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,	)	Docket No. 9318
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.	)	
	)	

ORDER DENYING COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO PRECLUDE RESPONDENTS FROM INTRODUCING EVIDENCE OF CUSTOMER SATISFACTION

I.

Complaint Counsel filed a motion *in limine* seeking to preclude Respondents from introducing exhibits or testimony regarding customer satisfaction ("Motion") on March 1, 2005. Respondents filed their opposition ("Opposition") on March 14, 2005.

II.

Complaint Counsel seeks to prohibit Respondents from introducing proposed exhibits and testimony regarding customer satisfaction. Motion at 1. Complaint Counsel argues that "[e]ven if Respondents' proposed exhibits were arguably relevant, their marginal probative value is substantially outweighed by the unnecessary delay and waste of time occasioned by the presentation of these exhibits and testimony" and later states that "Respondents should eliminate the above-referenced exhibits." Motion at 1, 5. Complaint Counsel does not attach copies of the exhibits, but rather provides the summary description of each proposed exhibit that was included by Respondents in their proposed exhibit list dated February 18, 2005.

Respondents assert that Complaint Counsel's motion is premised upon the assumption that the exhibits are offered for the purposes of bolstering Respondents' substantiation and establishing the efficacy of the challenged products. Opposition at 2. Respondents contend that the exhibits will be relevant to the case and request that the Court reserve ruling on the admissibility of the challenged exhibits until trial. Opposition at 2.

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. Toeppen*, 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).

A long line of cases has held that the existence of some satisfied customers does not constitute a defense to an action for deceptive practices. *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 572 (7th Cir. 1989); *Basic Books, Inc. v. FTC*, 276 F.2d 718, 721 (7th Cir. 1960); *Independent Directory Corp. v. FTC*, 188 F.2d 468, 471 (2d Cir. 1951); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 530 (S.D.N.Y. 2000); *FTC v. Wilcox*, 926 F. Supp. 1091, 1099 (S.D. Fla. 1995). Pursuant to this case law, the exhibits will not be permitted merely to establish the existence of some satisfied customers.

Complaint Counsel also suggests that Respondents may seek to utilize the exhibits as relevant to the existence of a money-back guarantee or to the issue of product substantiation. Motion at 8-10. Respondents have not yet identified the issue to which the exhibits are relevant, Opposition at 2, and the Court will not speculate on potential issues to which the evidence may

be relevant. It is premature at this stage to prohibit the introduction of the proposed exhibits. However, Respondents should be prepared at trial to identify the relevancy of the exhibits to an issue other than the existence of satisfied customers. In addition, Respondents should be prepared to demonstrate that these exhibits, like all exhibits, are otherwise admissible and are not hearsay.

IV.

Complaint Counsel has not presented an adequate basis for precluding Respondents from introducing evidence regarding customer satisfaction. Accordingly, Complaint Counsel's 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:

Stephen J. McGuire
Chief Administrative Law Judge

Date: January 9, 2006