

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

In the Matter of

BASIC RESEARCH, LLC, et al.

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

PUBLIC DOCUMENT

ANSWER OF RESPONDENT DANIEL B. MOWREY

Pursuant to the Rules of Practice for Adjudicative Proceedings, Rule 3.12, Respondent Daniel B. Mowrey ("Dr. Mowrey") respectfully contests the allegations set forth in Complaint in this administrative proceeding and responds to each numbered paragraph in that charging document as follows:

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

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

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

4. Dr. Mowrey is not a member, owner, officer, manager, director, employee or agent of Respondent Nutrasport, L.L.C. and, therefore, Dr. Mowrey cannot respond on behalf of Nutrasport, L.L.C. However, Dr. Mowrey admits he believes the allegations in paragraph 4 of the Complaint to be true, except that he believes that Nutrasport, L.L.C. is a limited liability company and not a corporation.

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

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

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

8. Admits that Dr. Mowrey is an individual, and that he has an office located at 5742 W. Harold Gatty Dr., Salt Lake City, Utah. All further allegations are denied.

9. Admits that Mitchell Friedlander is an individual. All further allegations are denied.

10. Denied.

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

12. Denied.

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

13. Denies that Dr. Mowrey has disseminated or caused to be disseminated the advertisements referenced in paragraph 13 of the Complaint. Admits that Dr. Mowrey believes that at different times one or more of the limited liability company Respondents placed or disseminated advertisements that contained the language quoted in sub-parts 13(A) through (G) and that Exhibits (A) through (G) to the Complaint appear to be true and accurate copies of Dermalin-APg™, Cutting Gel™, and Tummy Flattening Gel™ advertisements. All remaining allegations are denied, and denies that the quotations which appear in paragraph 13 of the Complaint accurately or fully reflect the express and/or implied messages of the advertisements.

14. Denies that Dr. Mowrey has made the representation referenced in paragraph 14 of the Complaint. The language "causes rapid and visibly obvious fat loss in areas of the body to which it is applied" does not appear in the advertisements identified in paragraph 13, is not defined in the Complaint, and is inherently vague,

subjective, and susceptible to numerous difference interpretation. All remaining allegations are denied.

15. Denies that Dr. Mowrey has made the representations referenced in paragraphs 14 and 15 of the Complaint. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements. All remaining allegations are denied.

16. Denies that Dr. Mowrey has made the representations referenced in paragraphs 14 and 15 of the Complaint. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements. All remaining allegations are denied.

17. Denies that Dr. Mowrey has made the representation referenced in paragraph 17 of the Complaint. The language “causes rapid and visibly obvious fat loss in areas of the body to which it is applied” does not appear in the advertisements identified in paragraph 13, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous difference interpretation. All remaining allegations are denied.

18. Denies that Dr. Mowrey has made the representations referenced in paragraphs 17 and 18 of the Complaint. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements. All remaining allegations are denied.

19. Denies that Dr. Mowrey has made the representations referenced in paragraphs 17 and 18 of the Complaint. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements. All remaining allegations are denied.

20. Denies that Dr. Mowrey has made the representation referenced in paragraph 20 of the Complaint. The language “causes rapid and visibly obvious fat loss in areas of the body to which it is applied” does not appear in the advertisements identified in paragraph 13, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous difference interpretation. All remaining allegations are denied.

21. Denies that Dr. Mowrey has made the representations referenced in paragraphs 20 and 21 of the Complaint. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements. All remaining allegations are denied.

22. Denies that Dr. Mowrey has made the representations referenced in paragraphs 20 and 21 of the Complaint. Further, the phrase “reasonable basis” is

inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements. All remaining allegations are denied.

23. Denies that Dr. Mowrey has made the representation referenced in paragraph 23 of the Complaint. All remaining allegations are denied.

24. Denies that Dr. Mowrey has made the representation referenced in paragraph 23 of the Complaint, and further denies that any other Respondent has made the representation referenced in paragraph 23 of the Complaint. All remaining allegations are denied.

25. Denies that Dr. Mowrey has made the representation referenced in paragraph 25 of the Complaint. All remaining allegations are denied.

26. Denies that Dr. Mowrey has made the representation referenced in paragraph 25 of the Complaint, and further denies that any other Respondent has made the representation referenced in paragraph 25 of the Complaint. All remaining allegations are denied.

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

27. Denies that Dr. Mowrey has disseminated or caused to be disseminated the advertisements referenced in paragraph 27 of the Complaint. Dr. Mowrey admits that he believes that, at different times, one or more of the limited liability company Respondents placed or disseminated advertisements that contained the language quoted in sub-parts 27(A) through (C) and that Exhibits (H) through (J) appear to be true and accurate copies of Leptoprin™ and Anorex™ advertisements. All remaining allegations are denied, and denies that the quotations which appear in paragraph 27 of the Complaint accurately or fully reflect the express and/or implied messages of the advertisements.

28. Denies that Dr. Mowrey has made the representations referenced in paragraph 28 of the Complaint. Further, the language which appears in paragraph 28 of the Complaint does not appear in the advertisements referenced in paragraph 27 of the Complaint, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations. All remaining allegations are denied.

29. Denies that Dr. Mowrey made the representations referenced in paragraphs 28 and 29 of the Complaint. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements. All remaining allegations are denied.

30. Denies that Dr. Mowrey made the representations referenced in paragraphs 28 and 29 of the Complaint. Further, the phrase “reasonable basis” is

inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements. All remaining allegations are denied.

31. Denies that Dr. Mowrey made the representations referenced in paragraph 31 of the Complaint. Further, the language which appears in paragraph 31 of the Complaint does not appear in the advertisements referenced in paragraph 27 of the Complaint, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations. All remaining allegations are denied.

32. Denies that Dr. Mowrey made the representations referenced in paragraphs 31 and 32 of the Complaint. All remaining allegations are denied.

33. Denies that Dr. Mowrey made the representations referenced in paragraph 33 of the Complaint. Further, the language which appears in paragraph 33 of the Complaint does not appear in the advertisements referenced in paragraph 27 of the Complaint, is not defined in the Complaint, and is inherently vague, subjective, and susceptible to numerous different interpretations. All remaining allegations are denied.

34. Denies that Dr. Mowrey made the representations referenced in paragraphs 33 and 34 of the Complaint. Further, the phrase "reasonable basis" is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements. All remaining allegations are denied.

35. Denies that Dr. Mowrey made the representations referenced in paragraphs 33 and 34 of the Complaint. Further, the phrase "reasonable basis" is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements. All remaining allegations are denied.

**PediaLean Product
for Weight Loss in Children**

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

37. Denies that Dr. Mowrey made the representations referenced in paragraph 37 of the Complaint. Further, the language which appears in paragraph 37 of the Complaint does not appear in the advertisements referenced in paragraph 36 of

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

38. Denies that Dr. Mowrey made the representations referenced in paragraphs 37 and 38 of the Complaint. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements. All remaining allegations are denied.

39. Denies that Dr. Mowrey made the representations referenced in paragraphs 37 and 38 of the Complaint. Further, the phrase “reasonable basis” is inherently vague, not defined in the Complaint, and subject to no discernible quantitative or qualitative requirements. All remaining allegations are denied.

40. Denies that Dr. Mowrey made the representation referenced in paragraph 40 of the Complaint. All remaining allegations are denied.

41. Denies that Dr. Mowrey made the representation referenced in paragraph 40 of the Complaint, and denies that any other Respondent made the representation referenced in paragraph 40 of the Complaint. All remaining allegations are denied.

Expertise of Respondent Mowrey

42. Dr. Mowrey denies that he has made the representation referenced in paragraph 42 of the Complaint. Further, to Dr. Mowrey’s knowledge, none of the other Respondents has made the representation referenced in paragraph 42 of the Complaint. All remaining allegations are denied.

43. Dr. Mowrey admits that he is not a medical doctor. However, Dr. Mowrey denies that he or any of the other Respondents has ever represented that Dr. Mowrey is a medical doctor. Dr. Mowrey further denies that the advertisements, in any respect, are false and misleading.

44. Denied.

AFFIRMATIVE DEFENSES

Without assuming any burden of production of proof that he would not otherwise be required to bear under applicable law, Dr. Mowrey asserts the following defenses and reserves his right to raise additional defenses as appropriate.

First Amendment: Free Speech

The Complaint abridges Respondents’, including Dr. Mowrey’s, rights under the First Amendment to the United States Constitution in that the Complaint seeks to punish and prohibit protected commercial speech through the use of ad hoc, non-defined terms

and advertising substantiation principles that lack any measurable degree of definiteness. The Complaint further violates Respondents', including Dr. Mowrey's, First Amendment rights in that the instant administrative proceeding is premised upon so called "implied" representations that are not obvious from the express language of the advertisements at issue, but which the Federal Trade Commission has inferred from the advertisements without the benefit of extrinsic evidence.

Fifth Amendment: Procedural and Substantive Due Process

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

Arbitrary and Capricious Agency Action

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

Laches and Estoppel

The Federal Trade Commission purposely delayed this action in order to time its administrative Complaint with a parallel Congressional investigation and hearing. To the extent that the Commission had a "reason to believe" that Respondents had violated Sections 5(a) and 12 of the Federal Trade Commission Act, the Commission possessed the predicate evidence supporting said determination years before it deliberately chose to commence this action in coordination with a parallel proceeding by a Congressional Committee. The Commission and or its staff delayed this proceeding for political purposes and in doing so, caused Respondents, including Dr. Mowrey, to lose the benefit of testimony from third party witnesses and otherwise caused their defense in this action to become stale.

Lack of Dissemination

Dr. Mowrey did not disseminate any of the advertisements at issue.

Lack of Causation

Dr. Mowrey did not cause any of the advertisements at issue to be disseminated.

Lack of Interstate Commerce

Dr. Mowrey did not act in or personally affect interstate commerce.

Puffery

One or more of the advertisements identified in the Complaint contains one or more claims and/or representations that are vague, generalized, subjective, highly suggestive, and/or exaggerated statements, and/or statements that ordinary consumers do not take literally or rely upon, and/or statements that cannot be substantiated objectively. Such claims and/or representations constitute puffery, which is not likely to mislead a reasonable consumer.

Administrative Procedure Act (5 U.S.C. § 706) -- Improper Agency Action

The Complaint and this enforcement action are based upon regulatory standards governing the quantity and quality of substantiation persons must possess at the time they make express and implied claims in advertisements. The standards fail and have failed to provide reasonable persons, including Dr. Mowrey, with fair notice as to whether contemplated claims in advertisements, including those at issue in this proceeding, are and were permissible and/or allow and have allowed the Commission and/or its representatives to enforce the standards pursuant to their personal or subjective predilections. The regulatory standards are unconstitutional; therefore, this enforcement action constitutes agency actions that is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, contrary to constitutional right, and/or without observance of procedure required by law.

Federal Trade Commission Act (15 U.S.C. § 45(b)) -- No Reason to Believe

The Commission failed, or failed properly, to reach the required determination that it had "reason to believe" Dr. Mowrey has violated the Act prior to initiating this enforcement action. The reasons for that failure include, but are not necessarily limited to, the Commission's use of regulatory standards that are inherently vague and subject to no discernible quantitative or qualitative requirements, and its refusal to consider extrinsic evidence in determining whether the advertisements at issue are false or misleading. In failing, or failing properly, to reach the "reason to believe" determination, the Commission has violated 15 U.S.C. § 45(b) of the Act.

Federal Trade Commission Act (15 U.S.C. § 45(b) -- Interest of the Public

The Complaint and this enforcement action are based upon regulatory standards governing the quantity and quality of substantiation persons must possess at the time they make express and implied claims in advertisements. The standards fail and have failed to provide reasonable persons, including Dr. Mowrey, with fair notice as to whether contemplated claims in advertisements, including those at issue in this proceeding, are and were permissible and/or allow and have allowed representatives of the Commission to enforce the standards pursuant to their personal or subjective predilections. The regulatory standards are unconstitutional; therefore, the Commission's decision to initiate this enforcement proceeding based upon that standard is not to the interest of the public.

Administrative Procedure Act (5 U.S.C. §§ 706(1) and/or 555(b)) – Unreasonable Delay

The Commission did not initiate this proceeding with due regard for the convenience and necessity of the parties or their representatives, or within a reasonable time, as required under 5 U.S.C. § 555(b). Instead, it unreasonably delayed the filing of the Complaint for political or otherwise improper reasons. This unreasonable delay has prejudiced the ability of Dr. Mowrey to present his case in this proceeding.

* * * * *

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

DEMAND FOR ATTORNEY'S FEES

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



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Attorneys for Respondent Daniel B. Mowrey

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2004, I caused the **ANSWER OF RESPONDENT DANIEL B. MOWREY** to be served as follows:

- (1) the original and one (1) paper copy filed by hand delivery and one (1) electronic copy via email to:

Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580

- (2) two (2) paper copies served, by hand delivery to:

The Honorable Stephen J. McGuire
Administrative Law Judge
600 Penn. Ave., N.W., Room H-104
Washington, D.C. 20580

- (3) one copy by first class U.S. mail and one copy by electronic mail to:

Laureen Kapin
Joshua S. Millard
Robin F. Richardson
Laura Schneider
Walter C. Gross III
Federal Trade Commission
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Ronald F. Price

A handwritten signature in black ink, appearing to read "Ronald F. Price", is written over a horizontal line.

RONALD F. PRICE

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