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

In the Matter of

BASIC RESEARCH, LLC,
a limited liability company;

A.G. WATERHOUSE, L.L.C.
a limited liability corporation,

KLEIN-BECKER USA, LLC,
a limited liability company;

NUTRASPORT, LLC,
a limited liability company;

SÖVAGE DERMALOGIC LABORATORIES, LLC,
a limited liability company;

BAN, LLC,
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, Ph.D.,
Also doing business as AMERICAN PHYTOTHERAPY RESEARCH LABORATORY, and

MITCHELL K. FRIEDLANDER,

Respondents.

Docket No. 9318

PUBLIC DOCUMENT

RESPONDENT MITCHELL K. FRIEDLANDER'S REPLY TO COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTIONS FOR A MORE DEFINITE STATEMENT AND MOTION FOR LEAVE TO FILE SAME, WITH CERTIFICATE OF SERVICE AND CERTIFICATE OF ELECTRONIC FILING

Respondent Mitchell K. Friedlander ("Respondent Friedlander"), hereby files this Reply to Complaint Counsel's Opposition to Respondents' Motions for a More Definite Statement ("Opposition"), and in support state as follows.

I. INTRODUCTION

In its Opposition, Complaint Counsel essentially argues that the complaint filed against Respondent Friedlander is clear and concise enough under 16 C.F.R. §3.11 for Respondent Friedlander to ascertain the practices alleged to violate the Federal Trade Commission Act. Complaint Counsel, however, employs ever-shifting legal terms of art, and vague, subjective wording that frustrates Respondent Friedlander's ability to understand how the advertisements are being interpreted by the Commission, and leaves the ultimate decision of defining the nature of the charges against Respondent Friedlander to the Administrative Law Judge, not Complaint Counsel. Such a practice necessarily means the complaint is defective and fails to satisfy Complaint Counsel's statutory burden.

II. RELEVANT FACTS

On June 28, 2004, Respondent Friedlander filed his Motion to Dismiss Complaint for Lack of Definiteness ("Motion to Dismiss") because Complaint Counsel's complaint failed to define key elements of its operative allegations and was therefore fatally defective. These key elements included the terms "Rapid," "Substantial," "Visibly Obvious," "Causes" and "Reasonable Basis." As a result of the indefiniteness of these terms, Respondent Friedlander asserted that he was unable to appreciate with "reasonable definiteness of the type of acts or practices alleged to be in violation of the law" under 16 C.F.R. 3.11(c).

On July 8, 2004, Complaint Counsel filed their Opposition to Respondent Friedlander's Motion to Dismiss. Although the document was captioned "Complaint Counsel's Opposition to

Respondents' Motions for a More Definite Statement," Complaint Counsel noted that it was directing its 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." *See*, Opposition, fn. 1.

The Opposition advanced several arguments to support the propriety of the complaint, including the contention that it is in compliance with 16 C.F.R. 3.11, and that the vagueness of the legal terms can be remedied by research or discovery. However, neither argument cures the flaws highlighted in Respondent Friedlander's Motion to Dimiss.

III. ARGUMENT

Respondent Friedlander stands accused of certain deceptive practices as set forth in the complaint. Complaint Counsel has taken the position that Respondent Friedlander's Motion to Dismiss should be denied because the terminology and standards set forth in the complaint are so well understood as to not require further definition. For example, the Opposition suggests that Respondents should be aware of the definitions of the terms "substantial," "rapid," "visibly obvious" and "causes" because the accused advertisements employ similar language. Moreover, Complaint Counsel argues that discovery will cure any ambiguity in the complaint. With respect to the term "reasonable basis," Complaint Counsel has asserted that the Administrative Law Judge will inevitably decide what is meant by these words. Complaint Counsel, however, is attempting to side-step both the duty to properly articulate the interpretation of the advertisements, and the standards against which the Respondent Friedlander's conduct can be measured.

To frame a defense in this case, Respondent Friedlander must first understand, with clarity, what the Commission believes the advertising at issue means, and second, what legal

benchmarks he stands accused of violating. Litigation is inherently a comparative analysis. The accusing party asserts a violation of a known standard and the defending party is left to explain why the articulated standard was not breached or violated. Here, that comparative analysis begins with the Commissions interpretation of the advertising and ends with a determination as to whether such advertising was lawful. As the accusing party in this case, Complaint Counsel must therefore articulate with clarity Respondent Friedlander's behavior, as well as those standards that it claims Respondent Friedlander has violated. In the absence of such particularity, Complaint Counsel will have the freedom to shift its theories upon a whim and Respondent Friedlander will be frustrated in his ability to prepare and present a defense.

1. The Meaning Of The Terms "Rapid," "Substantial," "Visibly Obvious" And "Causes" Are Amorphous Terms Subject To Multiple Meanings And Must Be Better Defined

The complaint against Respondent Friedlander alleges that the accused advertising expressly or impliedly conveys that the products in question will "Cause" fat loss that will be "Rapid," "Substantial" and/or "Visibly Obvious." Based on the fact that (i) these terms do not appear in the accused advertising; (ii) no definitions of these terms are provided; and (iii) an understanding of these terms is absolutely necessary to evaluate the appropriate level of support needed for the advertising, Respondent Friedlander moved to dismiss the complaint.

In response, Complaint Counsel essentially argues that the accused advertisements either use the same[1] or similar terms, and as such, their meanings should be understood. *See*, Opposition, page 8. For example, Complaint Counsel contends that "Substantial" and "Rapid" are clear because the term "significant" appears in the accused advertising as well as a collection of words that imply that fat loss will be quick and/or fast, respectively. *See*, Opposition, page 9-

[1] It is respectfully pointed out that none of the accused advertisements used these exact terms.

10. Using similar reasoning, Complaint Counsel asserts that the terms "Visibly Obvious" and "Causes[2]" are "derived" from Respondents' advertisements.

In other words, Complaint Counsel is suggesting that Respondent Friedlander already knows precisely what "Rapid," "Substantial," "Causes," and "Visibly Obvious" mean based on the usage of similar terms in the accused advertisements. It would therefore logically follow that Respondent Friedlander's answer to the charges against him may be predicated on what he believes these words mean. Respondent Friedlander respectfully requests clarification as to whether this is what Complaint Counsel intended.

If, on the other hand, the Commission is, in fact, responsible for determining these meanings, Respondent Friedlander must be advised of such meanings. Otherwise, Respondent Friedlander is left to guess and/or accurately predict what those definitions will be. Even if Respondent Friedlander were inclined to guess or predict such meanings, the terms in question are subjective, relative terms providing no adequate benchmark, no guidance as to what is objectionable, and no adequate notification of the acts of which Respondent Friedlander stands accused.

Complaint Counsel contention that further definition is unnecessary is misplaced. At present, Respondent Friedlander is not aware of whether "Substantial" fat loss concerns the loss of 5, 50, 100 pounds or more; whether "Rapid" fat loss concerns loss over the course of one day, one week, one month, or more; or whether "Visibly Obvious" fat loss means visible to the subject or other parties. Thus, Complaint Counsel's contention that further definition is

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[2] With respect to the term "Causes," Complaint Counsel mistakenly assumes the objection is predicated on a legal causation argument. *See*, Opposition, page 10, *citing*, *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (1928). To the contrary, the objection is predicated on the fact that the term is susceptible to multiple meanings. In the context of efficacy claims, for example, it is possible that a "Cause" may be contributory or exclusive cause.

unnecessary is tantamount to contending that Respondent Friedlander's answer would be the same regardless of whether "Substantial" and "Rapid" meant 5 pounds per week, or 50 pounds per week, or otherwise.

Complaint Counsel further argues that additional information concerning the definitions of these terms may be ascertained through discovery. Respondent Friedlander respectfully notes that, assuming the Commission has interpreted the implied meanings of advertisements, it is not possible to depose the Commission under the applicable rules. 16 C.F.R. §3.33(c).

Accordingly, Complaint Counsel must provide adequate definitions for the terms "Substantial," "Rapid," "Causes" and "Visibly Obvious" and clarify whether such definitions are binding upon the Commission. Otherwise, the complaint should be dismissed as being fatally defective.

2. The Term "Reasonable Basis" Is Not Adequately Defined

Even assuming, *arguendo*, that the foregoing terms were adequately defined, the complaint alleges that the Respondent Friedlander lacked a "reasonable basis" for the representations. The Opposition states that the meaning of "reasonable basis" ". . . has been established over time through jurisprudence and other materials." *See*, Opposition, page 7. The Opposition, however, then cites various authority in support of the conclusion that the reasonable basis requirement is "determined on a case-by-case basis" such that "this Court will determine the meaning during the course of the proceedings." *See*, Opposition, page 7.

The flaw in Complaint Counsel's logic is self-evident. If, as their Opposition contends, the meaning of the phrase "reasonable basis" is "well-established"—it cannot simultaneously be the case that "this Court will determine the meaning during the course of the proceedings." *See*, Opposition, page 8. To the contrary, such logic establishes that the phrase is *not* well-defined.

Moreover, if the Administrative Law Judge is left to determine the standard's meaning, Complaint Counsel has essentially shifted to the Court the burden of informing Respondents of what standard they allegedly failed to meet.

In its Opposition, Complaint Counsel repeatedly contends that it has met the minimum pleadings standards required under FTC law. Yet, if the pleading standards mean anything, they must require a complaint to set forth not just Respondents' behavior, but how that behavior "violates the law." Otherwise, Respondent Friedlander has been given the impossible task of predicting, in his answer and going forward, at what point their behavior allegedly became unlawful. Until Complaint Counsel defines the particulars of what substantiation was needed to constitute a "reasonable basis" for the challenged advertisements in this case, Respondent Friedlander is unable to evaluate, defend and prepare their case.

Indeed, Complaint Counsel's own authority establishes that the Commission bears the burden of alleging and proving in each case the amount of substantiation required to constitute a "reasonable basis." For example, the Opposition cites *Pfizer Inc.*, 81 F.T.C. 23 (1972) in this regard. *See*, Opposition, page 8. With respect to simple claims of efficacy, "*Pfizer* holds that the *Commission itself* may identify the appropriate level of substantiation for ads that do not expressly or impliedly claim a particular level of substantiation." *Thompson Medical Co. v. FTC*, 791 F.2d 189, 194 (D.C.Cir.1986), *cert. denied*, 479 U.S. 1086, 107 S.Ct. 1289, 94 L.Ed.2d 146 (1987) (emphasis added). With respect to claims that are more specific, the advertiser must possess the level of proof claimed in the ad, however, "[i]f the claim is more general, but nevertheless constitutes an establishment claim, *the FTC will specify* the nature and extent of substantiation that will support the claim." *Thompson Medical Co.*, 791 F.2d at 194 (emphasis added).

Thus, in this case, if Complaint Counsel believes that a "reasonable basis" required particular types and amounts of information, they should be required to allege the same in its complaint. With these particulars, Respondent Friedlander can commence his defense with a clear understanding of the alleged shortcomings of the advertisement substantiation. In the absence of such particulars, Complaint Counsel will remain free to argue, in the face of whatever proofs are offered, that a "reasonable basis" in this case requires something more than what has been offered. Respondent Friedlander should not be left to defend against a moving target and the complaint should therefore state, up front, the benchmark against which Complaint Counsel will ask this Court to measure the adequacy of Respondent Friedlander's advertising substantiation.

IV. CONCLUSION

Based on the foregoing, Respondent Friedlander respectfully requests the Administrative Law Judge dismiss the complaint based on Complaint Counsel's failure to adequately define the operative allegations therein. Alternatively, Respondent Friedlander respectfully requests that the Administrative Law Judge require Complaint Counsel to amend its complaint in order to better define the operative allegations therein, specifically, the terms "Rapid," "Substantial," "Visibly Obvious," "Causes" and "Reasonable Basis."

V. MOTION FOR LEAVE TO FILE REPLY TO OPPOSITION

Respondent Friedlander believes that Complaint Counsel's Opposition raises new issues from those present in his Motion to Dismiss. The instant Reply addresses these issues. Accordingly, Respondent Friedlander respectfully requests permission for leave to file same, or to join the additional Respondents' Motion in this regard, and that the Administrative Law Judge consider the foregoing prior to ruling.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 13th day of July, 2004 as follows:

(1) The original and one (2) copies by hand delivery to Donald S. Clark, Secretary, Federal Trade Commission, Room H-159, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

(2) One (1) electronic copy via e-mail attachment in Adobe® ".pdf" format to the Secretary of the FTC at Secretary@ftc.gov;

(3) Two (2) copies by hand delivery to Administrative Law Judge D. Michael Chappell, Federal Trade Commission, Room H-106, 600 Pennsylvania Avenue N.W., Washington, D.C. 20580;

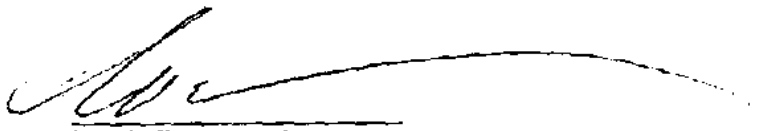
(4) One (1) copy via e-mail attachment in Adobe® ".pdf" format to Commission Complaint Counsel, Laureen Kapin, Joshua S. Millard, Robin Richardson, and Laura Schneider, all care of lkapin@ftc.gov, with one (1) paper courtesy copy via U. S. Postal Service to Laureen Kapin, Bureau of Consumer Protection, Federal Trade Commission, Suite NJ-2122, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

(5) One (1) copy via U. S. Postal Service to Elaine Kolish, Associate Director in the Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580

(6) One (1) copy each via United States Postal Service, separately, to Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker, LLC, Nutrasport, LLC, Sovage Dermalogic Laboratories, LLC, BAN, LLC, Dennis Gay, and Daniel B. Mowrey, Ph.D., each c/o the Compliance Department, Basic Research, LLC, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116.

CERTIFICATION FOR ELECTRONIC FILING

I FURTHER CERTIFY that the electronic version of the foregoing is a true and correct copy of the original document being filed this same day of July, 13, 2004 via hand delivery with the Office of the Secretary, Room H-159, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.



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