UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of BASIC RESEARCH, L.L.C., a limited liability corporation, A.G. WATERHOUSE, L.L.C., a limited liability corporation, KLEIN-BECKER USA, L.L.C., a limited liability corporation, NUTRASPORT, L.L.C., a limited liability corporation, SOVAGE DERMALOGIC LABORATORIES, L.L.C., a limited liability corporation, BAN, L.L.C., a limited liability corporation, also doing business as BASIC RESEARCH, L.L.C., OLD BASIC RESEARCH, L.L.C., BASIC RESEARCH, A.G. WATERHOUSE, KLEIN-BECKER USA, NUTRA SPORT, and SOVAGE DERMALOGIC LABORATORIES, DENNIS GAY, individually and as an officer of the limited liability corporations, DANIEL B. MOWREY, also doing business as AMERICAN PHYTOTHERAPY RESEARCH LABORATORY, and MITCHELL K. FRIEDLANDER	DOCKET NO. 9318 PUBLIC DOCUMENT

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTIONS FOR A MORE DEFINITE STATEMENT

Complaint Counsel oppose Respondents' Motions for a More Definite Statement

("Motion").[1] The Commission's Complaint not only meets but exceeds the standards governing the form of a complaint set forth in RULE OF PRACTICE 3.11(b). Accordingly, and for the reasons discussed below, we respectfully request that the Court deny Respondents' Motion.[2]

I. PROCEDURAL HISTORY

On June 15, 2004, the Commission filed a complaint alleging, *inter alia*, that Basic Research, L.L.C. and other related individuals and companies (collectively "Respondents") marketed certain dietary supplements with unsubstantiated claims for fat loss and/or weight loss, and falsely represented that some of these products were clinically proven to be effective, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act ("FTC Act").

The Complaint focuses on six products—three topically-applied gels, Dermalin-APg, Cutting Gel, and Tummy Flattening Gel; two dietary supplements marketed to significantly overweight adults, Leptoprin and Anorex; and one dietary supplement marketed to overweight children, PediaLean. The Complaint quotes extensively from Respondents' own marketing materials and identifies the individuals, entities, representations, and practices alleged to violate the FTC Act. Regarding the gels, the Complaint challenges, as unsubstantiated, representations

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[1] All Respondents except for Mitchell Friedlander are represented by Stephen E. Nagin of Nagin, Gallop & Figueredo, P.A. Mitchell Friedlander filed a *pro se* Notice of Appearance on June 29, 2004, and a Motion to Join in the other Respondents' Motion for a More Definite Statement one day past the filing deadline. On July 6, 2004, Mr. Friedlander filed a Motion to Dismiss for Lack of Definiteness. Complaint Counsel is directing this opposition to both Respondents' Motion for a More Definite Statement and *pro se* Respondent Mr. Friedlander's Motion to Dismiss Complaint for Lack of Definiteness. Though styled as a motion to dismiss, Mr. Friedlander has in essence filed the same motion as the rest of the Respondents. Mr. Friedlander's submission repeats *verbatim* most of the arguments presented in Respondents' original motion and is more properly addressed as a motion for a more definite statement.

[2] Attached hereto at Tab 1, Complaint Counsel have provided a copy of all of the unreported cases that are cited in this Response in alphabetical order.

that the gel products cause "rapid and visibly obvious fat loss in areas of the body to which it is applied." (Compl. ¶¶ 14-22.) As to the adult weight loss supplements, the Complaint challenges, as unsubstantiated, that Leptoprin and Anorex causes "weight loss of more than 20 pounds, including as much as 50, 60, or 147 pounds." (Compl. ¶¶ 28-30; 33-35.) The Complaint further challenges, as false, claims regarding the clinical testing for certain topical gels and the adult weight loss supplements. (Compl. ¶¶ 23-26; ¶¶ 31-32.) As to the children's weight loss supplement, the Complaint challenges, as unsubstantiated, the claim that "PediaLean causes substantial weight loss in overweight children," and as false, the claim that "clinical testing proves that PediaLean causes substantial weight loss in overweight or obese children." (Compl. ¶¶ 37-41.) Finally, the Complaint charges, as false, representations that Respondent Daniel Mowrey is a medical doctor. (Compl. ¶¶ 42-44.)

On June 28, 2004, Respondents filed their Motion for a More Definite Statement. On July 6, 2004, Respondent Friedlander filed his Motion to Dismiss Complaint for Lack of Definiteness. Respondents argue that the Complaint fails to inform them sufficiently of the specific charges leveled against each Respondent. Respondents maintain that they cannot ascertain the meaning and usage of certain terms used in the Complaint such as "rapid," "visibly obvious," "reasonable basis," "unfair," "clinical testing," "causes," and "substantial." (Mot. at 2.) As a result, Respondents contend they are "incapable of framing appropriate and full responses and pleading adequate defenses." (Mot. at 3.) [3]

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[3] Respondents cite *McHenry v. Renne*, 84 F.3d 1172 (9th Cir. 1996), which correctly observed that confusing complaints impose an unfair burden on litigants and judges. *McHenry* however, involved a *pro se* plaintiff whose rambling fifty-three page complaint contained a confusing mix of allegations of relevant facts, irrelevant facts, political argument, and legal argument. Unlike the complaint in that case, the Complaint here is concise and direct, laying out

II. ARGUMENT

Respondents have failed to make a reasonable showing that they cannot form a responsive answer based on the allegations contained in the Complaint. The Complaint presents a clear and concise factual statement sufficient to inform Respondents with reasonable definiteness of the practices alleged to violate the FTC Act. First, the Complaint provides detailed allegations that meet and exceed the standards set forth in RULE 3.11. Indeed, the allegations rely on Respondents' own advertising terminology for a large portion of the factual allegations. Second, Respondents' challenge to the definiteness of established legal terms is remedied easily by a modicum of research. Third, Respondents' challenge to the definiteness of commonly used terms does not meet the "reasonable showing" burden, and even if necessary, could be remedied easily by discovery. As set forth in more detail below, Respondents' Motions are devoid of merit and should be denied.

A. Pleading Requirements for Administrative Complaint

Section 3.11(b) (2) of the RULES OF PRACTICE requires that the complaint shall contain "a clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law." Commission complaints, like those in federal court, are merely designed to give a respondent notice of the charges against him. *Electrical Bid Registration Serv., Inc.*, No. 9183, 1984 WL 251757 (F.T.C.) (Aug. 29, 1984).[4] A motion for a more definite statement should be denied even where the

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the course of conduct for each product and allegations that claims made expressly or impliedly are false or unsubstantiated.

[4] Similarly, Rule 8 of the *Federal Rules of Civil Procedure* merely requires a "short plain statement" of the claim showing that the pleader is entitled to relief. FED. R. CIV. P. 8(a)(2).

complaint lacks details that the respondent may need to mount a defense against its allegations. *Diran M. Seropian, M.D.*, No. 9248, 1991 F.T.C. Lexis 306, at *1 (Jul. 3, 1991). RULE 3.11 does not require these details to be given in the complaint. The concept of notice pleading requires only a concise statement of the claim, not evidentiary facts. *Red Apple Co. Inc.*, No. 9266, 1994 F.T.C. Lexis 90, at *2 (Jun. 21, 1994) (court rejected respondent's motion for a more definite statement because the complaint was not unintelligible and sufficiently informed respondents of the nature of the charged statutory violations). At the complaint stage of pleading, the allegations may be succinct but informative; discovery and argument will add detail later. *New Balance Athletic Shoe, Inc.*, No. 9268, 1994 F.T.C. Lexis 213 (Oct. 20, 1994); *Weight Watchers Int'l, Inc.*, No. 9261, 1993 F.T.C. Lexis 300 (Oct. 27, 1993); *College Football Ass'n*, No. 9242, 1990 F.T.C. Lexis 350 (Oct. 9, 1990). Indeed, under the Federal Rules of Civil Procedure, motions for a more definite statement should not be granted "unless the complaint is so excessively vague and ambiguous as to be unintelligible and as to prejudice the defendant seriously in attempting to answer it." *Textil RV v. Italuomo, Inc.*, No. 92 Civ. 526, 1993 U.S. Dist. LEXIS 4663, at *6 (S.D.N.Y. Apr.13, 1993) quoting *Sanchez v. New York City*, No. CV-92-1467, 1992 U.S. Dist. LEXIS 9844, at *2-3 (E.D.N.Y. Jun. 29, 1992). These motions are "disfavored largely because they often add little that discovery couldn't provide, while creating delay." *Id.*

The Supreme Court has explained that a complaint need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (citation omitted); *accord Atchison, Topeka & Sante Fe Ry. v. Buell*, 480 U.S. 557, 568 n.15 (1987) (under *Federal Rule* 8, claimant has "no duty to set out all of the relevant facts in his complaint"). This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and to dispose of unmeritorious claims. *See Swierkiewicz*, 534 U.S. at 512-13.

In *Beneficial Corp.,* the Commission briefly discussed pleading requirements in an administrative proceeding. The Commission found that the complaint more than adequately raised the issues of whether the respondents' advertisements were unfair or deceptive by quoting the advertisements themselves and then alleging that, in fact, the respondents did not offer what the advertisement promised. *Beneficial Corp.*, 86 F.T.C. 119, 163 (1975). The Commission observed that "a clearer and more precise allegation is difficult to conceive. It certainly goes beyond the minimum standards of notice pleading acceptable in administrative hearings." *Id.* (citing *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454 (7th Cir. 1943)).

B. The Complaint is Clear and Definite and Goes Beyond the Minimum Standards of Notice Required by the Rules of Practice

1. The Complaint has Detailed Allegations that Rely on Respondents' Advertising

The Commission's Complaint meets and exceeds RULE 3.11's requirements. In this Complaint, similar to *Beneficial Corp.*, the Complaint identifies each Respondent, quotes illustrative statements from Respondents' marketing materials, and details the unlawful practices with regard to advertisements for each of the six specific products. In support of these allegations, as Respondents recognize in their Motion, the Complaint quotes extensively from Respondents' marketing materials for each product. (Mot. at 4.)

For example, Paragraph 27 of the Complaint directly quotes three advertisements for two of the challenged products—Leptoprin and Anorex. Relying upon the language set forth in those advertisements, the Complaint sets forth Respondents' representations and alleges Respondents lacked a reasonable basis that substantiated these representations. (Compl. ¶¶ 28-30.) The Complaint further specifies other false or misleading representations made by

Respondents in the same manner for all six of the challenged products. The Complaint employs similar specificity with regard to each of its allegations whether pertaining to the topical gels, the children's weight loss compound or Dr. Mowrey. Similar to the complaint in *Beneficial Corp.*, these allegations are clear and precise. This Complaint is specific in each allegation, far beyond the "notice pleading" standard set forth above in Section 3.11(b) (2) of the RULES OF PRACTICE. The Complaint details the specific acts, statements, and practices that the Commission believes violate the law. *See Red Apple*, 1994 F.T.C. Lexis 90, at *3 (the complaint sufficiently informed respondents of the nature of the charged statutory violations).

2. Respondents' Challenge to Legally-Defined Terms is Without Merit

Respondents further argue that the Complaint uses certain terms, including "reasonable basis" and "unfair," that are not defined, thereby making it impossible for them to respond to the Complaint. Mot. at 3. This contention is disingenuous because these challenged terms are legal phrases that have meanings established over time through Commission jurisprudence and other materials. Nonetheless, Respondents object to these terms claiming that they are "forced to guess at what standard the Commission staff seeks to enforce against them." (Mot. at 4.)

The Commission enforces Section 5(a) of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). The FTC Act itself defines an "unfair act[ ] and practice[ ]" as any "act or practice [that] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not out weighed by counterveiling benefits to consumers or competition." 15 U.S.C. 45(n); *see also Unfairness Policy Statement* (appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984)).

The term "reasonable basis" also comes directly from established Commission jurisprudence. Respondents' counsel should have first hand knowledge of what this term means because Complaint Counsel have previously given Respondents' counsel a copy of the FTC Policy Statement Regarding Advertising Substantiation (attached hereto at Tab 2). In this Statement, which is also readily available on the FTC's website, there is an entire section discussing the "reasonable basis" requirement of advertising substantiation. Simply put, Respondents have sufficient information to realize that under Section 5, advertisers must have a reasonable basis for making objective claims **before** the claims are disseminated. *See, e.g., Pfizer, Inc.*, 81 F.T.C. 23 (1972) (what constitutes a reasonable basis is determined on a case-by-case basis by analyzing the type of claim, the benefits if the claim is true, the consequences if the claim is false, the ease and cost of developing substantiation for the claim, the type of product, and the level of substantiation experts in the field would agree is reasonable); *see also Removatron Int'l Corp.*, 111 F.T.C. 206 (1988), *aff'd,* 884 F.2d 1489 (1st Cir. 1989) (requiring "adequate and well-controlled clinical testing" to substantiate claims for hair removal product). As discussed in the Statement Regarding Advertising Substantiation, this requirement is determined on a case-by-case basis. Thus, "unfair" and "reasonable basis"are legal terms that this Court will determine the meaning of during the course of the proceedings.

3. This Court should also Reject Respondents' Challenge to the Remaining Terms

Respondents' objection to the remaining terms is without merit. Respondents' advertisements contain the terms themselves or present a "net impression"[5] conveying the terms

[5] In determining the claims that an ad conveys, the Commission examines "the entire mosaic, rather than each tile separately." *FTC v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir.

used in the Complaint. For example, Respondents object to the term "clinical testing," yet Respondents assert in their advertisements that Leptoprin is "clinically established," (Compl., ¶27B); that Cutting Gel is backed by "clinical trials" and is "clinically proven," (Compl., ¶13D); and that Tummy Flattening Gel is "clinically proven" and its ingredient "Epidril has been verified by two published clinical trials" (Compl., ¶ 13F.).[6] Likewise, Respondents' argument that the term "substantial"[7] is vague is belied by their usage of the strikingly similar term "significant" in their marketing materials. For example, Respondents claim that "in a well-controlled double-blind clinical trial, each and every child who used PediaLean as directed lost a significant amount of excess body weight" (¶36B of the Complaint). These are terms or synonyms of terms that Respondents used to promote the efficacy of their products. Furthermore, Respondents' contention that the terms "rapid," "visibly obvious," and "causes" are ambiguous strains credulity. All of these terms are derived from what Respondents themselves state in their promotional materials and are part of the ads' net impression. For example,

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1964). *See also*, *Deception Policy Statement* appended to *Cliffdale Assoc. Inc.*, 103 F.T.C. 110, 164, n. 4, 174-184; *Stouffer Foods Corp.*, 118 F.T.C. 746, 799 (1994).

[6] The Commission has typically required a relatively high level of substantiation, usually "competent and reliable scientific evidence," typically defined as "tests, analyses, research, studies, or other evidence based upon the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results." *See, e.g., Brake Guard Products, Inc.*, 125 F.T.C. 138 (1998); *ABS Tech Sciences, Inc.*, 126 F.T.C. 229 (1998); *see also* Federal Trade Commission, *Dietary Supplements: An Advertising Guide for Industry* (issued Nov. 1998) (attached hereto Tab 3).

[7] Most of Respondents' scant authority is directed towards its arguments on the purported vagueness of the term "substantial." Respondents' reliance on cases dealing with the language of partial birth abortion laws is inapposite and unpersuasive because these cases deal with entirely different legal standards and subject matter.

Respondents claim that Cutting Gel "dissolves stubborn body fat on contact" (Compl., ¶ 13D); "apply Dermalin-APg's transdermal gel to your waist or tummy and watch them shrink in size within a matter of days" (Compl., ¶13B); and that applying Cutting Gel "to your glutes, biceps, triceps, or lats, and the fat literally melts away . . ." (Compl., ¶13E). The net impression of these advertisements is that fat loss will be fast or quick, or as the Commission stated in the Complaint, "rapid." The word "rapid" is a characterization of the collective words used by Respondents.

Similarly, the term "visibly obvious" is a term used to summarize the claims made by Respondents in their promotional materials. Again, Respondents themselves use the term "visible" in their own advertisements. For example, "[s]ee visible results in approximately 19 days, guaranteed" (Compl., ¶13F). Moreover, the net impression of the ads lead one to believe that the consumer will actually see the results with their own eyes, thus making it "visibly obvious." For example, Respondents' ads claim that "Dermalin-APg permits you to spot reduce. Put it on around your thighs - slimmer thighs. Over thirty and getting thick around the middle? Just apply Dermalin-APg's transdermal gel to your waist or tummy and watch them shrink in size within a matter of days" (Compl., ¶13A); and "Put Cutting Gel in a culture dish with fat cells and you can literally watch them deflate - similar to sticking a pin in a balloon" (Compl., ¶ 13D).

Respondents' challenge to the word "cause" is mystifying. It is clear from the Complaint that the term "cause" is not being used in the sense of a legal causation argument (as in the famous tort case of *Palsgraf v. Long Island RailRoad Co.*, 248 N.Y. 339 (1928)). Rather, the Complaints' use of the word "cause" is consistent with the net impression of Respondents' promotional materials. The thrust of the advertisements is that if one uses Respondents' product,

it will have a certain effect. For example, Respondents have represented that by using these gels, the end result is that the consumer will have visibly obvious fat lost in a fast amount of time. All of these terms are used in their common sense parlance and are based on the representations made in Respondents' own promotional materials.

4. The Court should Reject Friedlander's Motion to Dismiss because the Complaint Clearly Sets Forth Claims for Relief

Mr. Friedlander argues that the Complaint fails to state a violation of either Section 5(a) or 12 of the FTC Act and should be dismissed. However, a fair reading of the Complaint shows that the Commission has clearly and succinctly stated claims for relief. (Compl. ¶¶ 13-44). The Commission's Rules do not explicitly discuss the standards for moving to dismiss based upon failure to state a claim for relief but Commission practice has followed the same standards as the Federal Courts in deciding motions to dismiss. *See, e.g.*, *Schering-Plough Corp.*, No. 9297, 2001 FTC Lexis 198 (Oct. 31, 2001). On a motion to dismiss for failure to state a claim, "allegations in the complaint must be accepted as true and construed favorably to the plaintiff." *Id.* at *11-12. As the Court is well aware, Section 5 of the FTC Act proscribes "unfair or deceptive acts or practices in or affecting commerce" and Section 12 proscribes the dissemination of "false advertisements." 15 U.S.C. §§ 45, 52. As discussed above, the Complaint details how the Respondents promoted certain products with unsubstantiated efficacy claims and false establishment claims in violation of Sections 5 and 12 of the FTC Act. If proved, these specific allegations are sufficient to establish claims for relief.

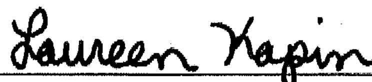
III. CONCLUSION

This Court should reject Respondents' thinly veiled attempt to gain more time to answer the Complaint. Respondents have failed to show that they cannot frame a responsive answer based on the allegations contained in the Complaint. The RULES make clear that all that is necessary at this stage of pleading is a "clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law." RULE 3.11(b)(2). The Complaint in this case more than satisfies that standard and more than fully gives Respondents notice of the charges against them.

Respondents' arguments to the contrary are inappropriate at this point in the proceedings and the questions Respondents have raised, to the extent they are legitimate, are more appropriately addressed through their own research and the discovery process. The Commission's Complaint more than meets the requirements set out by the RULES OF PRACTICE and the supporting caselaw.

For the foregoing reasons, the FTC respectfully requests that the Court deny Respondents' Motion for a More Definite Statement.

Respectfully submitted,



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Dated: July 8, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2004, I caused *Complaint Counsel's Opposition to Respondents' Motions for a More Definite Statement*, including the supporting memorandum and attachments to be filed and served as follows:

(1) the original and one (1) paper copy filed by hand delivery to:
Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580

(2) two (2) paper copies served by hand delivery to:
The Honorable D. Michael Chappell
Administrative Law Judge
600 Penn. Ave., N.W., Room H-104
Washington, D.C. 20580

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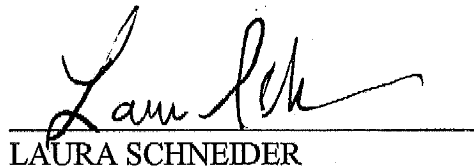

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