

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

In the Matter of)
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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 COMPLAINT COUNSEL'S
MOTION FOR PARTIAL SUMMARY DECISION**

I. PROCEDURAL BACKGROUND

On January 31, 2005, Complaint Counsel filed a motion seeking partial summary decision ("Motion"). On February 17, 2005, Respondents Basic Research, LLC; A.G. Waterhouse, LLC; Klein-Becker USA, LLC; Nutrasport, LLC; Sovage Dermalogic Laboratories, LLC; Ban, LLC; Dennis Gay; Daniel B. Mowrey; and Mitchell K. Friedlander ("Respondents") filed their opposition ("Opposition"). On February 17, 2005, Respondent Mitchell K. Friedlander filed an additional opposition ("Friedlander Opposition").

For the reasons set forth below, Complaint Counsel's motion for partial summary decision is **DENIED**.

II. POSITIONS OF THE PARTIES

In its motion, Complaint Counsel asserts that Respondents engaged in acts affecting commerce as alleged in the Complaint; Respondents operated a common business enterprise as alleged in the Complaint; Respondents made the claims challenged in the Complaint; and Respondents' claims are material to consumers. Motion 4-77. In their oppositions, Respondents assert that disputed issues of material facts preclude granting Complaint Counsel's motion. Opposition at 2-84; Friedlander Opposition at 4-20.

III. SUMMARY DECISION STANDARD

Commission Rule of Practice 3.24(a)(2) provides that summary decision "shall be rendered . . . if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." 16 C.F.R. § 3.24(a)(2). Commission Rule 3.24(a)(3) provides that once a motion for summary decision is made and adequately supported, "a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial." 16 C.F.R. § 3.24(a)(3). These provisions are virtually identical to the provisions governing summary judgment in the federal courts under Rule 56 of the Federal Rules of Civil Procedure; the Commission applies its summary decision rule consistent with case law construing Rule 56. *In re Kroger Co.*, 98 F.T.C. 639, 726 (Sept. 25, 1981); *In re Hearst Corp.*, 80 F.T.C. 1011, 1014 (Mar. 9, 1972).

The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The party moving for summary judgment bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Green v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

Once the moving party has properly supported its motion for summary judgment, the nonmoving party must "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. The nonmoving party may not rest on mere allegations or denials of its pleading but must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 587 (quoting Fed. R. Civ. P. 56(e)). *See also Liberty Lobby*, 477 U.S. at 256. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587. Even if summary judgment is technically proper, sound judicial policy and the proper exercise of judicial discretion permit denial of such a motion for the case to be developed fully at trial. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *State of New York v. Amfar Asphalt Corp.*, 1986

WL 27582, at *2 (E.D.N.Y. 1986); *In re Korean Air Lines Disaster of September 1, 1983*, 597 F. Supp. 613, 618 (D.D.C. 1984).

IV. GENUINE ISSUES OF MATERIAL FACT EXIST

Complaint Counsel moves for summary decision against all Respondents on the questions of commerce, common enterprise, advertising interpretation, and the materiality of the alleged claims in this matter. Motion at 1. Complaint Counsel alleges that each of the five corporate Respondents and each of the three individual Respondents engaged in acts or practices in or affecting commerce. Motion at 4-13. Complaint Counsel argues that Respondents operated a common business enterprise as alleged in the Complaint on the basis of: common control; common office space; common employees or personnel; advertising and product continuity; common accounting, payroll, and record-keeping; routine transfers or commingling of funds; and use of goodwill for the Basic Research family of companies. Motion at 15-30. Complaint Counsel contends that the uncontroverted evidence demonstrates that Respondents made the challenged claims. Motion at 30-71. In addition, Complaint Counsel argues that Respondents' advertising claims are material to consumers. Motion at 72-77.

Respondents contend that Complaint Counsel is barred from proceeding on an implied subjective claim theory under the First Amendment, Fifth Amendment, and Administrative Procedure Act. Opposition at 9-36. Respondents argue that there are genuine issues of material fact as to whether the ads at issue conveyed the allegedly implied messages and whether the relevant consumers, under the circumstances, could reasonably interpret the ads as alleged by Complaint Counsel. Opposition at 46-74. Respondents claim that the issue of common enterprise is premature and common enterprise theory does not apply to individuals. Opposition at 81-84. Friedlander argues that there are genuine issues of material fact as to whether the Commission can lawfully assert subject matter jurisdiction because there are material facts in dispute as to interstate commerce. Friedlander Opposition at 6-19.

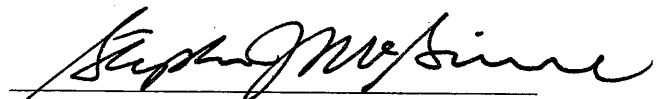
The determination of the questions of interstate commerce, common enterprise, advertising interpretation, and the materiality of the challenged claims requires determination of disputed material facts. The disputed material facts raised by Complaint Counsel's motion and Respondents' oppositions cannot be resolved without a full evidentiary hearing on the merits.

Among the factual questions raised by the pleadings and not resolved by Complaint Counsel's motion are what claims are conveyed by the advertisements; whether the claims conveyed are material to consumers; the roles of Respondents Gay, Mowrey, and Friedlander; the roles of the Corporate Respondents; the relationships of the Respondents and the Basic Research family of companies; the sales revenues and amount spent to advertise the challenged products; and whether the word "substantial" appears in Dermalin advertising. Viewing the evidence in the light most favorable to Respondents, the nonmoving party, there exist genuine issues of material fact precluding a partial summary decision.

V. CONCLUSION AND ORDER

As described above, the genuine issues of fact raised by the pleadings can only be properly determined through an evidentiary hearing. Such issues preclude granting partial summary decision, as a matter of law, at this stage of the proceeding. For the above-stated reasons, Complaint Counsel, the moving party, is not entitled to partial summary decision as a matter of law. Complaint Counsel's motion for partial summary decision is **DENIED**.

ORDERED:



Stephen J. McGuire
Chief Administrative Law Judge

Date: June 27, 2005