

**UNITED STATES OF AMERICA
BEFORE THE 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)	Docket No. 9318
LABORATORIES, L.L.C.,)	
BAN, L.L.C.,)	PUBLIC DOCUMENT
DENNIS GAY,)	
DANIEL B. MOWREY, and)	
MITCHELL K. FRIEDLANDER,)	
)	
Respondents.)	

**COMPLAINT COUNSEL’S OPPOSITION
TO BASIC RESEARCH’S MOTION TO COMPEL**

Complaint Counsel oppose Respondent Basic Research, LLC’s *Motion To Compel* Complaint Counsel to “more fully” respond to interrogatories in the following three categories: (1) advertising interpretation; (2) scientific study interpretation; and (3) the Commission’s internal deliberations prior to issuing the *Complaint*. See Mot. at 1. Respondent’s *Motion* improperly seeks to glean information protected by Complaint Counsel’s non-testifying experts, work product, and deliberative process privileges, as well as to contravene this Court’s *Scheduling Order* by prematurely seeking information about testifying experts and their opinions.

To the extent that Respondent seeks the work product of non-testifying experts, Respondent has not argued, nor can it, that “exceptional circumstances” in this case render it “impracticable” for them to “obtain facts or opinions on the same subject by other means.” COMMISSION RULE OF PRACTICE 3.31(c)(4)(B)(ii). Moreover, Respondent’s argument is contrary

to the weight of Commission precedent. With respect to attempts to obtain Complaint Counsel's work product and deliberative process – this information is similarly protected from disclosure.

To the extent that Respondent seeks the work product of testifying experts, that information will in fact be provided to Respondent in accordance with the timing of disclosure as set forth in this Court's *Scheduling Order* – in this case, on October 6th and October 20th. To the extent Respondent wishes to seek to modify this *Scheduling Order*, Respondent should do so directly by filing a motion to so modify. Otherwise seeking to compel information about expert witnesses is simply not “ripe” for a motion to compel and, in any event, is scheduled this month.

Respondent's *Motion* is a thinly veiled attempt to pierce longstanding privileges coupled with a curious attempt to prematurely gain access to testifying expert information. Respondent trots out its prior unsuccessful arguments in an ungainly attempt to support this *Motion*. Complaint Counsel's responses are sufficient and the challenged objections are justified. This Court should reject Respondent's empty arguments and deny the *Motion*.

BACKGROUND

A. Procedural History.

On June 15, 2004, the Commission filed a *Complaint* alleging, *inter alia*, that Basic Research and other related companies and individuals (collectively, “Respondents”) marketed certain dietary supplements by making unsubstantiated claims for fat loss and weight loss, and that Respondents falsely represented that some of these products were clinically proven to be effective, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act, (“FTC Act”), 15 U.S.C. §§ 45 and 52. After the Administrative Law Judge denied Respondents' multiple motions challenging the *Complaint*, Respondents filed their Answers on July 30, 2004.

On August 11, 2004, after a hearing, the Court issued a *Scheduling Order*. This *Order* establishes a comprehensive pre-trial and trial schedule, including the following dates:

- October 6, 2004 - Complaint Counsel provides **expert witness** list.
- October 13, 2004 - Respondents provide **expert witness** list.
- October 20, 2004 - Complaint Counsel provides **expert witness** reports.
- November 29, 2004 - Respondents provide **expert witness** reports.

Order at 1-2 (Aug. 11, 2004) (emphasis supplied).

B. Discovery at Issue.

On June 25, 2004, Complaint Counsel served its *First Request for Production of Documentary Materials and Tangible Things* and *First Set of Interrogatories* to Respondents. Respondents requested, and received, multiple extensions of time to respond to Complaint Counsel's discovery. Respondents responded, asserting objections and producing documents on August 9, August 18, and September 9, 2004, but Respondents have not completed their production. Complaint Counsel have identified numerous concerns with these discovery responses

On July 23, 2004, Basic Research served its *First Set of Interrogatories* and its *First Set of Requests for Documents*.¹ After receiving an extension of time in which to respond to Basic Research's *First Set of Interrogatories*, Complaint Counsel filed its responses to these *Interrogatories* on August 27, 2004. Complaint Counsel's Resp. to Resp't's' First Set of Interrogs. (Sept. 3, 2004) ("Compl. Counsel's Resp.") (attached as Att. A hereto). During this discovery period, Complaint Counsel has cooperated in several discovery conferences in an attempt to reach agreement on outstanding discovery issues. *See* Mot. at 5. Subsequently, on

¹ On September 9, 2004, Basic Research filed its Second Request for Production of Documents and its First Request for Admissions.

September 3, 2004, Complaint Counsel filed its *First Supplemental Response to Respondent's First Set of Interrogatories*. Complaint Counsel's First Supp. Resp. to Resp't's First Set of Interrogs. (Sept. 3, 2004) ("Compl. Counsel's Supp. Resp.") (attached as Att. B hereto). On September 9, 2004, Respondent filed the instant *Motion to Compel*.

C. Nature of the Case and The Motion To Compel.

Like many other Section 5 and 12 advertising cases, this case revolves around two key issues: (1) Interpretation of the relevant advertisements, and (2) interpretation of the Respondents' substantiation. Consequently, Complaint Counsel has consulted with both non-testifying experts and testifying experts regarding interpretation of Respondents' advertisements and substantiation.

In the instant *Motion*, Respondent demands that Complaint Counsel produce "better answers" to Respondent's interrogatories nos. 1(b), 1(c), 1(d), 1(e), 2, 3, 4, 5 and 6. Mot. at 6. These interrogatories seek information about the persons who interpreted the advertising materials and any related extrinsic evidence (1(b), 1(c), 3 & 4), the nature of substantiation needed (1(d)), interpretation of the Respondents' substantiation (1(e), 2), and the Commission's pre-complaint deliberative documents (5 & 6). Complaint Counsel respond as follows.

ARGUMENT

I. Complaint Counsel Fully Answered the Interrogatories and Complaint Counsel's Objections Are Justified Under The Applicable Rules and Legal Standards.

A. The Rules Applicable to Interrogatories.

The RULES provide that “[e]ach interrogatory shall be answered separately and fully in writing under oath, unless it is objected to on grounds not raised and ruled on in connection with the authorization, in which event the reasons for objection shall be stated in lieu of an answer. RULE 3.35(a)(2). A party may file a motion “for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to . . . an interrogatory under § 3.35.” RULE 3.38(a). The party making the objection has the burden of showing that the objection is justified. RULE 3.38(a)(1).

B. The Legal Standard Applicable to Non-Testifying Experts.

Commission Rule 3.31(c)(4)(ii) provides that a party may discover facts known or opinions held by an expert who is not expected to be called to testify, “only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” 16 C.F.R. § 3.31(c)(4)(ii). A party seeking discovery from a non-testifying retained expert faces a “heavy burden.” *In the Matter of Telebrands Corp.*, Docket No. 9313, 2003 F.T.C. Lexis 201, *2 (Dec. 23, 2004); *Hoover v. Dep’t of Interior*, 611 F.2d 1132, 1142 n.13 (5th Cir. 1980). A mere assertion that exceptional circumstances exist, without supporting facts, is not sufficient to compel the disclosure of otherwise nondiscoverable documents. *Martin v. Valley Nat’l Bank of Arizona*, 1992 U.S. Dist. Lexis 11571, *13 (S.D.N.Y. 1992). Those cases allowing such discovery from non-testifying

experts often involve situations having destroyed or non-available materials or situations in which the expert might also be viewed as a direct fact witness. *Telebrands*, 2003 F.T.C. Lexis 201, *2 (citing Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2032).

C. The Legal Standard Applicable to Work Product Privilege.

“The work product privilege provides a lawyer with a degree of privacy to assemble information, sift the facts, prepare legal theories and plan strategy free from unnecessary intrusion by opposing counsel.” Order, *In re Detroit Auto Dealers Ass’n*, Docket No. 9189, 1985 WL 260986 (Apr. 17, 1985).² The privilege “further[s] the interests of clients and, ultimately, the cause of justice.” Order, *In re Schering Corp.*, Docket No. 9232, 1990 F.T.C. Lexis 133, *2 (May 10, 1990). This privilege has been codified in the Commission’s Rules of Practice:

[A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for hearing by or for another party or by or for that other party’s representative (including the party’s attorney, consultant, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

RULE 3.31(c)(3) (emphasis added).

D. The Legal Standard Applicable to Deliberative Process Privilege.

The deliberative process privilege protects communications that are part of the decision-making process of a governmental agency. *Hoechst Marion Roussel, Inc.*, Docket No. 9293, 2000 F.T.C. Lexis 134, *8 (Aug. 18, 2000), citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132,

² Except when otherwise indicated, pinpoint citations are not available for the electronic documents cited herein.

150-52 (1975). This privilege permits the government to withhold information that “reflect advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated.” *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (citing *NLRB*, 421 U.S. at 150); *see also* RULE 4.10(a)(3).³ It was developed to promote frank and independent discussion among those responsible for making government decisions and also to protect against premature disclosure of proposed agency policies or decisions.” *Warner*, 742 F.2d at 1661 (citing *EPA v. Mink*, 410 U.S. 73, 87 (1973)). This is a qualified privilege and may be overcome when a sufficient showing of need exists. *Hoechst*, at *9.

II. Complaint Counsel Fully Responded to Each of the Interrogatories.

Respondent recognizes that Complaint Counsel has provided an answer beyond simply objecting to the interrogatory, consequently, Respondent contends that it would like Complaint Counsel to answer “more fully.” Mot. at 4. Complaint Counsel fully answered each interrogatory by raising the appropriate objections and by detailing the appropriate facts and discussion. *See* Compl. Counsel’s Resp., Att. A. Complaint Counsel’s responses made the objections based on privilege with particularity, including supporting case law citations in Complaint Counsel’s general objections, and by reference to relevant general objections in the specific responses.⁴

³ This RULE provides that “nonpublic material” includes “interagency or intra-agency memoranda or letters which would not routinely be available by law to a private party in litigation with the Commission. This exemption preserves the existing freedom of Commission officials and employees to engage in full and frank communication with each other.”

⁴ Complaint Counsel’s objections are more detailed than those raised by Respondent. *See, generally*, Respondents’ *Response to Complaint Counsel’s First Set of*

Importantly, much of the answers that Respondent demands, to wit, testifying expert information, will be provided in accordance with the Court's *Scheduling Order*. Respondent's scattershot *Motion* presents no arguments, reasons, or precedent that would require Complaint Counsel to supplement its answers. As articulated in the interrogatory responses, and as discussed below, Complaint Counsel's answers are sufficient and the objections are justified. Respondent's *Motion* should be denied.

A. Interrogatory No. 1 Improperly Seeks Information Protected from Disclosure Based on Non-testifying Expert, Deliberative Process, or Work Product Privilege.

Interrogatory No. 1 provides:

1. With respect to each representation that you claim in your Complaint was made by one or more Respondents in Promotional Materials for the Challenged Products, please:
 - a) state whether you contend that the representation was express or implied;
 - b) identify the person or persons who interpreted the Promotional Material in question and determined what representations it conveyed;
 - c) describe all extrinsic evidence (that is, anything other than the Promotional Material itself) that was relied upon in determining what representations were conveyed;
 - d) describe the nature, quantity, and type of substantiation that you contend Respondents needed in order to possess and rely upon a reasonable basis to make the representation;
 - e) describe the factual basis for your contention that Respondents did not possess and rely upon a reasonable basis that substantiated the representation.”

Att. A at 4.

Interrogatories at 2-4, 5-6, 7-8, 10 (Aug. 16, 2004) (Responses are attached as Att. C hereto, but omits Exhibit A, confidential ingredient information, to these responses).

1. Complaint Counsel Fully Answered Interrogatory No. 1(b) and 1(c).⁵

With respect to Interrogatories Nos. 1(b) and 1(c), Respondent demands that Complaint Counsel identify persons who interpreted Respondents' advertisements and describe the extrinsic evidence shown to these persons. Mot. at 5. In its response, Complaint Counsel recognized that it has consulted with persons both in anticipation of litigation and as part of this litigation.⁶ Compl. Counsel's Resp. at 4. First, with respect to persons consulted in anticipation of litigation, Complaint Counsel consulted with staff at the Bureau of Consumer Protection and with experts in determining what action should be taken. Thus to the extent that this is part of the decision to take any action in this case, these persons fall within the deliberative process privilege. Second, to the extent that these persons are non-testifying experts, information about these persons is protected from disclosure as both information related to a non-testifying expert and as work product. Third, to the extent that any such person would be a testifying expert, the identification of those persons and a description of extrinsic evidence will be provided in accordance with this Court's *Scheduling Order*, which provides that Complaint Counsel identify testifying experts by October 6, and produce expert reports by October 20. Of course, should any of the withheld information be relied upon or reviewed by Complaint Counsel's testifying experts in forming

⁵ As to Interrogatory No. 1(a) regarding whether the challenged interrogatories are express or implied, Respondent has, at this time, withdrawn its *Motion to Compel* with respect to this interrogatory. Mot. at 5; see Complaint Counsel's Supp. Resp., Att. B.

⁶ Complaint Counsel's response stated, *inter alia*, "Complaint Counsel object to the extent that this Interrogatory seeks information prepared in anticipation of litigation or disclosure of the theories and opinions of Complaint Counsel (General Objection 2), information protected from disclosure by the deliberative process privilege (General Objection 3), information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4) information relating to non-testifying expert witnesses (General Objection 5). . . ."

opinions, “the information is discoverable.” *Telebrands*, 2003 F.T.C. Lexis 201, *4.

Thus persons with whom Complaint Counsel consulted, and any extrinsic evidence discussed with them, are protected from disclosure at this time – either based on an applicable privilege – work product privilege, deliberative process privilege, and information related to non-testifying experts, or based on the timing of disclosure provisions as established in this Court’s *Scheduling Order*.

With respect to the information covered by the privilege, Respondent fails to provide any specific reasons or assert any arguments as to why any of the privileges should be pierced. *See* Mot. at 6. Indeed, Respondent expressly recognizes that this information “will be forthcoming during expert discovery.” Mot. at 6 (recognizing that “expert discovery may eventually take place”). Respondent admits that waiting for the expert discovery “forces Respondent to engage in wasteful discovery and hinders its ability to determine whom to depose, from whom to subpoena documents.” *See* Mot. at 5-6. In light of the plethora of motions, document requests, admissions, and interrogatories that Respondent has issued, Respondent’s concerns that its abilities may be hindered are without merit.⁷

2. Complaint Counsel Fully Responded to Interrogatory No. 1(d).

Respondent demands that Complaint Counsel should have answered Interrogatory No. 1(d) by opining as to “the level of substantiation that Respondent needed for the claims made in the challenged advertisements.” Mot. at 7 (footnote omitted). Complaint Counsel fully responded to Respondent’s Interrogatory No 1(d). *See* Compl. Counsel’s Resp. 5-6, Att. A.

⁷ We note that Respondents have filed approximately six motions, two requests for production of documents, two requests for interrogatories, and one set of requests for admissions.

Complaint Counsel's answer provided facts that identify "how the agency evaluates scientific substantiation," outlining specific sources of industry guidance, including specific reference to "agency statements, Commission Policy Statements, caselaw and other information, including prior orders, as provided on the agency's website." Compl. Counsel Resp. at 5.

As a threshold matter, this interrogatory is an open-ended question asking Complaint Counsel to speculate on "the nature, quantity and type of substantiation that you contend Respondents needed in order to possess and rely upon a reasonable basis to make the representation." *See* Mot. at 6. Complaint Counsel's response properly identified the specific objections applicable to this interrogatory, asserting privilege with respect to information involving non-testifying experts, deliberative process and work product. Compl. Counsel's Resp. at 5, Att. A. Complaint Counsel's answer identified various sources of information that provided factors relevant in analyzing substantiation, and Complaint Counsel's answer described the contents of these publications, including the pertinent provisions. *Id.* For example, Complaint Counsel's response provided guidance about how the agency evaluates scientific substantiation, "The Commission's 1988 Dietary Supplement Guide," and provided a detailed analysis of how the agency evaluates scientific substantiation related to advertising claims for dietary supplements. *Dietary Supplements: An Advertising Guide for Industry*, FTC, Bureau of Consumer Protection (1998). Complaint Counsel's response further elaborated that:

Section II.B. of the Guide describes basic principles about the amount and type of evidence required to support a health-related claim; how to evaluate the quality of that evidence; the importance of considering the totality of the evidence rather than individual studies in isolation; and how to evaluate the relevance of the evidence to a specific advertising claim and product.

Compl. Counsel's Resp. at 5, Att. A.

Respondent contends that Complaint Counsel's response would be "adequate" only if it "made the determination" as to what "level of substantiation Respondent needed to survive FTC review *in this case*." This argument is without merit – it attempts to impermissibly shift the burden to the FTC to articulate the substantiation that Respondent needed to have. Further, Respondent attempts to force the FTC to come up with the necessary level of substantiation based on Respondent's advertising. That simply is not the law. The law provides that Respondent is supposed to possess the requisite level of substantiation **at the time** Respondent makes any claims so that ostensibly, those claims are based on the substantiation. *See, e.g., Advertising Substantiation Policy Statement, appended to Thompson Medical Co., 104 F.T.C. 648, 839 (1984)* (Commission law requires an advertiser to possess adequate substantiation for a claim prior to the dissemination of the ad). This is not a simple intellectual exercise about which came first, the substantiation or the claim, but rather an attempt to invert the standards applicable to marketing and advertising products. Instead, the level of substantiation necessary is a function on the meaning of the advertising, which is determined by the "overall net impression." *See, e.g., Kraft Inc., 114 F.T.C. 40, 122 (1991)*, quoting *Thompson Medical, 104 F.T.C. 648, 790 (1984)*. Thus, Complaint Counsel's response describing the applicable standards provide a full answer to this Interrogatory. The discussed materials and the standards contained therein provide the necessary framework that the Commission employs to analyze the substantiation provided. That Respondent would like more is clear, however, Complaint Counsel sufficiently grounded its answer in the facts – in this case, the facts constitute those "factors" that the Commission takes into account.

Respondent argues that Complaint Counsel should have provided more "facts." Mot. at

7. This attempt to color Complaint Counsel's response as non-responsive is without basis, Complaint's Counsel responded to this interrogatory by detailing the relevant factors. Indeed, Respondent's argument conveniently overlooks that this interrogatory asked for, and received, the applicable legal standard. *See* Compl. Counsel's Resp. at 5-6, Att. A. Thus, this case is distinguishable from the facts present in the cases that Respondent summarily cites. *See, e.g., D'Scaife v. Boenne*, 191 F.R.D. 590 (N.D. Ind. 2000) (court rejected a copy of the arrest report as an insufficient response to an interrogatory in an excessive force case because the interrogatory asked the defendant police officers to describe what they experienced during the incident, and the report did not include any information about what the officers' experienced). This Court should reject Respondent's arguments.

B. Interrogatory No. 2 Improperly Seeks Information Protected from Disclosure Based on Non-testifying Expert, Deliberative Process, or Work Product Privileges.

Respondent seeks information related to Complaint Counsel's analysis and review of Respondents' substantiation. Interrogatory No. 2 states:

2. For each study, analysis, research, or test provided to you by any Respondent as substantiation for representations made concerning the Challenged Products during your investigation leading to the Complaint, please state whether you contend such study, analysis, research, or test does not constitute adequate substantiation for the representation for which it was asserted, and describe the basis and circumstances under which you made that determination, including without limitation the identity of the person who made the determination, when they made it, their qualifications to make such a determination, and the factual basis and reasoning underlying that determination.

Respondent demands that Complaint Counsel to provide a "determination" as to whether Respondent's substantiation studies "constitute adequate substantiation for the representation for which it was asserted." Mot. at 9. Complaint Counsel objected to this question. Compl.

Counsel Resp. at 6-7, Att. A. Complaint Counsel supported our objections by explaining that the interrogatory:

- (1) seeks “the identity of and opinions rendered by non-testifying experts,”
- (2) seeks “prematurely the identities of and opinions rendered by Complaint Counsel’s expert witnesses,”
- (3) Seeks “information prepared in anticipation of litigation and disclosure of the theories and opinions of Complaint Counsel,”
- (4) seeks “information protected from disclosure by the deliberative process privilege,” and
- (5) is “unduly burdensome.”

Compl. Counsel Resp. at 6-7, Att. A. Respondent fails to address the first four objections.

Instead, Respondent argues only the tautology that “[t]he interrogatory is not unduly burdensome; it simply requires Complaint Counsel to provide the information.” *See* Mot. at 10. However, Respondent’s arguments that this is not unduly burdensome is simply not supported by the evidence. For example, in connection with the ephedra products alone, Respondent provided over 284 different studies, analyses, and tests. In any event, the sought after information is either protected by privilege or subject to a timing of disclosure requirement as provided by the Court’s *Scheduling Order*.

Turning first to privileges, as with the interpretation of the ad issues, *see* discussion at p. 9-10 *supra*, interpretation of the scientific studies implicates (1) deliberative process privilege, (2) non-testifying experts privilege, (3) work product privilege, and (4) testifying experts. *See* Compl. Counsel’s Resp. at 5-6, Att. A. First, to the extent that any determinations involving Respondent’s substantiation is part of the agency’s decision-making process, that information falls within the deliberative process privilege. Second, to the extent that this information involves non-testifying experts, this information is protected from disclosure as both information

related to a non-testifying expert and as work product. *See, e.g., Telebrands*, 2003 F.T.C. Lexis 201, *3.

This interrogatory expressly requests “determinations,” the “basis and circumstances under which you made that determination,” “the identity of the person who made that determination, “their qualifications,” and the factual basis and reasoning underlying that determination.” Mot. at 9. Based on the wording of this interrogatory, we are hard pressed to see how it addresses anything but Complaint Counsel’s expert determinations, analysis, and opinions. In any event, notwithstanding the character of these requested “determinations,” Complaint Counsel will produce responsive information from testifying expert witnesses in accordance with the schedule for expert discovery set forth in the Court’s *Scheduling Order*. Third, to the extent that this information falls within Complaint Counsel’s legal theories and opinions, this information is further protected as work product. Finally, Respondent does not address Complaint Counsel’s objections with respect to these issues nor provide any showing of exceptional circumstances that would otherwise warrant providing this information. We note that Respondent could easily, and likely has, engaged experts to review its materials and provide the requested determinations.

Lastly, as indicated above, to the extent that sought after determinations involve a testifying expert, this information will be provided in accordance with the Court’s *Scheduling Order*.

C. Interrogatory No. 3 Improperly Seeks Information Protected from Disclosure Based on Non-Testifying Expert, Deliberative Process, or Work Product Privilege.

Interrogatory 3 states:

3. Please identify all Market Research⁸ or other evidence or information of which you are aware that is relevant or potentially relevant to determining consumer reaction to, or consumer perception, comprehension, understanding, “take-away,” or recall of statements or representations made by Respondents in Promotional Materials for the Challenged Products.

Respondent demands that Complaint Counsel provide “identification of market research.”

Respondent recognizes that this interrogatory “is relevant to the interpretation of the challenged advertisements.” Mot. at 10. Complaint Counsel fully answered this interrogatory pointing out the applicable privileges. Compl. Counsel Resp. at 7, Att. A.

As discussed more fully *supra*, this interrogatory calls for expert opinions. As discussed above, to the extent the sought after information involves non-testifying experts, that information is protected from disclosure. *Telebrands*, 2003 F.T.C. Lexis 201, *1-2. It also subsumes information protected as attorney theories and work product. Finally, to the extent it involves information related to our testifying experts, that information will be released in accordance with this Court’s *Scheduling Order* in October. However, notwithstanding these objections, and as communicated to Respondent’s counsel, other than information which will be discussed by our

⁸ Respondent broadly defines Market Research as “all information referring or relating to testing, measuring or assessing consumers’ or individuals’ interpretation of, understanding of, or reaction to any draft, proposed, or final promotional material, proposed advertising text, copy or creative strategy or platform, product category, product, entity or information conveyed in an advertisement, including but not limited to consumer perception tests, comprehension tests, recall tests, marketing or consumer surveys or reports, penetration tests, audience reaction tests, copy tests, focus groups, consumer survey data, and media research.” *Basic Research LLC’s First Set of Interrogatories*, at 4 (attached as Att. D hereto).

experts, we are not aware of any market research at this time.

D. Interrogatory No. 4 Improperly Seeks Information Protected from Disclosure Based on Non-testifying Expert, Deliberative Process, or Work Product Privilege.

Interrogatory 4 states:

4. What does the Commission mean by the terms “visibly obvious,” “rapid,” “substantial,” and “causes” as those terms are used throughout the Complaint?

Complaint Counsel fully answered this interrogatory, stating that Respondents used the words “visible” and “substantial” and “significantly overweight” in their advertising for the challenged products and that Respondents “are presumed to have understood the meaning of these words.” Compl. Counsel’s Resp. at 8, Att. A; *see also* Compl. Counsel’s First Supp. Resp. at 3, Att. B. Further, Complaint Counsel answer answered the question by stating, “Complaint Counsel states that the evidence submitted by Respondents as substantiation for representations made concerning the Challenged Products does not constitute adequate substantiation.

Complaint Counsel further state that additional information responsive to this request will be produced in accordance with the schedule set for expert discovery set forth in the Court’s Scheduling Order. “

Notwithstanding Respondent’s argument that Complaint Counsel’s responses are “blanket objections,” *See* Mot. at 10 & 15, Complaint Counsel provided a detailed response to this interrogatory, including one paragraph of objections (given that this interrogatory would otherwise cover privileged information), and two single-spaced pages addressing this interrogatory. Complaint Counsel’s response articulated the context by which these words will be evaluated, noting that the “meaning of these terms is conveyed through the net impression of Respondent’s ads and the circumstances surrounding those ads.” Compl. Counsel’s Resp. at 8,

Att. A. Complaint Counsel's response further described this standard, recognizing that the interpretation of these words depends on "the language used in Respondents' ads, the depictions and visual images, the prominence of certain text, the circumstances surrounding the ad, common usage of terms, the use of juxtaposition, and evidence of intent." *See also Thompson*, 104 F.T.C. at 789; *Cliffdale*, 103 F.T.C. at 166. Thus, Complaint Counsel fully responded to this interrogatory.

E. Interrogatory No. 5 Improperly Seeks Information That is Not Relevant or That is Protected from Disclosure Based on Law Enforcement, Non-testifying Expert or Deliberative Process Privileges.

Interrogatory No. 5 states:

5. Identify all documents or other materials provided by Respondents to the Commission during the pre-complaint investigative stage of the above-captioned case which the Commission has disclosed or otherwise provided to persons unaffiliated with the Commission (including but not limited to persons working for, on behalf of, or otherwise affiliated with the United States House of Representatives) and identify the persons to whom they were given.

Respondent argues that this interrogatory is "relevant to the Commission's coordination of the filing of the complaint with a congressional agenda." Mot. at 13. Respondent's unsavory inference of some inchoate impropriety during the investigation is without merit and has no place here. Complaint Counsel has fully answered this interrogatory and provided:

Complaint Counsel state, pursuant to Rule 4.11(b) of the Rules of Practice and Section 21 of the FTC Act, copies of advertisements for PediaLean and the Livieri study were disclosed but not provided to the minority and majority counsel of the United States House of Representatives Committee on Energy and Commerce Subcommittee on Oversight and Investigation. Although Respondents provided copies of the PediaLean advertisements and the Livieri study to Complaint Counsel, Complaint Counsel also obtained copies of these materials independently. Complaint Counsel provided PediaLean packaging to the minority and majority counsel of the United States House of Representatives Committee on Energy and Commerce Subcommittee on Oversight and Investigations after the Complaint was issued, and such packaging was returned.

Compl. Counsel's Resp. at 11, Att. A. Complaint Counsel also objected, *inter alia*, as follows:

Complaint Counsel object to the extent that this Interrogatory seeks information that is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent, in violation of the limits of discovery set by RULE 3.31(c)(1). Complaint Counsel also objected on grounds that this interrogatory sought information protected from disclosure by the deliberative process privilege and information obtained from or provided to other law enforcement agencies on the grounds that such documents are protected from disclosure by the law enforcement evidentiary privilege and disclosure would be contrary to the public interest.

Compl. Counsel's Resp. at 10, Att. A.

The RULES limit discovery to information reasonably expected to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of any respondent. RULE 3.31(c)(1). The pre-complaint investigative deliberations are not relevant and are beyond the reach of Respondent's discovery. *See, e.g., In the Matter of Exxon Corp.*, Docket No. 8934, 1981 F.T.C. Lexis 113 (Jan. 19, 1981) (Once the Commission has issued a complaint, "the issue to be litigated is not the adequacy 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 addition, Complaint Counsel's response objected to this request to the extent that it seeks information protected by the deliberative process privilege and information obtained from or provided to other law enforcement agencies on the grounds that such documents are protected from disclosure by the law enforcement evidentiary privilege and that disclosure of such documents would be against the public interest. Complaint Counsel further objected to this interrogatory to the extent it otherwise impermissibly sought information relating to non-testifying experts. The law enforcement investigatory files privilege protects from disclosure

investigatory files that would tend to reveal law enforcement techniques or sources. *Hoechst Marion Roussel, Inc. v. Carderm Capital*, Docket No. 9293, 2000 F.T.C. Lexis 134, *5-6 (Aug. 18, 2000). Although this privilege is not absolute, *see id.*, Respondent has not asserted any showing of necessity here. *See Mot.* at 13.

F. Interrogatory No. 6 Improperly Seeks Irrelevant Information and Information Protected from Disclosure Based on Deliberative Process or Work Product Privilege.

Interrogatory No. 6 states:

6. Please explain in detail why the Complaint in this case was not filed prior to June 16, 2004 and what circumstances, if any, precluded the Commission from filing the Complaint prior to that date.

As a threshold response, Complaint Counsel objected to this interrogatory to the extent that it seeks information not reasonably expected to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of any respondent. RULE 3.31(c)(1). Complaint Counsel has fully answered this interrogatory. As discussed above, the RULES limit discovery to information reasonably expected to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of any respondent. RULE 3.31(c)(1). The pre-complaint investigative deliberations are simply not relevant. *In the Matter of Exxon Corp.*, Docket No. 8934, 1981 F.T.C. Lexis 113 (Jan. 19, 1981) (Once the Commission has issued a complaint, “the issue to be litigated is not the adequacy 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.”)

III. Respondent Has Failed to Demonstrate the Circumstances Necessary to Breach the Asserted Privileges.

In essence, Respondent's *Motion* is an unseemly attempt to obtain information about Complaint Counsel's experts – both and testifying and non-testifying. As discussed above, the Commission's RULES OF PRACTICE afford vigorous protection to work product prepared in anticipation of litigation by experts not expected to be called to testify. To prevail on its *Motion*, Respondent must meet a standard even more strict than that applied to attorney work product in general. More than "substantial need" and "undue hardship," Respondent must demonstrate "exceptional circumstances under which it is impracticable for [it] . . . to obtain facts or opinions on the same subject by other means." *Cf.* RULE 3.31(c)(3) with RULE 3.31(c)(4)(B)(ii). Respondent does not, nor could it, argue that any such exceptional circumstances exist in this case.

Respondent cannot prove what it seems to profess—that it is "impracticable" for it to obtain information about the interpretation of the advertising and scientific studies at issue. Respondent does not disclose or confront these facts in its *Motion*. Instead, Respondent simply asserts that the privileged information is needed to prepare its defense—possibly, Respondent speculates, to refute the *Complaint's* allegations. Bare assertions of substantial need do not constitute the "exceptional circumstances" contemplated by Rule 3.31(c)(4)(B)(ii) or the "undue hardship" required by Rule 3.31(c)(3). *See In re Schering Corp., supra*, slip op. at 2 ("It is not enough for defendant to assert that the information is critically important, . . . relevant, and not available by practical means.") (applying Rule 3.31(c)(3) and quoting *Connelly*, 96 F.R.D. at 342); *see also Detroit Auto Dealers Ass'n, supra*, 1985 WL 260986 ("Respondents state that information in the withheld documents is crucial to preparation of their defense. This general

statement fails to show that the information is essential to a fair determination of the cause.”).

Similarly, “mere speculation of hope that the requested . . . [material] may prove to be contradictory or impeaching is not sufficient” to overcome the work product privilege. *Fontaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89, 93 (S.D.N.Y. 1980); *see Banks*, 151 F.R.D. at 113 (“The mere fact that the Plaintiffs are interested in utilizing the statement, for such impeachment purposes as it might bear, is unpersuasive. . . . The Rule calls for a ‘showing,’ and not a mere hypothesis.”).

Respondent argues that Complaint Counsel’s information are “facts” and therefore are not privileged. *See Mot.* at 4, 9-10. This argument is contrary to the Commission’s RULES OF PRACTICE, which expressly protect facts developed in anticipation of litigation. *See* RULE 3.31(c)(4)(B)(ii) (extending privilege to “facts known . . . by an expert”); RULE 3.31(c)(3) (extending privilege to “documents and tangible things otherwise discoverable”). Thus, Commission precedent also rejects Respondent’s argument.

The Court’s *Scheduling Order* entered required Complaint Counsel to provide an expert witness list on October 6, and expert reports on October 20, 2004. Discovery is not scheduled to close until January 10, 2005. Providing the expert information in accordance with the *Scheduling Order’s* requirements will provide sufficient information to allow Respondent to prepare for trial. *Aspen Technology*, Docket No. 9310 (Dec. 23, 2003).

CONCLUSION

This Court should reject Respondent’s unsupported arguments to breach work product, non-testifying expert, law enforcement and deliberative process privileges. Respondent fails to make the necessary showing of need and unavailability of the information elsewhere. These

privileges “stop” Respondent from obtaining the information that it demands. “To ignore these privileges would seriously interfere with the free flow of ideas and information at the Commission.” *Flowers Industries, Inc.*, Docket No. 9148, 1981 F.T.C. Lexis 117, at *2 (Sept. 11, 1981).

Respondent’s *Motion* is also an unseemly attempt to evade this Court’s *Scheduling Order* and prematurely obtain information related to Complaint Counsel’s testifying experts.

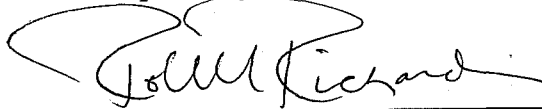
Respondent admits that it is seeking expert-related information, yet wholly fails to support its arguments with any specific grounds that would in any way justify the otherwise extraordinary relief that Respondent seeks.

In any event, events will shortly overtake Respondent’s arguments as Complaint Counsel is required to furnish much of the sought after information in accordance with the *Scheduling Order’s* upcoming deadlines on October 6th and 20th. One further point, and not an insubstantial one, the proximity in time between the filing of this *Motion* and the upcoming receipt of the sought-after information raises troubling questions about the Respondent’s purposes in filing this *Motion*. This Court should deny Respondent’s unfortunate *Motion* and allow Complaint Counsel to prepare and complete the testifying expert information and reports so that it may be produced on October 6th and 20th.

For the foregoing reasons, Complaint Counsel respectfully requests that the Court deny

Respondent's *Motion to Compel*.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robin M. Richardson", is written over a horizontal line.

Laureen Kapin (202) 326-3237
Joshua S. Millard (202) 326-2454
Robin M. Richardson (202) 326-2798
Laura Schneider (202) 326-2604
Bureau of Consumer Protection
Federal Trade Commission

Complaint Counsel
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W, Suite NJ-2122
Washington, D.C. 20580

October 4, 2004

Attachment A

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

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,)

Respondents.)
)
)

Docket No. 9318

PUBLIC DOCUMENT

**COMPLAINT COUNSEL'S RESPONSE TO
RESPONDENT'S FIRST SET OF INTERROGATORIES**

Pursuant to Rule 3.35 of the Commission's Rules of Practice, Complaint Counsel serve the following answers to Respondent Basic Research LLC's First Set of Interrogatories ("Respondent's Interrogatories").

GENERAL OBJECTIONS

1. Complaint Counsel object to Respondent's interrogatories to the extent they seek information which may be derived or ascertained by Respondents from documents or information already in Respondents' possession. Interrogatories are properly used to obtain information not otherwise available for the requesting party to analyze, not to "require a party in such discovery proceeding to do his adversary's work for him by compiling lists or other information . . . for him." *Berg v. Hoppe*, 352 F.2d 776, 779 (9th Cir. 1965).
2. Complaint Counsel object to Respondent's interrogatories to the extent they seek information prepared in anticipation of litigation or which seek disclosure of the theories and opinions of Complaint Counsel or Complaint Counsel's consultants or agents, on the grounds that such information is protected from disclosure by the attorney work product privilege and the provisions of Rule 3.31(c)(3). *Stouffer Foods Corp.*, No. 9250, Order Ruling on Stouffer Foods' Application for an Order Requiring the Production of

Documents (Feb. 11, 1992); *Kraft, Inc.*, No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (July 10, 1987).

3. Complaint Counsel object to Respondent's interrogatories to the extent they seek information protected from disclosure by the deliberative process privilege. *Stouffer Foods Corp.*, No. 9250, Order Ruling on Stouffer Foods' Application for an Order Requiring the Production of Documents (Feb. 11, 1992); *Kraft, Inc.*, No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (July 10, 1987); *see also* Rule 4.10(a)(3).
4. Complaint Counsel object to Respondent's interrogatories to the extent they seek information relating to the expert witnesses that Complaint Counsel intend to use at the hearing on the ground that the timing for identification of such witnesses and discovery relating to their opinions and testimony is established in the Scheduling Order Pursuant to Rule 3.21(c). *Schering Corp.*, No. 9232, Order re Interrogatories and Request for Production of Documents (Feb. 6, 1990); *Kraft, Inc.*, No. 9208, Order Ruling on Respondent's Motion for Documents in the Possession of Complaint Counsel (July 10, 1987).
5. Complaint Counsel object to Respondent's interrogatories to the extent that they seek information relating to non-testifying expert witnesses because Respondent has not made the proper showing that they are entitled to such information pursuant to Rule 3.31(c)(4)(ii). *Schering Corp.*, No. 9232, Order Denying Discovery and Testimony by Expert Witness (Mar. 23, 1990); *Telebrands Corp.*, No. 9313, Order Denying Respondents' Motion To Compel The Production of Consumer Survey Information, (Dec. 23, 2003).
6. Complaint Counsel object to Respondent's interrogatories to the extent that they seek information obtained from or provided to other law enforcement agencies, and to the extent that they seek information obtained in the course of investigating other marketers of dietary supplements and weight loss products, on the grounds that such documents are protected from disclosure by the law enforcement evidentiary files privilege and disclosure of such documents would be contrary to the public interest.
7. Complaint Counsel object to Respondent's interrogatories to the extent that, when read with the definitions and instructions, are so vague, broad, general, and all inclusive that they do not permit a proper or reasonable response and are, therefore, unduly burdensome and oppressive.
8. Complaint Counsel object to each of Respondent's interrogatories to the extent they seek information that is not reasonably expected to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of any Respondent, in violations of the limits of discovery set by Rule 3.31(c)(1).

9. Complaint Counsel object to the Instructions and Definitions to the extent that they impose an obligation greater than that imposed by the Commission's Rules of Practice and the provisions of any Pretrial Scheduling Order.
10. Complaint Counsel object to Respondent's interrogatories to the extent that they seek information ascertained from or the identity of confidential informants as disclosure of such information would be contrary to the public interest.
11. Complaint Counsel object to Respondent's interrogatories to the extent they seek information in the possession of the Commissioners, the General Counsel, or the Secretary in his capacity as custodian or recorder of any information in contravention of Rule 3.35(a)(1) because such documents are not in the possession, custody or control of Complaint Counsel.

GENERAL RESPONSES

1. Complaint Counsel's responses are made subject to all objections as to competence, 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 asked of, or if any statements contained herein were made by, or if any documents referenced here were offered by a witness present and testifying in court, all of which objections are reserved and may be interposed at the time of the hearing.
2. The fact that Complaint Counsel have answered or objected to any interrogatory or part thereof should not be taken as an admission that Complaint Counsel accept or admit the existence of any facts or documents set forth in or assumed by such interrogatory or that such answer or objection constitutes admissible evidence. The fact that Complaint Counsel have responded to any interrogatory in whole or in part is not intended and shall not be construed as a waiver by Complaint Counsel of all or any part of any objection to any interrogatory.
3. Complaint Counsel have not completed their investigation in this case, and additional facts may be discovered that are responsive to Respondent's interrogatories. Complaint Counsel reserve the right to supplement the responses provided herein as appropriate during the course of discovery.
4. As used herein, "Respondents" shall mean all Respondents named in the Complaint.
5. As used herein, "Respondent's interrogatories" shall mean the interrogatories and all applicable instructions and definitions as set forth in Respondent's interrogatories.

Interrogatories and Responses

INTERROGATORY NO. 1 [Respondent's Interrogatory No. 1a, b, and c]

1. With respect to each representation that you claim in your Complaint was made by one or more Respondents in Promotional Materials for the Challenged Products, please:

- a) state whether you contend that the representation was express or implied;
- b) identify the person or persons who interpreted the Promotional Material in question and determined what representations it conveyed; and
- c) describe all extrinsic evidence (that is, anything other than the Promotional Material itself) that was relied upon in determining what representations were conveyed

Response:

Complaint Counsel object to the extent that Respondent has included as many as five separate interrogatories under this one numbered interrogatory, the total number of discrete and separate interrogatories is understated. Complaint Counsel's responses are numbered according to the actual number of interrogatories posed. Accordingly, Complaint Counsel have renumbered the Interrogatories with Respondent's original number in brackets.

Complaint Counsel object to the extent that this Interrogatory seeks information prepared in anticipation of litigation or disclosure of the theories and opinions of Complaint Counsel (General Objection 2), information protected from disclosure by the deliberative process privilege (General Objection 3), information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4), information relating to non-testifying expert witnesses (General Objection 5), or is otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice (General Objection 9).

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that its Complaint alleges that Respondents have represented the claims at issue "expressly or by implication" and that information responsive to this request will be produced in accordance with the schedule for expert discovery set forth in the Court's Scheduling Order.

INTERROGATORY NO. 2 [Respondent's Interrogatory No. 1d]

With respect to each representation that you claim in your Complaint was made by one or more Respondents in Promotional Materials for the Challenged Products, please:

- d) describe the nature, quantity, and type of substantiation that you contend Respondents needed in order to possess and rely upon a reasonable basis to make the representation

Response:

Complaint Counsel object to the extent that Respondent has included as many as five separate interrogatories under this one numbered interrogatory, the total number of discrete and separate interrogatories is understated. Complaint Counsel's responses are numbered according to the actual number of interrogatories posed. Accordingly, Complaint Counsel have renumbered the Interrogatories with Respondent's original number in brackets.

Complaint Counsel object to the extent that this Interrogatory seeks information prepared in anticipation of litigation or disclosure of the theories and opinions of Complaint Counsel (General Objection 2), information protected from disclosure by the deliberative process privilege (General Objection 3), information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4), information relating to non-testifying expert witnesses (General Objection 5), or is otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice (General Objection 9).

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that the Commission and its staff have provided guidance to the industry about how the agency evaluates scientific substantiation for health-related advertising claims. The Commission's 1998 Dietary Supplement Guide, for example, provides a detailed analysis of how the agency evaluates scientific substantiation related to advertising claims for dietary supplements. Section II.B. of the guide describes basic principles about the amount and type of evidence required to support a health-related claim; how to evaluate the quality of that evidence; the importance of considering the totality of the evidence rather than individual studies in isolation; and how to evaluate the relevance of the evidence to a specific advertising claim and product. Other sources of industry guidance include: the FTC's Substantiation Policy Statement, appended to *Thompson Medical Co.*, 104 F.T.C. at 839 (1984); the Commission's Enforcement Policy Statement for Food Advertising; and a body of FTC case law, including *Pfizer, Inc.*, 81 F.T.C. 23 (1972) (articulating the factors that determine what level of substantiation is appropriate); *Schering Corp.*, 118 F.T.C. 1030 (1994) (ALJ's Initial Decision and consent order) (assessment of substantiation for weight loss and appetite suppressant claims for Fibre Trim supplement); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263 (S.D. Fla. 1999) (assessment of substantiation for weight loss supplements). Complaint Counsel further state that the guidance provided by the Commission through its opinions, cease and desist orders, consent decrees, complaints, and publications provide additional notice and guidance regarding the appropriate

type and level of substantiation for the advertising claims challenged in the *Complaint*. These documents are available to the public in the official FTC reporter and/or the agency's website.

INTERROGATORY NO. 3 [Respondent's Interrogatory No. 1e]

With respect to each representation that you claim in your Complaint was made by one or more Respondents in Promotional Materials for the Challenged Products, please:

- e) describe the factual basis for your contention that Respondents did not possess and rely upon a reasonable basis that substantiated the representation

Response:

Complaint Counsel object to the extent that this Interrogatory seeks information prepared in anticipation of litigation or disclosure of the theories and opinions of Complaint Counsel (General Objection 2), information protected from disclosure by the deliberative process privilege (General Objection 3), information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4), information relating to non-testifying expert witnesses (General Objection 5), or is otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice.

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that the evidence submitted by Respondents does not amount to competent and reliable scientific evidence typically required by Commission jurisprudence to support claims relating to health or safety. Complaint Counsel further state that information responsive to this request will be produced in accordance with the schedule for expert discovery set forth in the Court's Scheduling Order.

INTERROGATORY NO. 4 [Respondent's Interrogatory No. 2]

For each study, analysis, research, or test provided to you by any Respondent as substantiation for representations made concerning the Challenged Products during your investigation leading to the Complaint, please state whether you contend such study, analysis, research, or test does not constitute adequate substantiation for the representation for which it was asserted, and describe the basis and circumstances under which you made that determination, including without limitation the identity of the person who made the determination, when they made it, their qualifications to make such a determination, and the factual basis and reasoning underlying that determination.

Response:

Complaint Counsel object to this Interrogatory because it seeks the identity of and opinions rendered by non-testifying experts (General Objection 5). Complaint Counsel further

object to this interrogatory to the extent that it seeks prematurely the identities of and opinions rendered by Complaint Counsel's expert witnesses the disclosure of which is covered by the Court's Scheduling Order. *See* § 3.21(c) (General Objection 4). Complaint Counsel further object to the extent that this Interrogatory seeks information prepared in anticipation of litigation or which seek disclosure of the theories and opinions of Complaint Counsel (General Objection 2) and information protected from disclosure by the deliberative process privilege (General Objection 3). Moreover, to the extent it seeks a separate answer for each study, analysis, research, or test provided by Respondents, Complaint Counsel object to the extent that it is unduly burdensome (General Objection 7).

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that the evidence submitted by Respondents as substantiation for representations made concerning the Challenged Products does not constitute adequate substantiation. Complaint Counsel further state that additional information responsive to this request will be produced in accordance with the schedule for expert discovery set forth in the Court's Scheduling Order.

INTERROGATORY NO. 5 [Respondent's Interrogatory No. 3]

Please identify all Market Research or other evidence or information of which you are aware that is relevant or potentially relevant to determining consumer reaction to, or consumer perception, comprehension, understanding, "take-away," or recall of statements or representations made by Respondents in Promotional Materials for the Challenged Products.

Response:

Complaint Counsel object to the extent that this Interrogatory seeks information prepared in anticipation of litigation or which seek disclosure of the theories and opinions of Complaint Counsel (General Objection 2). Complaint Counsel further object to this interrogatory to the extent that it seeks prematurely the opinions rendered by Complaint Counsel's expert witnesses the disclosure of which is covered by the Court's Scheduling Order. *See* § 3.21(c) (General Objection 4) and opinions rendered by non-testifying experts (General Objection 5).

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that any responsive information will be produced in accordance with the schedule for expert discovery set forth in the Court's Scheduling Order.

INTERROGATORY NO. 6 [Respondent's Interrogatory No. 4]

What does the Commission mean by the terms "visibly obvious," "rapid," "substantial," and "causes" as those terms are used throughout the Complaint?

Response:

Complaint Counsel object to this Interrogatory to the extent it seeks information which may be derived or ascertained by Respondents from documents or information already in Respondents' possession (General Objection 1). Complaint Counsel object to the extent that this Interrogatory seeks information prepared in anticipation of litigation or disclosure of the theories and opinions of Complaint Counsel (General Objection 2) and information protected from disclosure by the deliberative process privilege (General Objection 3). Complaint Counsel further object to this interrogatory to the extent that it seeks prematurely the opinions rendered by Complaint Counsel's expert witnesses the disclosure of which is covered by the Court's Scheduling Order. *See* § 3.21(c) (General Objection 4) and opinions rendered by non-testifying experts (General Objection 5).

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel respond:

First, to the extent that Respondents have used the terms "visible," "rapid," "cause," and "substantial" in promotional materials for their products, including products that are not the subject of the Complaint, Respondents are presumed to have understood the meaning of these words. Complaint Counsel anticipates that Respondents themselves possess considerable information regarding the meaning of these terms and that discovery will generate further information pertinent to the meaning of Respondents' ads.

Second, Complaint Counsel state that the meaning of these terms is conveyed through the net impression of Respondents' ads and the circumstances surrounding those ads. The Commission has recognized that "[w]hether looking at evidence from the ad itself, extrinsic evidence, or both, the Commission considers the overall, net impression made by the advertisement in determining what messages may reasonably be ascribed to it." *Kraft Inc.*, 114 F.T.C. 40, 122 (1991) quoting *Thompson Medical*, 104 FTC 648, 790 (1984). As a result, the Commission would focus on, among other things, the language used in Respondents' ads, the depictions and visual images, the prominence of certain text, the circumstances surrounding the ad, common usage of terms, the use of juxtaposition, and evidence of intent. Complaint Counsel is still gathering information on these issues through the discovery process and reserves the right to supplement this answer as further information becomes available.

Nevertheless, regarding certain language in the ads as it relates to the meaning of the terms "visibly obvious," "rapid," "substantial," and "causes," Complaint Counsel reiterate their discussion of these issues in their previous filing. Respondents' advertisements contain the terms referenced in this interrogatory and analyzed as a whole, the ads themselves present a "net impression" conveying the meaning of the terms used in the Complaint.

The ads and packaging for Respondents' topical gels convey the net impression that these products will cause rapid and visibly obvious fat loss in areas of the body to which it is applied.

This net impression is based, among other things, upon the language of the marketing materials and their depictions and visual elements. The ads superimpose images of lean and/or muscular models along with bold text conveying messages such as “Penetrating Gel Emulsifies Fat On Contact” and “Penetrating Gel for the Visible Reduction of Surface Body Fat” and “Dissolves Surface Body Fat On Contact.” Compl. Exhs. A, C, D. The ads also state: “apply Dermalin-APg’s transdermal gel to your waist or tummy and watch them shrink in size within a matter of days”; and that applying Cutting Gel “to your glutes, biceps, triceps, or lats, and the fat literally melts away . . .” Compl., ¶13E. The net impression of these advertisements is that fat loss will be fast or quick, or as the Commission stated in the Complaint, “rapid.” The word “rapid” is a characterization of the collective words used by Respondents. Similarly, the term “visibly obvious” is a term used to summarize the claims made by Respondents in their promotional materials. Again, Respondents themselves use the term “visible” in their own advertisements. For example, “[s]ee visible results in approximately 19 days, guaranteed” (Compl., ¶13F). Moreover, the net impression of the ads lead one to believe that the consumer will actually see the results with their own eyes, thus making it “visibly obvious.” For example, Respondents’ ads claim the user can usually get the “desired results” in “about 10 days” proclaiming that in large letters: “Fact Get CUTTING GEL today! You will see the difference (and so will everyone else)!; “FACT Cutting Gel Reduces Surface Fat and Exposes the Toned Muscle Beneath!” Compl. Exhs. D-E. The Dermalin ad states that “Dermalin-APg permits you to spot reduce. Put it on around your thighs - slimmer thighs. Over thirty and getting thick around the middle? Just apply Dermalin-APg’s transdermal gel to your waist or tummy and watch them shrink in size within a matter of days” (Compl., ¶13A); and “Put Cutting Gel in a culture dish with fat cells and you can literally watch them deflate - similar to sticking a pin in a balloon” (Compl., ¶ 13D). These elements of the ads, among others, convey and reinforce the impression that the fat loss caused by these products will be rapid or quick, and noticeable or visibly obvious.

The term “substantial” is also used in Respondents’ marketing materials. For example, the Leptoprin and Anorex ads query “if substantial, excess body fat is adversely affecting your health and self-esteem, then it’s time for you to discover Leptoprin [Anorex].” Compl. Exhs. I and J. The Leptoprin commercial also uses “before” photos of testimonialists juxtaposed with their then-current images in connection with their statements claiming the loss of 50, 60 and 147 pounds. Compl. Exhs. H-H1. Both ads also refer to “significantly overweight” people. Compl. Exhs. I and J. These terms are strikingly similar to one another. Taken together, along with other elements in the ads, these depictions and statements convey and reinforce the impression that the product will cause the loss of substantial excess fat. In the PediaLean ads, Respondents claim that “in a well-controlled double-blind clinical trial, each and every child who used PediaLean as directed lost a significant amount of excess body weight” (¶36B of the Complaint). “Substantial” is a term or synonym of terms that Respondents used to promote the efficacy of their products.

The Complaint’s use of the word “cause” is consistent with the net impression of Respondents’ promotional materials. The thrust of the advertisements is that if one uses Respondents’ product, it will have a certain effect. For example, Respondents have represented

that by using the topical gels, the end result is that the consumer will have visibly obvious fat loss in a fast amount of time. All of these terms are used in their common sense parlance and are based on the representations made in Respondents' own promotional materials. Further discovery may produce testimony, documents, information, additional ads and draft ads for these same products and other ads by Respondents which use these same terms. Such evidence would also be relevant to the issue of the meaning of these terms.

The Commission may also examine extrinsic evidence to corroborate its conclusions regarding ad meaning, even if a facial analysis of the ads themselves is a sufficient basis to conclude that the ad conveys the claim. *See Stouffer Foods Corp.*, 118 F.T.C. 746, 798-804. If the Commission turns to extrinsic evidence to determine the meaning of an ad, the evidence can consist of "expert opinion, consumer testimony (particularly in cases involving oral representations), copy tests, surveys, or any other reliable evidence of consumer interpretation." *Cliffdale Associates & Deception Statement*, 103 F.T.C. at 174, 176 n.8; *Thompson Medical*, 104 F.T.C. at 790. As a result, to the extent Complaint Counsel chooses to present extrinsic evidence in the form of expert testimony to determine the meaning of any ads, further information responsive to this request will be produced in accordance with the schedule for expert discovery set forth in the Court's Scheduling Order.

INTERROGATORY NO. 7 [Respondent's Interrogatory No. 5]

Identify all documents or other materials provided by Respondents to the Commission during the pre-complaint investigative stage of the above-captioned case which the Commission has disclosed or otherwise provided to persons unaffiliated with the Commission (including but not limited to persons working for, on behalf of, or otherwise affiliated with the United States House of Representatives) and identify the persons to whom they were given.

Response:

Complaint Counsel object to the extent that this Interrogatory seeks information that is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent, in violations of the limits of discovery set by Rule 3.31c)(1) (General Objection 9). Complaint Counsel further object to the extent that this Interrogatory seeks information protected from disclosure by the deliberative process privilege (General Objection 3) and information obtained from or provided to other law enforcement agencies on the grounds that such documents are protected from disclosure by the law enforcement evidentiary files privilege and disclosure of such documents would be contrary to the public interest (General Objection 6). Complaint Counsel further object to the extent that this Interrogatory seeks information relating to non-testifying expert witnesses (General Objection 5) and information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4).

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that, pursuant to Rule 4.11(b) of the Rules of Practice and Section 21 of the FTC Act, copies of advertisements for Pedialean and the Livieri study were disclosed but not provided to the minority and majority counsel of the United States House of Representatives Committee on Energy and Commerce Subcommittee on Oversight and Investigations. Although Respondents provided copies of Pedialean advertisements and the Livieri study to Complaint Counsel, Complaint Counsel also obtained copies of these materials independently. Complaint Counsel provided PediaLean packaging to the minority and majority counsel of the United States House of Representatives Committee on Energy and Commerce Subcommittee on Oversight and Investigations after the Complaint was issued, and such packaging was returned.

INTERROGATORY NO. 8 [Respondent's Interrogatory No. 6]

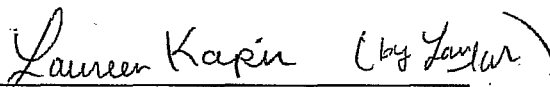
Please explain in detail why the Complaint in this case was not filed prior to June 16, 2004 and what circumstances, if any, precluded the Commission from filing the Complaint prior to that date.

Response:

Complaint Counsel object to the extent that this Interrogatory seeks information that is not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent, in violations of the limits of discovery set by Rule 3.31(c)(1) (General Objection 9) and is protected from disclosure by the deliberative process privilege (General Objection 3).

Dated: August 27, 2004

Respectfully submitted,

 *Laureen Kapin (by Taylor)*

Laureen Kapin (202) 326-3237
Walter C. Gross (202) 326-3319
Joshua S. Millard (202) 326-2454
Robin M. Richardson (202) 326-2798
Laura Schneider (202) 326-2604

Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Certificate of Service

I hereby certify that on this 27th day of August, 2004, I caused *COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT BASIC RESEARCH LLC'S FIRST SET OF INTERROGATORIES* to be served and filed as follows:

one (1) electronic copy via email and one (1) paper copy
by first class mail to the following persons:

Stephen E. Nagin
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For Respondents

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JFeldman@FeldmanGale.com
**For Respondents Basic
Research, LLC, A.G.
Waterhouse, LLC,
Klein-Becker USA, LLC,
Nutrasport, LLC, Sovage
Dermalogic Laboratories,
LLC, and BAN, LLC**

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Burbidge & Mitchell
215 S. State St., Suite 920
Salt Lake City, UT 84111
(801) 355-6677
(801) 355-2341 (fax)
rburbidge@burbidgeandmitchell.com

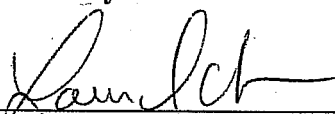
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Peters Scofield Price
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(801) 322-2003 (fax)
rpf@psplawyers.com

Mitchell K. Friedlander
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(801) 517-7108 (fax)
mkf555@msn.com

For Respondent Gay

For Respondent Mowrey

Respondent Pro Se



COMPLAINT COUNSEL

Attachment B

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

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,**

Respondents.

Docket No. 9318

PUBLIC DOCUMENT

**COMPLAINT COUNSEL'S FIRST SUPPLEMENTAL RESPONSE TO
RESPONDENT'S FIRST SET OF INTERROGATORIES**

On August 27, 2004, Complaint Counsel served its Response to Respondent Basic Research L.L.C.'s First Set of Interrogatories ("Respondent's Interrogatories"). Pursuant to Rule 3.22(f) of the Commission's Rule of Practice, the parties have held several conferences in an effort in good faith to resolve by agreement certain discovery issues. As a result of those conferences, and pursuant to Rule 3.35, Complaint Counsel serve the following supplemental response to Respondent's First Set of Interrogatories. Complaint Counsel reserves all applicable general objections set forth in Complaint Counsel's Response to Respondent's First Set of Interrogatories.

GENERAL RESPONSES

1. Complaint Counsel's responses are made subject to all objections as to competence, 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 asked of, or if any statements contained herein were made by, or if any documents referenced here were offered by a witness present and testifying in court, all of which objections are reserved and may be interposed at the time of the hearing.
2. The fact that Complaint Counsel have answered or objected to any interrogatory or part thereof should not be taken as an admission that Complaint Counsel accept or admit the existence of any facts or documents set forth in or assumed by such interrogatory or that such answer or objection constitutes admissible evidence. The fact that Complaint Counsel have responded to any interrogatory in whole or in part is not intended and shall not be construed as a waiver by Complaint Counsel of all or any part of any objection to any interrogatory.
3. Complaint Counsel have not completed their investigation in this case, and additional facts may be discovered that are responsive to Respondent's interrogatories. Complaint Counsel reserve the right to supplement the responses provided herein as appropriate during the course of discovery.
4. As used herein, "Respondents" shall mean all Respondents named in the Complaint.
5. -As used herein, "Respondent's interrogatories" shall mean the interrogatories and all applicable instructions and definitions as set forth in Respondent's interrogatories.

Interrogatories and Responses

INTERROGATORY NO. 1 [Respondent's Interrogatory No. 1a, b, and c]

1. With respect to each representation that you claim in your Complaint was made by one or more Respondents in Promotional Materials for the Challenged Products, please:
 - a) state whether you contend that the representation was express or implied;
 - b) identify the person or persons who interpreted the Promotional Material in question and determined what representations it conveyed; and
 - c) describe all extrinsic evidence (that is, anything other than the Promotional Material itself) that was relied upon in determining what representations were conveyed

Response:

Complaint Counsel object to the extent that Respondent has included as many as five separate interrogatories under this one numbered interrogatory, the total number of discrete and separate interrogatories is understated. Complaint Counsel's responses are numbered according to the actual number of interrogatories posed. Accordingly, Complaint Counsel have renumbered the Interrogatories with Respondent's original number in brackets.

Complaint Counsel object to the extent that this Interrogatory seeks information prepared in anticipation of litigation or disclosure of the theories and opinions of Complaint Counsel (General Objection 2), information protected from disclosure by the deliberative process privilege (General Objection 3), information relating to the expert witnesses that Complaint Counsel intend to use at the hearing (General Objection 4), information relating to non-testifying expert witnesses (General Objection 5), or is otherwise inconsistent with Complaint Counsel's obligations under the Rules of Practice (General Objection 9).

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that its Complaint alleges that Respondents have represented the claims at issue "expressly or by implication" and that information responsive to this request will be produced in accordance with the schedule for expert discovery set forth in the Court's Scheduling Order.

Supplement:

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state as follows: The Complaint alleges that Respondents have represented the claims at issue "expressly or by implication."

Express claims are those that are literally stated in a piece of promotional material, and require no evidence whatsoever beyond the text of the promotional material itself. *Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986). Implied claims are all other claims that are not expressly stated in the text of the promotional material. Such claims range from those that use language and imagery "virtually synonymous with an express claim, through language that literally says one thing but strongly suggests another, to language which relatively few consumers would interpret as making a particular representation." *Thompson Medical Co.*, 104 F.T.C. at 788-89.

Based upon the evidence presently available to Complaint Counsel, the representations made by Respondents in promotional materials for the challenged products are strongly implied claims. As Respondents are aware, some words in the alleged claims were literally stated in promotional materials. For example, Respondents have used the words "visible" and "substantial" and "significantly overweight" in their advertising for the Challenged Products. *See, e.g.*, Complaint 41 and accompanying Exhibits; Complaint Counsel's Response to Respondent's First Set of Interrogs., Interrog. 6 (Respondent's Interrog. 4).

Additional information responsive to this request will be produced in accordance with the schedule for expert discovery set forth in the Court's Scheduling Order.

Dated: September 3, 2004

Respectfully submitted,

Laureen Kapin

Laureen Kapin (202) 326-3237
Walter C. Gross (202) 326-3319
Joshua S. Millard (202) 326-2454
Robin M. Richardson (202) 326-2798
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 persons:

Stephen E. Nagin
Nagin Gallop Figuerdo P.A.
3225 Aviation Ave.
Miami, FL 33133-4741
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(305) 854-5351 (fax)
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For Respondents

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For Respondents

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(801) 355-6677
(801) 355-2341 (fax)
rburbidge@burbidgeandmitchell.com
For Respondent Gay

**A.G. Waterhouse, LLC,
Klein-Becker USA, LLC,
Nutrasport, LLC, Sovage
Dermalogic Laboratories,
LLC, and BAN, LLC**

Ronald F. Price
Peters Scofield Price
340 Broadway Centre
111 East Broadway
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(801) 322-2002
(801) 322-2003 (fax)
rfp@psplawyers.com
For Respondent Mowrey

Mitchell K. Friedlander
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Salt Lake City, UT 84116
(801) 517-7000
(801) 517-7108 (fax)
Respondent Pro Se
mkf555@msn.com


COMPLAINT COUNSEL

Attachment C

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

In the Matter of

BASIC RESEARCH, LLC,
a limited liability company;

A.G. WATERHOUSE, LLC,
a limited liability corporation;

KLEIN-BECKER USA, LLC,
a limited liability company;

NUTRASPORT, LLC,
a limited liability company;

SÖVAGE DERMALOGIC LABORATORIES, LLC,
a limited liability company;

BAN, LLC,
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, Ph.D.,
Also doing business as AMERICAN
PHYTOTHERAPY RESEARCH
LABORATORY, and

MITCHELL K. FRIEDLANDER,

Respondents.

Docket No. 9318

PUBLIC DOCUMENT

RESPONSE TO COMPLAINT COUNSEL'S FIRST SET OF INTERROGATORIES

Pursuant to Rule 3.35 of the Federal Trade Commission's Rules of Practice, Respondents
Basic Research, LLC, A.G. Waterhouse, LLC, Klein Becker usa, LLC, Nutrasport, LLC, Sovage

Dermalogic Laboratories, LLC, Ban, LLC (collectively, "Respondents") object and respond to Complaint Counsel's First Set of Interrogatories ("Request") as follows:

General Objections

A. Respondents object to the Interrogatories as overbroad and unduly burdensome on the grounds and to the extent that they call for responses that are neither relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence.

B. Respondents object to the Interrogatories on the grounds and to the extent that they seek responses that are subject to (i) the attorney-client privilege; (ii) the attorney and/or party work product immunity, and (iii) any other privilege or immunity, including common law and constitutional right of privacy and/or trade secret protection. Respondents hereby claim such privileges and immunities. Any disclosure of any such privileged or immunized information is inadvertent and is not, and is not intended, as a waiver of those privileges and immunities.

C. Respondents object to the Interrogatories and to the Definitions and Instructions on the grounds and to the extent that they are overbroad, unduly burdensome and oppressive, and purport to impose obligations on Respondents that are beyond the scope of the Rules of Practice or other applicable law.

D. Respondents object to the Interrogatories on the grounds and to the extent that they are vague, ambiguous and unintelligible, particularly in light of the inherent vagueness and ambiguity in the standards employed by the Commission as well as in the charges that have been levied in this matter, which is the subject of Respondents' pending motion for an interlocutory appeal and more definite statement by the Commission.

E. Respondents incorporate by this reference Respondents' Motion to Quash in Part and to Limit Subpoenas on Non-Parties and each response, objection and basis therefore in the motion, and further objects to each Interrogatory on those grounds.

F. Respondents' objections and responses to the Interrogatories are not intended to waive or prejudice any objections that Respondents may assert now or in the future, including,

without limitation, objections as to the relevance of the subject matter of any interrogatory, or of the admissibility of any response or document or category of responses or documents, at hearing, trial or any other time. Respondents expressly reserve any and all rights and privileges under the Rules of Practice, applicable evidentiary rules, and any other law or rule, and the failure to assert such rights and privileges or the inadvertent disclosure by Respondents of information protected by such rights or privileges shall not constitute a waiver thereof, either with respect to these responses or with respect to any future discovery responses or objections.

Specific Objections and Responses

Based on, subject to, and without waiving its General Objections, Respondents specifically and additionally respond to each of the Specifications contained in Complaint Counsel's Interrogatories as follows:

Interrogatory No. 1:

Identify and describe in detail the current and former duties, responsibilities, or work performed by each **person relating to the promotional materials** for each of the **challenged products**. (This request **includes**, but is not limited to, the creation, development, evaluation, approval, modification, and dissemination of **promotional materials**.)

Response:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents further objects to this interrogatory on the following grounds: (a) it is vague and ambiguous; (b) it is overly broad and unduly burdensome; (c) it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence; and (d) it seeks information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy. Based on, subject to, and without waiving the foregoing responses and objections, Respondents responds as follows:

Respondents interpret this interrogatory as requesting the identity of persons and descriptions of duties, responsibilities and work performed. In providing the following response,

Respondents do not discuss or imply, or intend to discuss or imply, any relationship between any of the parties and/or any of the persons identified below:

1. Dan Mowrey, Ph.D, researched and developed product ideas, concepts and ingredients; performed ad substantiation research, and reviewed ads for substantiation;
2. Mitch Friedlander, determined commercial viability of products, wrote copy, directed ad layout, and assisted with marketing;
3. Gina Gay, placed advertisements with media;
4. Jeff Davis, proof read advertisements;
5. Brett Madsen, assisted with copy layout;
6. Ned Simpson, assisted with copy layout;
7. John Swallow, reviewed ad copy;
8. Nathalie Chevreau, Ph.D., PediaLean project director; assisted with website development for PediaLean; performed PediaLean safety tests;
9. Carla Fobbs, facilitated and obtained substantiation review from outside counsel;
10. Dennis Gay, final approval of products and advertisements; and
11. Stephen Nagin, Esq., performed substantiation review.

Interrogatory No. 2:

Identify and describe in detail the current and former duties, responsibilities, or work performed by each **person** consulted by you, or upon who advise, opinion, or expertise you relied in the production of each of the **challenged products**. (This request **includes**, but it not limited to, the creation, development, evaluation, approval, and manufacture of the **challenged products**.)

Response:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents further objects to this interrogatory on the following grounds: (a) it is vague and

ambiguous; (b) it is overly broad and unduly burdensome; (c) it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence; and (d) it seeks information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy. Based on, subject to, and without waiving the foregoing responses and objections, Respondents respond by referring to their Response to Interrogatory No. 1, which includes the persons consulted.

Interrogatory No. 3:

Describe in detail the composition of each of the **challenged products**. (This request **includes**, but is not limited to, the identity of each ingredient and the amount of each ingredient contained in a single capsule, application, and serving. If any **challenged product** has been reformulated, provide a separate answer for each version of the product that has been marketed and sold, **identifying** the time period(s) in which each version was marketed and sold.

Response:

Respondents incorporate by reference each General Objection as set forth here in full. Based on, subject to, and without waiving the foregoing objections, Respondents refer to Attachment "A," which has been designated pursuant to the Protective Order as "Restricted Confidential, Attorney Eyes Only—FTC Docket No. 9318."

Interrogatory No. 4:

Disclose the total amount of sales, in terms of units and dollars that each Respondent has achieved for each of the **challenged products** for each year from 2001 to the present.

Response:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents further objects to this interrogatory on the following grounds: (a) it is vague and ambiguous; (b) it is overly broad and unduly burdensome; (c) it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence (the

requested information has no relationship to the alleged false or misleading advertising claims that Complaint Counsel pursues in this matter); and (d) it seeks information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy, including financial privacy.

Interrogatory No. 5:

To the extent a **challenged product** is a **substantially similar product** to others products, identify each other product.

Response:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents further objects to this interrogatory on the following grounds: (a) it is vague and ambiguous; (b) it is overly broad and unduly burdensome; (c) it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence (the requested information has no relationship to the alleged false or misleading advertising claims that Complaint Counsel pursues in this matter); and (d) it seeks information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy, including financial privacy.

Interrogatory No. 6:

Disclose all payments that each **Respondent** has received, directly or indirectly, in connection with the advertising, marketing, promotion, and sale of ach of the **challenged products** for each year from 2001 to the present. (This request **includes** the total dollar amount and source of all payments. For consumer sales, it is not necessary to disclose names, addresses, or telephone numbers.)

Response:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents further objects to this interrogatory on the following grounds: (a) it is vague and ambiguous; (b) it is overly broad and unduly burdensome; (c) it seeks irrelevant information and

information not reasonably calculated to lead to the discovery of admissible evidence (the requested information has no relationship to the alleged false or misleading advertising claims that Complaint Counsel pursues in this matter); and (d) it seeks information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy, including financial privacy.

Interrogatory No. 7:

Disclose the total amount of dollars that each **Respondent** has spent to advertise, market or otherwise promote each of the **challenged products** for each year from 2001 to the present, broken down by each medium used (*i.e.*, television, print, internet, radio, or other means). (This request **includes**, but is not limited to, all expenditures attributable to the creation, development, evaluation, approval, modification, and dissemination of **promotional materials**).

Response:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents further objects to this interrogatory on the following grounds: (a) it is vague and ambiguous; (b) it is overly broad and unduly burdensome; (c) it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence (the requested information has no relationship to the alleged false or misleading advertising claims that Complaint Counsel pursues in this matter); and (d) it seeks information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy, including financial privacy.

Interrogatory No. 8:

Provide a **dissemination schedule** that **describes** in detail how each item of **promotional materials** submitted in response to the **Requests for Production** was disseminated or otherwise exposed to consumers.

Response:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents further objects to this interrogatory on the following grounds: (a) it is vague and

ambiguous; (b) it is overly broad and unduly burdensome; (c) it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence (the requested information has no relationship to the alleged false or misleading advertising claims that Complaint Counsel pursues in this matter); and (d) it seeks information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy, including financial privacy.

Interrogatory No. 9:

Describe in detail the actions each **Respondent** has taken to comply with the U.S. Food and Drug Administration's prohibition on the sale of dietary supplements containing ephedrine alkaloids, effective April 12, 2004. (This request **includes**, but is not limited to, **identification** of any product formulations that have been created, modified, or removed from distribution, **identification** of any **promotional materials** that have been created, revised, or removed from dissemination, and the date(s) on which all of the actions described in your answer took place; and how orders for Leptoprin or Anorex or in response to existing **promotional materials** Leptoprin or Anorex have been fulfilled.)

Response:

Respondents incorporate by reference each General Objection as set forth here in full. Respondents further objects to this interrogatory on the following grounds: (a) it is vague and ambiguous; (b) it is overly broad and unduly burdensome; (c) it seeks irrelevant information and information not reasonably calculated to lead to the discovery of admissible evidence (the requested information has no relationship to the alleged false or misleading advertising claims that Complaint Counsel pursues in this matter); and (d) it seeks information protected from disclosure by the attorney-client privilege, work product doctrine, and/or right of privacy, including financial privacy.

Based on, subject to, and without waiving the foregoing responses and objections, Respondents state that during the first part of April 2004 Basic Research started the process of identifying all products that considered to be "adulterated" according to 21 CFR Part 119, which

states, "*all dietary supplements containing ephedrine alkaloids are adulterated under the Federal Food, Drug, and Cosmetic Act.*"

April 1st through April 6th of 2004 all products and raw materials containing a source of ephedrine alkaloids, such as ephedra, Ma huang and pinellia were gathered together and quarantined along with all boxes, labels, advertising brochures and other artwork containing information relative to ephedrine containing products.

On April 7th, 2004 Basic Research prepared Material Destruction Forms, which contained all necessary information for tracking the materials through all steps of the destruction process. The Material Destruction Forms included approval signatures, raw material lot numbers, finished good lot numbers, label revision numbers, persons responsible for destruction and all other pertinent information required to conform to the regulation.

On April 8th, 2004 Basic Research conducted one last search throughout the facility to ensure that every product considered adulterated by the FDA, had been properly identified and quarantined. All adulterated materials discovered during this comprehensive search were quarantined and Material Destruction Forms filled out.

On Friday the 9th of April 2004, all adulterated materials were destroyed prior to the April 12, 2004 deadline. During the destruction process, each item was verified by two separate individuals who immediately thereupon affixed their signatures to the Material Destruction Forms.

In accordance with 21 CFR part 119, Basic Research immediately destroyed every product containing a source of ephedrine alkaloid (such as ephedra, Ma huang and pinellia) returned to our facility by customers of Basic Research subsequent to the April 12, 2004 deadline.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 16 day of August, 2004 as follows:


(1) One (1) copy via e-mail attachment in Word document format to Commission Complaint Counsel, Laureen Kapin, Joshua S. Millard, and Laura Schneider, all care of lkapin@ftc.gov, jmillard@ftc.gov; rrichardson@ftc.gov; lschneider@ftc.gov with one (1) paper courtesy copy via U. S. Mail, First Class Postage Prepaid to Laureen Kapin, Bureau of Consumer Protection, Federal Trade Commission, Suite NJ-2122, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

(2) One (1) copy via U. S. Mail, First Class Postage Prepaid to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 3225 Aviation Avenue, Suite 301, Miami, Florida 33131.

(3) One (1) copy via U. S. Mail, First Class Postage Prepaid to Richard Burbidge, Esq., Jefferson W. Gross, Esq. and Andrew J. Dymek, Esq., Burbidge & Mitchell, 215 South State Street, Suite 920, Salt Lake City, Utah 84111, Counsel for Dennis Gay.

(4) One (1) copy via U. S. Mail, First Class Postage Prepaid to Ronald F. Price, Esq., Peters Scofield Price, A Professional Corporation, 340 Broadway Centre, 111 East Broadway, Salt Lake City, Utah 84111, Counsel for Daniel B. Mowrey.

(5) One (1) copy via U. S. Mail, First Class Postage Prepaid to Mitchell K. Friedlander, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84116, Pro Se.


Jeffrey D. Feldman

VERIFICATION

I, Carla R. Fobbs, being duly authorized to execute the aforesaid Answers to Complaint Counsel's First Set of Interrogatories on behalf of Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker usa, LLC, Nutrasport, LLC, and Sovage Dermalogic Laboratories, LLC, having read and reviewed said answers, hereby state that foregoing answers are true and correct to the best of my knowledge and belief.

FURTHER AFFIANT SAYETH NAUGHT.

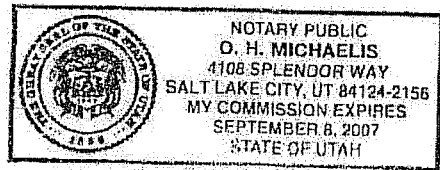
Carla R. Fobbs
CARLA R. FOBBS

STATE OF UTAH)
 :SS.
COUNTY OF SALT LAKE)

SWORN TO AND SUBSCRIBED before me this 16th day of August, 2004 by CARLA R. FOBBS, who is personally known to me / has produced DRIVERS LICENSE as identification. # 146319375

O. H. Michaelis
Notary Public, State of Utah

My Commission Expires: 09/08/07



Attachment D

**UNITED STATES OF AMERICA
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.,
BAN, L.L.C.,
DENNIS GAY,
DANIEL B. MOWREY, and
MITCHELL K. FRIEDLANDER,

Respondents.

Docket No. 9318

BASIC RESEARCH LLC'S FIRST SET OF INTERROGATORIES

Basic Research, LLC, through undersigned counsel, and pursuant to the Federal Trade Commission Rules of Practice, Rule 3.35, hereby propound these Interrogatories, to which Complaint Counsel shall respond separately and fully, in writing and under oath within 30 days of service.

DEFINITIONS

Notwithstanding any definition below, each word, term, or phrase used in these Interrogatories is intended to have the broadest meaning permitted under the Federal Trade Commission's Rules of Practice.

1. "Challenged Products" shall mean each product referred to in the Complaint, including: Dermalin-APg, Cutting Gel, Tummy Flattening Gel, Leptoprin, Anorex, and PediaLean, both individually and collectively.
2. "Commission," "you," and "your" shall mean the Federal Trade Commission, its employees, agents, attorneys, consultants, representatives, officers, and all other persons acting or purporting to act on its behalf.
3. "Communication(s)" shall mean the transmittal or exchange of information of any kind in any form, including oral, written, or electronic form.
4. "Complaint" shall mean: the administrative complaint issued by the Federal Trade Commission, and any amendments to that Complaint, in the above-captioned matter.
5. "Corporate Respondents" shall mean the following Respondents: Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker USA, LLC, Nutrasport, LLC, Sövage Dermalogic Laboratories, LLC, and BAN, LLC, both individually and collectively as defined in the Complaint, including all of their operations under any trade names.
6. "Describe" shall mean to offer a comprehensive, complete, accurate and detailed description, explanation or listing of the matter into which the Interrogatory inquires.
7. "Determination" shall include, but not be limited to: interpretation, evaluation, approval, and decision.

8. "Disclose" shall mean to offer a comprehensive, complete, accurate and detailed description, explanation or listing of the matter into which the Interrogatory inquires.

9. "Document" should be interpreted in the broadest sense permitted under the Federal Trade Commission's Rules of Practice, including but not limited to writings, drawings, graphs, charts, photographs, audio recordings, videotapes, electronic mail, and other data compilations from which information can be obtained. The term "document" includes originals and all non-identical copies.

10. "Each" and "any" shall mean and shall include the word "all," so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information and/or document(s) that otherwise might be construed to be outside its scope.

11. "Identify" or "identification" shall mean:

(a) when referring to a *natural person*, state the full name, present business address and telephone number, or if a present business affiliation or business address is not known, by the last known business and home addresses and both the business and home telephone numbers;

(b) when referring to any *entity*, such as a business or organization, state the legal name as well as any other names under which the entity has done business, address, telephone number and contact person, if applicable for that entity; and

(c) when referring to a "*document*" or "*communication*," state the full name(s) of the author(s) or preparer(s), the full name of the recipient(s), addressee(s), and/or person(s) designated to receive copies, the title or subject line of the

document or communication, a brief description of the subject matter of the document or communication, the date it was prepared, its present location, and its present custodian.

12. "Individual Respondents" shall mean: Respondents Dennis Gay, Daniel B. Mowrey, Mitchell K. Friedlander, both individually and collectively, unless otherwise stated.

13. "Market Research" shall mean: all information referring or relating to testing, measuring or assessing consumers' or individuals' interpretation of, understanding of, or reaction to any draft, proposed, or final promotional material, proposed advertising text, copy or creative strategy or platform, product category, product, entity or information conveyed in an advertisement, including but not limited to consumer perception tests, comprehension tests, recall tests, marketing or consumer surveys or reports, penetration tests, audience reaction tests, copy tests, focus groups, consumer survey data, and media research.

14. "Or" includes "and," and "and" shall include "or," so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information or documents that might otherwise be construed to be outside its scope.

15. "Person" or "Persons" shall mean: all natural persons, corporations, partnerships or other business associations, and each and every other legal entity, including but not limited to all members, officers, predecessors, assigns, divisions, branches, departments, affiliates, and subsidiaries.

16. "Promotional Material" shall mean: any written or oral statement, advertisement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of goods or services, whether the same appears in a press release, video news release, brochure,

newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, sticker, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, instructional or education materials, packaging, package insert, package label, film, slide, radio 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 publication or broadcast in any other medium.

17. "Referring to" or "relating to" shall mean: discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.

18. "Requests for Production" shall mean any and all Requests for Production of Documentary Materials and Tangible Things directed to Complaint Counsel in the above-captioned matter.

19. "Respondent(s)" shall mean: all Corporate Respondents and all Individual Respondents, both individually and collectively, unless otherwise stated.

INSTRUCTIONS

1. Unless otherwise specified, the time period covered by an Interrogatory shall not be limited. All information responsive to the Interrogatory – regardless of dates or time periods involved – must be provided (unless otherwise specified).

2. Each Interrogatory must be completely set forth, preceding the answer to it and must be answered separately and fully in writing, under oath.

3. All answers shall be served within 30 days after service of these Interrogatory Requests.

4. Information covered by these Interrogatory Requests shall include all information within your knowledge or possession, or under your actual or constructive custody or control, whether or not such information is located in the files or records of, or may be possessed by: Commission staff, employees or agents of any government agencies other than the Federal Trade Commission, expert witnesses, consultants, or otherwise; and whether or not such information is received from or disseminated to any other person or entity including individual Commissioners, Commission staff, employees of any government agencies other than the Federal Trade Commission, and employees of any private consumer protection organizations, attorneys, accountants, economists, statisticians, experts, and consultants.

5. If you object to any Interrogatory or a part of any Interrogatory, state the Interrogatory or part to which you object, state the exact nature of the objection, and describe in detail the facts upon which you base your objection. If any Interrogatory cannot be answered in full, it shall be answered to the fullest extent possible and the reasons for the inability to answer fully shall be provided. If you object to any Interrogatory on the grounds of relevance or overbreadth, you shall provide all responsive information that is concededly relevant to claims, defenses, or requested relief in this proceeding.

6. This First Set of Interrogatories is continuing in character so as to require you to produce additional information promptly upon obtaining or discovering different, new or further information before the close of discovery.

7. If any requested information is withheld based on any claim of privilege or otherwise, submit together with such claim for information that is withheld: (a) the specific subject matter; (b) the date of the information; (c) the names, addresses, positions, and organizations of all

authors and recipients of the information; and (d) the specific grounds for claiming that the information is privileged or otherwise is withheld. If only part of the responsive information is privileged, all non-privileged portions of the information must be provided.

8. The use of the singular includes the plural, and the plural includes the singular.
9. The use of a verb in any tense shall be construed to include all other tenses.
10. The spelling of a name shall be construed to include all similar variants of such name.

INTERROGATORIES

1. With respect to each representation that you claim in your Complaint was made by one or more Respondents in Promotional Materials for the Challenged Products, please:
 - a) state whether you contend that the representation was express or implied;
 - b) identify the person or persons who interpreted the Promotional Material in question and determined what representations it conveyed;
 - c) describe all extrinsic evidence (that is, anything other than the Promotional Material itself) that was relied upon in determining what representations were conveyed;
 - d) describe the nature, quantity, and type of substantiation that you contend Respondents needed in order to possess and rely upon a reasonable basis to make the representation;
 - e) describe the factual basis for your contention that Respondents did not possess and rely upon a reasonable basis that substantiated the representation.
2. For each study, analysis, research, or test provided to you by any Respondent as substantiation for representations made concerning the Challenged Products during your

investigation leading to the Complaint, please state whether you contend such study, analysis, research, or test does not constitute adequate substantiation for the representation for which it was asserted, and describe the basis and circumstances under which you made that determination, including without limitation the identity of the person who made the determination, when they made it, their qualifications to make such a determination, and the factual basis and reasoning underlying that determination.

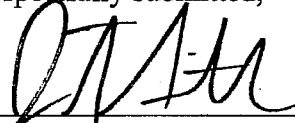
3. Please identify all Market Research or other evidence or information of which you are aware that is relevant or potentially relevant to determining consumer reaction to, or consumer perception, comprehension, understanding, “take-away,” or recall of statements or representations made by Respondents in Promotional Materials for the Challenged Products.

4. What does the Commission mean by the terms “visibly obvious,” “rapid,” “substantial,” and “causes” as those terms are used throughout the Complaint?

5. Identify all documents or other materials provided by Respondents to the Commission during the pre-complaint/investigative stage of the above-captioned case which the Commission has disclosed or otherwise provided to persons unaffiliated with the Commission (including but not limited to persons working for, on behalf of, or otherwise affiliated with the United States House of Representatives) and identify the persons to whom they were given.

6. Please explain in detail why the Complaint in this case was not filed prior to June 16, 2004 and what circumstances, if any, precluded the Commission from filing the Complaint prior to that date.

Respectfully submitted,



Lanny A. Breuer

Jay T. Smith

Covington & Burling

1201 Pennsylvania Avenue, NW

Washington, DC 20004

Tel: (202) 662-5614

Fax: (202) 662-6290

*Counsel for Respondent Basic Research,
L.L.C.*

Dated July 23, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2004, I caused Basic Research

LLC's First Set of Interrogatories to be served as follows:

- (1) one copy by hand delivery and one copy by electronic mail to:

Laureen Kapin
Joshua S. Millard
Robin F. Richardson
Laura Schneider
Walter C. Gross III
Federal Trade Commission
600 Pennsylvania Avenue, NW, Suite NJ-2122
Washington, DC 20580
email: lkapin@ftc.gov

- (2) one copy by first class U.S. mail to:

Jeffrey D. Feldman
FELDMANGALE, P.A.
Miami Center - 19th Floor
201 S. Biscayne Boulevard
Miami, FL 33131
*Counsel for Respondents A.G. Waterhouse, L.L.C., Klein-Becker, L.L.C.,
Nutrasport, L.L.C., Sovage Dermalogic Laboratories, L.L.C., and BAN, L.L.C.*

Ronald F. Price
PETERS SCOFIELD PRICE
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Salt Lake City, UT 84111
Counsel for Respondent Daniel B. Mowrey

Richard D. Burbidge
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215 South State Street, Suite 920
Salt Lake City, UT 84111
Counsel for Respondent Dennis Gay

Mitchell K. Friedlander
c/o Compliance Department
5742 West Harold Gatty Drive
Salt Lake City, UT 84116

A handwritten signature in cursive script that reads "Brooks Mackintosh". The signature is written in black ink and is positioned above a horizontal line.

Brooks Mackintosh, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2004, I caused *Complaint Counsel's Opposition to Basic Research's Motion to Compel* 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:
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 to:
The Honorable Stephen J. McGuire
Chief Administrative Law Judge
600 Penn. Ave., N.W., Room H-104
Washington, D.C. 20580
- (3) one (1) electronic copy via email and one (1) paper copy by first class mail to the following persons:

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Miami, FL 33133-4741
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(305) 854-5351 (fax)
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For Respondents

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JFeldman@FeldmanGale.com
For Respondents
**A.G. Waterhouse, LLC,
Klein-Becker USA, LLC,
Nutrasport, LLC, Sovage
Dermalogic Laboratories,
LLC, and BAN, LLC**

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COMPLAINT COUNSEL