UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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;

Docket No. 9318

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.
_____/

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"), through undersigned counsel, and pursuant to 16 C.F.R §3.11(c), Move for a More Definite Statement ("Motion"), and in support state as follows.

I. INTRODUCTION

The FTC alleges that Respondents are responsible for various acts or practices that are deceptive or unfair in connection with certain advertisements. The administrative complaint does not provide a clear and concise factual statement sufficient to inform each Respondent with reasonable definiteness about the type of specific acts or practices alleged to violate the FTC Act. As such, Respondents do not know with any degree of sufficiency the specific charges leveled against each of them. For example, Respondents cannot ascertain FTC's intended meaning and usage of certain terms, such as: "reasonable basis," "rapid," "substantial," "clinical testing," "visibly obvious," or "causes," and it fails to assert which (if any) specific acts or practices are "unfair" or why they are "unfair." Respondents cannot be expected to frame a responsive answer to the complaint absent a more definite statement, and respectfully request that their Motion be granted.

II. RELEVANT FACTS

On June 16, 2004 the Commission authorized an administrative complaint against Respondents[1], which alleges that the Respondents have engaged in "deceptive acts and practices" in connection with the marketing of the following weight loss products, *three* topical gels: Dermalin-APg™, Cutting Gel™, and Tummy Flattening Gel™; *two* Ephedra-caffeine-aspirin products, Leptoprin™ and Anorex™; and *one* children's weight loss diet aid, PediaLean®.

[1] One Respondent, Mr. Mitchall K. Friedlander, is representing himself and is not represented in this proceeding by the undersigned counsel.

The Commission's allegations primarily concern representations about the efficacy of these products as claimed in various advertisements. Although the FTC has divided the above products into separate sets, the operational allegation against each product essentially is the same. The Commission contends that Respondents advertising was false or misleading because (1) Respondents expressly or by implication represented that they had a "reasonable basis that substantiated the representation" for their claims; and (2) Respondents "did not possess or rely upon a reasonable basis that substantiated the representation."

The complaint, however, fails to adequately inform or notify Respondents what is encompassed by the terms "reasonable basis" or "substantiation," notwithstanding the fact that both terms are critical elements of the operative allegations. Throughout the complaint, the FTC refers to, but does not specify, define or clarify, the intended meaning or usage of critical terms, or why specific terms allegedly deceptive, including "reasonable basis," "rapid," "substantial," "clinical testing," "visibly obvious" and "causes." Further, the term "unfair" is not defined with regard to how it is to be applied in connection with specific advertised claims. The failure to provide adequate notice with respect to the substance of the allegations in the complaint renders Respondents incapable of framing appropriate and full responses and pleading adequate defenses.

III. ARGUMENT

"Confusing complaints impose an unfair burden on litigants and judges." *McHenry v. Renne,* 84 F.3d 1172, 1179-80 (9th Cir. 1996). Title 16 of the Code of Federal Regulations provides, in pertinent part, that "[w]here a respondent makes a reasonable showing that it cannot frame a responsive answer based on the allegations contained in the complaint, the respondent

may move for a more definite statement of the charges against it before filing an answer." 16 C.F.R. §3.11(c).

Here, due to the Commission's failure to define key elements of its operative allegations, the Complaint fails to contain "a clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law." 16 C.F.R. 3.11(c). Specifically, in its Complaint, the FTC has levied allegations against Respondents that accuse them of deceptive or unfair acts stemming from their marketing materials. Although the Complaint cites extensively from these marketing materials, the Complaint fails to clarify the following terms in a manner that allows Respondents to form an answer to the allegations.

A. "*Reasonable Basis*"

With respect to each of the products involved, the FTC has alleged that the Respondents lacked a "reasonable basis" for including various representations in their marketing material. Nowhere has the Commission defined the substance of that term. As such, Respondents are forced to guess at what standard the Commission staff seeks to enforce against them. Simply alleging that Respondents failed to possess a "reasonable basis" that substantiated their representations – without articulating what constitutes a reasonable basis – makes it impossible for Respondents to argue otherwise, much less argue that the nature, quantum or quality of the substantiation was, in fact, appropriate. Until the Commission defines "reasonable basis" as applied to each specific representation it has challenged, the Respondents are unable to evaluate, defend and prepare their case.

B. "*Rapid*"

With respect to the Topical Gels discussed in the administrative complaint, the Commission alleges that Respondents had no reasonable basis that substantiated their claims regarding "rapid" fat loss. Most importantly, the term "rapid" is not defined. Respondents are forced to speculate as to its meaning. How fast is rapid? Without further guidance as to what representations the FTC contends is objectionable Respondents cannot be expected to address such charges.

C. "*Substantial*"

The Commission's failure to define the term "substantial" when used in connection with the phrase "fat loss" fails to inform Respondents of the nature and quality of the standard the Commission intends to apply against them. Merely using this subjective and relative term, without an adequate benchmark provides no guidance as to what the Commission contends is objectionable and does not adequately notify Respondents of the acts of which they stand accused. By way of analogy, the term "substantial portion" of a fetal body in the context of "partial-birth" abortion statutes has been declared unconstitutional, as applied. *Carhart, M.D. v. Steinberg,* 11 F.Supp.2d 1099, 1131 (D. Nebraska 1998) ("While vaginal delivery of an arm or leg is a 'substantial portion' of a fetal body, it is unclear what more the term 'substantial portion' may mean. Every doctor who testified, including the defense experts, stated that they did not understand the outer limits of the term or the term could be interpreted in vastly different ways by fair-minded people."); *Richmond Medical Center For Women v. Gilmore,* 55 F.Supp.2d 441, 498 (E.D. Va. 1999) ([citing *Carhar*t] "…Nebraska's law was void for vagueness because, and only because, 'the words 'substantial portion' are so vague as to be meaningless to doctors, lay people and prosecutors alike.'").

D. "*Clinical Testing*"

The term "clinical testing: appears in Complaint paragraphs 24, 26, 32 & 41.

In paragraph 24 the Commission states that "…published, clinical testing does not prove that Cutting Gel causes rapid and visibly obvious fat loss in areas of the body to which it is applied." With respect to the allegation, which clinical testing shows the claims are not supported? Respondents do not understand which "clinical tests" allegedly do not prove the advertised claims.

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." With respect to the allegation, which clinical testing shows the claims are not supported? Respondents do not understand which "clinical tests" allegedly do *not* prove the advertised claims.

In paragraph 32 (A) the Commission states that "clinical testing does not prove that Leptoprin causes weight loss of more than 20 pounds, including as much as 50, 60, or 147 pounds, in significantly overweight users." With respect to the allegation, which clinical testing shows the claims are not supported? Respondents do not understand which "clinical tests" allegedly do *not* prove the advertised claims.

In paragraph 32 (B) the Commission states that "clinical testing does not prove that Leptoprin causes loss of substantial, excess fat in significantly overweight users." With respect to the allegation, which clinical testing shows the claims are not supported? Respondents do not understand which "clinical tests" allegedly do *not* prove the advertised claims.

In paragraph 41, the Commission states that "clinical testing does not prove that PediaLean causes substantial weight loss in overweight or obese children." With respect to the

allegation, which clinical testing shows the claims are not supported? Respondents do not understand which "clinical tests" allegedly do *not* prove the advertised claims.

E. "*Visibly Obvious*"

With respect to the topical gel products, the Commission alleges violations based on the words "visibly obvious." The complaint does not provide notice as to how the Commission defines and applies that term in the context of Respondents' marketing materials (*e.g.*, "visibly obvious" to who?). It simply is not possible to discern from whose perspective the Commission expects Respondents to defend the claim. As such, Respondents are incapable of formulating an appropriate and complete response let alone to understand, the specific claims against them in relation to this term.

F. "*Causes*"

Superficially, the term "causes" may appear not to require further definition. However, in the context of the complaint the term fails to inform Respondents of the nature of the allegations they must defend. It fails to identify whether "cause" refers to contributory or exclusive cause. As a result of that ambiguity Respondents are forced to guess which definition of "cause" the Commission has based its allegations on in the Complaint. Respondents accordingly do not know which definition they are alleged to have violated.

H. "*Unfair*"

Paragraph 44 of the complaint asserts: ""The acts and practices of respondents as alleged in this complaint constitute *unfair or* deceptive acts or practices, and the making of false advertisements…." The complaint does not otherwise define the term "unfair" or what acts or practices allegedly were "unfair," and if so, what made them so. Respondents do not know what

they should respond to as being allegedly unfair and as such cannot defend against such an amorphous allegation.

IV. CONCLUSION

Based on the foregoing, Respondents request the Administrative Law Judge to require Commission staff to provide a more definite statement to supplement the administrative complaint. Specifically, Respondents request that the Motion for a More Definite Statement be granted to better define and/or clarify the usage of the above referenced words as those terms are used in the complaint.

Respectfully submitted,

Attorney for Respondents

Dated: June 28, 2004

By:_____

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SUPPLEMENTAL CERTIFICATE OF SERVICE

I certify that *timely*, on Monday, June 28, 2004, undersigned counsel for Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker USA, LLC, Nutrasport, LLC, Sovage Dermalogic Laboratories, LLC, Ban, LLC, Mr. Dennis Gay, and Daniel B. Mowrey, Ph.D., caused to be served a **notice of appearance** and a **motion for a more definite statement** by hand on the Secretary of the Commission. On June 29th an electronic copy of the documents were e-mailed to FTC attorneys: Laureen Kapin; Joshua S. Millard; and Laura Schneider. A copy of this supplemental certificate and of the above-referenced Motion is provided to the Administrative Law Judge, D. Michael Chappell, herewith. Inasmuch as the original signature was not submitted on the Motion for Definite Statement (that had been e-mailed to Washington, D.C. for hand delivery on the due date), the original signed Motion accompanies this Supplemental Certificate of Service as does the Notice of Appearance form, *nunc pro tunc*. All future filings will be submitted pursuant to The FTC Rules of Practice, Rule 4.2. This Supplemental Certificate and all accompanying *original* documents are sent by Federal Express for delivery on July 2, 2004.

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Stephen E. Nagin