

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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)
LABORATORIES, L.L.C.)

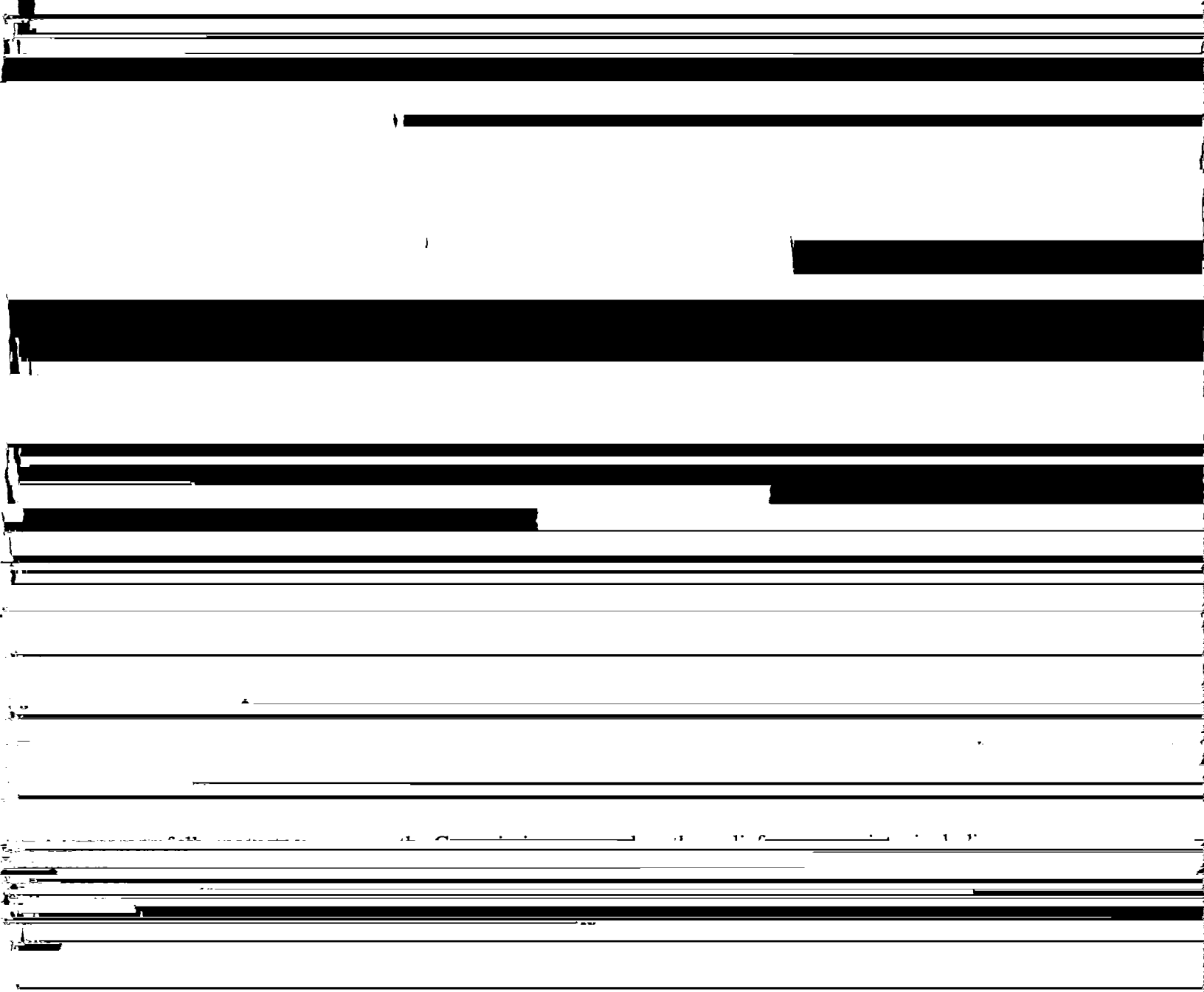
Docket No. 9318

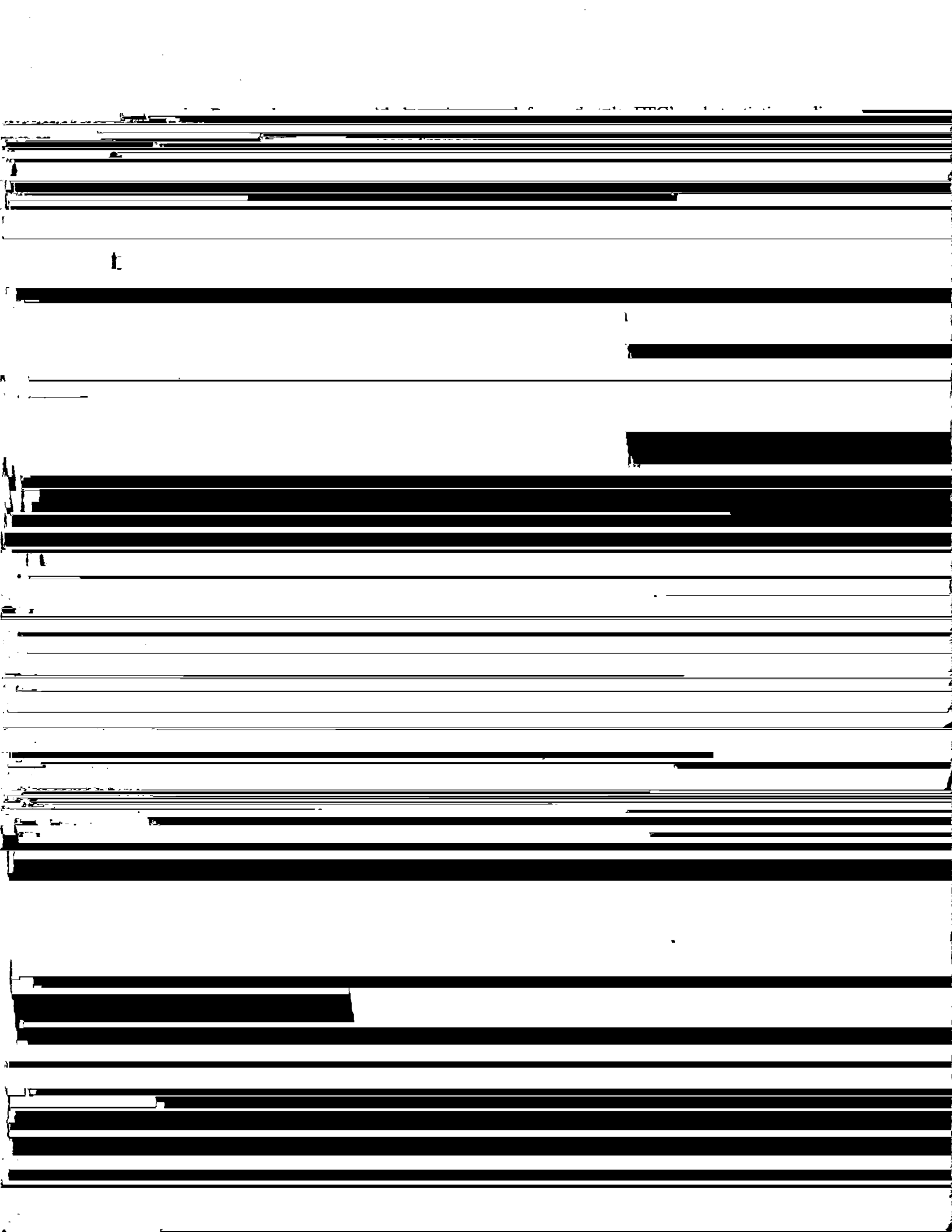
DENNIS GAY,)
DANIEL B. MOWREY, and)

FEDERAL TRADE COMMISSION

(citing Orders, Nov. 4, 2004). Respondents assert that their defenses permit them to challenge the FTC's substantiation policy and the consequences of the FTC's pre-*Complaint* investigation in this adjudicative proceeding. See Resp'ts' "Appl. for Rev." at 2 (hereinafter "Resp'ts' Mot.").

opportunity to contest these allegations, and of a notice order that may be issued, in the discretion of the Administrative Law Judge and the Commission, if the facts are found to be as alleged in the *Complaint*. This notice order contains provisions that would, if entered, require Respondents to cease and desist the law violations charged in the *Complaint*. As stated in the notice order, if the Commission should determine, upon review of the record, that such an order might be inadequate,





... because it closely threatened to broaden discovery into improper areas such as the mental

process of the Commission. *See id.* at 6. More significantly for present purposes, however, the

Court limited Respondents' policy argument-laden APA defense as follows:

Respondents indicate that the "gravamen" of their APA defenses "challenge the Commission's regulatory scheme governing dietary supplement[] and weight-loss claims. However, the issue in this proceeding is Respondents' allegedly false and misleading advertising, not Complaint Counsel's policy statements. Respondents will be permitted to argue an APA violation as it is relevant to the allegations of the Complaint and the proposed remedy.

challenge the Commission's determinations, framework, and choice of regulatory approaches. . . .

[T]he Court has already ruled that a line of defense that challenges such processes is

inappropriate." *Comcast Networks, Inc. v. FCC*, 13 S. Ct. 1197, 1211 (2013).

Defendant also defended the proposed testimony on the grounds that it was "relevant to

Comcast's General Counsel's letter to the FCC dated 1/20/14, which was filed with the court's submission of

DISCUSSION

consistently erred in declaring that the issue to be litigated here is “whether Respondents

type and level of substantiation for advertising claims such as those challenged in the *Complaint*.

After the issuance of the *Complaint*, *Complaint Council* personally provided *Respondents*'

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Respondents*' attachments contain

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

alleged defenses in this matter.

1. The Excluded Testimony Is Irrelevant to the Issues to Be Tried in this Adjudication

The defenses permitted in this matter relate, quite simply, to the allegations of the *Complaint* and the adjudication of this matter. Respondents' *First Amendment* defense cannot succeed unless the Court concludes that the allegations of the *Complaint* are inaccurate and that Respondents' commercial speech was not deceptive. *See* Order, Nov. 4, 2004, at 4 (recognizing that *First Amendment* does not protect deceptive speech). And Respondents cannot prevail on their due process defense unless this adjudicative proceeding, not the FTC's pre-*Complaint* investigation or substantiation policy, occasions a violation of due process rights. *See id.* at 2 (clarifying that cognizable issue was "whether this adjudicative proceeding violates Respondents' due process rights"). Similarly, with Respondents' APA defense, "the issue in this proceeding is

...in violation of the Commission's. The proffered testimony plainly relates to the new Complaint

processes of the Commission and/or business activities of Respondents other than those alleged

...in violation of the Commission's. The proffered testimony is not relevant to this case. See Order, Jan. 10, 2006, at

alleged violation has in fact occurred.”); *see also In re General Motors Corp.*, 99 F.T.C. 464, 550

(1987), *citin = Envtl. Corp. v. In re Price-Costs Corp.*, 87 F.T.C. at 246-47 (same). The

Respondents' own argument, the proffered testimony does *not* "bear upon the judgment that the Commission is called upon to render." *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1112

(9th Cir. 1998). The excluded testimony simply does not, to use Respondents' phrase, "relate

is relevant, much less exculpatory. There is no Constitutional right to present irrelevant evidence. “Without question, the Government has a legitimate interest in excluding evidence which is not relevant or is confusing.” *United States v. Moreno*, 102 F.3d 994, 998 (9th Cir. 1996) (stating, in context of dispute concerning scope of permissible testimony in defense, that “[t]he Constitutional right to testify is not absolute,” and recognizing that U.S. Supreme Court has described this guarantee as the right to present *relevant* testimony). The Court’s January 10th *Order* reflects the ordinary exercise of the Chief Administrative Law Judge’s authority to rule on motions and regulate these proceedings under the RULES OF PRACTICE, not a deprivation of Constitutional rights.

Respondents also appear to contend erroneously that the excluded testimony is relevant

to their alleged due process defense. This contention is erroneous because testimony on Complaint Counsel’s pre-*Complaint* protocols, the basis for issuing the *Complaint*, and Respondents’ costs of answering the FTC’s investigation or *Complaint* does not shed any light on the alleged due process issue arising in this matter, i.e., whether this adjudication actually

policy statement “does not control the outcome of the case and is not the standard against which

Respondents’ claims will be judged, except insofar as the policy has been adopted by relevant

laws and controlling cases.” *Id.* Respondents are not entitled to an adjudicatory proceeding in

which alternate forms of regulation are weighed, examined, or found to be superior. As this

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

see In re Gillette Co., 98 F.T.C. 875 (1981). Hence, the “overwhelming majority of decisions by

Administrative Law Judge’s ruling may be made

9297, 2002 WL 31433937 (Feb. 12, 2002).

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 which there is substantial ground for difference of opinion.” RULE 3.23(b). Second, the applicant must show

certification where “[t]he issues involved . . . [were] not central to the claims raised in the

~~Complaint and would not be determinative of the issues” (see attached hereto as Attachment 1)~~

~~Respondents contend that this is a controlling question because the Court held that~~

Respondents’ “pre-Complaint evidence” was irrelevant to this case. Resp’ts’ Mot. at 13-14. The

Court’s relevancy determination, by its very nature, is confined to the facts of this case. Hence,

~~Respondents’ contention that this determination may contribute to the determination of an~~

opportunity for appellate review. *Id.* However, the nature of the excluded testimony has already

_____ In the federal courts, an exclusion of evidence may be reviewed on

_____ the court has affirmed



Attachment 1

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

the litigation; and that subsequent review would not be an inadequate remedy.

III.

The Complaint in this case alleges that Respondents employed deceptive and unfair practices to sell the "Ab Force" electronic muscle stimulation device in violation of Sections 5

Complaint Counsel sought an order compelling discovery of Respondents' marketing of Ab Force *outside* the United States, including (1) information regarding a United Kingdom television advertisement; (2) promotional materials disseminated outside the United States, and

Mme. Paulette Dry Cleaners, 1986 WL 12511 (S.D.N.Y. 1986).

Complaint Counsel has not cited any intervening changes in controlling law that would warrant reconsideration. In its present motion Complaint Counsel merely restates its earlier

argument with respect to previously cited cases. Its citations to the *Duonquad Statement of the*

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[REDACTED]

[REDACTED]

[REDACTED]

Complaint Counsel further asks the Court to reconsider its findings in the February 25

~~Order relating to certain individual's and company's legal rights by the discovery request of~~

Complaint Counsel in this case. Reviewing the above arguments and finding that the requested discovery is not relevant, or reasonably calculated to lead to the discovery of admissible

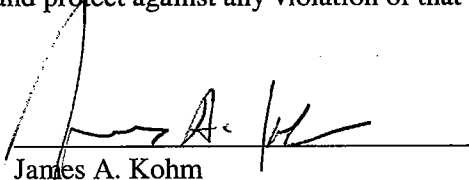
~~information, the Court hereby grants the motion of Complaint Counsel.~~

The second prong of the test, that an immediate appeal from the ruling may materially

[REDACTED]

CERTIFICATION OF REVIEWING OFFICIAL

I certify that I have reviewed the attached public filing, *Complaint Counsel's Consolidated Opposition to Respondents' Motions for Reconsideration or Certification of January 10th Order on Complaint Counsel's Motion In Limine*, prior to its filing to ensure the proper use and redaction of materials subject to the *Protective Order* in this matter and protect against any violation of that *Order* or applicable RULE OF PRACTICE.



James A. Kohm
Associate Director, Division of Enforcement
Bureau of Consumer Protection

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2006, I caused the attached *Complaint Counsel's Consolidated Opposition to Respondents' Motions for Reconsideration or Certification of January 10th Order on Complaint Counsel's Motion In Limine* to be served and filed as follows:

(1) electronic copy via email, filed with:

Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-135
Washington, D.C. 20580

(2) two (2) paper copies served by hand delivery to:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Penn. Ave., N.W., Room H-113
Washington, D.C. 20580