

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

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.,)
BAN, L.L.C.,)
DENNIS GAY,)
DANIEL B. MOWREY, and)
MITCHELL K. FRIEDLANDER,)
)
Respondents.)

Docket No. 9318

PUBLIC DOCUMENT

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENTS’ REQUEST
FOR PERMISSION TO FILE A SUR-REPLY**

Complaint Counsel oppose Respondents’ Request for Permission to File A Sur-Reply.

Complaint Counsel does not object to Respondents’ Request for Oral Argument but believe these issues have been fully briefed and will defer to the Court as to whether oral argument would assist the Court.

Respondents’ motion fails to justify why a sur-Reply is necessary or why it would assist to the Court. Respondents devote most of their motion to making legal arguments concerning what case law they contend applies to the issues. As a result, a sur-Reply is unnecessary because they have already included these arguments in their submission. To the extent Respondents seek to have another last word on what they construe to be “new issues” raised by Complaint Counsel’s Reply, a review of the submissions establishes that Complaint Counsel’s Reply does not raise new issues but merely responds to the new issues raised by Respondents’ Opposition.

Complaint Counsel sought leave to respond to several new issues raised by Respondents in their Opposition to Complaint Counsel's Motion to Strike Respondents' Additional Defenses.¹ Mindful that the Rules of Practice do not ordinarily permit the filing of a reply, Complaint Counsel confined its request to several important new issues including the Court's authority to rule on the motion to strike, what constitutes "final" agency action and First Amendment violations, and the correction of certain inaccuracies introduced by Respondents' in their legal arguments and descriptions of alleged "concessions." Complaint Counsel did not seek leave, nor did it construe leave was granted, to file the same type of reply that it would file if the Rules called for replies in the normal course of motions practice, *i.e.*, a comprehensive response to each of Respondents' material arguments. Now Respondents complain that not only did the Reply say too much (asserting our Reply raises two "new issues") but it said too little (Respondents contend they now need to address arguments "omitted" by Complaint Counsel).

We urge the Court to deny Respondents' motion. Complaint Counsel's Reply adhered to

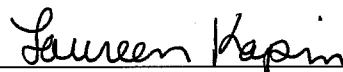
¹ Complaint Counsel summarized the new issues in its motion:

(1) Whether, as Respondents now contend, this Court lacks authority to rule on due process, *First Amendment*, and Administrative Procedure Act issues in the context of a *Motion to Strike*, when Respondents initially raised these issues as defenses for trial; (2) Whether, as Respondents now contend, the "controlling line of cases" for the alleged due process defense pertains to the standards employed by the FDA, or other entities, but not the FTC; (3) Whether, as Respondents now contend, the internal use of FTC advertising substantiation standards before the issuance of the *Complaint* actually constituted "final agency action" against Respondents, and a violation of the *First Amendment*; (4) Whether, as Respondents now contend, Complaint Counsel has made certain concessions regarding Respondents' assertions; and (5) Whether Respondents are entitled to assert laches or equitable estoppel against the FTC by raising new factual allegations in the *Opposition*, and will require discovery to uncover statements allegedly made directly to them, particularly when the weight of authority does not support the application of these defenses.

our original request. In our motion we identified that we sought leave to address the issue of final agency action and First Amendment issues (Mot. For Leave To submit Reply at p. 2) and did just that in our Reply(at pp. 8-14). Under the guise of pointing out these two “new issues,” Respondents merely assert additional arguments on the same issues raised by their Opposition and cite caselaw they did not include in their original filing.

Respondents have failed to justify why further briefing is necessary or helpful in this matter. Consequently, Complaint Counsel respectfully request that the Court deny Respondents’ motion for a sur-Reply.

Respectfully submitted,



Laureen Kapin	(202) 326-3237
Walter C. Gross, III	(202) 326-3319
Joshua S. Millard	(202) 326-2454
Robin M. Richardson	(202) 326-2798
Laura Schneider	(202) 326-2604

Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dated: October 1, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2004, I caused *Complaint Counsel's Opposition to Respondents' Request for Permission to File a Sur-Reply* 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-159
Washington, D.C. 20580

- (2) two (2) paper copies served by hand delivery to:
The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Penn. Ave., N.W., Room H-104
Washington, D.C. 20580

- (3) one (1) electronic copy via email and one (1) paper copy by first class mail to the following persons:

Stephen E. Nagin
Nagin Gallop Figuerdo P.A.
3225 Aviation Ave.
Miami, FL 33133-4741
(305) 854-5353
(305) 854-5351 (fax)
snagin@ngf-law.com
For Respondents

Jeffrey D. Feldman
FeldmanGale
201 S. Biscayne Blvd., 19th Fl.
Miami, FL 33131-4332
(305) 358-5001
(305) 358-3309 (fax)
JFeldman@FeldmanGale.com
For Respondents
**A.G. Waterhouse, LLC,
Klein-Becker USA, LLC,
Nutrasport, LLC, Sovage
Dermalogic Laboratories,
LLC, and BAN, LLC**

Ronald F. Price
Peters Scofield Price
310 Broadway Centre
111 East Broadway
Salt Lake City, UT 84111
(801) 322-2002
(801) 322-2003 (fax)
rpf@psplawyers.com
For Respondent Mowrey

Richard D. Burbidge
Burbridge & Mitchell
215 S. State St., Suite 920
Salt Lake City, UT 84111
(801) 355-6677
(801) 355-2341 (fax)
rburbidge@burbridgeandmitchell.com
For Respondent Gay

Mitchell K. Friedlander
5742 West Harold Gatty Dr.
Salt Lake City, UT 84116
(801) 517-7000
(801) 517-7108 (fax)
Respondent Pro Se
mkf555@msn.com



COMPLAINT COUNSEL