

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

In the Matter of)

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.)

Docket No. 9318

**ORDER ON RESPONDENTS' MOTION IN *LIMINE*
TO PRECLUDE RELIANCE ON OR USE OF "FACIAL ANALYSIS"**

I.

On January 31, 2005, Respondents filed a motion in *limine* to preclude reliance on or use of "facial analysis" to prove claims allegedly implied by the advertisements at issue in this case. Complaint Counsel filed its opposition on February 11, 2005. For the reasons set forth below, Respondents' motion is **DENIED**.

II.

Respondents state that at the heart of the claims against Respondents are the allegedly implied claims that the challenged products cause or result in "rapid" or "substantial" weight loss. Respondents assert that Complaint Counsel proffers nothing except its own judgment, and the opinion of its proffered expert, Michael Mazis, to prove that such claims are implied by the challenged advertisements. Respondents further assert that because the allegedly implied claims are neither "self-evident" nor "reasonably clear" on the face of the advertisements, Complaint Counsel is not entitled to rely solely on its own "facial analysis" or that of its proffered expert.

Accordingly, Respondents seek to preclude such reliance.

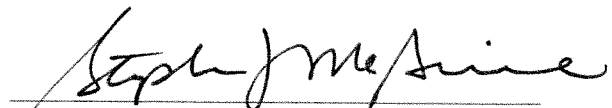
Complaint Counsel asserts that Respondents are seeking the highly unusual step of precluding Complaint Counsel from making arguments about the plain meaning of the challenged advertisements. Complaint Counsel further asserts that the Administrative Law Judge has the authority to draw conclusions about the meaning of the challenged ads in this case based upon its own facial analysis of the ads. Thus, Complaint Counsel argues that it should not be precluded from arguing its position.

III.

The relief sought by Respondents is not immediately apparent, as Respondents failed to attach a proposed order, as required by Commission Rule 3.22(b). However, Respondents did indicate, in the conclusion of their motion that "Complaint Counsel should not be entitled to use or rely upon a 'facial analysis' to prove the existence of implied advertising claims in this case because the uncontroverted evidence shows that no such claims are reasonably clear on the face of the advertisements for the Products at issue." Motion to Preclude Facial Analysis at 30. Respondents' motion appears to seek to preclude Complaint Counsel from presenting evidence about the very issue that must be decided after receipt of the evidence in this case. Indeed, whether such claims are reasonably clear on the face of the challenged advertisements is a factual issue to be determined after the evidentiary hearing. Thus, this cannot be a basis for precluding Complaint Counsel from presenting evidence in support of its position.

Respondents have not presented an adequate basis for precluding Complaint Counsel from relying on or using a "facial analysis" to try to prove claims allegedly implied by the advertisements at issue. Accordingly, Respondents' motion is **DENIED**.

ORDERED:



Stephen J. McGuire
Chief Administrative Law Judge

Date: December 1, 2005