

ORIGINAL

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.

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.



PUBLIC

Docket No. 9318

**RESPONDENTS' COMBINED OPPOSITION TO FTC'S MOTION FOR THE
ISSUANCE OF SUBPOENAS AD TESTIFICANDUM AND MOTION TO EXCLUDE
FTC'S INVESTIGATOR WITNESSES BASED ON THE JANUARY 10, 2006 ORDER**

All Respondents, by counsel and pursuant to Rule of Practice 3.22(a) and (c), hereby file their joint combined opposition to Complaint Counsel's January 10, 2006 Motion for the Issuance of Subpoenas *Ad Testificandum* (hereinafter "Motion for Subpoenas") and their motion to exclude FTC's Investigator witnesses based on the January 10, 2006 order of the Chief Administrative Law Judge. In that order, his Honor stated that "the pre-Complaint investigations are clearly irrelevant to the present matters before the Court." *Id.* at 8. Thus, for the reasons stated in detail below,¹ FTC should be excluded from calling at hearing Denise Owens and Kevin

¹ While Respondents take issue with the January 10, 2006 order (see the simultaneously filed motion for interlocutory appeal) it is the law of the case and should apply equally to both parties unless and until is reversed. If

Towers, current and former FTC investigators, respectively, whose scope of testimony would be to “testify about various documents that he [or she] has copied and/or reviewed and websites he [or she] has examined and copied.” See Attachment A at 6, all of which involve and concern the pre-Complaint investigatory stage of these proceedings.

To be admissible, evidence must be relevant, material, and reliable, pursuant to Commission Rule 3.43(b)(1). January 10, 2006 Order at 5. In the January 10, 2006 Order his Honor stated that “the issue to be litigated at the trial in this matter is whether Respondents violated the FTC Act’s prohibition against false and misleading advertising.” Id. at 8. Citing In re Exxon Corp., 83 F.T.C. 1759, 1760 (1974), the order states “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.” Id. Thus, for the purposes of this proceeding the law of the case is that any testimony on the pre-Complaint investigatory phase is irrelevant. See id; see also e.g., Castro v. United States, 540 U.S. 375, 384 (2003)(The law of the case doctrine cannot pose an insurmountable obstacle to our reaching this conclusion. Assuming for argument's sake that the doctrine applies here, it simply "expresses" common judicial "practice"; it does not "limit" the courts' power)(citing Messenger v. Anderson, 225 U.S. 436, 444, 56 L. Ed. 1152, 32 S. Ct. 739 (1912) (Holmes, J)).

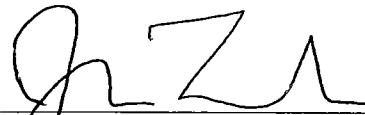
Because Mr. Towers is no longer with FTC, FTC counsel has requested a subpoena for his appearance at hearing. Motion for Subpoenas at Appendix A at 15. Mr. Towers’ testimony as an investigator in the pre-Complaint aspect of this case was made irrelevant by the January 10, 2006 order. Therefore, FTC Counsel should be excluded from calling Mr. Towers to testify in

it is reversed, it would be equitable to accord both sides the opportunity to present testimony on the pre-Complaint investigatory phase of this proceeding.

this case and a subpoena should not be issued for that purpose. In addition, FTC Counsel should be excluded from calling Ms. Owens, who remains employed by the FTC and therefore was not included in the list of witnesses for which subpoenas were sought. Like Mr. Towers Ms. Owens testimony as an investigator in the pre-Complaint investigatory phase of this proceeding was made irrelevant by the January 10, 2006 order. A draft order is attached to this combined opposition and motion.

Respondents have filed, concurrently with this combined opposition and motion, a motion for interlocutory appeal on the January 10, 2006 order to the extent that it precludes evidence on the pre-Complaint aspects of this case and his Honor's conclusion that those matters are irrelevant to this proceeding. The law of the case doctrine cannot prohibit a court from disregarding an earlier holding in an appropriate case. See e.g., Castro, supra at 384. Should Respondents' motion for interlocutory appeal be granted and Respondents granted the relief they are seeking regarding reversing the January 10, 2006 order, this motion would be moot.

Respectfully submitted,



Jonathan W. Emord
Emord & Associates, P.C.
1800 Alexander Bell Drive
Suite 200
Reston, VA 20191
Tel. (202) 466-6937
Fax (202) 466-6938

Counsel for Basic Research, LLC
A.G. Waterhouse, LLC
Klein-Becker USA, LLC
Nutrasport, LLC
Sovage Dermalogic Laboratories, LLC,
BAN, LLC

Stephen E. Nagin
Nagin, Gallop & Figueredo, P.A.
18001 Old Cutler Road
Miami, Florida 33157
Tel. (305) 854-5353
Fax (305) 854-5351

Counsel for Basic Research, LLC

Richard Burbidge, Esq.
Burbidge & Mitchell
215 South State Street
Suite 920
Salt Lake City, Utah 84111

Counsel for Dennis Gay

Ronald F. Price
PETERS SCOFIELD PRICE
A PROFESSIONAL CORPORATION
340 Broadway Centre
111 East Broadway
Salt Lake City, Utah 84111
Telephone: (801) 322-2002
Facsimile: (801) 322-2003

**Counsel for Respondent Daniel B.
Mowrey**

Mitchell K. Friedlander
5742 West Harold Gatty Drive
Salt Lake City, Utah 84111,

Pro se.

Date submitted: January 18, 2005

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2006, I caused Respondents Combined Opposition to FTC's Motion for Subpoenas Ad Testificandum and Motion to Exclude FTC's Investigator Witnesses in Accordance with the January 10, 2006 Order to be filed and served as follows:

- 1) an original and one paper copy filed by hand delivery and one electronic copy in PDF format filed by electronic mail to

Donald S. Clark
Secretary
U.S. Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-159
Washington, D.C. 20580

Email: secretary@ftc.gov

2) two paper copies delivered by hand delivery to:

The Hon. Stephen J. McGuire
Chief Administrative Law Judge
U.S. Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-112
Washington, D.C. 20580

3) one paper copy by first class U.S. Mail to:

James Kohm
Associate Director, Enforcement
U.S. Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

4) one paper copy by first class U.S. mail and one electronic copy in PDF format by electronic mail to:

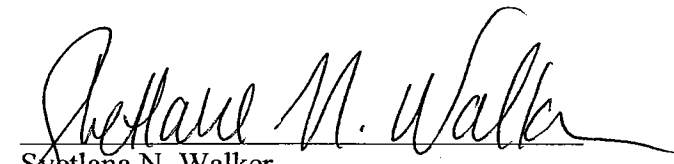
Laureen Kapin
Joshua S. Millard
Laura Schneider
Walter C. Gross III
Lemuel W. Dowdy
Edwin Rodriguez
U.S. Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Suite NJ-2122
Washington, D.C. 20580
Email: lkapin@ftc.gov
jmillard@ftc.gov
lschneider@ftc.gov
wgross@ftc.gov
ldowdy@ftc.gov
erodriguez@ftc.gov

Stephen E. Nagin
Nagin, Gallop & Figueredo, P.A.
18001 Old Cutler Road, Suite 556
Miami, Florida 33157-6416
Email: snagin@ngf-law.com

Richard D. Burbidge
Burbidge & Mitchell
215 South State Street
Suite 920
Salt Lake City, UT 84111
Email: rurbidge@burbidgeandmitchell.com

Ronald F. Price
Peters Scofield Price
340 Broadway Center
111 East Broadway
Salt Lake City UT 84111
Email: rfp@psplawyers.com

Mitchell K. Friedlander
c/o Compliance Department
5742 West Harold Gatty Drive
Salt Lake City, UT 84116
Email: mkf555@msn.com


Svetlana N. Walker

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ORDER

On January 10, 2006 FTC Counsel filed a motion for issuance of subpoenas *ad testificandum* including, in pertinent part, for a subpoena directed to former FTC investigator Kevin Towers. Respondents filed an opposition to the motion for the requested Towers subpoena and a combined motion to exclude FTC investigator Denise Owens and former investigator Towers from testifying, citing the January 10, 2006 order in this case where pre-Complaint testimony was ruled irrelevant and inadmissible. Upon consideration of FTC Counsel's Motion for Issuance of Subpoenas *Ad Testificandum* for Kevin Towers and Respondents combined opposition thereto and motion to exclude FTC investigators Owens and Towers, it is hereby **ORDERED** that the motion for subpoena *ad testificandum* for Kevin

Towers is **DENIED** and Respondents' Motion to exclude the testimony of Kevin Towers and Denise Owens is **GRANTED**.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: