UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
BASIC RESEARCH, L.L.C.,	)	
A.G. WATERHOUSE, L.L.C.,	)	
KLEIN-BECKER USA, L.L.C.,	)	
NUTRASPORT, L.L.C.,	)	
SOVAGE DERMALOGIC LABORATORIES, L.L.C.,	)	**Docket No. 9318**
BAN, L.L.C.,	)	**PUBLIC DOCUMENT**
DENNIS GAY,	)	
DANIEL B. MOWREY, and	)	
MITCHELL K. FRIEDLANDER,	)	
Respondents.	)	
	)	

FEDERAL TRADE COMMISSION
RECEIVED DOCUMENTS
JAN 30 2006
SECRETARY

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO EXCLUDE FTC INVESTIGATOR WITNESSES

Complaint Counsel hereby submit their opposition to Respondents' January 18th motion to exclude FTC investigators from our trial witness list. Respondents' motion is untimely and based on erroneous assumptions. The FTC investigators offer testimony relevant to the issue to be litigated at trial—whether Respondents violated the FTC Act's prohibition against false and misleading advertising. There are no valid grounds to exclude investigators from Complaint Counsel's trial witness list. This Court should deny Respondents' latest tardy motion to strike or to prevent fact witnesses from presenting the facts at the hearing in this matter.

BACKGROUND

Nearly a year ago, Complaint Counsel identified two FTC investigators as fact witnesses for trial. Complaint Counsel stated that we reserved the right to call these investigators to testify about various documents that each has copied and/or reviewed or websites that each has examined. *See* Compl. Counsel's Witness List at 4-5 (Feb. 2005). The deadline for motions to

strike and motions *in limine* expired soon thereafter. *See* Scheduling Order, Aug. 11, 2004, at 2. Respondents did not move to strike or limit the testimony of the FTC investigators before the expiration of the deadline for motions to strike in early 2005.

Pursuant to the deadline set in the Court's *Second Revised Scheduling Order*, Complaint Counsel identified the same FTC investigators as fact witnesses in early November 2005. This witness list did not change the topics on which these witnesses would offer testimony. *See* Compl. Counsel's Witness List at 6 (Nov. 8, 2005).

The *Second Revised Scheduling Order* did not reset or extend the previously-expired deadline for motions to strike and motions *in limine*. *See* Order, Aug. 4, 2005, at 2; Order, Dec. 7, 2005, at 2 (reaffirming that deadline for motions to strike has passed). Nevertheless, all Respondents moved by counsel to exclude witnesses from testifying on January 18, 2006—nearly a year after Complaint Counsel first identified those witnesses for trial.

DISCUSSION

As discussed below, Respondents' motion is untimely, and it is based on incorrect assumptions. Respondents' motion should be denied for one or both of these reasons.

I. Respondents' Motion is Untimely.

Respondents have filed an untimely motion to exclude two trial witnesses. Their motion to exclude trial witnesses is indistinguishable from a motion to strike or a motion *in limine*. *See, e.g.*, Order, Dec. 7, 2005, at 2 ("Although Respondents titled their motions as 'motions to exclude,' the relief sought is to exclude Complaint Counsel's [witnesses] from presenting testimony at trial, in part or in whole. Accordingly, Respondents' motions are motions *in limine*."). By *Order* of this Court, the parties were required to file motions *in limine* and

motions to strike in spring 2005. *See* Order, Aug. 11, 2005; Order, Aug. 4, 2005, at 2; Order, Dec. 7, 2005, at 2. Respondents have filed their present motion out of time, without showing good cause therefor. *See* Scheduling Order, Aug. 11, 2004, at ¶ 1 ("extensions . . . to these deadlines will be made only upon a showing of good cause"). Respondents' motion is untimely and should be denied on that basis. *See, e.g.*, Order, Dec. 7, 2005, at 2 (denying Respondents' motions to exclude three of Complaint Counsel's trial witnesses as untimely, stating: "A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.") (citation omitted).

The fact that Respondents cite the Court's recent January 10th *Order* in their motion does not constitute good cause for their motion. The Court's January 10th *Order* broke no new legal ground. It concluded, in part, that "the pre-Complaint investigations are clearly irrelevant to the present matters before the Court." Order, Jan. 10, 2006, at 8. The Court's conclusion was expressly grounded in the principle, set forth over thirty years ago, that "[o]nce the Commission has . . . issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred." *Id.* (citing *In re Exxon Corp.*, 83 F.T.C. 1759, 1760 (1974)). As discussed below, this principle does not affect the admissibility of our investigators' testimony. Here, however, it is sufficient to note that Respondents could have made the legal argument advanced in their latest motion many months ago. Respondents' motion is untimely.

II. Respondents' Motion is Based On Erroneous Assumptions.

Respondents' motion to strike is based on two mistaken assumptions—first, that the Court's January 10th Order prohibits the admission of any evidence obtained in pre-*Complaint*

investigations pertaining to Respondents' alleged acts or practices, and second, that the proffered testimony relates solely to pre-*Complaint* investigations. Both of these assumptions are incorrect.

A. Respondents Have Misread the January 10th *Order*; Evidence Relating to Respondents' Alleged Acts or Practices is Admissible Irrespective of Whether It Was Obtained Before, or After, the Issuance of the *Complaint*.

Respondents appear to presume, and erroneously contend, that the Court's January 10th *Order* precludes the admission of *any* evidence or testimony obtained in a pre-*Complaint* investigation. *See* Mot. to Excl. at 2. This assumption is false. The Court's *Order* was not so broad, and with good reason. RULE OF PRACTICE 3.43 sets forth the general standard for admissibility of evidence in adjudicate proceedings, and that standard is as follows:

> Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RULE 3.43. Under that RULE, evidence relevant to Respondents' alleged acts or practices is generally admissible. The RULE governing the admission of evidence in these proceedings does *not* purport to limit the admissibility of evidence based on the time it was obtained. *See id.*

Respondents have seized on a single statement in the Court's January 10th *Order*, that "the pre-Complaint investigations are clearly irrelevant to the present matters before the Court," Mot. to Excl. at 1 (quoting Order, Jan. 10, 2006, at 8), and have taken it out of its context. In the paragraphs preceding that statement, the Court clearly reiterated that "the issue to be litigated is not the adequacy of the . . . pre-Complaint investigation," and that issues relating to the Commission's decision to issue the *Complaint* are irrelevant to whether Respondents violated the

FTC Act as alleged in that document. *See* Order, Jan. 10, 2006 at 7-8. The Court drew the distinction between these two subjects quite distinctly: "[T]he issue to be tried is whether Respondents disseminated false and misleading advertising, not the Commission's decision to file the Complaint." *Id.* (quoting Order, Nov. 4, 2004).

Respondents have misread the statement that "the pre-Complaint *investigations* are clearly irrelevant to the present matters before the Court," Order, Jan. 10, 2006 at 8 (emphasis added), to somehow mean that the *evidence* obtained during the pre-*Complaint* investigation must be irrelevant and excluded. *See* Mot. to Excl. at 1 n.1 (arguing that January 10th *Order* on Complaint Counsel's timely motion *in limine* "should apply equally to both parties"). This is clearly not what the Court held. The Court did not hold that evidence obtained during the pre-*Complaint* investigation must be irrelevant and excluded. *See* Order, Jan. 10, 2006 at 7-8.

Respondents have cited no authority stating that evidence obtained in a pre-*Complaint* investigation of a respondent's acts or practices is inadmissible. We are aware of no such legal authority. The lack of any apparent authority supporting Respondents' proposition is no surprise. The RULES OF PRACTICE plainly contemplate that Complaint Counsel may obtain potentially relevant evidence for use at trial during a pre-*Complaint* investigation. *See, e.g.*, RULE 3.40 (referring to general use of "compulsory process under section 6, 9 or 20 of the [FTC] Act"). Excluding relevant evidence that Complaint Counsel happened to obtain before the issuance of the *Complaint* would frustrate the search for truth and cause unnecessary expense in the future. Such an order would prejudice Complaint Counsel in this case, impair the Administrative Law Judge's performance of fact-finding functions, and compel future Complaint Counsel to mount duplicative investigations to "re-unearth" evidence obtained in pre-*Complaint* investigations.

B. Respondents' Assumptions Regarding the Witnesses' Proffered Testimony Are Incorrect.

Respondents also base their motion on the speculative and unsubstantiated assumption that the FTC investigators' proffered testimony relates solely to a pre-*Complaint* investigation. This assumption is incorrect. The proffered witnesses have investigated and obtained evidence relevant to the allegations of the *Complaint* since the issuance of that document, and they are competent to testify concerning the evidence they have copied, reviewed, or examined.

Respondents may be attempting to argue that Complaint Counsel somehow intends to use the investigator witnesses to introduce evidence relating to pre-*Complaint* protocols or the Commission's basis for issuing the *Complaint*. *See* Mot. to Excl. at 1 n.1 (arguing that January 10th *Order* "should apply equally to both parties unless and until . . . reversed"). Complaint Counsel does not intend to introduce evidence on those irrelevant issues. To the extent that Complaint Counsel will present evidence obtained during a pre-*Complaint* investigation, that evidence will go to the core issue of the case: Respondents' deceptive acts or practices.

CONCLUSION

Respondents have filed another untimely motion to strike trial witnesses without demonstrating good cause therefor, a motion based on sweeping and inaccurate assumptions. Respondents' motion is untimely, speculative, and based on an flawed reading of the Court's January 10th *Order*. Respondents' latest tardy motion *in limine* should be summarily denied.

Respectfully submitted,

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Dated: January 30, 2006

CERTIFICATION OF REVIEWING OFFICIAL

I certify that I have reviewed the attached public filing, *Complaint Counsel's Opposition to Respondents' Motion to Exclude FTC Investigator Witnesses*, prior to its filing to ensure the proper use and redaction of materials subject to the *Protective Order* in this matter and protect against any violation of that *Order* or applicable RULE OF PRACTICE.

James A. Kohm
Associate Director, Division of Enforcement
Bureau of Consumer Protection

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of January, 2006, I caused *Complaint Counsel's Opposition to Respondents' Motion to Exclude FTC Investigator Witnesses* to be served and filed as follows:

(1) the original, two (2) paper copies filed by hand delivery and one (1) electronic copy via email to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-135
Washington, D.C. 20580

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

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
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(3) one (1) electronic copy via email and one (1) paper copy by first class mail to:

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