

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

In the Matter of)
)
)

BASIC RESEARCH, L.L.C.,)
A.G. WATERHOUSE, L.L.C.,)
KLEIN-BECKER USA, L.L.C.,)
NUTRASPORT, L.L.C.,)
SOVAGE DERMALOGIC)
LABORATORIES, L.L.C.,)
BAN, L.L.C.,)
DENNIS GAY,)
DANIEL B. MOWREY, and)
MITCHELL K. FRIEDLANDER,)

Respondents.)
)
)

Docket No. 9318

PUBLIC DOCUMENT

**COMPLAINT COUNSEL’S MEMORANDUM IN OPPOSITION
TO BASIC RESEARCH LLC’S *SECOND MOTION TO COMPEL***

Complaint Counsel hereby submit their *Opposition* to Respondent Basic Research, LLC’s *Second Motion To Compel* (“*Second Motion*”). With its *Second Motion*, Basic Research again seeks an *Order* compelling Complaint Counsel to produce work product, the work product of non-testifying experts, legal research and other publicly-available documents, and documents exempt from disclosure under the law enforcement and/or deliberative process privileges. This *Second Motion* is simply another effort to pierce applicable legal privileges, shift the burden of Respondent’s case research to Complaint Counsel, and consume Complaint Counsel’s resources. Our challenged objections to Respondent’s discovery demands are justified. This Court should reject Respondent’s recycled arguments and deny the *Second Motion to Compel*.

BACKGROUND

On June 15, 2004, the Commission filed a *Complaint* alleging, *inter alia*, that Basic

Research and other related companies and individuals (collectively, “Respondents”) marketed certain dietary supplements with unsubstantiated claims for fat loss and weight loss, and falsely represented that some of these products were clinically proven to be effective, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52. Discovery commenced in late June 2004, when Complaint Counsel served its first *Request for Production of Documentary Materials*. Respondents have served many discovery requests of their own since late July.

On September 9, 2004, Basic Research served its *Second Request for Production of Documents*. Complaint Counsel served its *Response* on September 23, 2004.¹ Our *Response* stated that responsive documents had been produced, or would be produced, and that testifying experts’ work product would be turned over in compliance with the Court’s *Scheduling Order*.² For certain requests, we asserted objections based on vagueness, relevance, Commission law and the RULES OF PRACTICE, privileges applicable to deliberative processes, law enforcement, attorney work product, or non-testifying experts, and/or the fact that the requested documents were not in our possession, custody, or control. *See* Compl. Counsel’s Resp. to Resp’t’s 2d Req. for Prod. at 2-3 (reciting legal and factual grounds of objections).

Thereafter, Complaint Counsel participated in several discovery conferences with

¹ These documents are attached to Respondent’s *Motion*.

² Respondent’s *Second Motion to Compel* was premature with respect to expert discovery. Testifying expert reports were not due to be turned over until October 20, 2004—one week *after* the filing of the instant *Motion to Compel*. In our *Response*, we objected to the premature disclosure of expert materials. We had advised Respondent that we would furnish all responsive, non-privileged documents relating to testifying experts after October 20th. However, Respondents chose to file their *Second Motion* seeking to compel those materials, necessitating our written response. To the extent that Respondent sought the work product of testifying experts, that information has been provided in accordance with the timing of disclosure set forth in the Court’s *Scheduling Order*.

Respondent in an attempt to prevent unnecessary motion practice and reach agreement on issues related to Basic Research's *Second Request for Production*. On October 13, 2004, Respondent truncated these discussions by filing the instant *Second Motion to Compel*.³

In its *Second Motion*, Basic Research demands that Complaint Counsel produce what it calls "complete" responses to document requests numbered 6-7, 10-11, 13, 15-16, 27, 29, 32-33, and 37.⁴ These wide-ranging requests seek: (1) all expert reports and depositions in administrative and Section 13(b) cases not involving Respondents (requests 6-7); (2) all communications with two other federal agencies relating to Respondents or their challenged products (requests 10-11); (3) all documents relating to two rulemaking petitions not submitted by Respondents (request 13); (4) all communications and notes of conversations with authors of scientific studies submitted by Respondents (request 15-16); (5) all documents relating to any requests for clarification of the advertising substantiation standard made by "dietary weight loss product" marketers unrelated to Respondents (request 27), and any requests for staff approval of advertisements made by entities unrelated to Respondents (request 29); (6) all documents and other authorities explaining the concept of "competent and reliable scientific evidence," and what constitutes such evidence for weight loss claims (requests 32-33); and (7) all documents reflecting the meaning of the words

³ Respondent filed its *First Motion to Compel* on September 9, 2004, and we filed a response on October 4, 2004. That *Motion* is currently pending. Complaint Counsel anticipate that we may need to file a *Motion to Compel* related to our *First Request for Production*, served June 25, 2004. Respondents have continued to delay producing material evidence in response to the earliest discovery request made in this case. We are waiting to file this *Motion* in the hopes of obtaining this needed discovery from Respondents without the need for judicial intervention.

⁴ See Resp't's Mot. at 1, 4-18. This *Opposition* employs Respondents' numbering for ease of reference. This numbering does not, however, account for the fact that Respondent had previously made fifteen other document requests. Accounting for these requests, the above-mentioned requests are requests 21-22, 25-26, 28, 30-31, 42, 44, 47-48, and 52, respectively.

“rapid” and “substantial,” as stated in the *Complaint* (request 37).

As discussed below, Complaint Counsel has produced documents in response to the *Second Request for Production*, including documents responsive to some of the above demands. We have well-founded objections to the production of the remainder of the documents demanded. Respondents are not entitled to an *Order* compelling production of those documents.

DISCUSSION

I. Respondents Are Not Entitled to an *Order* Compelling Production of Documents

A. Complaint Counsel Has Fully Responded to Respondent’s *Second Request for Production*

In the first paragraph of argument in its *Motion*, Basic Research declared that Complaint Counsel has not made available documents responsive to Respondent’s *Second Request for Production*. See Resp’t’s 2d Mot. at 4. This statement is untrue. Complaint Counsel provided three full boxes of documents in response to Respondent’s previous discovery requests, and many of those documents were responsive to the *Second Request for Production*. Additionally, our *Response* to the *Second Request* stated that Complaint Counsel would provide other documents as they were located, and we have done just that. Most recently, on October 28, 2004, Complaint Counsel produced another box of documents in compliance with our discovery obligations. Many documents responsive to Respondent’s *Second Request* were included in this production, which also included documents relating to four expert witnesses that are expected to testify at trial in support of the *Complaint*.

Complaint Counsel fully responded to Respondent’s *Second Request for Production* by raising the appropriate objections and by detailing the relevant facts or factors supporting our objections. See Compl. Counsel’s Resp. at 2-4, 7-11, 15-17, 19 (attached to Resp’t’s 2d Mot. as

Ex. 2). Indeed, Complaint Counsel's objections were more detailed than those previously asserted by Respondent.⁵ Following the practice established in this and other administrative proceedings, our *Response* to Respondent's *Second Request for Production* asserted objections based on privilege with particularity, including supporting caselaw citations in Complaint Counsel's general objections, and references to the relevant general objections in our specific responses. As further discussed below, Complaint Counsel have also furnished Respondents with a *Privilege Log* describing the type and subject matters of documents withheld on grounds of privilege.

Respondent's *Second Motion* presents no valid arguments or case precedent requiring Complaint Counsel to supplement its document production. As articulated in our *Response*, and as discussed below, Complaint Counsel have well-justified objections to producing the remaining documents demanded by Respondents. This Court should deny Respondent's *Motion*.

B. Complaint Counsel's Objections Are Justified Under the Applicable RULES and Legal Standards

1. Respondents Are Not Entitled to an Order Compelling Production of Expert Reports and Depositions in Other Administrative or Section 13(b) Cases (Document Requests 6 and 7)

Many of Respondent's document requests are objectionable because they are sweeping and burdensome in nature. These requests they are not reasonably expected to yield information relevant to this case—they simply require Complaint Counsel to perform Respondent's research. These conclusions clearly apply to document requests 6 and 7, which seek production of "*all expert reports* that the . . . Commission has filed in other part three proceedings or proceedings under Section 13(b) of the FTC Act," and "*all depositions* taken of the . . . Commission

⁵ See Resp'ts' Resp. to Compl. Counsel's Req. for Prod. (Aug. 3, 2004) (attached to Compl. Counsel's Resp. to Resp't's First Mot. to Compel as Attachment C).

substantiation experts in any weight loss cases.” Resp’t’s 2d Req. for Prod. at 6.

Respondents are not entitled to production of expert testimony or evidence from other Commission proceedings for several reasons. First, Respondent’s document requests are inconsistent with Commission law, and the requested documents are not reasonably expected to yield information relevant to this matter. *See generally* RULE 3.31(c). Under Commission caselaw, Respondents are not legally entitled to pick over the expert opinions of witnesses in varying Part III and Section 13(b) proceedings in the abstract hope of finding favorable opinion testimony someplace. Commission caselaw holds that “[d]iscovery directed to the Commission’s prior proceedings, including formal proceedings, investigations, compliance proceedings and proposed rulemaking proceedings, is *improper* since the reasons for the Commission’s disposition of these matters, or the reasons for any staff recommendations related thereto, are irrelevant to any of the issues in this proceeding.” *In re Sterling Drug, Inc.*, No. 8919, 1976 FTC LEXIS 460 (Mar. 17, 1976) (emphasis added). “[T]he only relevant documents in this case are those which relate to the investigation which led to this proceeding, not those which may have been gathered in other [industry] investigations.”⁶ Respondents have not disclosed these relevant authorities, nor have they shown how expert testimony on other claims or scientific issues raised in other cases would be probative of the material issues in this case. They are not entitled to the demanded testimony or evidence from other Commission proceedings.

⁶ *In re Metagenics, Inc.*, Docket No. 9267, 1995 FTC LEXIS 78 at *2 (Apr. 10, 1995); *see In re Hoechst Marion Roussel, Inc.*, Docket No. 9293, 2000 FTC LEXIS 134, *14-15 (Aug. 18, 2000) (hereinafter “*Hoechst*”); *see also In re Abbott Labs.*, 1992 FTC LEXIS 296, *7-8 (Dec. 15, 1992) (striking instruction in subpoena “to the extent it purports to require a search of the entire Commission for responsive documents; only files in the custody or control of complaint counsel need be searched”); *In re Kroger Co.*, Docket No. 9102, 1977 FTC LEXIS 55, *4 (Oct. 27, 1977) (“prior proceedings . . . are beyond the scope of legitimate discovery”).

Second, Respondent's demands for reports and depositions in other Commission cases are overbroad, unduly burdensome, and harassing. *See* Compl. Counsel's Resp. to Resp't's 2d Req. for Prod. at 7. As we noted in our *Response*, expert reports filed in other cases are not readily available, nor are they in the possession, custody, or control of Complaint Counsel.⁷ We have turned over documents relating to our testifying experts, including, where available, their previous testimony in FTC actions. *See* Compl. Counsel's Expert Witness List (attached hereto as Exhibit A, without voluminous transcripts appended to original document). This prior witness testimony is material because it bears on the credibility of witnesses' opinion testimony in this matter. Other prior expert testimony is not relevant or material to this action, and production of that prior testimony would impose a significant burden on Complaint Counsel and other FTC staff.

Respondents have offered utterly no legal authority or evidence to controvert our well-grounded assertions that the demanded discovery is irrelevant, inconsistent with Commission law, overbroad, burdensome, or not within the possession of Complaint Counsel. Instead, they simply contend that these two discovery requests are necessary in light of our purported "reticence about the specific substantiation standards that are applicable to this case." Resp't's 2d Mot. at 5. This

⁷ RULE OF PRACTICE 0.12 provides that the Secretary is the legal custodian of the Commission's legal records. Pursuant to that responsibility, the Secretary's Office supervises the storage of more than 65,000 cubic feet of records, the vast majority of which is stored outside Washington, D.C. Commission records are organized and indexed on the basis of unique matter numbers associated with particular matters—to our knowledge, the Commission's record system is not set up in a fashion that permits comprehensive retrieval of stored documents simply by searching for subject matters such as "expert witness reports" or "deposition testimony." A substantial amount of staff time and agency resources would be required to locate and review stored boxes, let alone produce the documents demanded by Respondent. If the Secretary were required to search for these documents, it would be an incredibly time-consuming task that would require the expenditure of significant agency resources and interfere with the normal operations of the Secretary's Office.

contention is incorrect. Complaint Counsel have repeatedly advised Respondents of the scientific evidence needed to substantiate their claims. We did so in advance of this litigation, and we have repeatedly done so since. *See, e.g.*, Mot. to Strike at 5-8; Compl. Counsel's Resp. to Resp't's First Set of Interrogs., at 5-6 (Aug. 27, 2004) (attached hereto as Exhibit B); *see also* Compl. Counsel's Resp. to Resp't Mowrey's First Set of Interrogs., at 19-20 (Oct. 29, 2004) (attached hereto as Exhibit C). Additionally, Basic Research now has the expert reports of the testifying medical experts that Complaint Counsel retained to evaluate product substantiation.⁸ Respondent does not need the expert reports and depositions submitted in other Commission proceedings to evaluate this matter and conduct its defense.

As discussed in our *Motion to Strike*, there is a large body of publicly-available legal guidance on the Commission's advertising substantiation standard. *See* Mot. to Strike at 5-8. Much of this legal guidance consists of decisions construing and analyzing expert testimony. The rulings of the Commission and the Administrative Law Judges are controlling and persuasive authorities in this matter; the unanalyzed reports and testimony of experts witnesses who testified before those bodies are not. If Basic Research seeks opinions on the advertising substantiation standard, it indisputably can obtain such opinions from other sources.⁹ Respondents are hardly

⁸ Respondents do not concede that they have fair notice of the Commission's long-standing advertising substantiation standard because they hope to convert these proceedings into a trial on the merits of the standard itself, and aim to challenge the Commission's legal framework upon appeal. *See, e.g.*, Resp'ts' Supp. Br. *passim*.

⁹ Indeed, Respondent retained former FTC Commissioner Mary L. Azcuenaga as counsel in pre-*Complaint* negotiations with Complaint Counsel. We served our initial discovery request on Ms. Azcuenaga because, at that time, we were under the impression that she had been retained to represent Respondents in this proceeding as well. *See* Certificate of Service, Compl. Counsel's First Req. for Prod. of Doc. Materials (June 25, 2004) (attached hereto as Exhibit D).

bereft of available opinion on the advertising substantiation standard. This Court should deny Respondent's general campaign to investigate reports and opinions related to other Commission proceedings. *See In re Sterling Drug, Inc.*, 1976 F.T.C. LEXIS 460.

2. Respondents Are Not Entitled to an Order Compelling Production of Agency Communications with Other Federal Agencies (Document Requests 10 and 11)

Document requests 10 and 11 improperly seek documents and communications protected from disclosure based on privileges applicable to non-testifying experts, attorney work product, and law enforcement evidentiary files. These requests seek all FTC communications with the National Institute of Health ("NIH") and the U.S. Food and Drug Administration ("FDA") relating to Respondents or their challenged products. We have turned over non-privileged responsive documents, including FDA communications. However, we object to the production of the remaining documents, which are protected by the aforementioned privileges.

Complaint Counsel has consulted with NIH scientists in anticipation of litigation and as part of this litigation. *See* Compl. Counsel's Resp. to Resp't's 2d Req. for Prod. at 8. As listed in Complaint Counsel's *Privilege Log*, Complaint Counsel has consulted with NIH staff regarding the "Livieri study" that Respondents have advanced as the primary evidence in support of their claims for the PediaLean product challenged in the *Complaint*. *See* Compl. Counsel's Priv. Log (Oct. 15, 2004) (attached hereto as Exhibit E). As discussed below, to the extent that NIH staff have served as non-testifying scientific experts for Complaint Counsel, and communicated their conclusions in writing to staff attorneys, such information is protected from disclosure as both information related to a non-testifying expert and as work product. Similarly, with respect to internal documents relating to communications between FTC staff and non-testifying scientific

experts at FDA, our recorded mental impressions and observations regarding Respondents' purported product substantiation are protected from disclosure based on these privileges, and the law enforcement investigatory files privilege.

i. Non-Testifying Expert Privilege

First, with respect to the non-testifying expert privilege, RULE 3.31 provides that a party may discover facts known or opinions held by an expert who is not expected to be called to testify “only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” RULE 3.31(c)(4)(ii). Complaint Counsel does not expect to call the NIH and FDA scientists who have served as consulting experts to testify at the hearing in this matter. Accordingly, the facts known and opinions held by these scientists are generally exempt from discovery.

A party seeking discovery from a non-testifying retained expert faces a “heavy burden.” *In re Telebrands Corp.*, Docket No. 9313, 2003 FTC LEXIS 201, *2 (Dec. 23, 2003); *see Hoover v. Dep't of Interior*, 611 F.2d 1132, 1142 n.13 (5th Cir. 1980). A mere assertion that exceptional circumstances exist, without supporting facts, is not sufficient to compel the disclosure of otherwise nondiscoverable documents. *Martin v. Valley Nat'l Bank*, 1992 U.S. Dist. LEXIS 11571, *13 (S.D.N.Y. 1992).¹⁰ In the present case, Respondent has not even asserted that exceptional circumstances exist. Respondent simply failed to challenge our assertion of the non-testifying expert witness privilege. *See* Resp't's 2d Mot. at 9. As a result, Respondent is not

¹⁰ Those cases allowing such discovery from non-testifying experts often involve situations having destroyed or non-available materials or situations in which the expert might also be viewed as a direct fact witness. *See In re Telebrands Corp.*, 2003 FTC LEXIS 201, *2 (citing WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 2032).

entitled to an *Order* compelling disclosure of the requested documents.

ii. Work Product Privilege

The demanded documents are also privileged work product. “The work product privilege provides a lawyer with a degree of privacy to assemble information, sift the facts, prepare legal theories and plan strategy free from unnecessary intrusion by opposing counsel.” *In re Detroit Auto Dealers Ass’n*, Docket No. 9189, 1985 WL 260986 (Apr. 17, 1985). The privilege “further[s] the interests of clients and, ultimately, the cause of justice.” *In re Schering Corp.*, Docket No. 9232, 1990 FTC LEXIS 133, *2 (May 10, 1990). This privilege has been codified in the Commission’s RULES OF PRACTICE as follows:

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

RULE 3.31(c)(3) (emphasis added). Moreover, work product that reveals “the attorneys’ mental processes . . . cannot be disclosed simply upon a showing of substantial need and inability to obtain the equivalent without undue hardship.” *Hoechst*, 2000 FTC LEXIS 134, at *11 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981)).

With respect to documents generated in anticipation of litigation, Respondent has failed to provide any specific reasons or assert any arguments as to why any of the privileges should be pierced. *See* Resp’t’s 2d Mot. at 7-10. Respondent has utterly failed to support its *Motion* with any statements of fact or any showing of substantial need or inability to obtain the equivalent documents without undue hardship. Instead, Respondent simply argues that Complaint Counsel

has failed to adduce facts in support of the asserted work product privilege, and that Complaint Counsel have therefore waived the privilege. *See* Resp't's 2d Mot. at 7-10.

Complaint Counsel have adduced facts in support of its work product privilege assertions. *See* Compl. Counsel's Privilege Log. Respondent's waiver argument is specious. This argument was made possible only by a brief delay of three days in the production of our *Privilege Log*. On October 12, 2004, before the filing of the present *Motion*, Complaint Counsel verbally advised Respondents that this short delay would occur, and Respondents confirmed in writing that our *Privilege Log* would be made available on October 15, 2004. Basic Research then made two tactical decisions. It decided to file its *Second Motion to Compel* almost immediately, on the following day, and it decided to omit *any* mention of this brief delay from its waiver argument.¹¹ These circumstances do not amount to the serious sort of delay required for waiver of the asserted work product privilege. "Waiver of privileges is a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith." *Hoechst*, 2000 FTC LEXIS 134, *3. The demanded inter-agency documents and communications evidencing the thought processes of Commission attorneys clearly fall within the confines of the work product privilege.

iii. Law Enforcement Investigatory Files Privilege

In addition to the preceding legal privileges, documents relating to communications between FTC attorneys and FDA scientists regarding this matter are also protected from disclosure based on the law enforcement investigatory files privilege. This privilege protects

¹¹ This omission is regrettable not only because it gives rise to a baseless waiver argument, but also because Respondent itself took over *three months* (until October 7, 2004), merely to produce a *list* of documents that it withheld from production in response to our first (June 25, 2004) *Request for Production*.

investigatory files compiled for law enforcement purposes that would tend to reveal law enforcement techniques or sources. *Hoechst*, 2000 FTC LEXIS 134, at *5-6. Admittedly, the privilege is not absolute; a demonstrated, specific need for material may prevail over a generalized assertion of privilege. However, the claimant *must* make a showing of necessity sufficient to outweigh the adverse effects the production would engender. *Id.* at *6-7. Respondents have made no such showing here. They have not suggested why the demanded documents are necessary at all to their defense, or why these documents are sufficiently necessary to justify the requested intrusion into law enforcement methods and investigatory file contents. *See* Resp't's 2d Mot. at 9.

FTC attorneys have communicated with NIH and FDA in evaluating Respondents' conduct and potential violations of the FTC Act. Withheld documents relating or referring to these communications were compiled for the purpose of enforcing this law. Our choice of non-testifying scientific experts, scientific topics, specific areas of inquiry, and questions would tend to reveal our law enforcement sources and techniques. Documents and communications revealing such matters are exempt from disclosure. *See Hoechst*, 2000 FTC LEXIS 134. Further, these materials also include staff attorneys' mental thoughts and impressions and would constitute work product as well as communications with non-testifying scientific experts. Therefore, persons with whom Complaint Counsel consulted, and any extrinsic evidence discussed with them, are protected from disclosure at this time based on privileges applicable to attorney work product and law enforcement files or methods, and RULE 3.31(c)(4)(ii) on non-testifying experts.

3. Respondents Are Not Entitled to an Order Compelling Production of Documents Relating to a Petition for Rulemaking Submitted by Others (Document Request 13)

Respondent's next document request is not reasonably expected to yield relevant

information and improperly seeks materials protected from disclosure based on work product and deliberative process privileges. This request seeks “all documents relating to any request for rulemaking submitted to the Federal Trade Commission by Jonathon W. Emord, Esq.” Resp’t’s 2d Req. for Prod. at 6. Respondents are seeking non-public documents relating to a petition for rulemaking submitted by other marketers. These documents are completely unrelated to the issues raised by the *Complaint*.

Notwithstanding our relevance objections, and as acknowledged by Respondent, Complaint Counsel has produced petitions and Commission decisions denying petitions relating to requests for rulemaking by Jonathon Emord, Esq. These documents are public records accessible on the FTC’s website. We object, however, to the production of other, non-public documents, which are covered by either the work product or deliberative process privileges.

The RULES OF PRACTICE limit discovery to information reasonably expected to yield information relevant to the allegations of the *Complaint*, to the proposed relief, or to the defenses of any Respondent. *See* RULE 3.31(c)(1). Respondent claims that documents relating to certain requests for rulemaking are relevant to its defense that the “FTC’s rules of practice and procedure for investigating advertisements like the ones at issue in this case lack sufficient definiteness to provide advertisers, such as Respondent, with sufficient notice as to what conduct is prohibited.” Resp’t’s 2d Mot. at 10-11. However, Respondent’s challenges to the Commission’s determinations, framework, or choice of regulatory approaches are dilatory and have no place in this proceeding. Specifically with respect to petitions for rulemaking, the Commission has held that “[d]iscovery directed to . . . proposed rulemaking proceedings, is improper since the reasons for the Commission’s disposition . . . or the reasons for any staff recommendations related thereto, are

irrelevant to any of the issues in this proceeding.” *In re Sterling Drug, Inc.*, 1976 FTC LEXIS 460. Document request 13 seeks irrelevant documents, and no *Order* compelling production of these documents should issue.

Respondents’ defense is a question of law relating to the Commission’s legal framework. If Respondents have a valid defense, and we have consistently argued to the contrary,¹² then the public documents already produced to Respondents are sufficient. Moreover, non-public and pre-decision documents are exempt from disclosure. Such documents memorialize the thought processes, internal determinations, analysis, and opinions of the Commission’s staff, management, and the Commissioners themselves. Although both work product and deliberative process privileges apply in this context,¹³ we focus on the deliberative process privilege, which has not been previously addressed.

The deliberative process privilege protects communications that are part of the decision-making process of a governmental agency. *See Hoechst*, 2000 FTC LEXIS 134, at *8 (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-52 (1975)). This legal privilege permits the

¹² Pre-*Complaint* deliberations are irrelevant and not properly part of this case. *See generally In re Exxon Corp.*, Docket No. 8934, 1981 FTC LEXIS 113 (Jan. 19, 1981) (“the issue to be litigated is not the adequacy of the Commission’s pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred”); *see also* Compl. Counsel’s Supp. Br. at 7-8; Mot. to Strike at 18-20.

¹³ Agency rulemaking on controversial subjects of public interest frequently may present the prospect of litigation in the form of a challenge to a final rule. Pre-decisional agency documents and deliberations may thus constitute work product if there is a prospect of litigation. *See generally Maine v. Dep’t of Interior*, 298 F.3d 60 (1st Cir. 2002) (concluding that work product privilege might apply to documents prepared by a state agency in response to rulemaking petition, if litigation was expected); *see also United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (holding that documents may be deemed prepared for litigation if “they can be fairly said to have been prepared or obtained because of the prospect of litigation”).

government to withhold materials that “reflect advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated.” *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (citing *Sears, Roebuck & Co.*, 421 U.S. at 150); *see also* RULE 4.10(a)(3).¹⁴ The privilege “was developed to promote frank and independent discussion among those responsible for making government decisions and also to protect against premature disclosure of proposed agency policies or decisions.” *Warner*, 742 F.2d at 1661 (citing, *inter alia*, *EPA v. Mink*, 410 U.S. 73, 87 (1973)). This is a qualified privilege, which may be overcome by a sufficient showing of need.¹⁵

In this case, Respondents have pointed to *no* exceptional circumstances that would warrant breaching the deliberative process privilege and providing information relating to other parties’ rulemaking requests. We agreed to provide decisional documents to Respondent, who now argues that this professional courtesy somehow conceded the relevance of *pre-decisional* and non-public documents. *See* Resp’t’s 2d Mot. at 11. However, Respondent has not shown

¹⁴ RULE 4.10(a)(3) provides that “nonpublic material” includes “interagency or intra-agency memoranda or letters which would not routinely be available by law to a private party in litigation with the Commission. This exemption preserves the existing freedom of Commission officials and employees to engage in full and frank communication with each other.”

¹⁵ *See Hoechst*, 2000 FTC LEXIS 134, at *8:

A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government’s interest in nondisclosure. . . . Among the factors to be considered in making this determination are: (1) the relevance of the evidence; (2) the availability of other evidence; (3) the government’s role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.

why it genuinely needs the demanded documents to present its defense.¹⁶ These documents are not relevant to this action, and we have asserted applicable privileges. No *Order* compelling the production of the withheld documents should issue.

4. Respondents Are Not Entitled to an *Order* Compelling Production of Communications or Notes of Conversations with Authors of Submitted Scientific Studies (Document Requests 15-16)

Document requests 15 and 16 are overbroad and improperly seek documents and communications protected from disclosure based on the work product privilege. Document request 15 seeks “all communications with authors of any studies or publications submitted to the Federal Trade Commission by the Corporate Respondents,” and document request 16 seeks “all notes of conversations with authors of studies or publications submitted to the Federal Trade Commission by the Corporate Respondents.”

These requests are clearly overbroad. During the course of the staff’s investigation, we received substantiation relating to many health or weight-loss related products not identified in the Commission’s *Complaint*. Some of Respondents’ other products include “Aprinol,” “Breast Augmentation Serum,” “Lip Plumper,” “Lipopeptide-Y,” “Luprinol,” “Oxy Poppers,” and “TestroGel.”¹⁷ The fact that Respondents marketed these products is relevant to the scope of

¹⁶ In addition, these documents are not in the custody and control of Complaint Counsel. The RULES note that “information shall not be deemed to be available insofar as it is in the possession of the Commissioners, the General Counsel, the Office of Administrative Law Judges, or the Secretary in his capacity as custodian or recorder of any such information, or their respective staffs.” See RULE 3.35(a). This discovery request will likely necessitate a search of the Offices of the Secretary or the General Counsel.

¹⁷ In their *Motion*, Respondent apparently forgot that the FTC staff’s pre-*Complaint* investigation included products such as those above. See Resp’t’s 2d Mot. at 13 (“Requests Nos. 15 and 16 are not overbroad. Respondent is not aware of any studies . . . submitted to the FTC that did not relate to the challenged products or to the instant case.”). Evidently Respondent did

relief, but whether claims for these products were properly substantiated is *not* an issue for trial. Accordingly, Respondent's requests are overbroad because they are not limited to the products challenged in this case.

Moreover, Respondents specifically seek "notes of conversations," which are attorney work product. Complaint Counsel's notes of conversations reflect and embody our observations, thoughts, and mental processes, and go directly to the heart of the work product privilege. *See Hoechst*, 2000 FTC LEXIS 134, at *10-11.

Respondent did not specifically address Complaint Counsel's objections with respect to these issues, or provide any showing of exceptional circumstances that would warrant the disclosure of this privileged information. Basic Research easily could engage experts to review its materials and provide its own thoughts and observations regarding the proffered studies. Presumably, Respondents have done so already. In addition, the authors of these studies are equally available to Respondents to interview and conduct their own inquiries. No *Order* compelling the production of the withheld documents should issue.

5. Respondents Are Not Entitled to an *Order* Compelling Production of All Documents Relating to Any Other Marketers' Requests for Clarification or Approval of Advertising (Document Requests 27, 29)

Respondents' next two demands focus on the activities of other advertisers. Document Request 27 seeks "[a]ll documents relating to requests by advertisers for clarification on the substantiation standards applicable in this case," and document request 29 seeks "[a]ll documents relating to requests made to the Federal Trade Commission by advertisers seeking approval of

not confer with its pre-*Complaint* counsel, an attorney of record in this case who facilitated the production of substantiation relating to other products, before filing its *Motion*.

advertising prior to dissemination.” Resp’t’s 2d Req. for Prod. of Docs. at 7-8. These two demands are overbroad, unduly burdensome, irrelevant or harassing, and inconsistent with Commission law.

Respondents assert that they require all documents relating to any requests for staff clarification or approval of other marketers’ advertising because they need “clarification as to what substantiation standards are being applied in this case.” Resp’t’s 2d Mot. at 14. They also claim that these materials are relevant to their invalid due process defense. *See id.* at 16. Again, “Respondents appear to be burying their heads in the sand with respect to the Commission’s long-standing substantiation standard.” Mot. to Strike at 7-8.

Respondents’ demands are not limited in scope, and go far beyond documents within our possession, custody, or control. Respondents seek to compel Complaint Counsel to search through the Commission’s entire files for information related to other marketers’ correspondence. As previously discussed, the proposed “subject matter” search imposes a serious burden upon Complaint Counsel and FTC staff. *See supra* n.7. Notably, Respondent’s demand bears on other marketers’ activities, and seeks to compel the production of confidential communications entitled to protection under Commission law. “Private parties are not permitted to discover information provided to the government by third parties when its disclosure would contravene a strong statutory policy of non-disclosure and the FTC Act embodies just such a policy.” *In re Wheat Farmers Antitrust Class Action Litig.*, 1983-1 Trade Cas. ¶ 65,256 at 69,522 (D.D.C. 1983) (citations omitted). The Commission has brought approximately 200 weight loss cases, and the staff has investigated others and provided information and business education materials to many marketers. Respondents’ demands are unreasonable, and should not be enforced.

Assuming *arguendo* that the Commission's advertising substantiation standard is unclear to Respondents, it begs reason for Respondents to demand non-public documents from the Commission. More than sufficient information on this standard has already been produced by Complaint Counsel. *See infra* pages 21-23. Due to the scope of Respondent's demands, many of the requested documents will constitute attorney work product or relate to agency deliberations. The information sought by Respondent is readily available through the expedient of performing legal research. *See infra* page 21 (discussing Respondents' efforts to obtain publicly-available research from Complaint Counsel).¹⁸ Respondents should perform such research.

Documents relating to any requests for staff clarification or approval of other marketers' advertising are not relevant to this proceeding. No *Order* compelling the production of these documents should issue.

6. Respondents Are Not Entitled to an *Order* Compelling Production of Written Authorities on Competent and Reliable Scientific Evidence (Document Requests 32-33)

Document requests 32 and 33 are overbroad, unduly burdensome, and improperly seek to compel Complaint Counsel to conduct Respondent's legal research. Document request 32 seeks "[a]ll documents which define or explain the meaning of 'competent and reliable scientific evidence,'" and document request 33 seeks "[a]ll documents which purport to establish what constitutes 'competent and reliable evidence' for purposes of supporting efficacy claims of weight loss products."

The RULES OF PRACTICE provide that discovery may be limited if "[t]he discovery sought

¹⁸ Complaint Counsel will not reiterate its arguments on Respondent's due process defense, previously presented in our pleadings on the *Motion to Strike*. For present purposes, it is sufficient to note that the demanded documents are not probative of material issues in this matter.

is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome or less expensive,” or if “[t]he burden and expense of the proposed discovery outweigh its likely benefit.” RULE 3.31(c)(1)(i), (iii). Here, the discovery requested is extraordinarily burdensome and duplicative of previous discovery requests, and calls for legal research and other documents containing legal analyses and conclusions.

Complaint Counsel have, in good faith, attempted to produce responsive documents. *See* Compl. Counsel’s Resp. to Resp’t’s Second Req. for Prod., at 17.¹⁹ We have furnished Respondents with a great deal of information relating to the Commission’s substantiation standard. However, Respondents have refused to reasonably limit the scope of their present demands. Request 32 is not limited in scope at all, and request 33, while limited to weight loss claims, still encompasses notes, memoranda, or other work product, and filings, reports, orders, and other documents for each of the approximately 200 weight loss cases filed by the Commission. Moreover, this request encompasses publicly-available publications not produced by the Commission, which are obtainable through conventional legal research without consumption of Complaint Counsel’s resources. This request also may include, in its sweep, documents relating to Commission deliberations, other investigations, and other proceedings. Respondent’s requests are simply too broad and impose an undue burden on Complaint Counsel.

¹⁹ The requests appear to encompass all Commission decisions in product substantiation cases in general, and in weight loss cases, specifically. Such decisions can be easily accessed by Respondent engaging in its own legal research. To search for responsive documents, Complaint Counsel accessed the public FTC website and printed hundreds of pages of publicly-available FTC publications. These documents, as well as other publicly available FTC publications and documents, have been turned over to Respondent. Additional production would impose an undue burden on Complaint Counsel. Respondent ultimately must take responsibility for performing its own legal research.

Significantly, Respondent has failed to support its *Motion to Compel* with any showing of necessity. Responsive documents are publicly available from other sources than Complaint Counsel. Respondent is not entitled to cast a dragnet for all legal documents and authorities on the competent and reliable scientific evidence requirement and then compel Complaint Counsel to pull the net in. “Discovery was hardly intended to enable a learned profession to perform on wits borrowed from the adversary.” *In re Detroit Auto Dealers Ass’n*, Docket No. 9189, 1985 WL 260986 (Apr. 17, 1985). Therefore, this Court should deny Respondent’s *Motion to Compel* additional documents in response to requests 32 and 33.

7. Respondents Are Not Entitled to an Order Compelling Production of All Documents Related to the Meaning of the Words “Rapid” and “Substantial” (Document Request 37)

Document request 37 is overbroad, unduly burdensome, and improperly seeks documents and communications protected from disclosure based on the non-testifying expert witness and work product privileges. Request 37 seeks “[a]ll documents in the FTC’s custody and control which reflect the meaning of the words ‘Rapid’ and ‘Substantial’ as charged or used in the Complaint.” Resp’t’s 2d Req. for Prod. at 8.

This request is cumulative or duplicative of past discovery disclosures, and other materials furnished to Respondent. *See, e.g.*, Compl. Counsel’s Resp. to Resp’t’s First Set of Interrogs., at 7-10 (Aug. 27, 2004) (specifically identifying numerous facts and factors bearing on meaning of phrases “rapid” and “substantial” as alleged in the *Complaint*) (attached hereto as Exhibit B);²⁰ *see*

²⁰ Complaint Counsel’s response articulated the context by which these words will be evaluated, noting that the “meaning of these terms is conveyed through the net impression of Respondent’s ads and the circumstances surrounding those ads.” Compl. Counsel’s Resp. at 8. Complaint Counsel’s response further described this standard, recognizing that the interpretation of these words depends on “the language used in Respondents’ ads, the depictions and visual

also Compl. Counsel's Resp. to Resp't's First Req. for Admissions, at 7 (Aug. 27, 2004) (attached hereto as Exhibit F). Moreover, Complaint Counsel has turned over expert reports and discovery that specifically relate to the use of the term "substantial" as used in the *Complaint* with reference to advertising for the Pedialean product. To the extent that there are non-testifying experts on this subject, any notes or memoranda that may exist as a result of those consultations with these persons are protected from disclosure as both information related to a non-testifying expert and as work product.²¹

Respondent's request seeks information obtainable from public sources and experts other than Complaint Counsel. The terms "rapid" and "substantial" have been used extensively in FTC cases and would require an extensive search to discover responsive documents from other cases. Such discovery is burdensome and unwarranted under Commission caselaw. *See supra* pages 6-7. No *Order* compelling Complaint Counsel to perform such case research for Respondent under the guise of "discovery" should issue.

images, the prominence of certain text, the circumstances surrounding the ad, common usage of terms, the use of juxtaposition, and evidence of intent." *Id.* (citations omitted).

²¹ Bare assertions of substantial need do not constitute the "exceptional circumstances" contemplated by Rule 3.31(c)(4)(B)(ii) or the "undue hardship" required by Rule 3.31(c)(3). *See In re Schering Corp., supra*, slip op. at 2 ("It is not enough for defendant to assert that the information is critically important, . . . relevant, and not available by practical means.") (applying Rule 3.31(c)(3) and quoting *Connelly*, 96 F.R.D. at 342); *see also Detroit Auto Dealers Ass'n, supra*, 1985 WL 260986 ("Respondents state that information in the withheld documents is crucial to preparation of their defense. This general statement fails to show that the information is essential to a fair determination of the cause.").

Of course, should any of the withheld information be relied upon or reviewed by Complaint Counsel's testifying experts in forming opinions, "the information is discoverable." *Telebrands*, 2003 F.T.C. Lexis 201, *4. Complaint Counsel are not aware of any withheld information that was reviewed or relied upon by our testifying experts.

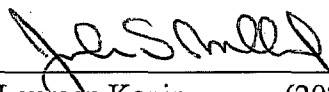
CONCLUSION

This Court should reject Respondent's renewed effort to breach work product, non-testifying expert, law enforcement, and deliberative process privileges. Respondent has failed to make the necessary showings of need and unavailability from other sources. These privileges "stop" Respondent from obtaining the information that it demands. "To ignore these privileges would seriously interfere with the free flow of ideas and information at the Commission." *In re Flowers Indus., Inc.*, Docket No. 9148, 1981 FTC LEXIS 117, at *2 (Sept. 11, 1981).

Moreover, as discussed in some detail in our recent *Supplemental Brief* on the pending *Motion to Strike*, Respondent's document demands relate to invalid defenses challenging the Commission's procedures and decisionmaking processes. These unreasonable requests include overbroad and unduly burdensome demands not reasonably expected to yield information relevant to the allegations of the complaint, the proposed relief, or properly-asserted defenses.

The *Second Motion to Compel* is yet another skirmish in Respondent's ongoing campaign to engage Complaint Counsel in unnecessary disputes peripheral to the true question in this case— whether Respondents actually violated the FTC Act. For the foregoing reasons, Complaint Counsel respectfully request that the Court deny Respondent's *Motion to Compel*.

Respectfully submitted,



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

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

November 3, 2004

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

In the Matter of)

BASIC RESEARCH, L.L.C.,)
A.G. WATERHOUSE, L.L.C.,)
KLEIN-BECKER USA, L.L.C.,)
NUTRASPORT, L.L.C.,)
SOVAGE DERMALOGIC)
LABORATORIES, L.L.C.,)
BAN, L.L.C.,)
DENNIS GAY,)
DANIEL B. MOWREY, and)
MITCHELL K. FRIEDLANDER,)

Respondents.)

Docket No. 9318

PUBLIC DOCUMENT

ORDER DENYING BASIC RESEARCH LLC'S SECOND MOTION TO COMPEL

On October 13, 2004, Respondent Basic Research LLC filed its *Second Motion to Compel*, which seeks additional documents in response to its *Second Request for Production of Documents*. Complaint Counsel filed its response and *Opposition* on November 3, 2004.

Complaint Counsel's Response to Respondent Basic Research LLC's Second Request for Production of Documents meets the requirements of RULE OF PRACTICE 3.37. Accordingly, the *Second Motion* is DENIED.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

**ATTACHED EXHIBITS TO
COMPLAINT COUNSEL'S MEMORANDUM IN OPPOSITION
TO BASIC RESEARCH LLC'S SECOND MOTION TO COMPEL**

- Exhibit A - Compl. Counsel's Expert Witness List (Oct. 6, 2004)
(excluding attachments)
- Exhibit B - Compl. Counsel's Resp. to Resp't's First Set of Interrogs.
(Aug. 27, 2004)
- Exhibit C - Compl. Counsel's Resp. to Resp't Mowrey's First Set of
Interrogs. (Oct. 29, 2004)
- Exhibit D - Certificate of Service, Compl. Counsel's First Req. for Prod. of
Doc. Materials (June 25, 2004)
- Exhibit E - Compl. Counsel's Priv. Log (Oct. 15, 2004)
- Exhibit F - Compl. Counsel's Resp. to Resp't's First Req. for Admissions
(Sept. 24, 2004) (excluding attachments)

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

In the Matter of)
)
)

BASIC RESEARCH, L.L.C.,)
A.G. WATERHOUSE, L.L.C.,)
KLEIN-BECKER USA, L.L.C.,)
NUTRASPORT, L.L.C.,)
SOVAGE DERMALOGIC)
LABORATORIES, L.L.C.,)
BAN, L.L.C.,)
DENNIS GAY,)
DANIEL B. MOWREY, and)
MITCHELL K. FRIEDLANDER,)

Respondents.)
)
)

Docket No. 9318

PUBLIC DOCUMENT

COMPLAINT COUNSEL'S EXPERT WITNESS LIST

Pursuant to the Court's September 21st *Order*, Complaint Counsel hereby submit the following *Expert Witness List* for our case-in-chief. As Complaint Counsel obtain additional information during discovery, we may modify or supplement this list. We reserve the right to call additional witnesses for rebuttal and to call witnesses listed on Respondents' *Expert Witness List*. Complaint Counsel may call the following expert witnesses to testify:

- Robert H. Eckel, M.D.
University of Colorado Health Sciences Center
4200 East Ninth Avenue, B-151
Denver, Colorado 80262

A copy of Dr. Eckel's *Curriculum Vitae* and a list of cases in which he testified or gave depositions are attached. There are no copies of trial or deposition transcripts in the possession, custody, or control of Dr. Eckel or Complaint Counsel.

- Steven B. Heymsfield, M.D.
St. Luke's-Roosevelt Hospital
Obesity Research Center
1090 Amsterdam Ave. #14C
New York, NY 10025

A copy of Dr. Heymsfield's *Curriculum Vitae* and a list of cases in which he testified or gave depositions is attached. There are no copies of trial or deposition transcripts in the possession, custody, or control of Dr. Heymsfield or Complaint Counsel.

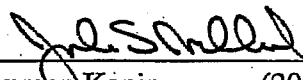
- Michael B. Mazis, Ph.D.
Professor of Marketing
The American University
Kogod School of Business
27 Kogod School of Business
4400 Massachusetts Avenue, NW
Washington, DC 20016

A copy of Professor Mazis's *Curriculum Vitae* and a list of cases in which he testified or gave depositions is attached. Also attached, in electronic format, are copies of transcripts in the possession, custody, or control of Professor Mazis or Complaint Counsel.

- Geoffrey Nunberg, Ph.D.
Consulting Full Professor, Department of Linguistics
Senior Researcher, Center for the Study of Language and Information
Stanford University
Ventura Hall
Stanford, CA 94305

A copy of Professor Nunberg's *Curriculum Vitae* and a list of cases in which he testified or gave depositions are attached. There are no copies of transcripts in the possession, custody, or control of Professor Nunberg or Complaint Counsel.

Respectfully submitted,



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

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

Dated: October 6, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2004, I caused *Complaint Counsel's Expert Witness List* to be served as follows:

one (1) electronic copy via email and one (1) paper copy by first class mail, with an attached CD-ROM disc, to the following persons:

Stephen E. Nagin
Nagin Gallop Figueroa P.A.
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Miami, FL 33133-4741
(305) 854-5353
(305) 854-5351 (fax)
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For Respondents

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FeldmanGale
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(305) 358-3309 (fax)
JFeldman@FeldmanGale.com
For Respondents
A.G. Waterhouse, LLC,
Klein-Becker USA, LLC,
Nutrasport, LLC, Soyage
Dermalogic Laboratories,
LLC, and BAN, LLC

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Peters Scofield Price
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For Respondent Mowrey

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Salt Lake City, UT 84111
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For Respondent Gay

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5742 West Harold Gatty Dr.
Salt Lake City, UT 84116
(801) 517-7000
(801) 517-7108 (fax)
Respondent Pro Se
mkf555@msn.com


COMPLAINT COUNSEL

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

In the Matter of)

BASIC RESEARCH, L.L.C.,)
A.G. WATERHOUSE, L.L.C.,)
KLEIN-BECKER USA, L.L.C.,)
NUTRASPORT, L.L.C.,)
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LABORATORIES, L.L.C.,)
BAN, L.L.C.,)
DENNIS GAY,)
DANIEL B. MOWREY, and)
MITCHELL K. FRIEDLANDER,)

Respondents.)
_____)

Docket No. 9318

PUBLIC DOCUMENT

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

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

GENERAL OBJECTIONS

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

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

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

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

GENERAL RESPONSES

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

Interrogatories and Responses

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

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

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

Response:

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

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

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

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

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

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

Response:

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

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

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

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

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

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

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

Response:

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

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

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

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

Response:

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

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

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

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

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

Response:

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

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

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

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

Response:

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

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

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

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

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

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

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

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

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

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

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

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

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

Response:

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

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

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

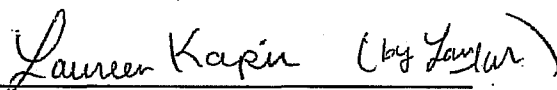
Please explain in detail why the Complaint in this case was not filed prior to June 16, 2004 and what circumstances, if any, precluded the Commission from filing the Complaint prior to that date.

Response:

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

Dated: August 27, 2004

Respectfully submitted,


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

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

Certificate of Service

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

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

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Respondent Pro Se



COMPLAINT COUNSEL

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

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

**COMPLAINT COUNSEL'S RESPONSE TO
RESPONDENT DANIEL B. MOWREY'S FIRST SET OF INTERROGATORIES**

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

GENERAL OBJECTIONS

1. Complaint Counsel object to Respondent's interrogatories to the extent they seek information which may be derived or ascertained by Respondents from documents or information already in Respondents' possession. Interrogatories are properly used to obtain information not otherwise available for the requesting party to analyze, not to "require a party in such discovery proceeding to do his adversary's work for him by compiling lists or other information . . . for him." *Berg v. Hoppe*, 352 F.2d 776, 779 (9th Cir. 1965).

2. Complaint Counsel object to Respondent's interrogatories to the extent 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.

3. Complaint Counsel object to each of Respondent's interrogatories to the extent they seek information that is not reasonably expected to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of any Respondent, in violations of the limits of discovery set by Rule 3.31(c)(1).
4. Complaint Counsel object to the Instructions and Definitions to the extent that they impose an obligation greater than that imposed by the Commission's Rules of Practice and the provisions of any Pretrial Scheduling Order.
5. Complaint Counsel object to Respondent's interrogatories to the extent they seek information in the possession of the Commissioners, the General Counsel, or the Secretary in his capacity as custodian or recorder of any information in contravention of Rule 3.35(a)(1), because such documents are not in the possession, custody or control of Complaint Counsel.

GENERAL RESPONSES

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

6. Complaint Counsel object to Instruction no. 4 to the extent that it attempts to define “[i]nformation covered by these Interrogatory Requests” as

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

Respt’s Interrog. at 3. Complaint Counsel object that this definition is overbroad and improperly attempts to make Complaint Counsel serve as Respondent’s agent for discovery purposes. To the extent that information is not within the possession, custody or control of Complaint Counsel, that information is outside of Complaint Counsel’s possession, custody or control. Thus Complaint Counsel object to Respondent’s interrogatories to the extent they seek information in the possession of the Commissioners, other Commission staff other than that of Complaint Counsel, 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 information is not in the possession, custody or control of Complaint Counsel. Complaint Counsel also object to this interrogatory to the extent that it improperly attempts to define “constructive custody” to include information held by persons that are outside of Complaint Counsel’s office, either to persons in another FTC office that is not part of Complaint Counsel’s office or to persons that are not employed by the FTC.

INTERROGATORIES AND RESPONSES

INTERROGATORY NO. 15 [Respondent Mowrey’s Interrogatory No. 1]

1. With respect to the phrase “expertise of professionals in the relevant area” which appears in the Advertising Guide, describe the credentials, experience and/or background FTC believes, asserts or contends is necessary to qualify a person as a “professional in the relevant area. . .” as applied to cases involving nutraceutical weight loss products.

Response

Complaint Counsel object to this question as vague and overbroad as it applies to an indeterminate number and indeterminate type of cases and, as such, fails to meaningfully identify the necessary context for which any “expertise of professionals in the relevant area” would be

otherwise qualified. Complaint Counsel further object to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lack sufficient information to respond. Complaint Counsel also object to the term “nutraceutical weight loss products,” as vague and indefinite, because Respondent’s interrogatories neither define the term “nutraceutical,” nor the phrase “as applied to cases involving nutraceutical weight loss products,” see Respt’s Interrog. at 1-2, Further, the term “nutraceutical” is not found in *The American Heritage Dictionary* or defined on the FTC website, www.ftc.gov. Because Respondent employs this indeterminate phrase as the necessary predicate for responding to this interrogatory, Complaint Counsel is unable to ascertain the meaning necessary to otherwise fully answer this interrogatory.

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that the credentials, experience and/or background which the FTC contends is necessary to qualify a person as a “professional in the relevant area” is fully answered by reference to the plain meaning of these words. Furthermore, the credentials, experience and/or background which Complaint Counsel contends is necessary would turn on a number of factors, including the type of product, the type of ingredients, the mechanism of action, the manner of delivery (oral, topical, etc.), and the claims made for the product. Thus there is no “one size fits all response to this question. In making decisions about hiring an expert, Complaint Counsel looks to accepted norms in the relevant fields of research. The Commission has addressed the qualifications, credentials, experience and background of experts on a case specific basis. See e.g., *Thompson Medical*, 104 F.T.C. 648 (1984); *Porter & Dietsch*, 90 F.T.C. 770 (1977); and *Nat’l Comm’n on Egg Nutrition*, 88 F.T.C. 191 (1976). Moreover in the FTC’s publication *Dietary Supplements: An Advertising Guide for Industry*, the FTC states it “gives great weight to accepted norms in the relevant fields of research” and looks to “procedures generally accepted in the profession to yield accurate and reliable results.” *Guide* at 9.

INTERROGATORY NO. 16 [Respondent Mowrey’s Interrogatory No. 2]

2. With respect to the phrase “expertise of professionals in the relevant area” which appears in the Advertising Guide, describe the credentials, experience and/or background which the FTC believes, asserts or contends is necessary to qualify a person as a “professional in the relevant area . . .” as applied to this case.

Response

Complaint Counsel object to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lack sufficient information to respond.. Complaint Counsel also object to this interrogatory to the extent that it asks Complaint Counsel to speculate as to what type of expertise the Respondents may elect to employ.

Subject to and without waiving these objections or the General Objections stated above, and expressly reserving our rights to challenge any person that Respondents may offer as an expert in the proceedings at bar, Complaint Counsel state that the credentials, experience and/or background which the FTC contends is necessary to qualify a person as a "professional in the relevant area" as applied to this case is fully answered by reference to the plain meaning of these words. The "relevant area" in any particular case depends upon a number of factors, including, but not necessarily limited to, the type of product, the active ingredients, the method of delivery (oral, topical, etc.), the mechanics of action of the active ingredient(s), and the claims made for the product. Taking these criteria into consideration, the relevant areas for expertise in this case include but are not necessarily limited to, fat storage, fat metabolism, obesity, weight loss, the design, execution, and analysis of clinical research, as well as consumer behavior, ad interpretation, market research, and linguistics. The Commission has addressed the qualifications, credentials, experience and background of experts on a case specific basis. See e.g., *Thompson Medical*, 104 F.T.C. 648 (1984); *Porter & Dietsch*, 90 F.T.C. 770 (1977); and *Nat'l Comm'n on Egg Nutrition*, 88 F.T.C. 191 (1976). Moreover in the FTC's publication *Dietary Supplements: An Advertising Guide for Industry*, the FTC states it "gives great weight to accepted norms in the relevant fields of research" and looks to "procedures generally accepted in the profession to yield accurate and reliable results." *Guide* at 9.

In any event, to the extent that this interrogatory may be construed to include the level of expertise possessed by Complaint Counsel's experts, Complaint Counsel refer Respondent to the curriculum vitae and expert report supplied by Stephen B. Heymsfield, M.D., Robert H. Eckel, M.D., Michael B. Mazis, Ph.D, and Geoffrey Nunberg, Ph.D. The expert reports detail and establish their academic credentials, background, experience as set forth more fully therein.

INTERROGATORY NO. 17 [Respondent Mowrey's Interrogatory No. 3]

3. With respect to the phrase "expertise of professionals in the relevant area" which appears in the Advertising Guide, does the FTC publish or otherwise disseminate standards and/or guidelines which identify the credentials, experience and/or background which are necessary to qualify a person as a "professional in the relevant area. . .?"

Response

Complaint Counsel object to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lack sufficient information to respond.

Subject to and without waiving this objection or the General Objections stated above, the FTC has not specifically published or otherwise disseminated standards or guidelines as to that credentials are "necessary" to qualify a person as a "professional in the relevant area." To the extent that this interrogatory seeks guidance on the standards applicable to determine whether

such persons qualify as experts, Complaint Counsel state that is not the role of the FTC. Instead, these decisions are made by reference to the applicable community. Complaint Counsel further state that published FTC case law identifies with particularity the training, background, credentials, and experience of individuals who have been qualified as experts. *See, e.g., Thompson Medical Co.*, 104 F.T.C. at 668-669, 671 (1984) (describing experts' credentials, background and clinical experience); *Sterling Drug*, 102 F.T.C. 395 (1983); *American Home Products*, 98 F.T.C. 136 (1981), *Porter & Dietsch*, 90 F.T.C. 770 (1977); and *Nat'l Comm'n on Egg Nutrition*, 88 F.T.C. 191 (1976). Complaint Counsel states that we have sought, and retained, individuals who possess scientific, technical, or other specialized knowledge that will assist the trier of fact as those standards are articulated within that person's area of study. Thus as recognized in the *Advertising Guide*, "the FTC gives great weight to accepted norms in the relevant fields of research." *Guide* at 9. Importantly, Complaint Counsel recognize that it is the trier of fact who makes all decisions regarding the admissibility of expert testimony. Thus the determination as to whether a person will qualify as an expert is a question that is decided by the Court.

INTERROGATORY NO. 18 [Respondent Mowrey's Interrogatory No. 4]

4. If your response to the preceding interrogatory was anything other than an unqualified no, identify with particularity all publications or other written materials which the FTC has published or otherwise made available to the public wherein the FTC has set forth standards and/or guidelines which identify the credentials, experience and/or background which is necessary to qualify a person as a "professional in the relevant area. . ."

Response

Complaint Counsel object to this interrogatory to the extent that it seeks to have Complaint Counsel review literature and caselaw that is equally available to Respondent. To the extent that *Advertising Guide* may be said to constitute "guidelines," Complaint Counsel state that the guidelines are intended to provide information about how the FTC evaluates substantiation.

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that the Commission and its staff have provided guidance to the industry about how the agency evaluates scientific substantiation for health-related advertising claims. The Commission's 1998 Dietary Supplement Guide, for example, provides a detailed analysis of how the agency evaluates scientific substantiation related to advertising claims for dietary supplements. Section II.B. of the guide describes basic principles about the amount and type of evidence required to support a health-related claim; how to evaluate the quality of that evidence; the importance of considering the totality of the evidence rather than individual studies in isolation; and how to evaluate the relevance of the evidence to a specific advertising claim and

product. Other sources of industry guidance include: the FTC's Substantiation Policy Statement, appended to *Thompson Medical Co.*, 104 F.T.C. at 839 (1984); the Commission's Enforcement Policy Statement for Food Advertising; and a body of FTC case law, including *Pfizer, Inc.*, 81 F.T.C. 23 (1972) (articulating the factors that determine what level of substantiation is appropriate); *Schering Corp.*, 118 F.T.C. 1030 (1994) (ALJ's Initial Decision and consent order) (assessment of substantiation for weight loss and appetite suppressant claims for Fibre Trim supplement); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263 (S.D. Fla. 1999) (assessment of substantiation for weight loss supplements). Complaint Counsel further state that the guidance provided by the Commission through its opinions, cease and desist orders, consent decrees, complaints, and publications provide additional notice and guidance regarding the appropriate level of expertise. See, e.g., *Thompson Medical Co.*, 104 F.T.C. at 668-669, 671 (1984) (describing experts' credentials, background and clinical experience); *Sterling Drug*, 102 F.T.C. 395 (1983); *American Home Products*, 98 F.T.C. 136 (1981), *Porter & Dietsch*, 90 F.T.C. 770 (1977); and *Nat'l Comm'n on Egg Nutrition*, 88 F.T.C. 191 (1976).

INTERROGATORY NO. 19 [Respondent Mowrey's Interrogatory No. 5]

5. Identify who, if any one, determines the credentials, experience and/or background which is necessary to qualify a person as a "professional in the relevant area."

Response

Complaint Counsel objects to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lack sufficient information to respond. Subject to and without waiving these objections or the General Objections stated above, to the extent this question addresses our procedural posture before the Court, Complaint Counsel state that it is the trier of fact, and ultimately, the Commission, who determines the credentials, experience and/or background which is necessary to qualify a person as a "professional in the relevant area." Complaint Counsel note that any such determination would necessarily be determined by reference to the standards applicable by the relevant area at issue.

INTERROGATORY NO. 20 [Respondent Mowrey's Interrogatory No. 6]

6. With respect to the phrase "expertise of professionals in the relevant area" which appears in the Advertising Guide, describe with particularity the "relevant area" as applied to cases involving nutraceutical weight loss products.

Response

Complaint Counsel object to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lack sufficient information to respond. Complaint Counsel further object to this question as vague and overbroad as it applies to an indeterminate number and indeterminate type of cases and, as such, fails to meaningfully identify the necessary context for which any “expertise of professionals in the relevant area” would be otherwise qualified. Complaint Counsel also object to the term “nutraceutical weight loss products,” as vague and indefinite, because Respondent’s interrogatories neither define the term “nutraceutical,” nor the phrase “as applied to cases involving nutraceutical weight loss products,” *see* Resp’t’s Interrog. at 1-2. Further, the term “nutraceutical” is not found in *The American Heritage Dictionary* or defined on the FTC website, www.ftc.gov. Because Respondent employs this indeterminate phrase as the necessary predicate for responding to this interrogatory, Complaint Counsel is unable to ascertain the meaning necessary to otherwise fully answer this interrogatory.

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that the phrase “expertise in the relevant area” is fully answered by reference to the plain meaning of these words. Thus the term “relevant area” would be the area of interest as raised by the claims and the substantiation provided, and the type of expertise would turn on the nature of the claims being evaluated and the type of evidence that is proffered to support the claim. Moreover, the “relevant area” in any particular case depends upon a number of factors, including, but not necessarily limited to, the type of product, the active ingredients, the method of delivery (oral, topical, etc.), the mechanics of action of the active ingredient(s), and the claims made for the product.

INTERROGATORY NO. 21 [Respondent Mowrey’s Interrogatory No. 7]

7. With respect to the phrase “expertise of professionals in the relevant area” which appears in the Advertising Guide, describe with particularity the “relevant area” as applied to this case.

Response

Complaint Counsel object to this interrogatory as vague as Respondent does not provide information sufficient for Complaint Counsel to identify any relevant areas that Respondents might employ. Complaint Counsel further object to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lack sufficient information to respond. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that the phrase “expertise of professionals in the relevant area” is fully answered by reference to the plain meaning of these words. Thus the term “relevant area” would be the area of interest as raised by the claims and the substantiation provided. Thus the type of expertise would turn on the nature of the claims being evaluated and

the type of evidence that is proffered to support the claim. Moreover, the "relevant area" in any particular case depends upon a number of factors, including, but not necessarily limited to, the type of product, the active ingredients, the method of delivery (oral, topical, etc.), the mechanics of action of the active ingredient(s), and the claims made for the product. Taking these criteria into consideration, the relevant areas for expertise in this case include but are not necessarily limited to, fat storage, fat metabolism, obesity, weight loss, the design, execution, and analysis of clinical research, as well as consumer behavior, ad interpretation, market research, and linguistics.

Complaint Counsel further state that to the extent this interrogatory seeks information as to Complaint Counsel's designated experts, Complaint Counsel refer Respondent to the curriculum vitae and expert reports supplied by Stephen B. Heymsfield, M.D., Robert H. Eckel, M.D., Michael B. Mazis, Ph.D, and Geoffrey Nunberg, Ph.D. The expert reports that were supplied to Respondents on October 20, specifically detail the experts' areas of professional expertise.

INTERROGATORY NO. 22 [Respondent Mowrey's Interrogatory No. 8]

8. State whether you assert or contend that Dr. Mowrey is not qualified to determine whether a scientific study is competent and reliable.

Response

Complaint Counsel object to this interrogatory because we do not have sufficient information about Dr. Mowrey's qualifications and background to articulate any opinion as to his ability to offer expert information. Subject to and without waiving these objections or the General Objections stated above, and expressly reserving our rights to challenge Respondent Mowrey as an expert in the proceedings at bar, Complaint Counsel also point out that the burden of establishing Dr. Mowrey's competency as an expert lies with Respondents. It is unclear the extent to which Respondent seeks to qualify Dr. Mowrey as an expert, including whether Respondents would seek to qualify him as an expert "to determine whether a scientific study is competent and reliable." Complaint Counsel will seek to inquire into Dr. Mowrey's field of expertise, including his background, credentials, education, etc., after receiving his report and during the course of his deposition. Once we have the opportunity to receive and explore any purported expertise in "determin[ing] whether a scientific study is competent and reliable," Complaint Counsel will be able to ascertain its contentions regarding Dr. Mowrey's qualifications.

INTERROGATORY NO. 23 [Respondent Mowrey's Interrogatory No. 9]

9. If you assert or contend that Dr. Mowrey is not qualified to determine whether a scientific study is competent and reliable, describe with particularity the factual basis for such assertion or contention, and describe with particularity the qualifications, credentials and/or experience you believe Dr. Mowrey would have to possess in order to be qualified to determine whether a scientific study is competent and reliable.

Response

Complaint Counsel object to this interrogatory because we do not have sufficient information about Dr. Mowrey's qualifications and background to articulate any opinion as to his ability to offer expert information. Subject to and without waiving these objections or the General Objections (nos 1, 3, 4 & 5) stated above, and expressly reserving our rights to challenge any person that Respondents may offer as an expert in the proceedings at bar, Complaint Counsel also point out that the burden of establishing Dr. Mowrey's competency as an expert lies with Respondents. It is unclear the extent to which Respondent seeks to qualify Dr. Mowrey as an expert, including qualifying him as an expert "to determine whether a scientific study is competent and reliable." Complaint Counsel will seek to inquire into Dr. Mowrey's field of expertise, including his background, credentials, education, etc., after receiving his report and during the course of his deposition. Without having the opportunity to receive and explore any purported expertise in "determin[ing] whether a scientific study is competent and reliable," any contention that Complaint Counsel may have regarding Dr. Mowrey's qualifications would be premature at this time.

Complaint Counsel object to this interrogatory to the extent it asks Complaint Counsel to opine on what qualifications, credentials, and/or experience Dr Mowrey "would have to possess." As so phrased, this interrogatory impermissibly seeks to shift the burden of establishing Dr. Mowrey's expertise to Complaint Counsel. Respondent has the burden to establish Dr. Mowrey's expertise.

INTERROGATORY NO. 24 [Respondent Mowrey's Interrogatory No. 10]

10. State whether you contend that any claims in the advertisements referenced in the Complaint implied that Respondents possessed more scientific studies than were expressly stated in the advertisements and, if so, identify with particularity each and every such implied claim, including the specific advertisement in which any such implied claim appears.

Response

Complaint object to this interrogatory because it is premature. Complaint Counsel have yet to take depositions in this matter and Respondents expert reports are not due until late November. Further, Respondents have yet to complete their responses to Complaint Counsel's discovery. Finally, Complaint Counsel will be obligated to specifically set forth all documents, witnesses and arguments it intends to offer at trial when it files its exhibit lists, witness lists and legal briefs.

Complaint Counsel further state that of the ads referenced in the Complaint and attached thereto as Exhibits A-L, the following contain the claims identified below that imply clinical evidence that is not specifically referenced in the ad itself:

Exhibit D: "A clinically proven transdermal gel that dissolves surface body fat wherever applied."

"FACT Clinically Proven, Full Strength, Patented Formula!"

Exhibit E: "A clinically proven transdermal gel that dissolves surface body fat wherever applied."

"Cutting Gel's clinically proven, patented formula is the only transdermal fat-emulsifying gel directed exclusively to bodybuilders and fitness enthusiasts."

Exhibit I: "Patent-protected, clinically established, and guaranteed to help you become the thinner, healthier, and more active person you've always anted to be."

Exhibit J: "Patent-protected, clinically established, and guaranteed to help you become the thinner, healthier, and more active person you've always anted to be."

Complaint Counsel reserve the right to supplement this response as necessary.

INTERROGATORY NO. 25 [Respondent Mowrey's Interrogatory No. 11]

11. State whether you contend that Dr. Mowrey disseminated any of the advertisements referenced in the Complaint and, if so, state the following: a. identify each and every advertisement which you contend, was disseminated by Dr. Mowrey; and b. describe with particularity all facts which support your contention that each such advertisement was disseminated by Dr. Mowrey.

Response

Complaint Counsel object to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Respondents found to be acting in common enterprise are each liable for the acts and practices of others in the common enterprise. See e.g., *Sunshine Art Studios Inc. v. F.T.C.*, 481 F.2d 1171, 1175 (1st Cir. 1973). Complaint further object to this interrogatory because it is premature. Complaint Counsel have yet to take depositions in this matter and Respondents expert reports are not due until late November. Further, Respondents have yet to complete their responses to Complaint Counsel's discovery. Receipt of Respondents' discovery responses, including answers to interrogatories will allow Complaint Counsel to answer more fully. Finally, Complaint Counsel will be obligated to specifically set forth all documents, witnesses and arguments it intends to offer at trial when it files its exhibit lists, witness lists and legal briefs. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel contend that Respondent Mowrey disseminated advertisements referenced in the Complaint. Complaint Counsel base this contention on the advertisements attached to the Complaint that include Respondent Mowrey's picture and testimonial endorsements. Complaint Counsel also base our contention on Respondent Mowrey's interrogatory responses that state that Respondent Mowrey "performs advertisement substantiation research and reviews proposed advertisements for substantiation." Resp. Mowrey Resp. at 3. Complaint Counsel further base this contention on Respondents' *Response to Complaint Counsel's First Set of Interrogatories*, that expressly identified Respondent Mowrey as having "researched and developed product ideas, concepts and ingredients; performed ad substantiation research, and reviewed ads for substantiation." Resp. at 4. Complaint Counsel further allege as stated in the Complaint that Respondent Mowrey acted in concert with the other Respondents and further, that Respondent Mowrey acted with the other Respondents in a common enterprise. Complaint Counsel reserve the right to supplement this contention as information becomes available during the course of discovery.

INTERROGATORY NO. 26 [Respondent Mowrey's Interrogatory No. 12]

12. State whether you contend that Dr. Mowrey caused any of the advertisements referenced in the Complaint to be disseminated and, if so, state the following:

- a. identify each and every advertisement which you contend Dr. Mowrey caused to be disseminated; and
- b. describe with particularity all facts which support your contention that Dr. Mowrey caused such advertisements to be disseminated.

Response

Complaint Counsel object to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Respondents found to be acting in common enterprise are each liable for the acts and practices of others in the common enterprise. *See e.g., Sunshine Art Studios Inc. v. F.T.C.*, 481 F.2d 1171, 1175 (1st Cir. 1973). Complaint Counsel further object to this interrogatory because it is premature. Complaint Counsel have yet to take depositions in this matter and Respondents expert reports are not due until late November. Further, Respondents have yet to complete their responses to Complaint Counsel’s discovery. Receipt of Respondents’ discovery responses, including answers to interrogatories will allow Complaint Counsel to answer more fully. Finally, Complaint Counsel will be obligated to specifically set forth all documents, witnesses and arguments it intends to offer at trial when it files its exhibit lists, witness lists and legal briefs. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel contend that Respondent Mowrey caused the advertisements in the Complaint to be disseminated. Complaint Counsel base this contention on the advertisements that include Respondent Mowrey’s picture and testimonial endorsements. Complaint Counsel also base our contention on Respondent Mowrey’s interrogatory responses that state that Respondent Mowrey “performs advertisement substantiation research and reviews proposed advertisements for substantiation.” Resp. Mowrey Resp. at 3. Complaint Counsel further bases this contention on Respondents’ *Response to Complaint Counsel’s First Set of Interrogatories*, that expressly identified Respondent Mowrey as having “researched and developed product ideas, concepts and ingredients; performed ad substantiation research, and reviewed ads for substantiation.” Resp. at 4. Complaint Counsel further allege as stated in the Complaint that Respondent Mowrey acted in concert with the other Respondents and further, that Respondent Mowrey acted with the other Respondents in a common enterprise. Complaint Counsel reserve the right to supplement this contention as information becomes available during the course of discovery.

INTERROGATORY NO. 27 [Respondent Mowrey’s Interrogatory No. 13]

13. State whether you contend that Dr. Mowrey has or had the authority to control any of the Corporate Respondents and, if so, describe with particularity all facts which support such contention.

Response

Complaint Counsel object to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Respondents found to be acting in common enterprise are each liable for the acts and practices of others in the common enterprise. *See e.g., Sunshine Art Studios Inc. v. F.T.C.*, 481 F.2d 1171, 1175 (1st Cir. 1973). Complaint further object to this interrogatory because it is premature. Complaint

Counsel have yet to take depositions in this matter and Respondents expert reports are not due until late November. Further, Respondents have yet to complete their responses to Complaint Counsel's discovery. Receipt of Respondents' discovery responses, including answers to interrogatories will allow Complaint Counsel to answer more fully. Finally, Complaint Counsel will be obligated to specifically set forth all documents, witnesses and arguments it intends to offer at trial when it files its exhibit lists, witness lists and legal briefs. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel contend that Respondent Mowrey has or had the authority to control the Corporate Respondents. Complaint Counsel base this contention on the advertisements that include Respondent Mowrey's picture and testimonial endorsements. Complaint Counsel also base our contention on Respondent Mowrey's interrogatory responses that state that Respondent Mowrey "performs advertisement substantiation research and reviews proposed advertisements for substantiation." Resp. Mowrey Resp. at 3. Complaint Counsel further bases this contention on Respondents' *Response to Complaint Counsel's First Set of Interrogatories*, that expressly identified Respondent Mowrey as having "researched and developed product ideas, concepts and ingredients; performed ad substantiation research, and reviewed ads for substantiation." Resp. at 4. Complaint Counsel further allege as stated in the Complaint that Respondent Mowrey acted in concert with the other Respondents and further, that Respondent Mowrey acted with the other Respondents in a common enterprise. Complaint Counsel reserve the right to supplement this contention as information becomes available during the course of discovery.

INTERROGATORY NO. 28 [Respondent Mowrey's Interrogatory No. 14]

14. State whether you contend that Dr. Mowrey knew that the advertising claims at issue in this case were false or misleading and, if so, describe with particularity all facts which support any such contention.

Response

Complaint Counsel object to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Respondents found to be acting in common enterprise are each liable for the acts and practices of others in the common enterprise. *See e.g., Sunshine Art Studios Inc. v. F.T.C.*, 481 F.2d 1171, 1175 (1st Cir. 1973). Complaint further object to this interrogatory because it is premature. Complaint Counsel have yet to take depositions in this matter and Respondents expert reports are not due until late November. Further, Respondents have yet to complete their responses to Complaint Counsel's discovery. Receipt of Respondents' discovery responses, including answers to interrogatories will allow Complaint Counsel to answer more fully. Finally, Complaint Counsel will be obligated to specifically set forth all documents, witnesses and arguments it intends to offer at trial when it files its exhibit lists, witness lists and legal briefs. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel contend that Respondent Mowrey knew that the advertising claims at issue in this case were false or

misleading. Complaint Counsel base this contention on the content of advertisements that include Respondent Mowrey's picture and testimonial endorsements. Complaint Counsel also base our contention on Respondent Mowrey's interrogatory responses that state that Respondent Mowrey "performs advertisement substantiation research and reviews proposed advertisements for substantiation." Resp. Mowrey Resp. at 3. Complaint Counsel further bases this contention on Respondents' *Response to Complaint Counsel's First Set of Interrogatories*, that expressly identified Respondent Mowrey as having "researched and developed product ideas, concepts and ingredients; performed ad substantiation research, and reviewed ads for substantiation." Resp. at 4. Complaint Counsel reserve the right to supplement this contention as information becomes available during the course of discovery.

INTERROGATORY NO. 29 [Respondent Mowrey's Interrogatory No. 15]

15. State whether you contend that Dr. Mowrey should have known that the advertising claims at issue in this case were false or misleading and, if so, describe with particularity all facts which support any such contention.

Response

Complaint Counsel object to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Respondents found to be acting in common enterprise are each liable for the acts and practices of others in the common enterprise. *See e.g., Sunshine Art Studios Inc. v. F.T.C.*, 481 F.2d 1171, 1175 (1st Cir. 1973). Complaint further object to this interrogatory because it is premature. Complaint Counsel have yet to take depositions in this matter and Respondents expert reports are not due until late November. Further, Respondents have yet to complete their responses to Complaint Counsel's discovery. Receipt of Respondents' discovery responses, including answers to interrogatories will allow Complaint Counsel to answer more fully. Finally, Complaint Counsel will be obligated to specifically set forth all documents, witnesses and arguments it intends to offer at trial when it files its exhibit lists, witness lists and legal briefs. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel contend that Respondent Mowrey should have known that the advertising claims in this case were false or misleading. Complaint Counsel base this contention on the advertisements that include Respondent Mowrey's picture and testimonial endorsements. Complaint Counsel also base our contention on Respondent Mowrey's interrogatory responses that state that Respondent Mowrey "performs advertisement substantiation research and reviews proposed advertisements for substantiation." Resp. Mowrey Resp. at 3. Complaint Counsel further bases this contention on Respondents' *Response to Complaint Counsel's First Set of Interrogatories*, that expressly identified Respondent Mowrey as having "researched and developed product ideas, concepts and ingredients; performed ad substantiation research, and reviewed ads for substantiation." Resp. at 4. Complaint Counsel reserves the right to supplement this contention as information becomes available during the course of discovery.

INTERROGATORY NO. 30 [Respondent Mowrey's Interrogatory No. 16]

16. State whether you contend that Dr. Mowrey acted in or personally affected interstate commerce and, if so, describe with particularity all facts which support any such contention.

Response

Complaint Counsel object to this interrogatory because it is premature. Complaint Counsel have yet to take depositions in this matter and Respondents expert reports are not due until late November. Further, Respondents have yet to complete their responses to Complaint Counsel's discovery. Finally, Complaint Counsel will be obligated to specifically set forth all documents, witnesses and arguments it intends to offer at trial when it files its exhibit lists, witness lists and legal briefs. Respondents have not completed its document production, nor responded to all of our discovery. Receipt of Respondents' discovery responses will allow Complaint Counsel to answer more fully. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel contend that Respondent Mowrey acted in or personally affected interstate commerce. Complaint Counsel base this contention on the advertisements that include Respondent Mowrey's picture and testimonial endorsements that were circulated in commerce as that term is defined in the FTC Act. Complaint Counsel further bases this contention on Respondents' *Response to Complaint Counsel's First Set of Interrogatories*, that expressly identified Respondent Mowrey as having "researched and developed product ideas, concepts and ingredients; performed ad substantiation research, and reviewed ads for substantiation." Resp. at 4. Complaint Counsel reserve the right to supplement this contention as information becomes available during the course of discovery.

INTERROGATORY NO. 31 [Respondent Mowrey's Interrogatory No. 17]

17. Do you contend that the Respondents (other than Dr. Mowrey) were not entitled to rely on the expertise of Dr. Mowrey with respect to the advertisements referenced in the Complaint?

Response

Complaint Counsel object to this interrogatory as vague and overbroad as it does not articulate the nature or scope of any such supposed expertise. In addition, Complaint Counsel object to this interrogatory to the extent that it fails to define any context for Dr. Mowrey's as yet undeterminate area of expertise. Respondent Mowrey has not outlined the nature and scope of any potentially proffered expertise. As such, Complaint Counsel's contentions regarding whatever type of expertise that Complaint Counsel may speculate that Respondent may offer is premature. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel note that Respondent Mowrey has not yet produced an expert report

that would allow Complaint Counsel an opportunity to evaluate any such proffered expertise. In addition, Complaint Counsel has not yet had an opportunity to depose Respondent Mowrey with respect to any such proffered expertise. Respondents have not completed its document production, nor responded to all of our discovery. Complaint Counsel reserves the right to supplement this response as information becomes available during the course of discovery.

INTERROGATORY NO. 32 [Respondent Mowrey's Interrogatory No. 18]

18. If your answer to the preceding interrogatory was anything other than an unqualified no, state with particularity the basis for any assertion that the Respondents (other than Dr. Mowrey) were not entitled to rely on the expertise of Dr. Mowrey with respect to the advertisements referenced in the Complaint.

Response

Complaint Counsel object to this interrogatory because it is premature. Complaint Counsel have yet to take depositions in this matter and Respondents expert reports are not due until late November. Further, Respondents have yet to complete their responses to Complaint Counsel's discovery. Receipt of Respondents' discovery responses will allow Complaint Counsel to answer more fully. Finally, Complaint Counsel will be obligated to specifically set forth all documents, witnesses and arguments it intends to offer at trial when it files its exhibit lists, witness lists and legal briefs. Complaint Counsel object to this interrogatory as vague and overbroad as it does not articulate the nature or scope of any such supposed expertise other than "with respect to the advertisements referenced in the Complaint." In addition, Complaint Counsel object to this interrogatory, because it fails to provide any contours for Dr. Mowrey's proffered expertise. At this point, the only information that Respondents have provided indicates that Respondent Mowrey's educational background appears to be in psychology. As a result, Complaint Counsel is not yet able to discern the likely scope of any supposed expertise of Dr. Mowrey. Complaint Counsel reserves the right to supplement this response as information becomes available during the course of discovery.

INTERROGATORY NO. 33 [Respondent Mowrey's Interrogatory No. 19]

19. Do you contend that Dr. Mowrey is not a "professional in the relevant area" as the phrase "professional in the relevant area" is used in the FTC's Advertising Guide?

Response

Complaint Counsel object to this interrogatory because it is premature. Complaint Counsel have yet to take depositions in this matter and Respondents expert reports are not due until late November. Further, Respondents have yet to complete their responses to Complaint

Counsel's discovery. Finally, Complaint Counsel will be obligated to specifically set forth all documents, witnesses and arguments it intends to offer at trial when it files its exhibit lists, witness lists and legal briefs. Complaint Counsel object to this interrogatory as vague and overbroad, because Respondent Mowrey has not outlined the nature and scope of any potentially proffered expertise. As such, Complaint Counsel's contentions regarding whatever type of expertise that Complaint Counsel may speculate that Respondent may offer is premature. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel note that Respondent Mowrey has not yet produced an expert report that would allow Complaint Counsel an opportunity to evaluate any such proffered expertise. In addition, Complaint Counsel has not yet had an opportunity to depose Respondent Mowrey with respect to any such proffered expertise. Complaint Counsel reserves the right to supplement this response as information becomes available during the course of discovery.

INTERROGATORY NO. 34 [Respondent Mowrey's Interrogatory No. 20]

20. If your response to the preceding interrogatory is anything other than an unqualified no, describe with particularity all facts which support your contention that Dr. Mowrey is not a "professional in the relevant area" as the phrase "professional in the relevant area" is used in the FTC's Advertising Guide.

Response

Complaint Counsel object to this interrogatory because it is premature. Complaint Counsel have yet to take depositions in this matter and Respondents expert reports are not due until late November. Further, Respondents have yet to complete their responses to Complaint Counsel's discovery. Finally, Complaint Counsel will be obligated to specifically set forth all documents, witnesses and arguments it intends to offer at trial when it files its exhibit lists, witness lists and legal briefs. Complaint Counsel further object to this interrogatory as vague and overbroad. Respondent Mowrey has not outlined the nature and scope of any potentially proffered expertise. As such, Complaint Counsel's contentions regarding whatever type of expertise that Complaint Counsel may speculate that Respondent may offer is premature. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel note that Respondent Mowrey has not yet produced an expert report that would allow Complaint Counsel an opportunity to evaluate any such proffered expertise. In addition, Complaint Counsel has not yet had an opportunity to depose Respondent Mowrey with respect to any such proffered expertise. Complaint Counsel reserves the right to supplement this response as information becomes available during the course of discovery.

INTERROGATORY NO. 35 [Respondent Mowrey's Interrogatory No. 21]

21. Describe with particularity the expertise, credentials, experience and/or background a person must possess in order to be a "professional in the relevant area" as the phrase "professional in the relevant area" is used in the FTC's Advertising Guide, and as that phrase is applied to cases involving nutraceutical weight loss products.

Response

Complaint Counsel object to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lack sufficient information to respond. Complaint Counsel further object to this question as vague and overbroad as it applies to an indeterminate number and indeterminate type of cases and, as such, fails to meaningfully identify the necessary context for which any "expertise of professionals in the relevant area" would be otherwise qualified. Complaint Counsel also object to the term "nutraceutical weight loss products," as vague and indefinite, because Respondent's interrogatories neither define the term "nutraceutical," nor the phrase "as applied to cases involving nutraceutical weight loss products," see Respt's Interrog. at 1-2, nor does Respondent provide any information that would otherwise allow this term to be defined based on context. Further, the term "nutraceutical" is not found in *The American Heritage Dictionary* or defined on the FTC website, www.ftc.gov. Because Respondent employs this indeterminate phrase as the necessary predicate for responding to this interrogatory, Complaint Counsel is unable to ascertain the meaning necessary to otherwise fully answer this interrogatory. Thus, Respondent's interrogatory must be answered in the context of substantiating claims. FTC law requires that advertisers have a reasonable basis for all express and implied claims. What constitutes a reasonable basis depends greatly on what claims are being made, how they are presented in the context of the entire ad, and how they are qualified. The relevant area may be defined by consideration of a number of factors, including, but not necessarily limited to, the type of product, the active ingredients, the method of delivery (oral, topical, etc.), the mechanics of action of the active ingredient(s), and the claims made for the product. Subject to and without waiving these objections, Complaint Counsel notes that the Commission has addressed the qualifications, credentials, experience and background of experts on a case specific basis. See e.g., *Thompson Medical*, 104 F.T.C. 648 (1984); *Porter & Dietsch*, 90 F.T.C. 770 (1977); and *Nat'l Comm'n on Egg Nutrition*, 88 F.T.C. 191 (1976). Moreover in the FTC's publication *Dietary Supplements: An Advertising Guide for Industry*, the FTC states it "gives great weight to accepted norms in the relevant fields of research" and looks to "procedures generally accepted in the profession to yield accurate and reliable results." *Guide* at 9.

INTERROGATORY NO. 36 [Respondent Mowrey's Interrogatory No. 22]

22. Describe with particularity the expertise, credentials, experience and/or background a person must possess in order to be a "professional in the relevant area" as the phrase "professional in the relevant area" is used in the FTC's Advertising Guide, and as that phrase is applied to this case.

Response

Complaint Counsel object to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lack sufficient information to respond. Complaint Counsel further object to this question as vague and overbroad as it fails to meaningfully identify the necessary context for which any "expertise of professionals in the relevant area" would be otherwise qualified. Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state that the phrase "professional in the relevant area" is fully answered by reference to the plain meaning of these words. Thus the term "relevant area" would be the area of interest as raised by the claims and the substantiation provided. Thus the type of expertise needed in any particular case would turn on the nature of the claims being evaluated and the type of evidence that is proffered to support the claim. Necessarily, the "relevant area" in any particular case depends upon a number of factors, including, but not necessarily limited to, the type of product, the active ingredients, the method of delivery (oral, topical, etc.), the mechanics of action of the active ingredient(s), and the claims made for the product. Taking these criteria into consideration, the required experts in this case should possess expertise, credentials, experience and/or background that relate to areas that include, but are not necessarily limited to: fat storage, fat metabolism, obesity, weight loss, the design, execution, analysis of clinical research, as well as consumer behavior, ad interpretation, market research, and linguistics. As recognized in the *Advertising Guide*, the FTC gives "great weight to accepted norms in relevant fields of research and consults with experts from a wide variety of disciplines." *Id.* at 9. Complaint Counsel notes that the Commission has addressed the qualifications, credentials, experience and background of experts on a case specific basis. *See e.g., Thompson Medical*, 104 F.T.C. 648 (1984); *Porter & Dietsch*, 90 F.T.C. 770 (1977); and *Nat'l Comm'n on Egg Nutrition*, 88 F.T.C. 191 (1976). Moreover in the FTC's publication *Dietary Supplements: An Advertising Guide for Industry*, the FTC states it looks to "procedures generally accepted in the profession to yield accurate and reliable results." *Guide* at 9. For example, the FTC often makes determinations about the level of scientific expertise by reference to the applicable area of study, *see, e.g.,* The Office of Dietary Supplements, National Institutes of Health, 6100 Executive Blvd., Room 3B01, M.C. 7517, Bethesda, MD 20892-7517; http://ods.od.nih.gov/Health_Information/Health_Information.aspx. As applied to this case, relevant areas include, but are not limited to, fat storage, fat metabolism, obesity, weight loss, the design, execution, analysis of clinical research, as well as consumer behavior, ad interpretation, and market research, and linguistics.

INTERROGATORY NO. 37 [Respondent Mowrey's Interrogatory No. 23]

23. State how many people the FTC contends must participate in a scientific study in order for the study to constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response

Complaint Counsel object to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lack sufficient information to respond. Complaint Counsel further object to this question as vague and overbroad as it applies to an indeterminate number and indeterminate type of cases and, as such, fails to meaningfully identify the necessary context for which any "expertise of professionals in the relevant area" would be otherwise qualified. Complaint Counsel also object to the term "nutraceutical weight loss products," as vague and indefinite, because Respondent's interrogatories neither define the term "nutraceutical," nor the phrase "as applied to cases involving nutraceutical weight loss products," *see* Respt's Interrog. at 1-2, nor does Respondent provide any information that would otherwise allow this term to be defined based on context. Further, the term "nutraceutical" is not found in *The American Heritage Dictionary* or defined on the FTC website, www.ftc.gov. Because Respondent employs this indeterminate phrase as the necessary predicate for responding to this interrogatory, Complaint Counsel is unable to ascertain the meaning necessary to otherwise fully answer this interrogatory. Finally, Complaint Counsel further object to this interrogatory to the extent that it implies that the FTC has somehow set itself up as an overarching decision-maker with respect to how the scientific community selects, designs, implements, and reports on scientific studies.

Subject to these objections, Complaint Counsel answer as follows. Standards applicable to the scientific community are well developed and well known in that community. It is by direct reference to these standards in general and to the scientific community specifically that the FTC makes independent evaluations regarding the reliability of studies. It is the scientific community that makes decisions about the nature and methodology of any scientific study, including the number of persons. The number of persons involved in a scientific study is the function of numerous design and methodological decisions, including the nature and type of study. Likewise, the *Advertising Guide* recognizes that "[t]here is no fixed formula for the number or type of studies required or for more specific parameters like sample size and study duration." *Advertising Guide* at 9. "If an advertiser asserts that it has a certain level of support for an advertised claim, it must be able to demonstrate that the assertion is accurate." *Advertising Guide* at 9. Accordingly, the evidence needed depends on the nature of the claim.

INTERROGATORY NO. 39 [Respondent Mowrey's Interrogatory No. 24

24. Identify the length of time over which the FTC contends a scientific study must be conducted in order for the study to constitute competent and reliable scientific evidence upon which a company can base product efficacy claims for a nutraceutical weight loss product.

Response

Complaint Counsel object to this request to the extent it presents a vague, hypothetical situation devoid of a specific factual context and as a result Complaint Counsel lack sufficient information to respond. Complaint Counsel further object to this question as vague and overbroad as it applies to an indeterminate number and indeterminate type of cases and, as such, fails to meaningfully identify the necessary context for which any "expertise of professionals in the relevant area" would be otherwise qualified. Complaint Counsel also object to the term "nutraceutical weight loss products," as vague and indefinite, because Respondent's interrogatories neither define the term "nutraceutical," nor the phrase "as applied to cases involving nutraceutical weight loss products," *see* Respt's Interrog. at 1-2, nor does Respondent provide any information that would otherwise allow this term to be defined based on context. Further, the term "nutraceutical" is not found in *The American Heritage Dictionary* or on the FTC website, www.ftc.gov. Because Respondent employs this indeterminate phrase as the necessary predicate for responding to this interrogatory, Complaint Counsel is unable to ascertain the meaning necessary to otherwise fully answer this interrogatory.

Subject to these objections, Complaint Counsel answer as follows. Standards applicable to the scientific community are well developed and well known in that community. It is by direct reference to these standards in general and to the scientific community specifically that the FTC makes independent evaluations regarding the reliability of studies. The length of time that a study must be conducted turns on various factors, which may be relevant depending on the circumstances. Importantly the length of time that a study is conducted largely determines the type of conclusions that may be drawn from that study. Generally a short term study may not be used to predict what may happen over a longer period of time. In other words, the length of a study is determined by those individuals responsible for the study and the hypothesis they are testing.

Dated: October 29, 2004

Respectfully submitted,

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600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Certificate of Service

I hereby certify that on this 29th day of October, 2004, I caused *COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT DANIEL B. MOWREY'S FIRST SET OF INTERROGATORIES* to be served and filed as follows:

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

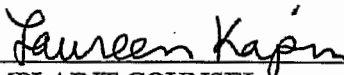
Stephen E. Nagin
Nagin Gallop Figueroa P.A.
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(305) 854-5353
(305) 854-5351 (fax)
snagin@ngf-law.com
For Respondents

Jeffrey D. Feldman
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201 S. Biscayne Blvd., 19th Fl.
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(305) 358-5001
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**For Respondents Basic
Research, LLC, A.G.
Waterhouse, LLC,
Klein-Becker USA, LLC,
Nutrasport, LLC, Sovage
Dermalogic Laboratories,
LLC, and BAN, LLC**

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For Respondent Gay

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5742 West Harold Gatty Dr.
Salt Lake City, UT 84116
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Respondent Pro Se



COMPLAINT COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that on this ~~25~~²⁷ day of June, 2004, I caused *Complaint Counsel's First Request for Production of Documentary Materials and Tangible Things* to be served as follows:

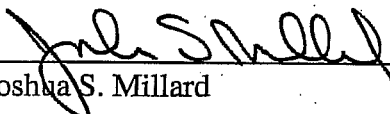
- (1) one (1) electronic copy via email and one (1) copy via first class U.S. Mail to:

Mary L. Azcuenaga, Esq.
Heller, Ehrman, White & McAuliffe, L.L.P.
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Washington, D.C. 20006
mazcuenaga@hewm.com

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Nagin Gallop Figuero P.A.
3225 Aviation Ave.
Miami, FL 33133
snagin@ngf-law.com

- (2) one (1) copy via first class U.S. Mail to:

Basic Research, L.L.C.
A.G. Waterhouse, L.L.C.
Klein-Becker USA, L.L.C.
Nutrasport, L.L.C.
Sovage Dermalogic Laboratories, L.L.C.
BAN, L.L.C.
Dennis Gay
Daniel B. Mowrey
Mitchell K. Friedlander
5742 W. Harold Gatty Dr.
Salt Lake City, UT 84116



Joshua S. Millard

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

In the Matter of

**BASIC RESEARCH, L.L.C.,
A.G. WATERHOUSE, L.L.C.,
KLEIN-BECKER USA, L.L.C.,
NUTRASPORT, L.L.C.,
SOVAGE DERMALOGIC
LABORATORIES, L.L.C.,
BAN, L.L.C.,
DENNIS GAY,
DANIEL B. MOWREY, and
MITCHELL K. FRIEDLANDER,**

Respondents.

Docket No. 9318

COMPLAINT COUNSEL'S PRIVILEGE LOG

Complaint Counsel hereby submits the attached *Privilege Log* in accordance with RULE OF PRACTICE 3.38A(a). We reserve the right to supplement the *Privilege Log* as additional information becomes available.

DEFINITIONS

The Federal Trade Commission's Bureau of Consumer Protection ("BCP") staff includes the following persons: Laureen Kapin, Esq., Walter C. Gross, Esq., Joshua S. Millard, Esq., Laura Schneider, Esq., and Robin M. Richardson, Esq. In addition to searching Complaint Counsel's own files, in making a reasonable search for relevant documents and materials, Complaint Counsel consulted with and/or reviewed the files of the following staff in the Division of Enforcement: Jock Chung, Esq., Louise Jung, Esq., Hampton Newsome, Esq., Carol Jennings, Esq., Angela Floyd, Esq., Joel Brewer, Esq., Adam Fine, Esq., Lemuel Dowdy, Esq., Laura Koss, Esq., Edwin Rodriguez, Esq., Roger Alvarez, who was formerly employed as an intern, Leslie Lewis, who is a legal technician, and Jonathan Cowen, Esq., who was formerly employed at the Division of Enforcement.

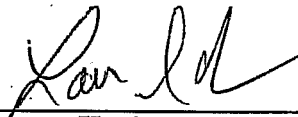
Complaint Counsel has also reviewed the files and/or consulted with Rebecca Hughes, an honors paralegal in BCP, Susan Braman, who is an economist in the Bureau of Economics ("BE"), and Karen Jagielski, Esq., who is an Attorney-Advisor in the Office of the Director of BCP. Complaint Counsel reviewed the files of the following persons at BCP's Division of Advertising Practices: Matthew Daynard, Esq., Michelle Rusk, Esq., and David Koehler, Esq.

The BCP and BE management involved in this matter includes the following persons: Elaine Kolish, Esq., the Associate Director of the FTC's Division of Enforcement, Reilly Dolan, an Assistant Director in the Division of Enforcement, Joni Lupovitz, an Assistant Director in the Division of Enforcement, Mary Engle, the Associate Director of BCP's Division of Advertising Practices, Heather Hipsley, an Assistant Director of BCP's Division of Advertising Practices, Richard Cleland, an Assistant Director in BCP's Division of Advertising Practices, Gerald Butters, the Associate Director of BE, Lee Peeler, the Deputy Director of BCP, Lydia Parnes, the Acting Director of BCP, and J. Howard Beales, who was formerly the Director of BCP.

The Federal Trade Commission is headquartered at 600 Pennsylvania Ave., N.W., Washington, D.C. 20580., and has a satellite office at 601 New Jersey Ave., N.W., Washington, D.C. 20580.

October 15, 2004

Respectfully submitted by:



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

Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
COUNSEL SUPPORTING THE COMPLAINT

Complaint Counsel's Privilege Log as of October 15, 2004

	AUTHOR	RECIPIENT	DESCRIPTION	PRIVILEGE(S)
1.	BCP Staff	BCP Staff and Management	Memos re: discussions with expert about calcium and weight loss from February 2003 - March 2004 and Expert's draft/proprietary confidential study in another active investigation.	Work Product Deliberative Process
2.	BCP Staff	BCP Staff and Management	Email re: discussions with expert about calcium and weight loss from February 2003 - March 2004 and Expert's draft/proprietary confidential study in another active investigation.	Work Product Deliberative Process
3.	BCP Management	-	Attorney legal research includes selected pages of Rand Report with highlights and handwritten annotations showing mental impressions	Work Product Deliberative Process
4.	BCP Management	-	Attorney research memorandum describing or analyzing dietary supplement and weight loss cases by ingredients	Work Product Deliberative Process
5.	BCP Staff and NIH Staff	BCP Staff and Management and NIH Staff	Notes re: non-testifying expert re: Livieri study.	Work Product Deliberative Process Law Enforcement Evidentiary Priv.
6.	BCP Staff and NIH Staff	BCP Staff and Management and NIH Staff	Emails re: non-testifying expert re: Livieri study.	Work Product Deliberative Process Law Enforcement Evidentiary Priv.
7.	BCP Staff and BCP Management	BCP Staff and BCP Management	Attorney notes regarding mental impressions re: numerous open investigations, conferences, meetings or other discussions with experts.	Work Product Deliberative Process Law Enforcement Evidentiary Priv.

8.	BCP Staff and BCP Management	BCP Staff and BCP Management	E-mails and communications regarding mental impressions re: numerous open investigations, conferences, meetings or other discussions with experts.	Work Product Deliberative Process Law Enforcement Evidentiary Priv.
9.	BCP Management	-	Report of Ephedra Working Group with handwritten notes reflecting mental processes (Copy without handwritten notes provided to Respondents during discovery).	Work Product Deliberative Process
10.	BCP Staff and Management	Commission Attorneys and/or other Commission Staff	Attorney notes and memoranda in preparation for briefing, litigation, and preparation for filing complaint.	Work Product Deliberative Process
11.	BCP Staff and Management	BCP Management	Memoranda and related internal documents concerning the internal recommendation to enter into consent negotiations.	Work Product Deliberative Process
12.	BCP Staff and Management	BCP Staff and Management	E-mails and other communications regarding scope of the complaint allegations.	Work Product Deliberative Process
13.	BCP Staff and Management	BCP Staff and Management	Internal memoranda and notes regarding scope of the complaint allegations.	Work Product Deliberative Process
14.	BCP Staff and Management	BCP Management	Memoranda, notes, and other related internal documents concerning the mental processes of attorneys and recommendation to issue a complaint.	Work Product Deliberative Process
15.	BCP Staff and Management	BCP Management	Memoranda and other internal documents concerning discussions with non-testifying experts and expert studies.	Work Product Deliberative Process
16.	BCP Staff and Management	BCP Staff and Management	Memoranda, notes and other communications concerning settlement negotiations.	Work Product Deliberative Process
17.	BCP Management	-	Research memoranda, cases and commission memos regarding individual liability.	Work Product Deliberative Process

18.	BCP Staff and Management	BCP Staff and Management	Notes, memoranda, and other communication re: filing of Complaint.	Work Product Deliberative Process
19.	BCP Staff and Management	BCP Staff and Management	Handwritten attorney notes re: ephedra and Rand report reflecting mental impressions and processes.	Work Product Deliberative Process
20.	BCP Staff and Management	BCP Staff and Management	Attorney memo re: FTC cases containing ephedra and the sample claims and ingredients.	Work Product Deliberative Process
21.	BCP Staff and Management	BCP Staff and Management and Commission	Attorney notes and mental impressions re: 2 other Division of Advertising Practices cases not related to Respondents.	Work Product Deliberative Process
22.	BCP Staff and Management	BCP Staff and Management and Commission	Draft complaint re: 2 other Division of Advertising Practices cases not related to Respondents.	Work Product Deliberative Process
23.	BCP Staff and Management	BCP Staff and Management and Commission	Draft orders re: 2 other Division of Advertising Practices cases not related to Respondents.	Work Product Deliberative Process
24.	BCP Staff and Management	BCP Staff and Management and Commission	Recommendation to Commission in 2 other Division of Advertising Practices cases not related to Respondents.	Work Product Deliberative Process
25.	BE Staff and Management	BE and BCP Staff and Management	Drafts of complaints in this matter.	Work Product Deliberative Process
26.	BE Staff and Management	BE and BCP Staff and Management	Staff memoranda and drafts of memoranda re: case strategy.	Work Product Deliberative Process
27.	BE Staff and Management	BE and BCP Staff and Management	Notes re: case strategy.	Work Product Deliberative Process
28.	BE Staff and Management	BE and BCP Staff and Management	Emails re: case strategy	Work Product Deliberative Process

29.	BE Staff and Management	BE and BCP Staff and Management	Copies of published journal articles with handwritten annotations reflecting mental impressions and thought processes.	Work Product Deliberative Process
30.	BE Staff and Management	BE and BCP Staff and Management	Notes from consultations with staff re: investigation/case progress.	Work Product Deliberative Process
31.	BE Staff and Management	BE and BCP Staff and Management	Notes from meetings with Basic Research counsel reflecting mental impressions and conclusions.	Work Product Deliberative Process
32.	BCP Staff	BCP Staff, Management	Staff notes and memoranda regarding one open investigation, and two closed cases, not related to Respondents, which involved glucomannan, ephedra, and/or other ingredients.	Work Product Deliberative Process
33.	BCP Staff and Management	BCP Staff and Management	Memoranda, notes and other communications concerning settlement negotiations in Basic Research.	Work Product Deliberative Process
34.	BCP Staff and Management	-	Handwritten notes containing personal observations and mental impressions re: Congressional hearing on dietary supplements for overweight children.	Work Product Deliberative Process
35.	BCP Staff and Management	Commission Attorneys and/or other Commission Staff	Notes re: preparation for litigation, preparation for filing complaint.	Work Product Deliberative Process
36.	BCP Staff and Management	Commission Attorneys and/or other Commission Staff	Memoranda re: preparation for litigation, preparation for filing complaint.	Work Product Deliberative Process
37.	BCP Staff and Management	BCP Staff and Management	E-mails and other communication regarding scope of the complaint allegations.	Work Product Deliberative Process
38.	BCP Staff and Management	BCP Staff and Management	Internal memoranda regarding scope of the complaint allegations.	Work Product Deliberative Process
39.	BCP Staff and Management	BCP Staff and Management	Notes regarding scope of the complaint allegations.	Work Product Deliberative Process

40.	BCP Staff and Management	-	Handwritten notes in preparation for nonpublic briefing for U.S. House of Representatives Committee on Energy and Commerce.	Work Product Deliberative Process Law enforcement evidentiary Privilege
41.	BE Staff	BCP Management	Memorandum analyzing issues in reviewing scientific studies. Prepared April 1997.	Deliberative Process
42.	BCP Staff and enforcement target	BCP Staff and Management	Draft complaints and related memoranda, notes, and charts regarding progress and status of investigation.	Work Product Deliberative Process Law enforcement evidentiary Privilege
43.	BCP Staff	BCP Staff and Management	Documents relating to unrelated calcium pyruvate investigation, including the target's website, not related to Respondents.	Work Product Deliberative Process Law enforcement evidentiary Privilege
44.	BCP Staff	BCP Staff and Management	With regard to an unrelated closed investigation, attorney notes and mental impressions re: consultation with non-testifying expert.	Work Product Deliberative Process Law enforcement evidentiary privilege
45.	BCP Staff	BCP Staff and Management	With regard to an unrelated closed investigation, consulting expert's draft document.	Work Product Deliberative Process Law enforcement evidentiary privilege
46.	BCP Staff	BCP Staff and Management	With regard to an unrelated closed investigation, attorney notes re: ephedra, aspirin, calcium, and caffeine.	Work Product Deliberative Process Law enforcement evidentiary privilege
47.	Confidential Informants	BCP Staff	Complaints and email from confidential informants.	Confidential Informant
48.	BCP Staff	BCP Staff	Attorney notes reflecting observations and thought processes re: investigation progress and status.	Work Product

49.	BCP Staff	BCP Staff	Attorney notes reflecting observations and thought processes re: consultation with non-testifying experts.	Work Product
50.	BCP Staff	BCP Staff	Attorney notes reflecting observations and thought processes re: testifying experts.	Work Product
51.	BCP Staff	BCP Staff	Attorney notes reflecting observations and thought processes re: Congressional testimony.	Work Product
52.	BCP Staff	BCP Staff	Attorney notes reflecting observations and thought processes re: document review.	Work Product
53.	BCP Staff	BCP Staff	Attorney notes reflecting observations and thought processes re: legal research.	Work Product
54.	BCP Staff	BCP Staff	Attorney notes reflecting observations and thought processes re: case strategy.	Work Product
55.	BCP Staff	BCP Staff	E-mails reflecting observations and thought processes re: investigation progress and status.	Work Product
56.	BCP Staff	BCP Staff	E-mails reflecting observations and thought processes re: consultation with non-testifying experts.	Work Product
57.	BCP Staff	BCP Staff	E-mails reflecting observations and thought processes re: testifying experts.	Work Product
58.	BCP Staff	BCP Staff	E-mails reflecting observations and thought processes re: Congressional testimony.	Work Product
59.	BCP Staff	BCP Staff	E-mails reflecting observations and thought processes re: document review.	Work Product
60.	BCP Staff	BCP Staff	E-mails reflecting observations and thought processes re: legal research.	Work Product
61.	BCP Staff	BCP Staff	E-mails reflecting observations and thought processes re: case strategy.	Work Product
62.	BCP Staff	BCP Staff	Memoranda reflecting observations and thought processes re: investigation status and progress.	Work Product

63.	BCP Staff	BCP Staff	Memoranda reflecting observations and thought processes re: consultation with non-testifying experts.	Work Product
64.	BCP Staff	BCP Staff	Memoranda reflecting observations and thought processes re: document review.	Work Product
65.	BCP Staff	BCP Staff	Memoranda reflecting observations and thought processes re: legal research.	Work Product
66.	BCP Staff	BCP Staff	Memoranda reflecting observations and thought processes re: case strategy.	Work Product
67.	BCP Staff		Notes re: non-testifying expert.	Work Product
68.	BCP Staff		Notes, memoranda, drafts re: ongoing investigation of caffeine and aspirin products.	Work Product Law enforcement evidentiary hearing
69.	BCP Staff		Notes re: closed investigation	Work Product
70.	BCP Staff	BCP Staff	E-mails and correspondence re: ephedra investigation of entity unrelated to Respondents.	Work Product, Law enforcement evidentiary privilege
71.	BCP Staff and enforcement target	-	Notes, drafts, and documents received in law enforcement investigation of di-calcium phosphate unrelated to Respondents.	Work Product, Law enforcement evidentiary privilege
72.	BCP Staff and enforcement target	-	Notes re: consultations with non-testifying experts in law enforcement investigation unrelated to Respondents.	Work Product, Law enforcement evidentiary privilege
73.	BCP Staff and enforcement target	-	Notes and documents received pursuant to process re: closed guarana law enforcement investigation unrelated to Respondents.	Work Product, Law enforcement evidentiary privilege
74.	BCP Staff and enforcement target	BCP Staff and Management	Notes, memoranda, and documents received pursuant to process in closed law enforcement investigation involving a calcium pyruvate ingredient. Investigation unrelated to Respondents.	Work Product, Law enforcement evidentiary privilege, deliberative process

75.	Enforcement target	BCP Staff	Documents received in closed ephedra law enforcement investigation unrelated to Respondents.	Law enforcement, evidentiary privilege
76.	BCP Staff	BCP Staff	Notes re: 2 open law enforcement investigations unrelated to Respondents involving ephedra products.	Work Product, Law enforcement, evidentiary privilege deliberative process
77.	BCP Staff	BCP Staff	Memoranda re: 2 open law enforcement investigations unrelated to Respondents involving ephedra products.	Work Product, Law enforcement, evidentiary privilege deliberative process
78.	BCP Staff and enforcement target	BCP Staff	Documents responsive to agency subpoenas re: 2 open law enforcement investigations unrelated to Respondents involving ephedra products.	Work Product, Law enforcement, evidentiary privilege deliberative process
79.	BCP Staff	BCP Staff	E-mails, memoranda, and notes re: consultations with non-testifying experts regarding Basic Research, re: confidential informants, investigation, legal research, settlement, case strategy, development of the complaint allegations, and internal deliberations.	Work Product, Law enforcement, evidentiary privilege deliberative process

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

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

**COMPLAINT COUNSEL'S RESPONSE TO
BASIC RESEARCH LLC'S FIRST REQUEST FOR ADMISSIONS**

Pursuant to Rule 3.32 of the Commission's Rules of Practice, Complaint Counsel serve the following answers to Respondent Basic Research LLC's First Request For Admissions ("Respondent's Admissions"). Complaint Counsel's provision of a response to any request for admission shall not constitute a waiver of any applicable objection, privilege, or other right. Where required in order to respond to these Requests For Admissions, Complaint Counsel represents that it has undertaken good faith efforts to identify the information that would allow it to admit or deny such requests.

GENERAL OBJECTIONS

1. Complaint Counsel object to Respondent's requests for admissions to the extent they fail to seek an admission of the truth of matters relevant to the pending proceedings. Rule 3.32, Admissions.

5. As used herein, "Respondent's requests for admission" shall mean the requests for admission and all applicable instructions and definitions as set forth in Basic Research, LLC's First Request For Admissions.

Requests For Admission and Responses

1. Admit that the Federal Trade Commission has not conducted any studies regarding the Efficacy of the Challenged Products.

Response:

Complaint Counsel objects to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel admit that they have not conducted any studies regarding the Efficacy of the Challenged Products.

2. Admit that the Federal Trade Commission has not conducted consumer surveys or other research relating to how reasonable consumers would interpret or understand the Challenged Advertisements.

Response:

Complaint Counsel objects to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel objects to this request as vague and overbroad as it pertains to "other research." Complaint Counsel further objects to this request because it seeks premature disclosure of Complaint Counsel's expert discovery contrary to the timing established in the Court's Scheduling Order and disclosure of information from Complaint Counsel's non-testifying witness[es] which is protected from disclosure under the work product doctrine. Subject to and without waiving these objections, Complaint Counsel admits this request to the extent that they have not, as of this date, conducted "consumer surveys" relating to "how reasonable consumers would interpret or understand the Challenged Advertisements" and denies this request as to "other research."

3. Admit that the Federal Trade Commission has not conducted consumer surveys or other research relating to what types of substantiation reasonable consumers would expect the Respondents to possess in order to have a reasonable basis for the Challenged Claims in the Challenged Advertisements.

Response:

Complaint Counsel objects to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel objects to this request as vague and overbroad as it pertains "other research." Complaint Counsel further objects to this request because it seeks premature disclosure of Complaint Counsel's expert discovery contrary to the timing established in the Court's Scheduling Order and disclosure of information from Complaint Counsel's non-testifying witness[es] which is protected from disclosure under the work product doctrine. Subject to and without waiving these objections, Complaint Counsel admits this request to the extent that they have not, as of this date,

conducted “consumer surveys” relating to “what types of substantiation reasonable consumers would expect the Respondents to possess in order to have a reasonable basis for the Challenged Claims in the Challenged Advertisements” and denies this request as to “other research.”

4. Admit that at the time the Complaint was filed, the Federal Trade Commission had no expert opinion as to what express and/or implied claims were made in the Challenged Advertisements.

Response: Complaint Counsel objects to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further objects to this request because it seeks premature disclosure of Complaint Counsel’s expert discovery contrary to the timing established in the Court’s Scheduling Order and disclosure of information from Complaint Counsel’s non-testifying witness[es] which is protected from disclosure under the work product doctrine. Subject to and without waiving these objections, Complaint Counsel denies.

5. Admit that at the time the Complaint was filed, the Federal Trade Commission had no expert opinion that Respondents lacked a “reasonable basis” for the Challenged Advertisements.

Response: Complaint Counsel objects to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further objects to this request because it seeks premature disclosure of Complaint Counsel’s expert discovery contrary to the timing established in the Court’s Scheduling Order and disclosure of information from Complaint Counsel’s non-testifying witness[es] which is protected from disclosure under the work product doctrine. Subject to and without waiving these objections, Complaint Counsel denies.

6. Admit that at the time the Complaint was filed, the Federal Trade Commission had no expert opinion to support the allegations in paragraphs 24,26,32, and 41 of the Complaint.

Response: Complaint Counsel objects to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further objects to this request because it seeks premature disclosure of Complaint Counsel’s expert discovery contrary to the timing established in the Court’s Scheduling Order and disclosure of information from Complaint Counsel’s non-testifying witness[es] which is protected from disclosure under the work product doctrine. Subject to and without waiving these objections, Complaint Counsel denies.⁴

7. Admit the interpretation of Challenged Advertisements used to support the filing of the Complaint was performed by Staff Counsel for the Federal Trade Commission.

Response: Complaint Counsel objects to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further objects to this request because it seeks disclosure of information from Complaint Counsel’s non-testifying witness[es] which is protected from disclosure under the work product doctrine. Subject to and without waiving these objections, Complaint Counsel admits this request to the extent that they reviewed, analyzed and interpreted the Challenged Advertisements in connection with the filing of the Complaint but denies that they were the only individuals who did so in connection with the filing of the complaint.

8. Admit that the term “Rapid” can mean different things to different reasonable consumers.

Response: Complaint Counsel objects to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. The issue in this case is not whether there are multiple reasonable meanings of the term “Rapid.” A respondent can be held liable where multiple interpretations of a claim are possible only one of which is deceptive. Stouffer Foods Corp., 118 F.T.C. at 799; Kraft., Inc. 114 F.T.C. at 120-21 n.8; Thompson Medical, 104 F.T.C. at 789 n.7.

9. Admit that the term “Substantial” can mean different things to different reasonable consumers.

Response: Complaint Counsel objects to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. The issue in this case is not whether there are multiple reasonable meanings of the term “Substantial.” A respondent can be held liable where multiple interpretations of a claim are possible only one of which is deceptive. Stouffer Foods Corp., 118 F.T.C. at 799; Kraft., Inc. 114 F.T.C. at 120-21 n.8; Thompson Medical, 104 F.T.C. at 789 n.7.

10. Admit that at the time the Challenged Advertisements were published, the Federal Trade Commission had no pre-screening protocol for the approval of the Challenged Advertisements.

Response: Complaint Counsel objects to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further objects to this request as vague as to “pre-screening protocol.” Complaint Counsel had sought clarification of this term from Respondent’s Counsel but failed to receive a response.

11. Admit that at the time the Challenged Advertisements were published, the Federal Trade Commission had no pre-screening protocol for determining the adequacy of the substantiation supporting the claims made in the Challenged Advertisements.

Response: Complaint Counsel objects to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel further objects to this request as vague as to "pre-screening protocol." Complaint Counsel had sought clarification of this term from Respondent's Counsel but failed to receive a response.

12. Admit that the Federal Trade Commission will not give advertisers definitive answers on the adequacy of their claim substantiation before advertisements are disseminated.

Response: Complaint Counsel objects to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Subject to and without waiving this objection, Complaint Counsel denies this request to the extent that FTC staff may, under certain circumstances, as part of the post-order compliance process, provide advice as to whether a proposed course of action, if pursued, will constitute compliance with a Commission Order. See 16 C.F.R. §2.41 (d).

13. Admit that 16 C.F.R. § 1.1 does not provide a pre-screening protocol for advertisers to receive approval of their advertising.

Response: Complaint Counsel objects to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel further objects to this request as vague as to "pre-screening protocol." Complaint Counsel had sought clarification of this term from Respondent's Counsel but failed to receive a response. Subject to and without waiving these objections, Complaint Counsel asserts that the text of 16 C.F.R. § 1.1 speaks for itself but admits this request to the extent that the text of the regulation does not contain the term "pre-screening protocol."

14. Admit that advice provided by the Federal Trade Commission under 16 C.F.R. § 1.1 is not binding on the Federal Trade Commission.

Response: Complaint Counsel objects to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Subject to and without waiving this objection, Complaint Counsel asserts that the text of 16 C.F.R. § 1.1 speaks for itself and that the regulatory framework governing Advisory Opinions cannot properly be understood except by reference to the framework as a whole which includes not only but §1.1 but §§ 1.2-1.4. Complaint Counsel admits this request to the extent that the text of §§ 1.3(b) and (c) provide that the Commission may reconsider, rescind, or revoke advice given by the Commission or its staff. Section 1.3(b) goes on to provide that "Notice of such rescission or revocation will be given to the requesting party so that he may discontinue the

course of action taken pursuant to the Commission's advice. The Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all the relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval."

15. Admit that the Federal Trade Commission is under no obligation to issue warning letters if it changes its position regarding advice previously provided under 16 C.F.R. § 1.1.

Response: Complaint Counsel objects to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel also objects to this request as vague as it fails to define "warning letters" and "changes its position." Subject to and without waiving these objections, Complaint Counsel asserts that the text of 16 C.F.R. § 1.1 speaks for itself and that the regulatory framework governing Advisory Opinions cannot properly be understood except by reference to the framework as a whole which includes not only but §1.1 but §§ 1.2-1.4. Complaint Counsel notes that the text of §§ 1.3(b) and (c) provide that the Commission may reconsider, rescind, or revoke advice given by the Commission or its staff. Section 1.3(b) goes on to provide that "Notice of such rescission or revocation will be given to the requesting party so that he may discontinue the course of action taken pursuant to the Commission's advice. The Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all the relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval."

16. Admit that in 2000, the Federal Trade Commission received a petition to adopt a rule for the pre-screening of dietary supplement advertisements.

Response: Complaint Counsel objects to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel further objects to this request as vague as to "pre-screening." Complaint Counsel had sought clarification of this term from Respondent's Counsel but failed to receive a response. Subject to and without waiving these objections, Complaint Counsel admits this request to the extent that the Federal Trade Commission received a Petition for Rulemaking in 2000 from Jonathan W. Emord, Esq. which is attached and speaks for itself.

17. Admit that in 2000, the Federal Trade Commission denied a petition to adopt a rule for the pre-screening of dietary supplement advertisements.

Response: Complaint Counsel objects to this request because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel further objects to this request as vague as to "pre-screening" Complaint Counsel had sought clarification of this term from Respondent's Counsel but failed to receive a

response. Subject to and without waiving these objections, Complaint Counsel admits this request to the extent that the Federal Trade Commission denied a Petition for Rulemaking in 2000 from Jonathan W. Emord, Esq. and the letter denying the Petition was previously produced to Respondents but is also attached and speaks for itself.

18. Admit that in 2000, the Federal Trade Commission denied a petition to adopt a rule for the pre-screening of dietary supplement advertisements because it was impracticable.

Response: Complaint Counsel objects to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further objects to this request as vague as to “pre-screening.” Complaint Counsel had sought clarification of this term from Respondent’s Counsel but failed to receive a response. Subject to and without waiving these objections, Complaint Counsel admits this request to the extent that the Federal Trade Commission denied a Petition for Rulemaking in 2000 from Jonathan W. Emord, Esq. and that the bases for the Federal Trade Commission’s denial cannot properly be understood except by reference to the letter denying the petition as a whole. The letter denying the Petition was previously produced to Respondents but is also attached and speaks for itself.

19. Admit that the Federal Trade Commission, at one time, had a pre-screening protocol for approving advertisements prior to dissemination.

Response: Complaint Counsel objects to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further objects to this request as vague as to “at one time” and “pre-screening protocol.” Complaint Counsel had sought clarification of this term from Respondent’s Counsel but failed to receive a response. Subject to and without waiving these objections, Complaint Counsel denies this Request to the extent that the compliance order procedures, allowing “any respondent to request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance” with a Commission Order, see 16 C.F.R. §2.41 (d), constitute a “pre-screening protocol.” Complaint Counsel also denies this request to the extent that the use of the phrase “at one time” suggests that the procedure set forth in §2.41 (d) is no longer in place. Complaint Counsel lacks sufficient information to either admit or deny the remainder of this request.

20. Admit that the Federal Trade Commission abolished its pre-screening protocol for approving advertisements prior to dissemination.

Response: Complaint Counsel objects to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further objects to this request as vague as to “pre-screening protocol.” Complaint Counsel had sought clarification of this term from Respondent’s Counsel but failed to receive a response. Subject to and without waiving these objections, Complaint Counsel denies this Request to the extent that the compliance order procedures, allowing “any respondent to request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance” with a Commission Order, see 16 C.F.R. §2.41 (d), constitute a “pre-screening protocol.” Complaint Counsel also denies this request to the extent that the use of the phrase “abolished” suggests that the procedure set forth in §2.41 (d) is no longer in place. Complaint Counsel lacks sufficient information to either admit or deny the remainder of this request.

21. Admit that the Federal Trade Commission would pre-screen Respondents’ advertisements in the event that a cease and desist order is issued against them.

Response: Complaint Counsel objects to this request because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further objects to this request as vague as to “pre-screening.” Complaint Counsel had sought clarification of this term from Respondent’s Counsel but failed to receive a response. Subject to and without waiving these objections, Complaint Counsel admits this Request to the extent that the compliance order procedures, allowing “any respondent to request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance” with a Commission Order, see 16 C.F.R. §2.41 (d), constitute “pre-screen[ing].” Complaint Counsel denies this Request to the extent that §2.41 (d) provides that such requests for advice are inappropriate under certain circumstances.

22. Admit that the Federal Trade Commission defines, in each case, the substantiation needed to constitute a reasonable basis for the Challenged Advertising.

Response: Complaint Counsel objects to this request to the because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further objects to this request because it seeks an admission as to a matter of law and hence is not a proper request.

23. Admit that in the case of specific establishment claims, the only substantiation required of the advertiser is the substantiation specifically referenced by the advertiser in the advertisement.

Response: Complaint Counsel objects to this request to the because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further objects to this request because it seeks an admission as to a matter of law and hence is not a proper request and exceeds the scope of Rule 3.32 Admissions.

24. Admit that what constitutes a “reasonable basis” changes from case to case.

Response: Complaint Counsel objects to this request to the because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further objects to this request as overbroad and because it seeks an admission as to a matter of law and hence is not a proper request and exceeds the scope of Rule 3.32 Admissions.

25. Admit that the Federal Trade Commission coordinated the filing of the Complaint with the Congressional hearings held on June 16, 2004 before the Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, United States House of Representatives (“the Hearings”).

Response: Complaint Counsel objects to this request to the because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further objects to this request as vague and ambiguous as to “coordinated.”

26. Admit that te Federal Trade Commission was asked by Congressional representatives to delay filing of the Complaint until the commencement of the Hearings.

Response: Complaint Counsel objects to this request to the because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further objects to this request as vague and ambiguous as to “Congressional representatives.”

27. Admit that J. Howard Beales III is not a medical doctor.

Response: Complaint Counsel objects to this request to the because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions.

28. Admit that at the Hearings, J. Howard Beales III was addressed as “Dr. Beales.”

Response: Complaint Counsel objects to this request to the because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions.

29. Admit that at the Hearings, when addressed as “Dr. Beales,” Dr. Beales did not correct any member of Congress that he was not a medical doctor.

Response: Complaint Counsel objects to this request to the because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions.

30. Admit that Dr. Wexler is not a medical doctor.

Response: Complaint Counsel objects to this request to the because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further object to this request as vague and overbroad as to Dr. Wexler.

31. Admit that the Federal Trade Commission deems Dr. Wexler to be an expert on child obesity.

Response: Complaint Counsel objects to this request to the because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further object to this request as vague and overbroad as to Dr. Wexler.

32. Admit that at the Hearings Dr. Wexler was addressed as “Dr. Wexler.”

Response: Complaint Counsel objects to this request to the because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further object to this request as vague and overbroad as to Dr. Wexler.

33. Admit that at the Hearings, when addressed as “Dr. Wexler,” Dr. Wexler did not correct any member of Congress that he was not a medical doctor.

Response: Complaint Counsel objects to this request to the because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further object to this request as vague and overbroad as to Dr. Wexler.

34. Admit that there is no Federal Trade Commission rule that prohibits a Ph.D from being referred to as a “doctor.”

Response: Complaint Counsel objects to this request to the because it does not seek “an admission of the truth of any matters relevant to the pending proceeding.” R. 3.32, Admissions. Complaint Counsel further objects to this request because it seeks an admission as to a matter of law and hence is not a proper request and exceeds the scope of Rule 3.32 Admissions.

35. Admit that the conclusion that Respondents did not possess or rely upon a reasonable basis that substantiated the accused advertising is premised upon the Respondents not having a specific type and amount of substantiation for its claims.

Response: Complaint Counsel objects to this request as vague as to "specific type and amount." Complaint Counsel further objects to this request because it seeks premature disclosure of Complaint Counsel's expert discovery contrary to the timing established in the Court's Scheduling Order and disclosure of information from Complaint Counsel's non-testifying witness[es] which is protected from disclosure under the work product doctrine. Subject to and without waiving these objections, Complaint Counsel admits this Request to the extent that Complaint Counsel contends that its allegations that respondents did not possess and rely upon a reasonable basis that substantiated the claims challenged in the Complaint will be proven at trial. Complaint Counsel's allegations are premised upon a review of Respondents' advertising of the Challenged Products and the substantiation proffered by Respondents to support the claims challenged in the Complaint. Complaint Counsel contends that the substantiation proffered does not constitute competent and reliable scientific evidence for the claims challenged in the Complaint.

36. Admit that the Federal Trade Commission's authority is limited to determining whether the representations made in the Challenged Advertisements are in accord with the level of substantiation Respondent's possessed.

Response: Complaint Counsel objects to this request as vague, ambiguous and overbroad regarding the "Federal Trade Commission's authority." Complaint Counsel further objects to this request because it seeks an admission as to a matter of law and hence is not a proper request and exceeds the scope of Rule 3.32 Admissions. Subject to and without waiving these objections, Complaint Counsel admits this request to the extent that Complaint Counsel contends that one of the issues for trial will be whether Respondents' had a reasonable basis for making the claims challenged in the Complaint before the claims were disseminated.

37. Admit that it is the Federal Trade Commission's position that "competent and reliable scientific evidence" can mean different types and amounts of evidence in different cases.

Response: Complaint Counsel objects to this request to the because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel further objects to this request because it seeks an admission as to a matter of law and hence is not a proper request and exceeds the scope of Rule 3.32 Admissions. Subject to and without waiving this objection, Complaint Counsel admits this request to the extent that what constitutes competent and reliable scientific evidence may vary depending upon a number of factors including the type of product, the type of claim being made, and the particular field of science involved based upon the claims and the product.

38. Admit that the Federal Trade Commission has not defined "competent and reliable scientific evidence" to require any specific kinds, types or amounts of scientific studies.

Response: Complaint Counsel objects to this request to the because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel further objects to this request because it seeks an admission as to a matter of law and hence is not a proper request and exceeds the scope of Rule 3.32 Admissions. Subject to and without waiving this objection, Complaint Counsel admits this request to the extent that the Federal Trade Commission has defined "competent and reliable scientific evidence" in the Order attached to its Complaint as "tests, analyses, research, studies, or other evidence based on 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."

39. Admit that the Federal Trade Commission has not defined "competent and reliable scientific evidence" to require any specific testing or research protocol or controls.

Response: Complaint Counsel objects to this request to the because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel further objects to this request because it seeks an admission as to a matter of law and hence is not a proper request and exceeds the scope of Rule 3.32 Admissions. Subject to and without waiving this objection, Complaint Counsel admits this request to the extent that the Federal Trade Commission has defined "competent and reliable scientific evidence" in the Order attached to its Complaint as "tests, analyses, research, studies, or other evidence based on 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."

40. Admit that the Federal Trade Commission's position is that the state of the science renders all the representations made in the Challenged Advertisements unsupported.

Response: Complaint Counsel objects to this request as vague as to "the state of the science" and overbroad as to "all the representations." Complaint Counsel further objects to this request because it seeks premature disclosure of Complaint Counsel's expert discovery contrary to the timing established in the Court's Scheduling Order and disclosure of information from Complaint Counsel's non-testifying witness[es] which is protected from disclosure under the work product doctrine.

41. Admit that it is the Federal Trade Commission's position that claims about the Safety and Efficacy of dietary supplements must be substantiated by competent and reliable scientific evidence.

Response: Complaint Counsel objects to this request because it seeks an admission as to a matter of law and hence is not a proper request and exceeds the scope of Rule 3.32 Admissions. Subject to and without waiving these objections, Complaint Counsel admits this request to the extent that the Federal Trade Commission typically requires claims about the efficacy or safety of dietary supplements to be supported with competent and reliable scientific evidence.

42. Admit that it is the Federal Trade Commission's position that Respondents needed competent and reliable scientific evidence to substantiate the representations made in the Challenged Advertisements.

Response: Complaint Counsel objects to this request because it seeks an admission as to a matter of law and hence is not a proper request and exceeds the scope of Rule 3.32 Admissions. Subject to and without waiving these objections, Complaint Counsel admits this request to the extent that it contends that Respondents needed competent and reliable scientific evidence to support the claims regarding the Challenged Products alleged in its Complaint.

43. Admit that the FTC Commissioners have no formal training or expertise in advertising interpretation.

Response: Complaint Counsel objects to this request to the because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel further objects to this request because it seeks an admission as to a matter of law and hence is not a proper request and exceeds the scope of Rule 3.32 Admissions.

44. Admit that the FTC Commissioners are not given any formal training in advertising interpretation prior to being commissioned.

Response: Complaint Counsel objects to this request to the because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions. Complaint Counsel further objects to this request because it seeks an admission as to a matter of law and hence is not a proper request and exceeds the scope of Rule 3.32 Admissions.

45. Admit that the FTC Commissioners have no formal training or expertise in the interpretation of science and/or medical studies.

Response: Complaint Counsel objects to this request to the because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions.

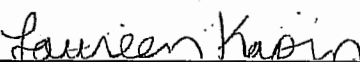
46. Admit that the FTC Commissioners are not given any formal training in the interpretations of science and/or medical studies prior to being commissioned.

Response: Complaint Counsel objects to this request to the because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions.

47. Admit that the attorneys for the Federal Trade Commission are bound to follow the procedures specifically discussed in the FTC Operating Manual.

Response: Complaint Counsel objects to this request to the because it does not seek "an admission of the truth of any matters relevant to the pending proceeding." R. 3.32, Admissions.

Dated: September 24, 2004



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

Amended Certificate of Service

I hereby certify that on the 24th day of September, 2004, I caused *COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT BASIC RESEARCH LLC'S FIRST REQUEST FOR ADMISSIONS* to be served and filed as follows:

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

Stephen E. Nagin
Nagin Gallop Figuerdo P.A.
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**For Respondents Basic
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Waterhouse, LLC,
Klein-Becker USA, LLC,
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Respondent Pro Se

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

- (1) the original, two (2) paper copies filed by hand delivery
and one (1) electronic copy via email to:

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

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

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


COMPLAINT COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2004, I caused *Complaint Counsel's Memorandum in Opposition to Basic Research LLC's Second Motion to Compel* to be served and filed as follows:

- (1) the original, two (2) paper copies filed by hand delivery and one (1) electronic copy via email to:
Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580
- (2) two (2) paper copies served by hand delivery to:
The Honorable Stephen J. McGuire
Administrative Law Judge
600 Penn. Ave., N.W., Room H-104
Washington, D.C. 20580
- (3) one (1) electronic copy via email and one (1) paper copy by first class mail to the following persons:

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COMPLAINT COUNSEL