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

In the Matter of	:	
	:	Docket No. 9318
BASIC RESEARCH, L.L.C.,	:	
A.G. WATERHOUSE, L.L.C.,	:	
KLEIN-BECKER USA, L.L.C.,	:	
NUTRASPORT, L.L.C.,	:	
SOVAGE DEMALOGIC LABORATORIES, L.L.C.,	:	PUBLIC DOCUMENT
BAN, L.L.C.	:	
DENNIS GAY,	:	
DANIEL B. MOWREY, and	:	

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concerning the marketability of potential products. APRL, in turn, provided independent consulting services to one or more of the Company Respondents.

At no time during the relevant time period did Respondent Friedlander ever own or have any ownership interest in APRL, or in any of the Company Respondents, or in [redacted]

[redacted]

may be related to the Respondent Companies. Respondent Friedlander also was not an employee of any of the Company Respondents, or of any companies which may be "related" to the Company Respondents. Furthermore, at no time was Respondent Friedlander ever an employee of APRL, and at no time did Respondent Friedlander ever have any authority or control [redacted]

2. During the 1980's, Respondent Friedlander determined that the combination of ephedrine, caffeine and aspirin ("ECA") could be useful in promoting weight loss. Friedlander Dep. at 45-18-47-7

[redacted]

[redacted]

Freidlander Decl. at ¶ 3.

11. At no time has Respondent Friedlander ever been an employee of any of the Company Respondents. Friedlander Dep.; Friedlander Decl.

12. At all relevant times Respondent Friedlander was not an owner of any of the Company Respondents, and Respondent Friedlander had no ownership interest in any of the Company Respondents. Friedlander Dep.

[redacted]

[redacted]

23. Respondent Friedlander has never been an employee of APRL. Friedlander Decl. at ¶¶ 7-8.

24. Respondent Friedlander has never owned or had any ownership interest in APRL. Friedlander Dep.

25. Respondent Friedlander has never had authority or control over APRL, and has never had authority to act on behalf of APRL. Friedlander Dep.

26. Respondent Friedlander has never sold any of the challenged products. Friedlander Dep.

27. Respondent Friedlander has never been an employee of any of the Company Respondents. Friedlander Dep.; Friedlander Decl.

28. Respondent Friedlander does not have, and has never had, any control over any of the Company Respondents. Friedlander Dep.; Friedlander Decl.

[redacted]

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

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.

2d 904, 912 (N.D. Ill. 1999) ("As the court has previously noted, if the plaintiff can satisfy the

three requirements necessary under the conspiracy theory of jurisdiction," defendant "would be

subject to the specific jurisdiction").

As an initial matter, Respondent Friedlander notes that the Complaint contains no

allegation that Respondent Friedlander [illegible]

B. THE COMMISSION CANNOT PROVE, BY A PREPONDERANCE OF THE EVIDENCE,

THE JURISDICTIONAL FACTS NECESSARY TO ESTABLISH SUBJECT MATTER

of Chicago v. Olsen, 262 U.S. 1, 43 S.Ct. 470, 477, 67 L.E. 839, repeating what had been said in

Stafford v. Wallace, supra: 'Whatever amounts to more or less constant practice, and threatens

The Commission has relied on the second category of situations (regulating and protecting the "instrumentalities of interstate commerce") where the FTC has jurisdiction under the FTC Act and Commerce Clause. For example, the Commission [redacted]

[redacted]

Motor Co. v. FTC, 120 F.2d 175, 183 (6th Cir. 1941), which in turn cites *Stafford v. Wallace*, 258

U.S. 495, 516 (1922), and quotes the following "snippet" from the *Ford Motor* decision:

[redacted]

Ford Motor also was a flow of commerce case. In that case, there was no question that

separately considered," might be beyond the FTC's jurisdiction, "when the activities of petitioner's local agencies are weighed in the light of their relationship to the petitioner, and its financing sales of cars, it is at once apparent that there is such a close and substantial relationship to interstate commerce that the control of such activities is appropriate to its production." *Id.*

This case, however, is not is flow of commerce case. Respondent Friedlander is not a

Kansas City stockyard or Ford Motor Company. He does not distribute cattle, dietary

commerce.

examples are by no means exhaustive but the matters [illegible]

substantial whatever substantial means. Thus, "[t]he most difficult activities for the FTC to

[redacted]

Indeed, when presented with this precise dilemma in Respondent Friedlander's prior to dismiss,

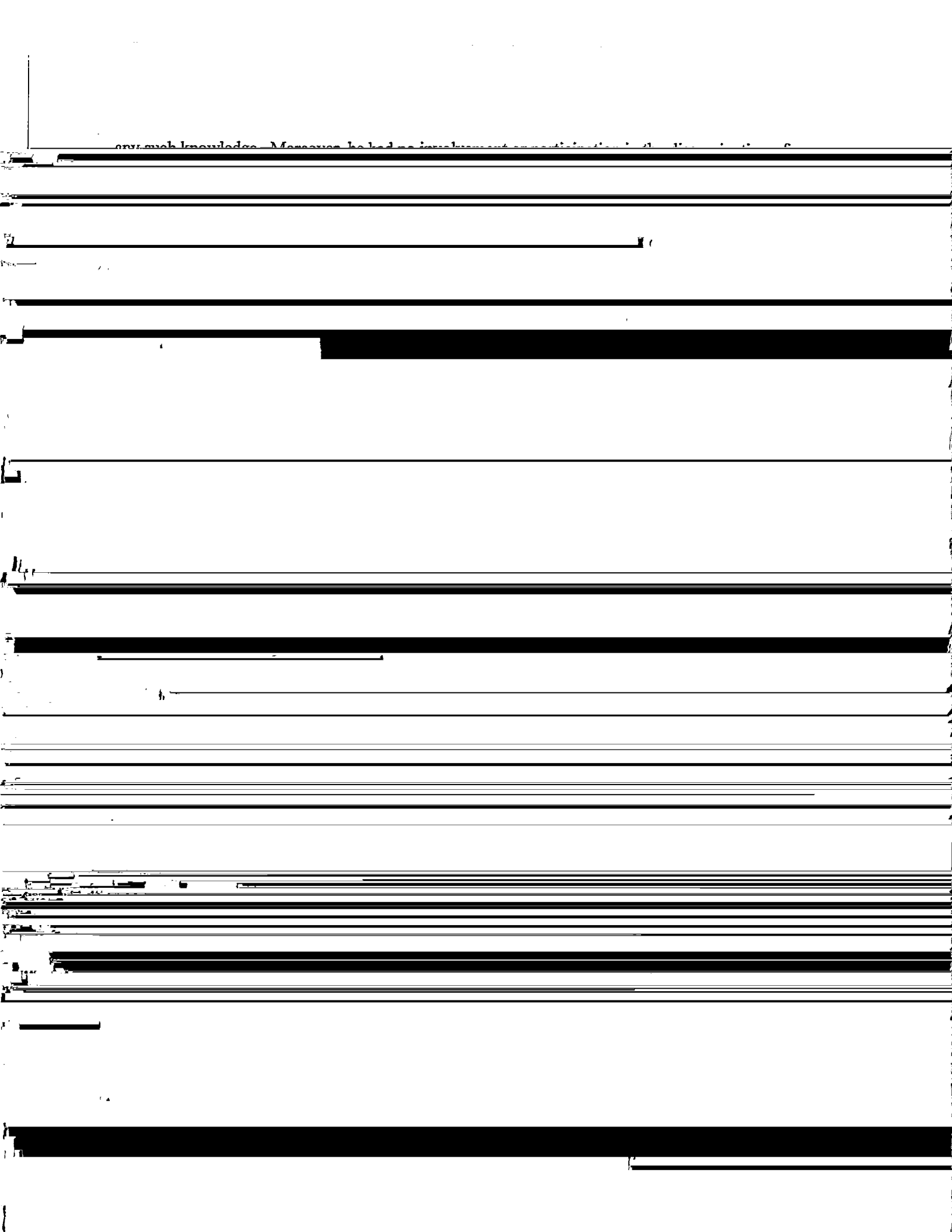
the Commission itself cited no such case law in its opposition memorandum, demonstrating that the Commission is also unaware of any such precedent.

Second, mere indirect participation in the acts or practices of others "in or affecting" interstate commerce is never enough to establish jurisdiction. That would push federal jurisdiction "to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a state."

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.

To bolster what is, at best, an ambiguous jurisdictional predicate for the charges the Commission has brought against Respondent Friedlander, the Commission [redacted]

claimed that Respondent Friedlander allegedly "had veto power over whether a product was [redacted]



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.

[redacted]

the challenged ads violated the law or were otherwise false or misleading or that there was no reasonable basis for the claims made in the ads. Indeed, Respondent Friedlander knew that the Respondent companies received a large volume of letters, e-mails and other communications

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) another federal judge had ruled that the company had a reasonable basis for advertising claims

[redacted]

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

[redacted]

Respondent Friedlander.

B. INJUNCTIVE RELIEF

Even if the Commission could prove that the ads violated the law (which the Commission

Dated this 15th day of February, 2006

Respectfully submitted,

Mitchell K. Friedlander
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Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of February, 2006, I caused the foregoing **RESPONDENT MITCHELL K. FRIEDLANDER'S CORRECTED PRE-HEARING BRIEF, AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** to be filed and served as follows:

(1) [redacted]

copy filed via email to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW Room H-159
Washington, DC 20580
Secretary@ftc.gov

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

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Pennsylvania Avenue, NW, Room H-112

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Mitchell K. Friedlander
c/o Compliance Department
[redacted]