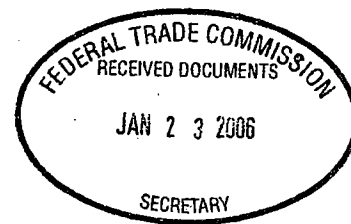


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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' SECOND REQUEST FOR OFFICIAL NOTICE

I.

On January 6, 2006, Respondents filed a motion seeking official notice of Federal Trade Commission ("FTC"), Food and Drug Administration ("FDA"), and National Institute of Health ("NIH) documents ("Motion"). On January 18, 2006, Complaint Counsel filed its opposition ("Opposition").

II.

Respondents seek official notice of twenty-three government agency publications, studies, and guidelines. Motion at 3-4. Respondents state that the FTC documents "reflect the agency's position concerning the matters addressed within the documents;" that the FDA documents "advocate the policies of the agency in matters relevant to this proceeding;" and that the NIH documents "may be officially noticed for the purpose of deciding issues that are ultimately relevant to the resolution of this matter." Motion at 4.

Complaint Counsel contends that the documents are not material *facts*; are not relevant or material to the issues to be tried; and that in many instances, the documents are hearsay. Opposition at 1-10.

III.

Commission Rule of Practice 3.43(d) states: “When any decision of an Administrative Law Judge or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.” 16 C.F.R. § 3.43(d); *see also* 5 U.S.C. § 556(e). Because the Commission Rule does not define official notice, it is appropriate to look to Federal Rule of Evidence 201(b). “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).

Under Commission precedent, official notice may be taken of references “generally accepted as reliable.” *In re Thompson Medical Co.*, 104 F.T.C. 648, 790 (1984); *In re Rambus*, 2003 WL 22064718 (Aug. 27, 2003). Further, it is appropriate to take official notice of government records where there is a guarantee of trustworthiness. *E.g.*, *In re Beauty-Style Modernizers, Inc.*, 83 F.T.C. 1761, 1780-81 (1974) (taking official notice of a Federal Reserve Board publication); *In re Avnet, Inc.*, 82 F.T.C. 391, 464 n.31 (1973) (taking official notice of U.S. census data).

Respondents do not adequately explain the relevance of the twenty-three documents at issue to the issue to be tried. As stated in a prior Order:

[T]he issue to be litigated at the trial in this matter is whether Respondents violated the FTC Act’s prohibition against false and misleading advertising. The FTC’s policy statement therefore does not control the outcome of the case and is not the standard against which Respondents’ claims will be judged, except insofar as the policy has been adopted by relevant laws and controlling cases. *Heintz v. Jenkins*, 514 U.S. 291, 298 (1995); *Goswami v. American Collections Enterprise, Inc.*, 377 F.3d 488, 493, n.1 (5th Cir. 2004); *Newman v. Boehm, Pearlstwin & Bright, Ltd.*, 119 F.3d 477, 481 n.2 (7th Cir. 1997); *Amrep Corp. v. FTC*, 768 F.2d 1171, 1178 (10th Cir. 1985).


November 4, 2004 Order on Complaint Counsel’s Motion to Strike Respondents’ Additional Defenses. Respondents have not demonstrated that the documents at issue are relevant, material, and true.

Respondents do not identify specific facts for which they seek official notice, but merely list the documents. In addition, Respondents failed to attach copies of the documents at issue, so the Court is unable to effectively evaluate them.

IV.

Accordingly, Respondents' motion for official notice is **DENIED WITHOUT PREJUDICE**. If Respondents renew their request for official notice, they must identify the specific facts for which official notice is sought. In addition, Respondents shall identify the relevance of those facts to specific issues to be determined by these proceedings and demonstrate that the facts are not subject to reasonable dispute in that they are either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Respondents shall also attach copies of the documents.

ORDERED:



Stephen J. McGuire
Chief Administrative Law Judge

Date: January 23, 2005