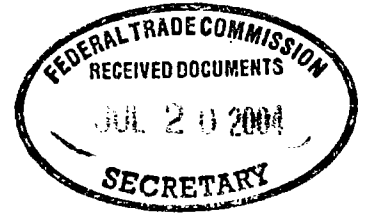


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of )  
)  
)  
BASIC RESEARCH, LLC )  
A.G. WATERHOUSE, LLC )  
KLEIN-BECKER USA, LLC )  
NUTRASPORT, LLC )  
SÖVAGE DERMALOGIC LABORATORIES, LLC )  
BAN, LLC d/b/a BASIC RESEARCH, LLC )  
    OLD BASIC RESEARCH, LLC, )  
    BASIC RESEARCH, A.G. WATERHOUSE, )  
    KLEIN-BECKER USA, NUTRA SPORT, and )  
    SÖVAGE DERMALOGIC LABORATORIES )  
DENNIS GAY )  
DANIEL B. MOWREY d/b/a AMERICAN )  
    PHYTOTHERAPY RESEARCH LABORATORY, and )  
MITCHELL K. FRIEDLANDER, )  
    Respondents. )

Docket No. 9318

**ORDER DENYING MOTIONS FOR A MORE DEFINITE STATEMENT AND  
MOTION TO DISMISS THE COMPLAINT FOR LACK OF DEFINITENESS**

**I. PROCEDURAL BACKGROUND**

On June 28, 2004, Respondents 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 (collectively referred to as "Respondents") filed a Motion for More Definite Statement ("Motion"). On June 29, 2004, Respondent Mitchell Friedlander ("Respondent Friedlander") filed a *pro se* motion to join the Respondents' Motion for More Definite Statement. On July 6, 2004, Respondent Friedlander filed a Motion to Dismiss the Complaint for Lack of Definiteness which is virtually identical to Respondents' Motion for More Definite Statement. On July 8, 2004, Complaint Counsel filed its opposition to the pending motions ("Opposition").

On July 13, 2004, Respondents and Respondent Friedlander filed motions for leave to file a reply brief and on the same date filed reply briefs, which were virtually identical to each other. On July 19, 2004, Complaint Counsel filed its opposition to Respondents' motions for leave to file reply briefs. Respondents have failed to demonstrate that a reply would be necessary or useful and therefore, pursuant to Commission Rule 3.22(c), the motions for leave to file reply briefs are DENIED.

For the reasons set forth below, the motions for a more definite statement are DENIED and Respondent Friedlander's motion to dismiss complaint for lack of definiteness is DENIED.

## II. ARGUMENTS OF THE PARTIES

Respondents claim that the Complaint fails to provide a clear and concise statement sufficient to inform each Respondent with reasonable definiteness about the types of specific acts or practices alleged to have violated the Federal Trade Commission Act ("FTC Act"). Respondents argue that the use of the terms "reasonable basis," "rapid," "substantial," "clinical testing," "visibly obvious," "causes," and "unfair" in the Complaint has left them "incapable of framing appropriate and full responses and pleading adequate defenses." Motion at 3.

Complaint Counsel responds that the Complaint meets and exceeds the notice pleading requirements as set out in Commission Rule 3.11. Opposition at 6. Complaint Counsel argues that the Complaint presents a clear and concise factual statement sufficient to inform Respondents with reasonable definiteness of the practices alleged to have violated the FTC Act; that the Complaint identifies each Respondent, the individuals, and entities alleged to violate the FTC Act; that the Complaint details the specific acts, statements, and practices that allegedly violate the law for the six products through quotes from Respondents' marketing materials; that the Complaint uses Respondents' own advertising material terminology in the factual allegations; and that the challenge to the definiteness of established legal terms is easily remedied by a modicum of research. Opposition at 2, 4, 6, 7.

## III. MOTION FOR MORE DEFINITE STATEMENT STANDARD

Respondents' motions for more definite statement are filed pursuant to Section 3.11(c) of the Commission's Rules of Practice which authorizes the filing of a motion for more definite statement. 16 C.F.R. § 3.11(c). See, e.g., *In re Weight Watchers Int'l, Inc.*, 1993 FTC LEXIS 300, \*1 (Oct. 27, 1993); *In re Diran M. Seropian*, 1991 FTC LEXIS 306, \*1 (July 3, 1991). Although Respondent Friedlander's motion is captioned as a motion to dismiss complaint for lack of definiteness, in substance it is a motion for more definite statement and will be treated as such. See *Mitchell v. E-Z Way Towers, Inc.*, 269 F.2d 126, 129-30 (5th Cir. 1959) (comparing motion for more definite statement with motion to dismiss for failure to state a claim).

Section 3.11(b)(2) of the Rules sets forth that the Commission's complaint shall 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(b)(2). This rule requires only that the complaint contain a factual statement sufficiently clear and concise to inform respondent with reasonable definiteness of the types of acts or practices alleged to be in violation of law, and to enable respondent to frame a responsive answer. *In re Schering-Plough Corp.*, 2001 FTC LEXIS 198, \*11 (Oct. 31, 2001). "Commission complaints, like those in the federal courts, are designed only to give a respondent 'fair notice of what . . . the claim is and the grounds upon which it rests.'" *Id.* (quoting *Conley v.*

*Gibson*, 355 U.S. 41, 47 (1957)).

“Under Section 3.11(b) of the Federal Trade Rules of Practice, a motion for a more definite statement is not granted unless the complaint is ambiguous or more information is necessary in order to enable the respondents to prepare a responsive answer to the complaint.” *In re Red Apple Companies, Inc.*, 1994 FTC LEXIS 90, \*1 (June 21, 1994); *see also In re Fruehauf Trailer Co.*, 53 F.T.C. 1269, 1270 (1956); *In re Kroger Company*, 1977 FTC LEXIS 133, \*1 (Aug. 12, 1977). Rule 3.11(c) is similar to Federal Rule of Civil Procedure 12(e) which allows for a more definite statement only where the pleading “is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.” Fed. R. Civ. P. 12(e).

#### IV. ANALYSIS

The Complaint alleges that Respondents marketed certain dietary supplements with unsubstantiated claims for fat loss and/or weight loss and that they falsely represented that some of these products were clinically proven to be effective, in violation of Sections 5(a) and 12 of the FTC Act. Complaint ¶¶ 11, 16, 19, 22, 24, 26, 30, 32, 35, 39, 41, 43, 44. The Complaint quotes extensively from Respondents’ marketing materials and identifies the individuals, entities, representations, and practices alleged to violate the FTC Act. *See* Complaint ¶¶ 13, 27, 36.

Respondents object to the terms “reasonable basis,” “rapid,” “substantial,” “clinical testing,” “visibly obvious,” “causes,” and “unfair” as used in the Complaint. According to Complaint Counsel, these terms have legal significance, are used in their ordinary meaning, or are the same or similar to terms used in Respondents’ own advertising.

Complaint Counsel contends that the terms “reasonable basis” and “unfair” are legal terms defined by case law. Under Section 5 of the FTC Act, Respondents must have a reasonable basis for making objective claims before claims are disseminated. *See, e.g. In re Pfizer, Inc.*, 81 F.T.C. 23 (1972); *In re Removatron Int’l Corp.*, 111 F.T.C. 206 (1988), *aff’d* 884 F.2d 1489 (1st Cir. 1989). Similarly, the term “unfair” is used by the relevant portions of the FTC Act itself which defines “unfair acts and practices.” 15 U.S.C. 45(n). Respondents have failed to demonstrate that the terms “reasonable basis” or “unfair” as used in the Complaint are not sufficient to inform Respondents of the types of acts or practices alleged with reasonable definiteness as required by Rule 3.11.

Complaint Counsel contends that the term “causes” is used to describe the effect of using each product as described in Respondents’ advertising and is used in its ordinary meaning. 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 with reasonable definiteness as required by Rule 3.11.

Complaint Counsel contends that the terms “rapid,” “substantial,” “clinical testing,” and “visibly obvious” are the same or similar to terms used in Respondents’ advertising and that

these terms are used in their ordinary meanings. Respondents have failed to demonstrate that the terms "rapid," "substantial," "clinical testing," and "visibly obvious" as used in the Complaint are not sufficient to inform Respondents of the types of acts or practices alleged with reasonable definiteness as required by Rule 3.11.

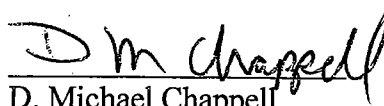
Respondents rely on *McHenry v. Renne* to support their argument for more definite statement. 84 F.3d 1172 (9th Cir. 1996). In *McHenry*, the complaint subject to the motion for a more definite statement was over fifty pages long, redundant, and mixed with allegations of relevant facts, irrelevant facts, stories, and political arguments that "read like a magazine story." *Id.* at 1174-76. It did not inform the defendants of the crimes and violations which they were accused. *Id.* The Complaint filed by Complaint Counsel in this case does not suffer from those defects.

Section 3.12(b)(1) of the Commission's Rules sets forth that "[a]n answer in which the allegations of a complaint are contested shall contain: (i) A concise statement of the facts constituting each ground of defense; (ii) Specific admission, denial, or explanation of each fact alleged in the complaint or, if the respondent is without knowledge thereof, a statement to that effect. Allegations of a complaint not thus answered shall be deemed to have been admitted." 16 C.F.R. 3.12(b)(1). The Complaint is sufficiently detailed in nature to allow Respondents to file an Answer pursuant to 3.12(b)(1). Any necessary clarification of these terms may be obtained during the normal course of discovery.

## VI. CONCLUSION

For the above stated reasons, Respondents' motions for a more definite statement are DENIED. Respondent Friedlander's motion to dismiss the complaint for lack of definiteness is DENIED. Respondents' Answers will be due, pursuant to Commission Rule 3.12(a), within ten (10) days of the date of this Order.

ORDERED:

  
D. Michael Chappell  
Administrative Law Judge

Date: July 20, 2004