

UNITED STATES OF AMERICA

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)

Docket No. 9318

PUBLIC DOCUMENT

DISCUSSION

Respondents' *Opposition* demonstrates that an *Order* striking the alleged defenses is appropriate in the circumstances of this case. As discussed below, the *Opposition* is fraught with

Law Judges have long ruled on these preliminary questions in the context of other motions to

uphold the FTC's regulatory scheme." Opp'n at 10.³ With this statement, Respondents advanced

legal issue that should be certified to the Commission," Opp'n at 10, even though this issue purportedly "fall[s] within the sole province of Article III courts." *Id.* Certification to the Commission would serve little purpose if the Commission lacked authority to rule on the issue. Respondents' contentions here are unsupported by citation to any authority, and are erroneous. Both the Court and the Commission may rule on constitutional and APA issues.⁴

Respondents also argued that the *Motion to Strike* is beyond the Court's authority because

questions of legal sufficiency, pleading, and relevance relative to defenses including [REDACTED]

on grounds of due process, the *First Amendment*, or the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (“APA”). Respondents’ arguments to the contrary are incorrect.

II. Respondents’ “Controlling Line of Precedent” Does Not Validate their Defenses

In their *Opposition*, Respondents offered several new permutations of their alleged constitutional defenses. First, they stated that the “overriding issue” is that due process requires [REDACTED]

Respondents' first case is *Kolender v Lawson* 461 U.S. 352 (1983) in which the

persons who loiter or wander on the streets to provide a "credible and reliable" identification, and to account for their presence when questioned by an officer. 461 U.S. at 353, *cited in Opp'n* at 14. Respondents contend that the *Kolender* decision, and others in their "controlling line,"

and (r)(5)(D) and comparing FDA statutory framework to FTC law).⁷

Pearson is not “controlling,” and it cannot resuscitate Respondents’ invalid defenses.

If the decisions of the U.S. Court of Appeals for the District of Columbia Circuit will control on appeal, as Respondents appear to suggest, see Opp’n at 14, then Respondents have not shown how their defenses can succeed in light of a decision from the D.C. Circuit that is directly

point — the decision validating the FTC’s advertising substantiation standard. 11/17/11

physicians “ensure that all patients . . . are cared for in a manner and in an environment that

Respondents spoke").⁹ As discussed below, the alleged APA defenses are still invalid.

A. The Commission's Activities Before the Filing of the *Complaint* Are Not "Final Agency Action" Under the *Administrative Procedure Act*

In their *Opposition*, Respondents alleged that "the Commission's policy choice to utilize

factual context very different from the present case, so their holdings are inapposite.¹¹ However, the general legal principles discussed in the lead decision cited in Respondents' *Opposition*, the *Appalachian Power Co.* decision, may be instructive. The *Appalachian Power Co.* court stated:

In the administrative setting, "two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory

nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"

208 F.3d at 1022 (citations omitted).

Applying these precepts to the present case, neither the Commission's adoption of an

advertising substantiation standard nor the staff's use of that standard before the filing of the

Complaint has "marked] the 'consummation' of the agency's decisionmaking process." *id.* as

opinions to them,¹⁴ or engaged in unsuccessful consent negotiations with them.¹⁵ Respondents'

new arguments do not change the fact that there has been no final agency action to date. The

alleged APA defenses are invalid, immaterial, and unripe for review.¹⁶

B. Respondents' Additional *First Amendment* Arguments Are Invalid

Complaint Counsel have already discussed Respondents' *First Amendment* argument based on FDA caselaw. Respondents maintain, however, that they have a valid *First Amendment* defense to "the FTC's substantiation doctrine" because the substantiation requirement, or the

does not protect false *or* deceptive commercial speech.¹⁷

At the outset, the Court should strike Respondents' alleged *First Amendment* defense to the false claims alleged in the *Complaint*. See Compl. ¶¶ 24, 26, 32, 41, 43. The *Complaint* alleges that Respondents made false establishment claims and falsely represented that

restraint on protected commercial speech.” Opp’n at 17. This argument is incorrect for several

reasons. First, the Supreme Court and other courts have

restraint doctrine applies to commercial speech. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 571 n.13 (1980) (noting that hardness of commercial speech may obviate need for prior restraint doctrine in this area); *Friedman v. Rogers*, 440 U.S. 1, 10 (1979); *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 713, 770 (1975).

IV. Complaint Counsel Did Not Make Admissions Reported by Respondents

Respondents next sought to justify their alleged "reason to believe" and "public interest"

purported concessions are strawmen. They do not validate Respondents' defenses, which have already been shown to be invalid. See *Mgt. to Strike* at 18-20 (discussing *inter alia In re Exxon*

responses to Respondent's Interrogatories. Our responses stated that pages 11 and 1

responsive information from expert witnesses regarding Respondent's alleged negligence.

As a threshold matter, Respondents' new allegations do not satisfy the fact pleading

"[t]he FTC has made numerous explicit and tacit representations in its reports and testimony that it

Respondents are incorrect. They cited *United States v. Philip Morris Inc.*, 300 F. Supp.2d 61

(D.D.C. 2004) for the proposition that laches and equitable estoppel are valid defenses. See

Opp'n at 35. However, the *Philip Morris* court stated:

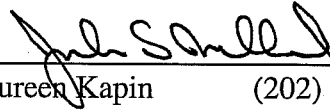
The essence of the Government's argument is that the equitable defenses of

Commission. See *FTC v. American Microtel, Inc.*, 1992 U.S. Dist. LEXIS 11046, *3 (D. Nev. June 10, 1992); *In re Rentacolor, Inc.*, 103 F.T.C. 400, 418 (1983); *In re Metagenics, Inc.*, 1995 FTC LEXIS at *3 (citing other cases). Such ill-asserted defenses are unavailing.

CONCLUSION

Throughout this litigation, Complaint Counsel has expended resources on otherwise unnecessary discovery and motions practice²⁴ because Respondents wish to try another case. In

Respectfully submitted,



Laureen Kapin (202) 326-3237
Walter C. Gross, III (202) 326-3319
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: September 28, 2004

**COMPLAINT COUNSEL'S REPLY TO RESPONDENTS' OPPOSITION
TO MOTION TO STRIKE RESPONDENTS' "ADDITIONAL DEFENSES"**

(1) **Complaint Counsel's First Supp. Resp. to Resp't's' First Set of Interrogs. (Sept. 3, 2004).**

(2) **Basic Research LLC's Second Dep. for Prod. of Documents**

(Sept. 9, 2004).

(3) **Basic Research LLC's First Dep. for Admissions**

GENERAL RESPONSES

1

Complaint Counsel's responses are made in accordance with the following:

relevance, privilege, materiality, propriety, admissibility, and any and all other objections and grounds that would require the exclusion of any statement contained herein if any requests were

Response:

Complaint Concerning [REDACTED]

[REDACTED]

Additional information responsive to this request will be produced in accordance with the

Dated: September 3, 2004

Respectfully submitted,

Laureen Kapin

Walter C. Gross (202) 326-3319

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Laura Schneider (202) 326-2604

Bureau of Consumer Protection

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2004, I caused *Complaint Counsel's First Supplemental Response To Respondent's First Set of interrogatories* to be served and filed as follows:

- (1) one (1) electronic copy via email and one (1) paper copy

~~by first class mail to the following~~

Stephen E. Nagin

Jeffrey D. Feldman

Richard D. Burbidge

**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

DOCKET NO. 9318

Respondents.

**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 parties.

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, and representatives.

or purporting to act on its behalf.

7. "Communication" or "communications" mean the act or fact of transmitting

[REDACTED]

instructional or education materials, including...

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.

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 they are:

[REDACTED]

6. All expert reports that the Federal Trade Commission has filed in

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 following:

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

19. All documents relating to the interpretations of the advertising

Challenged Products.

20. All documents relating to

advertising interpretation.

29. All documents relating to requests made to the Federal Trade Commission by advertisers seeking approval of advertising prior to dissemination.

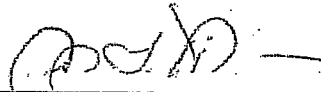
30. All studies reviewed by the Federal Trade Commission relating to the Challenged Products.

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 "scientific evidence."

scientific evidence."

33. All documents which define or explain the meaning of "scientific evidence."



Jeffrey D. Feldman
Gregory L. Hillyer

Miami Center -- 19th Floor
201 South Biscayne Blvd.

Telephone: (305) 358-5001
Facsimile: (305) 358-3309

CONFIDENTIAL AND PROPRIETARY

I HEREBY CERTIFY that a true and correct copy of the foregoing

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

In the Matter of

BASIC RESEARCH, L.L.C.,
A WATERHOUSE L.L.C.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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

reasonable basis for the Challenged Claims in the

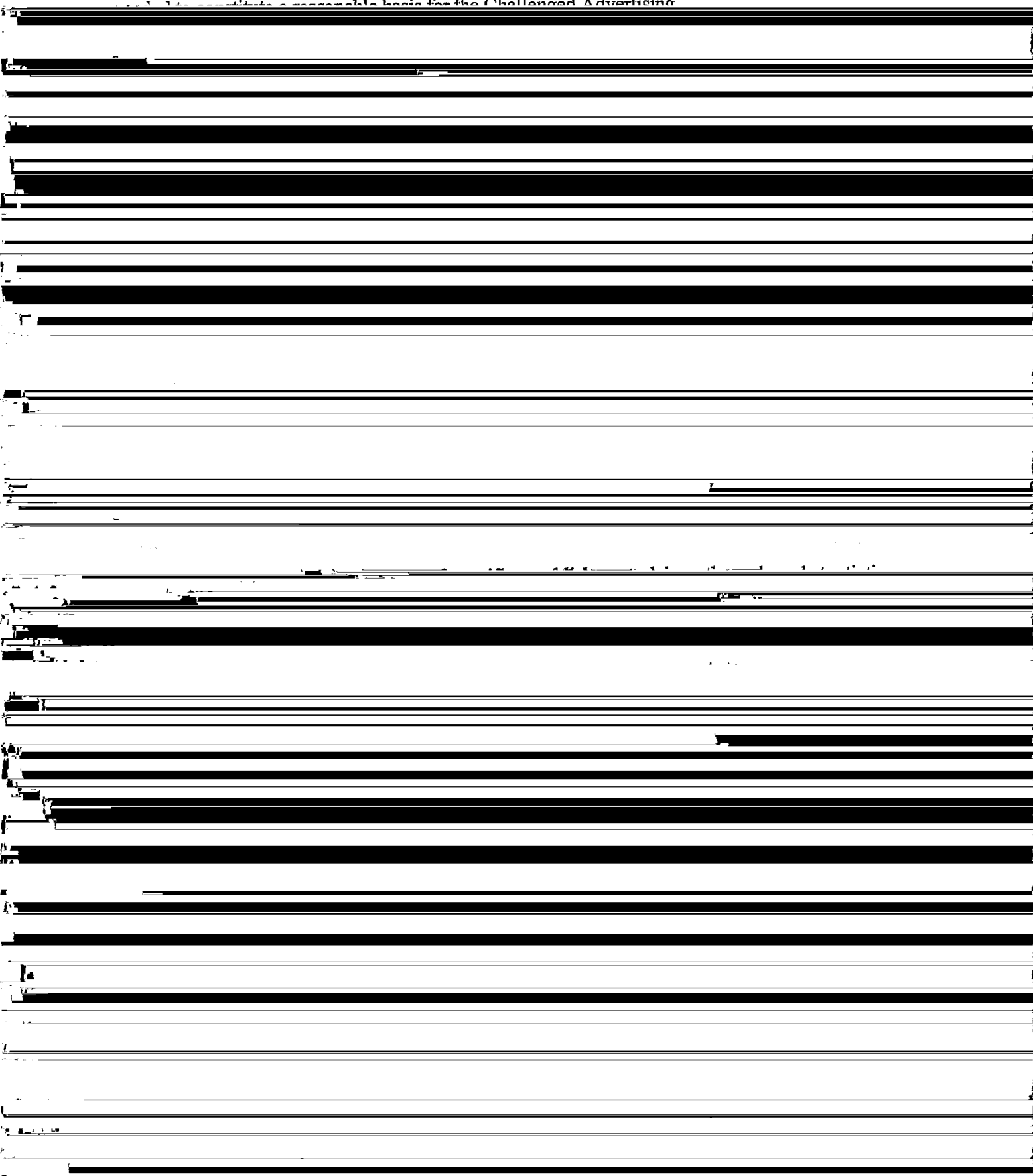
Challenged Advertisements.

4. The following amendments were published the Federal

[REDACTED]

22. Admit that the Federal Trade Commission defines, in each case, the substantiation

and constitute a reasonable basis for the Challenged Advertising



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

... Federal Trade Commission's position that "competent and

... have had no formal training or expertise in

... objection interpretation.



Respondents' Opposition to Motion to Strike Respondents' "Additional Defenses" to be served and filed as follows:

- (1) the original, two (2) paper copies filed by hand delivery and one (1) electronic copy via email to: