

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)
BASIC RESEARCH, L.L.C.,)
A.G. WATERHOUSE, L.L.C.,)
KLEIN-BECKER USA., L.L.C.,)
NUTRASPORT, L.L.C.)
SOVAGE DERMALOGIC)
LABORATORIES, L.L.C.,)
dba BASIC RESEARCH, L.L.C.,)
OLD BASIC RESEARCH, L.L.C.,)
BASIC RESEARCH, A.G.)
WATERHOUSE, BAN, L.L.C.,)
dba KLEIN, BECKER, USA,)
NUTRA SPORT, and)
SOVAGE DERMALOGIC)
LABORATORIES,)
DENNIS GAY,)
DANIEL B. MOWREY ,)
dba AMERICAN PHYTOTHERAPY)
RESEARCH)
LABORATORY, and)
MITCHELL K. FRIEDLANDER,)
Respondents)

DOCKET NO. 9318

PUBLIC DOCUMENT

**COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT PRO SE RESPONDENT
FRIEDLANDER'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

Pursuant to Rules 3.31(c) and 3.37(b) of the Commission's Rules of Practice, Complaint Counsel serve the following responses and objections to Pro Se Respondent Mitchell K. Friedlander's First Request for Production of Documents.

GENERAL OBJECTIONS - DOCUMENT REQUESTS

1. Complaint Counsel object to Respondent's requests for documents in the possession of the Commissioners, the General Counsel, or the Secretary in his capacity as custodian or recorder of any information in contravention of Rule 3.35(a)(1) because such documents are not in the possession, custody or control of Complaint Counsel.

2. Complaint Counsel object to Respondent's requests for documents prepared in anticipation of litigation or which seek disclosure of the theories and opinions of Complaint Counsel or Complaint Counsel's consultant or agent, on the grounds that such information is protected from disclosure by the attorney work product privilege and the provisions of Rule 3.31(c)(3). *Stouffer Foods Corp.*, No. 9250, Order Ruling on Stouffer Foods' Application for an Order Requiring the Production of Documents (Feb. 11, 1992); *Kraft, Inc.*, No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (July 10, 1987).
3. Complaint Counsel object to Respondent's requests for documents protected from disclosure by the deliberative process privilege. *Stouffer Foods Corp.*, No. 9250, Order Ruling on Stouffer Foods' Application for an Order Requiring the Production of Documents (February 11, 1992); *Kraft, Inc.*, No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (July 10, 1987); *see also* Rule 4.10(a)(3).
4. Complaint Counsel object to Respondent's requests for documents relating to non-testifying expert witnesses because Respondent has not made the proper showing that they are entitled to such information pursuant to Rule 3.31(c)(4)(ii). *Schering Corp.*, No. 9232, Order Denying Discovery and Testimony by Expert Witness (Mar. 23, 1990); *Telebrands Corp.*, No. 9313, Order Denying Respondents' Motion To Compel The Production of Consumer Survey Information, (Dec. 23, 2003).
5. Complaint Counsel object to Respondent's requests for documents received by FTC staff from Respondents during this investigation or this proceeding, or documents already possessed by Respondents, their representatives, attorneys, officers, employees, or agents, on the ground that production of such documents would be unduly burdensome, unnecessary and duplicative.
6. Complaint Counsel object to Respondent's requests for documents to the extent that they seek documents obtained in the course of investigating other dietary supplement and weight loss marketers on the grounds that such documents are protected from disclosure by the law enforcement evidentiary files privilege and disclosure of such documents would be contrary to the public interest. *Hoechst Marion Rousell, Inc.*, No. 9293, Order on Motions to Compel Discovery From Complaint Counsel filed by Andrix and Aventis (Aug. 18, 2000).
7. Complaint Counsel object to each of Respondent's document requests that, when read with the definitions and instructions, are so vague, broad, general, and all inclusive that they do not permit a proper or reasonable response and are, therefore, unduly burdensome and oppressive.
8. Complaint Counsel object to each of Respondent's document requests that seek information that is not reasonably expected to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of any Respondent,

in violation of the limits of discovery set by Rule 3.31(c)(1) of the Commission's Rules of Practice.

9. Complaint Counsel object to the Definitions and General Instructions to the extent that they impose an obligation greater than that imposed by the Commission's Rules of Practice and the provisions of the Pretrial Scheduling Order.

GENERAL RESPONSES

1. Complaint Counsel's responses are made subject to all objections as to competence, relevance, privilege, materiality, propriety, admissibility and any and all other objections and grounds that would require the exclusion of any statement contained herein if any requests were asked of, or if any statements contained herein were made by, or if any documents referenced here were offered by a witness present and testifying in court, all of which objections are reserved and may be interposed at the time of the hearing.
2. The fact that Complaint Counsel have answered or objected to any document request or part thereof should not be taken as an admission that Complaint Counsel accept or admit the existence of any facts or documents set forth in or assumed by such request or that such answer or objection constitutes admissible evidence. The fact that Complaint Counsel have responded to any request is not intended and shall not be construed as a waiver by Complaint Counsel of all or any part of any objection to any request.
3. Complaint Counsel have not completed their discovery in this case, and additional documents may be discovered that are responsive to Respondent's' request for documents. Complaint Counsel reserve the right to supplement the responses provided herein as appropriate during the course of discovery.

DOCUMENT REQUESTS AND RESPONSES

Request 1

All documents that show and/or provided the Federal Trade Commission a reason to believe Respondent Friedlander operated a common business enterprise with the other named Respondents.

Response:

Complaint Counsel object to this Request because any such documents are not relevant to this proceeding. *Exxon Corp.*, No. 8934, 1981 F.T.C. LEXIS 113 (Jan. 29, 1981) (Once the Commission has issued a complaint, "the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred."). As the Administrative Law Judge found in his denial of Respondent Basic Research's Motion to Compel, "the issue to be tried is whether Respondent disseminated false and misleading advertising, not the Commission's decision to file

the Complaint.” Order of November 4, 2004 at 5. Notwithstanding this objection, and as more fully set forth in General Objections 1-3, Complaint Counsel object to this Request, because any documents are protected from disclosure as either not in Complaint Counsel’s custody, possession, or control, or are privileged from disclosure as attorney work product or deliberative process. Complaint Counsel further state that certain documents responsive to this request are documents that the Respondents and their counsel have in fact provided to Complaint Counsel and hence the request calls for documents that are already in respondent’s possession, custody or control. Subject to and without waiving these objections or the General Objections stated above, to the extent there are non-privileged documents responsive to this request, Complaint Counsel have previously produced responsive documents and will continue to supplement this Request as necessary.

Request 2

All documents that show and/or provided the Federal Trade Commission a reason to believe Respondent Friedlander developed products marketed by the limited liability corporations.

Response:

Complaint Counsel object to this Request because any such documents are not relevant to this proceeding. *Exxon Corp.*, No. 8934, 1981 F.T.C. LEXIS 113 (Jan. 29, 1981) (Once the Commission has issued a complaint, “the issue to be litigated is not the adequacy of the Commission’s pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred.”). As the Administrative Law Judge found in his denial of Respondent Basic Research’s Motion to Compel, “the issue to be tried is whether Respondent disseminated false and misleading advertising, not the Commission’s decision to file the Complaint.” Order of November 4, 2004 at 5. Notwithstanding this objection, and as more fully set forth in General Objections 1-3, Complaint Counsel object to this Request, because any documents are protected from disclosure as either not in Complaint Counsel’s custody, possession, or control, or are privileged from disclosure as attorney work product or deliberative process. Complaint Counsel further state that certain documents responsive to this request are documents that the Respondents and their counsel have in fact provided to Complaint Counsel and hence the request calls for documents that are already in respondent’s possession, custody or control. Subject to and without waiving these objections or the General Objections stated above, to the extent there are non-privileged documents responsive to this request, Complaint Counsel have previously produced responsive documents and will continue to supplement this Request as necessary.

Request 3

All documents that show and/or provided the Federal Trade Commission a reason to believe Respondent Friedlander developed any of the challenged products marketed by the limited liability corporations.

Response:

Complaint Counsel object to this Request because any such documents are not relevant to this proceeding. *Exxon Corp.*, No. 8934, 1981 F.T.C. LEXIS 113 (Jan. 29, 1981) (Once the Commission has issued a complaint, “the issue to be litigated is not the adequacy of the Commission’s pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred.”). As the Administrative Law Judge found in his denial of Respondent Basic Research’s Motion to Compel, “the issue to be tried is whether Respondent disseminated false and misleading advertising, not the Commission’s decision to file the Complaint.” Order of November 4, 2004 at 5. Notwithstanding this objection, and as more fully set forth in General Objections 1-3, Complaint Counsel object to this Request, because any documents are protected from disclosure as either not in Complaint Counsel’s custody, possession, or control, or are privileged from disclosure as attorney work product or deliberative process. Complaint Counsel further state that certain documents responsive to this request are documents that the Respondents and their counsel have in fact provided to Complaint Counsel and hence the request calls for documents that are already in respondent’s possession, custody or control. Subject to and without waiving these objections or the General Objections stated above, to the extent there are non-privileged documents responsive to this request, Complaint Counsel have previously produced responsive documents and will continue to supplement this Request as necessary.

Request 4

All documents that show and/or provided the Federal Trade Commission a reason to believe Respondent Friedlander participates in the acts or practices of the limited liability corporations alleged in the Complaint in regards to the challenged products.

Response:

Complaint Counsel object to this Request because any such documents are not relevant to this proceeding. *Exxon Corp.*, No. 8934, 1981 F.T.C. LEXIS 113 (Jan. 29, 1981) (Once the Commission has issued a complaint, “the issue to be litigated is not the adequacy of the Commission’s pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred.”). As the Administrative Law Judge found in his denial of Respondent Basic Research’s Motion to Compel, “the issue to be tried is whether Respondent disseminated false and misleading advertising, not the Commission’s decision to file the Complaint.” Order of November 4, 2004 at 5. Notwithstanding this objection, and as more fully set forth in General Objections 1-3, Complaint Counsel object to this Request, because any documents are protected from disclosure as either not in Complaint Counsel’s custody, possession, or control, or are privileged from disclosure as attorney work product or deliberative process. Complaint Counsel further state that certain documents responsive to this request are documents that the Respondents and their counsel have in fact provided to Complaint Counsel and hence the request calls for documents that are already in respondent’s possession, custody or control. Subject to and without waiving these objections or the General Objections stated above, to the extent there are non-privileged documents responsive to this request, Complaint Counsel have previously produced responsive documents and will continue to supplement this Request as

necessary.

Request 5

All documents that show and/or provided the Federal Trade Commission a reason to believe Respondent Friedlander has manufactured, advertised, labeled, offered for sale, sold and/or distributed any of the challenged products.

Response:

Complaint Counsel object to this Request because any such documents are not relevant to this proceeding. *Exxon Corp.*, No. 8934, 1981 F.T.C. LEXIS 113 (Jan. 29, 1981) (Once the Commission has issued a complaint, “the issue to be litigated is not the adequacy of the Commission’s pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred.”). As the Administrative Law Judge found in his denial of Respondent Basic Research’s Motion to Compel, “the issue to be tried is whether Respondent disseminated false and misleading advertising, not the Commission’s decision to file the Complaint.” Order of November 4, 2004 at 5. Notwithstanding this objection, and as more fully set forth in General Objections 1-3, Complaint Counsel object to this Request, because any documents are protected from disclosure as either not in Complaint Counsel’s custody, possession, or control, or are privileged from disclosure as attorney work product or deliberative process. Complaint Counsel further state that certain documents responsive to this request are documents that the Respondents and their counsel have in fact provided to Complaint Counsel and hence the request calls for documents that are already in respondent’s possession, custody or control. Subject to and without waiving these objections or the General Objections stated above, to the extent there are non-privileged documents responsive to this request, Complaint Counsel have previously produced responsive documents and will continue to supplement this Request as necessary.

Request 6

All documents that show and/or provided the Federal Trade Commission a reason to believe Respondent Friedlander engaged in commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation in regards to the challenged products.

Response:

Complaint Counsel object to this Request because any such documents are not relevant to this proceeding. *Exxon Corp.*, No. 8934, 1981 F.T.C. LEXIS 113 (Jan. 29, 1981) (Once the Commission has issued a complaint, “the issue to be litigated is not the adequacy of the Commission’s pre-complaint information or the diligence of its study of the material in question

but whether the alleged violation has in fact occurred.”). As the Administrative Law Judge found in his denial of Respondent Basic Research’s Motion to Compel, “the issue to be tried is whether Respondent disseminated false and misleading advertising, not the Commission’s decision to file the Complaint.” Order of November 4, 2004 at 5. Notwithstanding this objection, and as more fully set forth in General Objections 1-3, Complaint Counsel object to this Request, because any documents are protected from disclosure as either not in Complaint Counsel’s custody, possession, or control, or are privileged from disclosure as attorney work product or deliberative process. Complaint Counsel further state that certain documents responsive to this request are documents that the Respondents and their counsel have in fact provided to Complaint Counsel and hence the request calls for documents that are already in respondent’s possession, custody or control. Subject to and without waiving these objections or the General Objections stated above, to the extent there are non-privileged documents responsive to this request, Complaint Counsel have previously produced responsive documents and will continue to supplement this Request as necessary.

Request 7

All documents, including but not limited to, affidavits, declarations, opinion letters, and trial testimony sufficient to show that there is a consensus among experts who have testified for the Federal Trade Commission in weight control product cases establishing a minimum threshold required to substantiate advertising claims for weight control products.

Response:

Complaint Counsel object to this Request to the extent that it is vague, overbroad, unduly burdensome, or otherwise inconsistent with Complaint Counsel’s obligations under the Rules of Practice. Complaint Counsel further object to this Request because it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent to the extent that it includes documents that do not address the Challenged Products in the Complaint. “Discovery directed to the Commission’s prior proceedings, including formal proceedings, investigations, compliance proceedings and proposed rulemaking proceedings, is improper since the reasons for the Commission’s disposition of these matters, or the reasons for any staff recommendations related thereto, are irrelevant to any of the issues in this proceeding.” *In re Sterling Drug, Inc.*, No. 8919, 1976 F.T.C. Lexis 460 (Mar. 17, 1976). Moreover, there have been approximately 200 weight loss cases brought by the Commission since 1927 and to compile and turn over all expert documents in every single case would be unduly burdensome, harassing and irrelevant. Such files are not readily available in Complaint Counsel’s custody and control. Complaint Counsel are not obliged to conduct Respondents’ legal research for them. In addition, Complaint Counsel object to this Request on the grounds that it would include documents that are protected from disclosure as attorney work product (General Objection 2) or by deliberative process privilege (General Objection 3). Complaint Counsel have turned over documents relating to the testifying experts in this case as provided under the Rules and this Court in its Scheduling Order, including the expert reports and where available, their previous testimony in FTC actions.

Request 8

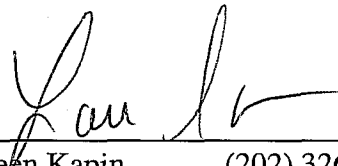
All documents, including but not limited to, affidavits, declarations, opinion letters, and trial testimony of experts who have disagreed with the Federal Trade Commission regarding the substantiation requirements for advertising claims for weight control products.

Response:

Complaint Counsel object to this Request to the extent that it is vague, overbroad, unduly burdensome, or otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice. Complaint Counsel further object to this Request because it is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent to the extent that it includes documents that do not address the Challenged Products in the Complaint. "Discovery directed to the Commission's prior proceedings, including formal proceedings, investigations, compliance proceedings and proposed rulemaking proceedings, is improper since the reasons for the Commission's disposition of these matters, or the reasons for any staff recommendations related thereto, are irrelevant to any of the issues in this proceeding." *In re Sterling Drug, Inc.*, No. 8919, 1976 F.T.C. Lexis 460 (Mar. 17, 1976). Moreover, there have been approximately 200 weight loss cases brought by the Commission since 1927 and to compile and turn over all expert documents in every single case would be unduly burdensome, harassing and irrelevant. Such files are not readily available in Complaint Counsel's custody and control. Complaint Counsel are not obliged to conduct Respondents' legal research for them. In addition, Complaint Counsel object to this Request on the grounds that it would include documents that are protected from disclosure as attorney work product (General Objection 2) or by deliberative process privilege (General Objection 3). Complaint Counsel have turned over documents relating to the testifying experts in this case as provided under the Rules and this Court in its Scheduling Order, including the expert reports and where available, their previous testimony in FTC actions.

Dated: December 1, 2004

Respectfully submitted,



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Federal Trade Commission
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Certificate of Service

I hereby certify that on this 1ST day of December, 2004, I caused *COMPLAINT COUNSEL'S RESPONSE TO PRO SE RESPONDENT FRIEDLANDER'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS* to be served and filed as follows:

one (1) electronic copy via email and one (1) paper copy
by first class mail to the following persons:

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