

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

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)	
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.,)	DOCKET NO. 9318
dba BASIC RESEARCH, L.L.C.,)	
OLD BASIC RESEARCH, L.L.C.,)	
BASIC RESEARCH, A.G.)	PUBLIC DOCUMENT
WATERHOUSE, BAN, L.L.C.,)	
dba KLEIN, BECKER, USA,)	
NUTRA SPORT, and)	
SOVAGE DERMALOGIC)	
LABORATORIES,)	
DENNIS GAY,)	
DANIEL B. MOWREY ,)	
dba AMERICAN PHYTOTHERAPY)	
RESEARCH)	
LABORATORY, and)	
MITCHELL K. FRIEDLANDER,)	
)	
Respondents)	

**COMPLAINT COUNSEL’S RESPONSE TO RESPONDENT
DENNIS GAY’S FIRST SET OF REQUESTS FOR PRODUCTION**

Pursuant to Rules 3.31(c) and 3.37(b) of the Commission’s Rules of Practice, Complaint Counsel serve the following responses and objections to Respondent Dennis Gay’s First Set of Requests for Production.

GENERAL OBJECTIONS - DOCUMENT REQUESTS

1. Complaint Counsel object to Respondent’s requests for documents 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.

2. Complaint Counsel object to Respondent's requests for documents prepared in anticipation of litigation or which seek disclosure of the theories and opinions of Complaint Counsel or Complaint Counsel's consultant or agent, 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 requests for documents 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 (February 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 requests for documents 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).
5. Complaint Counsel object to Respondent's requests for documents received by FTC staff from Respondents during this investigation or this proceeding, or documents already possessed by Respondents, their representatives, attorneys, officers, employees, or agents, on the ground that production of such documents would be unduly burdensome, unnecessary and duplicative.
6. Complaint Counsel object to Respondent's requests for documents to the extent that they seek documents obtained in the course of investigating other dietary supplement and weight loss marketers 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. *Hoechst Marion Rousell, Inc.*, No. 9293, Order on Motions to Compel Discovery From Complaint Counsel filed by Andrix and Aventis (Aug. 18, 2000).
7. Complaint Counsel object to each of Respondent's document requests 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 document requests that 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 violation of the limits of discovery set by Rule 3.31(c)(1) of the Commission's Rules of Practice.

9. Complaint Counsel object to the Definitions and General Instructions to the extent that they impose an obligation greater than that imposed by the Commission's Rules of Practice and the provisions of the Pretrial Scheduling Order.

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 document request 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 request or that such answer or objection constitutes admissible evidence. The fact that Complaint Counsel have responded to any request is not intended and shall not be construed as a waiver by Complaint Counsel of all or any part of any objection to any request.

3. Complaint Counsel have not completed their discovery in this case, and additional documents may be discovered that are responsive to Respondent's request for documents. Complaint Counsel reserve the right to supplement the responses provided herein as appropriate during the course of discovery.

DOCUMENT REQUESTS AND RESPONSES

Request 1

All documents identified in your responses to Respondent Dennis Gay's First Set of Interrogatories.

Response:

Complaint Counsel object to the extent that this Request is overbroad, unduly burdensome, or otherwise inconsistent with Respondent's obligations under the Rules of Practice. To the extent that this request calls for attorney notes and internal memoranda, these documents are protected from disclosure as attorney work product, as more fully set forth in General Objection 2. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have previously produced responsive documents and will continue to supplement this Request as necessary.

Request 2

All **documents** indicating, suggesting, or implying that any of the Advertisements, or any representation in any of the Advertisements, is false or misleading.

Response:

Complaint Counsel object to the extent that this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 4). Complaint Counsel further object to this Request because certain documents are protected from disclosure as attorney work product (General Objection 2) or by deliberative process privilege (General Objection 3). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have previously produced responsive documents and will continue to supplement this Request as necessary.

Request 3

All documents indicating, suggesting, or implying that any of the **Challenged Products**, or any ingredient (e.g., aminophylline, glucomannan, or ephedrine) of the **Challenged Products**, causes or may cause a loss of fat or a loss of weight.

Response:

Complaint Counsel object to this Request on the grounds that it is overbroad and unduly burdensome to the extent that it calls for documents relating to all ingredients, not just the active ingredients. Complaint Counsel further object to this Request because certain documents are protected from disclosure as attorney work product (General Objection 2), or by deliberative process privilege (General Objection 3), and as information relating to non-testifying or consulting expert witnesses (General Objection 4). In addition, this Request calls for documents which are not in Complaint Counsel's possession, custody, or control. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have produced responsive documents, but will continue to supplement this Request as necessary.

Request 4

All **documents** indicating, suggesting, or implying that any of the **Challenged Products**, or any ingredient (e.g., aminophylline, glucomannan, or ephedrine) of the **Challenged Products**, does NOT cause a loss of fat or a loss of weight.

Response:

Complaint Counsel object to this Request on the grounds that it is overbroad and unduly burdensome to the extent that it calls for documents relating to all ingredients, not just the active

ingredients. Complaint Counsel further object to this Request because certain documents are protected from disclosure as attorney work product (General Objection 2), or by deliberative process privilege (General Objection 3), and as information relating to non-testifying or consulting expert witnesses (General Objection 4). In addition, this Request calls for documents which are not in Complaint Counsel's possession, custody, or control. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have produced responsive documents, but will continue to supplement this Request as necessary.

Request 5 [Respondent's Request 4 (repeated #4)]

All documents relating to or referring to the Topical Fat Reduction Study, Regional Fat Loss Study, GREEWAY/BRAY/HEBER PUBLISHED STUDIES, First Fiber Study, Second Fiber Study, or the Ephedrine Study.

Response:

Complaint Counsel object to this Request because certain documents are protected from disclosure as attorney work product (General Objection 2) or by deliberative process privilege (General Objection 3). Complaint Counsel further object to the extent this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 4). In addition, this Request calls for documents which are not in Complaint Counsel's possession, custody, or control. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have produced responsive documents, but will continue to supplement this Request as necessary.

Request 6 [Respondent's Request 5]

All documents relating to or referring to any of the Respondents, Challenged Products, or Advertisements. (You need not produce documents produced by the Respondents since the Complaint was filed.)

Response:

Complaint Counsel object to this Request on the grounds that it is overbroad and unduly burdensome and calls for documents Respondent produced to Complaint Counsel prior to the filing of the Complaint that are already in Respondent's possession, custody or control. Complaint Counsel also object to this Request on the grounds that it would include documents that are protected from disclosure as attorney work product (General Objection 2), or by deliberative process privilege (General Objection 3), or exempt from disclosure to the extent this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 4). In addition, this Request calls for documents which are not in Complaint Counsel's possession, custody, or control. Subject to and without waiving these objections or the

General Objections stated above, Complaint Counsel have produced responsive documents, but will continue to supplement this Request as necessary.

Request 7 [Respondent's Request 6]

All **communications** between the **FTC** and any other **person** relating to any of the **Respondents, Challenged Products, or Advertisements.**

Response:

Complaint Counsel object to this Request on the grounds that it is overbroad and unduly burdensome. Complaint Counsel also object to this Request on the grounds that it would include documents that are protected from disclosure as attorney work product (General Objection 2) or by deliberative process privilege (General Objection 3), or exempt from disclosure to the extent this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 4). Complaint counsel also object to the extent that this Request seeks documents that fall within the government informant's privilege. *Diran M. Seropian, M..D.*, Docket No. 9248, 1991 F.T.C. LEXIS 451 (Oct. 11, 1991). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have produced responsive documents, but will continue to supplement this Request as necessary.

Request 8 [Respondent's Request 7]

All **documents** indicating, suggesting or implying that in disseminating any of the Advertisements, Mr. Gay did not satisfy or comply with the standards relating to Sections 5 and 12 of the Federal Trade Commission Act as set forth in the **Garvey Case.**

Response:

Complaint Counsel object to this Request on the grounds that it is vague, overbroad, and unduly burdensome. Complaint Counsel further object to this Request on the grounds that it would include documents that are protected from disclosure as attorney work product (General Objection 2) or by deliberative process privilege (General Objection 3).

Request 9 [Respondent's Request 8]

All **documents** that the FTC has considered or relied upon in evaluating the Advertisements.

Response:

Complaint Counsel object to this Request on the grounds that it would include documents that are protected from disclosure as attorney work product (General Objection 2) or by

deliberative process privilege (General Objection 3), or exempt from disclosure to the extent this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 4). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have produced responsive documents, but will continue to supplement this Request as necessary.

Request 10 [Respondent's Request 9]

All **documents** that the FTC has considered or relied upon in evaluating the Challenged Products.

Response:

Complaint Counsel object to this Request on the grounds that it would include documents that are protected from disclosure as attorney work product (General Objection 2) or by deliberative process privilege (General Objection 3) or exempt from disclosure to the extent this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 4). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have produced responsive documents, but will continue to supplement this Request as necessary.

Request 11 [Respondent's Request 10]

All **documents** that the FTC has considered or relied upon in evaluating any of the substantiation or documents (e.g., GREENWAY/BRAY/HEBER PUBLISHED STUDIES) Respondents have provided in support of the Advertisements and/or Challenged Products.

Response:

Complaint Counsel object to this Request on the grounds that it would include documents that are protected from disclosure as attorney work product (General Objection 2) or by deliberative process privilege (General Objection 3) or exempt from disclosure to the extent this Request seeks information relating to non-testifying or consulting expert witnesses (General Objection 4). Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have produced responsive documents, but will continue to supplement this Request as necessary.

Request 12 [Respondent's Request 11]

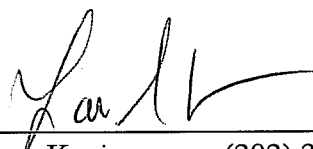
Copies of all Respondents' advertisements, whether in print, audio, visual, or any other medium, reviewed by the FTC prior to filing the instant Complaint, including copies of all Advertisements expressly or implicitly identified in the Complaint.

Response:

Complaint Counsel object to this Request because certain documents responsive to this request are documents that the Respondents and their counsel have in fact provided to Complaint Counsel and hence the request calls for documents that are already in Respondent's possession, custody or control. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel have produced responsive documents, but will continue to supplement this Request as necessary.

Dated: December 1, 2004

Respectfully submitted,



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Federal Trade Commission
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Certificate of Service

I hereby certify that on this 1st day of December, 2004, I caused *COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT DENNIS GAY'S FIRST SET OF REQUESTS FOR PRODUCTION* 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:

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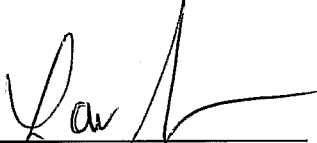
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