

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

**In the Matter of** )  
 )  
**BASIC RESEARCH, L.L.C.,** )  
 **a limited liability corporation,** )  
 )  
**A.G. WATERHOUSE, L.L.C.,** )  
 **a limited liability corporation,** )  
 )  
**KLEIN-BECKER USA, L.L.C.,** )  
 **a limited liability corporation,** )  
 )  
**NUTRASPORT, L.L.C.,** )  
 **a limited liability corporation,** )  
 )  
**SOVAGE DERMALOGIC LABORATORIES, L.L.C.,** )  
 **a limited liability corporation,** )  
 )  
**BAN, L.L.C.,** )  
 **a limited liability corporation, also doing** )  
 **business as BASIC RESEARCH, L.L.C.,** )  
 **OLD BASIC RESEARCH, L.L.C.,** )  
 **BASIC RESEARCH, A.G. WATERHOUSE,** )  
 **KLEIN-BECKER USA, NUTRA SPORT, and** )  
 **SOVAGE DERMALOGIC LABORATORIES,** )  
 )  
**DENNIS GAY,** )  
 **individually and as an officer** )  
 **of the limited liability corporations,** )  
 )  
**DANIEL B. MOWREY,** )  
 **also doing business as** )  
 **AMERICAN PHYTOTHERAPY RESEARCH** )  
 **LABORATORY, and** )  
 )  
**MITCHELL K. FRIEDLANDER** )

**DOCKET NO. 9318**

**PUBLIC DOCUMENT**

**COMPLAINT COUNSEL'S OPPOSITION TO  
RESPONDENTS' MOTIONS TO SUBMIT REPLIES**

Complaint Counsel oppose Respondents' Motions to Submit Replies to Complaint

Counsel's Opposition to Respondents' Motions for a More Definite Statement.<sup>1</sup> Respondents' proffered replies accompanying the motions duplicate their original motions, add no new facts or arguments, and will not assist this Court in ruling upon the Motions for a More Definite Statement. Respondents' Answers to the Complaint were originally due in early July. Through the filing of these duplicative and improper motions, Respondents have caused further delay to these proceedings. Respondents' tactics directly contravene the spirit of RULE OF PRACTICE 3.1 which provides that these proceedings shall be conducted "expeditiously" and that "counsel for all parties shall make every effort at each state of a proceeding to avoid delay." Accordingly, pursuant to RULE OF PRACTICE 3.22(c), and for the reasons discussed below, we respectfully request that the Court deny Respondents' Motions for Leave to File Reply Motions and request an expedited deadline for Respondents to file their answer.

### ARGUMENT

The RULES OF PRACTICE state that "[t]he moving party shall have no right to reply, except as permitted by the Administrative Law Judge or the Commission." RULE OF PRACTICE 3.22(c); *see e.g., Ford Motor Co.*, No. 9105, 1978 F.T.C. Lexis 499 (Feb. 28, 1978) (denying motion for a more definite statement and respondent's request for leave to file reply)(attached). The Southern District of New York supported the view embodied in RULE OF PRACTICE 3.22(c) and has declared that "reply papers should be the exception and not the rule." *See United States v. Int'l Bus. Machines Corp.*, 66 F.R.D. 383, 384 (S.D.N.Y. 1975). The District Court observed that "[c]learly, nothing but delay, unnecessary work, and unwarranted expense can result from the

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<sup>1</sup> Mr. Friedlander's submission repeats almost *verbatim* most of the arguments presented by the other Respondents. Complaint Counsel directs this Opposition to all Respondents' motions to submit replies.

routine filing of reply and, inevitably, surreply papers which do nothing more than restate in a different form or with additional detail material set forth in the moving and opposing papers.”

*Id.* The Court recognized that reply papers might be warranted where an opposition raises “raises new material issues” but pointed out that this situation was “the exceptional though rare case.”

*Id.*

Respondents’ motions demonstrate that these motions do not fall within the rare category of cases justifying the filing of a reply. Respondents’ proffer two justifications for their irregular filings -- first, they assert that Complaint Counsel’s Opposition raised “new issues;” second they contend that their replies will “assist the Administrative Law Judge.” Resp. Mot. to Submit Reply at 1. Their motion, however, fails to back up these assertions. The sole issue Respondents identify as new relates to the definition of “reasonable basis.” Resp. Mot. to Submit Reply at 1. Respondents’ identified this precise issue in their opening motions and should have already foreseen and presented any pertinent discussions. *See e.g.*, Resp. Mot. For Def. Stmt. at 2- 4 (“Respondents cannot ascertain FTC’s intended meaning and usage of certain terms, such as: ‘reasonable basis;’” Complaint fails to adequately notify what is encompassed by the term reasonable basis; etc.).<sup>2</sup> As to any assistance to the Court, other than Respondents’ bare

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<sup>2</sup> In their continuing objection to the Commission’s use of the term “reasonable basis,” Respondent’s curiously cite *Thompson Medical Co. v. FTC*, 791 F.2d 189, 194 (D.C. Cir. 1986) for the proposition that the FTC must “specify the nature and extent of the substantiation that will support the claim.” Resp. Mot. for Def. Stmt. at 4. In fact, this case did not address the requisite level of specificity required for complaint allegations; rather the Court discussed petitioner’s challenge to the FTC’s Order providing that “competent and reliable scientific evidence shall include at least two adequate and well-controlled, double-blinded clinical studies.” *See Thompson* at 791 F.2d at 194. Respondents’ citation to *Thompson* illustrates their misapprehension of the proper stage to raise objections to the Complaints’ use of legal terms. These are challenges more properly asserted in trial or appeal briefs.

assertion, their motion contains no explanation of how their replies will further illuminate the Courts' analysis of whether the Complaint is sufficiently definite to meet the requirements of RULE 3.11(b).

Respondents' proposed replies simply continue to press the dialogue and arguments previously set forth in their moving papers. Respondents' parrot the same objections to the terms "rapid," "substantial," "visibly obvious," and "causes." *See e.g.*, Resp. Mot. for Def. Stmt. at 5 (arguing that the term "rapid" is undefined and the term "substantial" is "subjective and relative") and Resp. Reply at 5 (arguing that the Commission "fail[ed] to define the terms 'substantial' and 'rapid'" and that both terms are "subjective and relative"); Resp. Mot. for Def. Stmt. at 7 (arguing that the term "visibly obvious" does not allow Respondents "to discern from whose perspective the Commission expects [them] to defend the claim") and Resp. Reply at 6 (arguing that the "manner in which the term 'visibly obvious' is used fails to provide notice from whose perspective the Commission expects Respondents to defend the claim"). Respondents' scant analysis and mere refrains of prior arguments provide no basis to justify the filing of their replies.

### **CONCLUSION**

In sum, this Court should reject Respondents' second attempt to gain more time to answer the Complaint. The Reply Motions fail to raise any new material issues and thus, will not aid this Court in its decision on Respondents' Motions for a More Definite Statement. For the foregoing reasons, the FTC respectfully requests that the Court deny Respondents' Motions for Leave to File Replies and set an expedited deadline for Respondents to answer the Complaint.

Respectfully submitted,

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Bureau of Consumer Protection

Federal Trade Commission

600 Pennsylvania Avenue, N.W.

Washington, D.C. 20580

Dated: July 19, 2004

# ATTACHMENT

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8 of 31 DOCUMENTS

In the Matter of FORD MOTOR COMPANY, a corporation.

DOCKET No. 9105 C

Federal Trade Commission

*1978 FTC LEXIS 499*

ORDER DENYING MOTION FOR MORE DEFINITE STATEMENT

February 28, 1978

**ALJ:** [\*1]

Thomas F. Howder, Administrative Law Judge

**ORDER:**

Upon consideration of respondent's motion for a more definite statement of the complaint's charges in this matter, and of complaint counsel's answer thereto, it is hereby ORDERED that such motion be denied.

In my view, the allegations set forth in the complaint constitute "[a] clear and concise factual statement sufficient to inform [the] respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law," as specified in § 3.11(b)(2) of the Commission's Rules. Nothing more is required of this pleading.

Respondent's request for leave to file a reply to complaint counsel's answer to the motion is likewise denied, pursuant to my authority under § 3.22(c).

SO ORDERED.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19<sup>th</sup> day of July, 2004, I caused *Complaint Counsel's*

*Opposition to Respondents' Motions To Submit Replies*, including the supporting memorandum and attachments to be filed and served as follows:

- (1) the original and one (1) paper copy 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 and one (1) electronic copy via email to:  
**The Honorable D. Michael Chappell**  
Administrative Law Judge  
600 Penn. Ave., N.W., Room H-104  
Washington, D.C. 20580
  
- (3) one (1) paper copy by first class mail and one (1) electronic copy via email to:  
**Stephen E. Nagin, Esq.**  
**Nagin, Gallop, & Figueredo, PA**  
3225 Aviation Avenue  
Miami, FL 33133-4741
  
- (4) one (1) paper copy by first class mail and one (1) electronic copy via email to:  
**Jeffrey D. Feldman, Esq.**  
**FeldmanGale, PA**  
Miami Center, 19<sup>th</sup> Floor  
201 South Biscayne Boulevard, Suite 1920  
Miami, FL 33131
  
- (5) one (1) paper copy by first class mail and one (1) electronic copy via email to:  
**Ronald F. Price, Esq.**  
**Peters, Scofield, Price, PC**  
310 Broadway Center  
111 East Broadway  
Salt Lake City, UT 84111



- (6) one (1) paper copy by first class mail and one (1) electronic copy via email to:  
**Mitchell K. Friedlander**  
c/o Compliance Department  
5742 West Harold Gatty Drive  
Salt Lake City, UT 84116
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LAURA SCHNEIDER