UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
BASIC RESEARCH, L.L.C.,	)	
A.G. WATERHOUSE, L.L.C.,	)	
KLEIN-BECKER USA, L.L.C.,	)	
NUTRASPORT, L.L.C.,	)	
SOVAGE DERMALOGIC	)	**Docket No. 9318**
LABORATORIES, L.L.C.,	)	
BAN, L.L.C.,	)	**PUBLIC DOCUMENT**
DENNIS GAY,	)	
DANIEL B. MOWREY, and	)	
MITCHELL K. FRIEDLANDER,	)	
	)	
Respondents.	)	

COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENTS' MOTIONS FOR INTERLOCUTORY APPEAL AND
PRO SE RESPONDENT FRIEDLANDER'S MOTION FOR CERTIFICATION

Complaint Counsel oppose Respondents' Motion For Interlocutory Appeal and Respondent Friedlander's related Motion Re Certification Or Alternatively, for an Interlocutory Appeal. Both motions present Respondents' third reprise of arguments objecting to the definiteness of the Complaint that Respondents' have already answered. Respondents fail to show that the issue of whether the Complaint is sufficiently definite to enable Respondents to answer involves a controlling question that would determine this case, much less a wide range of cases. Moreover, Judge Chapell's Order denying Respondents' motions for more definite statement raises no substantial ground for difference of opinion and further rulings on the definiteness of the Complaint will not materially advance the termination of the litigation. Respondents may seek review of this issue after issuance of an initial decision, and have failed to demonstrate that such review would be an inadequate remedy. Finally, Respondent Friedlander

has failed to demonstrate that the Order ruled on issues outside this Court's authority. As a result, the Court should reject Respondents' Motions.

I. BACKGROUND

A. The Commission's Complaint

On June 15, 2004, the Commission filed a Complaint alleging, *inter alia*, that Basic Research L.L.C. and other related individuals and companies (collectively "Respondents") marketed certain dietary supplements with unsubstantiated claims for fat loss and/or weight loss, and falsely represented that some of these products were clinically proven to be effective, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act").

The Complaint focuses on six products—three topically-applied gels, "Dermalin-APg," "Cutting Gel," and "Tummy Flattening Gel"; two dietary supplements marketed to significantly overweight adults, "Leptoprin" and "Anorex"; and a dietary supplement marketed for overweight children, "PediaLean." The Complaint quotes extensively from Respondents' own marketing materials and identified the individuals, entities, representations, and practices alleged to violate the FTC Act. Regarding the gels, the Complaint challenges, as unsubstantiated, representations that the gel products cause "rapid and visibly obvious fat loss in areas of the body to which it is applied." Compl. ¶¶ 14-22. As to the adult weight loss supplements, the Complaint challenges, as unsubstantiated, that Leptoprin and Anorex causes "weight loss of

C. Judge Chappell's Order and Respondents' Motions

Judge Chappell held that the Complaint gave Respondents fair notice of the Commission's factual and legal allegations basing his determination on various factors. First, the Order recognized that RULE 3.11(b)(2) requires only that complaints contain allegations

---

[2] A copy of cited unpublished decisions are attached in alphabetical order at Exhibit 2.

[3] The Court noted that Mr. Friedlander's motion, though "captioned" as a motion to dismiss complaint for lack of definiteness was, "in substance a motion for more definite statement" and treated it as such.

II. ARGUMENT

A. Respondents' Motions Fails To Meet the Standards Necessary to Certify this Matter for Interlocutory Appeal to the Commission

"Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of our adjudicative process." *Bristol-Myers Co.*, 90 F.T.C. 273 (1977); *see, e.g., Gillette Co.*, 98 F.T.C. 875 (1981). Hence, the "overwhelming majority of decisions by Administrative Law Judges deny requests for certification." *Schering-Plough Corp.,* No. 9297, 2002 WL 31433937 (Feb. 12, 2002). The Commission particularly frowns upon requests to certify interlocutory appeals of rulings on motions for a more definite statement. *See, e.g., Alterman Foods, Inc.,* 79 F.T.C. 984 (1971) (The Commission "ordinarily will not disturb" a ruling that the complaint was sufficient for the purpose of filing an answer).

Applications for immediate review of an Administrative Law Judge's ruling may be made only if the applicant meets both prongs of a two-prong test. First, the applicant must demonstrate that the challenged ruling involves "a controlling question of law or policy as to

[4] As discussed in our Opposition to Respondents' initial Motions, these phrases have meanings in case law or common parlance, and some of them (or variants thereof) have appeared in Respondents' own promotional materials. *See* FTC Opp'n. at 6-11.

[5] Respondents' proffered "issues" are as follows:

(1) whether the Commission should be required when drafting a complaint to

(Mar.17, 2003) (denying motion for interlocutory appeal because the question involved "well-settled doctrines of law"). No disagreements between legal authorities on the suggested

opinions discussing what constitutes a "reasonable basis" and what facts are relevant to this issue, and the staff has issued a plain language guide, *Dietary Supplements: An Advertising Guide For Industry*, that contains an in-depth discussion of substantiating claims. *See* pp. 8-18. Respondents' generalized complaints of unfairness ring hollow as a result.

2. Respondents' Proposed Appeal Will Not Hasten the Conclusion of this Matter

Although Respondents' Motions do not stay these proceedings absent an order of the Court under RULE

they may seek review at both the Commission and the appellate courts, if necessary. This Court should deny Respondents' Motions for Interlocutory Appeal.

B. The Court Should Reject *Pro Se* Respondent Friedlander's Motion for Certification Because the Court Had Authority to Rule on the Lack of Definiteness Issues

Complaint Counsel urge this Court to deny Respondent Friedlander's motion to certify his recently denied Motion to Dismiss Complaint for Lack of Definiteness. Having submitted both his initial motion and leave to reply to the Administrative Law Judge, Respondent Friedlander now asserts that this Court lacked authority to consider his motions. This Court should reject Respondent Friedlander's variation on the same theme sounded by the other Respondents because issues regarding the definiteness of the Complaint do not justify interlocutory review by the Commission either as an appeal or certification.

RULE 3.22(a) requires the Administrative Law Judge to certify to the Commission any motion upon which he has no authority to rule, accompanied by any recommendation that he may deem appropriate. 16 C.F.R. § 3.22(a). The Administrative Law Judge has broad authority, however, to determine the factual and legal issues raised in the course of administrative proceedings. As the Commission has recognized, the "role of an administrative law judge is 'functionally comparable' to a trial judge employed in the judicial branch." *Coca-Cola Co.,* No. 9215, 1988 F.T.C. LEXIS 164, at *4 (Oct. 25, 1988) (citation omitted). Given these standards, the Court had ample authority to address Respondent Friedlander's motion and this Court should deny certification.

1. Respondent Friedlander Has Failed to Establish That the Court Lacked Authority to Consider the Issues Raised in His Motion for More Definite Statement

Despite its caption, the Court properly treated the filing as a motion for more definite statement. Order at 2. As numerous orders demonstrate, rulings on motions for more definite statements are made by Administrative Law Judges or hearing examiners, with the Commission never asserting that the Administrative Law Judges exceeded their authority. *See, e.g., Schering Plough Corp.,* No. 9297, 2001 F.T.C. LEXIS 198 (Oct. 31, 2001); *New Balance Athletic Shoe Corp.,* No. 9268, 1994 F.T.C. LEXIS 213 (Oct. 20, 1994); *Diran M. Seropian, M.D.*, No. 9248, 1991 F.T.C. LEXIS 306 (July 3, 1991); *College Football Ass'n*, No. 9242, 1990 F.T.C. LEXIS

2. Respondent Has Failed to Establish That His Motion for More Definite Statement Raised Issues Involving the Commission's Administrative Discretion

Not all motions fall within this Court's authority. Issues of administrative discretion must be certified to the Commission for determination. As the Supreme Court has held, "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Industries v. Federal Trade Commission*

of the Complaint was in the public interest and whether certain other parties should have been joined in the Complaint. *Id.*[7] Here Respondent's initial motion raised legal matters relating to the sufficiency of the pleading. More analogous is *Coca Cola*, where the Court rejected a challenge to its authority to rule on a motion to dismiss for failure to state a claim as a "startling misconception." *Coca Cola*, 1988 F.T.C. LEXIS 164, at *1.

In contrast, the Commission utilized its prosecutorial discretion when it issued the Complaint.[8] The Administrative Law Judge has ruled that the Complaint's allegations are sufficiently clear "to inform Respondents of the types of acts or practices alleged . . ." Order at 3. Respondent's current motion is a third attempt to argue the merits of his original motion. As discussed above and in Complaint Counsel's prior responses to Respondents' original motions, the RULES make clear that all that is necessary at this stage of pleading is a "clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the types of acts or practices alleged to be in violation of the law." RULE 3.11(b)(2). The Complaint in this case more than satisfies that standard and more than fully gives Respondents notice of the charges against them. This Court should not entertain Respondents' last ditch efforts to rehash the same arguments and to further delay the proceedings in this case. Therefore, this Court should deny Respondent Friedlander's Motion for Certification.

---

[7] Although the Commission accepted the certification, it summarily rejected the respondents' claims stating that "once the Commission has resolved these questions and issued the complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the materials in question but whether the violation has in fact occurred." *Boise Cascade*, 97 F.T.C. at 247 (quoting *Exxon*, 83 F.T.C. at 1760). Because the Commission has summarily rejected a similar argument on legal rather than factual grounds, this issue does not need to be certified to the Commission.

[8] *See, e.g., Brake Guard*, 125 F.T.C. at 247 n.35.

III. CONCLUSION

Respondents have not established that Judge Chappell's Order involves a controlling question of law or policy. They have also not demonstrated that an immediate appeal would advance this litigation or that subsequent review would be inadequate. Certification of this issue to the Commission is unnecessary and would serve no purpose other than to delay this proceeding. We respectfully request that this Court rebuff Respondents' efforts to mount an unnecessary interlocutory appeal that would interfere with the orderly and expeditious hearing of this matter.

Respectfully submitted,

____
Laureen Kapin (202) 326-3237
Joshua S. Millard (202) 326-2454
Robin M. Richardson (202) 326-2798
Laura Schneider (202) 326-2604

Division of Enforcement

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2004, I caused *Complaint Counsel's Opposition to Respondents' Motions for Interlocutory Appeal and Pro Se Respondent Friedlander's Motion for Certification* to be served and filed as follows:

(1) the original, one (1) paper copy filed by hand delivery and one (1) electronic copy via email to:
Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580

(2) two (2) paper copies served by hand delivery to:
The Honorable Stephen J. McGuire
Administrative Law Judge
600 Penn. Ave., N.W., Room H-104
Washington, D.C. 20580

(3) one (1) electronic copy via email and one (1) paper copy by first class mail to the following persons:

Stephen E. Nagin
Nagin Gallop Figuerdo P.A.
3225 Aviation Ave.
Miami, FL 33133-4741
(305) 854-5353
(305) 854-5351 (fax)
snagin@ngf-law.com
For Respondents

Jay T. Smith
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-5538
(202) 662-5614
(202) 662-6291 (fax)
jsmith@cov.com
For Respondent Basic Research LLC

Jeffrey D. Feldman
FeldmanGale
201 S. Biscayne Blvd., 19th Fl.
Miami, FL 33131-4332
(305) 358-5001
(305) 358-3309 (fax)
JFeldman@FeldmanGale.com
For Respondents A.G. Waterhouse, LLC, Klein-Becker USA, LLC, Nutrasport, LLC, Sovage Dermalogic Laboratories, LLC, and BAN, LLC

Richard D. Burbidge
Burbridge & Mitchell
215 S. State St., Suite 920
Salt Lake City, UT 84111
(801) 355-6677
(801) 355-2341 (fax)
rburbidge@burbidgeandmitchell.com
For Respondent Gay

Ronald F. Price
Peters Scofield Price
310 Broadway Centre
111 East Broadway
Salt Lake City, UT 84111
(801) 322-2002
(801) 322-2003 (fax)
rfp@psplawyers.com
For Respondent Mowrey

Mitchell K. Friedlander
5742 West Harold Gatty Dr.
Salt Lake City, UT 84116
(801) 517-7000
(801) 517-7108 (fax)
Respondent *Pro Se*
mkf555@msn.com

____
COMPLAINT COUNSEL

EXHIBIT A

EXHIBIT B