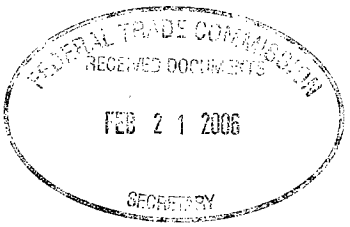
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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 RESPONDENTS' MOTION FOR CERTIFICATION OR RECONSIDERATION AND DENYING MOTION TO EXCLUDE FTC'S INVESTIGATOR WITNESSES

I.

On January 18, 2006, Respondents (corporate respondents, Dennis Gay, and Daniel B. Mowrey) filed an "application for review" of the January 10, 2006 Order on Complaint Counsel's Motion *in Limine* ("Certification/Reconsideration Motion"). For one specific portion of the January 10, 2006 Order, Respondents seek certification for interlocutory review by the Commission, or in the alternative, reconsideration and reversal. Respondent Friedlander filed a concurrence on January 18, 2006. Complaint Counsel filed its opposition on January 25, 2006. For the reasons set forth below, Respondents' request for certification is **DENIED** and Respondents' request for reconsideration and reversal is **DENIED**.

Also on January 18, 2006, Respondents filed a motion to exclude FTC's Investigator Witnesses Based on the January 10, 2006 Order ("Exclude Witnesses Motion"). Complaint Counsel filed its opposition on January 30, 2006 ("Exclude Witnesses Opposition"). For the reasons set forth below, Respondents' motion to exclude witnesses is **DENIED**.

II.

A. Respondents' Arguments

Respondents argue in the certification and reconsideration motion that "[b]y eliminating all pre-Complaint evidence," the January 10, 2006 Order "encumbers Respondents' right to defend themselves and to preserve for appellate review a full record." Certification/Reconsideration Motion at 2. Respondents declare, "[b]y excluding all pre-Complaint evidence," the January 10, 2006 Order "effectively has ruled that Respondents' affirmative defenses – including reliance on Constitutional rights – are invalid." Certification/Reconsideration Motion at 4. Respondents note that, by Order on Complaint Counsel's Motion to Strike Respondents' Additional Defenses, dated November 4, 2004, Respondents' Fifth Amendment Due Process and First Amendment defenses were not stricken, and argue that the January 10, 2006 Order improperly limits their rights to introduce evidence supporting those defenses. Certification/Reconsideration Motion at 4.

Respondents urge in their motion to exclude witnesses that Complaint Counsel should be precluded from eliciting testimony at trial from Denise Owens and Kevin Towers, current and former FTC investigators, respectively. According to Complaint Counsel's exhibit list, each of these individuals is expected to "testify about various documents that [she or he] has copied and/or reviewed and websites [he or she] has examined and copied." Exclude Witnesses Motion at 2. Respondents argue the January 10, 2006 Order, which stated, "the pre-Complaint investigations are clearly irrelevant to the present matters before the Court," requires exclusion of testimony from Owens and Towers on information they gathered during the pre-Complaint investigatory stage of these proceedings. Exclude Witnesses Motion at 1-2.

B. Complaint Counsel's Arguments

Complaint Counsel asserts that Respondents' motion for certification or reconsideration do not meet the standards for interlocutory review or reconsideration. Opposition at 2. According to Complaint Counsel, the evidence excluded does not support Respondents' contention that the FTC has failed to provide adequate guidance to advertisers and does not shed light on whether Respondents' claims for the challenged products were truthful and entitled to protection under the First Amendment or on whether this adjudication results in a violation of Respondents' due process rights. Opposition at 13, 15. Thus, Complaint Counsel asserts, the January 10, 2006 Order correctly excluded evidence that is not relevant to the issues to be litigated. Opposition at 13.

Complaint Counsel asserts that the motion to exclude is untimely, since it was filed well after the deadline for filing motions *in limine* or to strike. Exclude Witnesses Opposition at 2-3. Complaint Counsel also asserts that the motion should be denied because there are no valid grounds to exclude the proposed testimony. Exclude Witnesses Opposition at 3-5.

III.

A. Overview

Respondents misrepresent the January 10, 2006 Order as "excluding all pre-Complaint evidence." Certification/Reconsideration Motion at 4. *See also* Certification/Reconsideration Motion at 2 ("By eliminating all pre-Complaint evidence, your Honor encumbers Respondents' right to defend themselves and to preserve for appellate review a full record.") and at 5 ("By eliminating all pre-Complaint evidence, the Order creates a constitutionally-defective and asymetrical predicate for, and assures, an unfair proceeding.").

The January 10, 2006 Order does not prevent Respondents from presenting "all pre-Complaint evidence." Nor does it prevent Respondents from presenting evidence on their Fifth Amendment and First Amendment defenses. It only excluded "evidence on Complaint Counsel's pre-Complaint protocol, Complaint Counsel's reasonable basis for issuing the Complaint, or the costs to Respondents to comply with the pre-Complaint investigation and post-complaint defenses." In fact, in the January 10, 2006 Order, Complaint Counsel's request to limit testimony on the pre-Complaint investigation was only granted in part and was denied in other part.

The reference to "Complaint Counsel's pre-Complaint protocol," merely indicates, as have prior Orders, that evidence regarding the adequacy of the Commission's reason to believe a violation has occurred and its belief that a proceeding to stop it would be in the "public interest" are matters that go to the mental processes of the Commissioners and will not be reviewed by the courts. Such evidence is, without question, inadmissible. *In re Exxon Corp.*, 83 F.T.C. 1759, 1760 (1974); *Boise Cascade Corp. v. FTC*, 498 F. Supp. 772, 779 (D. Del. 1980). Respondents have not identified any specific evidence that is relevant to the allegations of the Complaint and their pending defenses thereto that would be excluded by the January 10, 2006 Order.

B. Motion for Certification

Pursuant to Commission Rule 3.23(b), a ruling by the Administrative Law Judge may be reviewed by the Commission only upon a determination: (1) "that the ruling involves a controlling question of law or policy as to which there is a substantial ground for difference of opinion" *and* (2) "that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy." 16 C.F.R. § 3.23(b). "Interlocutory appeals in general are disfavored." *In re Bristol-Myers Co.*, 90 F.T.C. 273, 273 (1977); *In re Gillette Co.*, 98 F.T.C. 875, 875 (1981).

A controlling question of law or policy has been defined in Commission cases as "'not equivalent to merely a question of law which is determinative of the case at hand. To the contrary, such a question is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases.'" *In re Schering-Plough Corp.*, 2002 WL 31433937

(Feb. 12, 2002) (citing *In re Automotive Breakthrough Sciences, Inc.*, 1996 FTC LEXIS 478, *1 (Nov. 5, 1996); *In re BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, *2 (Nov. 20, 1979)).

A question of law or policy as to which there is a substantial ground for difference of opinion "'requires a finding that the question presents a novel or difficult legal issue. It is this unsettled state of the law that creates a "substantial ground for difference of opinion" and triggers certification.'" *In re Schering-Plough Corp.*, 2002 WL 31433937 (citing *Int'l Assoc. of Conf. Interpreters*, 1995 FTC LEXIS 452, *4-5 (Feb. 15, 1995). "'Commission precedent also holds that to establish a "substantial ground"' for difference of opinion under Rule 3.23(b), a party seeking certification must make a showing of a likelihood of success on the merits.'" *In re Schering-Plough Corp.*, 2002 WL 31433937 (citing *Int'l Assoc. of Conf. Interpreters*, 1995 FTC LEXIS 452, *4-5; *BASF Wyandotte Corp.*, 1979 FTC LEXIS 77, *3 (Nov. 20, 1979)).

The order for which Respondents seek interlocutory review is an order excluding evidence. "The question of whether evidence on particular factual propositions is relevant to one or more of the allegations in a complaint is well within the area of trial management and, in absence of a clear abuse thereof, is committed to the sound discretion of the law judge." *In re Exxon Corp.*, 85 F.T.C. 91, 92 (1975) (Commission ruling that order denying motion to exclude as "not appropriate for interlocutory review"). Administrative law judges routinely deny applications for interlocutory review of orders limiting evidence. *E.g.*, *In re Metagenics, Inc.*, 1996 FTC LEXIS 453 (Oct. 7, 1996); *In re Detroit Auto Ass'n, Inc.*, 1985 FTC LEXIS 89 (Oct. 16, 1985); *In re Bristol-Myers Co.*, 1976 FTC LEXIS 540, at *4 (Feb. 12, 1976) ("The instant motion deals with evidentiary questions which lie peculiarly within the powers and duties of the administrative law judge."). Here, the January 10, 2006 Order excluding evidence similarly is within the area of trial management and does not present a controlling question of law.

Further, Respondents have not demonstrated "that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy," as required by Rule 3.23(b). Respondents do not argue that an appeal will advance the ultimate termination of the litigation. With respect to subsequent review, Respondents are aware that Commission Rule 3.43(g) states:

> Excluded evidence. When an objection to a question propounded to a witness is sustained, the questioner may make a specific offer of what he expects to prove by the answer of the witness, or the Administrative Law Judge may, in his discretion, receive and report the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

16 C.F.R. § 3.43(g). In *In re US Life Credit Corp.*, 88 F.T.C. 739 (Nov. 2, 1976), the Commission rejected certification of an order excluding evidence as "unnecessary" on grounds that "[t]he ALJ may proceed to render an initial decision in this matter and the parties are free to

raise the question of exclusion of evidence on appeal to the Commission." *Id.* at 739. *See also Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 753 (D.C. Cir. 1987) (Respondents "are free to raise their constitutional objections in any suit seeking review of the Commission's final order."). Accordingly, there are no grounds to conclude that subsequent review will be an inadequate remedy.

Both requirements of Rule 3.23(b) must be satisfied. Respondents have met neither. Accordingly, Respondents' request for certification for interlocutory appeal to the Commission fails.

C. Motion for Reconsideration

Motions for reconsideration should be granted only where: (1) there has been an intervening change in controlling law; (2) new evidence is available; or (3) there is a need to correct clear error or manifest injustice. *In re Basic Research, LLC*, 2006 FTC LEXIS 7 (January 10, 2006); *In re Basic Research, LLC*, 2005 FTC LEXIS 120 (August 9, 2005) (citing *Regency Communications, Inc. v. Cleartel Communications, Inc.*, 212 F. Supp. 2d 1, 3 (D.D.C. 2002)). Reconsideration motions are not intended to be opportunities to take a second bite at the apple and relitigate previously decided matters. *Id.* (*citing Goulding v. IRS*, 1997 WL 47450, at *1 (N.D. Ill. 1997); *Sims v. Mme. Paulette Dry Cleaners*, 1986 WL 12511, at *1 (S.D.N.Y. 1986)). Accordingly, they should be granted only sparingly. *Karr v. Castle*, 768 F. Supp. 1087, 1090 (D. Del. 1991).

Respondents' reconsideration motion does not rely on any intervening change in controlling law. The motion does not present new evidence. Respondents' motion does not establish any clear error or manifest injustice. Respondents primarily argue that exclusion of this evidence precludes them from presenting evidence on their Fifth Amendment and First Amendment defenses. Certification/Reconsideration Motion at 4. The error in this argument lies with Respondents' misinterpretation of the scope of the January 10, 2006 Order, as discussed above. To exclude inadmissible evidence does not constitute clear error or manifest injustice. Moreover, any evidence which is excluded may be made part of the record by an offer of proof. 16 C.F.R. § 3.43(g).

Having failed to demonstrate any of three prongs evaluated for reconsideration, Respondents failed to meet their heavy burden.

D. Motion to Exclude Witnesses

Respondents' motion to exclude FTC Investigator Witnesses was filed after the deadline for filing motions *in limine* or to strike. However, as the basis for this late filing is the January 10, 2006 Order, the motion will be permitted and decided on the merits.

Respondents' interpretation of the January 10, 2006 Order is, again, misplaced. Respondents appear to posit that the January 10, 2006 Order precludes the admission of any evidence or testimony obtained in a pre-Complaint investigation. It most certainly does not. Respondents have seized on a single statement in the January 10, 2006 Order and taken it out of context. The Court assumes that Respondents' erroneous interpretations were inadvertent, but cautions the parties to avoid any intentional misrepresentations of the Court's rulings. The Order does not exclude evidence simply because it was gathered during the pre-Complaint investigative stage.

Moreover, to exclude evidence on the ground that it was gathered during the pre-Complaint investigatory stage of these proceedings defies logic, the FTC's Rules of Practice, and common practice. The very advertisements being challenged and the substantiation Respondents may have possessed for the claims therein were generated prior to the initiation of the Complaint. This argument is rejected and the witnesses will be permitted to testify to issues relevant to the case.

V.

For the reasons set forth above, Respondents' request to certify the portion of the January 10, 2006 Order for interlocutory review is **DENIED**.

For the reasons set forth above, Respondents' request in the alternative to reconsider and reverse the portion of the January 10, 2006 Order is **DENIED**.

For the reasons set forth above, Respondents' motion to exclude testimony from FTC's investigator witnesses is **DENIED**.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: February 21, 2006