

**UNITED STATES OF AMERICA  
BEFORE 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.,  
    d/b/a BASIC RESEARCH, L.L.C.,  
    OLD BASIC RESEARCH, L.L.C.,  
    BASIC RESEARCH, A.G. WATERHOUSE,  
BAN, L.L.C.,  
    d/b/a KLEIN-BECKER USA, NUTRA SPORT, and  
    SOVAGE DERMALOGIC LABORATORIES,  
DENNIS GAY,  
DANIEL B. MOWREY,  
    d/b/a AMERICAN PHYTOTHERAPY RESEARCH  
    LABORATORY, and  
MITCHELL K. FRIEDLANDER,

*Respondents.*

**DOCKET NO. 9318**

**BASIC RESEARCH, LLC'S MOTION TO COMPEL**

Respondent Basic Research, LLC ("Basic Research" or "Respondent"), by and through undersigned counsel and pursuant to 16 C.F.R. §3.38, seeks an order compelling the Federal Trade Commission ("FTC") to provide complete answers to Basic Research's First Set of Interrogatories ("First Set of Interrogatories"), and in support thereof state as follows.

**I. BACKGROUND**

On June 15, 2004, the FTC filed an administrative complaint against Respondent alleging that certain of its dietary supplement advertising violated Sections 5 and 12 of the FTC Act ("FTC's Complaint"). According to the FTC's Complaint, the Commission (1) interpreted the challenged advertisements as making express and/or implied claims; (2) determined that

Respondent represented that it relied and possessed a “reasonable basis” that substantiated those claims; and (3) asserted that Respondent did not rely upon or possess the “reasonable basis” it purported to have. *See*, FTC’s Complaint.

Based on Respondent’s lack of understanding of the meaning attached by the FTC to the standard “reasonable basis,” and other subjective terms purportedly conveyed in the challenged advertisements<sup>1</sup>, Respondent filed a motion for a more definite statement on June 28, 2004.<sup>2</sup> (“Motion for More Definite Statement”). On July 8, 2004, Complaint Counsel filed its Opposition to the Motion for More Definite Statement (“Opposition”), in which it argued that the lack of specificity in the FTC’s Complaint could be “remedied easily by discovery.” *See*, Opposition, page 4. Complaint Counsel further relied upon several cases standing for the proposition that notice pleading relies on liberal discovery rules to provide information not contained in the complaint. *Id.* at page 5, *citing*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (“notice pleading relies on liberal discovery rules...to define disputed facts”).<sup>3</sup> On July 20, 2004, Respondent’s Motion for More Definite Statement was denied by the Administrative Law Judge D. Michael Chappell on the basis that any necessary clarification of the disputed terms “may be obtained during the normal course of discovery.”<sup>4</sup> *See*, ALJ’s Order Denying

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<sup>1</sup> These subjective terms included “rapid,” “substantial,” “visibly obvious,” and “causes.”

<sup>2</sup> On July 6, 2004, Respondent Mitchell K. Friedlander filed a motion to dismiss asserting that the complaint was fatally defective in this regard.

<sup>3</sup> Complaint Counsel also cited *Textil RV v. Italuomo, Inc.*, No. 92 Civ. 526, 1993 U.S. Dist. LEXIS 4663, at \*6 (S.D.N.Y. Apr. 13, 1993) (more definite statement adds “little that discovery could not provide”) and *New Balance and Athletic Shoe, Inc.*, No. 9268, 1994 F.T.C. LEXIS 213 (Oct. 20, 1994) (“discovery will add detail later”).

<sup>4</sup> On July 27, 2004, Respondents’ filed a motion for an interlocutory appeal of the decision on the motion for more definite statement. Plaintiff Mitchell K. Friedlander also requested certification to the Commission on the question of whether the Commission has given fair notice of the legal standard as to which Respondents’ conduct will be judged as it touched upon the (continued...)

Motions for More Definite Statement and Motion to Dismiss for Lack of Definiteness (“Order”).

Accordingly, on July 23, 2004, Respondent served its First Set of Interrogatories<sup>5</sup>, attached hereto as Exhibit 1, to discover facts underlying the FTC’s operative allegations, some of which Complaint Counsel refused to provide on Respondent’s Motion for More Definite Statement. Specifically, the First Set of Interrogatories inquired into (1) the interpretation of the challenged advertisements; (2) the nature of the substantiation necessary to form a “reasonable basis” in this case; and (3) what level of substantiation the FTC believes Respondents’ possessed and how it allegedly fell short.

On August 27, 2004, Complaint Counsel served its responses the First Set of Interrogatories, attached hereto as Exhibit 2 (“Complaint Counsel’s Responses”). These Responses, however, do not answer the questions posed. Rather, Complaint Counsel relies on blanket objections, boilerplate definitions, and partial answers, all designed to avoid providing the very information Complaint Counsel promised to provide in its Opposition to Respondent’s Motion for More Definite Statement. Such responses cannot stand.

Rule of Practice 3.35 requires that each interrogatory be answered “fully.” 16 C.F.R. §3.35(a)(2). To answer interrogatories “fully” Complaint Counsel must provide facts supporting

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Commission’s administrative discretion. On August 17, 2004, Respondents’ motion for interlocutory appeal and for certification were denied. Following the denial of these collective motions, Respondents answered the FTC’s Complaint asserting both constitutional and non-constitutional defenses, some of which are predicated on the deficiencies of the FTC’s Complaint.

<sup>5</sup> The Commission’s Rule of Practice 3.35 permits “any party to serve upon any other party written interrogatories...to be answered by the served party...who shall furnish such information as is available to the party.” 16 C.F.R. §3.35(a)(1). When the Commission amended its Rules to add this discovery device, it stated that it was “intended to shorten adjudicative proceedings by enabling the parties to more precisely define the actual issues.” 43 Fed. Reg. 56862 (Dec. 4, 1978). Accordingly, “[t]he purpose of interrogatories is to narrow the issues and thus help determine what evidence will be needed at trial.” *In re North Texas Specialty Physicians*, 2003 WL 22936410 (F.T.C.).

its contentions, not simply issue general objections, defer to third parties, or cite documents wholesale as an alternative to responding. *In re North Texas Specialty Physicians*, 2003 WL 22936410 (F.T.C.) (order granting motion to compel), *citing*, *In re Beatrice Foods Co.*, 1979 FTC LEXIS 598, \*4 (1979) (ordering complaint counsel to state the facts supporting certain allegations in the complaint); *In the Matter of Schering-Plough Corporation, et al.*, 2002 WL 32846 (F.T.C.) (where Complaint Counsel, in its memorandum in support of motion to compel responses to interrogatories, argued that answering “fully” means to “state facts” and “elaborate on legal contentions.”).

None of Complaint Counsel’s responses “state facts” or “elaborate on legal contentions.” As such, Complaint Counsel has failed to respond “fully” as required by the Rules of Practice. Respondent’s Motion seeking an order compelling the FTC to provide better answers to the First Set of Interrogatories (“Motion to Compel”) must therefore be granted.

## II. ARGUMENT

### A. Complaint Counsel Must Provide Better Answers To Respondent’s First Set of Interrogatories

As noted, *supra*, the core of the FTC’s Complaint against Respondent concerns (1) the interpretation of the challenged advertisements; (2) the level of substantiation necessary to support the claims made therein; and (3) why Respondent’s substantiation allegedly fell short. Respondent has a right to, and was promised, meaningful discovery on these issues. *See*, 16 C.F.R. §3.35; Complaint Counsel’s Opposition to Motion for More Definite Statement; and ALJ’s Order, dated July 20, 2004. However, as the following discussion demonstrates, Complaint Counsel has failed to provide meaningful responses.

1. Interrogatory No. 1(a)-(c)<sup>6</sup>

Interrogatory No. 1, subparts (a), (b) and (c), reads as follows:

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;
  - (c) describe all extrinsic evidence (that is, anything other than Promotional Material itself) that was relied upon in determining what representations were conveyed;

Interrogatory No. 1 requires Complaint Counsel to specify the nature of the challenged claims, by whom they were interpreted, and how. Complaint Counsel responded to Interrogatory No. 1 (a)-(c) as follows<sup>7</sup>.

**...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.**

*See*, Exhibit 2, page 4.

Complaint Counsel has agreed to provide better answers with respect to subsection (a). Respondent therefore reserves the right to reassert this aspect of its Motion to Compel once the sufficiency of these supplemental answers has been evaluated.

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<sup>6</sup> One of Complaint Counsel's objections was that Respondents purportedly understated the total number of interrogatories by including separate interrogatories in one numbered paragraph. As such, Complaint Counsel took the liberty of renumbering same. To remain consistent, however, Respondents' interrogatories have been given their original numbers.

<sup>7</sup> All of Complaint Counsel's answers were subject to general objections, which are discussed, *infra*.

At present, Complaint Counsel has not provided an adequate answer. Complaint Counsel has repeatedly emphasized that the requirements for advertising substantiation "depend on the nature of the advertised claims," yet refuses to articulate its position on this point. *See*, Complaint Counsel's Motion to Strike Respondents' Additional Defenses ("Motion to Strike"), page 6. Indeed, Complaint Counsel's response provides nothing more than what is set forth in the Complaint, *i.e.*, that Respondent has made claims "expressly or by implication."

Complaint Counsel's assurances that the answers will be forthcoming during expert discovery provides little comfort. To the contrary, this latter aspect of the answer is particularly troublesome given the fact that the challenged advertisements were presumably interpreted by the Commission prior to the filing of the FTC's Complaint. Thus, the fact that expert discovery may eventually take place should not hinder Complaint Counsel's ability to respond. Even if it did, the Rules of Practice allow the interrogatories to be supplemented if Complaint Counsel learns that the answers are in some material respect incomplete or incorrect. 16 C.F.R. §3.31(e)(2). Depriving Respondent of adequate answers, by comparison, forces Respondent to engage in wasteful discovery and hinders its ability to determine whom to depose, from whom to subpoena documents, which defenses to pursue, how to prepare witnesses, and how to respond to certain discovery. Thus, Complaint Counsel must provide better answers to Interrogatory 1(a)-(c).

**2. Interrogatory No. 1(d)**

Interrogatory No. 1, subparts (d), reads as follows:

- (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.

This interrogatory calls for the level of substantiation Respondent needed for the claims made in the challenged advertisements.<sup>8</sup> Complaint Counsel responded to Interrogatory No. 1(d) as follows.

**...the Commission and its staff have provided guidance to the industry about how the agency evaluates scientific substantiation for health-related advertising claims.**

See, Exhibit 2, page 5. Complaint Counsel then presents what appears to be a form paragraph containing various citations to FTC documents and favorable FTC decisional law.

This is not an adequate answer. Interrogatory 1(d) called for the level of substantiation Respondent needed to survive FTC review *in this case*. It is the responsibility of the FTC to make this determination. See, e.g., Motion to Strike, page 6, citing, *Thompson Medical Co. v. FTC*, 791 F.2d 189, 194 (D.C.Cir. 1986). Complaint Counsel's wholesale reference to general guidelines and the application of the substantiation doctrine in unrelated cases fails to enlighten Respondent on this point. A response to an interrogatory must be responsive to the question. It should be complete in itself and should not refer to other documents where such references make it impossible to determine whether an adequate answer has been given. *D'Scaife v. Boenne*, 191

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<sup>8</sup> To the extent this interrogatory may be considered a "contention" interrogatory, such interrogatories are encouraged by the Rules of Practice. 16 C.F.R. §3.35(b)(2); *In re Flowers Indust., Inc.*, 1981 FTC LEXIS 110 at \*2 (1981) (complaint counsel should answer the contention interrogatories by, *inter alia*, "stating facts and by elaborating legal contentions, so that respondent will have a road map of where this case is headed"). Such interrogatories assist in narrowing and defining the issues, as well as enabling the propounding party to determine the proof required to rebut the adverse party's position. *Steil v. Humana Kansas City, Inc.*, 197 F.R.D. 445, 447 (D.Kan. 2000); see also, *Nestle Foods Corp. v. Aetna Cas. and Sur. Co.*, 135 F.R.D. 101, 110 (D.N.J. 1990) (the objective of contention interrogatories is to "ferret out and narrow the issues").

F.R.D. 590, 594 (N.D. Ind. 2000), *citing, Smith v. Logansport Cmty. Sch. Corp.*, 139 F.R.D. 637, 650 (N.D. Ind. 1991) (motion to compel granted).<sup>9</sup>

It is not sufficient to simply invite Respondent to “figure it out.” Even if Respondent was inclined to engage in this exercise, the FTC will likely interpret the cited materials differently, leading to a war of interpretation. Respondent should not be required to guess. Respondent is entitled to know, up front, the precise nature, quantity, and type substantiation that was required in this case. Thus, Complaint Counsel must provide a better response to Interrogatory No. 1(d).

### 3. Interrogatory No. 1(e)

Interrogatory No. 1, subpart (e), read as follows:

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

This interrogatory asks Complaint Counsel to explain why the FTC believes Respondent fell short of having the necessary substantiation. Complaint Counsel responded as follows.

**...the evidence submitted by Respondent(s) does not amount to competent and reliable scientific evidence typically required by Commission jurisprudence to support claims relating to health and safety.**

*See*, Exhibit 2, page 6. This is a legal conclusion that wholly fails to state facts, much less elaborate on the conclusion. Interrogatory No. 1(e) calls for a *factual basis*, not a subjective legal standard pursuant to which Respondent is forced to guess at the answer to its own question.

Complaint Counsel once again attempts to evade the question by asserting that responsive information will be produced in accordance with the schedule for “expert discovery.” This is not

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<sup>9</sup> Although Commission Rule of Practice 3.35(c) permits Complaint Counsel to refer to documents from which the answer may be derived or ascertained, the rule does not permit Complaint Counsel to refer to such documents on a wholesale basis as an alternative to responding.



a question of “expert discovery”—it is the core accusation made in the FTC’s Complaint. The FTC presumably had sufficient facts to make this accusation. Accordingly, requiring Complaint Counsel to answer this contention interrogatory is consistent with the Federal Rules of Civil Procedure 11, which requires a party to have some factual basis for the allegations in their complaint. *King v. E.F. Hutton & Co.*, 117 F.R.D. 2, 5 (D.D.C. 1987); *Cable & Computer Tech, Inc. v. Lockheed Saunders, Inc.* 175 F.R.D. 646, 652 (C.D. Cal. 1997) (same); *In re One Bancorp Securities Litigation*, 134 F.R.D. 4, 7-8 (D.Me. 1991) (same). Respondents therefore request that Complaint Counsel back up its accusations by immediately providing the factual basis for its conclusions, if any.

#### 4. Interrogatory No. 2

Interrogatory No. 2 reads as follows.

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.

This interrogatory, like Interrogatory 1(e), is relevant to the level of substantiation Respondents possessed and how it allegedly fell short. Complaint Counsel’s response essentially tracks the response to Interrogatory No. 1(e), and states that:

**...the evidence submitted by Respondents as substantiation for representations made concerning the Challenged Products does not constitute adequate substantiation.**

*See*, Exhibit 2, page 6 to 7.

This response provides nothing more than what is set forth in the Complaint, does not “state facts,” or “elaborate on legal contentions,” and is otherwise inadequate for the similar reasons to those discussed in connection with Interrogatory 1(e). Complaint Counsel also asserted that Interrogatory 1(a)-(e) “is unduly burdensome.” *See*, Exhibit 2, pages 6 to 7. The interrogatory is not unduly burdensome; it simply requires Complaint Counsel to provide the information. Respondents have already provided the “study, analysis, research, or test[s],” the only question remaining is why they were considered inadequate, and who made that determination. Moreover, an objection on the basis that an interrogatory is “unduly burdensome” is not sufficiently specific to allow the ALJ to ascertain the claimed objectionable character of the request, and as such, this type of unsupported objection is not proper. *Burns v. Imagine Film Entm’t, Inc.*, 164 F.R.D. 589, 593 (W.D.N.Y. 1996).

#### 5. Interrogatory No. 3

Interrogatory No. 3 reads as follows.

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.

This interrogatory, like Interrogatory No. 1(a)-(c), is relevant to the interpretation of the challenged advertisements. Complaint Counsel, however, did not provide an answer. Instead, Complaint Counsel relied solely on “blanket objections” and the assertion that the request is premature in view of the Court’s schedule for “expert discovery.” *See*, Exhibit 2, page 7. As discussed, *infra*, blanket objections fail to explain why Interrogatory No. 3 is objectionable and the repeated claims that Respondents should be required to wait for critical information amounts to stonewalling.

Complaint Counsel's citation to, and anticipated reliance on, *Telebrands Corp.*, No. 9313 (Dec. 23, 2003), is misplaced. *Telebrands Corp.* dealt with a document request for consumer surveys in the possession of a non-testifying expert. Interrogatory No. 3 involves the *identification* of market research, not the opinions, notes, annotations of experts in light of those surveys, or even the actual surveys themselves.<sup>10</sup> Having failed to even identify such information, Complaint Counsel has equally failed to justify its coverage by the work-product privilege (such as the information at issue in *Telebrands*), or that it is attributable to either testifying or non-testifying experts. Moreover, as the present ALJ pointed out in *Telebrands*, "if any of the withheld information was relied upon or reviewed by Complaint Counsel's testifying experts in forming opinions in th[e] case, the information is discoverable." *Id.* Accordingly, Complaint Counsel must provide an adequate response to Interrogatory No. 3.

#### 6. Interrogatory No. 4

Interrogatory No. 4 reads as follows.

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

This interrogatory concerns the Commission's interpretation of the challenged advertisements, specifically, the meanings and usage of subjective and relative terms as understood by the reasonable consumer. These terms formed, in part, the basis of Respondents' motion for more definite statement and subsequent filings related thereto. In that context, Complaint Counsel asserted that the ambiguity could be "remedied easily by discovery." *See*, Opposition, page 4. Now, Complaint Counsel refuses to provide an adequate response.

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<sup>10</sup> The distinction between the opinions and thought-processes of experts on the one hand, and consumer survey data, on the other, has been recognized in the context of the work product doctrine. *See, In re Kraft, Inc.*, Order Ruling on Respondents' Motion for Documents in the Possession of Complaint Counsel, Docket No. 9208 (July 10, 1987).

Instead, Complaint Counsel cites to various decisional law in an attempt to explain the manner in which the Commission would go about interpreting the challenged advertising. *See*, Exhibit 2, page 8 to 10. Again, "figure it out" is not an answer. Ironically, Complaint Counsel points out that the Commission may rely on extrinsic evidence, such as "tests, surveys, or any other reliable evidence of consumer interpretation," which, as noted above in connection with Interrogatory No. 3, Complaint Counsel has refused to provide.

Complaint Counsel also quotes extensively from Respondents' own advertising in a misguided effort to establish that Respondent must understand the meaning of the disputed terms.<sup>11</sup> This approach overlooks the obvious point that all practices accused of being deceptive must be examined "from the perspective of a consumer acting reasonably in the circumstances." *See* FTC Policy Statement On Deception.<sup>12</sup> Accordingly, Interrogatory No. 3 requires Complaint Counsel to provide the meaning of the disputed terms as the Commission believes they would be understood by the reasonable consumer, not Respondent. Respondent should not have to mount its defense based on its own understanding of these terms, only to find out that the Commission has a different view. Thus, Complaint Counsel must supplement its answer to narrow this issue, avoid wasteful discovery, and avoid guessing games. If, on the other hand, Respondent may rely

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<sup>11</sup> For example, Complaint Counsel contends that "Respondents' topical gels convey the net impression that those products will cause rapid and visibly obvious fat loss in areas of the body to which it is applied." *See*, Exhibit 2, page 9. Similarly, Complaint Counsel contends that certain terms, taken together, "convey and reinforce the impression that the product will cause the loss of substantial excess fat." *Id.*

<sup>12</sup> The Policy Statement was described in a letter dated October 14, 1983 to Congressman Dingell, then Chairman of the House Committee on Energy and Commerce. A copy of this letter is set forth on the FTC Web site at: <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>.

on its understanding of the challenged advertising—as Complaint Counsel has repeatedly implied—Complaint Counsel should concede this point.<sup>13</sup>

**7. Interrogatory No. 5**

Interrogatory No. 5 reads as follows.

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.

This interrogatory is relevant to the Commission’s coordination of the filing of the complaint with a congressional agenda and several of Respondent’s affirmative defenses, including, *inter alia*, improper agency action, lack of public interest, and unreasonable delay. As such, Complaint Counsel’s objection that this Interrogatory seeks information “not reasonably expected to yield information relevant to the allegations of the complaint,” is misplaced. Discovery sought in a proceeding before the Commission is “reasonably expected to yield information” if it is relevant to the allegations of the complaint, to the proposed relief, *or to the defense of any Respondent.*” 16 C.F.R. §3.31(c)(1) (emphasis added).

Complaint Counsel responded to this interrogatory by stating that pursuant to a request from a congressional committee:

**copies of advertisements and the Livieri study were disclosed but not provided to the minority and majority counsel of the United States House of**

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<sup>13</sup> It is disingenuous for Complaint Counsel to suggest it does not recognize this distinction. In its Motion for More Definite Statement (and related filings), Respondent repeatedly posed demonstrative questions to demonstrate this point. For example, is “rapid” a day, a week, a month; what percentage of body weight is “substantial”; “visibly obvious” to whom; and does “cause” mean with or without diet and/or exercise? Respondents were promised answers to these questions in discovery.

**Representatives Committee on Energy and Commerce Subcommittee on  
Oversight and Investigations**

See, Exhibit 2, page 11.

This answer is incomplete. Interrogatory No. 5 requires Complaint Counsel to “identify the persons.” It is unclear from the response to whom these materials were shown. Moreover, based on Complaint Counsel’s general objections, it is unclear whether Complaint Counsel has responded “fully,” that is, disclosed all the parties to whom documents were given or shown. Respondents respectfully requests clarification in this regard.

**8. Interrogatory No. 6**

Interrogatory No. 6 reads as follows.

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.

This Interrogatory, like Interrogatory No. 5, is relevant to the Commission’s coordination of the filing of the complaint with a congressional agenda, and several of Respondent’s affirmative defenses such as improper agency action, lack of public interest, and unreasonable delay. In response, Complaint Counsel asserted that Interrogatory No. 6 is “not reasonably expected to yield information relevant to the allegations of the complaint” and the deliberate process privilege. Like Interrogatory No. 5, Interrogatory No. 6 is relevant to several defenses and is therefore proper. 16 C.F.R. §3.31(c)(1). As discussed, *infra*, discovery is liberal and governmental privileges like the deliberative process privilege are to be narrowly construed. Complaint Counsel cannot simply rely on blanket objections to avoid responding, and as such, should be compelled to provide a full response to Interrogatory No. 6.

**B. Complaint Counsel's General Objections Are Insufficient**

Complaint Counsel's responses are prefaced with eleven (11) overbroad, sweeping general objections and responses. *See*, Exhibit 2, pages 1 to 3. These general objections and responses are then asserted, in various combinations, to the specific interrogatories. These objections and responses are nothing more than transparent attempts to mask deficiencies in the answers by either avoiding, or deflecting the responsibility for providing the requested information. Even assuming, *arguendo*, that certain objections are applicable, the manner in which they are asserted by Complaint Counsel is not specific; fails to provide detailed explanation of why the interrogatory is objectionable; and lacks the information necessary to assess the applicability of the asserted protection and/or privilege.

Objections to interrogatories must be specific and supported by a detailed explanation of why the interrogatory is objectionable. *Burns v. Imagine Film Entm't, Inc.*, 164 F.R.D. 589, 593 (W.D.N.Y. 1996), *citing*, *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296-97 (E.D.Pa. 1980). Similarly, if an objection is made on the basis of privilege, the party resisting discovery has the burden of establishing the existence of the privilege. *Id.*; *National Union Fire Insurance Company of Pittsburgh v. Midland Bancor, Inc.*, 159 F.R.D. 562, 567 (D.Kan.1994); Fed.R.Civ.P. 26(b)(5). To do so, the party objecting must provide sufficient information to assess the applicability of that privilege or protection, without revealing the information that is privileged or protected. *See, e.g., Omega Eng'g, Inc. v. Omega, S.A.*, 2001 WL 173765, at \*4 (D.Conn. 2001), *citing*, *Burns v. Imagine Film Entm't, Inc.*, 164 F.R.D. 589, 593 (W.D.N.Y.1996). "Blanket assertions of privilege"—such as those asserted by Complaint Counsel—"do not satisfy this burden." *Id.*

All of Complaint Counsel's responses operate under the false assumption that Respondent has the burden of proving that Complaint Counsel's documents are not privileged. In truth, it is Complaint Counsel that must establish the legitimacy of its privileges. *See, e.g., In re Lindsey*, 158 F.3d 1263, 1269 (D.C. Cir. 1998); *FTC v. Lukens Steel Co.*, 444 F. Supp. 803, 806 (D.D.C. 1977). Accordingly, unless Complaint Counsel can specifically justify the application of the privilege(s) asserted, the interrogatory at issue should be answered.

Such justification is unlikely. For example, Complaint Counsel cannot summarily deny Respondent all information used to support the charges in the Complaint under the auspices that it was "prepared in anticipation of litigation." Further, in order for a document to be protected by the "deliberative process privilege," it must be pre-decisional and deliberative, reflecting the advisory and consultative process by which decisions and policies are formulated. *See, e.g., Army Times Publ'g Co. v. Department of the Air Force*, 998 F.2d 1067, 1069 (D.C. Cir. 1993). There has been no such showing. Moreover, governmental privileges are to be narrowly construed. *Id.*; *see also Price v. County of San Diego*, 165 F.R.D. 614, 620 (S.D. Cal. 1996) (the deliberative process privilege "is to be narrowly applied").

The remaining assertions of privilege, specifically those relating to experts, are equally misplaced. Complaint Counsel has not provided any guidance as to which information is held by testifying or non-testifying experts, much less establish that Respondents would be *per se* barred from discovering it.<sup>14</sup> Under such circumstances, Complaint Counsel's objections cannot be sustained.

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<sup>14</sup> Ironically, Complaint Counsel objects to this and other interrogatories on the basis that they may be inconsistent with certain obligations under the Rules of Practice. The Rules of Practice obligate Complaint Counsel to provide adequate responses to Respondents' interrogatories. *See*, 16 C.F.R. 3.35.



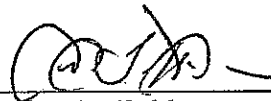
**III. CONCLUSION**

In light of the foregoing, Respondent respectfully submits that its Motion to Compel should be granted.

**IV. CERTIFICATE OF COMPLIANCE**

Pursuant to Section 3.22(f) of the Commission's Rules of Practice, Respondent has conferred with Complaint Counsel in a good faith effort to discuss the deficiencies with Complaint Counsel's responses to Interrogatories 1 to 6. Complaint Counsel has indicated that it may be willing to supplement its responses with regard to Interrogatory 1(a), however, no supplemental responses have been received at the time of this filing. The parties were unable to reach an agreement with regard to the remaining Interrogatories.

Respectfully submitted,



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Nutrasport, LLC, Sövage Dermalogic Laboratories,  
LLC and Ban, LLC

## CERTIFICATE OF SERVICE

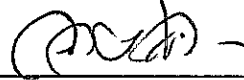
I HEREBY CERTIFY that a true and correct copy of the foregoing was provided to the following parties this 9th day of September, 2004 as follows:

- (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](mailto: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](mailto:lkapin@ftc.gov), [jmillard@ftc.gov](mailto:jmillard@ftc.gov); [r-richardson@ftc.gov](mailto:r-richardson@ftc.gov); [lschneider@ftc.gov](mailto: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.



**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 9, 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 "C. J. ...", is written above a horizontal line.

**UNITED STATES OF AMERICA  
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

**BASIC RESEARCH LLC'S FIRST SET OF INTERROGATORIES**

Basic Research, LLC, through undersigned counsel, and pursuant to the Federal Trade Commission Rules of Practice, Rule 3.35, hereby propound these Interrogatories, to which Complaint Counsel shall respond separately and fully, in writing and under oath within 30 days of service.

**DEFINITIONS**

Notwithstanding any definition below, each word, term, or phrase used in these Interrogatories is intended to have the broadest meaning permitted under the Federal Trade Commission's Rules of Practice.



1. "Challenged Products" shall mean each product referred to in the Complaint, including: Dermalin-APg, Cutting Gel, Tummy Flattening Gel, Leptoprin, Anorex, and PediaLean, both individually and collectively.

2. "Commission," "you," and "your" shall mean the Federal Trade Commission, its employees, agents, attorneys, consultants, representatives, officers, and all other persons acting or purporting to act on its behalf.

3. "Communication(s)" shall mean the transmittal or exchange of information of any kind in any form, including oral, written, or electronic form.

4. "Complaint" shall mean: the administrative complaint issued by the Federal Trade Commission, and any amendments to that Complaint, in the above-captioned matter.

5. "Corporate Respondents" shall mean the following Respondents: Basic Research, LLC, A.G. Waterhouse, LLC, Klein-Becker USA, LLC, Nutrasport, LLC, Sövage Dermalogic Laboratories, LLC, and BAN, LLC, both individually and collectively as defined in the Complaint, including all of their operations under any trade names.

6. "Describe" shall mean to offer a comprehensive, complete, accurate and detailed description, explanation or listing of the matter into which the Interrogatory inquires.

7. "Determination" shall include, but not be limited to: interpretation, evaluation, approval, and decision.

8. "Disclose" shall mean to offer a comprehensive, complete, accurate and detailed description, explanation or listing of the matter into which the Interrogatory inquires.

9. "Document" should be interpreted in the broadest sense permitted under the Federal Trade Commission's Rules of Practice, including but not limited to writings, drawings, graphs, charts, photographs, audio recordings, videotapes, electronic mail, and other data compilations from which information can be obtained. The term "document" includes originals and all non-identical copies.

10. "Each" and "any" shall mean and shall include the word "all," so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information and/or document(s) that otherwise might be construed to be outside its scope.

11. "Identify" or "identification" shall mean:

- (a) when referring to a *natural person*, state the full name, present business address and telephone number, or if a present business affiliation or business address is not known, by the last known business and home addresses and both the business and home telephone numbers;
- (b) when referring to any *entity*, such as a business or organization, state the legal name as well as any other names under which the entity has done business, address, telephone number and contact person, if applicable for that entity; and
- (c) when referring to a "*document*" or "*communication*," state the full name(s) of the author(s) or preparer(s), the full name of the recipient(s), addressee(s), and/or person(s) designated to receive copies, the title or subject line of the

document or communication, a brief description of the subject matter of the document or communication, the date it was prepared, its present location, and its present custodian.

12. "Individual Respondents" shall mean: Respondents Dennis Gay, Daniel B. Mowrey, Mitchell K. Friedlander, both individually and collectively, unless otherwise stated.

13. "Market Research" shall mean: all information referring or relating to testing, measuring or assessing consumers' or individuals' interpretation of, understanding of, or reaction to any draft, proposed, or final promotional material, proposed advertising text, copy or creative strategy or platform, product category, product, entity or information conveyed in an advertisement, including but not limited to consumer perception tests, comprehension tests, recall tests, marketing or consumer surveys or reports, penetration tests, audience reaction tests, copy tests, focus groups, consumer survey data, and media research.

14. "Or" includes "and," and "and" shall include "or," so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information or documents that might otherwise be construed to be outside its scope.

15. "Person" or "Persons" shall mean: all natural persons, corporations, partnerships or other business associations, and each and every other legal entity, including but not limited to all members, officers, predecessors, assigns, divisions, branches, departments, affiliates, and subsidiaries.

16. "Promotional Material" shall mean: any written or oral statement, advertisement, illustration, or depiction that is designed to effect a sale or create interest in the purchasing of goods or services, whether the same appears in a press release, video news release, brochure,

newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, sticker, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, instructional or education materials, packaging, package insert, package label, film, slide, radio or television broadcast or transmission, Internet or World Wide Web site, streaming video, electronic mail, audio program transmitted over a telephone system, script(s) used to make oral solicitations to consumers, or publication or broadcast in any other medium.

17. "Referring to" or "relating to" shall mean: discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.

18. "Requests for Production" shall mean any and all Requests for Production of Documentary Materials and Tangible Things directed to Complaint Counsel in the above-captioned matter.

19. "Respondent(s)" shall mean: all Corporate Respondents and all Individual Respondents, both individually and collectively, unless otherwise stated.

### **INSTRUCTIONS**

1. Unless otherwise specified, the time period covered by an Interrogatory shall not be limited. All information responsive to the Interrogatory – regardless of dates or time periods involved – must be provided (unless otherwise specified).

2. Each Interrogatory must be completely set forth, preceding the answer to it and must be answered separately and fully in writing, under oath.

3. All answers shall be served within 30 days after service of these Interrogatory Requests.



4. Information covered by these Interrogatory Requests shall include 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 government agencies other than the Federal Trade Commission, and employees of any private consumer protection organizations, attorneys, accountants, economists, statisticians, experts, and consultants.

5. If you object to any Interrogatory or a part of any Interrogatory, state the Interrogatory or part to which you object, state the exact nature of the objection, and describe in detail the facts upon which you base your objection. If any Interrogatory cannot be answered in full, it shall be answered to the fullest extent possible and the reasons for the inability to answer fully shall be provided. If you object to any Interrogatory on the grounds of relevance or overbreadth, you shall provide all responsive information that is concededly relevant to claims, defenses, or requested relief in this proceeding.

6. This First Set of Interrogatories is continuing in character so as to require you to produce additional information promptly upon obtaining or discovering different, new or further information before the close of discovery.

7. If any requested information is withheld based on any claim of privilege or otherwise, submit together with such claim for information that is withheld: (a) the specific subject matter; (b) the date of the information; (c) the names, addresses, positions, and organizations of all

authors and recipients of the information; and (d) the specific grounds for claiming that the information is privileged or otherwise is withheld. If only part of the responsive information is privileged, all non-privileged portions of the information must be provided.

8. The use of the singular includes the plural, and the plural includes the singular.
9. The use of a verb in any tense shall be construed to include all other tenses.
10. The spelling of a name shall be construed to include all similar variants of such name.

### INTERROGATORIES

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;
- c) describe all extrinsic evidence (that is, anything other than the Promotional Material itself) that was relied upon in determining what representations were conveyed;
- 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;
- e) describe the factual basis for your contention that Respondents did not possess and rely upon a reasonable basis that substantiated the representation.

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.

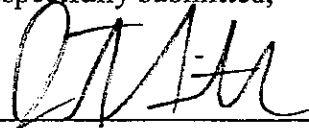
3. Please identify all Market Research or other evidence or information of which you are aware that is relevant or potentially relevant to determining consumer reaction to, or consumer perception, comprehension, understanding, "take-away," or recall of statements or representations made by Respondents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

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

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.

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.

Respectfully submitted,



Lanny A. Breuer

Jay T. Smith

Covington & Burling

1201 Pennsylvania Avenue, NW

Washington, DC 20004

Tel: (202) 662-5614

Fax: (202) 662-6290

*Counsel for Respondent Basic Research,  
L.L.C.*

Dated July 23, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 2004, I caused Basic Research

LLC's First Set of Interrogatories to be served as follows:

- (1) one copy by hand delivery and one copy by electronic mail to:

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

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

Jeffrey D. Feldman  
FELDMANGALE, P.A.  
Miami Center - 19th Floor  
201 S. Biscayne Boulevard  
Miami, FL 33131  
*Counsel for Respondents A.G. Waterhouse, L.L.C., Klein-Becker, L.L.C.,  
Nutrasport, L.L.C., Sovage Dermalogic Laboratories, L.L.C., and BAN, L.L.C.*

Ronald F. Price  
PETERS SCOFIELD PRICE  
310 Broadway Centre  
Salt Lake City, UT 84111  
*Counsel for Respondent Daniel B. Mowrey*

Richard D. Burbidge  
BURBIDGE & MITCHELL  
215 South State Street, Suite 920  
Salt Lake City, UT 84111  
*Counsel for Respondent Dennis Gay*

Mitchell K. Friedlander  
c/o Compliance Department  
5742 West Harold Gatty Drive  
Salt Lake City, UT 84116

A handwritten signature in cursive script that reads "Brooks Mackintosh". The signature is written in black ink and is positioned above a horizontal line.

Brooks Mackintosh, Esq.

**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 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

**EXHIBIT**  
**2**

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]

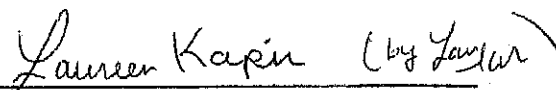
Please explain in detail why the Complaint in this case was not filed prior to June 16, 2004 and what circumstances, if any, precluded the Commission from filing the Complaint prior to that date.

**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,

 (by Lauren)

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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

**Barbara A. McGill**

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**From:** Barbara A. McGill

**Sent:** Tuesday, September 07, 2004 3:41 PM

**To:** Carla Fobbs; Christopher P. Demetriades; Dennis Gay; Gregory L. Hillyer; Jeffrey D. Feldman; Linda A. Guerra; Maydel V. Rodriguez; Mitch Friedlander; Richard Burbidge; Ronald F. Price; Stephen E. Nagin; Todd Malynn

**Subject:** Basic Research/FTC

Attached please find the following:

1. Order Granting Respondents' Motion for Extension of Time to File Responses to Interrogatories;
2. Order Granting Respondents' Motion for Extension of Time to File Response to Motion to Strike;
3. Complaint Counsel's Response to Respondent, Basic Research's First Set of Interrogatories; and
4. Complaint Counsel's Preliminary Witness List.