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

In the Matter of

BASIC RESEARCH, LLC, et al.
_____ /

**DOCKET: 9318
ALJ: Stephen J. McGuire**

PUBLIC DOCUMENT

ANSWER OF RESPONDENT MITCHELL K. FRIEDLANDER

Pursuant to the Rules of Practice for Adjudicative Proceedings, Rule 3.12, Respondent Mitchell K. Friedlander (“Friedlander”) respectfully contests the allegations set forth in Complaint in this matter and responds to each numbered paragraph in that charging document as follows:

1. Friedlander is not a member, owner, officer, manager, director, employee or agent of Respondent Basic Research, L.L.C. and, therefore, Friedlander cannot respond on behalf of Basic Research, L.L.C. However, Friedlander admits he believes the allegations in paragraph 1 of the Complaint to be true, except that he believes that Basic Research, L.L.C. is a limited liability company and not a corporation.

2. Friedlander is not a member, owner, officer, manager, director, employee or agent of Respondent A.G. Waterhouse, L.L.C. and, therefore, Friedlander cannot respond on behalf of A.G. Waterhouse, L.L.C. However, Friedlander admits he believes the allegations in paragraph 2 of the Complaint to be true, except that he believes that A.G. Waterhouse, L.L.C. is a limited liability company and not a corporation.

3. Friedlander is not a member, owner, officer, manager, director, employee or agent of Respondent Klein-Becker USA, L.L.C. and, therefore, Friedlander cannot respond on behalf of Klein-Becker USA, L.L.C. However, Friedlander admits he believes the allegations in paragraph 3 of the Complaint to be true, except that he believes that Klien-Becker USA, L.L.C. is a limited liability company and not a corporation.

4. Friedlander is not a member, owner, officer, manager, director, employee or agent of Respondent Nutrasport, L.L.C. and, therefore, Friedlander cannot respond on behalf of Nutrasport, L.L.C. However, Friedlander admits he believes the allegations in paragraph 4 of the

Complaint to be true, except that he believes that Nutrasport, L.L.C. is a limited liability company and not a corporation.

5. Friedlander is not a member, owner, officer, manager, director, employee or agent of Respondent Sovage Dermalogic Laboratories, L.L.C and, therefore, Friedlander cannot respond on behalf of Sovage Dermalogic Laboratories, L.L.C. However, Friedlander admits he believes the allegations in paragraph 5 of the Complaint to be true, except that he believes that Sovage Dermalogic Laboratories, L.L.C. is a limited liability company and not a corporation.

6. Friedlander is not a member, owner, officer, manager, director, employee or agent of Respondent BAN, L.L.C. However, Friedlander admits he believes that BAN, LLC is a limited liability company with its principal place of business at 5742 W. Harold Gatty Dr., Salt Lake City, Utah. All further allegations denied.

7. Admits that Dennis Gay is an individual, and that Friedlander believes that Dennis Gay's place of employment is located at 5742 W. Harold Gatty Dr., Salt Lake City, Utah. All further allegations denied.

8. Admits that Mowrey is an individual, and that he has an office located at 5742 W. Harold Gatty Dr., Salt Lake City, Utah. Friedlander believes that Mowrey participates in the development of products. All further allegations denied.

9. Friedlander admits that he is an individual. Respondent Friedlander Admits that at certain times he occupied office space provided by one or more of the respondents, but the office space alleged in the Complaint is not his principal place of business. All other allegations are denied.

10. Denied.

11. Friedlander Denies that he has manufactured, advertised, labeled, offered for sale, sold or distributed any of the products enumerated in paragraphs 11(A) through 11(F) of the Complaint. Friedlander believes that at different times, one or more of the limited liability company Respondents have advertised, distributed and sold the products enumerated in paragraphs 11 (A) through (F). The last sentence of paragraph 11 states a legal conclusion, to which no response is required. All remaining allegations are denied.

12. Denied.

**Dermalin-APg, Cutting Gel, and
Tummy Flattening Gel Products for Fat Loss**

13. Friedlander Denies that he has disseminated any advertisements referred to in paragraph 13 of the Complaint. Denies that he caused any advertisements to be disseminated, in that the term "caused" is inherently vague, subjective, and susceptible to numerous and different interpretations. Friedlander believes that at different times one or more of the Respondents

placed advertisements that contained the language quoted in sub-parts 13(A) through (G) and that Exhibits (A) through (G) to the Complaint. Admits, the excerpts appear to be true and accurate excerpts from Dermalin-APg™, Cutting Gel™, and Tummy Flattening Gel™ advertisements but denies the quotations that appear in paragraph 13 of the Complaint accurately or fully reflect the express and/or implied messages of the advertisements. All remaining allegations are denied.

14. Denied, in that the terms “causes”, “rapid”, and “visibly obvious” do not appear in Dermalin-APg™ advertisements, are not defined in the Complaint, and are inherently vague, subjective, and susceptible to numerous and different interpretations. All remaining allegations are denied.

15. Denied, in that the phrase “reasonable basis” is not defined in the Complaint, is inherently vague, subjective and is subject to no discernible quantitative or qualitative requirements. Additionally, Respondent Friedlander believes that substantiation exists now and existed for the claims made in the advertisement for Demalin-Apg. All remaining allegations are denied.

16. Denied, in that the phrase “reasonable basis” is not defined in the Complaint, is inherently vague, and subject to no discernible quantitative or qualitative requirements. Additionally, Friedlander believes that substantiation exists now and existed at the time the advertisements were made. All remaining allegations are denied.

17. Denied, in that the terms “causes”, “rapid”, and “visibly obvious” do not appear in the advertisements, are not defined in the Complaint, are inherently vague, subjective, and susceptible to numerous and different interpretations. All remaining allegations are denied.

18. Denied, in that the phrase “reasonable basis” is not defined in the Complaint, is inherently vague, and subject to no discernible quantitative or qualitative requirements. Additionally, Friedlander believes that substantiation exists now and existed at the time the Cutting Gel advertisements were made. All remaining allegations are denied.

19. Denied, in that the phrase “reasonable basis” is inherently vague, not defined in the Complaint and subject to no discernible quantitative or qualitative requirements. Additionally, Friedlander believes that substantiation exists now and existed at the time the Cutting Gel advertisements were made. All remaining allegations are denied.

20. Denied, in that the terms “causes”, “rapid”, and “visibly obvious” do not appear in advertisements, are not defined in the Complaint, are inherently vague, subjective, and susceptible to numerous and different interpretations. All remaining allegations are denied.

21. Denied, in that the phrase “reasonable basis” is not defined in the Complaint, is inherently vague, and subject to no discernible quantitative or qualitative requirements. Additionally, Friedlander believes that substantiation exists now and existed at the time the Tummy Flattening Gel advertisements were made All remaining allegations are denied.

22. Denied, in that the phrase “reasonable basis” is not defined in the Complaint, is inherently vague, and subject to no discernible quantitative or qualitative requirements. Additionally, Friedlander believes that substantiation exists now and existed at the time Tummy Flattening Gel advertisements were made All remaining allegations are denied.

23. Denied, in that the terms “causes”, “rapid”, and “visibly obvious” do not appear in advertisements, are not defined in the Complaint, are inherently vague, subjective, and susceptible to numerous and different interpretations. All remaining allegations are denied.

24. Denied, in that the terms “causes”, “rapid”, and “visibly obvious” do not appear in advertisements, are not defined in the Complaint, are inherently vague, subjective, and susceptible to numerous and different interpretations. All remaining allegations are denied.

25. Denied, in that the terms “causes”, “rapid”, and “visibly obvious” do not appear in advertisements, are not defined in the Complaint, are inherently vague, subjective, and susceptible to numerous and different interpretations. All remaining allegations are denied.

26. Denied, in that the terms “causes”, “rapid”, and “visibly obvious” do not appear in advertisements, are not defined in the Complaint, are inherently vague, subjective, and susceptible to numerous and different interpretations. All remaining allegations are denied.

Leptoprin and Anorex Products for Weight and Fat Loss in “the Significantly Overweight”

27. Friedlander Denies that he has disseminated any advertisements referred to in paragraph 27 of the Complaint. Denies that he caused any advertisements to be disseminated, in that the term “caused” is inherently vague, subjective, and susceptible to numerous and different interpretations. Friedlander believes that at different times one or more of the Respondents placed advertisements that contained excerpts quoted in paragraph 27(A) and Exhibits (A) through (G) to the Complaint. Admits, the excerpts appear to be true and accurate excerpts from Leptoprin and Anorex advertisements but denies the quotations that appear in paragraph 27 of the Complaint accurately or fully reflect the express and/or implied messages of the advertisements. All remaining allegations are denied.

28. Denied, in that the terms “causes”, and “substantial” do not appear in Leptoprin

advertisements, are not defined in the Complaint, and are inherently vague, subjective, and susceptible to numerous and different interpretations. All remaining allegations are denied.

29. Denied, in that the phrase “reasonable basis” is not defined in the Complaint, is inherently vague, and subject to no discernible quantitative or qualitative requirements. Additionally, Friedlander believes that substantiation exists now and existed at the time Leptoprin advertisements were made. All remaining allegations are denied.

30. Denied, in that the phrase “reasonable basis” is not defined in the Complaint, is inherently vague, and subject to no discernible quantitative or qualitative requirements. Additionally, Friedlander believes that substantiation exists now and existed at the time Leptoprin advertisements were made. All remaining allegations are denied.

31. Denied, in that the terms “causes”, and “substantial” do not appear in Leptoprin advertisements, are not defined in the Complaint, and are inherently vague, subjective, and susceptible to numerous and different interpretations. All remaining allegations are denied.

32. Denied, in that the terms “causes”, and “substantial” do not appear in Leptoprin advertisements, are not defined in the Complaint, and are inherently vague, subjective, and susceptible to numerous and different interpretations. All remaining allegations are denied.

33. Denied, in that the terms “causes”, and “substantial” do not appear in Anorex advertisements, are not defined in the Complaint, and are inherently vague, subjective, and susceptible to numerous and different interpretations. All remaining allegations are denied.

34. Denied, in that the phrase “reasonable basis” is not defined in the Complaint, is inherently vague, and subject to no discernible quantitative or qualitative requirements. Additionally, Friedlander believes that substantiation exists now and existed at the time Anorex advertisements were made. All remaining allegations are denied.

35. Denied, in that the phrase “reasonable basis” is not defined in the Complaint, is inherently vague, and subject to no discernible quantitative or qualitative requirements. Additionally, Friedlander believes that substantiation exists now and existed at the time Anorex advertisements were made. All remaining allegations are denied.

PediaLean Product
for Weight Loss in Children

36. Friedlander Denies that he has disseminated advertisements for PediaLean to be disseminated as alleged in paragraph 36 of the Complaint. Denies that he caused any advertisements to be disseminated, in that the term “caused” is inherently vague, subjective, and susceptible to numerous and different interpretations. Friedlander believes that one or more of

the Respondents are responsible for disseminating or advertising PediaLean™ and at different times one or more of them placed advertisements that are contained in the language quoted in sub-parts 36(A) and (B) and that Exhibits (K) through (L) appear to be true and accurate copies of PediaLean™ advertisements. Further, Friedlander denies that the quotations, which appear in paragraph 36 of the Complaint accurately, or fully, reflect the express and/or implied messages of the advertisements. All remaining allegations are denied.

37. Denied, in that the terms “causes”, and “substantial” do not appear in Pedialean advertisements, are not defined in the Complaint, and are inherently vague, subjective, and susceptible to numerous and different interpretations. All remaining allegations are denied.

38. Denied, in that the phrase “reasonable basis” is not defined in the Complaint, is inherently vague, and subject to no discernible quantitative or qualitative requirements. Additionally, Friedlander believes that substantiation exists now and existed at the time Pedialean advertisements were made. All remaining allegations are denied.

39. Denied, in that the phrase “reasonable basis” is not defined in the Complaint, is inherently vague, and subject to no discernible quantitative or qualitative requirements. Additionally, Friedlander believes that substantiation exists now and existed at the time Pedialean advertisements were made. All remaining allegations are denied.

40. Denied, in that the terms “causes”, and “substantial” do not appear in Pedialean advertisements, are not defined in the Complaint, and are inherently vague, subjective, and susceptible to numerous and different interpretations. All remaining allegations are denied.

41. Denied, in that the terms “causes”, and “substantial” do not appear in Pedialean advertisements, are not defined in the Complaint, and are inherently vague, subjective, and susceptible to numerous and different interpretations. All remaining allegations are denied.

Expertise of Respondent Mowrey

42. Denied

43. Friedlander admits that Dr. Mowrey is not a medical doctor. All remaining allegations are denied.

44. Denied, in that the allegations, terms and language contained in Complaint are unintelligible, not defined, inherently vague, subjective, and susceptible to numerous and different interpretations, contain no discernible qualification or quantification, and therefore no intelligible answer or response can be formulated beyond the foregoing answers. Furthermore, the language contained in paragraph 44 of the Complaint calls for a legal conclusion and does not require a response from Respondent. Friedlander further denies that he engaged in any conduct that would constitute a violation of any section of the FTC Act for any of the products

that are the subject of this action.

AFFIRMATIVE DEFENSES

First Amendment: Free Speech

The Commission's Complaint abridges Respondents', including Friedlander's rights under the First Amendment to the United States Constitution in that the Complaint seeks to punish and prohibit protected commercial speech through the use of ad hoc and non-defined terms and advertising substantiation standards that lack any measurable degree of definiteness. The Complaint further violates Respondents', including Friedlander's First Amendment rights in that the instant administrative proceeding is premised upon so called "implied" representations that are not obvious from the express language of the advertisements at issue, but which the Federal Trade Commission has inferred from the advertisements without the benefit of extrinsic evidence.

Fifth Amendment: Procedural and Substantive Due Process

The Commission's Complaint, as alleged, abridges Respondents', including Friedlander's, rights under the Fifth Amendment to the United States Constitution in that the Complaint seeks to punish and prohibit protected commercial speech through the use of ad hoc and non-defined terms and advertising substantiation standards that lack any measurable degree of definiteness.

Arbitrary and Capricious Agency Action

The Complaint and administrative enforcement action in this cause constitutes arbitrary and capricious agency action under 5 United States Code, Section 701, in that the Federal Trade Commission's action against Respondents, including Friedlander, seeks to punish and prohibit protected commercial speech through the use of ad hoc and non-defined terms and advertising substantiation standards that lack any measurable degree of definiteness.

Laches and Estoppel

The Federal Trade Commission purposely delayed this action in order to time its administrative Complaint with a parallel Congressional investigation and hearing. To the extent that the Commission had a "reason to believe" that Respondents had violated Sections 5(a) and 12 of the Federal Trade Commission Act, the Commission and or its staff delayed this cause for political purposes and in doing so, caused Respondents, including Friedlander, to lose the benefit of testimony from third party witnesses and otherwise caused their defense in this action to become stale.

Lack of Dissemination

Friedlander did not disseminate, contribute or participate in the dissemination of any of the advertisements at issue.

Inherently Unfair Complaint Allegations

By deliberately choosing to characterize claims in advertising for the Products named in the Complaint in a manner that is inherently vague, subjective, and is susceptible to numerous different interpretations, the Commission has placed each applicable Respondent at a severe, unfair disadvantage, has caused great uncertainty, improperly enables Complaint Counsel to shift their theory of the administrative action with impunity, and precludes Respondent from presenting a strong defense to the vague charges. Additionally, by denying Respondent's Motion for A More Definite Statement the Administrative Law Judge has reinforced and enhanced the inherent unfairness that infects this entire administrative proceeding and such a deleterious and unfair effect could have been prevented. The vague, subjective, and undefined charges that have been denied, above, are inimical to Consumer Welfare, are inconsistent with the Public Interest, are an improper exercise of adjudicative discretion under the Commission's mandate by Congress and decisions by the Judiciary, deliberately or negligently complicate the administrative proceeding, and cause Respondent considerable ill will, loss of value, and expense.

Bias and Impropriety by Commission Chairman Muris prior to his voluntary withdrawal from participation in Commission oversight of the Investigation that led to Complaint issuance

In 2001 as part of the Response to Civil Investigative Demands ("CIDs") filed in this matter, the Commission and its staff was placed on notice that then Commission Chairman

Tim Muris previously had served as a paid expert witness and consultant to a competitor of Basic Research, and – on belief – had specifically assisted the competitor in challenging advertising claims for several products sold by Basic Research or then related companies when he knew or should have known that the *Competitor's animus and allegations were unfounded and were part of an improper attempt to eliminate a competitor from the market.*

Having been so used as an instrument and facilitator of an unfair method of competition when Mr. Muris knew or should have known by the exercise of due diligence and care, about a cover-up of phony clinical evidence by the competitor, Mr. Muris should have disqualified himself from the moment he first became aware, as a FTC Commissioner, of the investigation of Basic Research.

The Bureau of Consumer Protection's investigation, *sub judice*, sought to cover-up the impropriety by Chairman Muris by seeking, and then by procuring the Commission's issuance of CIDs that were designed to attempt to obtain the same information and additional information independently of what the Commission staff had obtained through Mr. Muris' facilitation of the unfair method of competition.

The bias and unfairness of Mr. Muris involvement and subsequent failure to promptly disqualify himself in 2001 has caused great and unnecessary expense to Basic Research and related companies then existing in 2001 through 2003, and should have been disclosed to Respondent. On reasonable belief, the cover-up of Commissioner Muris' continued involvement in this matter was improper, has disadvantaged Respondent by creating a bias towards Respondent, was inimical to Consumer Welfare, inconsistent with the Public Interest, an improper exercise of adjudicative discretion under the Commission's mandate by Congress and

decisions by the Judiciary, deliberately or negligently complicates the administrative proceeding, and causes Respondent considerable ill will, loss of value, and expense.

* * * * *

To the extent any of the foregoing grounds of defense may not properly be asserted and/or adjudicated in this proceeding, Respondent hereby states his intent to preserve such defenses for future proceedings.

DEMAND FOR ATTORNEY'S FEES

Friedlander reserves all claims for attorney's fees and costs he may have the right to obtain under Recovery of Awards Under the Equal Access to Justice Act in Commission Proceedings, 5 U.S.C. 504 and 5 U.S.C. 553(b).

Respectfully Submitted,



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Pro Se Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2004, I caused to be filed and served the Answer and Grounds of Mitchell K. Friedlander as follows:

- (1) an original and two paper copies filed by hand delivery and one electronic copy in PDF format filed by electronic mail to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room H-159
Washington, D.C. 20580
Email: secretary@ftc.gov

- (2) one paper copy served by hand delivery to:

The Honorable Steven J. McGuire
Administrative Law Judge
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 and one electronic copy in PDF format by electronic mail to:

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Federal Trade Commission
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- (4) one paper copy by first class U.S. mail to:

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Klein-Becker USA, L.L.C., Nutrasport, L.L.C.,
Sovage Dermalogic Laboratories, L.L.C., and
Ban, L.L.C.*

I further certify that the electronic copies sent to the Secretary of the Commission are true and correct copies of the paper originals, and that paper copies with original signatures are being filed with the Secretary of the Commission on the same day by other means.



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Pro Se Respondent