

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

<i>In the Matter of</i>)	
)	
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,)	
)	
<i>Respondents.</i>)	
	/	

MOTION FOR INTERLOCUTORY APPEAL

Basic Research, LLC (“Basic Research”), A.G. Waterhouse, LLC (“A.G. Waterhouse”), Klein-Becker USA, LLC (“Klein-Becker”), Nutrasport, LLC (“Nutrasport”), Sövage Dermalogic Laboratories, LLC (“Sövage”), BAN, LLC (“BAN”), Dennis Gay (“Gay”) and Daniel B. Mowrey (“Mowrey”) (collectively, “Respondents”), by and through their counsel and pursuant to 16 C.F.R. §3.23(b), hereby file their Motion for Interlocutory Appeal from the Administrative

Law Judge's ruling denying Respondents' Motions for More Definite Statement, and in support thereof state as follows.

I. Introduction

Respondents respectfully request interlocutory review of the Administrative Law Judge's ("ALJ") July 20, 2004 Order ("Order") denying Respondents' Motion for More Definite ("Motion"). Although recognizing that the ALJ has carefully reviewed the Motion and issued a reasoned determination, Respondents submit that the legal and policy implications of depriving Respondents adequate definitions of key elements in the complaint are substantial, and should be resolved by the Commission itself.

Respondents have requested definition of the terms "Rapid," "Substantial," "Visibly Obvious," "Causes" and "Reasonable Basis" because these terms do not appear in the accused advertisements, are subjective, and are not otherwise defined in the complaint. The denial of this request severely hinders Respondents' ability to understand the Commission's interpretation of the accused advertisements and the substantiation standards the Commission is applying in this case.

Respondents further submit that an immediate review of the ALJ's ruling will materially advance the litigation. The ALJ has ruled that any ambiguity in the referenced terms can be cured through discovery. Accordingly, the ALJ invites Respondents to propound discovery on the Commission, as it is the Commission that has used the terms at issue and has the responsibility for defining the amount and types of substantiation that the Respondents allegedly needed to have a reasonable basis for the challenged advertisements. If, in lieu of answering discovery, the Commission takes this appeal and chooses instead to define the referenced terms, much time, money and judicial resources will have been saved and this case will have been

significantly advanced toward conclusion. For the foregoing reasons, Respondents respectfully request that the present application be granted.

II. Background

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

On June 28, 2004, Respondents Basic Research, A.G. Waterhouse, Klein-Becker, Nutrasport, Söavage, BAN, Gay and Mowrey filed a Motion for More Definite Statement. The basis of the Motion was that the Commission had failed to define the terms “Rapid,” “Substantial,” “Visibly Obvious,” “Causes,” and “Reasonable Basis.” Respondents asserted, *inter alia*, that absent clarification, it was not possible for Respondents to 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”).¹ 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 Respondents’ Motions (“Order”). According to the Order, the complaint was sufficiently detailed in nature to allow Respondents to

¹ The Opposition was directed “to both Respondents’ Motion for a More Definite Statement and *pro se* Respondent Mr. Friedlander’s Motion to Dismiss Complaint for Lack of Definiteness.” *See*, Opposition, f.n. 1.

file an Answer pursuant to 3.12(b)(1) and any necessary clarification could be obtained through discovery. *See*, Order, page 4.

III. 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 Respondents' present application.

A. Respondents' 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 "materially 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. Respondents are being forced to wait for information that the Commission can readily provide at the outset of the case. In the interim, Respondents are left to 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 contrast, is provided with excessive latitude to shift its theory 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. Respondents respectfully submit that the ambiguity of this term could be resolved by giving the word specific definition. Respondents 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, as Complaint Counsel suggests, 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 Respondents of what standard they allegedly failed to meet.²

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

Respondent appreciate the ALJ’s invitation to propound discovery on the Commission in this case. However, 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 Respondents of the interpretation of the advertising at issue, the level of substantiation necessary, and how Respondents allegedly fell short. It would be far more efficient for the Commission to provide this information rather than to have

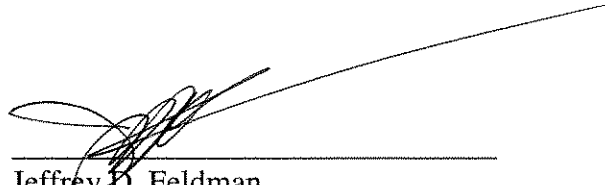
² The Commission, not the ALJ, bears the burden of alleging and proving in each case the amount of substantiation required to constitute a “reasonable basis.” For example, the Order cites *Pfizer Inc.*, 81 F.T.C. 23 (1972) in this regard. *See*, Order, page 3. With respect to simple claims of efficacy, *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). 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).

Respondents engage in discovery. Respondents are 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. Respondents simply cannot commence a defense until the challenged terms are defined and the Commission articulates the amount of substantiation the Respondents allegedly needed to have a reasonable basis for the challenged advertisements.

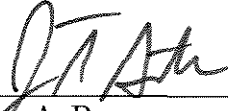
IV. CONCLUSION

Based on the foregoing, Respondents respectfully request that the Administrative Law Judge grant Respondents' application for full Commission review by certifying to the Commission, in writing, 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; (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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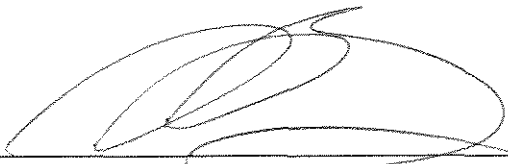
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A handwritten signature in black ink, appearing to read "Ronald F. Price", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2004, I caused Respondents' Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker USA, LLC, Nutrasport, LLC, Söavage Dermalogic Laboratories, LLC, BAN, LLC, Dennis Gay and Daniel B. Mowrey's Motion for Interlocutory Appeal to be filed and served 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, NW, Room H-159
Washington, DC 20580
Email: secretary@ftc.gov

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

The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Avenue, NW, Room H-106
Washington, DC 20580

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

Laureen Kapin
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Joshua S. Millard
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- (4) one paper copy by first class U.S. mail

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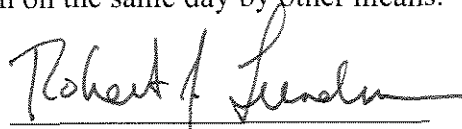
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I further certify that the electronic copies sent to the Secretary of the Commission are true and correct copies of the paper originals, and that paper copies with original signatures are being filed with the Secretary of the Commission on the same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


Robert J. Lundman