

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

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In the Matter of )  
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BASIC RESEARCH, LLC )  
A.G. WATERHOUSE, LLC )  
KLEIN-BECKER USA, LLC )  
NUTRASPORT, LLC )  
SOVAGE DERMALOGIC LABORATORIES, LLC )  
BAN, LLC d/b/a BASIC RESEARCH, LLC )  
    OLD BASIC RESEARCH, LLC; )  
    BASIC RESEARCH, A.G. WATERHOUSE, )  
    KLEIN-BECKER USA, NUTRA SPORT, and )  
    SOVAGE DERMALOGIC LABORATORIES )  
DENNIS GAY )  
DANIEL B. MOWREY d/b/a AMERICAN )  
    PHYTOTHERAPY RESEARCH LABORATORY, and )  
MITCHELL K. FRIEDLANDER, )  
    Respondents. )

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Docket No. 9318

**ORDER DENYING RESPONDENTS' MOTION IN *LIMINE* TO PRECLUDE  
COMPLAINT COUNSEL FROM INTRODUCING EVIDENCE OF EXPRESS CLAIMS  
OR NEW IMPLIED CLAIMS FOR THE PURPOSES OF ESTABLISHING LIABILITY**

**I.**

Respondents filed a motion *in limine* seeking to preclude Complaint Counsel from introducing evidence of express claims or new implied claims for purposes of establishing liability ("Motion") on February 28, 2005. Complaint Counsel filed its opposition ("Opposition") on March 9, 2005.

**II.**

Respondents seek to prohibit Complaint Counsel from introducing evidence of any express claims made by Respondents in the challenged advertisements and from introducing any implied claims not previously identified in the Complaint or from advertisements not contained in the Complaint, for purposes of establishing liability under the Federal Trade Commission Act ("FTC Act"). Motion at 1-2, 8-14, 18. Respondents also seek to limit Complaint Counsel from pursuing a falsity theory in connection with non-establishment claims or a reasonable basis

theory in connection with establishment claims and from amending their pleadings to add such allegations. Motion at 14-18.

Complaint Counsel asserts that Respondents are attempting to exclude material evidence on the mere possibility that Complaint Counsel may pursue new theories of liability at trial. Opposition at 2. Complaint Counsel also objects that Respondents' motion is overly broad and would limit the admission of relevant, material, and reliable evidence without the requisite showing of prejudice. Opposition at 3-4.

### III.

"Motion *in limine*" refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984); *see also In re Motor Up Corp., Inc.*, Docket 9291, 1999 FTC LEXIS 207, at \*1 (August 5, 1999). Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the court's inherent authority to manage the course of trials. *Luce*, 469 U.S. at 41 n.4. Motions *in limine* are generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible. *Bouchard v. American Home Products Corp.*, 213 F. Supp.2d 802, 810 (N.D. Ohio 2002); *Intermatic Inc. v. Toebben*, 1998 WL 102702, at \* 2 (N.D. Ill. 1998). Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *see also SEC v. U.S. Environmental, Inc.*, 2002 WL 31323832, at \*2 (S.D.N.Y. 2002). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *U.S. Environmental*, 2002 WL 31323832, at \*2. *In limine* rulings are not binding on the trial judge, and the judge may change his mind during the course of a trial. *Ohler v. U.S.*, 529 U.S. 753, 758 (2000); *Luce*, 469 U.S. at 41 (A motion *in limine* ruling "is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer."). "Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded." *Noble v. Sheahan*, 116 F. Supp.2d 966, 969 (N.D. Ill. 2000); *Knotts v. Black & Decker, Inc.*, 204 F. Supp.2d 1029, 1034 n.4 (N.D. Ohio 2002).

Respondents seek to preclude the introduction of evidence establishing the express and implied claims made in the advertisements identified in the Complaint and other advertisements for the same products. Motion at 8-14, 18. The claims for the identified products, whether express or implied, are relevant to determining the issues that must be decided after receipt of the evidence in this case. Indeed, identifying the claims made by the advertisements for the challenged products is a factual issue to be determined after the evidentiary hearing. The Complaint specifically alleges that Respondents made the challenged representations "expressly or by implication." Complaint, ¶¶ 14-15, 17-18, 20-21, 23, 25, 28-29, 31, 33-34, 37-38, 40, 42. In addition, the Complaint alleges that "Respondents have disseminated or have caused to be

disseminated advertisements and labeling for [the six products], including but not necessarily limited to the attached exhibits.” Complaint, ¶¶ 13, 27, 36. This language in the Complaint does not limit consideration to only implied claims nor does it limit consideration to only the advertisements attached as exhibits. Thus, evidence regarding express and implied claims made in the advertisements identified in the Complaint and other advertisements for the same products are relevant to the allegations of the Complaint.


In addition, Respondents seek to preclude Complaint Counsel from pursuing a falsity theory in connection with the non-establishment claims and from pursuing a reasonable basis theory in connection with the establishment claims set forth in the Complaint. Motion at 14-18. Complaint Counsel asserts that Respondents mistakenly assume that reasonable basis and falsity theories are mutually exclusive. Opposition at 9. The Complaint indicates that Respondents lacked a reasonable basis for its claims and that the representations made were “false and misleading.” Complaint, ¶¶ 15-16, 18-19, 21-22, 24, 26, 29-30, 32, 34-35, 38-39, 40-41. Therefore both the reasonable basis and falsity theories are relevant to the allegations of the Complaint.

Finally, Respondents seek to preclude Complaint Counsel from amending the pleadings or from conforming the pleadings to the evidence. Motion at 17-18. This request is premature as Complaint Counsel has not requested or attempted to amend the pleadings. In the event that Complaint Counsel seeks such an amendment, Respondents may file appropriate objections. At this point, however, ruling on such a potential amendment is premature.

#### IV.

Respondents have not presented an adequate basis for precluding Complaint Counsel from introducing evidence of express or implied claims for purposes of establishing liability. Accordingly, Respondents’ motion is **DENIED**. This ruling on the motion *in limine* does not imply a finding regarding the weight to be given to the evidence nor does it preclude appropriate objections during trial.

ORDERED:

  
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Stephen J. McGuire  
Chief Administrative Law Judge

Date: January 5, 2006