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Attorneys for Respondent Dennis Gay

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	Docket No. 9318
BASIC RESEARCH, LLC, et al.	ALJ: Stephen McGuire

ANSWER OF RESPONDENT DENNIS GAY

Pursuant to Rule 3.12 of the Rules of Practice for Adjudicative Proceedings, Respondent Dennis Gay (Mr. Gay) answers the Complaint on file herein as follows:

1. Admits.
2. Admits.
3. Admits.
4. Admits.
5. Admits.

6. Admits the first sentence. Denies all remaining allegations.
7. Denied, except admits the last sentence.
8. Denied, except admits the last sentence.
9. Denied, except admits that Friedlander has performed marketing services for one or more of the Respondents.
10. Denied.
11. Denied, except admits that at different times certain of the Respondents have advertised, distributed and sold products listed in this paragraph.
12. Denied.
13. Admits that at different times Mr. Gay and certain of the Respondents disseminated the advertisements. Denies that Mr. Gay caused any advertisements to be disseminated, in that the term "caused" is inherently vague, subjective, and susceptible to numerous and different interpretations. Denies the remaining allegations.
14. Denied, in that the terms "causes", "rapid", and "visibly obvious" do not appear in Dermalin-APg(tm) advertisements, are not defined in the Complaint, and are inherently vague, subjective, and susceptible to numerous and different interpretations. All remaining allegations are denied.
15. Denied, in that the phrase "reasonable basis" is not defined in the Complaint, is inherently vague, subjective and is subject to no discernible quantitative or qualitative requirements. Additionally, Mr. Gay believes that substantiation exists now and existed for the claims made in the advertisement for Dermalin-Apg. All remaining allegations are denied.

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

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

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

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

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

21. Denied, in that the phrase "reasonable basis" is not defined in the Complaint, is

inherently vague, and subject to no discernible quantitative or qualitative requirements. Additionally, Mr. Gay believes that substantiation exists now and existed at the time the Tummy Flattening Gel advertisements were made All remaining allegations are denied.

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

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

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

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

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

27. Admits that at different times Mr. Gay and certain of the Respondents disseminated the advertisements. Denies that Mr. Gay caused any advertisements to be disseminated, in that the term "caused" is inherently vague, subjective, and susceptible to numerous and different interpretations. Denies the remaining allegations.

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

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

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

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

32. Denied, in that the terms "causes", and "substantial" do not appear in Leptoprin advertisements, are not defined in the Complaint, and are inherently vague, subjective, and

susceptible to numerous and different interpretations. All remaining allegations are denied.

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

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

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

36. Admits that at different times Mr. Gay and certain of the Respondents disseminated the advertisements. Denies that Mr. Gay caused any advertisements to be disseminated, in that the term "caused" is inherently vague, subjective, and susceptible to numerous and different interpretations. Denies the remaining allegations.

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

38. Denied, in that the phrase "reasonable basis" is not defined in the Complaint, is

inherently vague, and subject to no discernible quantitative or qualitative requirements.

Additionally, Mr. Gay believes that substantiation exists now and existed at the time Pedialean advertisements were made. All remaining allegations are denied.

39. Denied, in that the phrase "reasonable basis" is not defined in the Complaint, is inherently vague, and subject to no discernible quantitative or qualitative requirements.

Additionally, Mr. Gay believes that substantiation exists now and existed at the time Pedialean advertisements were made. All remaining allegations are denied.

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

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

42. Denied.

43. Denied, except admits the first sentence.

44. Denied.

AFFIRMATIVE DEFENSES

First Amendment: Free Speech

The Commissions Complaint abridges Mr. Gay's rights under the First Amendment to the United States Constitution in that the Complaint seeks to punish and prohibit protected

commercial speech through the use of ad hoc and non-defined terms and advertising substantiation standards that lack any measurable degree of definiteness. The Complaint further violates Mr. Gay'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, but which the Federal Trade Commission has inferred from the advertisements without the benefit of extrinsic evidence.

Fifth Amendment: Procedural and Substantive Due Process

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

Arbitrary and Capricious Agency Action

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

Laches

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 Mr. Gay 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 chose to commence this action in coordination with a parallel proceeding by a Congressional Committee. The Commission and or its staff delayed this cause for political purposes and, in doing so, caused Mr. Gay to lose the benefit of testimony from third party witnesses and otherwise caused his defense in this action to become stale.

DEMAND FOR ATTORNEYS’ FEES

Mr. Gay reserves all claims for attorneys= 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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DATED this 30th day of July, 2004.

BURBIDGE & MITCHELL

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Richard D. Burbidge
Attorneys for Respondent Dennis Gay

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2004, I caused to be filed and served the Answer and Grounds of Defense of Respondent Dennis Gay as follows:

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

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

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

The Honorable Steven J. McGuire
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Room H-112
Washington, D.C. 20580

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

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

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

Elaine D. Kolish
Associate Director, Enforcement
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

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*Counsel for Respondent A.G. Waterhouse, L.L.C.,
Klein-Becker USA, L.L.C., Nutrasport, L.L.C.,
Sovage Dermalogic Laboratories, L.L.C., and
Ban, L.L.C.*

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

DATED this 30th day of July, 2004.

BURBIDGE & MITCHELL

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a horizontal line.

Richard D. Burbidge
Attorneys for Respondent Dennis Gay