

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

In the Matter of

BASIC RESEARCH, LLC, et al.
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DOCKET: 9318

Public Document

**RESPONDENTS' REPLY TO COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENTS' MOTION FOR A MORE DEFINITE STATEMENT**

Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker USA, LLC, Nutrasport, LLC, Sövage Dermalogic Laboratories, LLC, Ban, LLC, Dennis Gay, and Daniel B. Mowrey, Ph.D, (collectively "Respondents"), hereby file their Reply to Complaint Counsel's Opposition to Respondents' Motion for a More Definite Statement ("Opposition"), and in support state as follows.¹

**I.
INTRODUCTION**

In its Opposition, Complaint Counsel essentially argues that the Complaint is sufficiently clear and concise under 16 C.F.R. §3.11 for Respondents to ascertain the practices alleged to violate the Federal Trade Commission Act. This position appears either to be ill-informed or disingenuous. Complaint Counsel employs ever-shifting legal terms of art, and vague, subjective wording that leaves the ultimate decision of ascertaining the nature of the charges against the Respondents to the Administrative Law Judge, rather than to Complaint Counsel. Such a practice necessarily means the Complaint is defective, fails to satisfy Complaint Counsel's statutory burden, and requires more definiteness for the Respondents to fashion a response.

¹ This filing is submitted on behalf of all Respondents except for Mitchell K. Friedlander, who is representing himself *pro se*. It is undersigned counsel's understanding that Mr. Friedlander joins in with this filing.

II.
RELEVANT FACTS

comparative analysis. The accusing party asserts a violation of a known standard and the defending party is left to explain why the articulated standard was not breached or violated. On behalf of the accusing party in this matter, Complaint Counsel must articulate with clarity those standards they claim the Respondents have violated. In the absence of such particularity, Complaint Counsel will have the freedom to shift their theories upon a whim and Respondents will be frustrated in their ability to prepare and present a defense.

1. The Term “Reasonable Basis” Is Not Adequately Defined

With respect to each of the products involved, the complaint alleges that the Respondents lacked a “reasonable basis” for including various representations in their advertisements. The Opposition states that the meaning of “reasonable basis” “. . . has been established over time through jurisprudence and other materials.” *See*, Opposition, page 7. The Opposition, however, then cites various authority in support of the conclusion that the reasonable basis requirement is “determined on a case-by-case basis” such that “this Court [sic.] will determine the meaning during the course of the proceedings.” *See*, Opposition, page 7.

The flaw in Complaint Counsel’s logic is self-evident. If, as their Opposition contends, the meaning of the phrase “reasonable basis” is “well-established,” it simultaneously cannot be the case that “this Court [sic.] will determine the meaning during the course of the proceedings.” *See*, Opposition, page 8. To the contrary, such logic establishes that the phrase is *not* well-defined. Moreover, if the Administrative Law Judge is left to determine the meaning of the standard, Complaint Counsel essentially has shifted to the Administrative Law Judge the burden to inform Respondents what constitutes the standard they allegedly failed to meet.

In their Opposition, Complaint Counsel repeatedly contend that they have met the minimum pleadings standards required under FTC jurisprudence. However, if the pleading standards mean anything, they must require a Complaint to provide notice of Respondents’

alleged behavior, but also, notice of how that behavior “violates the law.” Otherwise, Respondents are given the impossible task of predicting, in their answer and going forward, at what point their behavior allegedly became unlawful. Until Complaint Counsel define the particulars of what substantiation was needed to constitute a “reasonable basis” for the challenged advertisements, Respondents are unable to evaluate, defend, and prepare their case.

Indeed, Complaint Counsel’s own authority establishes that the Commission bears the burden of alleging and proving in each case the amount of substantiation required to constitute a “reasonable basis.” For example, the Opposition cites *Pfizer Inc.*, 81 F.T.C. 23 (1972). *See*, Opposition, page 8. With respect to simple claims of efficacy, “*Pfizer* holds that the *Commission itself* may identify the appropriate level of substantiation for ads that do not expressly or impliedly claim a particular level of substantiation.” *Thompson Medical Co. v. FTC*, 791 F.2d 189, 194 (D.C.Cir.1986), *cert. denied*, 479 U.S. 1086, 107 S.Ct. 1289, 94 L.Ed.2d 146 (1987) [emphasis added]. With respect to claims that are more specific, the advertiser must possess the level of proof claimed in the advertisement. However, “[i]f the claim is more general, but nevertheless constitutes an establishment claim, *the FTC will specify* the nature and extent of substantiation that will support the claim.” *Thompson Medical Co.*, 791 F.2d at 194 [emphasis added].

Thus, in this case, if the Commission believes that a “reasonable basis” requires particular types and amounts of information, Complaint Counsel should be required to allege the particulars in the Complaint. With these particulars the Respondents can commence their defense with a clear understanding of alleged shortcomings in their substantiation. In the absence of such particulars, Complaint Counsel are unconstrained to argue – in the face of whatever proof the Respondents offer – that a “reasonable basis” in this matter requires something more than what the Respondents have tendered. Respondents should not be forced to defend

established.” Respondents respect

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Reply to Complaint Counsels' Opposition to

CERTIFICATION FOR ELECTRONIC FILING

I CERTIFY that this electronic version is a true and correct copy of the original document being filed this same day of July 13, 2004 via hand delivery with the Office of the Secretary, Room H-159, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.