

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

*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  
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.*

\_\_\_\_\_ /

**Docket No. 9318**

**Public Document**

**RESPONDENT MITCHELL K. FRIEDLANDER'S MOTION TO DISMISS  
COMPLAINT FOR LACK OF DEFINITENESS, WITH CERTIFICATE OF SERVICE  
AND CERTIFICATE OF ELECTRONIC FILING**

Respondent, Mitchell K. Friedlander ("Respondent"), pursuant to 16 C.F.R §3.22, hereby

files this Motion for Dismissal of the Complaint for Lack of Definiteness (“Motion”), and in support thereof states 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 Respondent Friedlander with reasonable definiteness about the type of specific acts or practices alleged to violate the FTC Act. As such, Respondent Friedlander does not know with any degree of sufficiency the specific charges leveled against him. For example, Respondent cannot ascertain FTC’s intended meaning and usage of certain terms, such as: “reasonable basis,” “rapid,” “substantial,” “visibly obvious,” or “causes,” and it fails to assert which (if any) specific acts or practices are “unfair” or why they are “unfair.” As a result of the indefiniteness of the Commission’s complaint, the complaint fails to state a violation of either Section 5(a) or 12 of the Federal Trade Commission Act and should accordingly be dismissed.

## II. RELEVANT FACTS

On June 16, 2004 the Commission authorized an administrative complaint against Respondents, 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®.

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 advertising for the products was false or misleading because (1) Respondent Friedlander expressly or by implication represented that he had a “reasonable basis that substantiated the representation” for his claims; and (2) Respondent Friedlander “did not possess or rely upon a reasonable basis that substantiated the representation.”

The complaint, however, fails to adequately inform or notify Respondent Friedlander 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,” “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 the complaint void, as Respondent Friedlander, as the complaint is currently framed, is incapable of framing appropriate and full responses and pleading adequate defenses.

### **III. ARGUMENT**

A complaint must allege sufficient facts to outline a cause of action *Chan v. City of Chicago*, 777 F. Supp 1437, 1440-1441 (N.D.Ill. 1991). The complaint must state either direct or inferential allegations concerning all material elements necessary for recovery under the relevant legal theory. *Id.* A court, however, need not strain to find favorable inferences that are not apparent on the face of the complaint. *Id.*, see also, *In re Credit Acceptance Corporation Securities Litigation*, 50 F.Supp.2d 662, 669 (E.D.Mich 1999).

Here, the Commission's failure to define key elements of its operative allegations in the complaint prohibits the Respondents from appreciating 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). Although the FTC's Complaint has levied allegations against Respondent Friedlander that accuse him of deceptive or unfair acts stemming from marketing materials, and has cited extensively from these marketing materials, the Complaint fails to clarify the following terms in a manner that advances the relevant legal theory, or allows Respondent Friedlander 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, Respondent Friedlander is forced to guess at what standard the Commission staff seeks to enforce against him. Simply alleging that Respondent Friedlander failed to possess a "reasonable basis" that substantiated his representations – without articulating what constitutes a reasonable basis – makes it impossible for Respondent Friedlander 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, Respondent Friedlander is unable to evaluate, defend and prepare his case.

Moreover, an amorphous definition of what constitutes a reasonable basis permits the Commission to negate the sufficiency of whatever substantiation evidence Respondent Friedlander may offer in defense of the complaint simply by contending that Respondent's proof is not enough. In other words, in the absence of precise standard of what constitutes a reasonable basis, neither Respondent Friedlander nor the Administrative Law Judge has a measurable

standard against which Respondent's substantiation evidence may be measured, leaving the Commission in a position of establishing the demarcation point between what is and is not legal to its own fancy. Simply put, how can Respondent Friedlander be guilty of committing violations of Section 5(a) and 12 of the Federal Trade Commission Act (the Act) for not having a "reasonable basis" when neither the Act, nor the Commission's rules reference the phrase or otherwise define it?

B. *"Rapid"*

With respect to the Topical Gels discussed in the administrative complaint, the Commission alleges that Respondent Friedlander had no reasonable basis that substantiated his claims regarding "rapid" fat loss. Most importantly, the term "rapid" is not defined. Respondent Friedlander is forced to speculate as to its meaning. How fast is rapid? Without further guidance as to what representations the FTC contends is objectionable, Respondent Friedlander cannot be expected to address such charges. As a result, the complaint is rendered void for failing to state a cause of action either under Section 5(a) or 12 of the Act.

C. *"Substantial"*

The Commission's failure to define the term "substantial" when used in connection with the phrase "fat loss" fails to inform Respondent Friedlander of the nature and quality of the standard the Commission intends to apply against him. 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 Respondent Friedlander of the acts of which he stands 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 *Carhart*] “...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.”). In the absence of a meaningful definition of substantial, the complaint fails for vagueness.

D. “*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 whom?). It simply is not possible to discern from whose perspective the Commission expects Respondent Friedlander to defend the claim. As such, Respondent Friedlander is incapable of formulating an appropriate and complete response, let alone to understand, the specific claims against him in relation to this term.

E. “*Causes*”

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

F. “*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. Respondent Friedlander does not know what he should respond to as being allegedly unfair and as such cannot defend against such an amorphous allegation.

**IV. CONCLUSION**

Based on the foregoing, Respondent Friedlander requests the Administrative Law Judge to dismiss the complaint for failing to state a cause of action under wither Section 5(a) or 12 of the Act and further require, in the event the Commission wishes to re-file an amended complaint, that the Commission staff, in any such amended complaint, define with specificity the terms and phrases addressed herein.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss Complaint for Lack of Definiteness, with proposed order, was provided to the following parties this 6th day of July, 2004 as follows:

(1) One (1) original and two (2) copies 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](mailto:Secretary@ftc.gov);

(3) One (1) copy 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, Lauren Kapin, Joshua S. Millard, and Laura Schneider, all care of [lkapin@ftc.gov](mailto:lkapin@ftc.gov), with one (1) paper courtesy copy via U. S. Postal Service to Lauren 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, 601 New Jersey Avenue, N.W., Washington, D.C. 20580

(6) One (1) copy each via United States Postal Service, separately, to Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker, LLC, Nutrasport, LLC, Sovage Dermalogic Laboratories, 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.

I FURTHER CERTIFY that the electronic version of my Motion to Dismiss Complaint for Lack of Definiteness is a true and correct copy of the original document being filed this same day of July 6, 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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Mitchell K. Friedlander  
c/o Compliance Department  
5742 West Harold Gatty Drive  
Salt Lake City, Utah 84116  
Telephone: (801) 414-1800  
Facsimile: (801) 517-7108

Pro Se Respondent

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

*In the Matter of*

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MITCHELL K. FRIEIDLANDER,

*Respondents.*

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**ORDER ON MOTION TO DISMISS COMPLAINT FOR LACK OF DEFINITENESS**

THIS CAUSE came before the Administrative Law Judge for the Federal Trade Commission on Respondent Mitchell K. Friedlander's ("Respondent") Motion to Dismiss Complaint For Lack of Definiteness ("Motion"). Having carefully reviewed the motion and any opposition thereto, it is hereby

ORDERED AND ADJUDGED that Respondent's Motion is hereby GRANTED. The Complaint in the above-identified action is DISMISSED, without prejudice. In the event that the Commission re-files an amended complaint, the Commission staff, in any such amended complaint, shall define with specificity the terms and phrases "reasonable basis," "rapid," "substantial," "visibly obvious," "causes," and "unfair."

DONE AND ORDERED this \_\_\_\_\_ day of July, 2004.

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D. Michael Chappell  
Administrative Law Judge

Copies furnished to:  
All counsel of record