

**UNITED STATES OF AMERICA
BEFORE 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 LABORATORIES, L.L.C.,)

d/b/a BASIC RESEARCH, L.L.C.,)

OLD BASIC RESEARCH, L.L.C.,)

BASIC RESEARCH, A.G. WATERHOUSE,)

BAN, L.L.C.,)

d/b/a KLEIN-BECKER USA, NUTRA SPORT, and)

SOVAGE DERMALOGIC LABORATORIES,)

DENNIS GAY,)

DANIEL B. MOWREY,)

d/b/a AMERICAN PHYTOTHERAPY RESEARCH)

LABORATORY, and)

MITCHELL K. FRIEDLANDER)

DOCKET NO. 9318

PUBLIC DOCUMENT

**REQUEST FOR ORAL ARGUMENT OR, IN THE ALTERNATIVE,
FOR PERMISSION TO FILE A SUR-REPLY**

Respondents Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker USA, LLC, Nutrasport, LLC, Sövage Dermalogic Laboratories, LLC, Ban, LLC, Dennis Gay, Daniel B. Mowrey, Ph.D and Mitchell K. Friedlander (collectively "Respondents"), request oral argument pursuant to RULE OF PRACTICE 3.22. Complaint Counsel's Reply to Respondents' Opposition to Motion to Strike Respondents' Additional Defenses (the "Motion") goes beyond the scope of

Complaint Counsel's Motion and raises new issues, including (a) whether the FTC's Complaint truly alleges a falsity theory of liability—or whether the FTC is simply restating its position that Respondents allegedly do not have “competent and reliable scientific evidence” in support of their alleged claims (*see* Reply at 13), and (b) whether the Commission's *Policy Statement on Advertising Substantiation* and the competent and reliable scientific evidence standard applied to dietary supplement and weight-loss claims constitute “final agency action” (*see* Reply at 9-10). The FTC's argument that its published *policy decision* and *standard of liability* that form its substantiation program do not represent the “consummation” of the agency's decisionmaking process; that the rights and obligations of advertisers are not “determined” by the FTC's policy decision and advertising standard; and that “legal consequences” do not “flow” from the FTC's adoption of its substantiation doctrine and competent and reliable scientific evidence standard is **fallacious**, particularly given that the Commission openly refused to modify its substantiation program in response to rulemaking petitions (*see* Reply at 6). The controlling case is not *Ticor Title Inc., Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1986), which did not concern the constitutionality of the FTC's interpretation and implementation of its delegated authority under Section 5 and 12 of the FTC Act, and where the majority of the panel did not agree with Justice Edwards' concurring opinion on the issue of finality. The controlling cases are *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and *Bennett v. Spears*, 520 U.S. 154 (1997), the Supreme Court cases followed by the D.C. Circuit decisions cited in Respondents' Opposition, *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000), *McGlouth Steel Products Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988), and *Ciba-Geigy v. EPA*, 801 F.2d 430 (D.C. Cir. 1986). These cases make clear that the FTC's policy decisions and standards interpreting and implementing

the FTC's delegated authority under Sections 5 and 12 of the Federal Trade Commission Act constitute "final agency action" ripe for immediate review.

Complaint Counsel's Reply also does not address numerous points made by Respondents in their Opposition, including the fact that Complaint Counsel has not cited a single case considering the First and Fifth Amendment arguments raised by Respondents, let alone addressing the recent Supreme Court decisions cited by Respondents,¹ which have all but reversed *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the case which forms the cornerstone of the Commission's regulation of commercial speech, which includes protected speech. Complaint Counsel all but concedes that its substantiation program regulates protected speech, including potentially misleading speech. Complaint Counsel only argues that the prior restraint doctrine (or some other form of strict scrutiny) should not apply, but rather the *Central Hudson* intermediate scrutiny test should apply. See Reply at 13-14.

Moreover, Complaint Counsel does not cite a single case discussing Respondents' Circuit Court decisions *Pearson v. Shalala*, 146 F.3d 650 (D.C. Cir. 1999), *American Home Prods Corp. v. FTC*, 695 F.2d 681 (3d Cir. 1983), and *Women's Medical Center of Northwest Houston v. Bell*, 248 F.3d 411 (5th Cir. 2001), as this precedent applies to the FTC's regulatory scheme, which (a) deprives advertisers of the opportunity to judge their commercial speech against a quantifiable and measurable standard before speaking, and the opportunity to avoid coercive law enforcement action if, in hindsight, the FTC contends that the advertiser's speech was potentially misleading, (b) embodies a policy of suppressing, not correcting, potentially misleading speech,

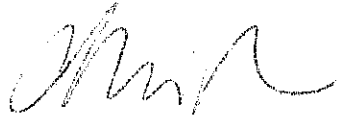
¹ *Kolender v. Lawson*, 461 U.S. 352 (1983); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *Ibanez v. Florida Department of Business and Professional Regulation*, 512 U.S. 136 (1994); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); and *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

thus having the same infirmity as the pre-approval scheme held unconstitutional in *Pearson*, without the benefit of protecting consumers, and (c) relies upon the after-the-fact opinions of third parties in applying the FTC's intentionally vague and ambiguous regulatory scheme. In each one of the cases cited in Complaint Counsel's Motion, the Circuit Courts **expressly limited** their holding to the particular cease and desist order at issue—which is apparently why Complaint Counsel in its Reply resorts to citing *the Commission's own refusal* to comply with the holding in *Pearson* as the **sole authority** for Complaint Counsel's argument that *the Commission's regulatory scheme* is "different" and constitutional (*see* Reply at 6). As plainly pointed out in Respondents' Opposition at page 13, Complaint Counsel's cases, *Bristol-Meyers Co. v. FTC*, 738 F.2d 554 (2nd Cir. 1984), *Thompson Medical Co.*, 791 F.2d 189 (D.C. Cir. 1986) and *Sterling Drug, Inc. v. FTC*, 741 F.2d 1145 (9th Circ. 1984), are easily distinguished.

Respondents respectfully request the opportunity to address these and other arguments made by or omitted in Complaint Counsel's Reply. Respondents believe that oral argument is necessary and appropriate to fairly resolve Complaint Counsel's Motion, and will benefit and assist the Court in its resolution of (a) whether it has the authority to resolve the substance of Complaint Counsel's effort to strike Respondents' Constitutional and APA defenses, (b) whether Respondents' Additional Defenses are procedurally "invalid" or "untenable" as pled, and if so, (c) whether Respondents are entitled to leave to amend any stricken defense. Alternatively, if the Court does not wish to have oral argument, Respondents' respectfully request the opportunity to file a sur-reply within five (5) business days following entry of an order granting this request. Respondents incorporate by this reference the authority cited and reasoning relied upon by

Complaint Counsel in moving for the opportunity to file a Reply as further support for Respondents' instant request for oral argument or opportunity to file a sur-reply.

Respectfully submitted,



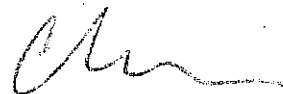
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LLC and Ban, LLC

CERTIFICATE OF SERVICE

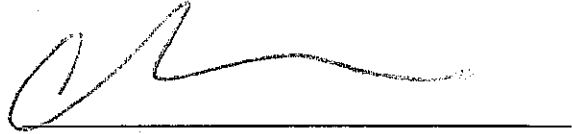
I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 21st day of September, 2004 as follows:

- (1) One (1) original and one (1) copy by Federal Express 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 Federal Express to Administrative Law Judge Stephen J. McGuire, Federal Trade Commission, Room H-104, 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, and Laura Schneider, all care of lkapin@ftc.gov, jmillard@ftc.gov; r-richardson@ftc.gov; lschneider@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 via United States Postal Service to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 3225 Aviation Avenue, Suite 301, Miami, Florida 33131.
- (7) One (1) copy via United States Postal Service to Richard Burbidge, Esq., Jefferson W. Gross, Esq. and Andrew J. Dymek, Esq., Burbidge & Mitchell, 215 South State Street, Suite 920, Salt Lake City, Utah 84111, Counsel for Dennis Gay.
- (8) One (1) copy via United States Postal Service to Ronald F. Price, Esq., Peters Scofield Price, A Professional Corporation, 340 Broadway Centre, 111 East Broadway, Salt Lake City, Utah 84111, Counsel for Daniel B. Mowrey.
- (9) One (1) copy via United States Postal Service to Mitchell K. Friedlander, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84111, Pro Se.



CERTIFICATION FOR ELECTRONIC FILING

I HEREBY CERTIFY that the electronic version of the foregoing is a true and correct copy of the original document being filed this same day of September 29th, 2004 via Federal Express with the Office of the Secretary, Room H-159, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a long, horizontal flourish that ends in a small hook. The signature is positioned above a solid horizontal line.