

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

In the Matter of)	
)	
BASIC RESEARCH, L.L.C.,)	
A.G. WATERHOUSE, L.L.C.,)	
KLEIN-BECKER USA, L.L.C.,)	
NUTRASPORT, L.L.C.,)	
SOVAGE DERMALOGIC)	Docket No. 9318
LABORATORIES, L.L.C.,)	
BAN, L.L.C.,)	PUBLIC DOCUMENT
DENNIS GAY,)	
DANIEL B. MOWREY, and)	
MITCHELL K. FRIEDLANDER,)	
)	
Respondents.)	

**COMPLAINT COUNSEL’S SUPPLEMENTAL BRIEF
IN SUPPORT OF PENDING MOTION TO STRIKE
RESPONDENTS’ “ADDITIONAL DEFENSES”**

Pursuant to the Court’s October 18th *Order*, Complaint Counsel hereby submit this *Supplemental Brief* addressing issues raised by the pleadings on the pending *Motion to Strike Respondents’ “Additional Defenses.”*

BACKGROUND

The *Complaint* in this matter alleges, *inter alia*, that Basic Research LLC and other related individuals and companies (collectively, “Respondents”) marketed dietary supplements with unsubstantiated claims for fat loss and/or weight loss, and false representations that some of these products were clinically proven to be effective, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act (“FTC Act”). Respondents have countered these allegations with an array of “additional defenses” generally challenging the Commission’s “regulatory standards,”

its investigation, or its decision to issue the *Complaint*. See, e.g., Answer, Resp't Basic Research LLC, at 12-15 (July 30, 2004). These alleged defenses relate to the Commission's conduct or legal framework, not whether Respondents marketed products with false or unsubstantiated claims in violation of the FTC Act. Complaint Counsel have moved to strike these defenses on the grounds that they are legally invalid, devoid of factual statements, irrelevant, and immaterial to this administrative proceeding.

After the parties filed successive pleadings on the alleged defenses, the Court directed the parties to provide concurrent supplemental briefs on the following issues:

(1) whether the Administrative Law Judge has the authority to decide the issues presented and, if not, the consequence thereof, (2) whether a Fifth Amendment challenge to a regulatory approach by a federal agency is a valid defense to an administrative proceeding, (3) whether Respondents are entitled to amend any stricken defenses, and (4) whether discovery should be limited if Respondents' defenses are not stricken.

Order, Oct. 18, 2004, at 1-2. Our response follows.

DISCUSSION

I. The Administrative Law Judge Has the Authority to Decide the Issues Presented

Respondents have failed to demonstrate that the *Motion to Strike* is beyond the authority of the Administrative Law Judge. As discussed below, Commission caselaw establishes that this Court has authority to strike the alleged defenses.

A. The Issues Presented in the *Motion to Strike* are Issues of Law Within the Court's Authority Under RULES OF PRACTICE 0.14 and 3.42

Respondents have alleged defenses under the due process clause of the *Fifth Amendment*, the free speech clause of the *First Amendment*, provisions of the Administrative Procedure Act

("APA"), the FTC Act, and the law of equity.¹ With respect to each of these defenses, Complaint Counsel has raised preliminary questions of legal sufficiency, pleading, and/or relevance in the *Motion to Strike*. See Mot. to Strike at 4-24. These are the issues presently before the Court.

This Court has authority to resolve the issues raised in Complaint Counsel's *Motion to Strike*. Under RULE OF PRACTICE 0.14, Administrative Law Judges "are officials to whom the Commission, in accordance with law, delegates the initial performance of statutory fact-finding functions and initial rulings on conclusions of law, to be exercised in conformity with Commission decisions and policy directives." Further, the Administrative Law Judges are empowered "[t]o consider and rule upon, as justice may require, all procedural and other motions appropriate in an adjudicative proceeding." RULE 3.42(c)(8).

The issues presented are preliminary issues of law. These issues were raised in a *Motion to Strike* appropriate for an adjudicative proceeding. As discussed in our previous pleadings, and as discussed in additional detail below, the Commission has issued decisions on many of the issues presented here, and permitted Administrative Law Judge decisions to stand on other issues raised in our *Motion*. Accordingly, this Court should exercise its authority and rule in conformity with those decisions and policy directives pursuant to RULE 0.14.

Even if Respondents raised issues that the Commission has not already opined on, however, "[t]he Administrative Law Judge may rule on questions of law, as long as they are not

¹ See Mot. to Strike at 4-24 (discussing defenses). Respondents have also advanced redundant "negative defenses" that merely reiterate previous denials of wrongdoing. These defenses should be stricken as surplusage. Respondents have not suggested that the Court lacks authority to do so; rather, they have argued that RULE OF PRACTICE 3.12 contemplates pleading redundant allegations as "defenses." See Opp'n at 34. Case precedent suggests otherwise. See Mot. to Strike at 19-22 (citing cases).

matters committed to the discretion of the Commission.” *In re Basic Research LLC*, 2004 WL 1942068 (Aug. 17, 2004) (citing *In re AMREP Corp.*, 87 F.T.C. 283 (1976)).

Preliminary questions of sufficiency, pleading, and relevance are indisputably questions of law that are within the general authority of the Administrative Law Judge. First, it is well-established that the legal sufficiency of an alleged defense is a question of law. *See, e.g., United States v. Tokash*, 282 F.3d 962, 967 (7th Cir. 2002); *United States v. Benning*, 248 F.3d 772, 775 (8th Cir. 2001); *United States v. Gole*, 158 F.3d 166, 168 (2d Cir. 1998). Second, the question of whether a pleading provides sufficiently-detailed allegations to satisfy pleading requirements is also a question of law. *See United States v. Miller*, 51 F.3d 1502, 1508 n.5 (9th Cir. 1995); *see also In re Basic Research LLC, et al.*, 2004 WL 1942068 (Aug. 17, 2004) (ruling that *Complaint* satisfied requirements of RULE 3.12). Next, with respect to issues of relevance, it is also well-established that “[r]elevance is a question of law to be decided by the trial judge, who ultimately will make the final determination if proffered evidence tends to prove or disprove a matter ‘properly provable in the case.’” *United States v. Torniero*, 735 F.2d 725, 729 (2d Cir. 1984) (citing FED. R. EVID. 401 advisory committee note). Materiality is, similarly, a question of law. *See, e.g., United States v. Holecek*, 739 F.2d 331, 337 (8th Cir. 1984) (citing decisions of five other Circuits). The Court has general authority to rule on the questions raised in our *Motion to Strike*. As discussed below, the sufficiency, pleading, and relevance of Respondents’ alleged defenses are *not* questions committed to the sole discretion of the Commission.

B. Respondents’ Arguments Concerning the Court’s Authority are Incorrect

Respondents have argued that this Court lacks authority to pass on their defenses, even in the context of a *Motion to Strike*. According to Respondents, the alleged defenses are committed

to the sole discretion of the Commission, so the Court lacks authority to *strike* those defenses on grounds of sufficiency, pleading, relevance, and/or materiality.² Respondents are mistaken. As discussed below, almost all of Respondents' defenses are *not* exclusively committed to the Commission, and Commission precedent confirms that "public interest" and "reason to believe" defenses may be stricken by Administrative Law Judges.

1. Defenses Not Committed to the Discretion of the Commission

Nearly all of Respondents' defenses are ordinary questions of law subject to final determination at trial by the Administrative Law Judge. First, Respondents have failed to show that their due process defense is beyond the Court's authority. Commission precedent holds that most due process questions are, in fact, within the authority of the Administrative Law Judges. *See In re Pepsico, Inc.*, 83 F.T.C. 26, 27 (1973) ("the administrative law judges have authority to rule on nearly all issues during the time the proceedings are before them, including most questions of due process that may be raised"). Administrative Law Judges have repeatedly ruled on motions to strike due process defenses in the past. *See* Reply at 3 (citing cases); *see also In re Tower Loan, Inc.*, Docket No. 9241, 1990 WL 10003009 (Oct. 10, 1990) (striking due process defense). Indeed, Respondents cited several ALJ decisions ruling on motions to strike due process defenses in defense of their allegations. *See* Opp'n at 4.

Respondents have not shown that their due process defense merits certification to the

² Respondents' argument confuses two separate types of issues. It confuses issues with respect to the sufficiency and/or relevance of the alleged defenses, on one hand, with the *merits* of each of those defenses at trial. Our *Motion to Strike* seeks a preliminary judicial determination on whether the alleged defenses are cognizable, properly pled, relevant, and material. Even if the Court declines to note this distinction, however, Respondents' arguments are still invalid for the reasons explained in Section B, above.

Commission. In the past, novel due process questions have occasionally merited certification. For example, in the *Pepsico* case, the Commission accepted certification of a motion to dismiss alleging a novel due process issue because the Commission had taken additional formal action against the respondent after the issuance of the Complaint.³ In another case, *Raymond Lee*, the Commission considered a novel due process challenge based on the allegation that Complaint Counsel refused to accept a *Consent Order* proposed by the respondents. *See In re Raymond Lee Org., Inc.*, 92 F.T.C. 489 (1978). Unlike the respondents in these cases, Respondents here have *not* identified a novel due process issue. Instead, they argue that the U.S. Constitution obliges the Commission to engage in a rulemaking procedure to regulate the advertising of dietary supplements—an argument that the Commission has already rejected in a policy directive.⁴

Similarly, Respondents have failed to show that other related defenses are beyond the Court's authority. Administrative Law Judges have long ruled on *First Amendment* and APA defenses. *See, e.g., In re Metagenics, Inc.*, 1995 FTC LEXIS 2, *2 (Jan. 5, 1995) (striking alleged defenses that proposed order would be arbitrary and capricious or would violate commercial free speech rights); *In re Trans Union Corp.*, Docket No. 9255, 2000 WL 257766 (Feb. 10, 2000), *cited in* Opp'n at 6; *In re Superior Ct. Trial Lawyers Ass'n*, 107 F.T.C. 510 (1986) (rejecting

³ In *Pepsico*, the Commission took additional action against the respondent after the filing of the administrative complaint by directing the General Counsel to seek an injunction from a Court of Appeals under the *All Writs Act*. *See In re Pepsico, Inc.*, 83 F.T.C. at 27.

⁴ Respondents complained that due process required the Commission “to promulgate a concrete, content-neutral standard against which an advertiser [specifically, ‘an advertiser of dietary supplements or weight-loss products’] may judge its commercial speech, before speaking.” Opp'n at 9, 10. The Commission recently rejected this argument in denying a rulemaking petition. *See* Letter from Federal Trade Commission to Jonathan W. Emord, Esq. (Nov. 30, 2000) (attached to *Motion to Strike*).

contention that boycott was political action protected by First Amendment); *In re Kroger Co.*, 1977 FTC LEXIS 70, *5 (Oct. 18, 1977) (striking defense “that the complaint is an arbitrary and discriminatory exercise of the Commission’s enforcement discretion”). Respondents described one of these decisions, the *Kroger* decision, as “instructive” and “relevant.” *See* Reply at 3. Hence, nearly all of Respondents’ defenses are *not* exclusively committed to the Commission.

2. The Administrative Law Judge Has Authority to Strike “Public Interest” and “Reason to Believe” Defenses

Respondents’ argument focuses on two alleged defenses. These defenses challenge the Commission’s determinations that it had “reason to believe” that violations of the FTC Act occurred, and that this action would be in the “public interest.” *E.g.*, Answer, Resp’t Basic Research, at 14-15. Respondents focus on these defenses because Administrative Law Judges “lack[] authority to rule on and must certify motions to dismiss for lack of public interest and other motions containing questions pertaining to the Commission’s exercise of administrative discretion.” *In re Gibson, et al.*, 90 F.T.C. 275 (1977); *see also* Reply at 3 n.3 (noting that Gibson decision denied motions to dismiss for lack of “public interest”).

Respondents have overlooked controlling Commission caselaw in arguing that the Administrative Law Judge cannot rule on questions of legal sufficiency, pleading, relevance, or materiality with respect to the “reason to believe” and “public interest” defenses. Respondents’ argument conflicts with Commission precedent. This controlling precedent makes clear that the Administrative Law Judge does have authority, and does not have to defer to the Commission, to *strike* defenses challenging the Commission’s determinations. The Commission itself has sustained an Administrative Law Judge’s decision to strike defenses challenging whether the

action is “in the public interest.” See *In re Warner-Lambert Co.*, 82 F.T.C. 749 (1973). The Commission has also sustained an Administrative Law Judge’s decision to strike a defense challenging whether the Commission had “reason to believe” violations of the FTC Act had occurred. See *In re AMREP Corp.*, 102 F.T.C. 1362 (1983):

Respondent is not entitled to litigate this issue during the administrative proceeding, which should be concerned with proving whether the allegations of the complaint are supported by evidence. Permitting litigation on the sufficiency of the pre-complaint investigation or the Commission’s determination of “reason to believe” would only invite delay into the hearing process.

102 F.T.C. at 1672-73 (footnote and citation omitted), *aff’d*, *AMREP Corp. v. FTC*, 768 F.2d 1171, 1177 (10th Cir. 1985). More recently, the Commission has refused to reopen or revisit the question of its “reason to believe” determination. See *In re Brake Guard Prods., Inc.*, 125 F.T.C. 138, 263 n.37 (1998).

Other Administrative Law Judges have exercised the authority to strike alleged “reason to believe” and “public interest” defenses. See *In re Volkswagen, Inc.*, Docket No. 9154, slip op. at 2, 5, 7 (July 8, 1981) (striking defenses relating to “reason to believe” and “public interest”) (attached to *Motion to Strike*); *In re General Motors Corp.*, Docket No. 9074, 1976 FTC LEXIS 237, *1-2 (July 9, 1976) (striking defenses relating to “reason to believe” and “public interest”). This Court has no less authority to strike Respondents’ invalid defenses.⁵

⁵ Respondents have not explained why the above-cited precedents are unpersuasive. Nor have they cited any cases establishing that Administrative Law Judges lack authority to strike the challenged defenses. Instead, they have simply pointed to orders certifying motions to dismiss administrative complaints for lack of “public interest.” See Reply at 3 n.2. These motions to dismiss are completely unlike the present *Motion to Strike*, because these motions were potentially dispositive of the Commission’s case. Administrative Law Judges do not have authority to dismiss *Complaints* for lack of “reason to believe” or “public interest.” By contrast, the present *Motion* is not potentially dispositive of the entire case, and as discussed above, the Court has well-established authority to strike defenses challenging these determinations.

Preliminary questions of legal sufficiency, pleading, and/or relevance raised before the close of discovery are not questions intruding on the Commission's exercise of administrative discretion. They are rudimentary questions of law related to the Administrative Law Judge's authority to manage these proceedings under RULE 3.42(c)(8) in the interests of justice and judicial economy. This Court has authority to rule upon the pending *Motion to Strike*.

**3. Consequences if the Court Lacks Authority to
Decide the Issues Presented in the *Motion to Strike***

RULE 3.22(a) states that “[t]he Administrative Law Judge shall certify to the Commission any motion upon which he or she has no authority to rule, accompanied by any recommendation that he or she may deem appropriate.” If the Court were to determine that it lacked authority to decide some or all the questions presented here, the Commission might be called upon to decide preliminary legal questions of sufficiency, pleading, and/or relevance in many administrative proceedings. This would not serve the interests of judicial economy or efficiency and fairness to the parties. If the Court were to reach this conclusion, however, Complaint Counsel would respectfully request that the Court strike those invalid defenses that are acknowledged to be within its authority and recommend to the Commission that the remainder of the alleged defenses be stricken. Under such circumstances, discovery on the defenses certified to the Commission should await the decision of the Commission.⁶

⁶ The RULES OF PRACTICE require that *Orders* requiring the disclosure of “nonpublic Commission minutes, Commissioner circulations, or similar documents prepared by the Commission, individual Commissioners, or the Office of the General Counsel” must be stayed for consideration by the Commission. *See* RULE 3.23(a)(1).

II. A *Fifth Amendment* Challenge to a Federal Agency’s “Regulatory Approach”?

The second issue identified by the Court in its October 18th *Order* is “whether a *Fifth Amendment* challenge to a regulatory approach by a federal agency is a valid defense to an administrative proceeding.” Respondents have suggested that due process requires the Commission to engage in rulemaking before regulating the advertising of dietary supplements or weight loss products. *See* Opp’n at 9, 10.⁷ Respondents are challenging the Commission’s decision to regulate by means of adjudication instead of rulemaking. This challenge to the Commission’s choice of regulatory approaches is not a valid due process claim or defense. Indeed, Respondents have not even pled the facts necessary to support a potential due process claim. Respondents must await a final *Order* before pursuing their due process case against the Commission. Following the weight of Commission authority, Respondents’ alleged defense is invalid and should be stricken.

A. The Commission, Like Other Federal Government Agencies, May Regulate Respondents’ Conduct By Adjudication Without Violating Due Process

The Commission is not required by law to proceed by rulemaking in order to regulate Respondents’ allegedly deceptive conduct. Significantly, the U.S. Court of Appeals for the Second Circuit reached this conclusion in a Commission advertising substantiation case—*Jay*

⁷ Respondents’ *Opposition* offered several permutations of the alleged due process defense. First, it stated that the “overriding issue” is that due process requires the Commission “to promulgate a concrete, content-neutral standard against which an advertiser [specifically, ‘an advertiser of dietary supplements or weight-loss products’] may judge its commercial speech, before speaking.” Opp’n at 9, 10. Alternatively, the “overriding issue” is that due process requires the FTC to provide “procedural safeguards that provide an advertiser the opportunity to correct—without liability for engaging in protected commercial speech, even if potentially misleading—what the Commission might claim, after-the-fact, is misleading.” Opp’n at 10. However, Complaint Counsel is aware of no allegations or evidence that Respondents ever filed a petition for the Commission to engage in the desired rulemaking.

Norris, Inc. v. FTC, 598 F.2d 1244 (2d Cir. 1979). The *Jay Norris* Court squarely rejected the defendant's argument that

the Commission should not apply a standard of prior substantiation unless it undertakes to do so "by a proposed industry-wide rule applicable to representations made by all companies in the industry, in accordance with the rulemaking machinery provided by Congress." In the absence of an abuse of discretion in the particular case . . . the agency is *not* required to proceed by rulemaking rather than adjudication.

598 F.2d at 1251 (emphasis added). Other federal agencies have similar discretion. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[T]he choice between rulemaking and adjudication lies in the first instance in the [agency]'s discretion."); *Stotler & Co. v. CFTC*, 855 F.2d 1288, 1294 (7th Cir. 1988) (citing *Bell Aerospace*).

As *Jay Norris* makes clear, the Commission is not required to engage in rulemaking to regulate marketers who sell products with unsubstantiated claims. Federal agencies may choose to regulate via rulemaking or adjudication. In the present case, the Commission has elected to proceed by means of adjudication. As noted in our *Motion* and *Reply*, Respondents can, or reasonably should, understand the issues, and they have a "full opportunity" to justify their conduct here. See *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1435 (9th Cir. 1986); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19, 21 (7th Cir. 1971). Respondents are receiving due process in this administrative proceeding. They have no constitutional right to their preferred choice of regulatory approaches.

B. Respondents' Due Process Challenge is Unripe

Respondents' alleged due process defense suffers from several other fatal flaws. First, Respondents' due process challenge is unripe. Under the Administrative Procedure Act, any due

process challenge to the Commission's choice of adjudication must await final agency action.

See 5 U.S.C. § 704. The U.S. Court of Appeals for the Ninth Circuit reached this conclusion in *Weight Watchers International, Inc. v. FTC*, 47 F.3d 990 (9th Cir. 1995). In *Weight Watchers*, the appellants complained that the Commission violated their due process rights by failing to proceed with an industry-wide rulemaking. The Court rejected the appellants' argument, and upheld the District Court's *sua sponte* dismissal of the due process claim, as follows:

[T]he district court did not abuse its discretion in dismissing this claim *sua sponte* under FED. R. CIV. P. 12(b)(6). Taking all allegations of material fact as true, and construing them in the light most favorable to Weight Watchers . . . we nevertheless hold that the dismissed complaint pertains to issues which are not yet ripe for review. See *FTC v. Standard Oil*, 449 U.S. 232, 239 (1980). While the district court must accept for review the FTC's denial of the rulemaking petition, it may neither enjoin the agency's ongoing investigation of the weight loss industry, nor require the FTC to proceed by rulemaking rather than adjudication, until the FTC has issued a final order against the moving party.

47 F.3d 992-93 (internal citations omitted).

No final agency action has occurred in this case, because no final *Order* has issued. As the Supreme Court articulated in the *Standard Oil* case, Respondents are prohibited from doing what they seek to accomplish here—mounting a pre-emptive constitutional challenge to ongoing agency deliberations, in advance of a final *Order*. See Reply at 9-12; Mot. to Strike at 16.⁸

⁸ Respondents recently cited two additional decisions to support their “final agency action” argument. See Respts' Req., Sept. 29, 2004, at 2 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967) and *Bennett v. Spears*, 520 U.S. 154 (1997)).

Here, as elsewhere, Respondents' argument contradicts their own cited cases. The *Abbott* Court declared that a case is fit for judicial review when the issues are purely legal ones and the agency's action is *not* dependent upon intervening agency rulings. See 387 U.S. at 149. And the *Bennett* Court simply restated that the challenged action must “mark the ‘consummation’ of the agency's decisionmaking process,” and concretely determine the parties' rights. See 520 U.S. 177-78 (citation omitted). Neither of these cases support Respondents' defenses. Respondents have not squared their argument with the Supreme Court's controlling decision in *Standard Oil*.

C. Respondents' Due Process Challenge is Improper

Additionally, Respondents' due process defense is improper because Respondents have not alleged facts, and cannot allege facts, to demonstrate that they have legal standing to assert this defense. Litigants must allege, and ultimately prove, that they have suffered injuries-in-fact that are fairly traceable to the challenged actions, and which are likely to be redressed by the requested relief. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In administrative proceedings, proof of due process violations requires a showing of substantial prejudice. *See United States v. Lober*, 630 F.2d 335 (5th Cir. 1980).

Respondents have not alleged, and cannot allege, facts sufficient to show substantial prejudice. They have not pled facts sufficient to demonstrate how that their marketing of dietary supplements was chilled by the Commission's advertising substantiation standard. Complaint Counsel seriously doubts that Respondents could make this showing in any event. Based on publicly-available information, Respondents have grossed hundreds of millions of dollars from the sale of supplements. *See* Exhibit A (Printout, www.flyingpointmedia.com (Oct. 27, 2004)). Respondents have not alleged, nor can they allege and prove, that the alleged due process violation actually resulted in any cognizable legal injury.⁹ The filing of the *Complaint* is clearly

⁹ Respondents' *Opposition* also mentioned the desirability of an advisory Commission staff opinion on promotional materials prior to dissemination. *See* Opp'n at 13; *see also id.* at 9. This leaves the incorrect impression that Respondents actively sought, and were denied, the staff's guidance in formulating product claims. The Commission's *Complaint* stemmed from a staff investigation of Respondents' advertising. During this investigation, the staff provided Respondents' counsel with a copy of the business education publication, *Dietary Supplements: An Advertising Guide for Industry*, appended to our *Opposition* to Respondents' *Motion for a More Definite Statement*. The staff also advised Respondents' counsel of the evidence that is required to substantiate Respondents' claims. Nevertheless, Respondents undertook to market and sell products with deceptive claims that were identified in the Commission's *Complaint*.

not cognizable injury-in-fact. *See Reichenberger v. Pritchard*, 660 F.2d 280, 285 (7th Cir. 1981) (“The legal fees expended by the plaintiffs in the administrative proceedings cannot qualify as constitutional injury absent a showing of deprivation of constitutional magnitude.”); *see also Standard Oil Co.*, 449 U.S. at 244 (noting that “expense and annoyance of litigation is ‘part of the social burden of living under government’”) (citations omitted). Respondents’ alleged due process defense is improper.

D. Respondents’ Due Process Challenge Conflicts with the Weight of Commission Precedent

Last, but no less important, as Complaint Counsel have previously emphasized, Respondents’ due process defense conflicts with the weight of Commission authority. The U.S. Courts of Appeals have repeatedly considered and rejected similar due process challenges to the Commission’s advertising substantiation standard. *See Mot. to Strike at 9* (citing *Thompson Medical Co. v. FTC*, 791 F.2d 189, 194 (D.C. Cir. 1986); *Sterling Drug, Inc. v. FTC*, 741 F.2d 1145, 1156-57 (9th Cir. 1984); *Bristol-Meyers Co. v. FTC*, 738 F.2d 554, 561 (2d Cir. 1984)). The due process issues that Respondents have raised are not issues of first impression. However, Respondents have repeatedly declined to analyze the Commission precedents on these issues.¹⁰ Instead, they continue to rely on inapposite decisions concerning the regulatory framework of the U.S. Food and Drug Administration, state criminal statutes, or state regulation of abortion

¹⁰ Respondents’ reluctance to confront the battery of Commission cases cited in our papers is evident from their recent *Request for Permission to File a Sur-Reply*. Injected into this pleading were several pages of argument on the issues *sub judice*. Respondents briefly cited the trilogy of *Bristol-Meyers*, *Thompson Medical*, and *Sterling Drug*, and observed that, “[a]s plainly pointed out in Respondents’ *Opposition* at page 13, Complaint Counsel’s cases . . . are easily distinguished.” Respts’ Request at 4. However, Respondents’ *Opposition* merely pointed out that all three cases involved *ripe* challenges to final agency action. *See Opp’n at 13*. This “distinction” hardly helps Respondents’ due process or finality arguments.

facilities. *See* Reply at 5-8 (analyzing “controlling line of cases” advanced by Respondents).

This Court’s *Order* specifically requested that the parties address the “controlling caselaw” on the identified issues. Based on the preceding discussion, and that contained in our *Motion* and *Reply*, the controlling caselaw consists of the predominant view of the U.S. Courts of Appeals squarely addressing the Commission’s advertising substantiation standard, not the cases cited by Respondents regarding other legal frameworks. Respondents’ due process defense does not suffer merely from defects of a technical nature; the defense is invalid as a matter of law.

Respondents can reassert the propriety of their defenses on appeal pursuant to RULE 3.52. The sufficiency, pleading, relevance, or materiality of the alleged defenses, as discussed *supra* page 4, are questions of law, not fact. Respondents will not be prejudiced by the striking of these defenses because they may again present their arguments at another time. There is no valid reason why this Court should be held to hear Respondents’ invalid, unripe, ill-pled, and previously-settled constitutional questions during the hearing in this matter.

III. Respondents Should Not Be Allowed to Amend their Invalid Defenses

RULE 3.15(a) provides that the Court may, with such conditions necessary to avoid prejudicing the public interest or the rights of the parties, allow amendments to pleadings. Similarly, federal courts may grant parties leave to amend pleadings “when justice so requires,” FED. R. CIV. P. 15(a). Courts may deny leave to amend for multiple reasons, including delay, futility of the amendment, dilatory motive of the movant, and prejudice. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). This case falls into the category of cases in which leave to amend defenses has been denied. In the present case, Respondents should not be granted leave to amend their stricken defenses for reasons of futility, delay, and prejudice to Complaint Counsel.

A. Futility of Amendments to Insufficient Defenses

First, as a threshold matter, Respondents should receive leave to amend defenses that are legally insufficient or invalid. Amendments to insufficient defenses are futile. *See United States v. Fleetwood Enters., Inc.*, 702 F. Supp. 1082, 1085 (1988) (citing *Massarsky v. General Motors Corp.*, 706 F.2d 111, 125 (3d Cir. 1983)). Complaint Counsel has previously set forth how Respondents' constitutional and statutory defenses are invalid. *See Mot. to Strike* at 4-20.¹¹ Stating additional facts will not remedy legal defects in those defenses.¹² If Respondents' defenses are legally insufficient, leave to amend those defenses should be denied. *See Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F. Supp. 780, 783 (D. Conn. 1976) ("The presentation of the defenses at trial, if legally insufficient, would be extremely prejudicial to plaintiffs."); *see also infra* page 17-19 (discussing prejudice to Complaint Counsel).

B. Respondents Have Delayed and Declined to State the Facts Constituting Each Alleged Ground of Defense

In the course of the extended briefing to date on Complaint Counsel's *Motion to Strike*, Respondents have largely rested on the alleged defenses instead of clarifying or amending them. They have had multiple opportunities to clarify their allegations and state the specific facts and circumstances supporting each ground of defense. Only once, with respect to their alleged due

¹¹ We have also noted how no federal court has ever sustained a ruling of laches or equitable estoppel against a government agency enforcing federal law. *See Reply* at 16-19.

¹² For example, if Respondents stated additional facts to support their due process allegations, those facts would not alter the reality that the *Complaint* has put Respondents on notice of the practices challenged by the Commission, and its allegations with respect to lack of substantiation may be readily understood in light of the Commission's opinions, orders, statements, and publications on the advertising substantiation standard. *See Mot. to Strike* at 5-9. Respondents can, or reasonably should, understand the issues, and they have a full opportunity to justify their conduct here. *See Reply* at 8.

process defense, have Respondents provided Complaint Counsel or the Court with any additional information at all concerning their allegations, and even that clarification was legal, not factual, in nature.¹³ Respondents have repeatedly delayed and declined to state the specific facts required by RULE 3.12(a). There is no reason why Respondents could not have asserted these facts before late October, 2004. Respondents have had sufficient time to state valid defenses. Under the present circumstances, Respondents should not be permitted to delay or expand the scope of these proceedings again by amending their allegations at the latest possible moment.

Respondents' delay weighs strongly against granting Respondents leave to amend. *See Tamari v. Bache & Co.*, 838 F.2d 904, 908 (7th Cir. 1988):

[T]he longer the delay, the greater the presumption against granting leave to amend. . . . The interests of justice go beyond the interests of the parties to the particular suit; all other considerations to one side, delay in resolving a suit may harm other litigants by making them wait longer in the court queue.

These considerations apply here, in the context of this expedited administrative proceeding, with even greater force.

C. Prejudice to Complaint Counsel Resulting from Respondents' Invalid Defenses and Delay

Lastly, amendment of the alleged defenses would cause serious prejudice to Complaint Counsel at this stage of the proceedings. The risk of prejudice to the party not seeking the amendment is a material consideration. *See In re Orkin Exterminating Co.*, Docket No. 9176,

¹³ As the Court will recall, Respondents restated their due process defenses in their *Opposition*, clarifying that the alleged due process violation occurred prior to the issuance of the *Complaint*, and actually related to the Commission's failure to engage in a rulemaking procedure that Respondents have never formally requested. *See* Opp'n at 9-10; *see also supra* at 10 n.7. In the future, Respondents may seek to revise their defenses yet again. Respondents' shifting grounds of defense delay these proceedings and consume the resources of Complaint Counsel.

1984 WL 251774 (Nov. 15, 1984).

When deciding whether to grant permission to amend, federal courts typically consider whether the proposed amendment will require the opposing party to expend significant resources in discovery and whether the final resolution of the case will be delayed as a result. *See Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993). Both results are likely here. This case is fast approaching the scheduled end of written discovery. The Court's *Scheduling Order* sets November 8, 2004, as the deadline for issuing document requests, requests for admission, interrogatories, and subpoenas *duces tecum*. Allowing Respondents to amend their stricken defenses at this time may surprise Complaint Counsel with new allegations or legal contentions requiring investigation and research,¹⁴ require Complaint Counsel to answer burdensome or new discovery demands, compel Complaint Counsel to exhaust its discovery requests, and would likely delay the hearing in this matter. Such prejudice justifies denying Respondents leave to amend their stricken defenses. *See, e.g., EEOC v. Morgan Stanley & Co.*, 211 F.R.D. 225, 227 (S.D.N.Y. 2002) (denying leave to amend where appreciable discovery had been conducted, parties were under tight time deadlines for fact and expert discovery, and additional discovery required by assertion of proposed defenses would cause unnecessary prejudice and delay). Respondents should not be allowed a new opportunity to burden Complaint Counsel, confuse the issues before the Court, lengthen these proceedings, and expand the scope of this matter.

¹⁴ Complaint Counsel have already expended significant resources in challenging the alleged defenses. We have also expended an appreciable number of our discovery requests. If the Court were to leave to amend at this late juncture, we would reasonably require additional time and discovery resources to investigate new allegations, identify parties with knowledge of the relevant facts, formulate discovery requests and responses, examine witnesses with personal knowledge, evaluate Respondents' new defenses, and formulate our response to Respondents' shifting grounds of defense.

D. Consequences if the Court Grants Respondents Leave to Amend

Respondents may intend to seek leave to amend their *Answers* to add facts that support new or different defenses. If the Court is inclined to grant Respondents any leave to amend, Complaint Counsel respectfully request that the Court restrain Respondents from alleging any new facts or legal theories that are not clearly within the scope of their original allegations. Any proposed amendments should satisfy the test that Complaint Counsel would have to satisfy if we sought to amend our pleadings. Amendments to allegations may be allowed only if those amendments are reasonably within the scope of the original charging document. *In re Midcon Corp., et al.*, Docket No. 9198, 1986 WL 293187 (Sept. 23, 1986). This limitation on the discretion of the Court is explained in the decision of *In re Standard Camera Corp.*, 63 F.T.C. 1238, 1266 (1963):

Where the effect of the amendment is an alteration of the underlying theory behind the complaint, or where it alleges substantially different acts or practices on the part of the respondent, or where it requires different determinations with respect to the belief that a violation has occurred and that the public interest is jeopardized, the hearing examiner is without power to authorize it.

See generally In re Midcon Corp., 1986 WL 293187. Fairness demands that the charging party only propose amendments that add specific “examples of practices already challenged.” *In re Orkin Exterminating Co.*, 1984 WL 251774.

The present case is clearly distinguishable from those in which parties have sought leave to amend defenses well in advance of the discovery cut-off date. *See Advent Elecs., Inc. v. Buckman*, 918 F. Supp. 260, 263 (N.D. Ill. 1996) (concluding that non-prejudicial delay in amending answer, occurring three months prior to close of discovery, did not justify denying leave to amend). This case falls into the category of cases in which leave to amend defenses has

been denied for reasons of futility, delay, and prejudice. Respondents should not be allowed to amend their allegations at this late juncture. Such amendments would be fruitless, they would further confuse the issues and prejudice Complaint Counsel who have already expended significant resources on these invalid defenses, and they would delay these proceedings.

IV. The Court Should Narrow the Scope of Discovery Even If Respondents' Defenses are Not Stricken

If this Court determines that none of Respondents' alleged defenses suffer from defects of legal sufficiency, pleading, relevance, or materiality, a stringent *Order* narrowing discovery will be necessary to prevent this case from being consumed by satellite issues. Already, the parties' resources and motions practice have largely dwelt on issues unrelated to whether Respondents have engaged in deceptive trade practices with their claims of exorbitant weight loss and gels that "emulsify fat on contact." Unless the Court issues an *Order* clarifying the proper scope of discovery, the primary issue of whether Respondents violated the FTC Act will be overridden by Respondents' effort to "try the Commission." The absence of clear guidelines will further embolden Respondents in their campaign to divert Complaint Counsel's resources and focus discovery upon the prosecutor rather than Respondents' own conduct.

A. Respondents' Discovery Far Exceeds the Boundaries Set Forth in the RULES OF PRACTICE and Case Law

Unless the Court narrows the inappropriate scope of discovery propounded by Respondents, their peripheral challenges to the Commission's standards may overwhelm the discovery, briefing, and trial of an ordinary deceptive advertising case. The RULES limit discovery to what "may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." RULE 3.31(c)(1).

Significantly, the RULES also provide this Court with latitude to narrow discovery if it “is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive” or if the “burden and expense of the proposed discovery outweigh its likely benefit.” RULE 3.31(c)(1).

To date, Respondents collectively have issued approximately 55 document requests, 81 requests for admissions,¹⁵ and 38 Interrogatories. Their discovery requests include numerous unreasonable demands that would require Complaint Counsel and other staff to expend considerable time and resources to locate and gather documents and information related to a host of satellite issues that are unrelated to the specific issues set forth in the *Complaint*. Moreover, Respondents’ improper discovery requests have consumed countless hours of Complaint Counsel in otherwise unnecessary meet-and-confer conference calls and motions practice.¹⁶

¹⁵ It is unclear from the *Scheduling Order* and the dialogue during the initial hearing whether each side (*i.e.*, Respondents collectively) is entitled to a *total* of 60 document requests, 60 interrogatories, and 60 requests for admissions, or whether each Respondent (the six corporate and 3 individuals) is entitled to issue their own 60 requests of each type. Based upon the discussion during the initial hearing (attached hereto as Exhibit B), Complaint Counsel believe that each side is entitled to issue a total of 60 document requests, 60 interrogatories, and 60 requests for admission. Our practice has been to issue identical sets of discovery to all Respondents. However, Respondents have issued separate discovery requests from Respondents Basic Research, A.G. Waterhouse, and Daniel Mowrey to date. Respondents’ interpretation of the *Scheduling Order* would conceivably allow them to issue hundreds of additional discovery requests from the remaining Respondents. We respectfully request that the Court clarify this issue because under Complaint Counsel’s interpretation, Respondents have already exceeded the number of requests for admissions permitted under the *Scheduling Order* and are near the limit for document requests.

¹⁶ While vigorously pursuing their satellite discovery, Respondents have requested and received numerous extensions because they claim they lacked time to respond to the FTC’s discovery, which goes to the core issues of the case: Respondents’ acts and practices. In fact, Respondents have yet to complete their response to Complaint Counsel’s first request for document production (issued on June 25, 2004) and have delayed searching and producing a significant number of documents that Respondents chose to maintain in large dumpster bins

1. The Court Should Reject Respondents' Discovery Focused on the Commissions' Prior Proceedings

The examples set forth below illustrate the irrelevant and burdensome scope of Respondents' demands. Respondents have demanded voluminous materials and improper admissions related to prior FTC cases:

- **all appellate briefs** filed by the Federal Trade Commission **in other part 3 proceedings or proceedings under Section 13(b)** of the FTC Act¹⁷ (8);¹⁷
- **all expert reports** that the Federal Trade Commission has filed **in other part three proceedings or proceedings under Section 13(b)** of the FTC Act (6);
- **all documents relating to submissions** by the Federal Trade Commission **in all prior weight loss cases** (3);
- **all consent orders** issued by the Federal Trade Commission in weight loss cases (4);
- **all depositions** taken of the Federal Trade Commission **substantiation experts in any weight loss cases** (7);
- **all requests for rulemaking** relating to the **substantiation standard** applicable in this case (26);
- **all documents** relating to **requests by advertisers for clarification on the substantiation standards** applicable in this case (27);
- **all documents** relating to requests made to the Federal Trade Commission by **advertisers seeking approval of advertising**

during the pendency of the FTC's investigation. Such delay threatens to sidetrack the discovery process and the efficiency of upcoming depositions.

¹⁷ Emphasis added. The listed request numbers are found in Basic Research's *Second Set of Requests For Production* attached as Exhibit D and Basic Research's *First Request For Admissions* attached as Exhibit E. (Basic Research's *First Set of Requests For Production*, referenced *infra* page 25, is attached as Exhibit C.)

prior to dissemination (29);

- **all documents relating to requests made by advertisers pursuant to 16 C.F.R. § 1.1 (28);**
- admit that the Federal Trade Commission will not give advertisers definitive answers on the adequacy of their claim substantiation before advertisements are disseminated (12); and
- admit that what constitutes a “reasonable basis” changes from case to case (24).

Respondents’ own discovery requests are the most compelling evidence supporting the need for a strong *Order* narrowing the proper scope of discovery.¹⁸ These requests go so far as to ask for every appellate brief ever filed by the FTC in all administrative and federal Section 13(b) proceedings. These requests are not merely unduly burdensome; they typify the irrelevant areas upon which Respondents are doggedly focused. These discovery requests fail to meaningfully distinguish between the facts pertinent to this particular matter and those issues that may have arisen in the context of other litigations dealing with differing advertising claims, products, or areas of science or medicine.

Numerous precedents support the principle that discovery related to prior proceedings is not proper. For example, in *In re Sterling Drug, Inc.*, No. 8919, 1976 FTC LEXIS 460 (Mar. 17, 1976), the Administrative Law Judge determined that

discovery directed to the Commission’s prior proceedings, including formal proceedings, investigations, compliance proceedings and proposed rulemaking proceedings, is *improper* since the reasons for the

¹⁸ Document Requests Nos. 6, and 7 (regarding expert issues in prior actions) and 27 and 29 (regarding requests from advertisers for clarification of FTC standards or approval of their ads) are the subject of Basic Research’s *Second Motion to Compel*. Pursuant to the Court’s October 26, 2004 *Order*, our arguments here are directed to the subject matter sought in those and other requests that are the subject of Respondents’ latest discovery motion.

Commission's disposition of these matters, or the reasons for any staff recommendations related thereto, are irrelevant to any of the issues in this proceeding.

See id. (emphasis added); *see also In re Kroger*, 1977 FTC LEXIS 55 (Oct. 27, 1977) (same); *In re American Home Prods. Corp.*, Docket No. 8918, 1976 FTC LEXIS 544 (Feb. 11, 1976) (concluding that material related to prior proceedings, even related proceedings, is not relevant).

As to expert reports and expert depositions from other cases, they are simply not relevant to the expert opinions that will be presented in this matter. Respondents have already sought discovery regarding the expert reports and they will have the opportunity to depose and cross-examine the expert witnesses. As the Administrative Law Judge in *American Home Products* observed in rejecting requests for expert materials from related proceedings, “the testimony of an expert in this case must stand or fall on the basis of the material he considered . . . and pretrial discovery of that material is adequate for purposes of cross-examination as well as for the purposes of defense preparation.” 1976 FTC LEXIS 544, *5. This reasoning is mirrored in the Court’s *Scheduling Order* which requires each party listing an expert witness to provide “all documents and other written materials relied upon by the expert in formulating an opinion in this case.” *Scheduling Order* at ¶ 11. The same logic applies to Respondents’ plethora of other burdensome and irrelevant requests focusing on the prior proceedings, rulemakings, compliance matters, and requests for clarification and approval from advertisers. In light of the clear and consistent rulings rejecting this type of discovery, Respondents should not be permitted to use admissions, interrogatories and document requests to mount a discovery safari— one that will consume our resources, but will not likely shed light on the issues raised in the *Complaint*.

2. The Court Should Reject Respondents' Discovery Focused on the Commissions' "Reason to Believe"

As discussed *supra* pages 6-8, and elsewhere in our moving papers, Commission precedents establish that the issue to be litigated in this administrative proceeding is whether Respondents committed the violations of the FTC Act alleged in the *Complaint*. Nevertheless, Respondents seek to delay these proceedings and consume Complaint Counsel's resources with discovery relating to the Commissioners' expertise, their mental processes, and the adequacy of the pre-*Complaint* investigation. For example, Respondents have repeatedly demanded discovery aimed at the basis and timing of the Commission's decision to issue the *Complaint*:

- all documents that refer or relate to the **decision of the Commission to issue the Complaint (8)**;¹⁹
- all documents that provided the **basis for the decision of the Commission to issue the Complaint (9)**;
- all documents referring or relating to the Congressional hearings on dietary supplements held by the House Subcommittee on Oversight and Investigations on June 16, 2004 (12);
- admit that the Federal Trade Commission coordinated the filing of the Complaint with the Congressional hearings held on June 16, 2004 before the Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, United States House of Representatives (25);
- admit that the Federal Trade Commission was asked by Congressional representatives to delay filing of the Complaint until the commencement of the Hearings (26);
- admit that **at the time the Complaint was filed, the Federal Trade Commission had no expert opinion** as to

¹⁹ Emphasis added. The listed request numbers are found in Basic Research's *First and Second Set of Requests For Production* attached as Exhibits C and D, and Basic Research's *First Request For Admissions* attached as Exhibit E.

what express and/or implied claims were made in the Challenged Advertisements (4);

- admit that **at the time the Complaint was filed, the Federal Trade Commission had no expert opinion** that Respondents lacked a “reasonable basis” for the Challenged Advertisements (5); and
- admit that **at the time the Complaint was filed, the Federal Trade Commission had no expert opinion** to support the allegations in para graphs 24,26, 32 and 41 of the Complaint (6);

Respondents’ discovery requests also make impertinent inquiries regarding the training and expertise of the FTC Commissioners:

- all documents relating to the **expertise and training of the FTC Commissioners in advertising interpretation** (20);²⁰
- all documents relating to the **expertise and training of the FTC Commissioners in the interpretation of scientific or medical studies** (21);
- admit that the **FTC Commissioners have no formal training or expertise in advertising interpretation** (43);
- admit that the **FTC Commissioners are not given any formal training in advertising interpretation** prior to being commissioned (44);
- admit that the **FTC Commissioners have no formal training or expertise in the interpretation of science and/or medical studies** (45); and
- admit that the **FTC Commissioners are not given any formal training in the interpretations of science and/or medical studies** prior to being commissioned (46)

²⁰ Emphasis added. The listed request numbers are found in Basic Research’s *Second Set of Requests For Production* attached as Exhibit D and Basic Research’s *First Request For Admissions* attached as Exhibit E.

Respondents' burdensome requests, exemplified by those listed above, have absolutely no bearing on whether the Respondents actually violated the FTC Act by marketing dietary supplements with false or unsubstantiated claims. Respondents prefer focus upon whether the Commission had an adequate basis to issue the complaint or possessed adequate expertise to make such a determination. *See, e.g.*, Document Requests 20-21 and Request for Admissions 43-36. Respondents have even identified five Commissioners in their *Initial Disclosures* as individuals likely to have discoverable information relevant to their defenses. *See, e.g.*, Initial Disclosures, Respondent Gay, at 1 (attached hereto as Exhibit F). As previously discussed, the Commission has recognized that defenses attacking the Commission's "reason to believe" basis for issuing a *Complaint* are not appropriate during the adjudicative proceeding. *See supra* page 8 (citing, *inter alia*, *In re Amrep Corp.*, 102 F.T.C. at 1672-73); Mot. to Strike at 18 (discussing *In re Exxon Corp.*, 83 F.T.C. 1759 (1974)). This rule has been applied in other cases to rebuff improper discovery demands.²¹ Based on this consistent line of Commission authorities, Respondents should not be permitted to use admissions, interrogatories, and document requests to search for grounds to attack the Commission's "reason to believe" determination.

**B. An Order Narrowing Discovery is Needed to Safeguard the
Ex Parte Protections Fostered by the RULES OF PRACTICE**

Respondents' expansive discovery requests would effectively require a breach of the *ex*

²¹ *See In re Flowers Indus., Inc.*, Docket No. 9148, 1981 FTC LEXIS 117 (Sept. 11, 1981) (holding that documents sought in pre-complaint files were irrelevant, and reasons for closing earlier preliminary investigation were also irrelevant, because veracity of Commission's "reason to believe" is an issue committed to agency discretion); *In re Tower Loan, Inc.*, Docket No. 9241, 1991 FTC LEXIS 24 (Jan. 17, 1991) (concluding that Complaint Counsel "properly refused" to answer interrogatories concerning Commission's pre-*Complaint* investigation, which sought "irrelevant information") (citing *Exxon Corp.*, 83 F.T.C. at 1760).

parte protections set forth in the RULES OF PRACTICE. The RULES implicitly recognize that neither the Commissioners nor the General Counsel nor the Secretary conduct independent investigations; rather, the Commissioners evaluate the evidence submitted by the staff in conjunction with the *Complaint* recommendation. The *ex parte* rules deliberately isolate the Commissioners and their legal counsel (generally, attorneys within the Office of General Counsel) from matters upon which they will subsequently have to render a final opinion. See RULE 4.7. The Part III discovery rules also incorporate these concepts, noting that “information shall not be deemed to be available insofar as it is in the possession of the Commissioners, the General Counsel, the Office of Administrative Law Judges, or the Secretary in his capacity as custodian or recorder of any such information, or their respective staffs.” See RULE 3.35(a).

Certain discovery requested by respondents would require a search of the General Counsel’s offices (*e.g.*, “all appellate briefs”) and the Secretary’s office (*e.g.*, “all requests for rulemaking relating to the substantiation standard applicable in this case”). Such requests clearly violate the RULES OF PRACTICE. Nevertheless, despite numerous discussions about the excessive scope of these requests, Respondents have chosen to move to compel discovery rather than adhere to the restrictions set forth in the RULES. As a result, the Court should issue a clear *Order* prohibiting discovery intrusions into the Offices of the Secretary, Commissioners, and General Counsel and their staffs. Respondents can retrieve a wealth of information regarding the Commission’s activities from public records and the agency’s website without such intrusions.

C. The Court Should Narrow Discovery to Focus on the *Complaint* and *Notice Order*, Prohibiting Discovery Relating to the Expertise, Timing, or Decision of the Commission to issue the *Complaint*

Unchecked, Respondents’ improper discovery requests will inject a host of peripheral

issues into the entire discovery, briefing, and trial process. To the extent that Respondents wish to pursue their defenses, these defenses present questions of law. Accordingly, Respondents may raise such arguments to the Commission after the initial decision has issued just as they would raise any other objection to the trial-stage disposition of this case. If the Commission rejects any of Respondents' arguments and ultimately issues an *Order* against them, Respondents may assert those arguments in the court of appeals on its petition for review of any final Commission *Order*.

The Court's *Scheduling Order* currently closes all discovery on January 10, 2005. After that date, rigorous briefing and trial preparations ensue in anticipation of the January 21st deadline to file summary decision motions and the March trial date. If this Court determines that none of Respondents' alleged defenses suffer from defects of legal sufficiency, pleading, relevance, or materiality, Complaint Counsel request an *Order* narrowing the scope of discovery in order to avoid further resource-intensive discovery disputes and focus the parties' attention on the genuine issues in this case regarding Respondents' alleged violations of the FTC Act. As a result, we would request the Court issue an *Order*:

1. confining Respondents to discovery on particular matters relevant to Respondents' conduct as alleged in the *Complaint* and relevant to the relief sought in the *Notice Order*;
2. prohibiting discovery directed to the Commission related to prior proceedings, including formal proceedings, investigations, compliance proceedings and proposed rulemaking proceedings;
3. limiting the scope of the discovery directed to the Commission to those documents and information within Complaint Counsel's custody and control; and
4. prohibiting discovery directed to either the Offices of the Commissioners, the General Counsel, or the Secretary.

If the Court declines to strike Respondents' alleged defenses, such an *Order* may markedly

improve the efficiency of these proceedings and focus the parties' attention on the violations alleged in the *Complaint* that initiated this action.

CONCLUSION

This matter is before the Court because the Commission has alleged that Respondents marketed dietary supplements with unsubstantiated claims for fat loss and/or weight loss, and false establishment claims, among other claims. Not surprisingly, however, Respondents have preferred to sidetrack this litigation by focusing questions on the Commission's conduct rather than their own. Respondents have identified what they describe as "overriding" issues. *See, e.g.*, Opp'n at 2, 8, 38. These issues should not be permitted to "override" this case and further consume the resources of Complaint Counsel and the Administrative Law Judge. Respondents may present their issues to another tribunal at the close of this administrative hearing.

For the reasons set forth in Complaint Counsel's moving papers, and in the interest of judicial efficiency and economy, this Court should strike all of Respondents' invalid defenses, narrow the scope of discovery, and grant such other relief as is appropriate.

Respectfully submitted,

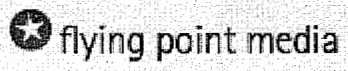


Laureen Kapin (202) 326-3237
Joshua S. Millard (202) 326-2454
Robin M. Richardson (202) 326-2798
Laura Schneider (202) 326-2604

Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dated: October 28, 2004

EXHIBIT A



COMPANY SERVICES CASE STUDIES NEWSLETTER ADVERTISERS

BASIC RESEARCH



KAPLAN COLLEGE



:: CASE STUDIES // BASIC RESEARCH

"We knew the promise of online advertising, but we didn't have the experience or resources to be involved. The Flying Point Media team not only helped us realize this promise, but exceeded any expectations we ever had."

- Gary Sandberg, VP of Marketing Basic Research

[Download PDF](#)



494 Eighth Avenue, Suite 400
New York, NY 10001
Phone: 212-629-4960

CASE STUDY: BASIC RESEARCH

"We knew the promise of online advertising, but we didn't have the experience or resources to be involved. The Flying Point Media team not only helped us realize this promise, but exceeded any expectations we ever had."

–Gary Sandberg, VP of Marketing, Basic Research

Company Background

Although largely unknown to the public and their consumers, Basic Research is the creative force behind some of the most popular and widely marketed health-related products. Driven to provide unique health supplements that address the specific needs of consumers – ranging from weight loss to bodybuilding, maternity, anti-aging, joint health and more – Basic Research's products are found anywhere from your local GNC to the window displays of Macy's and Bloomingdale's.

Challenge

Since it was founded in 1992, Basic Research has been an aggressive and successful direct marketer. With experience marketing through traditional media such as print, radio, TV, they have quickly grown to a \$350 million company. As the Internet was developing and the audience of online users began to grow rapidly, Basic Research recognized the potential and importance of the Web as a direct response medium. Lacking the knowledge, experience, and expertise in the new medium, they approached Flying Point Media to plan and execute their online marketing efforts.

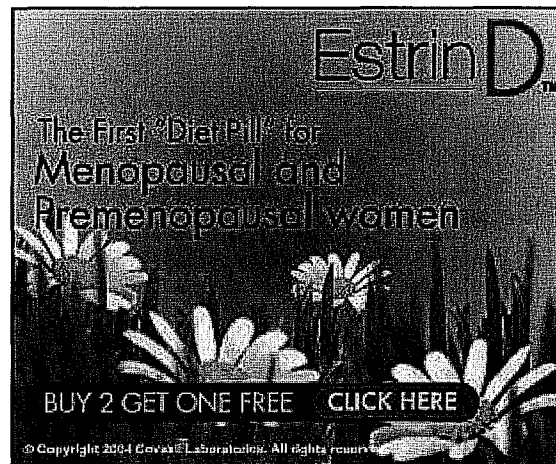
Strategy

With our successful history generating cost-effective sales for direct marketers on the Web, Flying Point sought to transplant the success Basic Research had with traditional media into the online space. Utilizing our knowledge of generating cost-effective sales online, we assembled a marketing plan consisting entirely of media publishers who offered the key components to successful direct online marketing campaigns:

- Ⓢ Ad targeting by demographic, content channel, or web-browsing activity
- Ⓢ Bulk pricing – enabling our clients to receive the price breaks of our purchasing power
- Ⓢ Multiple creative formats including large ad units and rich media
- Ⓢ Ability to optimize campaigns daily
- Ⓢ Flexible contract terms

Sample Creative

Our specific strategy for Basic Research was to utilize demographic information to identify and target the appropriate consumer for each product. For example, in the case of Estrin-D, a dietary supplement which is designed for women experiencing menopause, our media plan focused on delivering ads exclusively to a female audience, ages 40 and over. Using registration data from their respective user bases, the media publishers we chose were all capable of segmenting ad delivery to a demographic that perfectly matched the Estrin-D target audience. Additionally, we designed creatives that would instill a feeling of serenity and calm, as we understood that women experiencing menopause were going through a period of natural change.



We applied a similar strategy for each product in the entire product line. The result delivered was a highly efficient advertising program that accurately segmented each product's target market and delivered a strong ROI.

Results

Flying Point is now generating over \$5 million in annual sales revenue for Basic Research. In the year 2003, their Internet advertising matched or surpassed the ROI performance of TV, radio, or any other medium. Some other key statistics include:

- ⌚ For every \$1 spent on marketing, Basic Research is generating \$4 in retail sales
- ⌚ The net profit margin on Internet Sales is 20% higher than all other media due to lower overhead costs (no phone costs, customer service costs, limited overhead, etc.)
- ⌚ Online marketing is Basic Research's fastest growing direct to consumer sales segment
- ⌚ The ROI for Internet Marketing has increased every month for over 30 months in a row (see graph below)

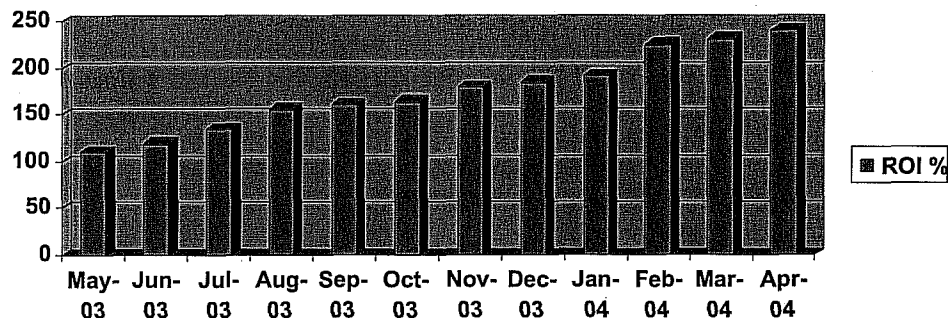


EXHIBIT B

OFFICIAL TRANSCRIPT PROCEEDING

FEDERAL TRADE COMMISSION

MATTER NO. D09318

TITLE BASIC RESEARCH, LTD., ET AL

**PLACE FEDERAL TRADE COMMISSION
600 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C.**

DATE AUGUST 10, 2004

PAGES 1 THROUGH 61

PREHEARING CONFERENCE

**FOR THE RECORD, INC.
603 POST OFFICE ROAD, SUITE 309
WALDORF, MARYLAND 20602
(301)870-8025**

1 UNITED STATES OF AMERICA
2 FEDERAL TRADE COMMISSION

3 In the Matter of:)

4 BASIC RESEARCH, LLC;)

5 A.G. WATERHOUSE, LLC;)

6 KLEIN-BECKER USA, LLC;)

7 NUTRASPORT, LLC;)

8 SOVAGE DERMALOGIC LABORATORIES, LLC;)

9 BAN, LLC d/b/a BASIC RESEARCH, LLC;)

10 OLD BASIC RESEARCH, LLC;)

11 BASIC RESEARCH; A.G. WATERHOUSE;)

12 KLEIN-BECKER USA; NUTRA SPORT;)

13 and SOVAGE DERMALOGIC LABORATORIES;)

14 DENNIS GAY;)

15 DANIEL B. MOWREY d/b/a AMERICAN)

16 PHYTOTHERAPY RESEARCH LABORATORY;)

17 and MITCHELL K. FRIEDLANDER,)

18 Respondents.)

19 -----)

20 Tuesday, August 10, 2004

21 Room 532

22 Federal Trade Commission

23 600 Pennsylvania Ave., N.W.

24 Washington, D.C. 20580

25 The above-entitled matter came on for
prehearing conference, pursuant to notice, at 11:32 a.m.

BEFORE THE HONORABLE STEPHEN J. McGUIRE

For The Record, Inc.

Waldorf, Maryland

(301) 870-8025

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 **LAUREEN KAPIN, Attorney**

5 **JOSHUA MILLARD, Attorney**

6 **ROBIN RICHARDSON, Attorney**

7 **LAURA SCHNEIDER, Attorney**

8 U.S. Federal Trade Commission

9 Bureau of Consumer Protection

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15 ON BEHALF OF THE CORPORATE RESPONDENTS:

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Waldorf, Maryland
(301) 870-8025

1 APPEARANCES: (continued)

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19 ON BEHALF OF DANIEL MOWREY:

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(301) 870-8025

1 APPEARANCES: (continued)

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3 ON BEHALF OF MITCHELL FRIEDLANDER:

4 **MITCHELL FRIEDLANDER** (pro se)

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6 Salt Lake City, Utah 84116

7 (801) 517-7000

8

9 ALSO PRESENT:

10 **ERIN WIRTH, Staff Counsel**

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1 JUDGE McGUIRE: Would you be sure when you offer
2 me your new joint proposed schedule to be sure and
3 include it?

4 MS. KAPIN: Yes, Your Honor.

5 JUDGE McGUIRE: Now, does that take care of all
6 the issues involving the scheduling?

7 MR. FELDMAN: I have a few more.

8 JUDGE McGUIRE: All right, Mr. Feldman, go
9 ahead.

10 Thank you, Ms. Kapin.

11 MS. KAPIN: Thank you, Your Honor.

12 MR. FELDMAN: Judge, item 5 of the additional
13 provisions --

14 JUDGE McGUIRE: Yes.

15 MR. FELDMAN: -- is inconsistent with the entry
16 under the schedule dealing with the cutoff of
17 discovery.

18 What I would propose is we eliminate the
19 category "cutoff of discovery" because you have a
20 cutoff for depositions and you have a deadline for
21 propounding written discovery, so I don't think that we
22 need that, plus I believe it's inconsistent with what
23 you have in item 5.

24 JUDGE McGUIRE: Ms. Kapin, did you want to
25 comment on that now?

1 MS. KAPIN: It seemed to me also, Your Honor, to
2 be inconsistent, and I was wondering if there was
3 something I didn't understand as to what --

4 JUDGE McGUIRE: All right. We'll take a look at
5 that, and if it is in fact inconsistent, we'll -- are
6 you proposing then, Mr. Feldman, that paragraph 5 just
7 be deleted in its entirety or just the one --

8 MR. FELDMAN: I think so, Judge, because what
9 paragraph 5 says is that you'll serve subpoenas and
10 discovery requests sufficiently in advance of discovery
11 cutoff, but you've set a deadline for the last day that
12 you could propound written discovery, so it seems almost
13 superfluous.

14 JUDGE McGUIRE: All right. I'll take a look at
15 that.

16 MR. FELDMAN: In item 6, we have -- Your Honor
17 proposes a cutoff of 50 requests, RFPs and
18 interrogatories.

19 JUDGE McGUIRE: Yes.

20 MR. FELDMAN: And what I was -- I don't want to
21 horse-trade with the court, but I was going to ask the
22 court if it would give us a little bit more leeway with
23 that because of the number of respondents that we're
24 dealing with.

25 JUDGE McGUIRE: What are you seeking?

1 MR. FELDMAN: I was going to say 75.

2 JUDGE MCGUIRE: Ms. Kapin, any objection?

3 MS. KAPIN: Your Honor, I have concerns about
4 that.

5 First of all, they have all those respondents.
6 I'm not sure -- and I would ask you, Your Honor, do they
7 each have 50?

8 If that is the case, it seems to me they have a
9 lot of document requests in their quiver.

10 JUDGE MCGUIRE: That's going to be a problem.

11 MR. FELDMAN: I actually was interpreting this
12 to mean that you were giving us the sides.

13 JUDGE MCGUIRE: Yes. And that's how this order
14 is intended.

15 So would you -- I could -- would you have any
16 opposition if that's what we intend and what we're going
17 to be -- he's asking for 75 per side.

18 Do you have any problem with that, Ms. Kapin?

19 MS. KAPIN: I still think, in light of the very
20 broad document requests that have been made and also the
21 fact that counsel would like to extend these discovery
22 deadlines, frankly, Your Honor, I'm just concerned about
23 being so mowed under by a lot of discovery that we're
24 not able to turn our attention to the nuts and bolts of
25 this case.

1 JUDGE McGUIRE: I believe as well that the rules
2 have been interpreted in the past to confine it to that
3 number per side, so I think that's where we're going to
4 keep it at, Mr. Feldman.

5 MR. FELDMAN: Judge, may I just say -- and I
6 think Mr. Friedlander may have a different feeling on
7 this issue than I do -- but the commission brought in
8 the respondents that they wanted to bring in. The rules
9 do give each respondent certain rights as it relates to
10 discovery.

11 The only rule that -- I believe I'm correct on
12 this -- that has limitation is the rule dealing with
13 interrogatories. I think it's 25 per side. There is no
14 limit on requests for admissions and no limits on
15 requests for production. And it should not -- you know,
16 a party should not be at a disadvantage in what it can
17 propound.

18 JUDGE McGUIRE: No. I agree. And each party
19 should have some limit.

20 This paragraph was taken from a prior order,
21 which typically contemplates a respondent.

22 What do you -- or do you propose something on
23 that, Mr. Friedlander?

24 MR. FRIEDLANDER: Well, as Mr. Feldman just
25 explained, on interrogatories I think the limit for me

1 is 25 and no limit on other forms of written discovery.
2 And I'd like to reserve all my rights --

3 JUDGE McGUIRE: Well, you're -- that's not a
4 problem.

5 All right. We'll take a look at that one as
6 well and we'll determine how to account for the several
7 respondents in this proceeding.

8 MR. FELDMAN: And then I had one other issue,
9 Judge, and I think this is more logistical.

10 In item 17, you anticipate that the respondent
11 will mark the exhibits "R-", but we have multiple
12 respondents in the case, so we'd just need to come up
13 with a different protocol for that.

14 JUDGE McGUIRE: Yeah. I'm perfectly open on
15 that. We could mark it RXA, RXB, like RXA 1, RXB 1,
16 whatever is easiest for the parties.

17 MR. FELDMAN: We'll take that up as part of
18 our --

19 JUDGE McGUIRE: You can take that up, and at the
20 time we start trial, you can advise the court how you
21 wish to proceed on that. I just think we should --

22 MR. FELDMAN: That's it.

23 JUDGE McGUIRE: -- we should have the clear RX
24 for the respondents, and then how you further subset it
25 is fine with me.

EXHIBIT C

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

In the Matter of

BASIC RESEARCH, L.L.C.,
A.G. WATERHOUSE, L.L.C.,
KLEIN-BECKER USA, L.L.C.,
NUTRASPORT, L.L.C.,
SOVAGE DERMALOGIC
LABORATORIES, L.L.C.,
BAN, L.L.C.,
DENNIS GAY,
DANIEL B. MOWREY, and
MITCHELL K. FRIEDLANDER,

Respondents.

Docket No. 9318

BASIC RESEARCH LLC'S FIRST SET OF REQUESTS FOR PRODUCTION

Basic Research, LLC, through undersigned counsel, and pursuant to the Federal Trade Commission Rules of Practice, Rule 3.37(a), hereby request Complaint Counsel to produce the documentary material and tangible things identified below for inspection and copying within 20 days at Covington & Burling, 1201 Pennsylvania Avenue, NW, Washington, DC, or at such time and place as may be agreed upon by all counsel.

DEFINITIONS

Notwithstanding any definition below, each word, term, or phrase used in these Requests for Production is intended to have the broadest meaning permitted under the Federal Trade Commission's Rules of Practice.

1. "Challenged Products" shall mean each product referred to in the Complaint, including: Dermalin-APg, Cutting Gel, Tummy Flattening Gel, Leptoprin, Anorex, and PediaLean, both individually and collectively.

2. "Commission," "you," and "your" shall mean the Federal Trade Commission, its employees, agents, attorneys, consultants, representatives, officers, and all other persons acting or purporting to act on its behalf.

3. "Communication(s)" shall mean the transmittal or exchange of information of any kind in any form, including oral, written, or electronic form.

4. "Complaint" shall mean: the administrative complaint issued by the Federal Trade Commission and any amendments to that Complaint, in the above-captioned matter.

5. "Corporate Respondents" shall mean the following Respondents: Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker USA, LLC, Nutrasport, LLC, Söavage Dermalogic Laboratories, LLC, and BAN, LLC, both individually and collectively as defined in the Complaint, including all of their operations under any trade names.

6. "Document" should be interpreted in the broadest sense permitted under the Federal Trade Commission's Rules of Practice, including but not limited to writings, drawings, graphs, charts, photographs, audio recordings, videotapes, electronic mail, and other data compilations from which information can be obtained. The term "document" includes originals and all non-identical copies.

7. "Each" and "any" shall mean and shall include the word "all," so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information and/or document(s) that otherwise might be construed to be outside its scope.

8. "Efficacy" shall mean the ability of the product to achieve the results for which it is advertised.

9. "Individual Respondents" shall mean: Respondents Dennis Gay, Daniel B. Mowrey, and Mitchell K. Friedlander, both individually and collectively, unless otherwise stated.

10. "Or" includes "and," and "and" shall include "or," so as to have the broadest meaning whenever necessary to bring within the scope of any Request all information or documents that might otherwise be construed to be outside its scope.

11. "Person" or "Persons" shall mean: all natural persons, corporations, partnerships or other business associations, and each and every other legal entity, including all members, officers, predecessors, assigns, divisions, branches, departments, affiliates, and subsidiaries.

12. "Promotional Material" shall mean: any written or oral statement, advertisement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of goods or services, whether the same appears in a press release, video news release, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, sticker, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, instructional or education materials, packaging, package insert, package label, film, slide, radio or television broadcast or transmission, Internet or World Wide Web site, streaming video, electronic mail, audio program transmitted over a telephone system, script(s) used to make oral solicitations to consumers, or publication or broadcast in any other medium.

13. "Referring to" or "relating to" shall mean: discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.

14. "Respondent(s)" shall mean: all Corporate Respondents and all Individual Respondents, both individually and collectively, unless otherwise stated.

15. "Safety" shall mean the ability of the product to be used without risk of adverse health consequences for the user.

INSTRUCTIONS

1. Unless otherwise specified, the time period covered by these document production requests shall not be limited. All documents and tangible things responsive to the request -- regardless of dates or time periods involved -- must be provided.

2. Each document production request shall operate and be construed independently. Unless otherwise indicated, no paragraph limits the scope of any other paragraph.

3. All documents that in their original form were stapled, clipped, or otherwise attached to other documents should be produced in such form. A complete copy of each document should be submitted even if only a portion of the document is within the scope of the Request. Each page produced should be marked with a unique Bates tracking number.

4. Documents covered by this Request are those which are in your possession or under your actual or constructive custody or control.

5. This Request does not seek documents that were provided to you by the Corporate Respondents in response to formal investigative demands.

6. Responsive documents that are not produced because you claim a privilege must be identified on a privilege log. The log must identify the grounds for withholding the document, the date of the document, type (e.g., letter, meeting, notes, memo), nature and subject matter of the document, the authors or originators, and the addressees/recipients. Each author or recipient who is an attorney should be noted as such. If only a part of a responsive document is privileged, all non-privileged portions of the document must be provided.

7. This First Request for Production is continuing in character so as to require you to produce additional information promptly upon obtaining or discovering different, new or further information before the close of discovery.

8. The use of the singular includes the plural, and the plural includes the singular.

9. The use of a verb in any tense shall be construed to include all other tenses.
10. The spelling of a name shall be construed to include all similar variants of such name.

DOCUMENT REQUESTS

Demand is hereby made for the following documentary materials and tangible things:

1. All documents that refer or relate to any of the Respondents or Challenged Products.
2. All documents that refer or relate to communications with any of the Respondents.
3. All documents that refer or relate to communications with persons other than the Respondents that refer or relate to any of the Respondents or Challenged Products.
4. All documents that refer or relate to interviews conducted by you that refer or relate to any of the Respondents or Challenged Products.
5. All witness statements, affidavits, or declarations that refer or relate to any of the Respondents or Challenged Products.
6. All documents that refer or relate to the ingredients of any of the Challenged Products, including without limitation aminophylline, ephedrine, caffeine, aspirin and glucomannan.
7. All documents, opinions, evaluations, or studies that refer or relate to:
 - (a) Promotional Materials for any of the Challenged Products, including without limitation any and all such Promotional Materials;
 - (b) consumer reaction to or consumer perception, comprehension, understanding, "take-away," or recall of statements or representations made by any of the Respondents in any and all Promotional Materials for any of the Challenged Products;
 - (c) the efficacy, safety, or other properties of any of the Challenged Products or their ingredients; and
 - (d) any other subjects addressed in the Complaint.

8. All documents that refer or relate to the decision of the Commission to issue the Complaint.

9. All documents that provided the basis for the decision of the Commission to issue the Complaint.

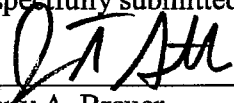
10. All documents authored by the Commission in response to inquiries relating to the "reasonable basis for substantiation" standard that the Commission applies to evaluate Promotional Materials.

11. All documents referring or relating to communications between you and the National Advertising Division of the Better Business Bureau or any other private organization other than Respondents that relate to any Challenged Product.

12. All documents referring or relating to the Congressional hearings on dietary supplements held by the House Subcommittee on Oversight and Investigations on June 16, 2004.

13. All documents identified, consulted, or used in preparing your Responses to Interrogatories.

Respectfully submitted,



Larry A. Breuer
Jay T. Smith
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 662-6000
Fax: (202) 662-6290

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

Dated July 23, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2004, I caused Basic Research

LLC's First Set of Requests for Production to be served as follows:

- (1) one copy by hand delivery and one copy by electronic mail to:

Laureen Kapin
Joshua S. Millard
Robin F. Richardson
Laura Schneider
Walter C. Gross III
Federal Trade Commission
600 Pennsylvania Avenue, NW, Suite NJ-2122
Washington, DC 20580
email: lkapin@ftc.gov

- (2) one copy by first class U.S. mail to:

Jeffrey D. Feldman
FELDMANGALE, P.A.
Miami Center - 19th Floor
201 S. Biscayne Boulevard
Miami, FL 33131
*Counsel for Respondents A.G. Waterhouse, L.L.C., Klein-Becker, L.L.C.,
Nutrasport, L.L.C., Savage Dermalogic Laboratories, L.L.C., and BAN, L.L.C.*

Ronald F. Price
PETERS SCOFIELD PRICE
310 Broadway Centre
Salt Lake City, UT 84111
Counsel for Respondent Daniel B. Mowrey

Richard D. Burbidge
BURBIDGE & MITCHELL
215 South State Street, Suite 920
Salt Lake City, UT 84111
Counsel for Respondent Dennis Gay

Mitchell K. Friedlander
c/o Compliance Department
5742 West Harold Gatty Drive
Salt Lake City, UT 84116



Brooks Mackintosh
Brooks Mackintosh, Esq.

EXHIBIT D

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

In the Matter of

BASIC RESEARCH, L.L.C.,
A.G. WATERHOUSE, L.L.C.,
KLEIN-BECKER USA, L.L.C.,
NUTRASPORT, L.L.C.,
SOVAGE DERMALOGIC LABORATORIES, L.L.C.,
 d/b/a BASIC RESEARCH, L.L.C.,
 OLD BASIC RESEARCH, L.L.C.,
 BASIC RESEARCH, A.G. WATERHOUSE,
BAN, L.L.C.,
 d/b/a KLEIN-BECKER USA, NUTRA SPORT, and
 SOVAGE DERMALOGIC LABORATORIES,
DENNIS GAY,
DANIEL B. MOWREY,
 d/b/a AMERICAN PHYTOTHERAPY RESEARCH
 LABORATORY, and
MITCHELL K. FRIEDLANDER

Respondents.

DOCKET NO. 9318

**BASIC RESEARCH, LLC'S SECOND REQUEST FOR PRODUCTION OF
DOCUMENTS**

Respondent, Basic Research, L.L.C., by and through its undersigned counsel, and pursuant to 16 CFR §3.37(a), hereby requests Complaint Counsel to produce the documentary material and tangible things identified below for inspection and copying within fifteen (15) days at FeldmanGale, P.A., Miami Center, 19th Floor, 201 South Biscayne Blvd., Miami, Florida 33131, or such time and place as may be agreed upon by all counsel.

DEFINITIONS

Notwithstanding any definition below, each word, term, or phrase used in these Requests for Production is intended to have the broadest meaning permitted under the Federal Trade Commission's Rule of Practice.

1. "Challenged Products" shall mean each product referred to in the Complaint, including: Dermalin-APg, Cutting Gel, Tummy Flattening gel, Leptroprin, Anorex, and PediaLean, both individually and collectively.

2. "Commission," "you," and "your" shall mean the Federal Trade Commission, its employees, agents, attorneys, consultants, representatives, officers, and all other persons acting or purporting to act on its behalf.

3. "Communications(s)" shall mean the transmittal or exchange of information of any kind in any form, including oral, written, or electronic form.

4. "Complaint" shall mean the administrative complaint issued by the Federal Trade Commission and any amendments to that Complaint, in the above-captioned matter.

5. "Corporate Respondents" shall mean the following Respondents: Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker, usa, LLC, Nutrasport, LLC, Söavage Dermalogic Laboratories, LLC and BAN, LLC, both individually and collectively as defined in the Complaint, including all of their operations under any trade names.

6. "Document" should be interpreted in the broadest sense permitted under the Federal Trade Commission's Rules of Practice, including but not limited to writings, drawings, graphs, charts, photographs, audio recordings, transcripts, videotapes, electronic mail, and other data compilations from which information can be obtained. The term "document" includes originals and all non-identical copies.

7. "Communication" or "communications" mean the act or fact of transmitting information, whether by correspondence, telephone line, computer media, meeting or any occasion of joint or mutual presence, as well as the transmittal of any document from one person to another.

8. "Each" and "any" shall mean and shall include the word "all" so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information and/or document(s) that otherwise might be construed to be outside its scope.

9. "Efficacy" shall mean the ability of the product to achieve the results for which it is advertised.

10. "Individual Respondents" shall mean: Respondents Dennis Gay, Daniel B. Mowrey, and Mitchell K. Friedlander, both individually and collectively, unless otherwise stated.

11. "Or" includes "and" and "and" shall include "or," so as to have the broadest meaning whenever necessary to bring within the scope necessary to bring within the scope of any Request for all information or documents that might otherwise be construed to be outside its scope.

12. "Person" or "Persons" shall mean: all natural persons, corporations, partnerships or other business associations, and each and every other legal entity, including all members, officers, predecessors, assigns, divisions, branches, departments, affiliates, and subsidiaries.

13. "Promotional Material" shall mean: any written or oral statement, advertisement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of goods or services, whether the same appears in a press release, video news release, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, sticker, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display,

instructional or education materials, packaging, package insert, package label, film, slide, radio or television broadcast or transmission, Internet or World Wide Web site, streaming video, electronic mail, audio program transmitted over a telephone system, script(s) used to make oral solicitations to consumers, or publications or broadcast in any other medium.

14. "Referring to" or "relating to" shall mean: discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.

15. "Respondent(s)" shall mean" all Corporate Respondents and all Individual Respondents, both individually and collectively, unless otherwise stated.

16. "Safety" shall mean the ability of the product to be used without risk or adverse health consequences for the user.

INSTRUCTIONS

1. Unless otherwise specified, the time period covered by these document production requests shall not be limited. All documents and tangible things responsive to the request – regardless of dates or time periods involved – must be provided.

2. Each document production request shall operate and be construed independently. Unless otherwise indicated, no paragraph limits the scope of any other paragraph.

3. All documents that in their original form were stapled, clipped, or otherwise attached to other documents should be produced in such form. A complete copy of each document should be submitted even if only a portion of the document is within the scope of the Request. Each page produced should be marked with a unique Bates tracking number.

4. Documents covered by this Request are those which are in your possession or under your actual or constructive custody or control.

5. This Request does not seek documents that were provided to you by the Corporate Respondents in response to formal investigative demands.

6. Responsive documents that are not produced because you claim a privilege must be identified on a privilege log. The log must identify the grounds for withholding the document, the date of the document, type (e.g., letter, meeting, notes, memo), nature and subject matter of the document, the author or originators, and the addressees/recipients. Each author or recipient who is an attorney should be noted as such. If only a part of a responsive document is privilege, all non-privileged portions of the document must be provided.

7. The First Request for Production is continuing in character so as to require you to produce additional information promptly upon obtaining or discovering different, new or further information before the close of discovery.

8. The use of the singular includes the plural, and the plural includes the singular.

9. The use of a verb in any tense shall be construed to include all other tenses.

10. The spelling of a name shall be construed to include all similar variants of such name.

DOCUMENT REQUESTS

1. All transcripts of or relating to the Respondents.

2. All documents listed in Complaint Counsel's Initial Disclosures.

3. All documents relating to submissions by the Federal Trade Commission in all prior weight loss cases.

4. All consent orders issued by the Federal Trade Commission in weight loss cases.

5. All documents relating to the contention that clinical testing does not support the representations made in the advertising of the Challenged Products.

6. All expert reports that the Federal Trade Commission has filed in other part three proceedings or proceedings under Section 13(b) of the FTC Act.
7. All depositions taken of the Federal Trade Commission substantiation experts in any weight loss cases.
8. All appellate briefs filed by the Federal Trade Commission in other part 3 proceedings or proceedings under Section 13(b) of the FTC Act.
9. All complaints relating to the Challenged Products, including consumer and non-consumer complaints.
10. All communications with the National Institute of Health (NIH) relating to the Respondents or Challenged Products.
11. All communications with the Food and Drug Administration (FDA) relating to the Respondents or Challenged Products.
12. All communications with or to Cytodyne Technologies, Inc., its agents, officers, employees, Brian Molloy, Steve Stern, Brian Benevento, or Mel Rich.
13. All documents relating to any request for rulemaking submitted to the Federal Trade Commission by Jonathon W. Emord, Esq.
14. All communications with or to former employees of the Corporate Respondents.
15. All communications with authors of any studies or publications submitted to the Federal Trade Commission by the Corporate Respondents.
16. All notes of conversations with authors of studies or publications submitted to the Federal Trade Commission by the Corporate Respondents.
17. All communications to or with consumers relating to the Challenged Products.

18. All communications to or with consumers relating to competitors of the Challenged Products.

19. All documents relating to the interpretations of the advertisements of the Challenged Products.

20. All documents relating to the expertise and training of the FTC Commissioners in advertising interpretation.

21. All documents relating to the expertise and training of the FTC Commissioners in the interpretation of scientific or medical studies.

22. All documents relating to studies contradicting or undermining the express or implied interpretations of the advertisements for the Challenged Products.

23. All Federal Trade Commission publications which set forth the substantiation standard applicable in this case.

24. All reported cases which set forth the substantiation standard applicable in this case.

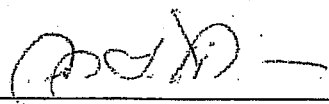
25. All internal memorandums which set forth the substantiation standard applicable in this case.

26. All request for rulemaking relating to the substantiation standard applicable in this case.

27. All documents relating to requests by advertisers for clarification on the substantiation standards applicable in this case.

28. All documents relating to requests made by advertisers pursuant to 16 C.F.R. §1.1.

29. All documents relating to requests made to the Federal Trade Commission by advertisers seeking approval of advertising prior to dissemination.
30. All studies reviewed by the Federal Trade Commission relating to the Challenged Products.
31. All consumer surveys conducted by the Federal Trade Commission relating to the Challenged Products.
32. All documents which define or explain the meaning of "competent and reliable scientific evidence."
33. All documents which purport to establish what constitutes competent and reliable evidence for purposes of supporting efficacy claims of weight loss products.
34. All correspondence to or with the individuals who served on the panel of "Deception in Weight Loss Advertising: A Workshop," held on November 19, 2002.
35. All documents that reflect the Federal Trade Commission's understanding of what the Federal Trade Commission needs to have a "reason to believe."
36. All documents which support the Federal Trade Commission's analysis of the meaning of the claims made by Respondents about the Challenged Products.
37. All documents which reflect the meaning of the words "Rapid" and "Substantial."
38. All drafts or versions of any expert reports.
39. All document and things considered and/or relied upon by any expert in connection with his or her services in this action.
40. All documents and things generated by any expert in connection with his or her services in the instant action, including but not limited to, any videos, photographs, tests, test results, notes and memoranda.



Jeffrey D. Feldman
Gregory L. Hillyer
FELDMANGALE, P.A.
Miami Center – 19th Floor
201 South Biscayne Blvd.
Miami, Florida 33131
Telephone: (305) 358-5001
Facsimile: (305) 358-3309

**Counsel for Respondents Basic Research, L.L.C.,
A.G. Waterhouse, L.L.C., Klein-Becker USA,
L.L.C., Nutrasport, L.L.C., Sovage Dermalogic
Laboratories, L.L.C. and Ban, L.L.C**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 9th day of September, 2004 as follows:

(1) 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; jmillard@ftc.gov; r-richardson@ftc.gov; lschneider@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;

(2) One (1) copy via United States Postal Service to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 3225 Aviation Avenue, Suite 301, Miami, Florida 33131.

(3) One (1) copy via United States Postal Service to Richard Burbidge, Esq., Jefferson W. Gross, Esq. and Andrew J. Dymek, Esq., Burbidge & Mitchell, 215 South State Street, Suite 920, Salt Lake City, Utah 84111, Counsel for Dennis Gay.

(4) One (1) copy via United States Postal Service to Ronald F. Price, Esq., Peters Scofield Price, A Professional Corporation, 340 Broadway Centre, 111 East Broadway, Salt Lake City, Utah 84111, Counsel for Daniel B. Mowrey.

(5) One (1) copy via United States Postal Service to Mitchell K. Friedlander, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84111, *pro se*.

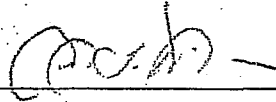
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EXHIBIT E

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

In the Matter of

BASIC RESEARCH, L.L.C.,
A.G. WATERHOUSE, L.L.C.,
KLEIN-BECKER USA, L.L.C.,
NUTRASPORT, L.L.C.,
SOVAGE DERMALOGIC LABORATORIES, L.L.C.,
d/b/a BASIC RESEARCH, L.L.C.,
OLD BASIC RESEARCH, L.L.C.,
BASIC RESEARCH, A.G. WATERHOUSE,
BAN, L.L.C.,
d/b/a KLEIN-BECKER USA, NUTRA SPORT, and
SOVAGE DERMALOGIC LABORATORIES,
DENNIS GAY,
DANIEL B. MOWREY,
d/b/a AMERICAN PHYTOTHERAPY RESEARCH
LABORATORY, and
MITCHELL K. FRIEDLANDER

Respondents.

DOCKET NO. 9318

BASIC RESEARCH, LLC'S FIRST REQUEST FOR ADMISSIONS

Respondent, Basic Research, LLC, by and through its undersigned counsel and pursuant to 16 CFR §3.32 hereby requests that the Federal Trade Commission admit the following within fifteen (15) days of service hereof.

DEFINITIONS

1. "Commission" or "FTC" shall mean the Federal Trade Commission, its employees, agents, attorneys, consultants, representatives, officers, and all other persons acting or purporting to act on its behalf.

2. "Staff Counsel" shall mean any attorney(s) employed by the Federal Trade Commission, excluding the Commissioners, including without limitation Complaint Counsel in the above-captioned matter.

3. "Complaint" shall mean the administrative complaint issued by the Federal Trade Commission and any amendments to that Complaint, in the above-captioned matter.

4. "Challenged Products" shall mean each product referred to in the Complaint, including: Dermalin-APg, Cutting Gel, Tummy Flattening Gel, Leptoprin, Anorex, and PediaLean, both individually and collectively.

5. "Challenged Advertisements" shall mean the advertising, both individually and collectively, for the Challenged Products referred to in the Complaint.

6. "Challenged Claims" shall mean the claims, both express and implied, appearing in the Challenged Advertisements and referred to in the Complaint.

7. "Respondent(s)" shall mean" all Corporate Respondents and all Individual Respondents, both individually and collectively, unless otherwise stated.

8. "Corporate Respondents" shall mean the following Respondents: Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker, usa, LLC, Nutrasport, LLC, Söavage Dermalogic Laboratories, LLC and BAN, LLC, both individually and collectively as defined in the Complaint, including all of their operations under any trade names.

9. "Individual Respondents" shall mean: Respondents Dennis Gay, Daniel B. Mowrey, and Mitchell K. Friedlander, both individually and collectively, unless otherwise stated.

10. "Efficacy" shall mean the ability of the product to achieve the results for which it is advertised.

11. "Safety" shall mean the ability of the product to be used without risk or adverse health consequences for the user.

12. "Operating Manual" means the Federal Trade Commission Operating Manual.

INSTRUCTIONS

The Requests for Admissions, as separately set forth below, shall be admitted unless, within fifteen (15) days after service, a sworn written answer or objection addressed to the Requests is served upon Basic Research, LLC and filed with the Secretary. Answers shall specifically deny the Request or set forth in detail the reasons why the Request cannot truthfully be admitted or denied. A denial shall fairly meet the substance of the Request, and when good faith requires that a party qualify its answer or deny only a part of the Request, so much of it as is true shall be specified, and the remainder shall be qualified or denied. Lack of information or knowledge shall not be given as a reason for failure to admit or deny unless a reasonable inquiry that the information known to or readily obtainable is insufficient to enable an admission or denial. If it is believed that a Request presents a genuine issue for trial, the Request may not, on that ground alone, be objected to; the Request may either be denied, or the reasons why the Request cannot be admitted or denied set forth.

REQUESTS FOR ADMISSIONS

1. Admit that the Federal Trade Commission has not conducted any studies regarding the Efficacy of the Challenged Products.

2. Admit that the Federal Trade Commission has not conducted consumer surveys or other research relating to how reasonable consumers would interpret or understand the Challenged Advertisements.

3. Admit that the Federal Trade Commission has not conducted consumer surveys or other research relating to what types of substantiation reasonable consumers would expect the Respondents to possess in order to have a reasonable basis for the Challenged Claims in the Challenged Advertisements.

4. Admit that at the time the Complaint was filed, the Federal Trade Commission had no expert opinion as to what express and/or implied claims were made in the Challenged Advertisements.

5. Admit that at the time the Complaint was filed, the Federal Trade Commission had no expert opinion that Respondents lacked a "reasonable basis" for the Challenged Advertisements.

6. Admit that at the time the Complaint was filed, the Federal Trade Commission had no expert opinion to support the allegations in paragraphs 24, 26, 32, and 41 of the Complaint.

7. Admit that the interpretation of Challenged Advertisements used to support the filing of the Complaint was performed by Staff Counsel for the Federal Trade Commission.

8. Admit that the term "Rapid" can mean different things to different reasonable consumers.

9. Admit that the term "Substantial" can mean different things to different reasonable consumers.

10. Admit that at the time the Challenged Advertisements were published, the Federal Trade Commission had no pre-screening protocol for the approval of the Challenged Advertisements.

11. Admit that at the time the Challenged Advertisements were published, the Federal Trade Commission had no pre-screening protocol for determining the adequacy of the substantiation supporting the claims made in the Challenged Advertisements.

12. Admit that the Federal Trade Commission will not give advertisers definitive answers on the adequacy of their claim substantiation before advertisements are disseminated.

13. Admit that 16 C.F.R. §1.1 does not provide a pre-screening protocol for advertisers to receive approval of their advertising.

14. Admit that advice provided by the Federal Trade Commission under 16 C.F.R. §1.1 is not binding on the Federal Trade Commission.

15. Admit that the Federal Trade Commission is under no obligation to issue warning letters if it changes its position regarding advice previously provided under 16 C.F.R. §1.1.

16. Admit that in 2000, the Federal Trade Commission received a petition to adopt a rule for the pre-screening of dietary supplement advertisements.

17. Admit that in 2000, the Federal Trade Commission denied a petition to adopt a rule for the pre-screening of dietary supplement advertisements.

18. Admit that in 2000, the Federal Trade Commission denied a petition to adopt a rule for pre-screening of dietary supplement advertisements because it was impracticable.

19. Admit that the Federal Trade Commission, at one time, had a pre-screening protocol for approving advertisements prior to dissemination.

20. Admit that the Federal Trade Commission abolished its pre-screening protocol for approving advertisements prior to dissemination.

21. Admit that the Federal Trade Commission would pre-screen Respondents' advertisements in the event that a cease and desist order is issued against them.

22. Admit that the Federal Trade Commission defines, in each case, the substantiation needed to constitute a reasonable basis for the Challenged Advertising.

23. Admit that in the case of specific establishment claims, the only substantiation required of the advertiser is the substantiation specifically referenced by the advertiser in the advertisement.

24. Admit that what constitutes a "reasonable basis" changes from case to case.

25. Admit that the Federal Trade Commission coordinated the filing of the Complaint with the Congressional hearings held on June 16, 2004 before the Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, United States House of Representatives ("the Hearings").

26. Admit that the Federal Trade Commission was asked by Congressional representatives to delay filing of the Complaint until the commencement of the Hearings.

27. Admit that J. Howard Beales III is not a medical doctor.

28. Admit that at the Hearings J. Howard Beales III was addressed as "Dr. Beales."

29. Admit that at the Hearings, when addressed as "Dr. Beales," Dr. Beales did not correct any member of Congress that he was not a medical doctor.

30. Admit that Dr. Wexler is not a medical doctor.

31. Admit that the Federal Trade Commission deems Dr. Wexler to be an expert on child obesity.

32. Admit that at the Hearings Dr. Wexler was addressed as "Dr. Wexler."

33. Admit that at the Hearings, when addressed as "Dr. Wexler," Dr. Wexler did not correct any member of Congress that he was not a medical doctor.

34. Admit that there is no Federal Trade Commission rule that prohibits a Ph.D. from being referred to as a "doctor."

35. Admit that the conclusion that Respondents did not possess or rely upon a reasonable basis that substantiated the accused advertising is premised upon the Respondents not having a specific type and amount of substantiation for its claims.

36. Admit that the Federal Trade Commission's authority is limited to determining whether the representations made in the Challenged Advertisements are in accord with the level of substantiation Respondents possessed.

37. Admit that it is the Federal Trade Commission's position that "competent and reliable scientific evidence" can mean different types and amounts of evidence in different cases.

38. Admit that the Federal Trade Commission has not defined "competent and reliable scientific evidence" to require any specific kinds, types or amounts of scientific studies.

39. Admit that the Federal Trade Commission has not defined "competent and reliable scientific evidence" to require any specific testing or research protocol or controls.

40. Admit that the Federal Trade Commission's position is that the state of the science renders all the representations made in the Challenged Advertisements unsupported.

41. Admit that it is the Federal Trade Commission's position that claims about the Safety and Efficacy of dietary supplements must be substantiated by competent and reliable scientific evidence.

42. Admit that it is the Federal Trade Commission's position that Respondents needed competent and reliable scientific evidence to substantiate the representations made in the Challenged Advertisements.

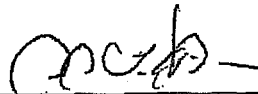
43. Admit that the FTC Commissioners have no formal training or expertise in advertising interpretation.

44. Admit that the FTC Commissioners are not given any formal training in advertising interpretation prior to being commissioned.

45. Admit that the FTC Commissioners have no formal training or expertise in the interpretation of science and/or medical studies.

46. Admit that the FTC Commissioners are not given any formal training in the interpretations of science and/or medical studies prior to being commissioned.

47. Admit that the attorneys for the Federal Trade Commission are bound to follow the procedures specifically discussed in the FTC Operating Manual.



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**Counsel for Respondents Basic Research, L.L.C.,
A.G. Waterhouse, L.L.C., Klein-Becker USA,
L.L.C., Nutrasport, L.L.C., Sovage Dermalogic
Laboratories, L.L.C. and Ban, L.L.C**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 9th day of September, 2004 as follows:

(1) 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, jmillard@ftc.gov, rjrichardson@ftc.gov, lschneider@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;

(2) One (1) copy via United States Postal Service to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 3225 Aviation Avenue, Suite 301, Miami, Florida 33131.

(3) One (1) copy via United States Postal Service to Richard Burbidge, Esq., Jefferson W. Gross, Esq. and Andrew J. Dymek, Esq., Burbidge & Mitchell, 215 South State Street, Suite 920, Salt Lake City, Utah 84111, Counsel for Dennis Gay.

(4) One (1) copy via United States Postal Service to Ronald F. Price, Esq., Peters Scofield Price, A Professional Corporation, 340 Broadway Centre, 111 East Broadway, Salt Lake City, Utah 84111, Counsel for Daniel B. Mowrey.

(5) One (1) copy via United States Postal Service to Mitchell K. Friedlander, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84111, *pro se*.

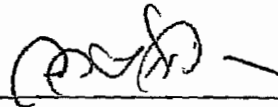
A handwritten signature in black ink, appearing to be "M. Friedlander", is written over a horizontal line.

EXHIBIT F

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

In the Matter of)	
BASIC RESEARCH, L.L.C.,)	
A.G. WATERHOUSE, L.L.C.,)	
KLEIN-BECKER usa, L.L.C.,)	Docket No. 9318
NUTRASPORT, L.L.C.,)	
SOVAGE DERMALOGIC)	
LABORATORIES, L.L.C.)	PUBLIC DOCUMENT
BAN, L.L.C.,)	
DENNIS GAY,)	
DANIEL B. MOWREY, and)	
MITCHELL K. FRIEDLANDER,)	
Respondents.)	

RESPONDENTS' INITIAL DISCLOSURES

Pursuant to RULE OF PRACTICE 3.31 (b), Respondents Basic Research, L.L.C., A.G. Waterhouse, L.L.C., Klein-Becker usa, L.L.C., NutraSport, L.L.C., Sovage Dermalogic Laboratories, L.L.C. and Ban, L.L.C., through undersigned counsel, make their Initial Disclosures.

1. Individuals likely to have discoverable information relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent.

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Salt Lake City, Utah 84116

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Gina Gay
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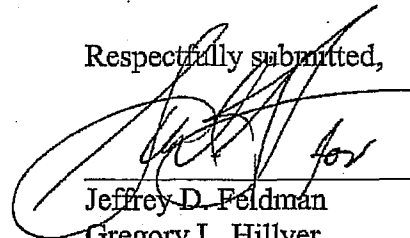
DermPharm
A Division of DermTech International
15222-B Avenue of Science
San Diego, California 92128
(858) 618-1328

2. A copy of, or a description by category and location of, all documents, data compilations and tangible things in the possession, custody or control of the respondent(s) that are relevant to the allegations of the Commission's Complaint, to the proposed relief sought, or to the defenses of the respondent(s):

- a. Challenged Product advertisements – 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116
- b. Substantiation for Challenged Product advertisements – 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116

- c. Formulation of Challenged Products – 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116
- d. Structure and inter-relationships among corporate respondents – 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116
- e. Customer correspondence and inquiries relating to the Challenged Products – 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116
- f. Packaging and Promotional Material for the Challenged Products – 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116
- g. Customer Returns of the Challenged Products – 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116
- h. Testing of the Challenged Products – 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116
- i. Consumer Surveys re Challenged Products – 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116

Respectfully submitted,



Jeffrey D. Feldman
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*Counsel for Respondents A.G.
Waterhouse, L.L.C., Basic Research,
L.L.C., Klein-Becker, usa, L.L.C.,
Nutraspourt, L.L.C., Sovage
Dermalogic Laboratories, L.L.C.,
and BAN, L.L.C.*

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August, 2004, I caused to be served the Respondents Basic Research, L.L.C., A.G. Waterhouse, L.L.C., Klein-Becker usa, L.L.C., NutraSport, L.L.C., Sovage Dermalogic Laboratories, L.L.C. and Ban, L.L.C. INITIAL DISCLOSURES as follows:

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

Laureen Kapin
Joshua S. Millard
Robin F. Richardson
Laura Schneider
Walter C. Gross III
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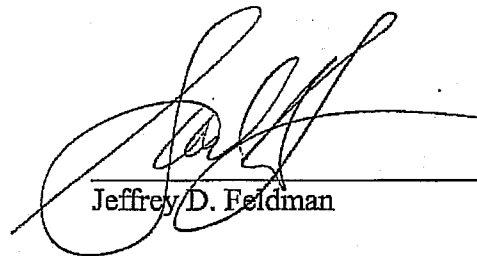
- (2) one paper copy via first class U.S. Mail to:

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(801) 517-7108 (fax)
mkf555@msn.com
Respondent Pro Se



Jeffrey D. Feldman

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2004, I caused *Complaint Counsel's Supplemental Brief in Support of Pending Motion to Strike Respondents' "Additional Defenses"* to be filed and served as follows:

- (1) the original, two (2) paper copies filed by hand delivery and one (1) electronic copy via email to:
Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580

- (2) two (2) paper copies served by hand delivery to:
The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Penn. Ave., N.W., Room H-104
Washington, D.C. 20580

- (3) one (1) electronic copy via email and one (1) paper copy by first class mail to the following persons:

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(305) 854-5351 (fax)
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Klein-Becker USA, LLC,
Nutrasport, LLC, Sovage
Dermalogic Laboratories,
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COMPLAINT COUNSEL