

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;)
)
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)
SÖVAGE DERMALOGIC LABORATORIES,)
)
DENNIS GAY,)
individually and as an officer of the)
limited liability corporations,)
)
DANIEL B. MOWREY,)
Also doing business as AMERICAN)
PHYTOTHERAPY RESEARCH)
LABORATORY, and)
)
MITCHELL K. FRIEDLANDER,)
Respondents.)
)

Docket No. 9318

ANSWER AND GROUNDS OF DEFENSE OF
RESPONDENT BAN, LLC

Pursuant to Federal Trade Commission (“Commission”) Rule of Procedure 3.12, Respondent, BAN, LLC respectfully submits this Answer and Grounds of Defense in response to the Complaint filed in this matter.

With respect to the first paragraph of the Complaint, BAN, LLC denies that the Commission has reason to believe that Respondents have violated the provisions of the Federal Trade Commission Act and/or that this proceeding is in the public interest.

BAN, LLC responds to each numbered paragraph of the Complaint as follows:

1. Admitted, except to clarify that the Respondent is a limited liability company. Denied as to “corporation.”

2. Admitted, except to clarify that the Respondent is a limited liability company. Denied as to “corporation.”

3. Admitted, except to clarify that the Respondent is a limited liability company. Denied as to “corporation.”

4. Admitted, except to clarify that the Respondent is a limited liability company. Denied as to “corporation.”

5. Admitted, except to clarify that the Respondent is a limited liability company. Denied as to “corporation.”

6. The first sentence of Paragraph 6 is admitted, except to clarify that the Respondent BAN, LLC is a limited liability company; denied as to “corporation.” As to the second sentence of Paragraph 6, it is admitted that BAN, LLC was named Basic Research, LLC prior to December 27, 2002, and that BAN, LLC was named Old Basic Research, LLC between December 27, 2002 and March 31, 2003; further admitted that, at certain times and under those earlier names, BAN, LLC has done business as Basic Research, A.G. Waterhouse, Klein-Becker

usa, Nutrasport, and Sövage Dermalogic Laboratories. Denied as to the third sentence of Paragraph 6.

7. Admitted that Dennis Gay is an individual whose principal place of business is at 5742 W. Harold Gatty Dr., Salt Lake City, Utah. Otherwise denied.

8. Admitted that Daniel B. Mowrey is an individual with an office located at 5742 W. Harold Gatty Dr., Salt Lake City, Utah. Otherwise denied.

9. Admitted that Mitchell Friedlander is an individual. Otherwise denied.

10. Denied.

11. Admitted that at certain times Respondent Basic Research, LLC and Respondent BAN, LLC have manufactured, advertised, labeled, offered for sale, sold and/or distributed the products identified in sub-Paragraphs 11(A) through 11(F) (“the Products”).

Admitted that other Respondents have performed those activities, but only as follows:

Respondent A.G. Waterhouse, LLC only with respect to Leptoprin, Respondent Klein-Becker

usa, LLC only with respect to Dermalin-APg, Anorex, and PediaLean, Respondent Nutrasport

LLC only with respect to Cutting Gel, and Respondent Sövage Dermalogic Laboratories, LLC

only with respect to Tummy Flattening Gel. Admitted as to the allegations in sub-Paragraphs

11(A) through 11(F) describing the advertisements. Admitted that each of the Products has been

advertised in one or more of the media identified in Paragraph 11, except denied as to “Basic

Research’s Internet websites.” The last sentence of Paragraph 11 states a legal conclusion, to

which no response is required. Otherwise denied.

12. Denied in that the Complaint does not accurately characterize the “acts and practices” of the Respondents.

Dermalin-APg, Cutting Gel, and Tummy Flattening Gel Products for Fat Loss

13. Admitted that, at certain times, Respondent BAN, LLC disseminated advertisements and/or labeling for Dermalin-Apg. Admitted that, at certain times, Respondent BAN, LLC disseminated advertisements and/or labeling for Cutting Gel. Admitted that, at certain times, Respondent BAN, LLC disseminated advertisements and/or labeling for Tummy Flattening Gel. Denied in that the term “caused” is inherently vague, subjective, and susceptible to multiple meanings. Admitted that advertisements for the named Products have appeared in the publications named in the second through fourth sentences of Paragraph 13. Admitted that the quoted language in sub-paragraphs 13(A) through 13(G) appear in the advertisements attached as Exhibits A through G, but denied that those quotations accurately or fully reflect the express and/or implied messages of those advertisements. Otherwise denied.

14. Denied in that the language “causes rapid and visibly obvious fat loss in areas of the body to which it is applied” does not appear in the advertisements for Dermalin-APg identified in Paragraph 13, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations.

15. Respondent BAN, LLC denies having made the representations alleged in Paragraph 14 and thus denies having represented that it “possessed and relied upon a reasonable basis that substantiated” such representations. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements.

16. Denied in that the allegations assume that Respondent BAN, LLC made the representations alleged in Paragraphs 14 and 15, which Respondent BAN, LLC denies.

Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements.

17. Denied in that the language “causes rapid and visibly obvious fat loss in areas of the body to which it is applied” does not appear in the advertisements for Cutting Gel identified in Paragraph 13, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations.

18. Respondent BAN, LLC denies having made the representations alleged in Paragraph 17 and thus denies having represented that it “possessed and relied upon a reasonable basis that substantiated” such representations. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements.

19. Denied in that the allegations assume that Respondent BAN, LLC made the representations alleged in Paragraphs 17 and 18, which Respondent denies. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements.

20. Denied in that the language “causes rapid and visibly obvious fat loss in areas of the body to which it is applied” does not appear in the advertisements for Tummy Flattening Gel identified in Paragraph 13, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations.

21. Respondent BAN, LLC denies having made the representations alleged in Paragraph 20 and thus denies having represented that it “possessed and relied upon a reasonable basis that substantiated” such representations. Further, the phrase “reasonable basis” is

inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements.

22. Denied in that the allegations assume that Respondent BAN, LLC made the representations alleged in Paragraphs 20 and 21, which Respondent BAN, LLC denies. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements.

23. Respondent BAN, LLC denies that it has represented that “Cutting Gel causes rapid and visibly obvious fat loss in areas of the body to which it is applied” and thus denies having represented that “published, clinical testing” has proven that statement to be true. Further, the language “Cutting Gel causes rapid and visibly obvious fat loss in areas of the body to which it is applied” does not appear in the advertisements for Cutting Gel identified in Paragraph 13, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations.

24. Denied in that the allegations assume that Respondent BAN, LLC has represented that “Cutting Gel causes rapid and visibly obvious fat loss in areas of the body to which it is applied” and that “published, clinical testing” has proven that statement to be true, which Respondent BAN, LLC denies. Further, the language “Cutting Gel causes rapid and visibly obvious fat loss in areas of the body to which it is applied” does not appear in the advertisements for Cutting Gel identified in Paragraph 13, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations.

25. Respondent BAN, LLC denies that it has represented that “Tummy Flattening Gel causes rapid and visibly obvious fat loss in areas of the body to which it is applied” and thus denies having represented that “published, clinical testing” has proven that

statement to be true. Further, the language “Tummy Flattening Gel causes rapid and visibly obvious fat loss in areas of the body to which it is applied” does not appear in the advertisements for Tummy Flattening Gel identified in Paragraph 13, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations.

26. Denied in that the allegations assume that Respondent BAN, LLC has represented that “Tummy Flattening Gel causes rapid and visibly obvious fat loss in areas of the body to which it is applied” and that “published, clinical testing” has proven that statement to be true, which Respondent denies. Further, the language “Tummy Flattening Gel causes rapid and visibly obvious fat loss in areas of the body to which it is applied” does not appear in the advertisements for Tummy Flattening Gel identified in Paragraph 13, is not defined in the Complaint, and is *inherently vague, subjective, and susceptible to numerous different interpretations.*

Leptoprin and Anorex Products for Weight and Fat Loss in “the Significantly Overweight”

27. Admitted that, at certain times, Respondent BAN, LLC disseminated advertisements and/or labeling for Leptoprin. Admitted that, at certain times, Respondent BAN, LLC disseminated advertisements and/or labeling for Anorex. Denied in that the term “caused” is inherently vague, subjective, and susceptible to multiple meanings. Admitted that the quoted language in sub-paragraphs 27(A) through 27(C) appear in the advertisements attached as Exhibits H through J, but denied that those quotations accurately or fully reflect the express and/or implied messages of those advertisements. Otherwise denied.

28. Denied as to Paragraph 28(A) in that the language “causes weight loss of more than 20 pounds, including as much as 50, 60, or 147 pounds, in significantly overweight

users” does not appear in the advertisements for Leptoprin identified in Paragraph 27, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations. Denied as to Paragraph 28(B) in that the language “causes loss of substantial, excess fat in significantly overweight users” does not appear in the advertisements for Leptoprin identified in Paragraph 27, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations.

29. Respondent BAN, LLC denies having made the representations alleged in Paragraph 28 and thus denies having represented that it “possessed and relied upon a reasonable basis that substantiated” such representations. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements.

30. Denied in that the allegations assume that Respondent BAN, LLC made the representations alleged in Paragraphs 28 and 29, which Respondent denies. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements.

31. Denied as to Paragraph 31(A) in that Respondent BAN, LLC denies that it has represented that “Leptoprin causes weight loss of more than 20 pounds, including as much as 50, 60, or 147 pounds, in significantly overweight users” and thus denies having represented that “clinical testing” has proven that statement to be true. Further, the language “Leptoprin causes weight loss of more than 20 pounds, including as much as 50, 60, or 147 pounds, in significantly overweight users” does not appear in the advertisements for Leptoprin identified in Paragraph 27, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations. Denied as to Paragraph 31(B) in that Respondent BAN, LLC

denies that it has represented that “Leptoprin causes loss of substantial, excess fat in significantly overweight users” and thus denies having represented that “clinical testing” has proven that statement to be true. Further, the language “Leptoprin causes loss of substantial, excess fat in significantly overweight users” does not appear in the advertisements for Leptoprin identified in Paragraph 27, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations.

32. Denied as to Paragraph 32(A) in that the allegations assume that Respondent BAN, LLC has represented that “Leptoprin causes weight loss of more than 20 pounds, including as much as 50, 60, or 147 pounds, in significantly overweight users” and that “clinical testing” has proven that statement to be true, which Respondent denies. Further, the language “Leptoprin causes weight loss of more than 20 pounds, including as much as 50, 60, or 147 pounds, in significantly overweight users” does not appear in the advertisements for Leptoprin identified in Paragraph 27, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations. Denied as to Paragraph 32(B) in that the allegations assume that Respondent BAN, LLC has represented that “Leptoprin causes loss of substantial, excess fat in significantly overweight users” and that “clinical testing” has proven that statement to be true, which Respondent BAN, LLC denies. Further, the language “Leptoprin causes loss of substantial, excess fat in significantly overweight users” does not appear in the advertisements for Leptoprin identified in Paragraph 27, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations.

33. Denied as to Paragraph 33(A) in that the language “causes weight loss of more than 20 pounds in significantly overweight users” does not appear in the advertisements for

Anorex identified in Paragraph 27, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations. Denied as to Paragraph 33(B). The language “causes loss of substantial, excess fat in significantly overweight users” does not appear in the advertisements for Anorex identified in Paragraph 27, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations.

34. Respondent BAN, LLC denies having made the representations alleged in Paragraph 33 and thus denies having represented that it “possessed and relied upon a reasonable basis that substantiated” such representations. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements.

35. Denied in that the allegations assume that Respondent BAN, LLC made the representations alleged in Paragraphs 33 and 34, which Respondent denies. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements.

PediaLean Product for Weight Loss in Children

36. Admitted that, at certain times, Respondent BAN, LLC disseminated advertisements and/or labeling for PediaLean. Denied in that the term “caused” is inherently vague, subjective, and susceptible to multiple meanings. Admitted that advertisements for PediaLean have appeared in the publications named in the second sentence of Paragraph 36. Admitted that the quoted language in sub-paragraphs 36(A) through 36(B) appear in the

advertisements attached as Exhibits K and L, but denied that those quotations accurately or fully reflect the express and/or implied messages of those advertisements. Otherwise denied.

37. Denied in that the language “causes substantial weight loss in overweight or obese children” does not appear in the advertisements for PediaLean identified in Paragraph 36, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations.

38. Respondent BAN, LLC denies having made the representation alleged in Paragraph 37 and thus denies having represented that it “possessed and relied upon a reasonable basis that substantiated” such representation. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements.

39. Denied in that the allegations assume that Respondent BAN, LLC made the representations alleged in Paragraphs 37 and 38, which Respondent denies. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements.

40. Respondent BAN, LLC denies that it has represented that PediaLean “causes substantial weight loss in overweight or obese children” and, thus, denies having represented that “clinical testing” proves that statement to be true. Further, the language “causes substantial weight loss in overweight or obese children” does not appear in the advertisements for PediaLean identified in Paragraph 36, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations.

41. Denied in that the allegations assume that Respondent BAN, LLC has represented that PediaLean “causes substantial weight loss in overweight or obese children” and

that “clinical testing” proves that statement to be true, which Respondent denies. Further, the language “causes substantial weight loss in overweight or obese children” does not appear in the advertisements for PediaLean identified in Paragraph 36, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations.

Expertise of Respondent Mowrey

42. Denied.

43. Admitted that Respondent Daniel B. Mowrey is not a medical doctor.

Otherwise denied.

44. Denied.

ADDITIONAL GROUNDS OF DEFENSE

Without assuming any burden of production or proof that it would not otherwise be required to bear under applicable law, Respondent asserts the following defenses and reserves its right to raise additional defenses as appropriate:

Fifth Amendment -- Due Process

This enforcement action is based upon regulatory standards governing the quantity and quality of substantiation Respondent must possess at the time it makes express and implied claims in advertisements. The standards fail and have failed to provide reasonable persons, including Respondent, with fair notice as to whether contemplated claims in advertisements, including those at issue in this proceeding, are and were permissible and/or allow and have allowed the Commission and/or its representatives to enforce the standards pursuant to their personal or subjective predilections. The regulatory standards are thus unconstitutionally vague on their face and/or as applied to Respondent’s prior and contemplated

advertising activity and, therefore, violate Respondent's rights to due process under the Fifth Amendment to the Constitution of the United States. The Complaint and enforcement action based upon such standards must therefore be dismissed.

First Amendment -- Freedom of Speech

The Commission's Complaint, enforcement action and the relief sought abridge Respondent's rights under the First Amendment to the Constitution of the United States because the Commission seeks to restrict, restrain and/or prohibit protected commercial speech, because the Commission seeks to restrict, restrain and/or prohibit protected commercial speech through the use of ad hoc and non-defined terms and advertising substantiation lacking any measurable degree of definiteness, and because the Commission's actions are premised at least in part upon alleged representations made "by implication" that the Commission has labeled false or misleading without relying on extrinsic evidence. In proceeding this way, the Commission has failed to choose and/or rejected alternate means to achieve its interests that are less restrictive of protected speech.

Puffery

One or more of the advertisements identified in the Complaint contains one or more claims and/or representations that are vague, generalized, subjective, highly suggestive, and/or exaggerated statements, and/or statements that ordinary consumers do not take literally or rely upon, and/or statements that cannot be substantiated objectively. Such claims and/or representations constitute puffery, which is not likely to mislead a reasonable consumer.

Administrative Procedure Act (5 U.S.C. § 706) -- Improper Agency Action

The Complaint and this enforcement action are based upon regulatory standards governing the quantity and quality of substantiation Respondent must possess at the time it

makes express and implied claims in advertisements. The standards fail and have failed to provide reasonable persons, including Respondent, with fair notice as to whether contemplated claims in advertisements, including those at issue in this proceeding, are and were permissible and/or allow and have allowed the Commission and/or its representatives to enforce the standards pursuant to their personal or subjective predilections. The regulatory standards are unconstitutional; therefore, this 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.

Federal Trade Commission Act (15 U.S.C. § 45(b)) -- No Reason to Believe

The Commission failed, or failed properly, to reach the required determination that it had “reason to believe” Respondent has violated the Act prior to initiating this enforcement action. The reasons for that failure include, but are not necessarily limited to, the Commission’s use of regulatory standards that are inherently vague and subject to no discernible quantitative or qualitative requirements, and its refusal to consider extrinsic evidence in determining whether the advertisements at issue are false or misleading. In failing, or failing properly, to reach the “reason to believe” determination, the Commission has violated 15 U.S.C. § 45(b) of the Act.

Federal Trade Commission Act (15 U.S.C. § 45(b)) -- Interest of the Public

The Complaint and this enforcement action are based upon regulatory standards governing the quantity and quality of substantiation Respondent must possess at the time it makes express and implied claims in advertisements. The standards fail and have failed to provide reasonable persons, including Respondent, with fair notice as to whether contemplated claims in advertisements, including those at issue in this proceeding, are and were permissible

and/or allow and have allowed representatives of the Commission to enforce the standards pursuant to their personal or subjective predilections. The regulatory standards are unconstitutional; therefore, the Commission's decision to initiate this enforcement proceeding based upon that standard is not to the interest of the public.

**Administrative Procedure Act (5 U.S.C. §§ 706(1) and/or 555(b)) --
Unreasonable Delay**

The Commission did not initiate this proceeding with due regard for the convenience and necessity of the parties or their representatives, or within a reasonable time, as required under 5 U.S.C. § 555(b). Instead, it unreasonably delayed the filing of the Complaint for political or otherwise improper reasons. This unreasonable delay has prejudiced the ability of Respondent to present its case in this proceeding.

* * * * *

To the extent any of the foregoing grounds of defense may not properly be asserted and/or adjudicated in this proceeding, Respondent hereby states its intent to preserve such defenses for future proceedings.

DEMAND FOR ATTORNEY'S FEES

Respondent reserves all claims for attorney's fees and costs that they may have under the Recovery of Awards Under the Equal Access to Justice Act in Commission Proceedings, 5 U.S.C. §§ 504 and 553(b).

Respectfully submitted,



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**Counsel for Defendant
Ban, L.L.C.**

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2004, I caused to be filed and served the Answer and Grounds of Defense of Respondent BAN, LLC as follows:

- (1) an original and two paper copies filed by hand delivery and one electronic copy in PDF format filed by electronic mail to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room H-159
Washington, D.C. 20580
Email: secretary@ftc.gov

- (2) one paper copy served by hand delivery to:

The Honorable Steven J. McGuire
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room H-112
Washington, D.C. 20580

- (3) one paper copy by first class U.S. mail and one electronic copy in PDF format by electronic mail to:

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Walter C. Gross
Joshua S. Millard
Robin F. Richardson
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Federal Trade Commission
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- (4) one paper copy by first class U.S. mail to:

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Counsel for Respondent Basic Research, L.L.C.

I further certify that the electronic copies sent to the Secretary of the Commission are true and correct copies of the paper originals, and that paper copies with original signatures are being filed with the Secretary of the Commission on the same day by other means.



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