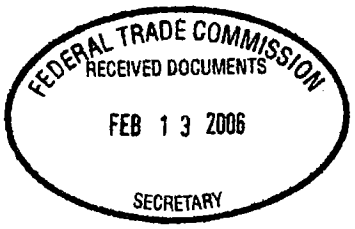
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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	:	
MITCHELL K. FRIEDLANDER,	:	
	:	
Respondents.	:	
	:	



RESPONDENT MITCHELL K. FRIEDLANDER'S CORRECTED PRE-HEARING BRIEF, AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Respondent Mitchell K. Friedlander submits this pre-hearing brief, and proposed findings of fact and conclusions of law.[1] Respondent Friedlander expressly adopts the arguments and proposed findings of fact and conclusions of law set forth in the pre-hearing briefs and proposed findings of fact and conclusions of law submitted by the other respondents in this matter.

FACTUAL BACKGROUND

Respondent Friedlander resides in Salt Lake City, Utah. At all relevant times, Respondent Friedlander was an independent consultant to an entity which is not a party to this action -- American Phytotherapy Research Laboratory ("APRL"). APRL is a Utah corporation, owned and operated by Respondent Daniel B. Mowrey, Ph.D. Friedlander Decl. at ¶ 6; Mowrey Deposition ("Mowrey Dep."), 01/13/2005, 69:6. APRL's principal place of business is located in the State of Utah. APRL does not place advertisements, does not manufacture any product, does not advertise any products, and does not sell any products. At all relevant times, APRL's sole business function was to provide consulting services to nutritional supplement companies, including one or more of the Respondent Companies. Mowrey Dep. 56:22-24; 60:16-23; and 63:14-17.

As an independent consultant, Respondent Friedlander provided consulting services to APRL, in Utah, which services included drafting proposed advertisements for proposed dietary supplements, and consulting with APRL's president and sole owner, Respondent Dr. Mowrey,

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[1] In reliance on Erin Wirth's letter of 18 January 2006, which stated, in part, that pre-hearing briefs do not need to comply with the requirements of the post-hearing briefs, the proposed findings of fact in Mr. Friedlander's original pre-hearing brief did not contain any citations to the record. However, in light of the language in his Honor's scheduling orders which state that, to the extent possible, the proposed findings of fact in the parties' pre-hearing briefs should contain citations to the record, Mr. Friedlander submits this corrected pre-hearing brief which contains, where possible, citations to the record for the proposed findings of fact.

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 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 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 over APRL, or authority to act on APRL's behalf. Moreover, at no time did Respondent Friedlander ever have any authority or control over any of the Company Respondents, or authority to act on behalf of any of the Company Respondents.

Respondent Friedlander also never disseminated or caused 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 ("FTCA"). In short, all of Respondent Friedlander's services to APRL were purely local services, and were not in or affecting interstate commerce as defined under the FTCA. Thus, the Commission lacks subject matter jurisdiction over Respondent Friedlander, and all claims asserted against him must be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

1. Respondent Friedlander resides in Salt Lake City, Utah. Declaration of Mitchell K. Friedlander ("Friedlander Decl.") dated 16 February 2005, at ¶ 3 (filed in support of Friedlander's Motion to Dismiss, dated March 25, 2005).

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.

3. Respondent Friedlander subsequently commissioned a scientific study on the ECA combination, which study was performed by Dr. Patricia Daly, among others, at Harvard University. The results of this study were ultimately published in the International Journal of Obesity, (1992) 17 (Suppl. 1) S73-S78. Friedlander Dep. at 47:8-49:9.

4. In 1991, Respondent Friedlander obtained a patent on the ECA combination for weight loss. Friedlander Dep. at 44:12-15; 92:23-25

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. Friedlander Dep.

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. Friedlander Decl.

7. APRL, now known as DBM Enterprises, Inc., is a Utah corporation which is not a party to this proceeding. Mowrey Dep. at 78:3-15.

8. Beginning in the latter part of the 1990's, Respondent Friedlander began to provide independent consulting services to APRL. Friedlander Dep. at 43:25-44:3.

9. At all times relevant hereto, all services provided by Respondent Friedlander were provided to APRL, in the capacity as an independent consultant. Friedlander Dep. at 60:2 - 61:3.

10. At no time has Respondent Friedlander ever been an employee of ARPL. 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.

13. Respondent Friedlander provided consulting services to APRL, in Utah, including drafting proposed advertisements for proposed dietary supplements, and consulting with APRL's president and sole owner, Respondent Dr. Mowrey, concerning the marketability of potential products. Friedlander Decl. at ¶ 4.

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

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. at ¶ 5.

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. Friedlander Decl. at ¶ 6.

17. Respondent Friedlander had no authority to act on behalf of any of the Company Respondents. Friedlander Decl. at ¶ 7.

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. Friedlander Decl. at ¶ 8.

19. None of the services that Respondent Friedlander provided to APRL involved interstate commerce. Indeed, until such time as the challenged advertisements appeared in public and the challenged products were offered for sale, no interstate commerce occurred. Friedlander Decl. at ¶ 9.

20. Respondent Mowrey has some thirty years experience in studying and developing dietary supplements, including the publication of numerous books concerning the use of dietary supplements. Mowrey Dep., *passim*.

21. Although Respondent Friedlander drafted ad copy for advertisements for the challenged products, at no time did Respondent Friedlander ever have authority to approve dissemination of the advertisements. Friedlander Decl. at ¶¶ 7-8. 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 were being made in the advertisements were reasonable and supported by the scientific evidence, (2) the Company Respondents' compliance department reviewed and signed off on the advertisements, and (3) the Company Respondents' outside counsel, a former FTC attorney, reviewed and signed off on the advertisements. Mowrey Dep.; Friedlander Decl.

22. 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 FTCA. Friedlander Dep.

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.

29. Respondent Friedlander does not have, and has never had, any decision making authority for any of the Company Respondents. Friedlander Dep.; Friedlander Decl.

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

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

32. At no time did Respondent Friedlander ever have any authority to approve products on behalf of Basic Research, LLC or on behalf of any of the Company Respondents. Friedlander Dep.; Friedlander Decl.

33. Respondent Friedlander has and had, as at all relevant times, a reasonable basis to believe that the claims made in the promotional materials for the challenged products are true. Friedlander Dep.; Friedlander Decl.

34. The consulting services provided by Respondent Friedlander have been of a purely local nature, and do not constitute engagement or participation in interstate commerce, as defined under the FTCA. Friedlander Decl.

35. Respondent Friedlander reasonably relied on Dr. Mowrey, and Dr. Mowrey's determination that there was a reasonable basis for the claims being made. Friedlander Dep.

36. Respondent Friedlander did not participate in a common enterprise with the other Respondents. Friedlander Dep.; Friedlander Decl.

II. CONCLUSIONS OF LAW

1. The consulting services provided by Respondent Friedlander have been of a purely local nature. As such, Respondent Friedlander's actions have not been in or affecting interstate commerce as defined under the FTCA. Therefore, the Commission lacks subject matter jurisdiction over Respondent Friedlander.

2. Respondent Friedlander is not individually liable for restitution because he acted reasonably and in good faith.

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, who did not have knowledge of wrongful conduct of others, found not liable even though he controlled corporation).[2] Absent an allegation and proof of civil conspiracy, the Commission as 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 conspiracy as jurisdictional facts); *United Phosphoros, Ltd. v. Angus Chemical Co.*, 43 F. Supp.

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[2] In *Garvey* and *Coro*, the issue of knowledge was not a jurisdictional fact, but just an element of "participant liability," because the FTC alleged, and proved, that Messrs. Garvey and Coro directly engaged in acts or practices "in or affecting" interstate commerce. Respondent Garvey appeared in television commercials and was the face and public spokesperson for the challenged product, and Respondent Coro controlled the corporate respondents that disseminated the subject advertisement. Here, in contrast, Respondent Friedlander neither controlled the Company Respondents who disseminated the challenged products and advertisements, nor held himself out to the public as the face or spokesperson for the challenged products

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 court's jurisdiction.").

As an initial matter, Respondent Friedlander notes that the Complaint contains no allegation that Respondent Friedlander knew or should have known of the alleged deceptive acts or practices. Aside from that omission, the Commission cannot meet their burden of proving, by a preponderance of the evidence, that Respondent Friedlander knew or should have know of the alleged falsity of the challenged advertisements. On the contrary, the facts are clear that before the challenged advertisements were ever publicly disseminated, (1) respondent Dr. Mowrey, who has published numerous books on dietary supplements and has some three decades of experience in studying and developing dietary supplements, reviewed and signed off on the advertisements, (2) the Company Respondents' compliance department reviewed and signed off on the advertisements, and (3) the Company Respondents' outside counsel, a former FTC attorney, reviewed and signed off on the advertisements. .

Moreover, the evidence will clearly show, and even the Commission's own experts have conceded, that the challenged products work -- the challenged products clearly promote weight and/or fat loss.[3] 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.

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[3] In light of their concession that the challenged products work, the Commission and its experts essentially are relegated to asserting that the challenged products do not work as well as claimed in the challenged advertisements.

B. THE COMMISSION CANNOT PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THE JURISDICTIONAL FACTS NECESSARY TO ESTABLISH SUBJECT MATTER JURISDICTION OVER ANY CLAIM ASSERTED UNDER A PARTICIPANT LIABILITY THEORY

The Commission has have previously asserted in this case that "[i]t is well-settled precept that the FTC's jurisdiction over acts and practices in or affecting [interstate] commerce under the FTC Act is coextensive with the Constitutional power of Congress under the Commerce Clause." The Commission's Motion for Summary Decision at 4. Thus the Commission's jurisdiction is ***not*** without limits. *U.S. v. Morrison*, 529 U.S. 598, 609 (2000) ("[E]ven [our] modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits."). That limit was plainly stated in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29 (1937), as follows:

> The authority of the federal government may not be pushed 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. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

Id. at 29; *accord Morrison*, 529 U.S. at 609 ("'In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely 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*

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 to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause . . . .'" 301 U.S. at 29. Since *Jones & Laughlin Steel,* the Supreme Court has heeded the warning not to destroy the distinction between local and interstate activities, and has not "pushed" federal jurisdiction to such an extreme as to destroy the distinction between a local activity and "a regulated activity [that] sufficiently affect[s] interstate commerce." *U.S. v. Lopez*, 514 U.S. 549, 557 (1995).

In *Morrison*, the Supreme Court identified the three categories of factual situations in which the federal government's interstate commerce jurisdiction extends:

> [M]odern Commerce Clause jurisprudence has "identified three broad categories of activity that Congress may regulate under its commerce power." [Citations omitted.] "First, Congress may regulate the use of the channels of interstate commerce." [Citations omitted.] "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." [Citations omitted.] "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce."

529 U.S. at 609 (citations omitted).

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 has the Commission previously claimed that this category is relevant.

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

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 has previously cited *Ford 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:

> Interstate commerce includes intercourse for the purpose of trade which results in the passage of property, persons or messages from within one state to within another state. All of those things which stimulate or decrease the flow of commerce, although not directly in its stream, are **essential adjuncts** thereto and the Congress has power to confer on the Federal Trade Commission their regulation.

Commission's Motion for Summary Decision at 5 (emphasis added).

Stafford is the paradigm "flow of commerce case." It concerned whether the Packers and Stockyards Act of 1921, which regulated local stockyards, was Constitutional. The Supreme Court held that the Act was Constitutional, because (a) stockyards were an instrumentality of interstate commerce (*i.e.*, "The stockyards are but a throat through which the current flows"), (b) "transactions which occur therein are only incident to this current" (*i.e.*, they are essential adjuncts), and (c) regulating those transactions was "necessary" to protect the flow of commerce, and therefore the local transactions had "a national character." 258 U.S. at 516 ("The stockyards and the sales are necessary factors in the middle of this current of commerce. The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. . . . That it is a business within the power of regulation by legislative action needs no discussion.").

Ford Motor also was a flow of commerce case. In that case, there was no question that *Ford was involved* in interstate commerce.[4] There also was no question that *Ford was using* an instrumentality of commerce (*i.e.*, advertising) as an "integral part"[5] of its distribution of cars throughout the United States.[6] Ford's argument was that the FTC lacked jurisdiction to regulate "[t]he sale on credit of [its] cars by its local dealers . . . ." 120 F.2d at 183. The Circuit Court rejected Ford's argument, because the local transactions were essential to the flow of Ford's cars to consumers, and because regulating those transactions was necessary to protect consumers throughout the United States. While the Court recognized that local sales transactions, "when

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[4] Ford was involved in the sale and distribution of "cars manufactured by them . . . from [its] factories in Michigan and elsewhere to all parts of the United States for sale to the purchasing public. [Ford] maintains several thousand retail dealer outlets throughout the United States with whom it has contracts to sell its cars wholesale at prices fixed by petitioner, the dealers agreeing to maintain places of business of a definite kind and nature and to sell the cars in a manner specified by petitioner. . . . Petitioner's dealers agree to take retail orders for new cars on a specified order blank and operate their business generally in the manner outlined in their contracts with it. Petitioner sells its cars direct to dealers who take title to them and in turn the dealers sell to the public, but petitioner assists in the sales through wide and extensive advertising in newspapers, magazines, billboards and in other ways." 120 F.2d at 177-78

[5] "The use of advertising as an aid to the production and distribution of goods has been recognized so long as to require only passing notice. The economy of mass production is just as well known and the effects of advertising may be described as mass selling without which distribution would be lessened and a fortiori production correspondingly decreased. The present advertisement of the method for financing the purchase of petitioner's cars on credit was an integral part of their production and distribution." 120 F.2d at 183.

[6] The FTC ordered Ford "to cease and desist from the use of the word 'six per cent' or the figure and symbol '6%' in certain forms of advertising in connection with the cost of, or the additional charge for, the use of a deferred or installment payment plan of purchasing automobiles manufactured by it." *Id.* at 177. "[It] found that the statements contained *in [Ford's] advertising matter* with reference to its '6%' plan had the tendency to mislead and deceive, and did mislead and deceive, a substantial part of the purchasing public into the erroneous belief that petitioner's finance plan or method as outlined contemplates a simple 6% interest charge upon the deferred and unpaid balance of the purchase price of cars . . . , when the actual credit charge . . . amounts to approximately 11 ½% simple annual interest on the unpaid balance of the installments due on cars sold." *Id.* at 180.

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 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. Finally, there is no other compelling reason of a "national character" for the FTC to regulate Respondent Friedlander.

On the contrary, Respondent Friedlander provides local consulting services. He does not disseminate any ads or distribute any product. Until the challenged advertisements were finalized, approved, and disseminated by the Company Respondents, and appeared in public, and the challenged products were offered for sale, no interstate commerce occurred.

In responding to Respondent Friedlander's prior motion to dismiss, the Commission asked your Honor to focus on the fact that the Company Respondents ultimately chose to place advertisements into interstate commerce. However, that decision was far removed from Respondent Friedlander's actions. Respondent Friedlander's services were provided to APRL, in Utah. APRL, in turn, provided its own consulting services to the Company Respondents. 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, admittedly, our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.").

While the Supreme Court has never clearly defined the amount of impact a local activity must have to qualify as "substantial," the Supreme Court has been perfectly clear that a "substantial" impact is required, *Lopez*, 514 U.S. at 559, and whether a local activity has a substantial impact on interstate commerce must be determined case by case, and entails a factual inquiry that "is necessarily one of degree." *Jones & Laughlin Steel*, 301 U.S. at 29. The Supreme Court has indicated that examples of substantial local activities include "intrastate coal 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 substantial, whatever substantial means. Thus, "[t]he most difficult activities for the FTC to reach even under its broadened mandate will be those involving *local rendering of services* or restraints on production of goods which are locally manufactured or processed." 1 Fed. Trade Comm'n. § 1:4 (2003) (emphasis added).

Here, Respondent Friedlander's writing of proposed advertisements cannot constitute a "substantial" impact on interstate commerce. Had Respondent Friedlander not drafted the advertisements, somebody else would have. Furthermore, although Respondent Friedlander admittedly drafted advertisements, he did not determine what scientific claims could be made in the ads. That determination was made by others, and Respondent Friedlander simply drafted advertisements based upon the claims that others had determined could be made. Thus, had Respondent Friedlander not drafted the advertisements, somebody else would have, using the exact same claims that others had already determined could be made in the advertisements. Thus, the fundamental substance of the advertisements would have been the same, regardless of Mr. Friedlander's involvement. Accordingly, his involvement cannot be said to rise to the requisite level of "substantial impact."

Furthermore, it was not, in any event, the drafting of the advertisements which had any impact on interstate commerce; it was the dissemination of the final advertisements which had impacted interstate commerce. And with respect to the dissemination, the evidence will show 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 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 over APRL, or authority to act on APRL's behalf. Moreover, at no time did Respondent Friedlander ever have any authority or control over any of the Company Respondents, or authority to act on behalf of any of the Company Respondents, including with respect to decisions relating to the dissemination of advertisements. It was this dissemination of advertisements, not the writing of the advertisements, which impacted interstate commerce. Thus, Respondent Friedlander's involvement cannot be said to rise to the requisite level of "substantial impact."

In light of FTC case law applying the doctrine of "participant liability," two things become clear from this Supreme Court precedent. First, in order for the FTC to obtain jurisdiction over a person for false advertising, that person must have control over the dissemination of the advertisement, must have actually disseminated the ad in interstate commerce, or must have engaged in some other form of "direct" participation in interstate commerce. Respondent Friedlander is not aware of any case where the Commission has issued a cease and desist order against a party for mere indirect participation in interstate commerce. *See, e.g., FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997) (president of corporation can "be held individually liable for injunctive relief . . . for corporate practices if the FTC can prove (1) that the corporation committed misrepresentations or omissions of a kind usually relied on by a reasonably prudent person, resulting in consumer injury, and (2) that [the president] participated directly in the acts or practices or had authority to control them.").

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." *Jones & Laughlin Steel,* 301 U.S. at 29; *Morrison*, 529 U.S. at 609. It would also render moot the Commission's obligation to prove "knowledge" as a jurisdictional fact when it seeks to attribute to a respondent the conduct of others as a basis for jurisdiction.

In this case, the facts are clear that Respondent Friedlander's conduct involved the provision of purely closed-ended local services. Regardless of what efforts the Commission may make to try to create an inference of "in or affecting" commerce (i.e., the Commission has previously asserted that Respondent Friedlander (1) "helped" Dr. Mowrey decide whether products would be commercially viable; (2) "concluded" that Dermalin, Cutting Gel, and Tummy Flattening Gel were commercially viable products (the Commission omitted that Respondent Friedlander also concluded and advised his client that PediaLean was not a commercially viable product); (3) came up with the names "Dermalin," "Cutting Gel," "Tummy Flattening Gel," and "Anorex" (but not "Leptroprin" and "PediaLean"); and (4) "participated" in the creation of 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.

To bolster what is, at best, an ambiguous jurisdictional predicate for the charges the Commission has brought against Respondent Friedlander, the Commission has previously claimed that Respondent Friedlander allegedly "had veto power over whether a product was marketed . . . ." However, the evidence at the hearing will demonstrate the following: (1) 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 any entities which may be related to the Respondent Companies; (2) Respondent Friedlander was not an employee of any of the Company Respondents, or of any companies which may be "related" to the Company Respondents; (3) at no time was Respondent Friedlander ever an employee of APRL, and at no time did Respondent Friedlander ever have any authority or control over APRL, or authority to act on APRL's behalf; and (4) at no time did Respondent Friedlander ever have any authority or control over any of the Company Respondents, or authority to act on behalf of any of the Corporate Respondents, including with respect to the Company Respondents' decisions to disseminate advertisements and market their products.

In short, the evidence will not support a finding that Respondent Friedlander possessed any knowledge of the alleged deceptive acts or practices that form the basis of Commission's charges. On the contrary, there is a complete lack of evidence that Respondent Friedlander had

any such knowledge. Moreover, he had no involvement or participation in the dissemination of the advertisements. He had no authority or control over the Company Respondents, and he had no control over decisions relating to the dissemination of advertisements. Therefore, his alleged "participation" facts are insufficient to establish subject matter jurisdiction.

II. RESPONDENT FRIEDLANDER HAS NO PARTICIPANT LIABILITY BECAUSE HE ACTED REASONABLY AND IN GOOD FAITH

Respondents intend to prove at trial that there was a reasonable basis for all of the challenged ads and that those ads did not violate the FTCA. However, even assuming *arguendo* that one or more of the advertisements violated the FTCA, and even assuming *arguendo* that the Commission has subject matter jurisdiction over the claims asserted against Respondent Friedlander, the evidence will demonstrate that Respondent Friedlander is not individually liable for restitution[7] and that no injunctive relief should issue against him.

A. RESTITUTION

In order to impose restitution liability upon Respondent Friedlander, the Commission is required to prove that he participated directly in the alleged wrongful acts or had the authority to control them and, in addition, that Respondent Friedlander "had actual knowledge of the material 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."

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[7] Respondent Friedlander recognizes that restitution is not directly at issue in this proceeding, inasmuch as any possible restitution would have to be sought by the Commission through a separate Section 19(b) proceeding. However, any decision by the Commission as to whether to commence a Section 19(b) decision will stem from this proceeding and your Honor's rulings herein, Respondent Friedlander chooses to briefly address herein the issue of restitution and the reasons such a proceeding against him would be inappropriate.

Garvey, 383 F.3d at 900. *See also FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997).[8]

Respondent Friedlander has no liability for restitution because the evidence will demonstrate that he did not have any actual knowledge of any material misrepresentations nor was he recklessly indifferent to the truth or falsity of a misrepresentation, nor did he have an awareness of a high probability of fraud and intentionally avoid the truth. Although Respondent Friedlander admittedly wrote the ad copy, he is not a scientist and does not have the technical expertise to evaluate the efficacy of the products and the validity of studies and other evidence supporting the products. For that reason, Respondent Friedlander relied on Dr. Mowrey, a person trained in the scientific method and who has some thirty years experience studying medicinal plants, herbs and nutritional supplements, and who had written several books on herbs and herbal medicine, whose job was to study the scientific literature and available evidence to ensure that there was a reasonable basis for the scientific claims that would be made in the promotional materials, and that the claims were truthful.

Furthermore, Respondent Friedlander knew that with respect to whatever products the Company Respondents may decide to market, the Company Respondents would not, and did, go forward with the manufacturing and/or marketing of any product until the scientific group, the marketing group and the company lawyers, including a former FTC attorney, signed off on the product and the advertisements. Respondent Friedlander relied upon the expertise, investigation and work of these people in approving the ads. He relied upon Dr. Mowrey and the other scientists that there was a reasonable basis for believing that the products worked, i.e., that used

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[8] In this regard, the Commission has alleged a common enterprise theory in this case. However, the common enterprise theory only applies to corporate respondents and not to individuals. *In Re Telebrands Corp.*, Docket No. 9313, Initial Decision (September 15, 2004).

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.

There is no evidence that Respondent Friedlander possessed actual knowledge that any of 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 from its customers praising the products and recounting customer successes with the products.

In *FTC v. Garvey*, Respondent Garvey had been a media spokesman for various weight loss products. The Ninth Circuit held he had no individual liability for restitution because he had no actual knowledge of any alleged material misrepresentations concerning the product and had relied, among other things, upon booklets and a study furnished to him by the company. The Ninth Circuit concluded it was reasonable for Garvey to have believed that the information supported the representations he made and that he was not recklessly indifferent to the truth of his statements or aware that fraud was highly probable and intentionally avoided the truth.

Here, Respondent Friedlander did not know of any misrepresentations, he was not reckless and he did not intentionally avoid the truth. On the contrary, he relied on Dr. Mowrey and on the process the Company Respondents had instituted, including the fact that any ads he wrote for APRL would be fully reviewed and approved by the Company Respondents' attorneys. 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) another federal judge had ruled that the company had a reasonable basis for advertising claims made in support of another ECA product. There is no basis to impose restitution liability on Respondent Friedlander.

B. INJUNCTIVE RELIEF

Even if the Commission could prove that the ads violated the law (which the Commission cannot do), injunctive relief would not be appropriate against Respondent Friedlander. In order to obtain injunctive relief, the Commission is required to show that there is a reasonable apprehension of future violations of the FTCA by Respondent Friedlander. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *Commodity Futures Trading Commission v. British American Commodity Options Corp.*, 560 F.2d 135 (2nd Cir. 1977); *FTC v. Atlantex Associates*, 1987 WL 20384 *13 (S.D. Fla. 1987), *aff'd* 872 F.2d 966 (11th Cir. 1989). The Commission cannot satisfy that prerequisite. As demonstrated above, Respondent Friedlander acted in good faith and reasonably in relying on Dr. Mowrey, and on the substantiation and ad review process which had been instituted by the Company Respondents. He did not act fraudulently, or deceptively or recklessly. He drafted advertisements in reliance on Dr. Mowrey, and relied on a detailed process in the companies that he believed would insure the ads were proper and legal. There is no need for an injunction against Respondent Friedlander; it would serve no valid public purpose.

Dated: February 10, 2006.

Dated this 15th day of February, 2006

Respectfully submitted,

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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) an original and one paper copy filed by hand delivery and one electronic 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
Washington, D.C. 20580

(3) one paper copy by first class U.S. Mail to

James Kohm
Associate Director, Enforcement
U.S. Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

(4) one paper copy by first class U.S. mail and electronic PDF copy by email to:

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