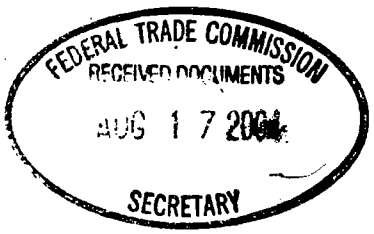
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of	)	
	)	
BASIC RESEARCH, LLC	)	
A.G. WATERHOUSE, LLC	)	
KLEIN-BECKER USA, LLC	)	
NUTRASPORT, LLC	)	
SOVAGE DERMALOGIC LABORATORIES, LLC	)	
BAN, LLC d/b/a BASIC RESEARCH, LLC	)	
OLD BASIC RESEARCH, LLC,	)	Docket No. 9318
BASIC RESEARCH, A.G. WATERHOUSE,	)	
KLEIN-BECKER USA, NUTRA SPORT, and	)	
SOVAGE DERMALOGIC LABORATORIES	)	
DENNIS GAY	)	
DANIEL B. MOWREY d/b/a AMERICAN	)	
PHYTOTHERAPY RESEARCH LABORATORY, and	)	
MITCHELL K. FRIEDLANDER,	)	
Respondents.	)	
	)	

ORDER DENYING MOTIONS FOR INTERLOCUTORY APPEAL AND MOTION TO CERTIFY

I.

On July 20, 2004, an Order denying Respondents' Motions for More Definite Statement ("July 20 Order") was issued. On July 27, 2004, Respondents Basic Research, L.L.C.; A.G.Waterhouse, L.L.C.; Klein-Becker USA, L.L.C.; Nutrasport, L.L.C.; Sovage Dermalogic Laboratories, L.L.C.; BAN, L.L.C.; Dennis Gay; and Daniel B. Mowrey; (collectivly referred to as "Basic Research") filed a motion seeking to certify the July 20 Order for interlocutory appeal ("Motion"). On July 27, 2004, Respondent Mitchell K. Freidlander filed a motion seeking to certify the July 20 Order to the Commission pursuant to Section 3.22(a) of the Rules of Practice and, in the alternative, for interlocutory appeal, pursuant to Section 3.23(b) of the Rules (Freidlander's Motion"). On August 3, 2004, Complaint Counsel filed its Opposition to both motions ("Opposition"). For the reasons set forth below, Respondents' motions are **DENIED**.

II.

Basic Research now requests an interlocutory appeal of the July 20 Order, arguing that the legal and policy implications of depriving Respondents of adequate definitions of key elements in the Complaint are substantial and should be resolved by the Commission itself. Motion at 2. Basic Research further argues that its' Motion presents a controlling issue of law or policy as to which there exists a substantial ground for a difference of opinion and that an immediate appeal will materially advance the termination of the litigation whereas subsequent review is inadequate. Motion at 4-7.

Friedlander argues that the underlying motion should have been certified to the commission because the Complaint does not give fair notice of the violation of the law alleged and because the issue of whether the Commission has adequately specified the standard as to which Respondents' conduct will be judged touches upon administrative discretion. Friedlander Motion at 2-6. Friedlander argues, in the alternative, for interlocutory appeal on essentially the same grounds as Basic Research. *See* Friedlander Motion at 6-11.

Complaint Counsel asserts that Respondents' motions fail to meet the standards necessary to certify this matter for interlocutory appeal to the Commission, that Respondents' proposed appeal will not hasten the conclusion of this matter, and that subsequent review affords Respondents an adequate remedy. Opposition at 5-10. Complaint Counsel further asserts that this Court should reject *pro se* Respondent Friedlander's Motion for Certification because the Court had authority to rule on the lack of definiteness issues, Respondent Friedlander has failed to establish that the Court lacked authority to consider the issues raised in his motion for more definite statement, and that Respondent has failed to establish that his motion for more definite statement raised issues involving the Commission's administrative discretion. Opposition at 10-14.

III.

In the underlying motions, the Respondents move for a more definite statement of the terms "reasonable basis," "rapid," "substantial," "clinical testing," "visibly obvious," "causes" and "unfair" as used in the Complaint. Order at 2, 3. Complaint Counsel argues that the Complaint met the requirements of notice pleading and that the terms are either defined by case law; used to describe the effect of using each product as described in Respondents' advertising; are the same or similar to terms used in Respondents' advertising; and are used in their ordinary meaning. Order at 3-4. The July 20 Order found that Respondents failed to demonstrate that the terms as used in the Complaint were not sufficient to inform Respondents of the types of acts or practices alleged with reasonable definiteness as required by Rule 3.11. Order at 3, 4. In the instant motions, Respondents echo the arguments made in the underlying motions.

A.

Basic Research and Friedlander seek interlocutory review pursuant to Commission Rule 3.23(b), which allows review of a ruling by the Administrative Law Judge ("ALJ") only upon a determination by the ALJ that "the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy." 16 C.F.R. § 3.23(b). The Commission "ordinarily will not disturb" a ruling that the complaint was sufficient for the purpose of filing an answer. *In re Alterman Foods, Inc.*, 79 F.T.C. 984, 1971 FTC LEXIS 354, *1 (Aug. 11, 1971).

Respondents argue that the controlling issues of law or policy as to which there exists a substantial ground for a difference of opinion are whether the Commission should be required when drafting a complaint to adequately define subjective terms it uses in setting forth its interpretation of an advertisement in a false advertising case, and whether the Commission in bringing an inadequate substantiation case must allege at the commencement of the case the specific type and amount of information a Respondent needs in order to have a reasonable basis for the challenged advertisements. Motion at 5, Friedlander Motion at 8.

Respondents have not demonstrated that the first prong of the test set forth in Rule 3.23(b) is met. A "controlling question of law or policy has been defined in Commission cases as 'not equivalent to merely a question of law which is determinative of the case at hand. To the contrary, such a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases.'" *In re Schering-Plough Corp.*, 2002 WL 31433937 (Feb. 12, 2002) (quoting *In re Automotive Breakthrough Sci., Inc.*, 1996 FTC LEXIS 478, *1 (Nov. 5, 1996)). Commission precedent also holds that to establish a "substantial ground" for difference of opinion under Rule 3.23(b), "a party seeking certification must make a showing of a likelihood of success on the merits." *Int'l Assoc. of Conf. Interp.*, 1995 FTC LEXIS 452, *4-5 (Feb. 15, 1995); *BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, *3 (Nov. 20, 1979).

The July 20 Order does not involve a controlling question of law or policy as to which there is a substantial ground for difference of opinion. Numerous cases recognize that FTC Complaints need only satisfy the requirements of notice pleading. *See, e.g., In re Times-Mirror Company Inc.*, 1997 FTC LEXIS 107, *1 (Sept. 20, 1997) ("The rule calls for notice pleading"); *In re Red Apple Companies, Inc.*, 1994 FTC LEXIS 90, *1 (June 21, 1994) ("Since the Complaint is not unintelligible, granting respondents' motion would defeat the concept of notice pleading"); *In re the Electrical Bid Registration Service of Memphis Inc.*, 1984 WL 251757, *1 (Aug. 29, 1984) (Commission complaints, like those in federal court, are merely designed to give respondent notice of the charges against him). Notice pleading is a broad standard only requiring "a short and plain statement of the claim." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). At this stage of the proceeding, the issue is the sufficiency of the Complaint's allegations, not the merits of the Complaint's allegations. As explained in the July 20 Order, the Complaint's allegations are sufficient to meet the requirements of notice pleading. Order at 3-4. In addition, Respondents have not made the requisite showing of a likelihood of success on the merits.

Regarding the second prong, Respondents merely argue that it would be more efficient for Complaint Counsel to define terms in the Complaint and that Respondents cannot commence a defense until the challenged terms are defined and the Commission articulates the amount of substantiation the Respondents allegedly need to have a reasonable basis for the challenged advertisements. Motion at 6-7; Freidlander's Motion at 10. No cases are cited by Respondents in support of this argument. Motion at 6-7, Freidlander's Motion at 10.

Respondents have not demonstrated that the second prong of the test, that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or that subsequent review will be an inadequate remedy, is met. Even if the Commission provided a more definite statement as requested, Respondents would still be required to defend the case on its merits. Indeed, Respondents have more than enough information from the Complaint and prior case law to commence their defense. If, after the hearing on this matter, Respondents believe that the substantiation standards have been applied improperly, Respondents have not demonstrated that subsequent review will be an inadequate remedy.

B.

Friedlander also seeks certification to the Commission pursuant to Rule 3.23(a), which states that the "Administrative Law Judge shall certify to the Commission any motion upon which he or she has no authority to rule, accompanied by any recommendation that he or she may deem appropriate." 16 C.F.R. § 3.22(a). Where a motion to dismiss requires a determination as to whether continued litigation would be in the public interest, the Administrative Law Judge is without authority to rule. *In re H.J. Heinz Co.*, 2001 FTC LEXIS 96, *1 (June 6, 2001); *In re Columbia Hospital Corp.*, 1993 FTC LEXIS 180 (July 28, 1993). Further, where a motion to dismiss is addressed to the Commission in its administrative capacity, the ALJ shall certify the motion to the Commission. *Heinz*, 2001 FTC LEXIS at *1; *In re Drug Research Corp.*, 63 F.T.C. 998 (Oct. 3, 1963).

The ALJ may rule on questions of law, as long as they are not matters committed to the discretion of the Commission. *In re AMREP Corp.*, 87 F.T.C. 283, 1976 FTC LEXIS 514, *3 (Feb. 24, 1976). Respondents have not demonstrated that the underlying motion was outside the authority of the ALJ. The underlying motions did not require determination of an issue of public interest nor were they addressed to the Commission in its administrative authority. Moreover, pursuant to Rule 3.42(c)(8), the ALJ is vested with the authority to "consider and rule upon, as justice may require, all procedural and other motions appropriate in an adjudicative proceeding." 16 C.F.R. § 3.42(c)(8).

IV.

For the above stated reasons, Respondents motions for interlocutory appeal are **DENIED** and Respondent Friedlander's motion for certification is also **DENIED**.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

August 17, 2004