

**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 DENYING RESPONDENT FRIEDLANDER'S MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION**

I.

Respondent Friedlander filed a motion seeking to dismiss the case against him for lack of subject matter jurisdiction ("Motion") on March 28, 2005. Complaint Counsel filed its opposition ("Opposition") on June 22, 2005.

II.

Respondent Friedlander argues that subject matter jurisdiction over the claims asserted against him is lacking because the Complaint fails to allege the jurisdictional facts necessary for a vicarious liability or participant liability claim. Motion at 10-13. In addition, Respondent Friedlander argues that Complaint Counsel cannot meet its burden of demonstrating, by a preponderance of the evidence, that this Court has subject matter jurisdiction over the claims asserted against him. Motion at 13-23.

Complaint Counsel asserts that the Complaint is sufficiently pled so as to give notice of the charges against Respondent Friedlander and that the disputed factual issues are intertwined with the merits and should be resolved at trial. Opposition at 1.

III.

For purposes of a motion to dismiss for lack of subject matter jurisdiction as a matter of law, the factual allegations of the complaint are presumed to be true and all reasonable inferences are to be made in favor of the plaintiff. *Whisnant v. United States*, 400 F.3d 1177, 1179 (9th Cir. 2005); *Ezekiel v. Michel*, 66 F.3d 894, 897 (7th Cir. 1995); *In re R.J. Reynolds Tobacco Co.*, 111 F.T.C. 539, 1988 FTC LEXIS 9, at *5-6 (Mar. 4, 1988). If the complaint alleges facts which, if true, would be sufficient to establish jurisdiction, then the next question is whether the facts alleged are supported by the evidence. In making this factual determination, there is no presumption that the allegations of the complaint are true, and the burden is on Complaint Counsel to prove jurisdiction by a preponderance of the evidence. *Reynolds Tobacco*, 1988 FTC LEXIS at *5-6 (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980); *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884 (3d Cir. 1977)). However, where the jurisdictional issue is bound up with the merits, the entire factual dispute is appropriately resolved by the proceeding on the merits. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *Williamson v. Tucker*, 645 F.2d 404, 414-15 (5th Cir. 1981).

Respondent Friedlander first alleges that the Complaint does not plead the requisite jurisdictional facts necessary to establish subject matter jurisdiction over him. Motion at 10-13. The legal standard will be examined followed by an examination of the Complaint's allegations. If the Complaint's allegations are legally sufficient, then the factual issue will be examined.

Corporate respondents acting in concert to further a common enterprise are each liable for the acts and practices of the others in furtherance of the enterprise. *See Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1173 (1st Cir. 1973); *Zale Corp. & Corrigan-Republic, Inc. v. FTC*, 473 F.2d 1317, 1320-21 (5th Cir. 1973); *Waltham Precision Instrument Co. v. FTC*, 327 F.2d 427, 431 (7th Cir. 1964); *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964). To obtain a cease and desist order against an individual, Complaint Counsel must prove violations of the FTC Act by the corporation and that the individual either directly participated in the acts at issue or had some measure of control over those acts. *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 119-20 (1937); *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997); *In re Nat'l Housewares, Inc.*, 90 F.T.C. 572, 598 (Nov. 18, 1977).

The Complaint alleges that "Friedlander has developed products marketed by the limited liability corporations and participates in the acts or practices of the limited liability corporations alleged in this complaint." Complaint, ¶ 9. The Complaint further alleges that "Respondents have operated a common business enterprise while engaging in the deceptive acts and practices alleged below and are therefore jointly and severally liable for said acts and practices."


Complaint, ¶ 10. Thus, the Complaint alleges that the corporate respondents “operated a common business enterprise” and that Respondent Friedlander “participates in the acts or practices of the limited liability corporations alleged in this complaint.” Complaint, ¶¶ 9-10. Therefore, the Complaint alleges facts sufficient to obtain subject matter jurisdiction over Respondent Friedlander.

Respondent Friedlander next contends that Complaint Counsel cannot meet its burden of demonstrating the facts necessary to establish subject matter jurisdiction over the claims asserted by Respondent Friedlander. Motion at 13-23. This factual challenge is intertwined with the merits of the matter and because the factual issues in dispute go to the heart of the matter to be tried, it is appropriate to resolve these issues after a full hearing on the merits. *See Augustine*, 704 F.2d at 1077; *Adams*, 697 F.2d at 1219; *Williamson*, 645 F.2d at 414-15.

IV.

For the above-stated reasons, Respondent Friedlander’s motion to dismiss for lack of subject matter jurisdiction is **DENIED**.

ORDERED:



Stephen J. McGuire
Chief Administrative Law Judge

Date: January 5, 2006