UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

BASIC RESEARCH, LLC, et al.
_____/

DOCKET: 9318

Public Document

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

Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker USA, LLC, Nutrasport, LLC, Sövage Dermalogic Laboratories, LLC, Ban, LLC, Dennis Gay, and Daniel B. Mowrey, Ph.D, (collectively "Respondents"), hereby file their Reply to Complaint Counsel's Opposition to Respondents' Motion for a More Definite Statement ("Opposition"), and in support state as follows.[1]

I.
INTRODUCTION

In its Opposition, Complaint Counsel essentially argues that the Complaint is sufficiently clear and concise under 16 C.F.R. §3.11 for Respondents to ascertain the practices alleged to violate the Federal Trade Commission Act. This position appears either to be ill-informed or disingenuous. Complaint Counsel employs ever-shifting legal terms of art, and vague, subjective wording that leaves the ultimate decision of ascertaining the nature of the charges against the Respondents to the Administrative Law Judge, rather than to Complaint Counsel. Such a practice necessarily means the Complaint is defective, fails to satisfy Complaint Counsel's statutory burden, and requires more definiteness for the Respondents to fashion a response.

[1] This filing is submitted on behalf of all Respondents except for Mitchell K. Friedlander, who is representing himself *pro se*. It is undersigned counsel's understanding that Mr. Friedlander joins in with this filing.

II.
RELEVANT FACTS

On June 28, 2004 Respondents filed their Motion for More Definite Statement ("Motion") because the Complaint failed to define key elements of the operative allegations. These elements included the terms "reasonable basis," "rapid," "substantial," "visibly obvious," and "causes." As a result of the indefiniteness of these terms, Respondents asserted that they are unable to appreciate with "reasonable definiteness of the type of acts or practices alleged to be in violation of the law." 16 C.F.R. 3.11(c).

On July 8, 2004, Complaint Counsel filed their Opposition to Respondent's Motion. 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 Respondents' Motion.

III.
ARGUMENT

Respondents stand accused of certain deceptive or unfair practices as set forth in the Complaint. Complaint Counsel's position is that Respondents' Motion should be denied because the standards set forth in the Complaint are so well understood as to not require further definition. Indeed, the Opposition suggests at four separate places that "discovery" will cure any ambiguity and that the Administrative Law Judge inevitably will decide what the Commission meant by the words "reasonable basis," "substantial," "rapid," "visibly obvious," and "causes." In asserting this position, Complaint Counsel attempt to side-step their duty to properly articulate standards against which the Respondents' conduct can be measured.

Simply stated, to frame a defense in this case Respondents need to understand with clarity what legal benchmarks they are accused of violating. Litigation inherently is 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. On behalf of the accusing party in this matter, Complaint Counsel must articulate with clarity those standards they claim the Respondents have violated. In the absence of such particularity, Complaint Counsel will have the freedom to shift their theories upon a whim and Respondents will be frustrated in their ability to prepare and present a defense.

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

With respect to each of the products involved, the complaint alleges that the Respondents lacked a "reasonable basis" for including various representations in their advertisements. 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 [sic.] 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 simultaneously cannot be the case that "this Court [sic.] 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 meaning of the standard, Complaint Counsel essentially has shifted to the Administrative Law Judge the burden to inform Respondents what constitutes the standard they allegedly failed to meet.

In their Opposition, Complaint Counsel repeatedly contend that they have met the minimum pleadings standards required under FTC jurisprudence. However, if the pleading standards mean anything, they must require a Complaint to provide notice of Respondents'

alleged behavior, but also, notice of how that behavior "violates the law." Otherwise, Respondents are given the impossible task of predicting, in their answer and going forward, at what point their behavior allegedly became unlawful. Until Complaint Counsel define the particulars of what substantiation was needed to constitute a "reasonable basis" for the challenged advertisements, Respondents are 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). *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 advertisement. 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 the Commission believes that a "reasonable basis" requires particular types and amounts of information, Complaint Counsel should be required to allege the particulars in the Complaint. With these particulars the Respondents can commence their defense with a clear understanding of alleged shortcomings in their substantiation. In the absence of such particulars, Complaint Counsel are unconstrained to argue – in the face of whatever proof the Respondents offer – that a "reasonable basis" in this matter requires something more than what the Respondents have tendered. Respondents should not be forced to defend

themselves against a moving target. The Complaint should state the benchmark against which Complaint Counsel will request the Administrative Law Judge to measure the adequacy of Respondents' substantiation.

2. The Meaning Of The Terms "Rapid," "Substantial" and "Visibly Obvious" Are Amorphous Terms Subject To Multiple Meanings

With respect to Respondents' objections to the terms "rapid," "substantial" and "visibly obvious," the Opposition contends that the accused advertisements either use these exact terms, or that they imply them, and as such, their meanings should be understood. *See*, Opposition, page 8. As a threshold matter, none of Respondents' advertisements use these exact terms. Where Respondents use similar terms, the objections either are predicated on the *manner* in which the Complaint uses these terms to in the allegations, or the fact that the selection of new, albeit similar terminology, necessarily attaches new meaning beyond what explicitly was stated in an advertisement. In sum, what Complaint Counsel fail to appreciate is that the terms in question form the operative allegations in the Complaint. As such, Respondents are entitled to know their intended usage and definition.

a. The Terms "Substantial" And "Rapid"

Respondents' Motion pointed out that Complaint Counsel's failure to define the terms "Substantial" and "Rapid" – both of which are subjective and relative – leaves Respondents without an adequate benchmark, provides no guidance as to what is objectionable, and fails to adequately place Respondents on notice of the acts of which they stand accused.

Complaint Counsel nevertheless claim that "Substantial" and "Rapid" are clear because Respondents used the term "significant," along with a mélange of words that imply that fat loss will be quick and/or fast. *See*, Opposition, page 9-10. Why did the Complaint not simply use the same term Respondents uses: "significant?" Regardless of the reason, the fact that the

Commission chose to use different terminology necessitates further definition. At present, Respondents are not aware of whether they have been accused of making representations concerning the loss of 5, 10, 20, 30, 50 pounds or more, over the course of one day, one week, one month, or more. Respondents are entitled to such information before they are forced to respond.

b. The Terms "Visibly Obvious" And "Causes"

The Opposition filing expresses incredulity over question about the definition of the terms "Visibly Obvious" and "Causes." As best understood, this incredulity stems from the fact that these terms are, once again, "derived" from Respondents' advertisements. Accordingly, with similar reasoning to that set forth above, the manner in which the term "Visibly Obvious" is used fails to provide notice from whose perspective the Commission expects Respondents to defend the claim. As such, Respondents are incapable of formulating an appropriate and complete response, much less to understand the specific claims against them in relation to this term.

With respect to the term "Causes," the Opposition filing mistakenly assumes Respondents' 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, Respondents objection is predicated on the fact that the term is susceptible of multiple meanings. In the context of efficacy claims, for example, it is possible that a "Cause" may be contributory or exclusive. Absent further clarification Respondents cannot know upon which definition the Commission is relying.

c. The Term "Clinical Testing"

The Opposition also dismisses Respondents' objection to the accusations concerning their reliance on "Clinical Testing" because the advertising in question uses the term "clinically

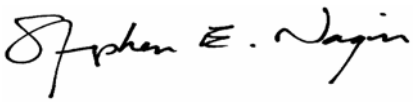
established." Respondents respectfully submit that Complaint Counsel missed the point. Simply because the term may be capable of some definition, does not mean it is clear and concise enough to satisfy pleading obligations.

Respondents' Motion made clear that the context for seeking a more definite statement concerning the term "clinical testing" was the allegation that such testing "does not prove" certain claims. For example, in paragraph 26 the Commission states, "…published, clinical testing does not prove that Tummy Flattening Gel causes rapid and visibly obvious fat loss in areas of the body to which it is applied." Respondents asserted that this allegation fails to inform them concerning the nature of the perceived failure of proof. It is wholly unclear whether Respondents are because accused of: (i) relying on clinical testing that does not exist; (ii) relying on clinical testing that exists, but is inadequate; (iii) relying on clinical testing where contrary clinical test exist; or (iv) something else. Clarification is needed.

IV.
CONCLUSION

Based on the foregoing, Respondents respectfully request the Administrative Law Judge to require Complaint Counsel to better define the operative allegations in the Complaint.

Respectfully submitted,
Attorney for Respondents,



Dated: July 13, 2004 By:_____

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Reply to Complaint Counsels' Opposition to Respondents' Motion For A More Definite Statement was provided this 13th day of July, 2004 as follows:

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

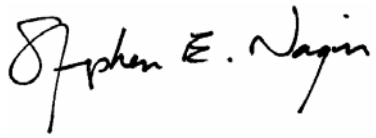
(2) One (1) *electronic copy* via e-mail attachment in Adobe® ".pdf" format to the **Secretary** of the FTC at Secretary@ftc.gov;

(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** [LKAPIN@ftc.gov], **Walter C. Gross** [WGROSS@ftc.gov], **Joshua S. Millard** [JMILLARD@ftc.gov], **Robin Richardson** [RRICHARDSON@ftc.gov], and **Laura Schneider** [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 each via United States Postal Service, separately, to each **Respondent** c/o the Compliance Department, Basic Research, LLC, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116.



CERTIFICATION FOR ELECTRONIC FILING

I CERTIFY that this electronic version 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.