include the wording “American cardiologist” when referencing Dr Levy.
3. **Website radio advertisement** – The Advertiser said they do not accept this advertisement breaches Principle 2 of the Code because Dr Levy, being an American cardiologist, falls outside the definition of healthcare professional for the purposes of the Code, and therefore his endorsement is not prohibited under the Code. The Advertiser noted its

practice is to seek Therapeutic Advertising Pre-Vetting Service (TAPS) approval for all of its radio advertising.

4. **Website advertisement** – Without any admission as to liability and to avoid further complaints of potential non-compliance the Advertiser said they have removed the link to the excerpt from ‘Curing the Incurable’, a book by Dr Thomas Levy.
5. **Television advertisement** – The Advertiser said they do not accept the statement “Be aware of imitations – there is only one Lypo-Spheric Vitamin C.” breaches Principle 2. The Advertiser noted the advertisement has TAPS approval.
6. **Website advertisement** - Without any admission as to liability and to for a speedy resolution of the complaint, the Advertiser said they are prepared to reassess the claims and while this is being undertaken, they are prepared to remove the link to the LivOn website in the Appleton website. The Advertiser said they will also request the online stores that the Complainant has identified as selling the product to remove the reference to the claims, noting whether those online stores comply with such a request is outside Appleton Associates’ control.

The Advertiser also said they will ensure all versions of advertisements that include Dr Levy’s endorsement will receive TAPS approval before being submitted and they will issue instructions to online stores to remove any reference to the Hickey study.

Oral submissions

At the hearing both the Complainant and the Advertiser presented oral submissions. The **Advertiser** offered to remove any reference to “Dr Thomas Levy, American cardiologist” from existing advertising and to only refer to him as “Thomas Levy” in future advertising, to settle the dispute. The **Complainant** said this would not resolve their concerns.

Summary of the Panel Ruling

The Panel ruled the following in respect of each of the six advertisements:

- 1 Outdoor sandwich board
The Panel ruled unanimously that this aspect of the complaint was Settled.
- 2 Pamphlet
The Panel ruled unanimously that this aspect of the complaint was Settled.
- 3 Website radio advertisement
The Panel ruled unanimously that this aspect of the complaint was Upheld.
- 4 Website advertisement: Link to excerpt from “Curing the Incurable”
The Panel ruled unanimously that this aspect of the complaint was Settled.
- 5 Television advertisement
The Panel ruled by majority that this aspect of the complaint was Upheld.
- 6 Website advertisement: Link to LivOn Labs website
The Panel ruled unanimously that this aspect of the complaint was Settled.

[Advertisements removed or to be removed]

Please note this headnote does not form part of the Decision.

PANEL HEARING

PROCEDURE

The Chair ruled to deal with the matter by “adjudication with attendance of the parties” pursuant to Rule 3 of the Complaints Procedures of the Advertising Standards Complaints Board. This system is designed to resolve disputes between competitors, and a Panel was appointed.

THE PANEL

Chair – R Anderson, Chair of the Advertising Standards Complaints Board.

Co-Panelists – C Magee (Public Member of the Advertising Standards Complaints Board) and N Keats (Industry Member of the Advertising Standards Complaints Appeal Board).

THE PARTIES

The Complainant, AFT Pharmaceuticals Ltd: Peter Yoo, Regulatory Affairs Associate/Medical Affairs & New Product Manager and Malcolm Tubby, CFO, on behalf of the CEO.

The Advertiser, John Appleton Associates Ltd: John Appleton (Attended via video teleconference).

RELEVANT CODES OF PRACTICE

The Chair directed the Panel to consider the advertisement with reference to the following codes:

THERAPEUTIC AND HEALTH ADVERTISING CODE

PRINCIPLE 1

Therapeutic and Health advertisements shall observe a high standard of social responsibility particularly as consumers often rely on such products, devices and services for their health and wellbeing.

Rule 1 (b) Safety and effectiveness

Advertisements shall not contain any claim, statement or implication that the products, devices or services advertised:

- are safe or that their use cannot cause harm or that they have no side effects or risks.
- are effective in all cases
- are infallible, unflinching, magical, miraculous, or that it is a certain, guaranteed or sure cure
- are likely to lead persons to believe that;
 - they are suffering from a serious ailment, or

- harmful consequences may result from the therapeutic or health product, device or service not being used.

Rule 1(c) Vulnerable audiences

Advertisements should not portray unrealistic outcomes or prey on or misrepresent vulnerable audiences (e.g. sick, elderly, pregnant women, overweight people).

PRINCIPLE 2

Advertisements shall be truthful, balanced and not misleading. Advertisements shall not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust, exploit their lack of knowledge or without justifiable reason, play on fear. This includes by implication, omission, ambiguity, exaggerated or unrealistic claim or hyperbole.

Rule 2 (c) Comparative advertising

Comparative advertising shall be balanced and shall not be misleading, or likely to be misleading, either about the product, device or service advertised or classes of products, devices or services, with which the comparison is made.

- i. Comparative advertisements shall not be disparaging and shall be factual, fair and able to be substantiated, referenced to the source and reflective of the body of available evidence.
- ii. Comparative advertisements shall not discourage consumers from following the advice of their healthcare practitioner.
- iii. Comparative advertisements shall compare 'like with like'. Advertisements for Natural Health Products and Dietary Supplements shall not include comparisons with medicines or medical devices either specifically or generally.

Rule 2(f) Testimonials and healthcare professional endorsements

Patient testimonials and healthcare professional endorsements in advertisements, where not prohibited by law, shall comply with the Code, be authenticated, genuine, current, and typical and acknowledge any valuable consideration. Exceptional cases shall be represented as such.

Relevant Precedent Decision

In considering this complaint the Complaints Board referred to a precedent decision, Decision 17/372, which was Upheld in part and Settled in part.

The full version of this decision can be found on the ASA website:

<https://www.asa.co.nz/decisions/>

Decision 17/372 concerned an advertisement for the BeActive pressure pad, a pain relief device which is contained within an adjustable leg brace. The Complainant said the advertisement, which was on the Brand Developers Ltd website, made therapeutic claims that were unable to be substantiated and included testimonials which were likely to mislead consumers.

The Complaints Board considered whether the Customer Reviews were advertising, when placed in or adjacent to an advertisement for a product. The Complaints Board said that as there was a level of Advertiser control in that the Customer Reviews were intentionally placed adjacent to product information for the BeActive product, they "influence the choice, opinion or behaviour" and therefore met the definition of an advertisement.

The Complaints Board noted the Advertiser does not solicit the reviews or control what is written. However, the Advertiser is able to control where the Customer Review is seen, and they were intentionally placed within the same webpage as the product, in a similar style and format. The Complaints Board noted the webpage also referenced the aggregated rating in the webpage and the mechanism for completing a review was a link included on the website. The Complaints Board said the content of the Customer Reviews was likely to influence the purchasing behaviour of the consumer.

The Complaints Board said the Customer Reviews, which appeared at the bottom of the webpage which promoted the BeActive product, was advertising for the purposes of the ASA Codes of Practice and the Advertiser had control over the placement. The Complaints Board said the therapeutic benefit claims in the testimonials were in breach of Rule 2(f) of the Therapeutic and Health Advertising Code, were likely to mislead the consumer and had not been placed with a high standard of social responsibility to consumers in breach of Principle 2 and Rule 2(a) of the Therapeutic and Health Advertising Code. The Complaints Board ruled this aspect of the complaint was Upheld.

TAPS approval

The Panel noted that while it is strongly recommended to Advertisers, TAPS approval is not mandatory. However, some media organisations may require TAPS approval prior to accepting an advertisement. The Panel noted that while TAPS approval will help minimise the risk of a code breach, it is not a guarantee that an advertisement will not be in breach of the ASA Codes. Substantiation of claims is the responsibility of the Advertiser and required under the relevant legislation and codes. TAPS advises Advertisers that all evidence in support of any claims made in an advertisement must be held on file and be able to be produced in the event of a complaint.

Complainant's Oral Submission to the Panel

The Complainant, AFT Pharmaceuticals Ltd, made the following opening statements to the Panel:

The Complainant said their main concerns relate to the use of a healthcare professional to endorse the Lypo-Spheric Vitamin C product and the lack of confirmation about whether the radio advertisement had received the appropriate TAPS approval. The Complainant said if the Code prohibits New Zealand registered healthcare professionals from promoting natural health products then, according to the intent of the Code, this restriction should also apply to a doctor who is registered in America.

The Complainant noted the Advertiser had removed the link on its website to the excerpt from the book titled "Curing the Incurable". However, as the Advertiser does not view this advertisement to be in breach of the Code, the Complainant said they would nonetheless like the Panel to rule on whether or not a breach had occurred. The Complainant said the claims made in the article could be interpreted as portraying unrealistic and unsubstantiated outcomes to a potentially vulnerable audience.

The Complainant requested that the Family Health Diary television advertisement breached Rule 2(c) of the Therapeutic and Health Advertising Code. This is because they believe the advertisement makes a disparaging comparison between Lypo-Spheric Vitamin C and other liposomal vitamin C products.

The Complainant said consumers are still being led to misleading information about the product on the LivOn labs' website, via the packaging and the retail website of John Appleton.

The Complainant said the responses and suggested actions taken by the Advertiser do not adequately reflect the potential harm caused by the misleading advertisements. The Complainant said as the Advertiser is unwilling to admit their actions are in breach of the Code, they request the ASA to make a formal ruling.

Advertiser's Oral Submission to the Panel

The Advertiser, John Appleton, said he was surprised to learn about the complaint as he has distributed LivOn Labs' Lypo-Spheric Vitamin C for fourteen years without any previous complaints. The Advertiser said he is committed to all the points made in his written submission and will comply with all offers to resolve the complaint which he has already made.

The Advertiser said he is now willing to remove any wording on the sandwich board that may have caused a problem. He is also now willing to contact all relevant retail outlets and ask them to destroy the pamphlets. The Advertiser said he sought legal advice regarding the use of a product endorsement by Dr Levy, and he was advised this was not in breach of the Code.

The Advertiser said the radio advertisement on his website has been removed. He is unable to confirm if this advertisement had TAPS approval.

The Advertiser said the link on his website to the excerpt from the article 'Curing the Incurable' has been removed, and he is happy to remove any other links which are of concern.

The Advertiser said he believes the Family Health Diary television advertisement complies with the Code. He noted that it does have TAPS approval.

The Advertiser referred to the Complainant's concern that the LivOn Labs website can be accessed from the John Appleton website. The Advertiser said it is common for many brands to be labelled with the manufacturer's contact details, including the website address, and it is important for consumers to be able to access more information about a product and its manufacturer.

PANEL DISCUSSION

Confirmation of Codes

Before commencing the adjudication, the Panel sought agreement from the Advertiser, John Appleton, that the complaint about the television advertisement would be considered under Rule 2(c) Comparative Advertising, as that rule had been raised by the Complainant, but inadvertently not referred to in the Secretariat papers. The Advertiser, John Appleton Associates Ltd, agreed.

ASA Jurisdiction on Labelling

The Panel noted that it does not have jurisdiction to rule on labelling and packaging, except where it is visible, as part of an advertisement.

Role of the Panel

The Panel read all the relevant correspondence regarding the complaint, viewed copies of the advertisements and noted the Complainant's concerns that it considered the Advertiser made misleading and unsubstantiated claims in its advertising, portrayed unrealistic outcomes and used healthcare professional endorsements which are prohibited by the Code.

The Panel confirmed its role was to consider the advertisements, and the claims made, from the perspective of their likely audience. It then had to consider whether the information provided to it, when taken at face value, went far enough to substantiate the claims made in the advertisement. The Panel noted the onus to substantiate the claims in the advertisement fell on the Advertiser.

Advertising self-regulation

The Panel noted that the ASA was a self-regulatory organisation funded by industry to set standards and support responsible advertising. This included codes of practice which set out standards in addition to the requirements set out in relevant legislation. The ASA Codes of Practice contain the basic principles by which advertisements are judged. In interpreting the Codes, emphasis will be placed on the spirit and intention of the Codes.

In the spirit of self-regulation, where suitable changes to advertisements have been agreed by the Advertiser, after taking into consideration the views of the complainant, the Panel can regard complaints as Settled, that is the Advertiser has taken the equivalent action the Panel could require, if the complaint was upheld.

Advertiser Offers made during the Panel Hearing

During the Panel hearing the Advertiser made a revised offer to settle the complaint. This offer consisted of:

In relation to advertisement 1 (Outdoor sandwich board) the entire text complained about would be removed, not just the references to Dr Levy's medical credentials, and no endorsements from New Zealand or foreign healthcare professionals would be used on these sandwich boards in future.

In relation to the advertisement 2 (Pamphlet) the pamphlets would be destroyed and not used again in that format.

In relation to advertisement 3 (Website radio advertisement) this would not be used again in the format complained about, and in future they would remove any references in the advertisements to "Dr Levy, American cardiologist" and replace them with "Thomas Levy".

The Panel referred this suggestion to the Complainant, for a response.

The Complainant said this suggested amendment would not resolve their concerns. The Complainant said even without the honorific "Dr" in front of his name, Thomas Levy could still be identified as a medical professional, due to the ease of accessing information about him via the internet. The Complainant noted Dr Levy has been associated with the Lypo-Spheric Vitamin C product for fourteen years and his name is familiar to a significant number of consumers in this industry.

In relation to advertisements 4 and 6 (Website advertisements) the Advertiser confirmed that they would not link to the complained about material, or similar material containing unsubstantiated representations, in any future website advertising.

PANEL DECISION

The Panel considered each of the advertisements in turn, according to the relevant Codes, and made the following rulings:

1. Outdoor sandwich board

“Lypo-Spheric Vitamin C – The Vitamin C that the world is talking about – “Every Human needs optimal Vitamin C every day – This is a spectacular product” Dr Thomas Levy MD JD – Author of 3 best-selling books on Vitamin C – Get yours today!”

Is the advertisement misleading and does the use of a healthcare professional endorsement comply with the Code?

The Panel agreed the advertisement was misleading and the use of a healthcare professional endorsement did not comply with the Code. This is because healthcare professional endorsements are not permitted.

The Panel noted the argument put forward by the Advertiser that the Code did not specifically include overseas trained doctors in the definition of “healthcare professional”. However, the Panel noted that in interpreting the Code “emphasis must be placed on compliance with both the spirit and intention of the Code.” and the likely consumer takeout. The Panel confirmed that the likely consumer takeout was that a healthcare professional was endorsing the product.

In light of the self-regulatory action taken by the Advertiser in agreeing to remove the complained about text from this advertisement by placing a sticker over it, the Panel agreed this part of the complaint was Settled.

The Panel noted the Advertiser’s agreement not to use endorsements from foreign healthcare professionals in similar future advertising and confirmed that this effectively prevents any references to “Thomas Levy” in future advertising, even if there are no references to Mr Levy’s medical credentials. The Panel noted that Thomas Levy’s medical credentials are public and easy to find and have been established in the advertising aired to date. Therefore, any similar future advertisement would be in breach of the Code if it contained an endorsement from “Thomas Levy”.

Does the advertisement observe a high standard of social responsibility?

The Panel agreed the advertisement did not observe a high standard of social responsibility. This is because the advertisement was misleading, and the use of a healthcare professional endorsement did not comply with the Code. However, in light of the self-regulatory action taken by the Advertiser in agreeing to remove the wording from the advertisement that had been complained about, the Panel agreed this part of the complaint was Settled.

2. Pamphlet

“I am convinced that Lypo-Spheric vitamin C far surpasses any traditional oral vitamin C supplement. Thomas Levy MD JD- (acclaimed author of ‘Curing the Incurable’)

Is the advertisement misleading and does the use of a healthcare professional endorsement comply with the Code?

The Panel agreed the advertisement was misleading and the use of a healthcare professional endorsement did not comply with the Code.

The Panel noted the argument put forward by the Advertiser that the Code did not specifically include overseas trained doctors in the definition of “healthcare professional”. However, the Panel noted that in interpreting the Code “emphasis must be placed on compliance with both the spirit and intention of the Code” and the likely consumer takeout. The Panel confirmed that the likely consumer takeout was that a healthcare professional was endorsing the product.

However, in light of the self-regulatory action taken by the Advertiser in agreeing to remove these advertisements including destroying the pamphlets, the Panel agreed this part of the complaint was Settled.

The Panel noted the Advertiser’s agreement not to use endorsements from foreign healthcare professionals in similar future advertising and confirmed that this effectively prevents any references to “Thomas Levy” in future advertising, even if there are no references to Mr Levy’s medical credentials. The Panel noted that Thomas Levy’s medical credentials are public and easy to find and have been established in the advertising aired to date. Therefore, any similar future advertisement would be in breach of the Code if it contained an endorsement from “Thomas Levy”.

Does the advertisement observe a high standard of social responsibility?

The Panel agreed the advertisement did not observe a high standard of social responsibility. This is because the advertisement was misleading, and the use of a healthcare professional endorsement did not comply with the Code.

However, in light of the self-regulatory action taken by the Advertiser in agreeing to remove these advertisements, the Panel agreed this part of the complaint was Settled.

3. Website radio advertisement

“This is Dr Thomas Levy, an American cardiologist and author of several best-selling books of Vitamin C. Many people ask me which form of Vitamin C I use. For me, it is Lypo-Spheric Vitamin C. This is a spectacular product. There is nothing else like it.”

Is the advertisement misleading and does the use of a healthcare professional endorsement comply with the Code?

The Panel agreed the advertisement was misleading and the use of a healthcare professional endorsement did not comply with the Code.

The Panel noted the argument put forward by the Advertiser that the Code did not specifically include overseas trained doctors in the definition of “healthcare professional”. However, the Panel noted that in interpreting the Code “emphasis must be placed on compliance with both the spirit and intention of the Code” and the likely consumer takeout. The Panel confirmed that the likely consumer takeout was that a healthcare professional was endorsing the product and the use of a healthcare professional endorsement did not comply with the Code. This part of the complaint was Upheld.

The Panel discussed whether it would be sufficient, to comply with the Code, to replace the references in the advertisement to “Dr Levy, American cardiologist” with references to “Thomas Levy”. The Panel noted that Thomas Levy’s medical credentials are public and easy to find and have been established in the advertising aired to date. Therefore, the advertisement would still be in breach of the Code if it just referred to “Thomas Levy” rather than “Dr Levy, American cardiologist”.

Does the advertisement observe a high standard of social responsibility?

The Panel agreed the advertisement did not observe a high standard of social responsibility. This is because the advertisement was misleading, and the use of a healthcare professional endorsement, from Dr Thomas Levy, did not comply with the Code. This part of the complaint was Upheld.

4. Website advertisement

On John Appleton's website there is a link to an excerpt from 'Curing the Incurable', a book by Dr Thomas Levy. The book claims that properly dosed Vitamin C will cure acute polio and hepatitis and reverse and almost always prevent other conditions such as cancer and heart disease.

Is the information in the linked website part of the advertisement?

The Panel said that precedent, Decision 17/372 was directly relevant. The information in the linked website containing the book excerpt formed part of the advertisement because the Advertiser had control over the placement of that link.

Is the advertisement misleading and does the use of a healthcare professional endorsement comply with the Code?

The Panel agreed the advertisement was misleading and the use of a healthcare professional endorsement did not comply with the Code.

The Panel noted the argument put forward by the Advertiser that the Code did not specifically include overseas trained doctors in the definition of "healthcare professional". However, the Panel noted that in interpreting the Code "emphasis must be placed on compliance with both the spirit and intention of the Code" and the likely consumer takeout. The Panel said the likely consumer takeout was that Dr Thomas Levy was a doctor and he was endorsing the product. The intent of the Code was to prohibit that.

However, in light of the self-regulatory action taken by the Advertiser in agreeing to remove this part of the advertisement, by removing the link, the Panel agreed this part of the complaint was Settled.

Does the advertisement contain any claim, statement or implication that the product advertised is miraculous or that it is a certain, guaranteed or sure cure?

The Panel agreed the advertisement did contain a claim that the product advertised was miraculous or a certain, guaranteed or sure cure. This is because of the phrases: "...modern medicine does not seem to be aware that properly dosed vitamin C will reliably and quickly cure nearly all cases of acute polio and acute hepatitis", and "While a great deal of evidence exists to further demonstrate that properly dosed vitamin C can reverse and almost always prevent other significant medical conditions such as cancer and heart disease, the best documented and most compelling evidence involved the cure of multiple infectious diseases that cause great suffering and often kill or incapacitate." The Panel said that the consumer takeout was that the product was a miracle cure for serious illnesses such as polio, hepatitis, cancer and heart disease. The Advertiser had not provided substantiation for these claims.

However, in light of the self-regulatory action taken by the Advertiser in agreeing to remove this part of the advertisement, by removing the link, the Panel agreed this part of the complaint was Settled.

Does the advertisement portray unrealistic outcomes or prey on or misrepresent vulnerable audiences?

The Panel agreed the advertisement did portray unrealistic outcomes and preyed on vulnerable audiences, such as those suffering from cancer.

However, in light of the self-regulatory action taken by the Advertiser in agreeing to remove this part of the advertisement, by removing the link and agreeing not to link to similar unsubstantiated material in future advertisements, the Panel agreed this part of the complaint was Settled.

Does the advertisement observe a high standard of social responsibility?

The Panel agreed the advertisement did not observe a high standard of social responsibility. This is because the advertisement was misleading, the use of a healthcare professional endorsement did not comply with the Code, the advertisement contained a claim that the product advertised was miraculous or a certain, guaranteed or sure cure and the advertisement portrayed unrealistic outcomes and preyed on vulnerable audiences.

However, in light of the self-regulatory action taken by the Advertiser in agreeing to remove this part of the advertisement, by removing the link and agreeing not to link to similar unsubstantiated material in future advertisements, the Panel agreed this part of the complaint was Settled.

5. Television advertisement – Family Health Diary TVC warns “Be aware of imitations – there is only one Lypo-Spheric Vitamin C”.

Is the comparative advertising misleading, or likely to be misleading, either about the product advertised or class of products with which the comparison is made?

A majority of the Panel agreed the comparative advertising was misleading, or likely to be misleading. This is because when the advertisement is considered in its entirety, in the context of the high standard of social responsibility required in the Therapeutic and Health Advertising Code, the reference to other liposomal Vitamin C products as “imitations” of Lypo-Spheric vitamin C comes across as disparaging and effectively an implied claim that other products are inferior. The Panel noted LivOn Labs does not have exclusivity over the liposomal encapsulation process and no substantiation had been provided to show that other liposomal encapsulation products were inferior. It was therefore misleading to suggest other products were inferior imitations.

A minority disagreed. The minority said the voiceover said “Be aware of imitations” not “Beware of imitations”. That is simply a statement that the Advertiser believes imitations exist, which is usual with this type of product. It did not suggest that all other products or even a significant number were imitations. The advertisement did not therefore reach the threshold to be considered disparaging or, as a consequence, misleading

However, in accordance with the majority, this part of the complaint was Upheld.

Does the advertisement observe a high standard of social responsibility?

A majority of the Panel agreed the advertisement did not observe a high standard of social responsibility. This is because the advertisement was misleading about the class of products with which the comparison was made because the advertisement made an implied claim that other products were inferior, and no substantiation had been provided to show they were inferior.

A minority disagreed. The minority said the advertisement did observe a high standard of social responsibility as the advertisement was not misleading about the class of products with which the comparison was made.

However, in accordance with the majority this part of the complaint was Upheld.

6. Website advertisement

John Appleton's website directs customers to the LivOn Labs' website for more information, including a study by S Hickey et al called "Pharmacokinetics of oral vitamin C". The study claims:

- LivOn Labs' liposome-encapsulated vitamin C nearly doubled bioavailability over that thought possible from studies published by the National Institutes of Health, and
- Scientifically proven to raise Vitamin C plasma levels 2x previously thought possible.

Is the information in the linked website part of the advertisement?

The Panel said that precedent, Decision 17/372 was directly relevant. The information in the linked website formed part of the advertisement because the Advertiser had control over the placement of that link.

Is the advertisement misleading?

The Panel agreed the advertisement was misleading. This is because the advertisement makes claims which the Advertiser has not substantiated.

However, in light of the self-regulatory action taken by the Advertiser in agreeing to remove this part of the advertisement, by removing the link, and agreeing not to link to similar unsubstantiated material in future advertisements, the Panel agreed this part of the complaint was Settled.

Does the advertisement portray unrealistic outcomes or prey on or misrepresent vulnerable audiences?

The Panel agreed the advertisement did portray unrealistic outcomes and preyed on vulnerable audiences, such as people with cancer.

However, in light of the self-regulatory action taken by the Advertiser in agreeing to remove this part of the advertisement, by removing the link, and agreeing not to link to similar unsubstantiated material in future advertisements, the Panel agreed this part of the complaint was Settled.

Does the advertisement observe a high standard of social responsibility?

The Panel agreed the advertisement did not observe a high standard of social responsibility. This is because the advertisement was misleading, portrayed unrealistic outcomes and preyed on vulnerable audiences, such as people with cancer.

However, in light of the self-regulatory action taken by the Advertiser in agreeing to remove this part of the advertisement, by removing the link, and agreeing not to link to similar unsubstantiated material in future advertisements, the Panel agreed this part of the complaint was Settled.

In Summary

The Panel ruled the following in respect of each of the six advertisements:

- 1 Outdoor sandwich board
The Panel ruled unanimously that this aspect of the complaint was Settled.
- 2 Pamphlet
The Panel ruled unanimously that this aspect of the complaint was Settled.

- 3 Website radio advertisement
The Panel ruled unanimously that this aspect of the complaint was Upheld.
- 4 Website advertisement: Link to excerpt from “Curing the Incurable”
The Panel ruled unanimously that this aspect of the complaint was Settled.
- 5 Television advertisement
The Panel ruled by majority that this aspect of the complaint was Upheld.
- 6 Website advertisement: Link to LivOn Labs’ website
The Panel ruled unanimously that this aspect of the complaint was Settled.

Decision: Complaint Settled in part and Upheld in part.

APPENDICES

1. **Description of the Advertisements**
 2. **Complaint from AFT Pharmaceuticals Ltd**
 3. **Responses from the Advertiser, John Appleton Associates Ltd**
 4. **Subsequent Responses from AFT Pharmaceuticals Ltd**
 5. **Response from BrandWorld**
 6. **Responses from online shopping stores**
 7. **TAPS approval for Family Health Diary TVC**
-

Appendix 1

DESCRIPTION OF THE ADVERTISEMENTS

This complaint concerns six advertisements for Lypo-Spheric Vitamin C, which is distributed by John Appleton (Three of these advertisements are on the John Appleton website).

1. **Outdoor sandwich board** – with the following text:
Lypo-Spheric Vitamin C – The Vitamin C that the world is talking about – “Every Human needs optimal Vitamin C every day – This is a spectacular product” Dr Thomas Levy MD JD – Author of 3 best-selling books on Vitamin C – Get yours today!
2. **Pamphlet** – with the following text:
“I am convinced that Lypo-Spheric vitamin C far surpasses any traditional oral vitamin C supplement. Thomas Levy MD JD- (acclaimed author of ‘Curing the Incurable’)
3. **Website radio advertisement** – with the following statement:
“This is Dr Thomas Levy, an American cardiologist and author of several best-selling books of Vitamin C. Many people ask me which form of Vitamin C I use. For me, it is Lypo-Spheric Vitamin C. This is a spectacular product. There is nothing else like it.”
4. **Website advertisement** – On John Appleton’s website there is a link to an excerpt from ‘Curing the Incurable’, a book by Dr Thomas Levy. The book claims that properly dosed Vitamin C will cure acute polio and hepatitis and reverse and almost always prevent other conditions such as cancer and heart disease.
5. **Television advertisement** – Family Health Diary TVC warns “Be aware of imitations – there is only one Lypo-Spheric Vitamin C
6. **Website advertisement**- John Appleton’s website directs customers to the LivOn Labs’ website for more information, including a study by S Hickey et al called “Pharmacokinetics of oral vitamin C”. The study claims:
 - LivOn Labs liposome-encapsulated vitamin C nearly doubled bioavailability over that thought possible from studies published by the National Institutes of Health, and
 - Scientifically proven to raise Vitamin C plasma levels 2x previously thought possible

The Complainant also said many of the online shopping websites are employing the statement: “Recent clinical trials by world-renowned Vitamin C expert and pharmacologist, Steve Hickey, PhD, show that Lypo-Spheric vitamin C is able to produce serum levels of Vitamin C nearly double those thought theoretically possible with any oral form of Vitamin C”.

Appendix 2

COMPLAINT – FROM AFT PHARMACEUTICALS LTD

AFT Pharmaceuticals Ltd. would like to raise the following complaints with regards to LivOn Lab's Lypo-Spheric[®] Vitamin C sold and distributed in New Zealand by Appleton Associates Ltd.

We believe that the following advertisements appear to contravene the Therapeutic and Health Advertising Code (shortened as the "Code" hereinafter). We detail different types of advertisement published by Mr. John Appleton (Director of Appleton Associates Ltd.), LivOn Labs and Family Health Diary in New Zealand for the aforementioned product that we believe are in breach of the Code.

Item 1: Advertising/Promotional Materials for Lypo-Spheric[®] Vitamin C at Retail Outlets

The below quoted endorsements are attributed to an overseas medical doctor, "Dr Thomas Levy MD JD" and they appear on advertisement/promotional materials at a number of pharmacies and health food stores:

- "Every Human needs optimal Vitamin C every day. **This is a spectacular product.** Dr Thomas Levy MD JD – Author of 3 best-selling books on Vitamin C" – **Annex I**
- "I am convinced that Lypo-Spheric[®] Vitamin C far surpasses any traditional oral vitamin C supplement. Thomas Levy MD JD – (acclaimed author of 'Curing the Incurables')" – **Annex II**

Item 2: Radio Advertisement for Lypo-Spheric[®] Vitamin C on John Appleton's Website

In addition, a radio advertisement by Dr Thomas Levy can be found embedded into John Appleton's website. The following statement is read out during the radio advertisement of the product:

- "This is Dr Thomas Levy, an American cardiologist and author of several best-selling books of Vitamin C. Many people ask me which form of Vitamin C I use. For me, it is Lypo-Spheric[®] Vitamin C. This is a spectacular product. There is nothing else like it." – **Annex III**

We believe that the statements in **Item 1 & 2** may influence the public to purchase the product misusing the credibility of a medical professional. We believe that the advertisements violate the **Principle 2 Truthful Presentation** of the Code whereby healthcare professional endorsements are prohibited to promote natural health or dietary supplement products. Albeit the medical doctor in question is not registered in New Zealand, the medical professional titles, "Dr" and "MD", represent Dr Levy as a Medical Doctor to the New Zealand public.

Item 3: Excerpt from “Curing the Incurables” on John Appleton’s Website

On the Appleton website where New Zealanders can purchase the product, one can find the link to “*This is the introduction to Dr Thomas Levy’s book Curing the Incurable*”, which is an excerpt from the book “*Curing the Incurables*” by Dr Thomas Levy. The excerpt contains claims including, “...modern medicine does not seem to be aware that properly dosed vitamin C will reliably and quickly cure nearly all cases of acute polio and acute hepatitis” and “...properly dosed vitamin C can reverse and almost always prevent other significant medical conditions such as cancer and heart disease...”. – **Annex IV**

The advertisements in **Item 1, 2 & 3** also appear to violate the **Principle 1 Social Responsibility** of the Code as we believe an inappropriate therapeutic claim has been implied to a potentially vulnerable audience. Mentioning that the endorsement is from the author of “Curing the Incurables” and having the excerpt from the book on the Appleton webpage, could be interpreted that incurable conditions and diseases may be cured by the use of Lypo-Spheric[®] Vitamin C. As per Rule 1 (b) and (c) of the Code, this is an unsubstantiated claim which can portray unrealistic or “miraculous” outcomes to a vulnerable audience.

Whilst appreciating that the ASA complaints procedure does not specifically consider other statutes, the aforementioned advertisements may not be in compliance with the laws of New Zealand. The advertisement appears to breach the Medicines Act 1981 and Dietary Supplements Regulations 1956. As per the Medicines Act 1981 Section 58(1), indicating either “directly or by implication” claims that the product will “prevent, alleviate, or cure any disease” is prohibited. It also forbids products being recommended by any individual qualified to provide therapeutic treatment in the course of a profession or occupation.

Item 4: Family Health Diary Television Advertisement

We would like to refer you to the currently aired Family Health Diary television advertisement for Lypo-Spheric[®] Vitamin C. Towards the end of the clip, the advertiser warns the consumers –

“Be aware of imitations – there is only one Lypo-Spheric[®] Vitamin C”. – **Annex V**

As Lypo-Spheric[®] Vitamin C is LivOn Labs’ trademark, the second half of the statement is factually correct. However, when considering the warning statement in its entirety and the visual presentation at the time of the statement being read out, we believe it is referring to other liposomal Vitamin C products on the market, including AFT Pharmaceuticals’ Vitamin C.

Lipo-Sachets[®]. Such comparison implies that all other liposomal Vitamin C products are mere “imitations” of its class of product and Lypo-Spheric[®] Vitamin C is the best option on the market. However, such a misleading claim is not factual and cannot be substantiated thus is disparaging to the other products, including our own product.

Unless the advertiser can provide balanced comparison to make such claim or have evidence to back their claim, this seems to contravene **Principle 2 Truthful Presentation**.

Item 5: LivOn Labs' Website Accessed from John Appleton's Website

The website set up by John Appleton directs the customers to LivOn Labs' website for more information. – **Annex VI**

We refer you to the following study which can be found within Scientific Studies section of the LivOn Labs' website – “Hickey S., Roberts H, Miller N, (2008), “Pharmacokinetics of oral vitamin C” *Journal of Nutritional & Environmental Medicine* July 31”. The description of the article is written as “Authors found that **LivOn Lab's liposome-encapsulated vitamin C** nearly doubled bioavailability over that thought possible from studies published by the National Institutes of Health”. In addition, the advertiser claims “Scientifically proven to raise Vitamin C Plasma levels 2X previously thought possible” and make a reference to the aforementioned article. – **Annex VII & VIII**

These are misleading and we believe it is not in compliance with the **Principle 2 Truthful Presentation** of the Code. It seems that the claim derives from the comparison of their pharmacokinetic result with a different study. *Padayatty et al* study found that the maximum attainable plasma concentration with repeated oral Vitamin C doses of 3 g six times daily (total of **18 g** in 24 hours) is 220 uML⁻¹. The advertiser compares this value to the result of the *Hickey et al* study which is 400 uML⁻¹. However, this higher plasma concentration was achieved with a **single** liposomal dose of **36 g**. Not only is this a biased and indirect comparison, it does not validate the said claim that “a liposome-encapsulated vitamin C nearly doubled bioavailability over that thought possible from studies published by the National Institutes of Health”.

Furthermore, in a more like-for-like comparison situation, the *Hickey et al* study compares a single 5 g oral dose of standard Vitamin C to a single 5 g oral dose of liposomal Vitamin C in 2 subjects (**Figure 1 of Hickey et al study on page 4**). Both subjects achieved **similar** plasma response which actually disproves their claim.

We note that many of the online shopping websites in New Zealand are employing the statement, “Recent clinical trials by world-renowned Vitamin C expert and pharmacologist, Steve Hickey, PhD, show that Lypo-Spheric[®] Vitamin C is able to produce serum levels of Vitamin C nearly double those thought theoretically possible **with any oral form of Vitamin C**.” – **Annex VIII**

The above claim based upon available literature (*Hickey et al*) is untrue and cannot be substantiated. Hence Appleton Associates Ltd. should be required to inform all the product distributors to remove this misleading claim from the websites and to list a retraction on their websites.

Please do not hesitate to contact us should you require any further information.

Note: The Complainant included examples of the advertisements listed above.

Appendix 3

RESPONSES FROM ADVERTISER, JOHN APPLETON ASSOCIATES LTD

Includes:

1. Email of 1 August 2019 from John Appleton
2. Email of 2 August 2019 from John Appleton
3. Letter of 12 August 2019 from Simpson Grierson, Legal Counsel for John Appleton & LivOn Laboratories: First offer to Settle
4. Letter of 3 September 2019 from Simpson Grierson, Legal Counsel for John Appleton & LivOn Laboratories: Second offer to Settle

1. Email of 1 August 2019 from John Appleton

Attached for your information is a copy of the TV ad. This ad is fully TAPS approved. It's true to say 'there is only one Lypo-Spheric Vitamin C'.

Other companies such as AFT are keen to get a 'slice' of what they perceive as a lucrative market for a Vitamin C product. Their problem is that it's very costly in terms of R&D and manufacturing to make a true to label nano liposomal product.

Livon have invested many millions and their product speaks for itself. It has become the number one product in pharmacies and health food stores in New Zealand and it's not surprising what would be competitors are trying to get in on the market.

The only way anyone can compete with the Livon product is to make something similar but so far no one else has been willing to make the investment.

New Zealanders really love the product and this morning when I was driving, I heard Peter Williams on 'Magic Talk' speaking with a caller saying he had the flu. Attached is a brief clip which is relevant because just as Dr Levy talks about the Livon product in glowing terms, many others do too and this is clearly a problem for AFT. It would be a dark day if we were to prevent folks from expressing an opinion about a product.

2. Email of 2 August 2019 from John Appleton

It's interesting that the online stores have picked up the Steve Hickey 'message' I have attached the relevant documents for you. I don't provide them with this information.

It's even more interesting to see the banner on the AFT Lipo Sachets website. www.lipovitaminc.co.nz. They don't seem to be bothered about making a very bold statement about their product.

It's a big claim.

3. Letter of 12 August 2019 from Simpson Grierson, lawyer for John Appleton & LivOn Laboratories: First offer to Settle

We act for John Appleton / Appleton Associates Ltd (**Appleton Associates**) and LivOn Laboratories Inc (**LivOn**) (collectively referred to as our **Clients**), and have been instructed to provide a consolidated response to the above complaint made by Peter Yoo from AFT Pharmaceuticals Ltd (**Complainant**).

As requested, we provide comments on behalf of our Clients in response to the complaint.

Background

1. LivOn manufactures a vitamin C product known as Lypo-Spheric® Vitamin C (**Product**). The Product uses patented liposomal encapsulation technology to deliver vitamin C. The Product is known for superior absorption of vitamin C compared to standard delivery methods of vitamin C. The Product has become well known in New Zealand in relation to vitamin C, as well as in the other territories around the world where the Product is sold.
2. John Appleton is the distributor of the Product in New Zealand.
3. The Complainant has submitted a letter of complaint to the Advertising Standards Authority (**ASA**), alleging that our Clients' advertising of the Product breaches the ASA Therapeutic and Health Advertising Code (**Code**).

The Complaints

4. As requested, we address each of the Complainant's issues below on behalf of our Clients.

Item 1: Advertising/Promotional Materials for Lypo-Spheric® Vitamin C at Retail Outlets

5. The Complainant outlines that the below quoted endorsements on signage and pamphlets at retail outlets are attributed to an overseas medical doctor:
 - (a) *“Every Human needs optimal Vitamin C every day. This is a spectacular product. Dr Thomas Levey MD JD – Author of 3 best-selling books on Vitamin C”;*
 - (b) *“I am convinced that Lypo-Spheric® Vitamin C far surpasses any traditional oral vitamin C supplement. Thomas Levy MD JD (acclaimed author of ‘Curing the Incurable’).*
6. The Complainant believes that these advertisements breach Principle 2 of the Code which prohibits healthcare professional endorsements for natural health products and dietary supplements. The Complainant believes that, although Dr Levy is not registered in New Zealand, the titles “Dr” and “MD” on the signage and pamphlets represent Dr Levy as a medical doctor to the New Zealand public.
7. Our Clients are of the view that as Dr Levy not registered in New Zealand, he falls outside the definition of healthcare professional for the purposes of the Code, and therefore his endorsement is not prohibited under the Code. However, without any admission as to liability and for a speedy resolution of the complaint, our Clients have proposed the following actions to address this issue:
 - (a) amending signage to include the wording “American cardiologist” when referencing Dr Levy. This will clarify to consumers that Dr Levy is not a New Zealand-registered healthcare professional; and
 - (b) informing retail outlets that existing pamphlets are to be disposed of; and

- (c) printing amended pamphlets that include the wording “American cardiologist” when referencing Dr Levy and distributing these amended pamphlets to retail outlets.

Item 2: Radio Advertisement for Lypo-Spheric® Vitamin C on John Appleton’s Website

- 8. The Complainant outlines that the following statement is read out during a radio advertisement of the Product. The radio advertisement is embedded into Appleton Associates’ website www.johnappleton.co.nz (**Appleton website**):

“This is Dr Thomas Levy, an American cardiologist and author of several best-selling books of Vitamin C. Many people ask me which form of Vitamin C I use. For me, it is Lypo-Spheric Vitamin C. This is a spectacular product. There is nothing else like it.”

- 9. The Complainant believes that the advertisement breaches Principle 2 of the Code which prohibits healthcare professional endorsements for natural health products and dietary supplements.
- 10. Our Clients do not accept that the radio advertisement breaches Principle 2 of the Code. This is because:
 - (a) Dr Levy, being an American cardiologist, falls outside the definition of healthcare professional for the purposes of the Code, and therefore his endorsement is not prohibited under the Code; and
 - (b) The wording “American cardiologist” is used in reference to Dr Levy, which clearly identifies him as a non-New Zealand healthcare professional to consumers.
- 11. Appleton Associates also notes that its practice is to seek the Therapeutic Advertising Pre-vetting Service (**TAPS**) approval for all of its radio advertising. It is currently in the process of verifying whether all versions of its radio ads has had TAPS approval, with the aim of withdrawing from radio any versions without the approval and replacing them with the approved versions.

Item 3: Excerpt from “Curing the Incurable” on John Appleton’s Website

- 12. The Complainant outlines that the Appleton website contains a link to an excerpt from “*Curing the Incurable*”, a book by Dr Thomas Levy. The Complainant outlines that the excerpt contains claims including “...modern medicine does not seem to be aware that properly dosed vitamin C will reliably and quickly cure nearly all cases of acute polio and acute hepatitis” and “...properly dosed vitamin C can reverse and almost always prevent other significant medical conditions such as cancer and heart disease...”.
- 13. The Complainant believes that the advertisements in items 1, 2 and 3 above breach Rule 1(c) of Principle 1 of the Code as they imply “*an inappropriate therapeutic claim*” to a “*potentially vulnerable audience*”. The Complainant believes that the endorsement by Dr Levy and including the link to the excerpt from his book on the Appleton website “*could be interpreted that incurable conditions and diseases may be cured by the use of Lypo-Spheric® Vitamin C*”,

and thereby breaches Rules 1(b) and (c) as “*this is an unsubstantiated claim which can portray unrealistic or miraculous outcomes to a vulnerable audience.*”

14. Our Clients do not accept that the advertisements in items 1, 2 and 3 breach Rules 1(b) and (c) as they are not making the claims contained in the excerpt “*Curing the Incurable*”, but are merely including a link to the book of Dr Levy who is the marketing talent for the Product. Our Clients dispute that the advertisements mislead NZ consumers in any way by making inappropriate and unsubstantiated claims.
15. However, without any admission as to liability and avoid further complaints of potential non-compliance, our Clients have removed the link to the excerpt of Dr Levy’s book “*Curing the Incurable*” from the Appleton website.

Item 4: Family Health Diary Television Advertisement

16. The Complainant notes that the Family Health Diary television advertisement for Lypo-Spheric® Vitamin C states “*Be aware of imitations – there is only one Lypo-Spheric® Vitamin C*”.
17. The Complainant believes that this statement breaches Principle 2 of the Code as it implies “*all other liposomal Vitamin C products are mere imitations of its class of product and Lypo-Spheric® Vitamin C is the best option on the market*”.
18. Our Clients do not accept that this statement breaches Principle 2. Our clients are of the view that the advertisement is simply stating factual information, is not a comparative claim and does not denigrate competitors. That is, there is only one Lypo-Spheric® Vitamin C product, for which the trade mark is registered in the name of LivOn Laboratories Inc, and consumers should be aware that there may be imitation products (eg. counterfeits) on the market that are attempting to pass off as Lypo-Spheric® Vitamin C products but which are not.
19. Our Clients note that the television advertisement has received TAPS approval.
20. Our Clients also note that the television advertisement is no longer on air. However, our Clients dispute that the advertisement misleads consumers in any way by direct comparison and stands by the advertisement as an accurate and fair portrayal of the Product.

Item 5: LivOn Labs’ Website Accessed from John Appleton’s Website

21. The Complainant states that the Appleton website directs customers to LivOn Labs’ website for more information. The Complainant further states that LivOn’s website contains information on the Hickey S., Roberts H, Miller N (2008) study (**Hickey study**). The Complainant notes that the article on the study states that “*Authors found that LivOn Lab’s liposome-encapsulated vitamin C nearly doubled bioavailability over that thought possible from studies published by the National Institutes of Health*”. The Complainant also refers to the statement made on LivOn Lab’s website, namely, “*Scientifically proven to raise Vitamin C Plasma levels 2X previously thought possible*” (**Claims**).

22. The Complainant believes that the comparison made in connection with the Hickey study is biased and indirect, making the Claims untrue and unsubstantiated.
23. First, we note LivOn Labs' website is hosted outside of New Zealand, and the claims made on the website, including the Claims, are not intended to be directed to New Zealand consumers. Our Clients consider that those claims, therefore, do not fall within the jurisdiction of the ASA.
24. Second, Our Clients do not accept that merely including a link on the Appleton website to the LivOn website amounts to Appleton Associates making the Claims. If Appleton Associates were to be held responsible for all claims, representations and statements made by LivOn on its website, this would create an absurd result.
25. The link to the LivOn website is provided solely for the purpose of providing more information about the manufacturer of the Product (ie. LivOn) to consumers. John Appleton notes that he frequently receives such requests from customers. This intention is clearly indicated in the wording on the Appleton website as follows:



FOR MORE INFORMATION

Please visit the [LivOn Laboratory's website](#) or visit my [Vitamin C website](#).

26. For clarity, John Appleton notes that he does not provide information on the Hickey study to the online retailers that sell the Product. The retailers have voluntarily taken information for the manufacturer's website and published them on their website.
27. On the basis of the above, our Clients consider that the Complainant has no grounds to challenge Appleton Associates' inclusion of a link to LivOn's website on its website, without any direct reference to the claims made on LivOn's website, including the Claims.
28. In any event, Our Clients do not consider that the Claims are untrue or unsubstantiated in breach of Principle 2 of the Code. LivOn notes that their advertising material and website undergo thorough reviews for legal compliance with USA Food and Drug Administration stringent requirements. LivOn states that any "questionable statements" and information that is not supported by appropriate evidence are removed. LivOn notes that the inclusion of the Hickey study on LivOn's website has been reviewed and received legal sign-off from their lawyers for compliance.
29. The Claims are based on the conclusions drawn by the Hickey study - see the relevant extract below¹:

¹ Lines 26 – 33

Results. Preliminary investigations of the effects of liposomal and standard formulation ascorbate showed that blood plasma levels in excess of the previously assumed maximum of $220 \mu\text{mL}^{-1}$ are possible. Large oral doses of liposomal ascorbate resulted in plasma levels above $400 \mu\text{mL}^{-1}$.

Conclusions. Since a single oral dose can produce plasma levels in excess of $400 \mu\text{mL}^{-1}$, pharmacokinetic theory suggests that repeated doses could sustain levels well above the formerly assumed maximum. These results have implications for the use of ascorbate, as a nutrient and as a drug. For example, a short *in vitro* treatment of human Burkitt's lymphoma cells with ascorbate, at

30. Our Clients consider that:
 - (a) the Claims are consistent with the conclusions of the Hickey Study; and
 - (b) the Hickey study, being independent and reliable, provides them with reasonable grounds for making such claims.

31. However, in light of the Complainant's views, without any admission as to liability and for a speedy resolution of the complaint, our Clients are prepared to reassess the Claims and while this is being undertaken, the Clients propose to remove the link to the LivOn website in the Appleton website. The Clients will also request the online stores that the Complainant has identified as selling the Product to remove the reference to the Claims, noting whether those online stores comply with such request is outside Appleton Associates' control.

Conclusion

32. In light of the above, our Clients ask that the Complaints Board review our Clients' response and proposed actions, and consider settling the complaint.

33. Thank you for the opportunity to respond to the complaint. Please contact us if you need any further information.

4. Letter of 3 September 2019 from Simpson Grierson, lawyer for John Appleton & LivOn Laboratories: Second offer to Settle

Re: Complaint 19/247 AWAP 19/002 — John Appleton pamphlet, sandwich board, website, radio & television advertisements

1. As you are aware, we act for John Appleton / Appleton Associates Ltd (Appleton Associates) and LivOn Laboratories Inc (**LivOn**) (collectively referred to as our **Clients**).
2. We refer to your email dated 27 August 2019, attaching the response from Dr. Hartley Atkinson of AFT Pharmaceuticals (**Complainant**) to our letter to the ASA dated 12 August 2019.
3. Our Clients maintain their view that they have not breached the Advertising Codes for the reasons outlined in our letter of 12 August 2019. In particular, our Clients dispute that the addition of wording "American Cardiologist" undermines the intention of the Code and note that the radio ad referencing both Dr. Levy and American Cardiologist has received Therapeutic Advertising Pre-vetting Service (**TAPS**) approval.

4. Despite our Clients' views, in order to address the Complainant's concerns and to settle their complaint, we note our Clients have taken or are proposing to take the following self-regulatory measures, at significant expense to themselves:
 - (a) Amending all advertising and signage to make it clear that Dr. Levy is an American Cardiologist, and not a New Zealand registered cardiologist;
 - (b) Issuing instructions to retailers to dispose of existing advertising and pamphlets;
 - (c) Ensuring that all versions of advertisements that include Dr. Levy's endorsement receive TAPS approval before being submitted;
 - (d) Removing the link to Dr. Levy's book "Curing the Incurable" from the John Appleton website;
 - (e) Removing the link to the LivOn website from the John Appleton website; and
 - (f) Issuing instructions to online stores to remove any reference to the Hickey study.
5. Our Clients propose to take the following self-regulatory actions to further address the Complainant's concerns in their latest response:
 - (a) Instructing Family Health Diary to remove the link to the television advertisement on their website; and
 - (b) Taking reasonable steps to remove any other existing marketing materials referencing "Dr" or "MD" (that do not also include the words "American Cardiologist", which approach we note has had TAPS approval).
6. Our Clients express their disappointment with the Complainant not agreeing to settle the Complaint despite our Clients' extensive self-regulatory actions.
7. Our Clients express their concern that the Complainant is refusing to settle the Complaint in order to exploit the hearing process as a way of putting financial pressure on our Clients.
8. Our Clients express their further concern that the Complainant is also seeking to use the ASA's competitor complaints process to damage our Clients' goodwill and reputation.
9. In light of the above, our Clients ask that the Complaints Board review our Clients' response and self-regulatory actions taken to date and as proposed, and consider not convening a hearing.
10. Thank you for the opportunity to respond to the complaint. Please contact us if you need any further information.

Appendix 4

SUBSEQUENT RESPONSES FROM AFT PHARMACEUTICALS LTD

Includes:

1. Letter of 18 August 2019 from AFT Pharmaceuticals
2. Letter of 4 September 2019 from AFT Pharmaceuticals

1. Letter of 18 August 2019 from AFT Pharmaceuticals

In relation to your email dated 16 August 2019, AFT Pharmaceuticals would like to thank you for sharing with us the response to our **Complaint 19/247 AWAP 19/002** from Ms Sarah Lee of Simpson Grierson, acting on behalf of Mr. John Appleton, Appleton Associates Ltd. and LivOn Laboratories Inc.

As requested, please find below the response to the letter dated 12 August 2019. Our comments will follow each of the responses (underlined and *italic*) from the advertiser.

Item 1: Advertising/Promotional Materials for Lypo-Spheric® Vitamin C at Retail Outlets Paragraph 7

7. Our Clients are of the view that as Dr Levy not registered in New Zealand, he falls outside the definition of healthcare professional for the purposes of the Code, and therefore his endorsement is not prohibited under the Code. However, without any admission as to liability and for a speedy resolution of the complaint, our Clients have proposed the following actions to address this issue:

AFT: We do not believe that Dr Levy falls outside the definition of healthcare professional for the purposes of the Code as we believe that the Code should be interpreted with the consideration to both the principles, the spirit and the intention. Although the individual in question may not be an actual registered medical practitioner in New Zealand, in the eyes of the public, the words such as "Dr.", "MD" and "Cardiologist" indicate that the individual is a medical professional (or healthcare professional) regardless of where he is registered. The intention to take advantage of the trust and confidence gained by the medical profession to promote any products goes against the very purpose of the Code, and any other relevant law(s).

Furthermore, it would be preposterous to consider that the testimonials and endorsements from overseas-registered healthcare professional would be allowed. We also point out that agreement with such a contention would undermine this section of the Code and such a precedent would allow all advertisers to side-step the intent of the Code in this respect by sourcing an overseas medical practitioner to endorse healthcare products.

Therefore in summary, we believe that Dr Levy falls within the definition of healthcare professional for the purposes of the Code.

Paragraph 7(a)

(a) amending signage to include the wording "American cardiologist" when referencing Dr Levy. This will clarify to consumers that Dr Levy is not a New Zealand-registered healthcare professional; and

AFT: We do not accept the suggestion of amending the allegedly offending signage to include the wording "American cardiologist" when referencing Dr Levy. We believe that this suggestion at a minimum deliberately undermines the intent of the Code.

It is also ambiguous in that it can be read as a New Zealand Cardiologist who is American by birth i.e. American cardiologist.

Nevertheless, the healthcare professional term, “cardiologist” is still viewed as a medical practitioner **in the eyes of the public**. Furthermore, the guideline of the Code recommends that the individuals should only be labelled as a healthcare professional only if it fits the legal definition as outlined in the Medicines Act 1981. Otherwise the advertisement may be misleading, and any advertisement that is likely to mislead the consumers is in breach of the following Principles of the Code;

Principle 1: Social Responsibility has been developed to protect the consumers who are vulnerable and often rely on such products, devices and services for their health and well-being.

Principle 2: Truthful Presentation has been developed so that advertisements will not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust, exploit their lack of knowledge.

Hence we suggest that in fact all the advertising involved should be immediately withdrawn and detailed reconciliation of withdrawn materials should be provided to the Advertising Standards Authority (referred to as ASA hereinafter) to assure compliance. A further comment is that any communication that might be deemed necessary should be pre-approved by the ASA.

Paragraph 7(b)

(b) informing retail outlets that existing pamphlets are to be disposed of; and

AFT: We agree with the proposal that the advertiser should inform the retailers for the existing pamphlets to be destroyed, and this should also include any other offending materials in the market. However, we believe that this process should be transparent and conducted in an unbiased manner as the retailers have the right to be informed of the circumstances and the reasons for disposal i.e. they are considered to be misleading and in breach of the ASA Code

Paragraph 7(c)

(c) printing amended pamphlets that include the wording “American cardiologist” when referencing Dr Levy and distributing these amended pamphlets to retail outlets.

AFT: Please refer to the response for **Paragraph 7(a)**.

Item 2: Radio Advertisement for Lypo-Spheric® Vitamin C on John Appleton’s Website
Paragraph 10

10. Our Clients do not accept that the radio advertisement breaches Principle 2 of the Code. This is because:

AFT: We do not believe that the radio advertisement is in compliance with the Code.

Paragraph 10(a)

(a) Dr Levy, being an American cardiologist, falls outside the definition of healthcare professional for the purposes of the Code, and therefore his endorsement is not prohibited under the Code; and

AFT: Please refer to the response for **Paragraph 7**.

Paragraph 10(b)

(b) The wording “American cardiologist” is used in reference to Dr Levy, which clearly identifies him as a non-New Zealand healthcare professional to consumers.

AFT: Please refer to the response for **Paragraph 7(a)**.

Paragraph 11

11. Appleton Associates also notes that its practice is to seek the Therapeutic Advertising Pre-vetting Service (TAPS) approval for all of its radio advertising. It is currently in the process of verifying whether all versions of its radio ads has had TAPS approval, with the aim of withdrawing from radio any versions without the approval and replacing them with the approved versions.

AFT: The response from the advertiser does not specify whether or not the radio advertisements aired on New Zealand radio and on the advertiser's website have the appropriate TAPS approval.

We would like the advertiser to confirm whether or not all the relevant advertisements have the TAPS approval, and if unsure, they should be immediately removed until verified to minimise the risk of any unapproved and/or misleading advertisements being aired to the New Zealand consumers.

It should be taken into account that NewsTalkZB is a nationwide talk radio network that is available throughout New Zealand.

We also note a further concern that the advertiser does not have in place sufficient systems to determine if the advertisements are TAPS approved.

Item 3: Excerpt from “Curing the Incurables” on John Appleton’s Website

Paragraph 14

14. Our Clients do not accept that the advertisements in items 1, 2 and 3 breach Rules 1(b) and (c) as they are not making the claims contained in the excerpt “Curing the Incurable”, but are merely including a link to the book of Dr Levy who is the marketing talent for the Product. Our Clients dispute that the advertisements mislead NZ consumers in any way by making inappropriate and unsubstantiated claims.

AFT: We do not believe that “merely including a link” to the offending material is the justification for breaching Rules 1(b) and (c) of the Code. We believe that any content within the advertising media, whether controlled directly or indirectly, is the sole responsibility of the advertiser. The link has been created on the sales webpage with intention to influence the “choice, opinion or behaviour” of the shoppers (i.e. New Zealand consumers included). This is supported by the guideline set by the ASA: “How codes are applied to advertisements”.

It is also interesting to note that Dr Levy internally within Appleton Associates Ltd. is referred to as the marketing talent for the Product whilst in previous points, he was referred to as an “American cardiologist”, “Dr.” and “MD JD” giving endorsements and testimonials. This further emphasizes the serious concerns regarding this point.

Paragraph 15

15. However, without any admission as to liability and avoid further complaints of potential non-compliance, our Clients have removed the link to the excerpt of Dr Levy’s book “Curing the Incurable” from the Appleton website.

AFT: We agree that the link should be removed, however, we do not accept that the advertiser should be able to deny any wrongdoing. We believe that the advertiser should take responsibility for such serious breach of adopting therapeutic claims for the dietary supplement, and recommend that Medsafe be alerted of the incident. The whole response and emphasis around “avoid any further complaints” avoids responsibility for ongoing conduct.

Item 4: Family Health Diary Television Advertisement

Paragraph 18

18. Our Clients do not accept that this statement breaches Principle 2. Our clients are of the view that the advertisement is simply stating factual information, is not a comparative claim and does not denigrate competitors. That is, there is only one Lypo-Spheric® Vitamin C product, for which the trade mark is registered in the name of LivOn Laboratories Inc. and consumers should be aware that there may be imitation products (eg. counterfeits) on the market that are attempting to pass off as Lypo-Spheric® Vitamin C products but which are not.

AFT: We do not believe that the advertiser is “simply stating factual information” – Lypo-Spheric® Vitamin C does not have any exclusivity on the general technology of liposomal drug encapsulation outside that afforded to it by any patents or know how around its own specific formulation.

The visual includes several unmarked items – one box and two bottles with the label “BEWARE OF IMITATIONS” underneath – which indicates that these are the counterfeit products or that other legitimate liposomal vitamin C products are imitations of their product which is an untrue and unsubstantiated comparison. Also stating that consumers should be “Beware of imitations” is an unsubstantiated claim – for example, why should consumers be wary of another form of liposomal vitamin C.

Paragraph 20

20. Our Clients also note that the television advertisement is no longer on air. However, our Clients dispute that the advertisement misleads consumers in any way by direct comparison and stands by the advertisement as an accurate and fair portrayal of the Product.

AFT: We dispute that the content of the advertisement is an accurate and fair portrayal of the Product, as explained above. In addition, please note that the advertisement has been aired on television up until recently, and the clip is still available for viewing from the Family Health Diary website.

Should the advertisement be found in breach of the Code we respectfully suggest that consideration be given to the damages caused by the campaign.

Item 5: LivOn Labs’ Website Accessed from John Appleton’s Website

Paragraphs 23 & 24

23. First, we note LivOn Labs’ website is hosted outside of New Zealand, and the claims made on the website, including the Claims, are not intended to be directed to New Zealand consumers. Our Clients consider that those claims, therefore, do not fall within the jurisdiction of the ASA.

24. Second, Our Clients do not accept that merely including a link on the Appleton website to the LivOn website amounts to Appleton Associates making the Claims. If Appleton Associates were to be held responsible for all claims, representations and statements made by LivOn on its website, this would create an absurd result.

AFT: We dispute that the Claims fall outside the jurisdiction of the ASA. It may be that when Livon Labs created the materials on their website, they did not intend the content to be directed to New Zealand. However, we believe that because the link on the Mr John Appleton's New Zealand website has been deliberately created, the content from the link should fall within the ASA jurisdiction. The decision to include the link was made by Mr. John Appleton, thus we believe that he should be responsible for the content that is being provided to the New Zealand consumers by the link. This is supported by the advice published by the Advertising Standards Authority: Application of the ASA Codes to international advertisements. Even though the materials have been originated outside New Zealand, the intention to reach New Zealand consumers is clear as the advertiser has added the link on his New Zealand retail website. Furthermore, the advertiser encourages the consumers to visit the offending website with "Please visit the LivOn Laboratory's website" and by having LivOn Labs' website information on the label of the Product being distributed in New Zealand market.

We suggest that unless the LivOn website is amended immediately then product with this labelling in distribution in New Zealand should be immediately withdrawn from the New Zealand market in order to prevent ongoing breaches of the ASA Code.

Paragraph 25

25. The link to the LivOn website is provided solely for the purpose of providing more information about the manufacturer of the Product (ie. LivOn) to consumers. John Appleton notes that he frequently receives such requests from customers. This intention is clearly indicated in the wording on the Appleton website as follows:

AFT: We do not accept that providing the link to the LivOn Labs website is the solution to providing information about the manufacturer of the Product, when the content from the originator website is not suitable for the New Zealand market.

As an example, the advertiser could extract certain relevant and appropriate information from the LivOn Labs website and publish on his advertising materials. Furthermore, this is a product with major sales in New Zealand so this further supports the contention that any necessary content can be readily re-created to avoid any breaches of the Codes and the relevant law(s) of New Zealand.

Paragraph 26

26. For clarity, John Appleton notes that he does not provide information on the Hickey study to the online retailers that sell the Product. The retailers have voluntarily taken information for the manufacturer's website and published them on their website.

AFT: As above, this demonstrates the risk involved with providing the links to the websites such as LivOn Labs, which contain contents which may not be suitable for the New Zealand market.

In addition, although individual retailers make the final decision on what is published on their respective websites, it is also the responsibility of the Product distributor/sponsor to oversee what is being claimed by its retailers in the market. We suggest that the misinformation should be removed from all New Zealand websites.

Paragraph 27

27. On the basis of the above, our Clients consider that the Complainant has no grounds to challenge Appleton Associates' inclusion of a link to LivOn's website on its website, without any direct reference to the claims made on LivOn's website, including the Claims.

AFT: Again, we view this as a cynical attempt to shift responsibilities. Please refer to our responses under **Paragraph 25**.

Paragraph 28

28. In any event, Our Clients do not consider that the Claims are untrue or unsubstantiated in breach of Principle 2 of the Code. LivOn notes that their advertising material and website undergo thorough reviews for legal compliance with USA Food and Drug Administration stringent requirements. LivOn states that any “questionable statements” and information that is not supported by appropriate evidence are removed. LivOn notes that the inclusion of the Hickey study on LivOn’s website has been reviewed and received legal sign-off from their lawyers for compliance.

AFT: We believe that legal compliance assessed by US Food and Drug Administration have no jurisdiction over what is allowed and prohibited with regards to the advertisements in New Zealand. Unless the legal sign-off has included the consideration of the New Zealand laws, it does not bears any weight in this case. The content of the advertisements should only be considered with respect to the Codes and the relevant law(s) of New Zealand only, as the materials in question are being directed to New Zealand consumers.

Paragraph 30 (a) and (b)

30. Our Clients consider that:

(a) the Claims are consistent with the conclusions of the Hickey Study; and

(b) the Hickey study, being independent and reliable, provides them with reasonable grounds for making such claims.

AFT: We dispute that the Hickey study is independent and reliable, and that it provides reasonable grounds to make claims such as “Scientifically proven to raise Vitamin C Plasma levels 2X previously thought possible” and “Authors found that LivOn Lab’s liposome-encapsulated vitamin C nearly doubled bioavailability over that thought possible from studies published by the National Institutes of Health” for the following reasons:

- The total number of subjects in this study is two (2), which is insufficient to make such an emphatic claim.
- The direct comparison between 5 g Lypo-Spheric® Vitamin C and 5 g traditional form of Vitamin C does not show any statistically significant difference.
- The highest level attained by the test subjects in the study was possible with the single 36 g dose of Lypo-Spheric Vitamin C. This is not a valid comparison to 18 g (3 g x 6 times) of a traditional form of Vitamin C. The treatment groups were not comparable and hence the suggestion that somehow Lypo-Spheric® Vitamin C doubles absorption is not substantiated.

Paragraph 31

31. However, in light of the Complainant’s views, without any admission as to liability and for a speedy resolution of the complaint, our Clients are prepared to reassess the Claims and while this is being undertaken, the Clients propose to remove the link to the LivOn website in the Appleton website. The Clients will also request the online stores that the Complainant has identified as selling the Product to remove the reference to the Claims, noting whether those online stores comply with such request is outside Appleton Associates’ control.

AFT: We do not believe that the advertiser should be able to deny any wrongdoing, as it sets precedence for advertising therapeutic products in New Zealand. In addition, we believe that the process of informing the retailers should be transparent and conducted or approved by an independent body as the retailers have the right to be informed of the circumstances and the reasons for the amendment such as for example breaches of the ASA Code. We believe that at a minimum any such notification text should be pre-submitted to the ASA or any appropriate body for approval.

Paragraph 32

32. In light of the above, our Clients ask that the Complaints Board review our Clients' response and proposed actions, and consider settling the complaint.

AFT: In light of our comments to the response by the advertisers, we request that the Complaints Board consider the severity of the breach and action accordingly. We believe that the response and the suggested remedies by the advertiser are **not** adequate to reflect the potential damage caused by the misleading advertisements, and that the advertiser should assume the full responsibility. We wish to proceed to take this matter forward to the Adjudication Panel.

2. Letter of 4 September 2019 from AFT Pharmaceuticals

In relation to your email dated 04 September 2019, AFT Pharmaceuticals would like to thank you for sharing with us the response to our **Complaint 19/247 AWAP 19/002** from Ms Sarah Chapman and Ms Sarah Lee of Simpson Grierson, acting on behalf of Mr. John Appleton, Appleton Associates Ltd. and LivOn Laboratories Inc.

As requested, please find below the response to the letter dated 03 September 2019. Our comments will follow each of the responses from the advertiser.

Paragraph 3

As outlined in our initial Complaint letter dated 18 July 2019 and in our Response letter dated 18 August 2019, AFT Pharmaceuticals maintains the view that the advertiser has clearly breached the Therapeutic and Health Advertising Code (hereinafter “Code”).

We strongly maintain our belief that the wording “American Cardiologist” undermines the intention and spirit of the Code. Furthermore, we maintain that the statement is ambiguous in that it can also be understood to be a New Zealand Cardiologist who is born in USA.

We would like for the advertiser to confirm that the specific radio advertisement attached as Annex III in our initial Complaint received Therapeutic Advertising Pre-Vetting Service (hereinafter “TAPS”) approval. Furthermore, the advertiser should be able to confirm that **ALL** advertisements viewed or potentially viewed by consumers within New Zealand have the appropriate TAPS approval.

Paragraph 4(a)

We believe that the response from the advertiser does not address the issues discussed in our Response letter dated 18 August 2019. We would like to reiterate the points mentioned in the letter, especially that the healthcare professional term, “cardiologist” is still viewed as a medical practitioner in the eyes of the public. The use of the terms relating to healthcare professional carry a certain level of trust and these should not be exploited, especially with healthcare products which are usually aimed at vulnerable audience.

Furthermore, we restate our view that allowing testimonials and endorsements from overseas-registered healthcare professional undermines the intention of the Code which exists to protect the consumers of New Zealand, and this would potentially set a precedent to allow all advertisers to side-step such intent of the Code.

This seems to be a very important issue to clarify through a hearing as clearly both sides are in disagreement.

Paragraph 4(b)

As mentioned in our Response letter dated 18 August 2019, we believe that the retailers have the right to know the reasons behind the instruction to dispose of existing advertising and pamphlets. The issuance of such instructions without transparency to an independent body enables the advertiser to avoid taking responsibility and potentially further mislead the retailers of New Zealand.

Furthermore, point 4(c) suggests that not all advertisements may have a current and valid TAPs approval. If this is the case then how can the ASA or ourselves be confident that

sufficient systems exist with Appleton Associates Ltd and LivOn to ensure that such an exercise is correctly undertaken without oversight.

Paragraph 4(c)

We would like to emphasise that **ALL** advertisements – whether in the past, present or future – must have the appropriate TAPS approvals. If required, the advertiser should be able to produce the copy of the specific TAPS approval for the relevant advertisement. There should not be any ambiguity as to whether or not the advertisement in question has received TAPS approval.

Paragraph 4(d)

Noted – but now it has been replaced by another link to “*AUCKLAND CARDIOLOGIST DR GERALD LEWIS...*” which raises further questions in relation to the Code.

Paragraph 4(e)

Noted – however, it should be noted that two video clips with LivOn Lab’s logo are still available on the said website (**Annex I**).

Furthermore, as well as the LivOn Laboratories logo on the carton and each individual sachet labelling of the product (**Annex II**), the following distributor detail with the website address is also present on the carton and each individual sachet (**Annex III**):

“Distributed by
LivOn Laboratories
2654 W. Horizon Ridge Pkwy * Suite B5-108
Henderson, NV 89052
Phone: 1-866-790-2107
www.LivOnLabs.com”

Hence consumers in New Zealand are still receiving promotion to the LivOn material. The only way to rectify this is to either amend the LivOn website or to remove any reference to www.Livonlabs.com from the packaging in New Zealand. Thus, the conduct continues despite assurances to the contrary. If the website is not altered then the only way we can see to address this is to recall all product from the market and to over-label it to remove reference to www.LivonLabs.com.

Paragraph 4(f)

Please refer to our response in Paragraph 4(b). This conduct and promotion continues.

Paragraph 5(a)

Noted that the advertiser has removed the link to the television advertisement from the Family Health Diary website. We would like the advertiser to confirm the removal of the television advertisement from **all media**, not just from the Family Health Diary website.

Paragraph 5(b)

Despite such reasonable steps supposedly taken, we have found the examples of advertisements in the Takapuna area, which happens to be the place of residence of the advertiser – **Annex IV and V**. This is inconsistent with assurances within 5(b) as this material could readily be amended almost immediately being in the “hometown” of Appleton Associates Ltd.

Again, it is also important to note that many of the existing marketing materials, if not all, mentioned do not have the appropriate TAPS approval number displayed on them.

Paragraph 7

We reject the unsubstantiated claim from the advertiser that we are exploiting the hearing process as a way of putting financial pressure on the advertiser. We contend there is a valid complaint to be heard as this has still not been resolved.

To clarify, AFT Pharmaceuticals, at this stage, is not seeking damages and/or costs from the advertiser in the case that the complaint is successful. Thus we have chosen to file a Competitor Complaint under the Advertising Standards Authority process, instead of going through the normal court procedures. We note that it is Appleton Associates Ltd that are the party who have on their volition decided to retain a legal firm and the related expenses from this.

Paragraph 8

We reject the claim from the advertiser that we are seeking to use the Competitor Complaint process to damage the advertiser's goodwill and reputation. This statement is unsubstantiated and unwarranted.

AFT Pharmaceuticals has chosen to file a Competitor Complaint as we believe this process will give a fast and thorough consideration for the benefit of consumers and to ensure a level playing field for the industry. We have followed the process outlined by the ASA in good faith.

AFT Pharmaceuticals believes that the responses and suggested actions taken by the advertiser are **not** adequate to reflect the potential damage caused by the misleading advertisements. Furthermore, we ask the Complaints Board consider the fact that the advertiser is not willing to admit that their actions have breached the Code. We also contend that the process has been prolonged and in the meantime the advertiser appears to have ramped up advertising with full page advertisements in the Herald on Sunday.

As per our initial request, we would still like to proceed to take this matter forward to the Adjudication Panel and with urgency.

Note: The Complainant included examples of the advertisements referred to above.

Appendix 5

RESPONSE FROM BRANDWORLD

BrandWorld acknowledges there was an ASA complaint made about the advertising for Lypo-Spheric Vitamin C.

We have supported our client John Appleton by providing him with the TAPS Approval no. for the Lypo-Spheric Vitamin C comparative FHD TVC (June 7, 2018) and also removed the digital content for Lypo-Spheric Vitamin C from our online platforms.

Appendix 6

RESPONSES FROM ONLINE SHOPPING STORES

Includes:

1. Response from Healthpost
2. Response from Pharmacy Direct
3. Response from Winton Pharmacy

1. Response from Healthpost

This letter confirms that we have received the complaint made to the Advertising Standards Authority about Livon Lypospheric Vitamin C by AFT Pharmaceuticals on 1 August 2019.

The only relevant advertising to HealthPost listed within the complaint is found within the product description on the product page, referred to in the complaint as Annex VIII, exhibit A.

I have instructed our Webteam to remove the statement highlighted (*“Recent clinical trials by world renowned Vitamin C expert and pharmacologist, Steve Hickey, PhD, show that Lypospheric Vitamin C is able to produce serum levels of Vitamin C nearly double those thought theoretically possible with any oral forms of Vitamin C.”*), so as at 5 August 2019, the page shows as follows: [page included]

TAPS compliant product copy was requested from Appleton & Associates on 24 July 2017. I was told we would receive it by the 29 September 2017. I requested TAPS compliant copy again on 29 September 2017 but never received a response. I spoke with John on Friday 2 August 2019 by phone and requested TAPS compliant copy for all products. I was told that it will be sent through when he is back from holiday in 5 weeks. We will update the product page to have TAPS compliant copy once we receive it.

We take our regulatory obligations seriously, and actively support and participate in the self-regulatory framework.

In light of this matter, we would welcome any further advice or instructions you might have regarding ensuring our continued compliance with the Advertising Standards Code.

2. Response from Pharmacy Direct

Thank you for your recent letter dated 1st August 2019 advising us of a complaint lodged by AFT Pharmaceuticals Ltd in regards Lypospheric vitamin C.

Before I comment on the specific matter of the complaint I wish to clarify/restate how product text is approved for placement on the Pharmacy Direct website:

As NZ's leading online Pharmacy we take our responsibility to provide accurate information to the consumer extremely seriously, especially to those shopping independently online, so that they can make an informed and safe choice. The core principle of "First, do no harm" is paramount in the provision of all our services.

As such we operate to a very strict set of Standard Operating Procedures and templates for placing products on the site. This template covers information on the potential benefits but also specific information on ingredients, dosage, and risks. ALL

material for a product is provided to us directly by the manufacturer or supplier and in the main it is normally TAPS approved prior to being supplied. Note that we do not, under any circumstance, add or embellish in any way the supplied material. We do review and we may remove content we consider not appropriate but overall we do not create any product content ourselves.

Manufacturer product information is sourced from product packaging, product fact sheets, and the manufacturers website if they have one.

We also operate the business on the mantra "Good health is a right, not a privilege" and we aim to achieve this through giving the consumer choice (Availability) and by making healthcare products as affordable as we can (Affordability). So we hold ourselves accountable to a very high standard at all times, without compromise, and we would never knowingly or intentionally allow content on the site that could mislead consumers.

In regards the complaint relating to the LivOn Labs Lypo-Spheric Vitamin C product we, as a retailer, would have expected as a result of John Appleton getting approval to import and sell the product in NZ that the product would be marketed and sold in accordance with the relevant NZ guidelines specifically TAPS when it comes to both scientific and efficacy statements provided to us. We are extremely disappointed if it is proven that this is not the case as we do rely on others operating within the permissible guidelines.

As a result of this complaint we reviewed the product quoted and have removed the paragraph referred to under Item 5 on the complaint as being prevalent on online websites such as ours. We have also removed other statements where it makes comparisons with other forms of vitamin C supplements as we also consider these will not necessarily remain true over the course of time.

I hope the ASA can recognise that we take all measures to protect the consumer from any inappropriate content and that we take all consumer concerns as serious and endeavour to respond accordingly and take prompt remedial action when deemed necessary. We believe the removal of the offending content should deal to the complainants concerns and would welcome the ASA feedback

3. Response from Winton Pharmacy

Having read AFT's presentation on Mr Appletons claims, we agree that his claims may need further scrutiny and have withdrawn the information from our Website. Our Website is only an information source and customers cannot purchase from that site.

Winton Pharmacy does not have the information resources that are available to AFT, to make the sort of informed decisions on factual information (or not) that another company may put forward. We routinely rely on reputable companies medicine information , and while that can be backed up from Pharmaceutical information sites , the information supplied on Lipospheric Vitamin C cannot be verified on those sites.

Thus we rely on information supplied by the company in good faith.

I would have thought that if AFT Pharmaceuticals were genuine in their complaint they would have approached us well before now, as we have stocked both Appletons and AFT Lipospheric Vitamin C products for a number of years.