

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

TRADE COMMISSION

Commission has issued a complaint, the issue to be litigated is not the propriety of the

Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred." *In re Exxon Corp.*, 83 F.T.C. 1759, 1760 (1974). However, Respondents do not seek evidence of pre-Complaint information to question

The Constitution guarantees defendants “a meaningful opportunity to present a complete defense.” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citing *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984)). A basic requirement of due process is a fair trial in a fair tribunal. *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (citing *In re Murchison*, 349 U.S. 133, 136 (1955); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973)). That requirement applies to administrative agencies as well as to courts. *Id.* Your Honor’s Oath of Office requires faithful allegiance to the Constitution. 5 U.S.C. § 3331. Respondents must be heard to present evidence of actions by this agency that undermine their Constitutional rights and deny them procedural fairness.

An essential component of procedural fairness is an opportunity to be heard. *Id.* (citing *In re Oliver*, 333 U.S. 257, 273 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). That opportunity is denied if the FTC is permitted to exclude material evidence when such evidence is central to Respondents’ affirmative defenses. “[E]xclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the _____ once encounter and survive the availability of

meaningful adversarial testing.” *Id.* (citing *United States v. Cronin*, 466 U.S. 648, 656 (1984); *Washington v. Texas*, 388 U.S. 14, 22-23 (1967)).

judgment that the Commission is called upon to render?" Dkt. Jan. 927 F.04 at 1111.

develop a factual record on these issues. The determination of prejudged invalidity of

Respondent's affirmative defenses by granting Complaint Counsel's motion to *limit summary judgment*.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

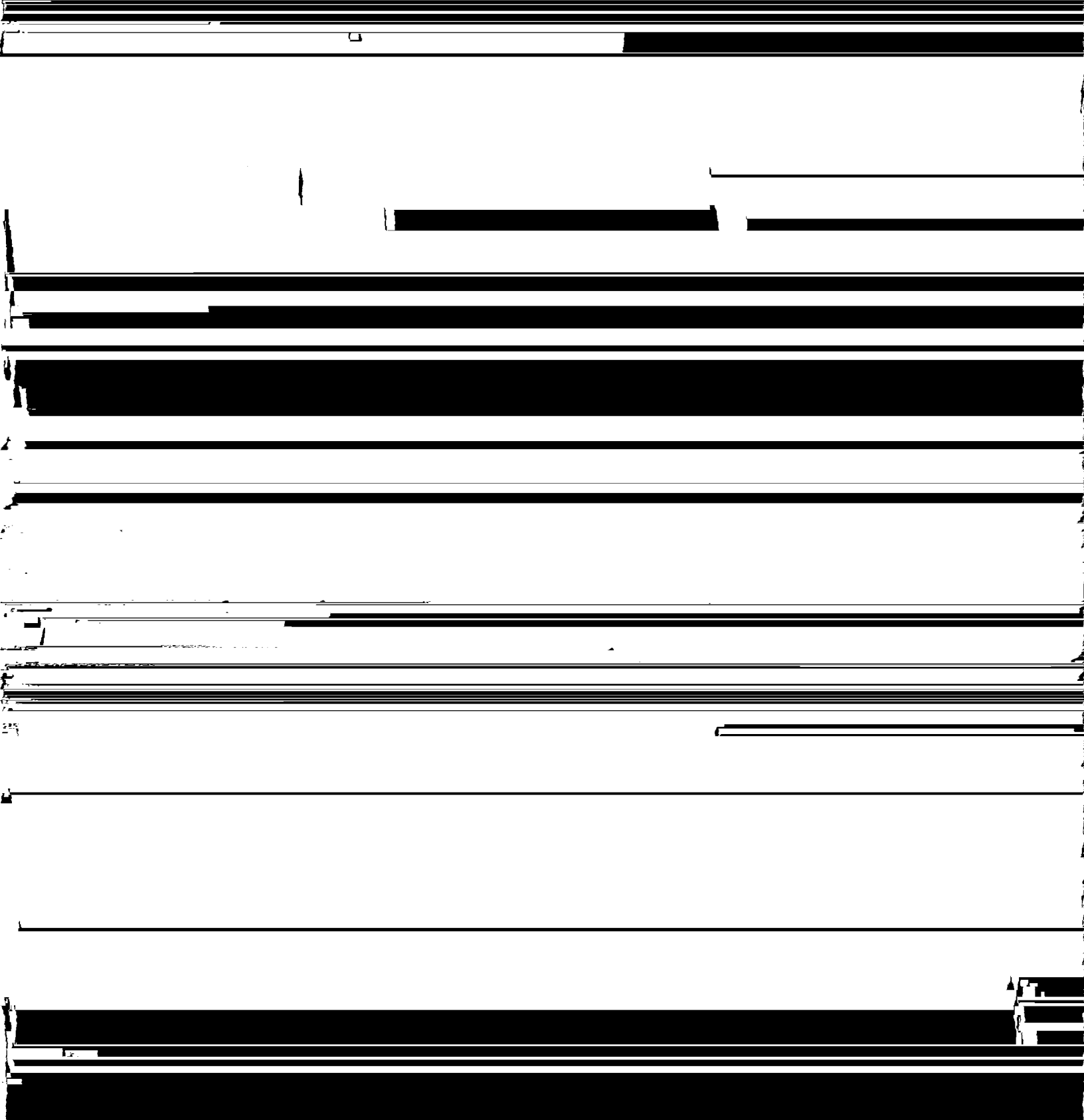
[REDACTED]

[REDACTED]

[REDACTED]

Thereafter, the Commission's undisclosed evaluation yielded a determination that Respondents' scientific evidence was not competent and reliable. *See* RX-126 (Attachment D).

Not over that the Commission would not inform Respondents of what scientific evidence it



of Respondents' First Amendment rights. Respondents have a constitutional right that trumps

potentially misleading claims must be permitted with reasonable disclosures designed to

eliminate misleading connotations. *See In re R.M.J.*, 455 U.S. at 203 (“Restrictions

and disclosures must be based on the actual facts and circumstances of the case.”)

1,577

are relevant and material to Respondents' affirmative defense based on the lawful exercise of First Amendment rights.

Under the First Amendment, any restraint on speech must be lifted at the earliest possible moment if an obvious, less-speech-restrictive alternative can be found to achieve the government's legitimate ends. *See Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965) ("Any restraint imposed in advance of a final determination on the merits must...be limited...to the shortest fixed period compatible with sound judicial resolution."). Delay in receipt of justice in the presence of government speech suppression is the bane of the First Amendment and cannot

**B. The Pre-Complaint Evidence Precluded by the Order is Relevant to
Respondent's Fifth Amendment Affirmative Defense**

[REDACTED]

support of claims is “competent and reliable,” *See, e.g., In re Schering Corp.*, 118 F.T.C. 1030 (1994); *In re Metagenics*, 124 F.T.C. 483 (1997); *In re Nature’s Bounty*, 130 F.T.C. 206 (1995), but does not apprise regulates of the science it expects them to possess before making the claims or before continuing to make the claims.

Respondents are unable to discern from FTC precedent what principles guide the Commission

in making its determinations on the corroborative sufficiency of science supporting claims in advertising for diet and weight-loss supplements. Therefore, prior to the filing of the Complaint

on June 16, 2004, Respondents specifically asked the Commission on numerous instances

necessary and sufficient support for any particular claim. Moreover, Respondents cannot

~~determine how best to qualify the claims to address concerns the FTC may have about the~~

extent to which the science provides evidence of the claimed benefits. In short, FTC's criteria

~~for evaluating claims and its weighing of those criteria are hidden from Respondents and other~~

wish to use the evidence to support their constitutionally-based affirmative defenses. In *Exxon*,

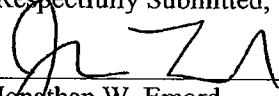
the A.L.J. explained that the issue to be litigated was “whether the alleged violation had in fact

occurred.” That is precisely the issue Respondents wish to address with their pre-Complaint evidence, as Respondents argue that it is impossible to violate an unconstitutional law. Thus,

there is a legitimate difference of opinion on how to apply *Exxon* to a case like the instant case

request that your Honor certify those portions hereinabove mentioned of the January 10, 2006 Order for interlocutory review under Rule 3.23(b) or, in the alternative, to reconsider and to reverse that Order.

Respectfully Submitted,


Jonathan W. Emord
Emord & Associates, P.C.
1800 Alexander Bell Drive, Suite 200
Reston, VA 20191
Tel. (202) 466-6937
Fax (202) 466-6938

Counsel for Basic Research, LLC
A.G. Waterhouse, LLC
Klein-Becker USA, LLC
Nutrasport, LLC
Sovage Dermalogic Laboratories, LLC
BAN, LLC

Richard Burbidge, Esq.
Burbidge & Mitchell
215 South State Street, Suite 920
Salt Lake City, Utah 84111
Counsel for Dennis Gay

Stephen E. Nagin
Nagin, Gallop & Figueredo, P.A.
18001 Old Cutler Road
Miami, Florida 33157
Tel. (305) 854-5353
Fax (305) 854-5351
Counsel for Basic Research, LLC

Ronald F. Price
PETERS SCOFIELD PRICE
A PROFESSIONAL CORPORATION
340 Broadway Centre
111 East Broadway
Salt Lake City, Utah 84111
Telephone: (801) 322-2003

Facsimile: (801) 322-2003

Date submitted: January 23, 2006

UNITED STATES OF AMERICA

OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.

In the Matter of

BASIC RESEARCH, LLC
A.G. WATERHOUSE, LLC
KLEIN-BECKER USA, LLC
NUTRASPORT, LLC
SOVAGE DERMATOLOGIC LABORATORIES, LLC
[REDACTED]

DUPLICATE VERSION

Email: secretary@ftc.gov

2) two paper copies delivered by hand delivery to:

The Hon. Stephen J. McGuire
Chief Administrative Law Judge
U.S. Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-112
Washington, D.C. 20580

3) one paper copy by first class U.S. Mail to:

James Kohm
Associate Director, Enforcement
U.S. Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

4) one paper copy by first class U.S. mail and one electronic copy in PDF format

by electronic mail to:

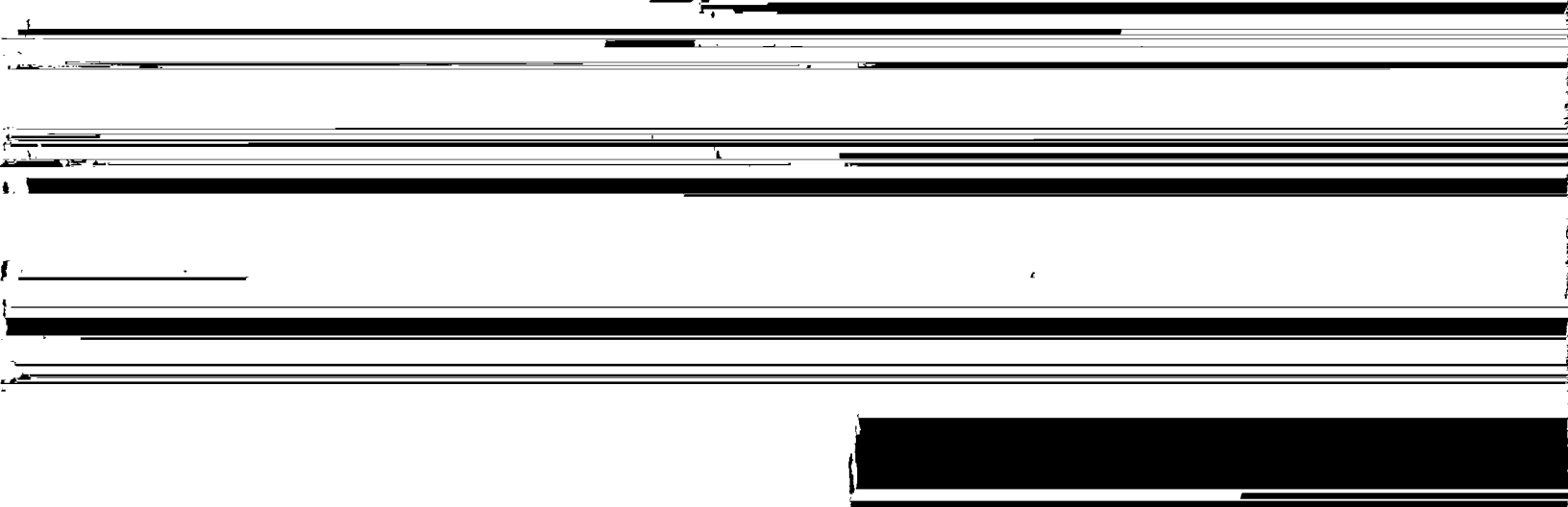
Laureen Kapin
Joshua S. Millard
Laura Schneider
Walter C. Gross III
Lemuel W. Dowdy
Edwin Rodriguez
U.S. Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Suite NJ-2122
Washington, D.C. 20580
Email: lkapin@ftc.gov
jmillard@ftc.gov
lschneider@ftc.gov

Burbidge & Mitchell
215 South State Street
Suite 920
Salt Lake City, UT 84111
Email: rurbidge@burbidgeandmitchell.com

Ronald F. Price
Peters Scofield Price
340 Broadway Center
111 East Broadway
Salt Lake City UT 84111
Email: rpf@psplawyers.com

Mitchell K. Friedlander
c/o Compliance Department
5742 West Harold Gatty Drive
Salt Lake City, UT 84116
Email: mkf555@msn.com

Christine M. Walker



Attachment A

further examination on the area Mowrey was unable to address. Opposition at 14.

With respect to Complaint Counsel's request to preclude Respondents from presenting
testimony of trial concerning the [redacted] of [redacted]

be excluded." 16 C.F.R. § 3.43. To the extent Respondents seek to introduce evidence on Complaint Counsel's pre-Complaint protocol, Complaint Counsel's reasonable basis for issuing the Complaint, or the costs to Respondents to comply with the same, [REDACTED]

[REDACTED]

Attachment B

Confidential Material Subject to Protective Order

Redacted

Attachment C

Confidential Material Subject to Protective Order

Redacted

Attachment D

Confidential Material Subject to Protective Order

Redacted