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

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	)	**Docket No. 9318**
LABORATORIES, L.L.C.,	)	
BAN, L.L.C.,	)	**PUBLIC DOCUMENT**
DENNIS GAY,	)	
DANIEL B. MOWREY, and	)	
MITCHELL K. FRIEDLANDER,	)	
	)	
Respondents.	)	

COMPLAINT COUNSEL'S MOTION TO STRIKE
RESPONDENTS' "ADDITIONAL DEFENSES"

Pursuant to RULE OF PRACTICE 3.22, Complaint Counsel move to strike the "additional defenses" alleged in Respondents' *Answers*. As fully explained below, Respondents' alleged affirmative defenses: (1) do not satisfy the fact pleading requirement of RULE 3.12(b); (2) are invalid and untenable as a matter of law; and/or (3) are irrelevant and immaterial, serving only to needlessly compound and confuse the issues in this matter. Respondents' alleged defenses have no bearing on the merits of the *Complaint* and should be stricken.

BACKGROUND

On June 15, 2004, the Commission filed a *Complaint* alleging, *inter alia*, that Basic Research LLC 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"). Respondents initially responded by filing separate *Motions for a More Definite Statement.* Administrative Law Judge D. Michael Chappell denied these motions and ordered Respondents to file *Answers* by July 30, 2004. Respondents filed separate *Answers* on the July 30th deadline.

Each of Respondents' *Answers* contains an assortment of "additional defenses" that generally challenge the Commission's decision to issue the *Complaint* and pursue this action. The *Answers* filed by Respondents Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker USA, LLC, Nutrasport, LLC, Sovage Dermalogic Laboratories, LLC, and BAN, LLC (collectively, "Corporate Respondents") each offer the same seven "defenses." Respondent Gay adopts four of those seven alleged defenses in his *Answer.* Respondent Mowrey borrows all seven alleged defenses and adds five of his own. *Pro se* Respondent Friedlander adopts five defenses raised by Mowrey and offers two others. In total, Respondents' *Answers* purport to raise fourteen defenses, many of which revive arguments that Respondents raised in previous motions. Additionally, the *Answers* filed by Corporate Respondents go so far as to deny the unnumbered preamble paragraph of the Commission's *Complaint.* These denials and alleged defenses prompted the present *Motion.*

DISCUSSION

I. Legal Standard for Motion to Strike

The Commission has held that motions to strike portions of answers and affirmative defenses from respondents' answers may be granted in appropriate circumstances. *See In re Warner-Lambert Co.*, 82 F.T.C. 749 (1973). The Administrative Law Judge has authority to strike portions of an answer or affirmative defenses under his general powers to simplify issues

and regulate the course and conduct of proceedings pursuant to RULES OF PRACTICE 3.42 and 3.21. *See In re Volkswagen, Inc.*, No. 9154, slip op. at 1 (July 8, 1981) (attached hereto).

"[A] motion to strike portions of an answer is a long established practice in FTC proceedings and well comports with the important objectives of economy and efficiency of administrative adjudications." *In re Kroger Co.*, No. 9102, 1977 FTC LEXIS 70, *1 (Oct. 18, 1977). Although generally not favored, motions to strike can be quite beneficial because they preserve parties' resources and enhance judicial economy. "Weeding out legally insufficient defenses at an early stage of a complicated law suit may be extremely valuable to all concerned 'in order to avoid the needless expenditures of time and money,' in litigating issues which can be foreseen to have no bearing on the outcome." *Narragansett Tribe v. Southern R.I. Land Dev. Corp.*, 418 F. Supp. 798, 801-02 (D.R.I.1976) (discussing motions to strike defenses).[1] By granting a motion to strike, the Administrative Law Judge can exclude immaterial issues that threaten to expand discovery, to delay the proceedings, or to lead to irrelevant evidence at hearing. *See In re Warner-Lambert Co.*, 82 F.T.C. at 750 (denying appeal from Administrative Law Judge's decision striking affirmative defenses).

The Court may grant a motion to strike where an answer "injects irrelevant or immaterial issues into the case, or makes assertions which are frivolous or clearly invalid as a matter of law." *In re Volkswagen, Inc.*, slip op. at 1 (citing *Warner-Lambert Co.*, 82 F.T.C. at 750-53). A

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[1] *See also United States v. Geppert Bros., Inc.*, 638 F. Supp. 996, 998 (E.D. Pa. 1986) (observing that motions to strike affirmative answers in federal court under FED. R. CIV. P. 12(f) "do serve a useful purpose in eliminating insufficient defenses and thus saving the time and expense which would otherwise be spent"). *Federal Rule of Civil Procedure* 12 provides that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f).

motion to strike will be granted whenever the answer or defense "is unmistakably unrelated or so immaterial as to have no bearing on the issues" and "prejudices Complaint Counsel by threatening an undue broadening of the issues, by requiring lengthy discovery, or by imposing an undue burden on Complaint Counsel." *In re Hoechst Marion Roussel, Inc.*, No. 9293, 2000 FTC LEXIS 137, *1 (Sept. 14, 2000).

II. Respondents' "Additional Defenses" Should Be Stricken Because They Are Invalid, Irrelevant, or Immaterial to the Issues Raised in the *Complaint*

Each "defense" raised by Respondents—addressed *seriatim* below—should be stricken because it is defective. Some of Respondents' "additional defenses" are legally untenable and invalid. Others are irrelevant or immaterial because they are unsupported with statements of fact as required by RULE 3.12(b), and/or are not affirmative defenses in the first place. Respondents have raised these "defenses" as a pretext to challenge the Commission's decision to issue and pursue the *Complaint*. At bottom, however, Respondents' alleged defenses have no bearing on the ultimate question in this proceeding: Whether the Respondents violated the FTC Act by marketing dietary supplements with false or unsubstantiated claims.

A. "Due Process" is Not a Valid Affirmative Defense to Allegations that Respondents Violated the FTC Act

Respondents claim that the due process clause of the *Fifth Amendment* to the *U.S. Constitution* bars this action. This claim is spurious.

The *Fifth Amendment* provides, in pertinent part, that no persons shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. "An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ. v.*

Loudermill, 470 U.S. 532, 542 (1985). As discussed below, Respondents have received, and continue to receive, the notice and opportunity for hearing required by law.

1. Respondents Have Fair Notice of the Commission's Substantiation Standard

Respondents mistakenly argue that they lack "notice" as to the substantiation standard that the Commission applies to their challenged advertisements. They have repeatedly injected this argument into these proceedings through responses to written discovery requests, statements of counsel, and motions denied by this Court.[2] Contrary to Respondents' assertions, however, the Commission has provided fair notice of its substantiation standard.

The Commission has provided notice and guidance to advertisers through its *Policy Statement Regarding Advertising Substantiation* ("*Advertising Substantiation Statement*"), which was appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839-42 (1984). Commission opinions, cease and desist orders, consent decrees, complaints, and publications provide additional notice and guidance regarding the appropriate type and level of substantiation for the advertising claims challenged in the *Complaint*. These documents are available to the public in the official FTC reporter and/or the agency's website. Since the publication of the *Advertising Substantiation Statement*, the Commission has filed at least one hundred actions in the dietary supplement and weight loss area alone, many of which relate to issues of substantiation.[3] Respondents have more

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[2] Complaint Counsel previously addressed Respondents' argument in responding to Respondents' *Motions for a More Definite Statement* and *Motions for Interlocutory Appeal*. Respondents have since raised "vagueness and ambiguity in the standards employed by the Commission" as a general objection to Complaint Counsel's *First Set of Interrogatories*. *E.g.*, Corporate Resp'ts' Resp. to First Set of Interrogs. at 2 (Aug. 16, 2004) (attached hereto).

[3] The Commission also has issued a plain language guide, *Dietary Supplements: An Advertising Guide for Industry*, attached to Complaint Counsel's *Opposition to* (cont.)

than ample notice of the Commission's advertising substantiation requirements.

The requirements for advertising substantiation depend on the nature of the advertised claims—whether the challenged product claims are "establishment claims" (claims that the efficacy of a product has been scientifically proven, *i.e.*, "established") or "non-establishment claims" (simple claims of efficacy). *See Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1492 n.3 (1st Cir. 1989); *Thompson Medical Co. v. FTC*, 791 F.2d 189, 194 (D.C. Cir. 1986).

If an advertisement contains an establishment claim that expressly states the level of evidence supporting the claim or that implies a certain level of support, the Commission requires the advertiser to have at least the level or type of substantiation claimed. *See, e.g., Advertising Substantiation Statement*, 104 F.T.C. at 839; *Thompson Medical Co.*, 791 F.2d at 194; *In re Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 463, *aff'd*, 481 F.2d 246 (6th Cir. 1972). If the claims are more general but nevertheless constitute establishment claims, the Commission compares the advertiser's substantiation evidence to that required by the relevant expert community to see if the claims have been established. *Removatron*, 884 F.2d at 1498.

For non-establishment claims, absent evidence indicating what consumer expectations would be, the Commission assumes that consumers expect a "reasonable basis" for product claims. A reasonable basis for objective product claims is determined by weighing six factors: (1) the type and specificity of the claim; (2) the type of product; (3) the consequences of a false claim; (4) the benefits of a truthful claim; (5) the ease and cost of developing substantiation for the claim; and (6) the level of substantiation experts in the field believe is reasonable. *Advertising Substantiation Statement*, 104 F.T.C. at 839-40; *In re Pfizer, Inc.*, 81 F.T.C. 23, 64

(cont.) *Respondents' Motion for a More Definite Statement.*

(1972). The formulation of the "reasonable basis" standard is determined on a case-by-case basis because each case involves different advertisements, and the level of substantiation required necessarily relates to the level of substantiation expressly or impliedly claimed in the challenged advertisements. *See, e.g.*, *In re Brake Guard Prods., Inc.*, 125 F.T.C. 138, 231-32 (1998); *Removatron Int'l Corp.*, 111 F.T.C. 206 (1988), *aff'd,* 884 F.2d 1489; *In re Pfizer, Inc.*, 81 F.T.C. at 62-64.[4] "[T]here may be some types of claims for some types of products for which the only reasonable basis, in fairness and in the expectations of consumers, would be a valid scientific or medical basis." *Pfizer*, 81 F.T.C. at 64.

Previous Commission and court statements make clear that the reasonableness of Respondents' substantiation for their product claims is determined by the level and amount of substantiation experts in the field believe is reasonable to support the advertised claim, and such substantiation must relate to normal conditions of product use. In the present case, the challenged dietary supplement advertisements refer or relate to scientific studies, articles, and other scientific evidence, and appear to rely on such evidence. *E.g.*, Compl. Exs. A-L. At the hearing in this matter, Complaint Counsel will introduce evidence to show that competent and reliable scientific evidence is required to establish a reasonable basis for the challenged claims. Commission staff have personally and repeatedly advised Respondents' counsel of the evidence that is required to substantiate Respondents' claims. Respondents appear to be burying their

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[4] Notwithstanding these cases, Respondents suggest that only an objective formula or standard would comport with due process. *E.g.*, Answer, Resp't Gay, at 13 (July 30, 2004) (arguing that substantiation standard lacks "any measurable degree of definiteness"). However, courts reviewing the Commission's advertising standards have stated that they will "not require the Commission to attempt to devise a universal formula" to take into account a variety of factual permutations. *See, e.g.*, *Bantam Books, Inc. v. FTC*, 275 F.2d 680, 683 (2d Cir. 1960) (rejecting due process challenge to order requiring disclosure "in clear, conspicuous type").

heads in the sand with respect to the Commission's long-standing substantiation standard, and that is no defense to this action.

2. Respondents' "Notice" or "Vagueness" Argument is Invalid as a Matter of Law

Respondents mistakenly argue in their *Answers* that this administrative proceeding deprives them of due process because the *Complaint* employs a "reasonable basis" substantiation standard that is "vague" or "lack[s] any measurable degree of definiteness." *See* Answer, Resp't Gay, at 8; Answer, Resp't Basic Research, at 13 (July 30, 2004).

Respondents' argument is untenable. To begin, "economic regulation is subject to a less strict vagueness test." *Trans Union Corp. v. FTC*, 245 F.3d 809, 817 (D.C. Cir. 2001) (quoting *Village of Hoffman Estates, v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982)). This is because businesses have economic demands to plan their behavior carefully, and can be expected to review the law before taking action. *See id.*

Review of the law establishes that the formulation of the "reasonable basis" standard is determined on a case-by-case basis, depending on the claims made by the seller and the level of substantiation that experts in the relevant fields consider necessary, among other factors. *See* cases cited *supra* pages 6-7. The Commission has developed a large body of precedent and guidance, both general and case-specific, that gives content to the "reasonable basis" standard and the phrase, "competent and reliable scientific basis." *See, e.g.*, *Bristol-Meyers Co. v. FTC*, 738 F.2d 554, 561 (2d Cir. 1984) (rejecting contention that order defining "reasonable basis" to consist of "competent and reliable scientific evidence" was vague, and noting that, as of that date, Commission had issued "some 21 litigated orders and 126 consent orders involving

advertising substantiation using equivalent language").[5]

Applying the Commission's precedents and guidance, the federal courts have repeatedly upheld substantiation standard in response to challenges of "vagueness." *See Thompson Medical Co.*, 791 F.2d at 194-96; *Sterling Drug, Inc. v. FTC*, 741 F.2d 1145, 1156-57 (9th Cir. 1984); *Bristol-Meyers Co.*, 738 F.2d at 561.[6] The weight of authority does not support Respondents' contention that the terms employed in the *Complaint* "lack any measurable degree of definiteness" and thereby offend due process.

Respondents' "notice" or "vagueness" argument is not a defense to the *Complaint*. This "defense" flies in the face of Commission opinions, orders, and policy statements or publications such as those discussed above. It also overlooks the fact that Respondents' own advertisements contain efficacy claims purportedly supported by scientific evidence. Respondents have ample notice of the substantiation standard applicable to this matter.

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[5] In their *Answers*, Respondents also appear to suggest that this matter should be the subject of a rulemaking procedure. However, the Commission is not required to proceed by rulemaking in order to enforce the FTC Act. "[T]he choice between rulemaking and adjudication lies in the first instance in the [agency]'s discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1251 (2d Cir. 1979). The Commission carefully considered and rejected arguments remarkably similar to those presented here by Respondents when it denied a formal petition for rulemaking pursuant to RULE OF PRACTICE 1.9. *See* Letter from Federal Trade Commission to Jonathan W. Emord, Esq. (Nov. 30, 2000) (attached hereto). This litigation is *not* the proper forum to challenge the Commission's determination, or to conduct discovery related thereto.

[6] In *American Home Products Corp. v. FTC*, 695 F.2d 681 (3d Cir. 1982), the Third Circuit vacated one part of an FTC order requiring "competent and reliable scientific evidence" as a reasonable basis for non-establishment claims, citing vagueness and overbreadth concerns. Later Court of Appeals declined to follow this decision and expressly distinguished it. *See Thompson Medical Co.*, 791 F.2d at 196; *Sterling Drug, Inc.*, 741 F.2d at 1156; *Bristol-Myers Co.*, 738 F.2d at 560-61. Moreover, Respondents have the benefit of additional guidance on the Commission's substantiation standard that has been developed in the intervening 22 years.

3. Respondents Are Being Afforded Due Process

The root requirement of the due process clause is that an individual be afforded the opportunity for a hearing before being deprived of any significant property interest. *Cleveland Bd. of Educ.*, 470 U.S. at 542. It defies credulity for Respondents to suggest that this administrative proceeding violates the tenets of due process.

Respondents have been fully appraised of the nature and details of their alleged violations of the FTC Act, and they will have an opportunity to present evidence at trial. If there is any good faith difference of opinion as to the appropriate level of substantiation for Respondents' dietary supplement advertising, the purpose of the administrative hearing process is to examine relevant evidence and to determine whether Respondents' proffered substantiation provides a reasonable basis for their claims. *See Advertising Substantiation Statement*, 104 F.T.C. at 840.

The present proceeding is precisely the type of "due process" required by the Constitution and sanctioned by the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* ("APA"). Federal courts have routinely rejected arguments that due process has been violated, absent a concrete showing that respondents were precluded from understanding the allegations and from presenting their defense. *See Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1435 (9th Cir. 1986); *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1173 (1st Cir. 1973).

The sole effect of the Commission's *Complaint* is to require Respondents to appear and defend themselves. The costs and inconvenience of litigation do not constitute a violation of due process. *See FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) ("expense and annoyance of litigation is 'part of the social burden of living under government'") (citations omitted); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) (finding that litigation

expense does not constitute irreparable injury); *Reichenberger v. Pritchard*, 660 F.2d 280, 285 (7th Cir. 1981) ("The legal fees expended by the plaintiffs in the administrative proceedings cannot qualify as constitutional injury absent a showing of deprivation of constitutional magnitude."). Respondents' alleged due process "defense" should be stricken.

B. The *First Amendment* is Not a Valid Affirmative Defense to Allegations that Respondents Violated the FTC Act with Deceptive and Misleading Commercial Speech

Notwithstanding the Commission opinions, orders, and policy statements or publications providing notice of the substantiation standard, Respondents contend that their "notice" argument actually rises to a *First Amendment* free speech claim. This defense is invalid as well.

1. The *First Amendment* Does Not Protect Deceptive Commercial Speech

The *First Amendment* does not give Respondents a license to engage in deceptive commercial speech.[7] The Supreme Court has recognized that truthful commercial speech is immune from government regulation, but this does *not* extend to deceptive speech whose restriction advances a substantial interest. "The government may ban forms of communication more likely to deceive the public than to inform it." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563-66 (1980); *see also Virginia State Bd. of Pharm. v. Virginia Citizens Cons. Council, Inc.*, 425 U.S. 748, 771-72 (1976). Deceptive commercial speech disserves society and consumers' interests "in the free flow of commercial information," which

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[7] Respondents essentially have conceded that the challenged claims are commercial speech. *E.g.*, Answer, Resp't Basic Research, at 13. This concession immediately distinguishes this case from several other cases that have evaluated the *First Amendment* as a potential affirmative defense. *See In re Superior Ct. Trial Lawyers Ass'n*, 107 F.T.C. 510 (1986) (rejecting contention that boycott was political action protected by *First Amendment*); *In re Rodale Press, Inc.*, 71 F.T.C. 1184 (1967) (rejecting contention that advertisements for book were immunized from Commission scrutiny by *First Amendment*).

ensures the sharing of information essential to the "proper allocation of resources" in the economy. *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 43 (D.C. Cir. 1985).

2. The *First Amendment* Is Not a Valid Affirmative Defense to Allegations of Deceptive Commercial Speech

The *First Amendment* does not provide a valid affirmative defense to the *Complaint*'s allegations of deceptive and misleading speech. An affirmative defense is an assertion that will defeat the legal cause of action, "even if all allegations in the complaint are true." *Emergency One, Inc. v. American Fire Eagle Engine Co.*, 332 F.3d 264, 271 (4th Cir. 2003); *see Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir.2003). Respondents allegedly made deceptive and misleading claims for dietary supplements offered for sale in the United States. *See* Compl. ¶¶ 10, 16, 19, 22, 24, 26, 30, 32, 35, 39, 41, 43, 44. If these allegations are true, Respondents engaged in deceptive and misleading commercial speech, which is not protected by the *First Amendment*. *See* cases cited *supra* page 11. This Court should strike Respondents' invalid defense. *See, e.g., In re Metagenics, Inc.*, 1995 FTC LEXIS 2, *2 (Jan. 5, 1995) (striking affirmative defense that claimed that the proposed order would violate respondents' commercial free speech rights and would also be arbitrary and capricious).[8]

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[8] We respectfully aver that the *Metagenics* decision is more persuasive than the decision in *Kroger Co.*, which declined to strike a *First Amendment* defense. *Compare In re Metagenics, Inc.*, 1995 FTC LEXIS 2, *2 *with In re Kroger Co.*, 1977 FTC LEXIS 70, *5. The more recent *Metagenics* decision related to dietary supplement advertising, unlike the *Kroger* decision, which related to price advertising by a grocer. *Kroger* acknowledged that "the *First Amendment* does not sanction false or misleading advertisements," but nonetheless allowed the respondent to raise that provision as an affirmative defense. *See In re Kroger Co.*, 1977 FTC LEXIS 70, *5 (citing *Virginia State Bd. of Pharm.*, 425 U.S. at 771-72 n.24). The *Kroger* decision did not reconcile its outcome with the Supreme Court precedent that it cited.

3. The Commission's Substantiation Standard Does Not Chill or Infringe Protected Speech

The Commission has authority to regulate deceptive and misleading commercial speech, including unsubstantiated advertisements.[9] Federal courts have rejected the contention that the FTC Act does not encompass deceptive acts and practices "with respect to prior substantiation and lack of substantiation for the assertion[s] made." *E.g.*, *Jay Norris, Inc.*, 598 F.2d at 1252 (internal citations omitted):

> The use of the requirement of substantiation as regulation is clearly permissible. . . . [M]isleading commercial speech[] is clearly subject to restraint. Only because of petitioners' business practices is truthful speech indistinguishable from deceptive speech except by reference to reasonable substantiation for the representations.

Requiring Respondents to have a reasonable basis for their claims does not chill free speech. When the *Jay Norris, Inc.* matter was before the Commission, it considered whether requiring a company to have a reasonable basis for all claims relating to "safety, efficacy, performance, content, or any other characteristic of any product" infringed on free speech. The Commission concluded as follows:

> Respondents' argument appears to stem from the fear that the cost of acquiring a reasonable basis which they feel confident meets the order's requirements will chill their dissemination of truthful advertising claims. Yet, as the previously cited decisions emphasize, more reliable information enhances the flow of truthful advertising and furthers *First Amendment* interests. Since advertisers are in a far better position than consumers to verify the accuracy of their claims, it is only reasonable that they bear the burden of such verification.

In re Jay Norris, Inc., 91 F.T.C. 751, 854 (1978) (referring to, *inter alia*, *Virginia State Bd. of*

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[9] Further, the Commission has authority to regulate deceptive and misleading commercial speech regardless of whether consumers are expressly misled, or misled by implied claims. *See, e.g.*, *Removatron Int'l Corp. v. FTC*, 884 F.2d at 1492.

Pharm., 425 U.S. at 781). On appeal, the Second Circuit agreed with the Commission's reasoning, concluding that substantiation requirements are not an undue burden on sellers because a seller is "in a better position than consumers to evaluate . . . performance claims for products sold by it." *Jay Norris, Inc.*, 598 F.2d at 1250; *see Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 399 (9th Cir. 1982) (adopting Second Circuit's conclusion).

This conclusion applies with equal force to the present matter. Requiring Respondents to have a "reasonable basis" for their product claims serves *First Amendment* interests, and does not violate them. This Court should strike Respondents' invalid defense.

3. Entry of an *Order* Will Not Violate the *First Amendment*

If this Court finds that Respondents have engaged in deceptive speech as alleged in the *Complaint*, entry of an *Order* will not violate Respondents' rights.[10] Once an unfair or deceptive trade practice is found, the Commission has wide discretion to fashion an effective cease and desist order, including broad "fencing in" provisions to deter future violations: "All that is necessary is that the Commission's remedial orders have a 'reasonable relation' to the unlawful practices found to exist. And an order should ordinarily not be modified or narrowed because of hypothetical situations where lawful conduct could conceivably be prohibited by the cease and desist order." *Thiret v. FTC*, 512 F.2d 176, 180-81 (10th Cir. 1975) (citing, *inter alia*, *FTC v. National Lead Co.*, 352 U.S. 419, 428-29, 431 (1957)); *see also United States v. Reader's Digest Ass'n, Inc.*, 662 F.2d 955, 965 (3d Cir. 1981) ("Any remedy formulated by the FTC that is reasonably necessary to the prevention of future violations does not impinge upon

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[10] Alternatively, if Respondents prevail on the merits and obtain a finding that they did not make deceptive claims, the Court will issue an *Order* dismissing the case, which likewise will not infringe on Respondents' rights.

constitutionally protected commercial speech."). The proposed *Order* explicitly requires Respondents to comply with Sections 5 and 12 of the FTC Act, which they are already obliged to do. *See Jay Norris, Inc.*, 598 F.2d at 1250. Neither the *Complaint* nor the proposed *Order* infringe on protected, truthful commercial speech.

Respondents' statement that their advertisements are "protected commercial speech" avers, in essence, that their advertisements are not deceptive or misleading. This is a redundant denial of the Complaint's allegations, not an affirmative defense. Respondents alleged no facts to support their broad, highly generalized claim, and requiring Respondents to have a reasonable basis for their claims serves *First Amendment* interests. Respondents' alleged free speech "defense" is not a valid affirmative defense and it should be stricken.

C. Redundant and Conclusory Allegations of "Improper Agency Action" and/or "Arbitrary and Capricious Agency Action" Are Not Valid Affirmative Defenses to Allegations that Respondents Violated the FTC Act

Respondents' next two "defenses" restate their "notice" argument, which was invalid for multiple reasons, as discussed above. The only innovation here is a pair of citations to the APA, Title 5, *United States Code*, Sections 701 and 706,[11] and a sweeping conclusion: "[T]his enforcement action constitutes agency action that is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, contrary to constitutional right, and/or without observance of procedure required by law." *E.g.*, Answer, Resp't Basic Research, at 14.[12] Respondents seek

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[11] The APA provides for judicial review of "final agency action," 5 U.S.C. § 704, defined to include an agency "rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13).

[12] Respondent Mowrey twice raised "arbitrary and capricious agency action" as a "additional defense"; once separately and then again as an example of "improper agency action." *See* Answer, Resp't Daniel B. Mowrey, at 7, 8 (July 30, 2004).

to "try the prosecutor." However, these allegations are not valid affirmative defenses under the APA or the RULES OF PRACTICE to alleged violations of the FTC Act.

First and foremost, Respondents' defenses are invalid because "[t]he Commission's issuance of its complaint is not 'final agency action.'" *Standard Oil Co.*, 449 U.S. at 239. The Supreme Court has held that issuance of a *Complaint* averring reason to believe that a Respondent has violated the FTC Act is not "final agency action" under Section 10 of the APA. Accordingly, it is *not* subject to review until administrative adjudication concludes. *See Standard Oil Co.*, 449 U.S. at 239-42. Respondents' alleged defenses relying on the APA are legally invalid.

Second, the RULES OF PRACTICE impose basic pleading requirement for affirmative defenses. They require that *Answers* contain "[a] concise *statement of the facts* constituting each ground of defense." RULE 3.12(b)(1)(i) (emphasis added). Although many of Respondents' alleged "defenses" fail to satisfy the factual pleading requirement, Respondents' bald, conclusory assertions here regarding "improper agency action" and/or "arbitrary and capricious agency action" flagrantly disregard RULE 3.12(b)(1)(i). Respondents' assertions here are not a concise statement of facts; they are sweeping conclusions of law.

Lastly, these alleged defenses are completely irrelevant to Respondents' obligations, as marketers of the challenged advertisements, to ensure that their advertising complies with the FTC Act. *See In re Metagenics, Inc.*, 1995 FTC LEXIS 2, *2-3 (striking affirmative defense alleging that proposed order would be arbitrary and capricious). Respondents are not entitled to "try the Commission." Their alleged defenses of "improper" or "arbitrary and capricious" agency action are invalid and immaterial. These defenses should be stricken.

D. "Unreasonable Delay for Political Reasons" is Not a Valid Affirmative Defense to Allegations that Respondents Violated the FTC Act

Respondents, except for Mr. Gay and Mr. Friedlander, contend that the Commission unreasonably delayed bringing this case for "political or otherwise improper reasons," prejudicing their "ability . . . to present their case," and thereby violating the Administrative Procedure Act, 5 U.S.C. § 555(b). This alleged "political defense" is invalid and must be stricken for several reasons.

First, Respondents' "political defense" is plainly unsupported by any "*statement of the facts* constituting each ground of defense." RULE 3.12(b)(1)(i) (emphasis added). Respondents did *not* state facts to show that the staff's investigation was allegedly unreasonable in length.

Second, even if Respondents had recited the entire history of the Commission's nearly four-year long investigation (an investigation that involved a multitude of companies related to Respondents, dozens of dietary supplements, and numerous products introduced during the investigation whose claims necessitated further inquiry), there still would be no valid affirmative defense. Significantly longer investigations have been held not to violate due process or federal law. *See, e.g.*, *Gibson v. FTC*, 682 F.2d 554, 560 (5th Cir. 1982) (rejecting appellants' contention that they were denied due process by thirteen-year delay preceding federal court review, including eight-year delay between commencement of investigation and issuance of administrative complaint).

Third, Respondents' alleged "defense" is completely immaterial to the merits of the *Complaint*. This "political defense" clearly threatens an undue broadening of discovery far beyond the issues actually raised by the *Complaint*. Defenses that tend to significantly complicate

litigation are particularly vulnerable to a motion to strike. *See Narragansett Tribe*, 418 F. Supp. 798, 801-02 (D.R.I. 1976). This defense should be stricken.

E. "FTC Has No Reason to Believe" or "FTC is Not Acting in the Public Interest" Are Not Valid Affirmative Defenses to Allegations that Respondents Violated the FTC Act

Respondents, except for Mr. Gay and Mr. Friedlander, raise the discredited "defense" that the Commission applied a "vague" substantiation standard and "failed properly to reach the required determination that it had 'reason to believe' Respondent[s] . . . violated the [FTC] Act," thereby bringing a case "not to the interest of the public." *E.g.*, Answer, Resp't Basic Research, at 14, 15.[13] Here, Respondents tacitly concede that they want to conduct discovery related to the Commission's deliberations instead of their own alleged violations of law.

It is well-established that the adequacy of the Commission's "reason to believe" that violations of the FTC Act have occurred and the Commission's belief that a proceeding to stop alleged violations would be "in the public interest" are *not* subject to review here. *See In re Boise Cascade Corp.*, 97 F.T.C. 246, 246-47 (1981); *In re Exxon Corp.*, 83 F.T.C. 1759, 1760 (1974). These determinations relate to the mental processes of the Commission and are improper subjects for trial. 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." *In re Exxon Corp.*, 83 F.T.C. at 1760 (emphasis added); *see also In re General Motors Corp.*, 99 F.T.C. 464, 550 (1982) (citing *Exxon Corp.*); *In re Boise Cascade Corp.*, 97 F.T.C. at 246-47 (same).

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[13] Like many of Respondents' arguments, this "defense" pointedly ignores numerous Commission opinions, orders, and publications providing fair notice of the substantiation standard. *See supra* pages 5-9.

Respondents cannot raise the Commission's "reason to believe" and "public interest" determinations as issues for trial. The *Complaint* states that the Commission did, in fact, determine that it had reason to believe that Respondents had violated the FTC Act and that issuance of the *Complaint* would serve the interests of the public. *See* Compl. at 1. "The issuance of the complaint is definitive on the question whether the Commission avers reason to believe that the respondent is violating the Act." *Standard Oil Co.*, 449 U.S. at 241. Similarly, the Commission's public interest determination cannot be litigated here. *See In re Brake Guard Prods., Inc.*, 125 F.T.C. at 247, 248 n.37 ("in issuing the complaint the Commission made its own determinations of public interest"; whether others "contacted the Commission to complain about the respondents' claims has no bearing either on the public interest of the proceeding or on the merits of the case"); *In re Exxon Corp.*, 83 F.T.C. at 1760; *In re TK-7 Corp.*, No. 9224, 1989 FTC LEXIS 32, *3-4 (May 3, 1989).

Although the Commission, and the Courts of Appeals, may review the Commission's public interest determinations in "extraordinary circumstances,"[14] no such circumstances are present here, and none were suggested in Respondents' *Answers*. Respondents failed to comply with RULE 3.12(b)(1)(i) by offering facts to support their contentions that the *Complaint* is not in the public interest. It would impose an undue and unjust burden on Complaint Counsel if Respondents were permitted to "try the prosecutor" and conduct discovery on an imagined but undescribed factual issue, particularly when the Commission's public interest determination

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[14] *See In re Brake Guard Prods., Inc.*, 125 F.T.C. at 247; *In re Boise Cascade Corp.*, 97 F.T.C. at 247 n.3; *see also Cotherman v. FTC*, 417 F.2d 587, 594 (5th Cir. 1969) (noting that public interest determination may be reviewed by appellate court only for abuse of discretion).

cannot be litigated here.[15]

There is ample precedent for striking affirmative defenses that challenge the Commission's conclusion that there is "reason to believe" a violation has occurred and that issuance of a complaint is "in the public interest." *See, e.g.*, *In re Metagenics, Inc.*, 1995 FTC LEXIS 2, at *1; *In re Volkswagen, Inc.*, slip op. at 4; *cf. In re Hoechst Marion Roussel, Inc.*, No. 9293, 2000 FTC LEXIS 137, *12 (Sept. 14, 2000) (striking "reason to believe" defense and allowing only limited discovery for alleged "public interest" defense). Respondents' defenses challenging the Commission's decision to issue and pursue the *Complaint* should be stricken.

F. "Puffery" is Not a Valid Affirmative Defense to Allegations that Respondents Violated the FTC Act

Respondents, except for Mr. Gay and Mr. Friedlander, contend that the *Complaint* contains claims that are "puffery . . . not likely to mislead a reasonable consumer." *E.g.*, Answer, Resp't Basic Research, at 14. Like the Respondents' alleged *First Amendment* defense, this "puffery" defense is not an *affirmative* defense, valid or otherwise, in the first place. It is a *negative* defense—one that reiterates Respondents' denials of the *Complaint*'s allegations—and should be stricken as immaterial and redundant.

Respondents' *Answers* appear not to recognize the difference between affirmative and negative defenses. As previously noted *supra* page 12, in an affirmative defense, the defendant asserts that, for the reasons set forth in the defense, the defendant should prevail even if all of the allegations of the complaint are true. *See Emergency One, Inc.*, 332 F.3d at 271; *see also*

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[15] Respondents may well argue that this affirmative defense, or others, should not be stricken until they have the opportunity to conduct discovery. This Court should not allow Respondents to use conclusory allegations to launch a campaign to discover prejudice that they were incapable of articulating in their *Answers*.

Instituto Nacional de Comercializacion Agricola v. Continental Illinois Nat'l Bank & Trust Co., 576 F. Supp. 985, 988 (N.D. Ill. 1983). A negative defense, on the other hand, directly denies the allegations in the complaint. Such a defense is redundant and should be stricken where it reasserts one of the defendant's specific denials to the allegations of the complaint. *See Continental Illinois*, 576 F. Supp. at 991; *see also* 2 MOORE'S FEDERAL PRACTICE § 12.37(3).

Respondents' "defense" of "puffery . . . not likely to mislead a reasonable consumer" directly denies the allegations in the *Complaint* that Respondents' advertisements were, in fact, misleading. *See* Compl. ¶¶ 16, 19, 22, 24, 26, 30, 32, 35, 39, 41, 43. This is a negative defense, for if all of the allegations of the *Complaint* are true, Respondents' advertisements were, in fact, misleading and were *not* puffery. Respondents' puffery "defense" is not an affirmative defense, and it should be stricken. *See Image Sales & Consultants*, 1997 U.S. Dist. LEXIS 18942, *10 (N.D. Ind. Sept. 17, 1997) (striking affirmative defense as surplusage because defendants were "repeating their earlier denials of wrongdoing").

G. Lack of Dissemination, Causation, or Interstate Commerce Are Not Valid Affirmative Defenses to Allegations that Respondents Violated the FTC Act

Respondent Mowrey raises several other "defenses," asserting that he did not disseminate any of the challenged advertisements, cause them to be disseminated, or "act in or personally affect interstate commerce." Answer, Resp't Daniel B. Mowrey, at 7, 8. Respondent Friedlander joins Mowrey with respect to the first of these three "defenses." None of these alleged defenses are affirmative defenses to the *Complaint*. Again, these are negative defenses, which directly deny the allegations of the *Complaint*. *See* Compl. ¶¶ 12 (alleging interstate "commerce"), 13, 27, 36 (alleging "dissemination" or having "caused to be disseminated"). As previously

discussed, these are redundant denials, and should be stricken as such. *See Image Sales & Consultants*, 1997 U.S. Dist. LEXIS 18942, *10; 2 MOORE'S FEDERAL PRACTICE § 12.37(3).[16]

H. Laches and Estoppel are Not Valid Affirmative Defenses to Allegations that Respondents Violated the FTC Act

Respondents' alleged defenses of laches or estoppel are invalid because they cannot be asserted in a case brought by a government agency to enforce an act of Congress for the public. Respondents Gay and Mowrey raise laches as a defense, but laches is not a defense to a civil suit to protect a public interest. *United States v. Summerlin*, 310 U.S. 414, 416 (1939); *United States v. Ruby Co.*, 588 F.2d 697, 705 n.10 (9th Cir. 1978). Courts have often stricken this defense when asserted in FTC actions. *See FTC v. American Microtel, Inc.*, 1992 U.S. Dist. LEXIS 11046, *3 (D. Nev. June 10, 1992); *In re Rentacolor, Inc.*, 103 F.T.C. 400, 418 (1983); *In re Metagenics, Inc.*, 1995 FTC LEXIS at *3 (citing other cases). Similarly, Respondent Mowrey alone raises estoppel as a defense, but estoppel is not a valid defense. "[P]rinciples of equitable estoppel are not available as defenses in a suit brought by the government to enforce . . . a public interest." *American Microtel, Inc.*, 1992 U.S. Dist. LEXIS 11046, *3; *see also Ruby Co.*, 588 F.2d at 705 n.10. These defective defenses should be stricken.

I. Generalized Complaints and Unfounded, Immaterial Accusations of Personal Bias Are Not Valid Affirmative Defenses to Allegations that Respondents Violated the FTC Act

Pro se Respondent Friedlander alone advances two arguments as "additional defenses."

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[16] Additionally, these alleged "defenses" do not extinguish Respondent Mowrey or Friedlander's potential liability. The Commission may obtain both injunctive and other equitable relief from Respondents Mowrey or Friedlander if they: (1) had knowledge of the unlawful conduct; (2) directly participated in the unlawful acts; (3) the deceptive or misleading statement was of a type upon which a reasonable person would rely; and (4) consumer injury resulted. *See FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989).

These arguments are not valid defenses; they are invective, by and large, and should be stricken.

First, Respondent Friedlander reintroduces Respondents' previous "notice" argument with the caption, "inherently unfair complaint allegations." He contends that, "by denying Respondent's *Motion for a More Definite Statement*[,] the Administrative Law Judge has reinforced and enhanced the inherent unfairness that infects this entire administrative proceeding." Answer, Resp't Friedlander, at 7-8.

This argument fails for reasons already stated. Respondents, including Mr. Friedlander, have ample notice of the substantiation standard applicable in this matter. *See supra* pages 5-9; *cf. In re Eastern Detective Academy, Inc.*, 78 F.T.C. 1428 (1971) (citing *pro se* respondents' *Motion for a More Definite Statement* as an "example of respondents' familiarity with their rights and with the issues in the complaint"). Respondents have tried to wrap their "notice" argument in the garb of due process, free speech, and the APA, in the apparent hope of fatiguing the reader into accepting one of these arguments as a potential defense. As the preceding analysis has demonstrated, none of these arguments are valid affirmative defenses to the *Complaint*.

Second, Respondent Friedlander alleges that former FTC Chairman Timothy J. Muris engaged in bias and impropriety by failing to timely disqualify himself from the Commission's consideration of Respondents. Answer, Resp't Friedlander, at 8-9. This "defense" should be stricken because it makes groundless assertions and injects immaterial issues into this case.

The record clearly reflects that former Chairman Muris recused himself from this case. *See* Federal Trade Commission, Press Release, at 2 (June 16, 2004) ("The Commission vote to file the administrative complaint was 4-0, with Chairman Timothy J. Muris not participating.") (attached hereto). Respondent Friedlander has not stated facts to support his defense. If this

"defense" is not stricken, it could transform discovery and the hearing itself into a proceeding focused not on the merits of the *Complaint* but on the imagined actions of former Chairman Muris. The Court should strike this alleged defense, which is both immaterial to this matter and "impertinent" or "scandalous" in nature, to use the terminology of *Federal Rule* 12(f).

In sum, Respondents' alleged defenses threaten an undue broadening of the issues that would foster unnecessary discovery and consume Complaint Counsel's time and resources.

J. Corporate Respondents' Denial of the Preamble to the *Complaint* Should Likewise Be Stricken

Finally, Corporate Respondents reached out in their *Answers* to deny the *Complaint*'s preamble, which states that the Commission has reason to believe that Respondents have violated the FTC Act and that this proceeding is in the public interest. *E.g.*, Answer, Resp't Basic Research, at 2. Respondents cannot contest, in this proceeding, the Commission's stated grounds for initiating these proceedings. *See supra* pages 17-20. Accordingly, their denials of the unnumbered preamble paragraph of the *Complaint* should be stricken. *See, e.g., In re Volkswagen, Inc.*, slip op. at 7 (striking respondents' denial of preamble paragraph).

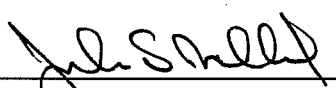
CONCLUSION

After repeated delays stretching over six weeks, Respondents have chosen to frame responses to the *Complaint* with alleged defenses rife with "redundant, immaterial, impertinent, or scandalous matter[s]," FED. R. CIV. P. 12, that have no bearing on the true question in these proceedings—whether Respondents actually violated the FTC Act as alleged in the *Complaint*.

Respondents' alleged defenses are legally untenable, devoid of factual statements, irrelevant and immaterial. Some are negative defenses, which are not affirmative defenses at all.

None of Respondents' "defenses" are valid. They are simply invitations to a frivolous side show, seemingly calculated to consume Complaint Counsel's resources and to distract the Court from the merits of the *Complaint*. Respondents should not be allowed to divert the parties' resources, and those of this Court, from the case at hand. For the reasons set forth above, and in the interest of judicial efficiency and economy, this Court should strike all of Respondents' invalid defenses and Corporate Respondents' denial of the unnumbered preamble paragraph of the *Complaint*.

Respectfully submitted,



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Dated: August 20, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2004, I caused *Complaint Counsel's Motion to Strike Respondents' Alleged "Additional Defenses"* to be served and filed as follows:

(1) the original, two (2) paper copies filed by hand delivery and one (1) electronic copy via email 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 Stephen J. McGuire
Administrative Law Judge
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(3) one (1) electronic copy via email and one (1) paper copy by first class mail to the following persons:

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