

supplement Interrogatory 1(a), and undersigned counsel so certified in a Certificate of Compliance pursuant to Section 3.22(f) of the Commission's Rules of Practice.

4. The Certificate of Compliance further reflected that no supplemental responses had been received at the time the Motion to Compel was filed.

5. On Friday, September 10, 2004, however, it was discovered that Complaint Counsel had provided Complaint Counsel's First Supplemental Responses to Basic Research's First Set of Interrogatories ("Supplemental Responses") to Jeffrey Feldman, lead counsel for Basic Research, on Friday, September 3, 2004. A copy of Complaint Counsel's Supplemental Responses are attached hereto as Exhibit 1.

6. Unfortunately, due to office closures and other complications created by both Hurricane Frances and Mr. Feldman's extensive travel schedule, the Supplemental Responses were not reviewed until after the Motion to Compel was filed.

7. Accordingly, undersigned counsel hereby issues this Notice of Correction to correct the Certificate of Compliance accompanying the Motion to Compel to reflect that Complaint Counsel provided its Supplemental Responses on September 3, 2004.

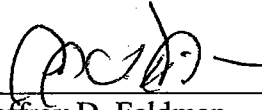
8. With respect to the substance of Complaint Counsel's Supplemental Response to Interrogatory No. 1(a), Complaint Counsel responded as follows:

...the representations made by Respondents in promotional materials for the challenged products are strongly implied claims.

See, Supplemental Responses, page 3 (emphasis added).

9. Based on Complaint Counsel's concession that none of the representations made by Respondents in promotional materials for the challenged products are express claims, Basic Research withdraws its objection as set forth in its Motion to Compel with respect to, but only with respect to, Complaint Counsel's response to Interrogatory 1(a).

Respectfully submitted,



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Attorneys for Respondents Basic Research, LLC,
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Nutrasport, LLC, Sövage Dermalogic Laboratories,
LLC and Ban, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Correction was provided to the following parties this 15th day of September, 2004 as follows:

(1) One (1) original and one (1) copy by Federal Express to Donald S. Clark, Secretary, Federal Trade Commission, Room H-159, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

(2) One (1) electronic copy via e-mail attachment in Adobe® “.pdf” format to the Secretary of the FTC at Secretary@ftc.gov;

(3) Two (2) copies by Federal Express to Administrative Law Judge Stephen J. McGuire, Federal Trade Commission, Room H-104, 600 Pennsylvania Avenue N.W., Washington, D.C. 20580;

(4) One (1) copy via e-mail attachment in Adobe® “.pdf” format to Commission Complaint Counsel, Laureen Kapin, Joshua S. Millard, and Laura Schneider, all care of lkapin@ftc.gov, jmillard@ftc.gov; rrichardson@ftc.gov; lschneider@ftc.gov with one (1) paper courtesy copy via U. S. Postal Service to Laureen Kapin, Bureau of Consumer Protection, Federal Trade Commission, Suite NJ-2122, 600 Pennsylvania Avenue, N.W., Washington, D.C., 20580;

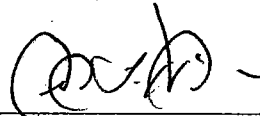
(5) One (1) copy via U. S. Postal Service to Elaine Kolish, Associate Director in the Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580

(6) One (1) copy via United States Postal Service to Stephen Nagin, Esq., Nagin Gallop & Figueredo, 3225 Aviation Avenue, Suite 301, Miami, Florida 33131. . .

(7) One (1) copy via United States Postal Service to Richard Burbidge, Esq., Jefferson W. Gross, Esq. and Andrew J. Dymek, Esq., Burbidge & Mitchell, 215 South State Street, Suite 920, Salt Lake City, Utah 84111, Counsel for Dennis Gay.

(8) One (1) copy via United States Postal Service to Ronald F. Price, Esq., Peters Scofield Price, A Professional Corporation, 340 Broadway Centre, 111 East Broadway, Salt Lake City, Utah 84111, Counsel for Daniel B. Mowrey.

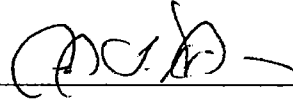
(9) One (1) copy via United States Postal Service to Mitchell K. Friedlander, 5742 West Harold Gatty Drive, Salt Lake City, Utah 84111, Pro Se.



A handwritten signature in black ink, appearing to be "D. S. Clark", is written above a horizontal line.

CERTIFICATION FOR ELECTRONIC FILING

I HEREBY CERTIFY that the electronic version of the foregoing is a true and correct copy of the original document being filed this same day of September 15, 2004 via Federal Express with the Office of the Secretary, Room H-159, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

A handwritten signature in black ink, appearing to be "A.C. H.", is written above a horizontal line.

**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,)

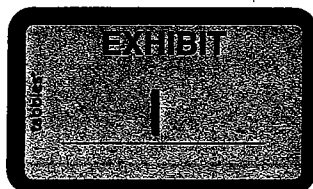
Respondents.)

Docket No. 9318

PUBLIC DOCUMENT

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

On August 27, 2004, Complaint Counsel served its Response to Respondent Basic Research L.L.C.'s First Set of Interrogatories ("Respondent's Interrogatories"). Pursuant to Rule 3.22(f) of the Commission's Rule of Practice, the parties have held several conferences in an effort in good faith to resolve by agreement certain discovery issues. As a result of those conferences, and pursuant to Rule 3.35, Complaint Counsel serve the following supplemental response to Respondent's First Set of Interrogatories. Complaint Counsel reserves all applicable general objections set forth in Complaint Counsel's Response to Respondent's First Set of Interrogatories.



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.

Supplement:

Subject to and without waiving these objections or the General Objections stated above, Complaint Counsel state as follows: The Complaint alleges that Respondents have represented the claims at issue "expressly or by implication."

Express claims are those that are literally stated in a piece of promotional material, and require no evidence whatsoever beyond the text of the promotional material itself. *Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986). Implied claims are all other claims that are not expressly stated in the text of the promotional material. Such claims range from those that use language and imagery "virtually synonymous with an express claim, through language that literally says one thing but strongly suggests another, to language which relatively few consumers would interpret as making a particular representation." *Thompson Medical Co.*, 104 F.T.C. at 788-89.

Based upon the evidence presently available to Complaint Counsel, the representations made by Respondents in promotional materials for the challenged products are strongly implied claims. As Respondents are aware, some words in the alleged claims were literally stated in promotional materials. For example, Respondents have used the words "visible" and "substantial" and "significantly overweight" in their advertising for the Challenged Products. *See, e.g.*, Complaint 41 and accompanying Exhibits; Complaint Counsel's Response to Respondent's First Set of Interrog., Interrog. 6 (Respondent's Interrog. 4).

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.

Dated: September 3, 2004

Respectfully submitted,

Laureen Kapin

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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

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2004, I caused *Complaint Counsel's First Supplemental Response To Respondent's First Set of interrogatories* to be served and filed as follows:

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

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(305) 854-5351 (fax)
snagin@ngf-law.com
For Respondents

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Nutrasport, LLC, Sovage
Dermalogic Laboratories,
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