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,	)	**Docket No. 9318**
a limited liability company;	)	
BAN, LLC,	)	**PUBLIC DOCUMENT**
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 RE CERTIFICATION OR, ALTERNATIVELY, FOR AN INTERLOCUTORY APPEAL

Respondent, Mitchell K. Friedlander ("Respondent"), proceeding *pro se* and pursuant to 16 C.F.R. §3.23(b), hereby files a Motion re Certification of his Motion to Dismiss Complaint for Lack of Definiteness or, in the alternative, for an Interlocutory Appeal from July 20, 2004 Order of the Administrative Law Judge denying his Motion to Dismiss Complaint for Lack of Definiteness, and in support thereof state as follows.

I. Motion re Certification of Motion to Dismiss

Respondent respectfully requests that the Administrative Law Judge ("ALJ") certify to the Commission Respondent's Motion to Dismiss Complaint for Lack of Definiteness ("Motion"). The Motion raised both legal issues, which the ALJ could properly resolve, and issues touching upon a matter of administrative discretion, which the ALJ could not resolve, but which should have been certified to the Commission pursuant to Rule of Practice 3.22.

The issue of administrative discretion is whether the Commission has adequately specified in its complaint the standard as to which Respondents' conduct will be judged. The reason why this issue must be certified to the Commission is highlighted by the following truism concerning practice before the Federal Trade Commission: The Commission issues the complaint; the factual basis of the Commission's claims are subject to discovery; the standard against which the Commission will judge Respondent's conduct is not. Thus, federal law requires the Commission to give "fair notice" of both the factual basis of its claims, and the grounds upon which those claims rest. *See In re Schering-Plough Corp.*, 2001 FTC LEXIS 198, *11 (Oct. 31, 2001) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (federal complaints must give "'fair notice' of what . . . the claim is and the grounds upon which it rests.")).

On July 20, 2004, the ALJ found that the Commission's complaint satisfied the first requirement of Rule 3.11(b)(2) of the Rules of Practice. It provided a *"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 . . . ."[1] Order, page 2 (emphasis added).

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[1] *See* Order, page 3 ("Respondents have failed to demonstrate that the term 'reasonable basis' or 'unfair' as used in the Complaint is not sufficient to inform Respondents of *the types of acts or practices alleged*"); *id.* ("Respondents have failed to demonstrate that the term 'causes' as used in the Complaint is not sufficient to inform Respondents *of the types of acts or practices alleged*"); *id.* at 4 ("Respondents have failed to demonstrate that the terms 'rapid,' 'substantial,'

Respondent's Motion, though, was not based, or solely based, on whether fair notice of the factual basis of the Commission's complaint was given. It was based on whether fair notice of the "violation of the law" was given by the Commission.[2] Respondent objected that the Commission's interpretation of Respondents' advertisements used subjective and relative terms, which are not found in the advertisements and which do not give fair notice of the "*standard* the Commission staff seeks to enforce against them." Motion at 4 (emphasis added). Merely using subjective and relative terms, "*without an adequate benchmark* provides no guidance as to what the Commission contends is objectionable . . . ." Motion at 5 (emphasis added).

The Commission, not the ALJ, bears the burden of alleging and proving that the standard as to which Respondents' conduct will be judged has been violated.[3] If, for example, "rapid" fat loss is interpreted by the Commission to mean twenty pounds per week, as opposed to twenty pounds per month or per year, *the Commission's charge is completely different*. The ALJ's findings of fact and recommendations pertaining to the amount of fat loss resulting from an

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'clinical testing,' and 'visibly obvious' as used in the Complaint are not sufficient to inform Respondents of *the types of acts or practices alleged*") (emphasis in each quote added).

[2] *See* Motion at 4 ("Although the FTC's Complaint has levied allegations against Respondents that accuse them of deceptive or unfair acts stemming from their marketing materials, and has cited extensively from those marketing materials, *the Complaint fails to clarify the following terms in a manner that advances the relevant legal theory, or allows Respondents to form an answer to the allegations*.") (emphasis added).

[3] The Order cites *Pfizer Inc.*, 81 F.T.C. 23 (1972) in this regard. *See* Order, page 3. With respect to simple claims of efficacy, *e.g.*, non-establishment claims, "*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). Similarly, with respect to claims that are more specific, *e.g.*, establishment claims, 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).

appropriate and advertised use of Respondents' products will *either* exonerate Respondents *or* adjudicate them liable for a violation of law. While the ALJ recognized that under *McHenry v. Renne*, 84 F.3d 1172 (9th Cir. 1996), a complaint must "inform the defendants of the crimes and violations which they were accused," it distinguished *McHenry* because there the complaint was "long, redundant, and mixed with allegations of relevant facts, irrelevant facts, and political arguments that 'read like a magazine story.'" Order, page 4. Respondent acknowledges that, here, "[t]he Complaint filed by Complaint Counsel . . . does not suffer from *those* defects." *Id.* (emphasis added). However, *the complaint suffers from other noted defects*, which, as a result, *fails to inform Respondents "of the crimes and violations which they [have been] accused.*"

This issue raised by Respondent's Motion—whether the Commission has adequately specified the standard as to which Respondents' conduct will be judged—should have been certified to the Commission, as it touches upon the administrative discretion. *See In the Matter of Herbert R. Gibson, Sr., et al.*, 90 F.T.C. 275, 275, 1977 WL 189044, at *1 (Oct. 12, 1977) ("It is well established that an administrative law judge lacks authority to rule on and must certify motions to dismiss . . . and other motions containing questions pertaining to the Commission's exercise of administrative discretion.") (citations omitted). It is based on four, or possibly five, narrow predicates, all of which pertain to the Commission's administrative discretion in interpreting advertisements and identifying in the complaint the standard as to which the respondent's conduct will be judged: (1) the Commission interpreted Respondents' advertisements using subjective and relative terms, such as "reasonable basis," "rapid," "substantial," "visibly obvious," "causes" and "unfair," which do not appear anywhere in the advertisements; (2) the Commissioner's complaint does not define these terms which form the standard as to which Respondents' liability will be adjudicated; (3) case law does not define or

adequately define each of these terms and provide fair notice of the standard against which Respondents' conduct will be judged; (4) the Commission did not use the subjective and relative terms as a matter of administrative convenience, but rather it used them as a means of to impose liability on Respondents; and (5) no amount of discovery will reveal what the Commission meant by each of these terms, which form the operate allegations in the complaint.[4] Therefore, absent a more definite statement issued by the Commission, the complaint in this case fails to state a claim as a matter of law.

The case, *In the Matter of Boise Cascade Corp.*, 97 F.T.C. 246, 1981 WL 389463 (March 27, 1981), presented an analogous situation. There, "[t]he administrative law judge . . . issued orders rejecting several of the grounds asserted in the motion [to dismiss] and certif[ied] to the Commission . . . four issues which he believed outside of his authority to decide . . . ." *Id.* Each issue concerned a matter of the Commission's administrative discretion in issuing a complaint: "(1) whether the Commission determined that it had 'reason to believe' a violation of the law had occurred and that issuance of the complaint was in the public interest; (2) whether the complaint issued as the result of industry pressure and congressional interference; (3) whether Boise' suppliers who allegedly violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, should have been joined as parties; and (4) whether instead of issuing the complaint the Commission should have instituted a rulemaking proceeding." *Id.* Similarly, here, the specification of the standard as to which Respondents' conduct will be judged is a matter of administration discretion resting solely with the Commission. Whether a complaint must be dismissed or amended, or a more definite statement of the standard governing Respondent's conduct provided, is a matter that only the Commission can answer. Neither the ALJ nor

[4] *See* 16 C.F.R. 3.33(c) (Commission cannot be deposed).

Complaint counsel has any authority to set the standard, or the ability to commune with the Commission during the adversarial process, so as to obtain clarification from the Commission as to the what standard of conduct it has charged Respondents of violating.[5]

Accordingly, Respondent respectfully requests that its Motion to Dismiss be certified to the Commission pursuant to Section 3.22(a) of the Rules of Practice.

II. Alternative Motion for Interlocutory Appeal.

Alternatively, Respondent respectfully requests interlocutory review under Rule of Practice 3.23(b) of the July 20, 2004 Order denying Respondent's Motion to Dismiss. Although recognizing that the ALJ has carefully reviewed the Motion and issued a reasoned determination, Respondent submits that the legal and policy implications of depriving Respondent adequate definitions of key elements in the complaint are substantial, and should be resolved by the Commission itself.

A. Background

On June 15, 2004, the Federal Trade Commission ("FTC" or "Commission") issued an administrative complaint alleging that Respondent has engaged in unfair or deceptive acts in violation of Sections 5(a) and 12 of the FTC Act. The operative allegations charge Respondent with lacking support for various representations purportedly made in certain advertising.

On July 6, 2004, Respondent filed a Motion for Dismissal for Lack of Definiteness. The basis of the Motion for Dismissal was that the Commission had failed to define the terms

[5] *See* FTC Operating Manual, Chpt 10, §.9.1 (Once "[a]n adjudicative proceeding commences upon the affirmative vote of the Commission to issue a complaint," "rules concerning ex parte communications apply and case-related contact with Commissioners or with other involved in the decisional process is not permitted and all communications concerning the conduct of the proceeding must be addressed or directed to the ALJ . . . . Thus, for example, if a mistake is discovered in a complaint before it has been mailed, complaint counsel may not communicate the mistake to the Commission. The appropriate procedure is a motion . . . addressed to the ALJ.").

"Rapid," "Substantial," "Visibly Obvious," "Causes," and "Reasonable Basis." Respondent asserted, *inter alia*, that absent clarification, the complaint was so fatally deficient that Respondent could not appreciate with "reasonable definiteness...the type of acts or practices alleged to be in violation of the law" under 16 C.F.R. 3.11(b)(2).

On July 8, 2004, Complaint Counsel filed their Opposition to Respondents' Motion for More Definite Statement ("Opposition").[6] 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, that the cited terms are readily understood, and any vagueness could be remedied through discovery. *See* Opposition, pages 6 to 10.

On July 20, 2004, the ALJ issued an Order denying Respondent's Motion ("Order"). According to the Order, the complaint was sufficiently detailed in nature to allow Respondent to file an Answer pursuant to 3.12(b)(1) and any necessary clarification could be obtained through discovery. *See* Order, page 4.

B. Argument

Section 3.23(b) of the Commission's Rules of Practice specifies the circumstances under which the ALJ should refer a ruling to the full Commission for interlocutory review. Such review is warranted where (1) the ruling involves a controlling question of law or policy as to which there exists a substantial ground for a difference of opinion and (2) either (i) an immediate appeal from the ruling may materially advance the ultimate termination of the litigation, or (ii) subsequent review of the ALJ's ruling will be an inadequate remedy. 16 C.F.R. §3.23(b). These circumstances all weigh heavily in favor of granting Respondent's present application.

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[6] The Opposition was directed "to both Respondent's 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.

1. Respondent's Motion Presents a Controlling Issue of Law or Policy as to Which There Exists a Substantial Ground for a Difference of *Opinion.*

Rule of Practice 3.23(b) requires that the ALJ first determine whether its Order involves a "controlling question" of law or policy. The Rules of Practice do not define this phrase, but certain court decisions have defined the term to include "difficult central question[s]...which [are] not settled by controlling authority." *In re Heddendorf*, 263 F.2d 887, 889 (1st Cir. 1959). A legal question does not have to be dispositive of the case in order to be "controlling," but the resolution of the question must relate to issues that seriously affect the litigation. *U.S. v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959); *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026-27 (9th Cir. 1982). As defined in previous administrative decisions, "[a] question of law or policy is deemed controlling only if it may contribute to the determination, at an early stage, of a wide spectrum of cases." *In re Automotive Breakthrough Sciences, Inc.*, Docket Nos. 9275, 9277, 1996 FTC LEXIS 478, *1 (Nov. 5, 1996). Such is the case here.

The controlling issues of law or policy in this case as to which there exists a substantial ground for a difference of opinion are: (1) whether the Commission should be required when drafting a complaint to adequately define subjective terms it uses in setting forth its interpretation of an advertisement in a false advertising case; and (2) whether the Commission in bringing an inadequate substantiation case must allege at the commencement of the case the specific type and amount of information a Respondent needs in order to have a "reasonable basis" for the challenged advertisements.

The Commission's actions in this case fall far short of what is required to comport with fundamental fairness. Respondent is being forced to wait for information that the Commission can readily provide at the outset of the case. In the interim, Respondents are left guess the

meanings of subjective and relative terms, and further, to guess as to the amount of substantiation they needed to form a reasonable basis. The Commission, by comparison, is provided with excessive latitude to shift theories on a whim.

The intolerable indefiniteness in the complaint includes the use of the word "Substantial," a word that means different things to different people. Respondent respectfully submit that the ambiguity of this term could be resolved by giving the word specific definition. Respondent seek nothing more than what the Commission would provide if called upon to define the term. This logic applies equally to the terms "Rapid," "Visibly Obvious" and "Causes," as they are all subjective terms and may mean different things to different people.

With respect to the term "Reasonable Basis," the Order appears to adopt Complaint Counsel's rationale for refusing to further define this term on the basis that it has been established over time through case law and other materials. *See* Order, page 3. Complaint Counsel, however, also asserted 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.

If the meaning of the phrase "reasonable basis" were already well-established, it would not be necessary for the ALJ to determine its meaning during the course of the proceedings. To the contrary, such circular logic establishes that the phrase is not well-defined. Moreover, if the ALJ is left to determine the standard's meaning, the Commission has essentially shifted to the ALJ the burden of informing Respondent of what standard they allegedly failed to meet.[7]

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[7] As mentioned, the Commission, not the ALJ, bears the burden of alleging and proving that the standard as to which Respondents' conduct will be judged has been violated, including but not limited to the amount of substantiation required to constitute a "reasonable basis." Again, with respect to simple claims of efficacy, only "the *Commission itself* may identify the appropriate level of substantiation for ads that do not expressly or impliedly claim a particular

2. An Immediate Appeal Will Materially Advance the Termination of the Litigation Whereas Subsequent Review is Inadequate

Respondent appreciates the ALJ's invitation to propound discovery on the Commission in this case. However, even if possible, engaging in discovery to ascertain definitions for the cited terms will involve more resources than necessary given that the Commission can simply provide the information at the outset of the litigation. The Commission certainly recognizes from its own cases that it has the responsibility to advise Respondent of the interpretation of the advertising at issue, the level of substantiation necessary, and how Respondent allegedly fell short. It would be far more efficient for the Commission to provide this information rather than to have Respondent engage in likely fruitless discovery. Respondent is entitled to know such information not only to gain a full understanding of the charges against them, but so the Commission will be held accountable and not simply shift theories on a whim.

Subsequent review of the ALJ's decision will be an inadequate remedy. Respondent simply cannot commence a defense until the challenged terms are defined and the Commission articulates the amount of substantiation the Respondent allegedly needed to have a reasonable basis for the challenged advertisements.

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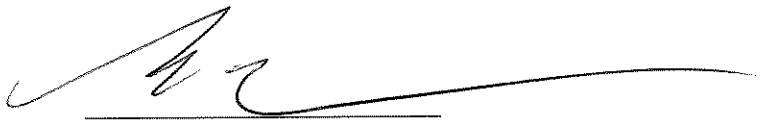
level of substantiation." *Thompson Medical Co. v. FTC,* 791 F.2d 189, 194 (D.C.Cir.1986), *cert. denied,* 479 U.S. 1086, 107 S.Ct. 1289, 94 L.Ed.2d 146 (1987) (emphasis added). Similarly, with respect to claims that are more specific, the advertiser must possess the level of proof claimed in the advertisement, 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).

Accordingly, Respondent respectfully requests that its Motion to Dismiss be certified to the Commission or, alternatively, that the Administrative Law Judge grant Respondent's application for full Commission review by certifying that (i) its ruling involves a controlling question of law and policy as to which there exists a substantial ground for a difference of opinion; and/or (ii) an immediate appeal from the ruling will materially advance the ultimate termination of the litigation and/or subsequent review of its ruling will be an inadequate remedy.



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Pro Se Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 27th 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;

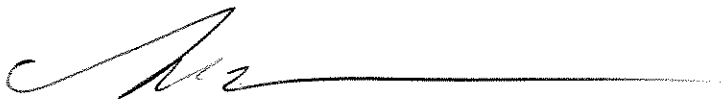
(4) One (1) copy via e-mail attachment in Adobe® ".pdf" format to Commission Complaint Counsel, Laureen Kapin, Joshua S. Millard, and Laura Schneider, all care of lkapin@ftc.gov, with one (1) paper courtesy copy via U. S. Postal Service to Laureen Kapin, Bureau of Consumer Protection, Federal Trade Commission, 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, Klein-Becker, 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 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 July 27, 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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