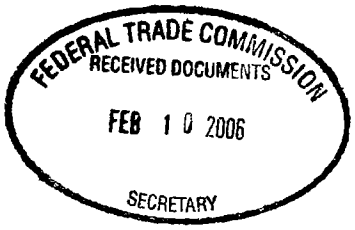
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of	:	
	:	Docket No. 9318
BASIC RESEARCH, L.L.C.,	:	
A.G. WATERHOUSE, L.L.C.,	:	
KLEIN-BECKER USA, L.L.C.,	:	
NUTRASPORT, L.L.C.,	:	
SOVAGE DEMALOGIC	:	
LABORATORIES, L.L.C.,	:	PUBLIC DOCUMENT
BAN, L.L.C.	:	
DENNIS GAY,	:	
DANIEL B. MOWREY, and	:	
MITCHELL K. FRIEDLANDER,	:	
	:	
Respondents.	:	
	:	

RESPONDENT DANIEL B. MOWREY, Ph.D.'S PRE-HEARING BRIEF, WITH PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Respondent Daniel B. Mowrey, Ph.D. ("Dr. Mowrey"), submits this pre-hearing brief, with proposed findings of fact and conclusions of law. Dr. Mowrey expressly adopts the arguments and proposed findings of fact and conclusions of law set forth in the pre-hearing briefs and proposed findings of fact and conclusions of law submitted by the other respondents.

FACTUAL BACKGROUND

One over-riding fact which your Honor must keep in mind when considering this matter is that, as discussed in the Company Respondents' pre-hearing brief, the challenged products all in fact promote weight and/or fat loss. There is no doubt that the products work, and the Commission's whole case centers on the assertion that although the products work, they do not work as well as allegedly implied by the challenged advertisements. It is within this rubric of weight and/or fat loss products that undeniably work that Dr. Mowrey's involvement must be considered.

Dr. Mowrey was born in Salt Lake City, Utah, and was raised in various cities in the State of Washington. Upon graduating from high school he completed a year of undergraduate studies at Brigham Young University. He then spent 2½ years as a volunteer missionary in Germany, where learned and became fluent in German.

After completing his missionary service Dr. Mowrey returned to Brigham Young University to continue his studies. Those studies were interrupted by a four year tour of duty in the military, where Dr. Mowrey served as an electronic traffic analyst, linguist and administrative assistant in the United States Army Security Agency. During this time he was stationed at Fort Devens, Massachusetts, Sinop, Turkey, and Vint Hill Farms Station near Warrenton, Virginia. The nature of his duties required that Dr. Mowrey have a Top Secret

Codeword clearance.

In 1972, Dr. Mowrey returned to Brigham Young University to continue his college education. He obtained an undergraduate degree in psychology from Brigham Young University, and later obtained a Ph.D. in experimental psychology, with an emphasis in psychopharmacology, from Brigham Young University in 1978.

During his graduate studies, Dr. Mowrey obtained extensive training in the design, conduct, and evaluation of experimental studies. He also studied the relationship between drugs and human behavior. Experimental psychology is, itself, the study of the experimental analysis of behavior, and emphasizes the design, conduct, and evaluation of experimental studies, and psychopharmacology is the study of the relationship between drugs and behavior, and involves an understanding of physiology and biochemistry. In connection with these studies, Dr. Mowrey's course work included training in biochemistry, biology, neurology, and anatomy.

Dr. Mowrey's experience at Brigham Young University was not limited to that of student. On the contrary, Dr. Mowrey was a part-time faculty member for several years, and taught courses in experimental psychology, psychopharmacology, physiological psychology, sensation, cognition, and statistics.

Dr. Mowrey's introduction to medicinal plants began in graduate school during his studies of experimental psychology. The use of psychoactive plant materials was fairly widespread at that time, and because his specialty was psychopharmacology, Dr. Mowrey was especially interested in the pharmacology of those materials. Given the opportunity to evaluate the ability of a certain herbal compound to affect the course of mild sleep disorders, Dr. Mowrey was impressed by the success of those applications. He soon learned that the beginning materials

for many drugs were and in some cases still are plant extracts. For example, aspirin was originally derived from *Salix alba* (white willow bark), quinine from cinchona bark, the laxative cascara from *Cascara sagrada* (senna and psyllium are also plants), reserpine from *rauwolfia*, atropine and scopolamine from Belladonna, ephedrine from Ephedra chinensis, vincristine and vincoleukoblastine from periwinkle, carbenoxolone from *Glycyrrhiza glabra,* and sodium cromoglycate from *Tylophora Indica.*

An opportunity arose during graduate school for Dr. Mowrey to investigate the anti-nausea activity of ginger root. This work eventually became part of Dr. Mowrey's dissertation, and Dr. Mowrey devised a way to study the anti-nausea activity of ginger root in motion sickness. He subsequently published the results of this study in a peer-reviewed paper which was published in the prestigious journal, The Lancet.

As a result of his studies and teaching experiences, Dr. Mowrey gained a keen interest in the area of medicinal plants, dietary supplements and alternative medicine. He began to devote large amounts of time to studying scientific literature from throughout the world that addressed these topics. He also accepted a position as the director of research at Nature Sunshine Products, fka Amtech Industries, a nutritional supplement company, where he performed safety and efficacy tests on the company's products, and helped develop products for the company.

During his work at Nature Sunshine Products, Dr. Mowrey gained experience working with guar gum and bentonite. These substances are extenders of drilling fluid systems, and Dr. Mowrey decided to take that knowledge and experience and use it in the polymer drilling fluid industry. Accordingly, Dr. Mowrey left Nature Sunshine Products in 1979 and went to work for Nova Corporation, where he handled the development of new fluid systems based on polymer

and surfactant rheological technology, and where he also wrote operations and technical manuals. Dr. Mowrey worked for Nova Corporation until 1986.

Although his work for Nova Corporation was not related to nutritional supplements, Dr. Mowrey did not lose his keen interest in the area of medicinal plants, dietary supplements and alternative medicine. Thus, throughout his association with Nova Corporation, Dr. Mowrey continued to spend large amounts of time studying the world's scientific literature that addressed these topics. Dr. Mowrey also began work on writing his first book, The Scientific Validation of Herbal Medicine, which Dr. Mowrey self-published in 1986.

The publication of Dr. Mowrey's first book, The Scientific Validation of Herbal Medicine, coincided with Dr. Mowrey's decision to leave his employment and seek to earn a living in the field of medicinal plants and nutritional supplements. Dr. Mowrey began to consult with nutritional supplement companies concerning the formulation of products, and performing archival research on ingredients, often included publishing written summaries, and coordinating basic and clinical research on products at neighboring universities. Dr. Mowrey also began authoring a newsletter on Guaranteed Potency herbs (The Herb Blurb), writing columns and articles for trade magazines, traveling and speaking in seminars and conventions, participating in radio and television programs, and providing guidance for other professionals who were evaluating the industry.

Dr. Mowrey also began work on his second book, Guaranteed Potency Herbs, Next Generation Herbal Medicine, which he self-published in 1988. After this second book was published, Keats Publishing, located in New Canaan, Connecticut, purchased the rights to both this book and Dr. Mowrey's first book, The Scientific Validation of Herbal Medicine. Keats

Published subsequently published Dr. Mowrey's third book, Herbal Tonic Therapies, which was published in 1993. Dr. Mowrey subsequently self-published a fourth book, Fat Management! The Thermogenic Factor.

One of the things Dr. Mowrey learned early on in his study of medicinal plants was that the wealth of information on these materials was not restricted to controlled scientific trials, but included much more. To fully appreciate the possible usefulness of herbs requires the evaluation of how they have been used across the decades, or centuries, how different cultures evolved the same or very similar applications for the same or similar species of plants, how different forms of extraction yield different medicinal properties, how folklore uses have evolved in the West versus the East, and how old concepts of health and disease translate into the discoveries of modern science. Thus, the placebo-controlled, double-blind, randomized scientific experiment is just one part of the study of medicinal plants.

Dr. Mowrey continually searches and studies the world's literature on medicinal plants and related areas of dietary supplementation. The amount of literature being generated around the world in these areas is huge. Its study is extremely time-consuming. Ferreting out those materials that will make immediate contributions to well being and health cannot be restricted to any one discipline or source, but requires an examination of each culture's contributions. Often, important information comes in the form of studies whose authors, for patent, political, economic or personal reasons have chosen to report only in part. When that happens, an important aspect of Dr. Mowrey's work is to contact the studies' lead investigators and ask the questions that will shed more light on the study so that Dr. Mowrey can more fully evaluate the validity of the work as well as the usefulness of the studied material. Thus, for example, Dr. Mowrey has

communicated with many of the lead investigators of studies relating to the challenged products, including Dr. Astup, Dr. Blackburn, Dr. Bray, Dr. Breum, Dr. Colker, Dr. Daly, Dr. Frome, Dr. Greenway, Dr. Heber, Dr. Livieri, and Dr. Riquier.

In approximately 1986, Dr. Mowrey, working out of home, was working on writing his second book, consulting with nutritional supplement companies, speaking at conventions and seminars, participating in television and radio talk shows on the subject of medical plants and nutritional supplements, and writing articles in various trade publications. It was during this time frame that, through a mutual friend, Evan Bybee, Dr. Mowrey was first introduced to Respondent Dennis Gay. Mr. Gay and Mr. Bybee were business partners, and they offered Dr. Mowrey an opportunity to "rent" office space from their business. In exchange for use of the office space, Dr. Mowrey would help write materials Mr. Gay and Mr. Bybee could use in their real estate business, and Mr. Gay and Mr. Bybee would assist Dr. Mowrey with some of the contractual issues with which he became involved in connection with his own consulting and writing businesses.

Ultimately, Mr. Gay and Mr Bybee decided to get involved in the nutritional supplement business, and in 1992 they formed a company known as Basic Research, LLC, which was a predecessor to Respondent Basic Research, LC. At that time, Dr. Mowrey had been operating his independent consulting business under a dba of American Phytotherapy Research Laboratory. At the end of 1992, based upon the advice of his accountant, Dr. Mowrey registered American Phytotherapy Research Laboratory ("APRL") as a nonprofit corporation with the State of Utah. Soon thereafter, it was apparent that APRL could not effectively operate as a nonprofit corporation, and its corporate structure was subsequently formally changed to a for profit

corporation.

At this time, Dr. Mowrey, through APRL, was fully engaged in his independent consulting business, his continued archival research and study of the word's scientific literature on medicinal plants, and was working on writing his third book. Dr. Mowrey also began to provide independent consulting services to the old Basic Research, LLC, as well continuing to consult with his other clients.

During the mid to late 1980's, Dr. Mowrey had become familiar with a body of scientific literature which demonstrated that ephedrine, particularly in combination with caffeine, was an effective weight loss agent. In fact, it was the most effective weight loss compound that was available in the market. Dr. Mowrey later also aware of scientific research which indicated that aspirin potentiated the effects of ephedra and caffeine, and that the combination of ephedrine, caffeine and aspirin ("ECA") was a particularly effective weight loss agent.

When Mr. Gay and Mr. Bybee formed the old Basic Research, LLC, Dr. Mowrey, as an independent consultant through APRL, suggested that old Basic Research, LLC could sell an effective weight loss compound whose active ingredients consisted of the ECA combination. Shortly after old Basic Research, LLC's sales of this product began, Dr. Mowrey received a telephone call from Respondent Friedlander, who indicated that he owned a patent on the ECA a weight loss compound, and that old Basic Research, LLC's sales of its ECA product infringed upon his patent. Rather than advising old Basic Research, LLC to change its formula to use salicin instead of aspirin (as others in the industry had done), Dr. Mowrey advised old Basic Research, LLC, that it should try to negotiate a license agreement with Mr. Friedlander, so that old Basic Research, LLC could continue to sell its ECA product. Throughout this time frame old

Basic Research, LLC was but one of Dr. Mowrey's many clients.

By about the end of the 1990's, the consulting services requested by old Basic Research, LLC had reached a point that Dr. Mowrey, through APRL, had begun to devote full time to consulting with old Basic Research, LLC. Time simply did not permit Dr. Mowrey to continue to consult with other nutritional supplement companies.

As Dr. Mowrey, through APRL, consulted with old Basic Research, LLC, Dr. Mowrey saw that one of the many talents which Mr. Gay possessed was the ability to develop a process which was designed to ensure compliance with state and federal laws applicable to the marketing and selling of nutritional supplements. Dr. Mowrey, through APRL, was to play an important role in this process. In particular, Dr. Mowrey was to continue to research and study the world's scientific literature on weight loss compounds, herbs and medicinal plants. In addition, with respect to products which the company was going to consider bringing to the market, and before any such products could be marketed or sold, Dr. Mowrey would create "substantiation binders" into which he, and later other scientists, would place scientific studies and materials which substantiated the contemplated products' efficacy and safety. Additionally, before any advertisement could be run, and before any final decision could even made by the company as to whether to try to sell a particular product, Dr. Mowrey would review the draft advertisements to ensure that the scientific claims which he believed were being made in the advertisements were in fact substantiated by the available scientific evidence.

Although Dr. Mowrey would review proposed advertisements to determine whether the scientific claims in the advertisements were substantiated, he is not an expert in marketing or ad interpretation. Thus, once Dr. Mowrey reviewed an ad and provided his recommendation to the

company concerning whether it should or should not proceed with selling a particular product, there still was no final decision as to whether the ad should be run and the product sold. Indeed, before any such final decisions could be made, the marketing department would have to give final approval to the ad and, importantly, the company's legal counsel, a former FTC attorney, would have to review and approve the proposed ads before they could be run.

Throughout this process, a number of things were always clear. Dr. Mowrey was not an owner or member of the company, and he had no ownership interest in the company. Dr. Mowrey never wrote ad copy, and he never disseminated, or caused to be disseminated, any advertisements for the challenged products. Dr. Mowrey did not have, and has never had, any control over any of the Company Respondents. Nor did he have, nor has he ever had, any decision making authority for any of the Company Respondents. Rather, he was, at all relevant times, an independent consultant -- an independent consultant on weight and/or fat loss products that clearly work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACT

1. Dr. Mowrey received a bachelor of science degree in psychology from Brigham Young University.

2. Dr. Mowrey received a Ph.D. in experimental psychology, with an emphasis in psychopharmacology, from Brigham Young University in 1978.

3. Experimental psychology is the study of the experimental analysis of behavior, and emphasizes the design, conduct, evaluation of experimental studies.

4. Psychopharmacology is the study of the relationship between drugs and behavior,

and involves an understanding of physiology and biochemistry.

5. Dr. Mowrey's course work included training in biochemistry, biology, neurology, and anatomy.

6. Dr. Mowrey wrote his thesis on the anti-nausea effects of ginger root, which was later published as a paper titled "Motion Sickness, Ginger and Pyschophysics," in The Lancet, March 20, 1982, 655-657.

7. During the time frame of 1973 through approximately 1979, Dr. Mowrey was a part-time faculty member at Brigham Young University, where he taught courses in experimental psychology, psychopharmacology, physiological psychology, sensation, cognition, and statistics.

8. During 1977 and 1978, Dr. Mowrey was the director of research at Nature Sunshine Products, fka Amtech Industries, where he performed safety and efficacy tests on the company's products, and helped develop products for the company.

9. From 1979 until approximately 1986, Dr. Mowrey work for Nova Corporation, where he handled the development of new fluid systems based on polymer and surfactant rheological technology, and where he also wrote operations and technical manuals.

10. Throughout his employment with Nova Corporation, Dr. Mowrey continued to do extensive research concerning the effects of medicinal plants, nutrients and other substances at specified dose levels on physiological response and processes.

11. Dr. Mowrey has spent 30 years studying published research concerning the effects of medicinal plants, nutrients and other substances at specified dose levels on physiological response and processes.

12. To fully appreciate the possible usefulness of herbs requires the evaluation how

they have been used across the decades, or centuries, how different cultures evolved the same or very similar applications for the same or similar species of plants, how different forms of extraction yield different medicinal properties, how folklore uses have evolved in the West versus the East, and how old concepts of health and disease translate into the discoveries of modern science. The placebo-controlled, double-blind, randomized scientific experiment is just one part of the study of medicinal plants.

13. Dr. Mowrey regularly reads The International Journal of Obesity, Obesity Research, The New England Journal of Medicine, Journal of the American Medical Association, Metabolism, Cell, The Lancet, Phytomedicine, The Clinical Endocrinology of Metabolism, and Nature and Science, among others.

14. Dr. Mowrey is a member of the North American Association for the Study of Obesity ("NAASO"), and regularly attends NAASO's meetings.

15. Dr. Mowrey is the author of the book The Scientific Validation of Herbal Medicine, which was published in 1986.

16. Dr. Mowrey is the author of the book Guaranteed Potency Herbs Next Generation Herbal Medicine, which was published in 1988.

17. Dr. Mowrey is the author of the book Herbal Tonic Therapies, which was published in 1993.

18. Dr. Mowrey is the author of the book Fat Management! The Thermogenic Factor, which was published in 1994.

19. Commencing in approximately 1986, Dr. Mowrey began to consult, as an independent consultant, with companies that were in the business of manufacturing, marketing

and selling nutritional supplements.

20. As an independent consultant, Dr. Mowrey consulted with nutritional supplement companies, providing a variety of consulting services, including the formulation of products, archival research on ingredients that often included published written summaries, coordinating basic and clinical research on products at neighboring universities, authoring a newsletter on Guaranteed Potency herbs (The Herb Blurb), writing columns and articles for trade magazines, traveling and speaking in seminars and conventions, and providing guidance for other professionals who were evaluating the industry.

21. In addition, Dr. Mowrey would provide advice to people throughout the health food industry and the health industry, including medical doctors, who would call Dr. Mowrey for advice.

22. In approximately 1986, Dr. Mowrey met Respondent Dennis Gay through a mutual friend, Evan Bybee.

23. At the time Dr. Mowrey met Mr. Gay, Dr. Mowrey was working on his book The Guaranteed Potency of Herbs, and was giving seminars and doing radio and television programs on herbal remedies, herbal medicine, and the use of herbs for wellness. Dr. Mowrey had been working out of his home.

24. Mr. Gay and Mr. Bybee, who were business partners, allowed Dr. Mowrey to use a spare office at their business, where he continued to consult with nutritional companies on herbal remedies, herbal medicine, and the use of herbs for wellness.

25. In approximately 1992 Dr. Mowrey began to consult, as an independent consultant, with Basic Research, LLC, which was a predecessor of Respondent Basic Research,

LLC ("Basic Research"), and which had recently been formed by Mr. Gay and Mr. Bybee.

26. Dr. Mowrey had no ownership interest in the original Basic Research, LLC, and was not an employee of the original Basic Research, LLC.

27. The original Basic Research, LLC was only one of Dr. Mowrey's many clients, and Dr. Mowrey continued to consult, as an independent consultant, with his other clients.

28. Prior to 1992, Dr. Mowrey had performed his independent consulting services under the dba Mountain West Institute of Herbal Sciences, and subsequently under the dba American Phytotherapy Research Laboratory.

29. In the latter part of 1992, Dr. Mowrey registered American Phytotherapy Research Laboratory ("APRL") with the Utah Department of Commerce, as a non-profit corporation. Shortly thereafter it became apparent that it was not feasible for APRL to operate as a non-profit corporation and, therefore, its status was changed to a for profit corporation. At all times subsequent thereto, APRL, now known as DBM Enterprises, Inc., has been registered as a for profit corporation with the State of Utah

30. After 1992, through APRL, Dr. Mowrey continued to provide independent consulting services to companies throughout the health food/nutritional supplement industry, and the original Basic Research, LLC continued to be just one of Dr. Mowrey's many clients.

31. At all times relevant hereto, Dr. Mowrey has been employed by APRL, now known as DBM Enterprises, Inc.

32. By the late 1990's, Basic Research LLC was occupying more and more of Dr. Mowrey's time, and Dr. Mowrey eventually began to devote full-time to providing independent consulting services to Basic Research, LLC. At all relevant times, these independent consulting

services were provided to Basic Research, LLC through APRL.

33. Dr. Mowrey has never written ad copy.

34. At no time did Dr. Mowrey disseminate, or cause to be disseminated, any advertisements for the Challenged Products in "commerce" as that term is defined by section 4 of the Federal Trade Commission Act ("FTCA").

35. Dr. Mowrey has never sold any of the challenged products.

36. Dr. Mowrey does not have, and has never had, any control over any of the Company Respondents.

37. Dr. Mowrey does not have, and has never had, any decision making authority for any of the Company Respondents.

38. Dr. Mowrey has not have any authority to act on behalf of any of the Company Respondents.

39. Dr. Mowrey does not have any ownership interest in any of the Company Respondents.

40. As an independent consultant, Dr. Mowrey has been involved in developing the challenged products. However, Dr. Mowrey's involvement was solely in the capacity as an independent consultant, and was limited to making recommendations to the company concerning potential and existing products. At no time did Dr. Mowrey ever have any authority to approve products on behalf of Basic Research, LLC or on behalf of any of the Company Respondents.

41. As a result of his extensive research concerning herbs and herbal products, and their ability to provide benefits to humans, Dr. Mowrey became familiar with a body of literature which demonstrated that ephedra, and particularly ephedra in combination with caffeine, was

effective in promoting weight loss.

42. Thus, during 1980's, Dr. Mowrey's consulting services including providing advice concerning the use of ephedra, and ephedra and caffeine for weight loss.

43. During the early 1990's, Dr. Mowrey became familiar with research which demonstrated that the combination of ephedra, caffeine and aspirin was particularly effective in promoting weight loss, and it was during the very early 1990's when Dr. Mowrey first formulated an ephedra, caffeine and aspirin product for one of his clients (a client which was not the old Basic Research, LLC, and was not related to the old Basic Research, LLC).

44. Since that time, Dr. Mowrey has communicated with, and observed the results obtained by, thousands of consumers who have used ephedra based products for weight loss.

45. In connection with synthesizing the vast literature on medicinal plants, Dr. Mowrey continually searches the world's literature on medicinal plants and related areas of dietary supplementation. The amount of literature being generated around the world in these areas is huge. Its study is extremely time-consuming. Ferreting out those materials that will make immediate contributions to well being and health cannot be restricted to any one discipline or source, but requires an examination of each culture's contributions. Often, important information comes in the form of studies whose authors, for patent, political, economic or personal reasons, have chosen to report only in part. When that happens, Dr. Mowrey contacts the lead investigators and asks questions that will shed more light on the study so that he can more fully evaluate the validity of the work as well as the usefulness of the studied material. Becoming acquainted with these cultural differences is inherent in the nature of the work performed by Dr. Mowrey.

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46. In connection with his extensive and continuous review of the available medical and scientific literature, Dr. Mowrey frequently contacts authors of published scientific papers to ask questions concerning the studies, to obtain additional information concerning the studies where the published papers may be lacking in detail, and to otherwise discuss the findings reported in the papers. The scientists with whom Dr. Mowrey communicated in relation to the challenged products include Dr. Astup, Dr. Blackburn, Dr. Bray, Dr. Breum, Dr. Colker, Dr. Daly, Dr. Frohm, Dr. Greenway, Dr. Heber, Dr. Livieri, and Dr. Riquier.

47. Dr. Mowrey is trained in the scientific method, is a research scientist, and has studied the effects of formulas he has designed on test subjects in original research and on consumers in the market.

48. Dr. Mowrey, and later other scientists, would thoroughly investigate and research a proposed new product before recommending it to the company. Dr. Mowrey maintained voluminous substantiation binders evidencing his research and investigation.

49. Before Basic Research, LLC would go forward with a new product, Dr. Mowrey had to sign off on the product, meaning that Dr. Mowrey had to first conclude that the product worked, and that the efficacy and safety claims which he believed were being made in promotional materials were reasonable and substantiated.

50. In addition, and before Basic Research, LLC, or any of the Company Respondents, would go forward with a new product, marketing had to sign off on the product, and legal counsel had to sign off on the product to insure that there was a reasonable basis for believing that the product worked and that the claims about the product were true, and that all laws and regulations had been complied with by the company.

51. Dr. Mowrey has and had, as at all relevant times, a reasonable basis to believe that the claims made in the promotional materials for the challenged products are true.

52. The consulting services provided by Dr. Mowrey have been of a purely local nature, and do not constitute engagement or participation in interstate commerce.

53. The Commission's counsel have failed to show that there is a reasonable apprehension of future violations of the FTCA by Dr. Mowrey.

54. Dr. Mowrey did not participate in any common enterprise with the Company Respondents.

II. CONCLUSIONS OF LAW

1. The consulting services provided by Dr. Mowrey have been of a purely local nature . As such, Dr. Mowrey's actions have not been in or affecting interstate commerce. Therefore, the Commission lacks subject matter jurisdiction over Dr. Mowrey.

2. Dr. Mowrey had a reasonable basis to believe the advertising claims made for the challenged products were true.

3. Dr. Mowrey did not have actual knowledge of material misrepresentations nor was he recklessly indifferent to the truth or falsity of any misrepresentations, nor did he have an awareness of a high probability of fraud and intentionally avoid the truth.

4. The common enterprise theory is not applicable to the individual respondents.

5. No injunctive relief would be appropriate against Dr. Mowrey because there is no reasonable apprehension of future violations of the FTCA by him.

LEGAL DISCUSSION

I. THE COMMISSION'S PROCESS IS UNFAIR AND UNCONSTITUTIONAL

As an initial matter, Dr. Mowrey notes that he and the other Respondents have made herculean efforts to comply with the Commission's advertising standards, whatever and however vague and undefined those standards may be. Years ago, the Company Respondents instituted a process whereby vast amounts of scientific literature was researched and accumulated in order to demonstrate that there was a reasonable basis for claims that were to be made. Dr. Mowrey himself has spent some thirty years researching and studying the world's scientific literature on medicinal plants, herbs and nutritional supplements, and has published several books on herbs and medicinal plants. He has used that knowledge and experience to create substantiation binders which contain literally thousands of pages of scientific data supporting the challenged products and the advertisements at issue. The end result of that process is a series of weight and/or fat loss products which undisputedly promote weight and/or fat loss -- weight and/or fat loss products which undisputedly work.

And how does the Commission choose to reward Respondents for their multi-year efforts of trying to comply with the Commission's vague and undefined advertising guidelines? Instead of being willing to provide specific guidance as to what level and type of substantiation would be required, the Commission, armed with an expert witness who is the head of the obesity drug research department of Merck & Co. , whose compensation depends on his ability to develop weight loss drugs which will directly compete with the Company Respondents' products, and who freely admits he would testify against Respondents for free, has brought this action on the basis that although the challenged products work, they just do not work as well as the

Commission thinks the advertisements imply.

There is something (indeed many things) fundamentally wrong, unfair and unconstitutional with this picture. Although the Commission has refused to engage in formal rule making, it has long sought to enforce its de facto "competent and reliable scientific evidence" standard. With respect to that standard, that Commission has told advertisers that, prior to making a claim, they must possess "tests, analyses, research, studies, or other evidence based upon the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results." In an effort to comply with this vague and indefinite rule, the company retained the services of Dr. Mowrey to do exactly what is was the Commission said was required -- have a professional in the relevant field (here, the field of medicinal plants and nutritional supplements) evaluate tests, analyses, research, studies (which tests, research and studies have been performed by some of the world's most foremost experts), or other evidence, to determine that there is a reasonable basis before any advertising claims were ever made.

This is exactly what Dr. Mowrey does; it is exactly what he did. He has spent some thirty years studying the vast scientific literature on medicinal plants, nutritional supplements and alternative medicine. He created voluminous substantiation binders verifying the scientific claims and efficacy of the challenged products. His reward? Not only does the Commission sue the Company Respondents, it has sued the very person that the Commission told Respondents they had to have in order to comply with its guidelines -- a professional in the relevant field. A more chilling effect on free speech is hard to imagine. The Commission won't tell advertisers

what level of scientific substantiation they need to have to make claims, but says they must have "professionals in the relevant area" conduct or evaluate "tests, analyses, research, studies, or other evidence," and that such "tests, analyses, research, studies, or other evidence" must be "evaluated in an objective manner by persons qualified to do so" in order to make claims. Then, when the Commission decides to infer ad meanings without any consumer survey evidence, it turns around and sues the very professionals which the Commission told the advertisers they had to enlist. For this and the reasons explained in the Company Respondents' pre-hearing, this proceeding violates Dr. Mowrey's rights under the United States Constitution.

II. DR. MOWREY HAS NO PERSONAL LIABILITY

The evidence at the hearing will clearly demonstrate that there was a reasonable basis for all of the challenged advertisements, and that those advertisements did not violate the FTCA. However, even assuming *arguendo* that one or more of the advertisements violated the FTCA, the evidence will demonstrate that Dr. Mowrey is not individually liable for restitution[1] and that no injunctive relief should issue against him.

A. RESTITUTION

In order to impose restitution liability upon Dr. Mowrey, the Commission would ultimately be required to prove that Dr. Mowrey participated directly in the alleged wrongful acts or had the authority to control them and, in addition, that he "had actual

[1] Dr. Mowrey recognizes that restitution is not directly at issue in this proceeding, inasmuch as any possible restitution would have to be sought by the Commission through a separate Section 19(b) proceeding. However, any decision by the Commission as to whether to commence a Section 19(b) decision will stem from this proceeding and your Honor's rulings herein, Dr. Mowrey chooses to briefly address herein the issue of restitution and the reasons such a proceeding against him would be inappropriate.

knowledge of the material misrepresentations, was recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth." *FTC v. Garvey*, 383 F.3d 891, 900 (9th Cir. 2004). *See also FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997).[2]

Dr. Mowrey has no liability for restitution because did not have any actual knowledge of any material misrepresentations nor was he recklessly indifferent to the truth or falsity of a misrepresentation, nor did he have an awareness of a high probability of fraud and intentionally avoid the truth. Dr. Mowrey freely concedes that he reviewed the advertisements to verify that the scientific claims made in the advertisements were supported by the available evidence. However, Dr. Mowrey is not an expert in marketing or ad interpretation. Thus, once Dr. Mowrey reviewed an ad and provided his recommendation to the company concerning whether it should or should not proceed with selling a particular product, there still was no final decision as to whether the ad should be run and the product sold. Indeed, before any such final decisions could be made, the marketing department would have to give final approval to the ad and, importantly, the company's legal counsel, a former FTC attorney, would have to review and approve the proposed ads before they could be run.[3] Dr.

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[2] In this regard, the Commission has alleged a common enterprise theory in this case. However, the common enterprise theory only applies to corporate respondents and not to individuals. *In Re. Telebrands Corp.*, Docket No. 9313, Initial Decision (September 15, 2004).

[3] Under the Commission's rationale for suing Dr. Mowrey, the Commission could use that same rationale to sue attorneys who advise advertisers. That chilling prospect should be not supported by extending liability in this case to the very type of professional that the Commission told the Company Respondents they had to have in order to make advertising claims.

Mowrey, although an independent consultant, relied upon lawyers for the companies to review the ads and the product labeling to insure compliance with applicable laws and regulations.

Furthermore, there is no evidence that Dr. Mowrey possessed actual knowledge that any of the challenged ads violated the law or were otherwise false or misleading or that there was no reasonable basis for the claims made in the ads. On the contrary, Dr. Mowrey has spent some thirty years studying and research medicinal plants and nutritional supplements. Based upon his years of experience and the available evidence, Dr. Mowrey concluded that the challenged products would be effective in promoting weight and/or fat loss. These conclusions are absolutely correct, as the evidence will clearly demonstrate that the challenged products in fact work.

Furthermore, Dr. Mowrey knew that the Company Respondents received a large volume of letters, e-mails and other communications from their customers praising the products and recounting customer successes with the products.

In *FTC v. Garvey*, *supra*, Mr. Garvey had been a media spokesman for various weight loss products. The Ninth Circuit held that he had no individual liability for restitution because he had no actual knowledge of any alleged material misrepresentations concerning the product and had relied, among other things, upon booklets and a study furnished to him by the company. The Ninth Circuit concluded that it was reasonable for Mr. Garvey to have believed that the information supported the representations he made and that he was not recklessly indifferent to the truth of his statements or aware that fraud was highly probable and intentionally avoided the truth.

Here, Dr. Mowrey did not know of any misrepresentations, he was not reckless and he did

not intentionally avoid the truth. On the contrary, he correctly concluded that the products work. Furthermore, he knew that (a) Timothy Muris, the Commission's former chair, had opined that a single study was sufficient to support advertising claims, (b) a federal judge had ruled that the specific study which was at issue when Mr. Muris rendered his opinion (a study which the Commission's expert in this case criticizes) is a competent and reliable scientific study, and (c) another federal judge had ruled that the company had a reasonable basis for advertising claims made in support of another ECA product. There simply is no basis for the Commission to seek to impose restitution liability on Dr. Mowrey.[4]

B. INJUNCTIVE RELIEF

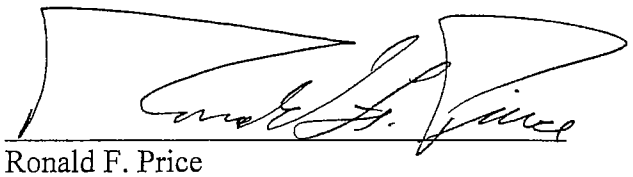
Further, even if the Commission could prove that the challenged advertisements violated the law (which the Commission cannot do), injunctive relief would not be appropriate against Dr. Mowrey.

In order to obtain injunctive relief, the Commission is required to show that there is a reasonable apprehension of future violations of the FTCA by Dr. Mowrey. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *Commodity Futures Trading Commission v. British American Commodity Options Corp.*, 560 F.2d 135 (2nd Cir. 1977); *FTC v. Atlantex Associates*, 1987 WL 20384 *13 (S.D. Fla. 1987), *aff'd* 872 F.2d 966 (11th Cir. 1989). The Commission cannot satisfy that prerequisite. As demonstrated above, Dr. Mowrey acted in good faith, and it was reasonable for Dr. Mowrey to believe

[4] Dr. Mowrey is aware the Commission has asserted that Respondents falsely implied that Dr. Mowrey was a medical doctor, in part because a picture of Dr. Mowrey wearing a white lab coat appeared in certain advertisements. However, as discussed in the Company Respondents' pre-hearing brief, it is undisputed that Dr. Mowrey frequently wears a white lab coat at work.

the scientific claims made in the advertisements were supported by the available evidence. He did not act fraudulently, deceptively or recklessly. He relied on prior rulings of two federal judges, and he participated in good faith in a detailed process in the companies that he believed would insure the ads were proper and legal. There is no need for an injunction against Dr. Mowrey; it would serve no valid public purpose.

Dated: February 9, 2006.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT DANIEL B. MOWREY PH.D.'S PRE-HEARING BRIEF, WITH PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** was provided to the following as follows:

(1) On 9 February 2006, the original and two (2) paper copies sent via Federal Express overnight delivery, and on 10 February 2006, one (1) electronic copy via email attachment in Adobe® ".pdf" format, to: Donald S. Clark, Secretary, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room H-159, Washington, D.C. 20580.

(2) On 9 February 2006, three (3) paper copies sent via Federal Express overnight delivery to: The Honorable Stephen J. McGuire, Chief Administrative Law Judge, 600 Pennsylvania Avenue, N.W., Room H-104, Washington, D.C. 20580.

And on 10 February 2006, to the following as follows:

(3) One (1) copy via e-mail attachment in Adobe® ".pdf" format to Commission Complaint Counsel, Laureen Kapin, Joshua S. Millard, Laura Schneider, Walter C. Gross III, and Edwin Rodriguez all care of lkapin@ftc.gov, jmillard@ftc.gov; lschneider@ftc.gov, wgross@ftc.gov, and erodriguez@ftc.gov, with one (1) paper copy via U. S. Postal Service to Laureen Kapin, Bureau of Consumer Protection, Federal Trade Commission, Suite NJ-2122, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580, facsimile no. (202) 326-2558.

(4) One (1) copy via United States Postal Service to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 18001 Old Cutler Road, Miami, Florida 33157.

(5) One (1) copy via United States Postal Service 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.

(6) One (1) copy via United States Postal Service to Jonathan W. Emord, Emord & Associates, 1800 Alexander Bell Drive, Suite 200, Reston, Virginia, 20191, 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.

(7) One (1) copy via United States Postal Service to Mitchell K. Friedlander, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84111, *pro se*.

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