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

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	In the Matter of BASIC RESEARCH, L.L.C.,	Docket No. 9318
	A.G. WATERHOUSE, L.L.C., KLEIN-BECKER USA, L.L.C., NUTRASPORT, L.L.C., SOVAGE DEMALOGIC LABORATORIES, L.L.C., BAN, L.L.C.	: PUBLIC DOCUMENT
	DENNIS GAY, DANIEL B. MOWREY, and	AL TRADE COMMISS
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II.	Cond	CLUSIONS OF LAW
LEG.	AL DIS	<u>CUSSION</u>
I.		COMMISSION LACKS SUBJECT MATTER JURISDICTION OVER CLAIMS ASSERTED AGAINST RESPONDENT FRIEDLANDER
	A.	THE COMMISSION CANNOT PROVE THAT RESPONDENT FRIEDLANDER

TABLE OF AUTHORITIES

Cases:

Board of Trade of City of Chicago v. Olsen,	
262 U.S. 1, 43 S.Ct. 470, 67 L.E. 839)

	Options Corp., 560 F.2d 135 (2 nd Cir. 1977) 22-
Coro	, Inc. v. FTC,
	338 F.2d 149, 154 (1st Cir. 19
Ford	Motor Co. v. FTC,
	120 F.2d 175 (6 th Cir. 1941)
FTC ·	v. Atlantex Associates, 1987 WL 20384 *13 (S.D. Fla. 1987),
	aff'd 872 F.2d 966 (11 th Cir. 1989)
FTC 1	v. Garvey,
	383 F.3d 891, 900-02 (9th Cir. 2004)
Coro,	Inc. v. FTC, 338 F.2d 149, 154 (1st Cir. 1964)
	v. Publishing Clearing House, Inc.,
	104 F.3d 1168 (9th Cir. 1997)
Halbe	rstam v. Welch,
	705 F.2d 472 (D.C. Cir. 1983)

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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

One promoting interest in ADDT on in our of the Common Down down - it -Ł 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 ADDI and at no time did Deemandant Eriadlander anen have anterette aite anaacted ---

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

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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

<u></u>	Company Recoondents Friedlander Dan		
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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.

25. Respondent Friedlander has never had authority or control over APRL, and has

	norm had anthonistic to got an haber of A MBT. But the 1 . B.	
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26. Respondent Friedlander has never sold any of the challenged products.

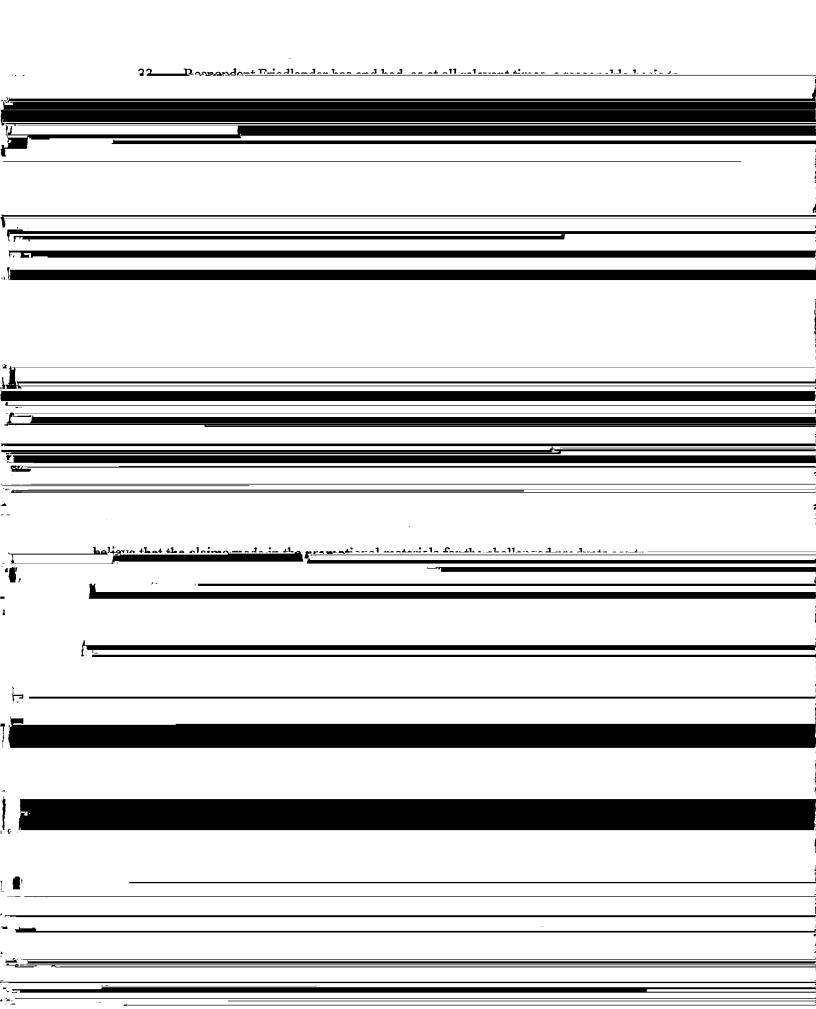
Friedlander Dep.

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 Aggregants Decoder dente Deterlander Decoder Decolo Deco



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

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Commission would have to establish as a jurisdictional fact that Respondent Friedlander knew,

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	2d 904, 912 (N.D. Ill. 1999) ("As the court has previously noted if the plaintiff can satisfy the
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•	three requirements necessary under the conspiracy theory of jurisdiction " defendant "would be
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	As an initial matter, Respondent Friedlander notes that the Complaint contains no
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	B, <u>The Commission Cannot Prove. By A Preponderance Of The Evidence</u>	
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of Chicago v. Olsen. 262 U.S. 1. 43 S.Ct. 470. 477. 67 L.E. 839. repeating what had been said in _ _ 4 24 -Stafford v. Wallace, supra: 'Whatever amounts to more or less constant practice, and threatens È. 1____

The Commission has relied on the second category of situations (regulating and

protecting the "instrumentalities of interstate commerce") where the FTC has jurisdiction under

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

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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

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

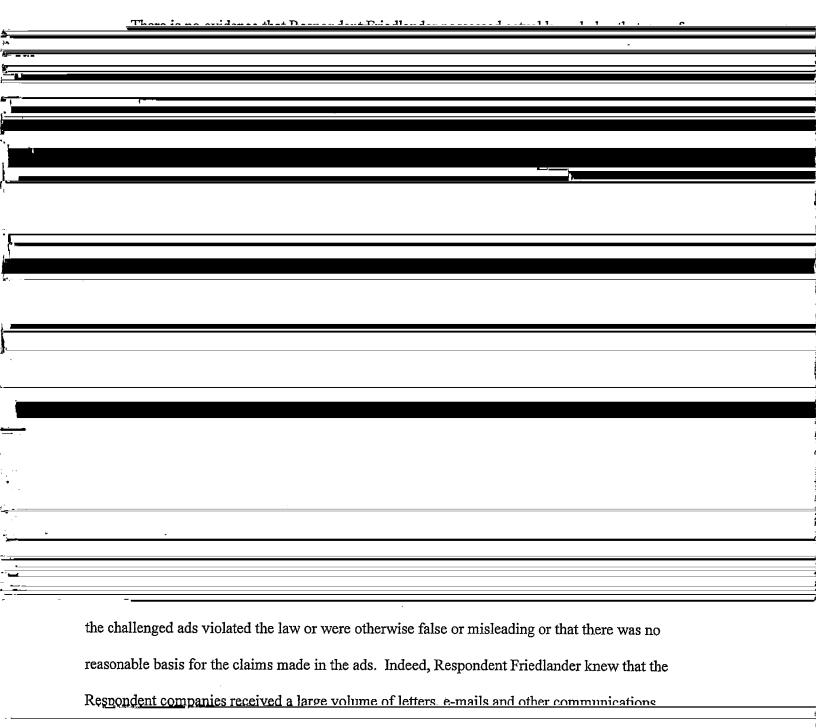
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	claimed that Respondent Friedlander allegedly "had veto power over whether a product was	
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in accordance with the directions and in conjunction with exercise and/or reduced caloric intake, that the 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.



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 advortising element

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Respondent Friedlander.

B. INJUNCTIVE RELIEF

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

Dated this the day of Feloniary, 2006

Respectfully submitted,

Mitchell K. Friedlander

5742 West Harold Gatty Drive Salt Lake City, UT 84116 <u>Mkf555@msn.com</u>

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:

	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

1

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Mitchell K. Friedlander c/o Compliance Department

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