UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of : Docket No. 9318

BASIC RESEARCH, L.L.C., :
A.G. WATERHOUSE, L.L.C., :

NUTRASPORT, L.L.C., :
SOVAGE DEMALOGIC : PUBLIC DOCUMENT
LABORATORIES, L.L.C., :

TABLE OF CONTENTS

Page

FACTUAL BACKGROUND 1

FINDINGS OF FACT AND CONCLUSIONS OF LAW 2

I. FINDINGS OF FACT 2

II. CONCLUSIONS OF LAW 6

LEGAL DISCUSSION 7

I. THE COMMISSION LACKS SUBJECT MATTER JURISDICTION OVER THE CLAIMS ASSERTED AGAINST RESPONDENT FRIEDLANDER 7

A. THE COMMISSION CANNOT PROVE THAT RESPONDENT FRIEDLANDER KNEW OR SHOULD HAVE KNOWN OF THE ALLEGED FALSITY OF THE CHALLENGED ADVERTISEMENTS 7

B. THE COMMISSION CANNOT PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THE JURISDICTIONAL FACTS NECESSARY TO ESTABLISH SUBJECT [illegible]

PARTICIPANT LIABILITY THEORY 9

C. SUBJECT MATTER JURISDICTION OVER THE CLAIMS ASSERTED [illegible]

TABLE OF AUTHORITIES

Page

Cases:

Board of Trade of City of Chicago v. Olsen

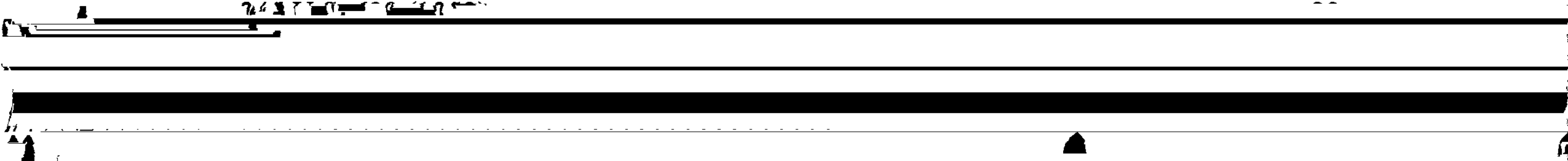
TABLE OF AUTHORITIES

Page

Cases:

United Phosphoros, Ltd. v. Angus Chemical Co.,
43 F. Supp. 2d 904 (N.D. Ill. 1999) 8

United States v. W.T. Grant Co.,



Respondent Mitchell K. Friedlander submits this pre-hearing brief and proposed findings

of fact and conclusions of law. Respondent Friedlander expressly adopts the arguments and

proposed findings of fact and conclusions of law set forth in the pre-hearing briefs and proposed

of APRL, and at no time did Respondent Friedlander ever have any authority or control over

5. In April 1993, Respondent Friedlander entered into a royalty agreement with Basic Research, LLC, which was a predecessor of Respondent Basic Research, LC, relating to the sale of products containing ECA.

6. On 2 April 1999, before any of the challenged products were marketed or sold, Respondent Friedlander assigned all of his patent rights in the ECA combination. Respondent Friedlander thus had no rights in the ECA patent, and he did not retain any royalty rights with respect to the ECA patent.

7. APRL, now known as DBM Enterprises, Inc., is a Utah corporation which is not a party to this proceeding.

8. Beginning in the latter part of the 1990's, Respondent Friedlander began to provide independent consulting services to APRL.

9. At all times relevant hereto, all services provided by Respondent Friedlander were

with APRL's president and sole owner, Respondent Dr. Mowrey, concerning the marketability of potential products.

14. At no time did Respondent Friedlander ever receive any payment, money, etc. from or based upon sales of any of the challenged products.

15. At no time did Respondent Friedlander disseminate, or cause to be disseminated, any advertisements for the Challenged Products in "commerce" as that term is defined by section 4 of the Federal Trade Commission Act. See Friedlander Decl. ¶ 6.

16. Respondent Friedlander did not have final say or control over product development, or final say or control over the content of the challenged advertisements for the Challenged Products.

17. Respondent Friedlander had no authority to act on behalf of any of the Company Respondents.

18. Respondent Friedlander did not know, nor should he have known, of the alleged "deceptive" nature of the acts and practices alleged in the Complaint.

19. None of the services that Respondent Friedlander provided to APRL involved

dissemination of the advertisements. On the contrary, before the challenged advertisements were

ever publicly disseminated, (1) Dr. Mowrey reviewed and signed off on the advertisements,

indicating that he believed the scientific claims he thought [illegible]

30. Respondent Friedlander does not have, and has never had, any authority to act on behalf of any of the Company Respondents.

31. Respondent Friedlander does not have any ownership interest in any of the

Company Respondents.

32. [illegible]

3. Respondent Friedlander did not have actual knowledge of material misrepresentations nor was he recklessly indifferent to the truth or falsity of any misrepresentations, nor did he have an awareness of a high probability of fraud and intentionally avoid the truth.

4. Common enterprise theory applies only between corporate entities.

5. No injunctive relief would be appropriate against Respondent Friedlander because there is no reasonable apprehension of future violations of the FTCA by him.

LEGAL DISCUSSION

I. THE COMMISSION LACKS SUBJECT MATTER JURISDICTION OVER THE CLAIMS ASSERTED AGAINST RESPONDENT FRIEDLANDER

A. THE COMMISSION CANNOT PROVE THAT RESPONDENT FRIEDLANDER KNEW OR SHOULD HAVE KNOWN OF THE ALLEGED FALSITY OF THE CHALLENGED ADVERTISEMENTS

In order to establish subject matter jurisdiction for any claim of vicarious liability, the Commission would have to establish *as a jurisdictional fact* that Respondent Friedlander knew, or should have known, of the "deceptive acts or practices alleged [in the Complaint]." Complaint ¶ 10; *FTC v. Garvey*, 383 F.3d 891, 900-02 (9th Cir. 2004) (knowledge is element of "participant liability"); *Coro, Inc. v. FTC*, 338 F.2d 149, 154 (1st Cir. 1964) (corporate president,

a matter of law cannot attribute the conduct of others to Respondent Friedlander to establish

jurisdiction over him. *See Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983) (to obtain

jurisdiction over alleged co-conspirator arising from acts of others; party has to prove elements of

and/or fat loss.[2] Given such facts, the Commission simply cannot prove, by a preponderance of the evidence, that Respondent Friedlander knew or should have known of the alleged falsity of the advertisements. Thus, any claim based on a theory of vicarious liability must be dismissed for lack of subject matter jurisdiction.

B. The Commission Cannot Prove By A Preponderance Of The Evidence

indirect and remote that to embrace them, in view of our complex society, would effectually

centralized government."""") (citation omitted).

In *Jones & Laughlin Steel*, the Supreme Court was clear that whether commercial activity

is local and beyond the federal government's jurisdiction, or whether a local activity affects

interstate commerce, "is necessarily one of degree. As the Court said in *Board of Trade of City*

In this case, the first category identified by the Supreme Court in *Morrisson* is not at issue. Respondent Friedlander did not make "use of the channels of interstate commerce." Nor

C. **SUBJECT MATTER JURISDICTION OVER THE CLAIMS ASSERTED AGAINST RESPONDENT FRIEDLANDER DOES NOT EXIST UNDER THE "FLOW OF COMMERCE" THEORY**

rejected Ford's argument, because the local transactions were essential to the flow of Ford's cars

throughout the United States. While the Court recognized that local sales transactions, "when

Moreover, as indicated above, Respondent Friedlander is not a Kansas City stockyard or Ford Motor Company. He does not distribute cattle, dietary supplements or any other goods throughout the United States. There is no local transaction between him and anybody, including a stockyard or a consumer, pursuant to which commerce flows, that is essential to the stream of commerce.

D. Indirect Participation in the Acts or Practices of Others "In Or Affecting" Commerce Is Not Enough To Establish Jurisdiction.

The third category of cases to which the Commission's jurisdiction extends is cases involving local activities that have a "substantial relation to interstate commerce, . . . *i.e.,* those activities that substantially affect interstate commerce." *Morrison*, 529 U.S. at 609 (citations omitted). Admittedly, this category of cases is not as well defined as the other two, but it does

require a showing of "substantial" impact. *Lopez*, 514 U.S. at 559 ("Within this final category

mining; . . . intrastate extortionate credit transactions . . . , restaurants utilizing substantial

interstate supplies, inns and hotels catering to interstate guests, and production and

consumption of homegrown wheat . . . .” *Lopez*, 514 U.S. at 558-59 (citations omitted). “These

examples are by no means exhaustive, but the pattern is clear.” *Id.* “Substantial” means

that Respondent Friedlander was not involved in the dissemination. For example, Respondent Friedlander did not own or have any ownership interest in APRL, or in any of the Company Respondents, or in any entities which may be related to the Respondent Companies. Respondent Friedlander also was not an employee of any of the Company Respondents, or of any companies

Friedlander ever an employee of APRL, and at no time did Respondent Friedlander ever have any

FTC can prove (1) that the corporation committed misrepresentations or omissions of a kind

promotional materials (*i.e.,* he wrote ad copy for Dermalin, Cutting Gel, Anorex, Leptroprin and PediaLean, and provided input to his client on ad layout)), the fact remains that Respondent Friedlander's activities were closed ended and purely local in nature.

For example, at all relevant times, Respondent Friedlander was an independent consultant to APRL. Respondent Friedlander's consulting services, including the drafting of proposed advertisements for proposed products, and consulting with APRL's president and sole owner, Dr. Mowrey, concerning the marketability of potential products, all were local activities. None of the services that Respondent Friedlander provided to APRL involved interstate commerce

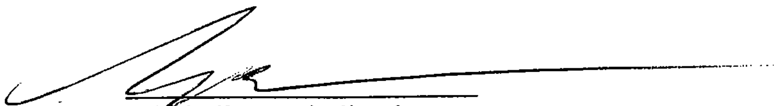
misrepresentations, was recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth."

and work of these people in approving the ads. He relied upon Dr. Mowrey and the other

in accordance with the directions and in conjunction with exercise and/or reduced caloric intake, that the products would assist in weight loss. He relied upon Dr. Mowrey and the other scientists that any studies referred to in ads were valid scientific studies that supported claims made in the ads. He relied upon lawyers for the companies to review the ads and the product labeling to insure compliance with applicable laws and regulations.

Furthermore, he knew that (a) Timothy Muris, the Commission's former chair, had opined that a single study was sufficient to support advertising claims, (b) a federal judge had ruled that the specific study which was at issue when Mr. Muris rendered his opinion (a study which the Commission's expert in this case criticizes) is a competent and reliable scientific study, and (c)

made in support of another ECA product. There is no basis to impose restitution liability on



Mitchell K. Friedlander
c/o Compliance Department
5742 West Harold Gatty Drive

Pro Se Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT MITCHELL K. FRIELDANDER'S PRE-HEARING BRIEF, AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** was provided to the following as follows:

(1) On 9 February 2006, the original and two (2) paper copies sent via Federal Express overnight delivery, and on 10 February 2006, one (1) electronic copy via email attachment in