

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

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

**COMPLAINT COUNSEL'S MOTION TO COMPEL PRODUCTION OF  
RESPONDENTS' TESTIFYING EXPERT LAWRENCE SOLAN'S DOCUMENT**

Pursuant to RULE OF PRACTICE 3.38, Complaint Counsel moves this Court to compel production of a document responsive to both Complaint Counsel's *subpoena duces tecum* to Respondents' testifying expert Lawrence Solan, and Complaint Counsel's *Second Request for Production of Documentary Materials and Tangible Things*. This document falls well within the specifications set forth in the *subpoena* issued to Professor Solan and to the *Second Request for Production*, because it consists of material considered by Prof. Solan in preparing his expert report. During Prof. Solan's deposition, he admitted that prior to the time that he drafted his expert report, he received and read a document that summarized Respondents' counsel's meeting with him and another then-designated testifying expert. Both Prof. Solan and Respondents' counsel refuse to provide this document, other than in a severely redacted form. See Attachment A hereto. Thus Complaint Counsel seeks an order compelling production of this document in its

original, unredacted form. We also request that this Court order the deposition of Prof. Solan continued, pending production of this document, in the event that a reasonable review of this complete testifying expert summary document raises additional questions that Complaint Counsel was not able to meaningfully explore with the redacted version.

## INTRODUCTION

On June 15, 2004, the Commission filed a *Complaint* against Basic Research, LLC, and other related companies and individuals (collectively, “Respondents”). The *Complaint* alleges that Respondents engaged in deceptive advertising practices.

On October 13, 2004, Respondents listed Prof. Solan as their testifying expert.<sup>1</sup> On October 14th, Complaint Counsel issued a *Second Request for Production*, seeking, *inter alia*, “[a]ll documents, **communications**, and tangible things given to, or generated by, any expert witness in connection with his services in this action, **including** but not limited to any **documents, communications**, and videos, photographs, tests, test results, notes, or memoranda.” *Second Request for Production*, Specification No. 10 (Oct. 14, 2004) (emphasis in original), Attachment B hereto.

On November 5, 2004, Complaint Counsel sent a *subpoena duces tecum* to Prof. Solan.<sup>2</sup> See Attachment C hereto. Prof. Solan’s response was due on November 29, 2004. *Id.*

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<sup>1</sup> Respondents listed Prof. Solan, Edward Popper, and Respondent Daniel Mowrey. After seeking and obtaining an extension of time, on December 1, 2004, on the day that the expert reports were otherwise due, Respondents’ counsel Jeffrey Feldman called Complaint Counsel to explain that Mr. Popper would no longer be a testifying expert and thus Respondents would not be producing Mr. Popper’s expert report.

<sup>2</sup> Lawrence Solan is presently a law professor at Brooklyn Law school. Prior to this position, he was a partner at a New York law firm, specializing in commercial litigation.

Responding to the *subpoena duces tecum*, Respondents' counsel produced a first set of Prof. Solan's documents. On Monday, December 6, 2004, two days before Prof. Solan's out-of state deposition, Respondents produced a second and smaller set of documents. In this second production, Respondents included a privilege log that solely listed an email attachment that Prof. Solan received from Respondent's counsel, Mr. Feldman. *See* Attachment D hereto.<sup>3</sup> That same day, Complaint Counsel requested a copy of this document for use at the impending deposition. On December 7, 2004, Respondents' counsel sent, via facsimile, a redacted version of this document. *See* Attachment A. The document is dated October 13, 2004, and is entitled, "Meeting with Larry Solan and Ed Popper." *Id.* The document is two pages in length and consists of two introductory paragraphs, including one that has been partially redacted, and nine numbered paragraphs. Of these nine numbered paragraphs, six paragraphs have been completely redacted and two others have been redacted in part. *See id.* The document's opening paragraph bears the heading, "Summary," stating that "[t]his morning we met with Larry Solan and Ed Popper to outline a scope of the work they are to perform for the respondents in the Basic Research/FTC case. This was the first meeting we had with both men following there [sic] being named as the Respondents' experts in this case." *Id.* In the body of the document, Paragraph no. 2 states that "The net impression of the ads, as alleged by the FTC, is that the challenged products cause rapid, substantial, and/or visibly obvious weight loss." *Id.*

Complaint Counsel's *subpoena duces tecum* requested documents, including a copy of Prof. Solan's file, and any correspondence or communications relating to this case. *See*

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<sup>3</sup> Although the privilege log is accompanied by a cover letter dated December 2, this log and the second set of documents were shipped via Fedex, standard overnight, labeled with a "ship date" of December 3 and a "deliver by" date of December 6.

Attachment C, Specifications nos. 1-5. Complaint Counsel's *subpoena duces tecum* specifications also demanded all documents prepared by Prof. Solan in connection with this case, as well as all documents reviewed by him and all materials that he consulted or relied upon in forming any opinion in connection with this case. *Id.* Neither Respondents nor Prof. Solan moved to quash this *subpoena* in whole or in part. Neither Respondents nor Prof. Solan sought a protective order in connection with any part of this *subpoena duces tecum*.

Complaint Counsel has conferred with Respondents' counsel in an attempt to resolve the issues relating to the scope of this *subpoena*, both on the record as reflected by the transcript of the deposition, off the record at the deposition, and via telephone. Respondents' counsel and Prof. Solan have refused to provide this testifying expert summary document, and their refusals necessitate the filing of this *Motion*.

## DISCUSSION

### I. Complaint Counsel Is Entitled to the Instant Document Because it Falls Within the Scope of Discovery Applicable to Testifying Experts

Complaint Counsel's specifications calling for the document at issue is proper as this document clearly falls within the scope of discovery applicable to testifying experts. "Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the compliant, to the proposed relief, or to the defenses of any respondent." RULE OF PRACTICE 3.31(c)(1); *see also FTC v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979). RULE 3.31(c)(4)(A) provides for discovery of an expert who is to testify at the trial. The court may order further discovery, and has ample power to regulate its timing and scope. "All data, documents, or information considered by a testifying expert witness in forming the opinions to be proffered in a case is discoverable." *Dura Lube Corp.*, Docket No. 9292, 1999

F.T.C. Lexis 254 at \*6 (Dec. 15, 1999) citing Fed. R. Civ. P. 26(a)(2)(B), 16 C.F.R. § 3.31(c)(4)(B); *Thompson Med. Co.*, 101 F.T.C. 385, 388 (1983). Therefore, for each expert expected to testify at trial, the parties must exchange all documents reviewed, consulted, or examined by the expert in connection with forming an opinion, whether or not such document constitutes work product or is privileged. *Telebrands Corp.*, Docket No. 9313 2003 F.T.C. Lexis 201, \*4-5 (Dec. 23, 2004); see *Musselman v. Phillips*, 176 F.R.D. 194, 199 (D. Md. 1997); *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 63 (S.D.N.Y. 1997); *Karn v. Rand Ingersoll*, 168 F.R.D. 633, 639 (N.D. Ind. 1996). “Full disclosure of the basis of an expert opinion ensures the independence of the expert’s conclusions.” See *Dura Lube* at \*6. Disclosure also ensures that the opposing counsel receives an adequate opportunity to prepare for cross-examination. *Dura Lube* at \*3; *Thompson Med. Co.*, 101 F.T.C. at 387.

As the RULES OF PRACTICE and this Court’s recent *Order* make clear, for each expert expected to testify at trial, the parties must exchange all documents reviewed, consulted, or examined by the expert in connection with forming his or her opinion on the subject on which he or she is expected to testify, regardless of the source of the document. See *Dura Lube* at \*6-7. The scope of discovery is not limited to documents relied on by the expert in support of his or her opinions, but also extends to documents considered but rejected by the testifying expert in reaching those opinions. *Id.* at \*7.

As this document deals with the scope of Prof. Solan’s inquiry, and because Prof. Solan read this document prior to completing his expert report, Prof. Solan and Respondents’ counsel must produce this two page testifying expert summary document.

**II. Professor Solan's Refusal to Produce a Relevant E-mail Attachment That He Received, Read and Maintained During the Time That He Was Formulating His Expert Opinions in this Case Is Unjustified.**

Complaint Counsel is entitled to the testifying expert summary document that was attached to an e-mail, because Prof. Solan admitted that he read and maintained a copy of this summary document prior to, as well as during, the time that he formulated his expert opinions in this case. The redacted version of this testifying expert summary document addresses the scope of Prof. Solan's expertise as well as summarizes Respondents' counsel's meeting with Prof. Solan. Thus this document falls within the scope of the *subpoena duces tecum* specifications that properly demand documents in connection with this case, which were prepared or used and relied upon, or that are declined to be relied upon, by the Respondents' proffered testifying expert, Prof. Solan. Further, this document also falls expressly within the scope of Complaint Counsel's *Second Request for Production* that requests, *inter alia*, all documents given to Respondents' experts.

Prof. Solan's production of documents was accompanied by a privilege log consisting of one document. Complaint Counsel immediately requested a copy of this document. Following Complaint Counsel's inquiry as to the basis for withholding a document admittedly considered by a testifying expert, Respondents provided a severely redacted version of this document. During Prof. Solan's deposition, Respondents' counsel and Prof. Solan refused to provide an unredacted version.

Prof. Solan testified that he received this testifying expert summary document via email, that he read this summary document, and that the summary contained notes of an early meeting that Prof. Solan had participated in with Respondents' counsel and Edward Popper, who was, at

that time and until December 1<sup>st</sup>, a testifying expert. *See* Attachment E hereto (Solan Tr. at 47). Moreover, Prof. Solan testified that he learned of the scope of his requested expertise at this meeting, (Attachment E, Solan Tr. at 71), notwithstanding the severely redacted nature of this document, this document was sent to Prof. Solan and it characterizes the scope of his expertise. *See* Attachment A. Thus it is fair and reasonable for Complaint Counsel to request this document.

During the deposition, Complaint Counsel, Robin Richardson asked Prof. Solan about this document:

Q. So you have no recollection of the rest of the document?

A. That's right. It was notes. There were notes of what happened in the meeting. I couldn't tell you what was the rest of that.

Q. Did you read the document when you received it via e-mail?

A. I read it casually, because I was at the meeting and I wasn't terribly interested in what the summary of it was.

(Attachment E, Solan Tr. at 48.) Prof. Solan stated that he saved the document: "I kept it, which is why I produced it. I looked at it. But it really wasn't of much moment to me." *Id.*

Although Respondents' privilege log asserted that this document constituted attorney work product, by sending this document directly to Prof. Solan, who is their testifying expert, Respondents have waived any such privilege. Importantly, Prof. Solan testified that he read the document and did so prior to drafting his expert report. Prof. Solan also testified that Respondents counsel did not contact him regarding this document, (Attachment E, Solan Tr. at 48), and that he was neither instructed to return it, nor told that it was inadvertently disclosed. (Attachment E, Solan Tr. at 48-49.) More telling is the fact that Prof. Solan kept this document, notwithstanding his practice to "get rid of" e-mails as soon as possible. (Solan Tr. at 60.) Prof.

Solan produced it to Respondents counsel because Prof. Solan believed that he had complied with the *subpoena duces tecum* by providing this document, in an unredacted form, to counsel. (Solan Tr. at 56.) Any suggestion that this testifying expert summary document was somehow inadvertently disclosed to Prof. Solan is belied by the record. Indeed, an examination of the redacted form shows that it is what it purports to be, to wit, a summary of the meeting with the designated testifying experts and counsel. That it involves notes regarding a meeting with a person who has been switched to a non-testifying expert is not relevant, as any documents relied upon or reviewed by a testifying expert in forming opinions are discoverable. *Dura Lube*, \*5.

Complaint Counsel is entitled to view an unredacted version of this document that Respondents' testifying expert admits that he received, read and maintained after attending a meeting that he admits defined the scope of his role in this case.



## CONCLUSION

Respondents' counsel's and Prof. Solan's refusal to turn over an unredacted form of the email attachment summarizing the meeting is not justified. Complaint Counsel's *subpoena duces tecum*, and *Second Request for Production* reasonably requested such documents and Complaint Counsel moves this Court for an Order compelling production in accordance with the *subpoena duces tecum* and Complaint Counsel's Second Request for Production, as well as continuing the deposition, pending Complaint Counsel's review of the documents.

Respectfully submitted,



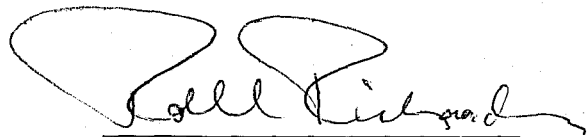
Laureen Kapin (202) 326-3237  
Joshua S. Millard (202) 326-2454  
Robin M. Richardson (202) 326-2798  
Laura Schneider (202) 326-2604

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

Dated: December 13, 2004

**STATEMENT PURSUANT TO RULE 3.22(f)**

I HEREBY CERTIFY that Complaint Counsel conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised in this motion to compel. On Monday, December 6, after receiving Respondents' testifying expert privilege log, Complaint Counsel, Lauren Kapin, called Respondents' counsel, Jeffrey Feldman, and requested a copy of this testifying expert summary document as the privilege log indicated that it had been sent directly to Prof. Solan. *See* Attachment D. During a subsequent call on Tuesday, December 7, Mr. Feldman agreed to provide a redacted version of this document, and faxed it to Complaint Counsel that afternoon. Complaint Counsel agreed to review the redacted version. The next morning, during Prof. Solan's deposition, Complaint Counsel, Robin Richardson, explored the circumstances surrounding this document and then requested an unredacted version of this document. Ms. Richardson also requested production of another document that Dr. Solan admitted that he had that accounted for his time and activities spent in this matter. On Thursday, December 8, 2004, Ms. Richardson called Respondents' counsel, Robert J. Shelby and Ronald F. Price, both of whom were present at Prof. Solan's deposition, and Respondents' lead counsel, Jeffrey Feldman (on both his cell and office numbers). With each of these three individuals, Ms. Richardson left a detailed voicemail message, requesting these documents and asking that counsel respond as to whether they would agree to so provide these documents. That same day, Mr. Price returned Ms. Richardson's call and told her that he would "horse trade" production of Prof. Solan's time sheet if Complaint Counsel would produce the time sheet for one of their experts, Prof. Michael Mazis. Ms. Richardson responded that Prof. Mazis had in fact brought his entire file to his deposition and that Ms. Richardson had no knowledge of any such document and stated that she would call Prof. Mazis to see whether he had yet prepared such a document. However, Ms. Richardson explained that, notwithstanding her inquiry to Prof. Mazis, Respondents had an obligation to immediately produce Prof. Solan's time document, as Prof. Solan, unlike Prof. Mazis, had testified that he had created such a document and had a copy of it in his possession. However, both Mr. Price and Mr. Feldman refused to provide a copy of the email attachment document. On Friday, December 10, Mr. Price called and agreed to provide Prof. Solan's time sheet but again declined to agree to provide the testifying expert summary document.



COMPLAINT COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2004, I caused *Complaint Counsel's Motion to Compel Production of Respondents' Testifying Expert Lawrence Solan's Document* to be served and filed as follows:

- (1) the original, two (2) paper copies filed by hand delivery and one (1) electronic copy via email to:  
**Donald S. Clark, Secretary**  
Federal Trade Commission  
600 Penn. Ave., N.W., Room H-159  
Washington, D.C. 20580
- (2) two (2) paper copies served by hand delivery to:  
**The Honorable Stephen J. McGuire**  
Administrative Law Judge  
600 Penn. Ave., N.W., Room H-113  
Washington, D.C. 20580
- (3) one (1) electronic copy via email and one (1) paper copy by first class mail to the following persons:

**Stephen E. Nagin**  
Nagin Gallop Figueroa P.A.  
3225 Aviation Ave.  
Miami, FL 33133-4741  
(305) 854-5353  
(305) 854-5351 (fax)  
[snagin@ngf-law.com](mailto:snagin@ngf-law.com)  
**For Respondents**

**Jeffrey D. Feldman**  
FeldmanGale  
201 S. Biscayne Blvd., 19<sup>th</sup> Fl.  
Miami, FL 33131-4332  
(305) 358-5001  
(305) 358-3309 (fax)  
[JFeldman@FeldmanGale.com](mailto:JFeldman@FeldmanGale.com)  
**For Respondents**  
**Basic Research, LLC,**  
**A.G. Waterhouse, LLC,**  
**Klein-Becker USA, LLC,**  
**Nutrasport, LLC, Sovage**  
**Dermalogic Laboratories,**  
**LLC, and BAN, LLC**

**Ronald F. Price**  
Peters Scofield Price  
310 Broadway Centre  
111 East Broadway  
Salt Lake City, UT 84111  
(801) 322-2002  
(801) 322-2003 (fax)  
[rfp@psplawyers.com](mailto:rfp@psplawyers.com)  
**For Respondent Mowrey**

**Richard D. Burbidge**  
Burbidge & Mitchell  
215 S. State St., Suite 920  
Salt Lake City, UT 84111  
(801) 355-6677  
(801) 355-2341 (fax)  
[rburbidge@burbidgeandmitchell.com](mailto:rburbidge@burbidgeandmitchell.com)  
**For Respondent Gay**

**Mitchell K. Friedlander**  
5742 West Harold Gatty  
Salt Lake City, UT 84116  
(801) 517-7000  
(801) 517-7108 (fax)  
**Respondent Pro Se**  
[mkf555@msn.com](mailto:mkf555@msn.com)

**Lawrence Solan**  
Professor  
Brooklyn Law School  
250 Joralemon Street  
Brooklyn, NY 11202



COMPLAINT COUNSEL



# Attachment A

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Attendees:

Steph Nagin  
Ron Price  
Jeff Feldman  
Dick Burbidge (via phone)

Location:

Greenberg Traurig  
200 Park Avenue  
15<sup>th</sup> Floor  
New York New York

Summary:

This morning we met with Larry Solan and Ed Popper to outline the scope of the work they are to perform for the respondents in the Basic Research//FTC case. This was the first meeting we had with both men following there being named as the Respondents' experts in this case.

We met from approximately 8:40 am until 1:00 pm. (REDACTED)  
(REDACTED)

1. (REDACTED)
2. The net impression of the ads, as alleged by the FTC, is that the challenged products cause rapid, substantial, and/or visibly obvious weight loss.
3. (REDACTED)
4. (REDACTED)

(REDACTED)

5.

(REDACTED)

6.

(REDACTED)

7.

(REDACTED)

8.

(REDACTED) it was agreed that Larry and Ed would pull the books and papers written by opposing experts and would also assist in preparing for the depositions of these people.

9.

(REDACTED) we agreed that we would re-convene in New York after we receive the FTC's expert witness reports.

# Attachment B

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

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

**COMPLAINT COUNSEL'S SECOND REQUEST FOR PRODUCTION  
OF DOCUMENTARY MATERIALS AND TANGIBLE THINGS**

Pursuant to RULE OF PRACTICE 3.37(a), Complaint Counsel requests that Respondents produce the documentary materials and tangible things identified below for inspection and copying within 15 days at the Federal Trade Commission, 601 New Jersey Ave., N.W., Suite NJ-2122, Washington, D.C. 20001, or at such time and place as may be agreed upon by all counsel.

**DEFINITIONS**

- 1) "All documents" means each **document**, as defined below, which can be located, discovered or obtained by reasonable, diligent efforts, **including** without limitation all **documents** possessed by: (a) you or your counsel; or (b) any other **person** or entity from whom you can obtain such **documents** by request or which you have a legal right to bring within your possession by demand. As set forth in Instruction (4) below, **documents** covered by these Specifications are those which are in your possession or under your actual or constructive custody or control (and in the case of **Corporate Respondents**, includes all of their operations under assumed names), whether or not such **documents** were received from or disseminated to any other **person** or entity **including** attorneys, accountants, directors, officers and employees.
  
- 2) "**Challenged products**" means the products identified as Dermalin-APg, Cutting Gel, Tummy Flattening Gel, Leptoprin, Anorex, and PediaLean in the administrative **Complaint**

issued by the Federal Trade Commission in the above-captioned matter, both individually and collectively.

3) “**Communication(s)**” includes, but is not limited to, any and all conversations, meetings, discussions and any other occasion for verbal exchange, whether in person, by telephone, or electronically, as well as all letters, memoranda, telegrams, cables, and other writings or **documents**.

4) “**Complaint**” means the administrative **Complaint** issued by the Federal Trade Commission, and any amendments thereto, in the above-captioned matter.

5) “**Corporate Respondents**” means Respondents 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., both individually and collectively, **including** all of their operations under assumed names. This term also includes the entity known as American Phytotherapy Research Laboratory identified in the administrative **Complaint** issued by the Federal Trade Commission.

6) “**Dissemination schedule**” **includes**, but is not limited to, the following: (a) for radio, audio, television, and video **promotional materials**, the date, time of day, location and station name; (b) for product packaging, the names of distributors and retailers to whom the packaging or other **promotional material** was transmitted, the date of transmittal, and the number of pieces transmitted; (c) for printed **promotional materials**, the name and date of the publication or place in which the **promotional material** appeared; and (d) for Internet materials, the date that the **promotional material** was first placed on the Internet, the date (if any) that it was removed from the Internet, and the number of “hits” that the advertisement registered.

7) “**Document**” means the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, taped, recorded, filmed, punched, computer-stored, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, **including** but not limited to any advertisement, book, pamphlet, periodical, contract, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, package insert, sticker, web page, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book, data compilation, tests, reports, clinical studies, test reports, scientific literature, articles, expert opinions, handwritten notes, correspondence, **communications**, electronic mail, electronically stored data, computer (**including** handheld computer) material (**including** print-outs, cards, magnetic or electronic tapes, discs and such codes or instructions as will transform such computer materials into easily understandable form), and video and audio recordings.

8) “**Each**” and “**any**” include “**all**,” so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information and/or **documents** that might

otherwise be construed to be outside its scope.

9) “**Includes**” or “**including**” means “**including but not limited to,**” so as to avoid excluding any information that might otherwise be construed to be within the scope of any Specification.

10) “**Individual Respondents**” means Respondents Dennis Gay, Daniel B. Mowrey, and Mitchell K. Friedlander, both individually and collectively.

11) “**Interrogatories**” means any and all *Interrogatories* served on the **Respondents** in the above-captioned matter.

12) “**Market research**” means all information referring or relating to testing, measuring or assessing consumers’ or individuals’ interpretation of, understanding of or reaction to a 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** consumer perception tests, comprehension tests, recall tests, marketing or consumer surveys or reports, penetration tests, audience reaction tests, focus groups and media research.

13) “**Or**” includes “**and,**” and “**and**” includes “**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.

14) “**Person**” or “**Persons**” means all natural persons, corporations, partnerships or other business associations, and all other legal entities, **including** all members, officers, predecessors, assigns, divisions, affiliates and subsidiaries.

15) “**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 used to make oral solicitations to consumers, or publication or broadcast in any other medium.

16) “**Referring to**” or “**relating to**” means discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.

17) “**Respondent(s)**” means all **Corporate Respondents** and all **Individual Respondents**, both individually and collectively.

- 18) “**You**” or “**Your**” means means Basic Research, LLC, unless otherwise noted.
- 19) The use of the singular includes the plural, and the plural includes the singular.
- 20) The use of a verb in any tense shall be construed as the use of the verb in all other tenses.
- 21) The spelling of a name shall be construed to include all similar variants thereof.

### INSTRUCTIONS

- 1) Unless otherwise specified, the time period covered by a Document Specification shall not be limited and all **documents** responsive to the Specification, regardless of dates or time periods involved, should be provided.
- 2) A complete copy of each **document** should be submitted even if only a portion of the **document** is within the terms of the Specification. The **document** shall not be edited, cut, or expunged and shall include all covering letters and memoranda, transmittal slips, appendices, tables or other attachments.
- 3) All information submitted shall be clearly and precisely identified as to the Specification(s) or sub-Specification(s) to which it is responsive. Each page submitted should be marked with a unique “Bates” **document** tracking number.
- 4) **Documents** covered by these Specifications are those which are in your possession or under your actual or constructive custody or control (and in the case of **Corporate Respondents**, includes all of their operations under assumed names), whether or not such **documents** were received from or disseminated to any other **person** or entity **including** attorneys, accountants, directors, officers and employees.
- 5) All information submitted shall be clearly and precisely identified as to the **Respondent(s)** who produced the information. You shall do so by: (a) marking each submitted item with a notation identifying the **Respondent(s)** who produced that item; or (b) providing a separate list of submitted items, in numeric “Bates” **document** tracking number order, that identifies the **Respondent(s)** who produced each item.
- 6) **Documents** that may be responsive to more than one Specification need not be submitted more than once; however, your response should indicate, for each **document** submitted, each Specification to which the **document** is responsive. If any **documents** responsive to a Specification have been previously supplied to the Commission, you may comply with the Specification by identifying the **document(s)** previously provided and the date of submission; identification shall be by Bates number if the **document(s)** were so numbered when submitted, or by author and subject matter if not so numbered.

7) If any of the documentary materials requested in these Specifications are available in machine-readable form (such as floppy or hard disks, drums, core storage, magnetic tapes or punch cards), state the form in which it is available and describe the type of computer or other machinery required to read the record(s) involved. If the information requested is stored in a computer or a file or record generated by a computer, indicate whether you have an existing program that will print out the record in readable form and state the name, title, business address and telephone number of each **person** who is familiar with the program.

8) Draft or final **Promotional materials** submitted in response to these Specifications shall be made available in the following form(s) as follows: For **documents**, provide the original **promotional materials** if available, or, if not available, color copies thereof. For audio-only (or radio) materials, provide a tape cassette (or digitized recording, if in machine-readable form) and a script, as well as any audio out-takes. For video recordings, provide a DVD or VHS cassette and script or storyboard, as well as any video out-takes. For Internet or other online materials, provide a CD (if in machine-readable form) or a clear color printout of all screens displayed in the promotional materials and identify the site, forum, or address.

9) All objections to these Document Specifications, or to any individual Specification, must be raised in the initial response or are otherwise waived.

10) If any requested material is withheld based on a claim of privilege, submit together with such claim a schedule of the items withheld which states individually for each item withheld: (a) the type, title, specific subject matter, and date of the item; (b) the names, addresses, positions, and organizations of all authors and recipients of the item; and (c) the specific grounds for claiming that the item is privileged. If only part of a responsive **document** is privileged, all non-privileged portions of the **document** must be submitted.

11) This Second Request for Production of Documentary Materials and Tangible Things, like Complaint Counsel's First Request, 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. Further instructions pertinent to a particular Document Specification appear in parentheses within or following that Specification.

### SPECIFICATIONS

Demand is hereby made for the following documentary materials and tangible things:

1) All **documents** and **communications** that support or refute, or **refer or relate to**, your interpretation(s) of the claims made in **promotional materials** for the **challenged products**. (This request includes all claims regardless of whether the claims are express or implied, and regardless of whether the claims are based on a selected portion of the **promotional material** or are based the overall net impression created by the interaction of different elements in the **promotional material**.)

- 2) **All documents and communications referring or relating to** the depictions, images, photographs, graphs, or other visuals employed or displayed in any draft or final **promotional material** for any of the **challenged products**.
- 3) All draft and final **promotional materials** that contain one or more of the following words or phrases appearing in the claims alleged in the *Complaint*: “rapid,” “visibly obvious,” “fat loss,” “clinical testing,” “proves,” “causes,” “weight loss,” “more than 20 pounds,” “significantly overweight,” “substantial,” “excess fat,” “obese,” and “unfair.”
- 4) **All documents and communications referring or relating to** the contents of draft or final **promotional material** described in Specification 3, above. (This request **includes**, but is not limited to, **all documents and communications referring or relating to** the intended meaning of such **promotional material**, the claims or messages in such **promotional material**, or consumer perception of such **promotional material**.)
- 5) **Documents and communications** sufficient to show the marketing capabilities of each Respondent, specifically **including documents and communications** sufficient to show each Respondent’s capabilities with respect to the creation and development of products, the creation, development, and review of **promotional materials**, the shipment of products, the dissemination of **promotional materials**, media management services, financing and accounting services, telemarketing services, credit card processing, the provision of customer service, and customs clearance.
- 6) **All documents and communications** that support or refute, or **refer or relate to**, your interpretation(s) of the **documents** submitted as product substantiation by Respondents.
- 7) **All documents and communications referring or relating to** the Commission’s advertising substantiation standard, specifically **including** all previously-undisclosed **documents and communications referring or relating to** your contentions regarding that standard and your interpretation of that standard.
- 8) **All documents and communications** made or adopted by any **Respondent** that analyze, discuss, or criticize any other **documents (including** but not limited to clinical studies, test reports, articles, and expert opinions) submitted as substantiation for dietary supplement advertising or **promotional materials**. (This request specifically **includes**, but is not limited to, responsive federal and state court filings and trial or deposition testimony.)
- 9) **All documents, communications, and tangible things** considered, and/or relied upon by any expert witness in connection with his services in this action, **including** but not limited to any notes on **documents** and notes of conversations with the parties or their counsel.
- 10) **All documents, communications, and tangible things** given to, or generated by, any expert witness in connection with his services in this action, **including** but not limited to any **documents, communications, and videos, photographs, tests, test results, notes, or memoranda**.

11) All documents, communications, tangible things, and evidence listed in your *Initial Disclosures* and any supplemental *Disclosures* that you may file.

12) All communications made to persons and entities other than the Federal Trade Commission or Respondents that refer or relate to the Federal Trade Commission's law enforcement investigation and action against Respondents. (This request specifically includes, but is not limited to, all communications made to all third parties, including subpoena recipients, since the filing of the administrative *Complaint*.)

13) From January 1, 2000 to the present, all documents and communications referring or relating to each Respondents' respective practices and/or policies with respect to the retention, storage, movement (both within the Respondents' business premises and from those premises), destruction, or production of documents and communications, whether in written or electronic or other form, specifically including the documents and communications described in Complaint Counsel's current or previous *Requests for Production*.

(This request specifically includes, but is not limited to, any written retention policies, confidentiality agreements, or destruction protocols, and any documents or communications referring or relating to any action taken to retain, store, move, destroy, or produce documents or communications described in Complaint Counsel's current or previous *Requests for Production*. For Corporate Respondents, this request includes the document practices and/or policies of their owners, directors, officers, managers, and/or employees, as well as any consultants with offices at Respondents' business premises.)

Respectfully submitted,



---

Lauren Kapin (202) 326-3237  
Walter C. Gross III (202) 326-3319  
Joshua S. Millard (202) 326-2454  
Robin M. Richardson (202) 326-2798  
Laura Schneider (202) 326-2604

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

Dated: October 14, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of October, 2004, I caused *Complaint Counsel's Second Request for Production of Documentary Materials and Tangible Things Directed to Basic Research LLC* to be served as follows:

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

**Stephen E. Nagin**  
Nagin Gallop Figuerdo P.A.  
3225 Aviation Ave.  
Miami, FL 33133-4741  
(305) 854-5353  
(305) 854-5351 (fax)  
[snagin@ngf-law.com](mailto:snagin@ngf-law.com)  
**For Respondents**

**Jeffrey D. Feldman**  
FeldmanGale  
201 S. Biscayne Blvd., 19<sup>th</sup> Fl.  
Miami, FL 33131-4332  
(305) 358-5001  
(305) 358-3309 (fax)  
[JFeldman@FeldmanGale.com](mailto:JFeldman@FeldmanGale.com)  
**For Respondents**

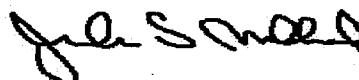
**Richard D. Burbidge**  
Burbidge & Mitchell  
215 S. State St., Suite 920  
Salt Lake City, UT 84111  
(801) 355-6677  
(801) 355-2341 (fax)  
[rburbidge@burbidgeandmitchell.com](mailto:rburbidge@burbidgeandmitchell.com)  
**For Respondent Gay**

**A.G. Waterhouse, LLC,  
Klein-Becker USA, LLC,  
Nutrasport, LLC, Sovage  
Dermalogic Laboratories,  
LLC, and BAN, LLC**

**Ronald F. Price**  
Peters Scofield Price  
340 Broadway Centre  
111 East Broadway  
Salt Lake City, UT 84111  
(801) 322-2002  
(801) 322-2003 (fax)  
[rpf@psplawyers.com](mailto:rpf@psplawyers.com)  
**For Respondent Mowrey**

**Mitchell K. Friedlander**  
5742 West Harold Gatty Dr.  
Salt Lake City, UT 84116  
(801) 517-7000  
(801) 517-7108 (fax)  
**Respondent Pro Se**  
[mkf555@msn.com](mailto:mkf555@msn.com)

---



COMPLAINT COUNSEL



# Attachment C

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# SUBPOENA DUCES TECUM

Issued Pursuant to Rule 3.34(b), 16 C.F.R. § 3.34(b)(1997)

1. TO  
 Lawrence Solan  
 Brooklyn Law School  
 250 Joralemon Street  
 Brooklyn, NY 11201

2. FROM  
 UNITED STATES OF AMERICA  
 FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things - or to permit inspection of premises - at the date and time specified in Item 5, at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION OR INSPECTION  
 Federal Trade Commission  
 600 Pennsylvania Avenue, N.W.  
 Suite NJ-2122  
 Washington, D.C. 20580

4. MATERIAL WILL BE PRODUCED TO  
 An authorized Federal Trade Commission representative

5. DATE AND TIME OF PRODUCTION OR INSPECTION  
 November 29, 2004

6. SUBJECT OF PROCEEDING  
 In the Matter of Basic Research, L.L.C., et al., Docket No. 9318

7. MATERIAL TO BE PRODUCED See the attached specifications. In Lieu of production at the above place, documents may be returned by mail on or before 11/29/04 to Joshua S. Millard, Federal Trade Commission, Suite NJ-2122, Washington, D.C. 20580, provided that an affidavit is submitted simultaneously that meets the requirements set forth in Exhibit A hereto.

8. ADMINISTRATIVE LAW JUDGE  
 The Honorable Stephen J. McGuire  
 Federal Trade Commission  
 Washington, D.C. 20580

9. COUNSEL REQUESTING SUBPOENA  
 Joshua S. Millard  
 Complaint Counsel  
 Federal Trade Commission  
 Suite NJ-2122  
 Washington, D.C. 20580

DATE ISSUED  
 SEP 9 2004

SECRETARY'S SIGNATURE

### GENERAL INSTRUCTIONS

#### APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

#### MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed with the Secretary of the Federal Trade Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

#### TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

**RETURN OF SERVICE**

*I hereby certify that a duplicate original of the within subpoena was duly served:* (check the method used)

*in person.*

*by registered mail.*

*by leaving copy at principal office or place of business, to wit:*

-----  
250 Joralemon St.  
-----  
Brooklyn, NY  
-----  
11201  
-----  
-----

*on the person named herein on:*

-----  
Nov. 5, 2004  
-----  
(Month, day, and year)

-----  
J.S. Millard  
-----  
(Name of person making service)

-----  
Attorney  
-----  
(Official title)

**“ATTACHMENT A” TO SUBPOENA DUCES TECUM  
DIRECTED TO LAWRENCE SOLAN**

**DEFINITIONS**

- 1) **“All documents”** means each **document**, as defined below, which can be located, discovered or obtained by reasonable, diligent efforts, **including** without limitation all **documents** possessed by: (a) **you** or **your** counsel; or (b) any other **person** or entity from whom **you** can obtain such **documents** by request or which **you** have a legal right to bring within **your** possession by demand.
- 2) **“Challenged products”** means the products identified as Dermalin-APg, Cutting Gel, Tummy Flattening Gel, Leptoprin, Anorex, and PediaLean in the administrative **Complaint** issued by the Federal Trade Commission in the above-captioned matter, both individually and collectively. (This definition **includes** all current and previous versions of these products as well as any other products made of the same formulation(s) used in the products identified above.)
- 3) **“Communication(s)”** includes, but is not limited to, any and all conversations, meetings, discussions and any other occasion for verbal exchange, whether in person, by telephone, or electronically, as well as all letters, memoranda, telegrams, cables, and other writings or **documents**.
- 4) **“Dissemination schedule”** includes, but is not limited to, the following: (a) for radio, audio, television, and video **promotional materials**, the date, time of day, location and station name; (b) for product packaging, the names of distributors and retailers to whom the packaging or other **promotional material** was transmitted, the date of transmittal, and the number of pieces transmitted; (c) for printed **promotional materials**, the name and date of the publication or place in which the **promotional material** appeared; and (d) for Internet materials, the date that the **promotional material** was first placed on the Internet, the date (if any) that it was removed from the Internet, and the number of “hits” that the advertisement registered.
- 5) **“Document”** means the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, taped, recorded, filmed, punched, computer-stored, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, **including** but not limited to any advertisement, book, pamphlet, periodical, contract, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, package insert, sticker, web page, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book, data compilation, tests, reports, clinical studies, test reports, scientific literature, articles, expert opinions, handwritten notes, correspondence, **communications**, electronic mail, electronically stored data, computer (**including** handheld computer) material (**including** print-outs, cards, magnetic or electronic tapes, discs and such codes or instructions as will transform such computer materials into easily understandable form), and video and audio recordings.

- 6) **"Each"** and **"any"** include **"all,"** so as to have the broadest meaning whenever necessary to bring within the scope of any Specification all information and/or **documents** that might otherwise be construed to be outside its scope.
- 7) **"Includes"** or **"including"** means **"including but not limited to,"** so as to avoid excluding any information that might otherwise be construed to be within the scope of any Specification.
- 8) **"Ingredients"** means the component parts or constituent ingredients contained in the **challenged products, including** but not limited to aminophylline, ephedra, caffeine, aspirin, or glucomannan.
- 9) **"Market research"** means all information referring or relating to testing, measuring or assessing consumers' or individuals' interpretation of, understanding of or reaction to a 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** consumer perception tests, comprehension tests, recall tests, marketing or consumer surveys or reports, penetration tests, audience reaction tests, focus groups and media research.
- 10) **"Or"** includes **"and,"** and **"and"** includes **"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.
- 11) **"Person"** or **"Persons"** means all natural persons, corporations, partnerships or other business associations, and all other legal entities, **including** all members, officers, predecessors, assigns, divisions, affiliates and subsidiaries.
- 12) **"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 used to make oral solicitations to consumers, or publication or broadcast in any other medium.
- 13) **"Referring to"** or **"relating to"** means discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.
- 14) **"Respondent(s)"** means any one or more of the following: 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, American Phytotherapy

Research Laboratory, or Mitchell K. Friedlander, **including** all of their operations under assumed names.

- 15) "You" or "Your" means the **person** or entity to whom this subpoena duces tecum is directed.
- 16) The use of the singular includes the plural, and the plural includes the singular.
- 17) The use of a verb in any tense shall be construed as the use of the verb in all other tenses.
- 18) The spelling of a name shall be construed to include all similar variants thereof.

### INSTRUCTIONS

- 1) Unless otherwise specified, the time period covered by a Document Specification shall not be limited and all **documents** responsive to the Specification, regardless of dates or time periods involved, should be provided.
- 2) A complete copy of each **document** should be submitted even if only a portion of the **document** is within the terms of the Specification. The **document** shall not be edited, cut, or expunged and shall include all covering letters and memoranda, transmittal slips, appendices, tables or other attachments.
- 3) All information submitted shall be clearly and precisely identified as to the Specification(s) or sub-Specification(s) to which it is responsive. **You** should consecutively number each page in **your** submission; each page submitted should be marked with a unique "Bates" **document** tracking number.
- 4) **Documents** covered by these Specifications are those which are in **your** possession or under **your** actual or constructive custody or control, whether or not such **documents** were received from or disseminated to any other **person** or entity **including** attorneys, accountants, directors, officers, and employees.
- 5) **Documents** that may be responsive to more than one Specification need not be submitted more than once; however, **your** response should indicate, for each **document** submitted, each Specification to which the **document** is responsive. If any **documents** responsive to a Specification have been previously supplied to the Commission, **you** may comply with the Specification by identifying the **document(s)** previously provided and the date of submission; identification shall be by Bates number if the **document(s)** were so numbered when submitted, or by author and subject matter if not so numbered.
- 6) If any of the documentary materials requested in these Specifications are available in machine-readable form (such as floppy or hard disks, drums, core storage, magnetic tapes or punch cards), state the form in which it is available and describe the type of computer or other machinery required to read the record(s) involved. If the information requested is stored in a

computer or a file or record generated by a computer, indicate whether you have an existing program that will print out the record in readable form and state the name, title, business address and telephone number of each **person** who is familiar with the program.

7) **Promotional materials** submitted in response to these Specifications shall be submitted in the following form(s) as follows: For **documents**, provide the original **promotional materials** if available, or, if not available, color copies thereof. For audio-only (or radio) materials, provide a tape cassette (or digitized recording, if in machine-readable form) and a script, as well as any audio out-takes. For video recordings, provide a DVD or VHS cassette and script or storyboard, as well as any video out-takes. For Internet or other online materials, provide a CD (if in machine-readable form) or a clear color printout of all screens displayed in the promotional materials and identify the site, forum, or address.

8) All objections to these Document Specifications, or to any individual Specification, must be raised in the initial response or are otherwise waived.

9) If any requested material is withheld based on a claim of privilege, submit together with such claim a schedule of the items withheld which states individually for each item withheld: (a) the type, title, specific subject matter, and date of the item; (b) the names, addresses, positions, and organizations of all authors and recipients of the item; and (c) the specific grounds for claiming that the item is privileged. If only part of a responsive **document** is privileged, all non-privileged portions of the **document** must be submitted. (Further instructions pertinent to a particular Document Specification appear in parentheses within or following that Specification.)

## SPECIFICATIONS

Demand is hereby made for the following documentary materials and tangible things:

- 1) Your complete file related to this matter.
- 2) All **communications** with **Respondents referring or relating to** this matter regardless of whether you were the author, addressee or copy recipient.
- 3) All **communications** with any **person** or entity other than **Respondents referring or relating to** this matter regardless of whether you were the author, addressee or copy recipient.
- 4) All draft and final notes, reports, and other **documents** prepared by you in connection with this matter.
- 5) All **documents** and **communications** reviewed by you in connection with this matter.
- 6) All **documents, communications**, and other tangible things consulted by you or relied upon by you in forming any opinion in connection with this matter.
- 7) All **documents** and **communications referring or relating to** any criminal convictions

that you may have for crimes involving dishonesty or false statement, regardless of the punishment.

- 8) **All documents and communications referring or relating to any analysis that you conducted of the promotional materials for the challenged products.**
- 9) **All documents and communications that support your definition or interpretation of the following words or phrases appearing in the claims alleged in the *Complaint*: “rapid,” “visibly obvious,” “fat loss,” “clinical testing,” “proves,” “causes,” “weight loss,” “more than 20 pounds,” “significantly overweight,” “substantial,” “excess fat,” “obese,” and “unfair.”**
- 10) **All documents and communications referring or relating to consumer tests, copy tests, penetration studies, focus groups, or research that you conducted, directed, supervised, or assisted in connection with this matter.**
- 11) **All documents and communications referring or relating to proof or substantiation of claims in any promotional material for any of the challenged products, including but not limited to any clinical studies, test reports, articles, expert opinions, and all documents referring or relating to the amount, type, or quality of such proof or substantiation.**
- 12) **All documents and communications referring or relating to draft or final promotional materials for each of the challenged products. (This request includes but is not limited to contracts, documents, and communications evidencing the creation, modification, approval, execution, evaluation, dissemination, clearance, or placement of promotional materials, and documents referring or relating to the contents of draft or final promotional materials, including but not limited to any claims, messages, or communication contained in any draft or final promotional material.)**
- 13) **All documents and communications referring or relating to the marketing of each of the challenged products. (This request includes but is not limited to market research, marketing plans or strategies, and all other document(s) and communications referring or relating to consumer perception of any promotional materials for each of the challenged products.)**
- 14) **All documents and communications prepared by, received from, or provided to one or more of the Respondents, or any of their employees, agents, or affiliates, in connection with the formulation, development, manufacture, testing, advertising, marketing, promotion, or sale of each of the challenged products. (You need not produce routine invoices, shipping documents, or payment records in response to this Specification.)**



## **EXHIBIT A**

### **INSTRUCTIONS FOR COMPLIANCE BY DELIVERY OF DOCUMENTS**

If documents are delivered by hand, overnight delivery service, mail, or electronic means, your response shall be accompanied by an affidavit, executed by you, that provides:

1. The names, addresses, positions, and organizations of all persons whose files were searched and all persons who participated in or supervised the collection of the documents, and a brief description of the nature of the work that each person performed in connection with collecting the documents;
2. A statement that the search was complete and that all responsive documents are being produced;
3. A statement as to whether the documents were made and kept in the course of your regularly conducted business, and whether it was your regular practice to make and keep such documents; and
4. A statement as to whether any document called for by the subpoena has been misplaced, lost, or destroyed. If any document has been misplaced, lost, or destroyed, identify: the type of document; the date (or approximate date) of the document; subject matter of the document; all persons to whom it was addressed, circulated, or shown; its date of destruction, or when it was lost or misplaced; the reason it was destroyed, lost, or misplaced; and the custodian of the document on the date of its destruction, loss or misplacement.

If the affidavit is incomplete, or additional information is necessary, you may be compelled to appear and testify.

## CERTIFICATE OF SERVICE

I hereby certify that, on this 5<sup>th</sup> day of September, 2004, I caused a copy of Complaint Counsel's *Subpoena Duces Tecum to Lawrence Solan* to be served as follows:

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

**Stephen E. Nagin**  
Nagin Gallop Figuero P.A.  
3225 Aviation Ave.  
Miami, FL 33133-4741  
(305) 854-5353  
(305) 854-5351 (fax)  
[snagin@ngf-law.com](mailto:snagin@ngf-law.com)  
**For Respondents**

**Jeffrey D. Feldman**  
FeldmanGale  
201 S. Biscayne Blvd., 19<sup>th</sup> Fl.  
Miami, FL 33131-4332  
(305) 358-5001  
(305) 358-3309 (fax)  
[JFeldman@FeldmanGale.com](mailto:JFeldman@FeldmanGale.com)

**Richard D. Burbidge**  
Burbidge & Mitchell  
215 S. State St., Suite 920  
Salt Lake City, UT 84111  
(801) 355-6677  
(801) 355-2341 (fax)  
[rburbidge@burbidgeandmitchell.com](mailto:rburbidge@burbidgeandmitchell.com)  
**For Respondent Gay**

**For Respondents**  
A.G. Waterhouse, LLC,  
Klein-Becker USA, LLC,  
Nutrasport, LLC, Sovage  
Dermalogic Laboratories,  
LLC, and BAN, LLC

**Ronald F. Price**  
Peters Scofield Price  
340 Broadway Centre  
111 East Broadway  
Salt Lake City, UT 84111  
(801) 322-2002  
(801) 322-2003 (fax)  
[rfp@psplawyers.com](mailto:rfp@psplawyers.com)  
**For Respondent Mowrey**

**Mitchell K. Friedlander**  
5742 West Harold Gatty Dr.  
Salt Lake City, UT 84116  
(801) 517-7000  
(801) 517-7108 (fax)  
**Respondent Pro Se**  
[mkf555@msn.com](mailto:mkf555@msn.com)

  
\_\_\_\_\_  
COMPLAINT COUNSEL

**AMENDED CERTIFICATE OF SERVICE**

I hereby certify that, on this 5<sup>th</sup> day of November, 2004, I caused a copy of Complaint Counsel's *Subpoena Duces Tecum to Lawrence Solan* to be served as follows:

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

**Stephen E. Nagin**  
Nagin Gallop Figuerdo P.A.  
3225 Aviation Ave.  
Miami, FL 33133-4741  
(305) 854-5353  
(305) 854-5351 (fax)  
[snagin@ngf-law.com](mailto:snagin@ngf-law.com)  
**For Respondents**

**Jeffrey D. Feldman**  
FeldmanGale  
201 S. Biscayne Blvd., 19<sup>th</sup> Fl.  
Miami, FL 33131-4332  
(305) 358-5001  
(305) 358-3309 (fax)  
[JFeldman@FeldmanGale.com](mailto:JFeldman@FeldmanGale.com)  
**For Respondents**

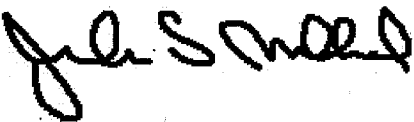
**Richard D. Burbidge**  
Burbidge & Mitchell  
215 S. State St., Suite 920  
Salt Lake City, UT 84111  
(801) 355-6677  
(801) 355-2341 (fax)  
[rburbidge@burbidgeandmitchell.com](mailto:rburbidge@burbidgeandmitchell.com)  
**For Respondent Gay**

**A.G. Waterhouse, LLC,  
Klein-Becker USA, LLC,  
Nutrasport, LLC, Sovage  
Dermalogic Laboratories,  
LLC, and BAN, LLC**

**Ronald F. Price**  
Peters Scofield Price  
340 Broadway Centre  
111 East Broadway  
Salt Lake City, UT 84111  
(801) 322-2002  
(801) 322-2003 (fax)  
[rfp@psplawyers.com](mailto:rfp@psplawyers.com)  
**For Respondent Mowrey**

**Mitchell K. Friedlander**  
5742 West Harold Gatty Dr.  
Salt Lake City, UT 84116  
(801) 517-7000  
(801) 517-7108 (fax)  
**Respondent Pro Se**  
[mkf555@msn.com](mailto:mkf555@msn.com)

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COMPLAINT COUNSEL

# Attachment D

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**BASIC RESEARCH adv. FTC**  
**PRIVILEGE LOG FOR LAWRENCE M. SOLAN PRODUCTION**

<b><u>DATE</u></b>	<b><u>DESCRIPTION</u></b>	<b><u>TO</u></b>	<b><u>FROM</u></b>	<b><u>BATES NUMBER</u></b>	<b><u>PRIVILEGE</u></b>
10/18/2004	Email (With Attachment) Styled "Re: Meeting with Larry Solans and Ed Popper"	Larry Solan	Jeffrey D. Feldman	LMS01056-1058	Attorney Work Product

**BURBIDGE AND MITCHELL**

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

ATTORNEYS AND COUNSELORS AT LAW

PARKSIDE TOWER

215 SOUTH STATE STREET, SUITE 920

SALT LAKE CITY, UTAH 84111-2311

ROBERT J. SHELBY

TELEPHONE

(801) 355-6677

FACSIMILE NUMBER

(801) 355-2341

rshelby@burbidgeandmitchell.com

December 2, 2004

Robin F. Richardson  
FEDERAL TRADE COMMISSION  
600 Pennsylvania Ave, NW, Suite NJ-2122  
Washington, D.C. 20580

Re: *BASIC RESEARCH et al., adv. FTC Docket No. 9318*

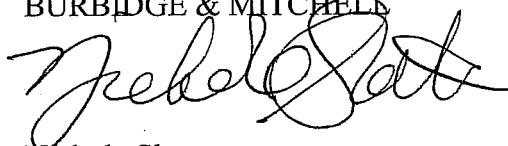
Dear Ms. Richardson:

Enclosed please find supplemental documents pursuant to the *Subpoena Duces Tecum* for Lawrence M. Solan. Also, enclosed is a privilege log for the documents withheld.

If you have any questions or need anything further please contact me.

Sincerely,

BURBIDGE & MITCHELL



Nichole Slatter

Paralegal to Robert J. Shelby

# Attachment E

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1           A. The only marks I put on Dr. Nunberg's report  
2 were that I highlighted in yellow the relevant  
3 sentences in the newspaper articles attached to the  
4 report so that when I wanted to refer to the examples,  
5 I didn't have to continually re-read the entire  
6 article.

7           Q. And did you produce a copy of these annotated  
8 reports?

9           A. I produced a copy of my copy of Dr. Nunberg's  
10 report. How well that highlighting came through on a  
11 copy, I don't know.

12          Q. Is it your practice to make notes to yourself  
13 when you read someone's work?

14          A. Sometimes yes, sometimes no.

15          Q. Did you make any notes in this case?

16          A. No.

17          Q. Were you directed not to make notes?

18          A. No.

19          Q. Were you told anything about making notes?

20          A. No.

21          Q. I show you a document which I'd like to mark as  
22 Exhibit-5. This is a copy of what I believe purports  
23 to be an e-mail attachment. It's dated October 13,  
24 2004, and was received in my business office yesterday,  
25 December 7. Do you recognize this? And unfortunately,



1 I don't have a copy of this, because I received it via  
2 facsimile at the hotel. I assume you guys know what it  
3 is because you might have sent it to us.

4 (Two-page document dated October 13, 2004  
5 entitled Meeting with Larry Solan and Ed Popper  
6 was marked as Solan Exhibit-5 for identification;  
7 12-8-04, E.L.)

8 A. The question?

9 Q. Do you recognize that document?

10 A. That appears to be a redacted version of a memo  
11 that I received by e-mail.

12 Q. And when did you receive that, approximately?

13 A. I don't remember, but it would have been  
14 shortly after. It would have been around the time of  
15 its date.

16 Q. So you believe it's around the time of the date  
17 that's stated on that document?

18 A. Yes.

19 Q. Would that document then have been received  
20 after the first meeting, but prior to the second  
21 meeting with Mr. Popper and the other counsel?

22 A. Yes.

23 Q. And does that document, notwithstanding the  
24 redacted portions, appear to be as you recollect it to  
25 be?

1 A. Yes.

2 Q. Did you receive another similar type of memo  
3 after the second meeting?

4 A. No.

5 Q. Did you receive any other types of memos during  
6 the course of your engagement with Basic Research?

7 A. I don't believe so.

8 Q. Or in connection with your work performed in  
9 this matter?

10 A. Right.

11 Q. So "no," you did not receive anything else; is  
12 that correct?

13 A. That's right.

14 Q. Can you share with me what the rest of the  
15 document said?

16 A. I don't remember what the rest of the document  
17 said.

18 Q. So you have no recollection of the rest of the  
19 document?

20 A. That's right. It was notes. These were notes  
21 of what happened in the meeting. I couldn't tell you  
22 what was the rest of that.

23 Q. Did you read the document when you received it  
24 via e-mail?

25 A. I read it casually, because I was at the

1 meeting and I wasn't terribly interested in what the  
2 summary of it was.

3 Q. But you did have an opportunity to review this  
4 document?

5 A. Well, "reviewed." I don't know reviewed. The  
6 thing came. I kept it, which is why I produced it. I  
7 looked at it. But it really wasn't of much moment to  
8 me.

9 Q. Did anyone call you to discuss this document?

10 A. No.

11 Q. So you didn't receive any call from Mr. Feldman  
12 after this document was produced or after this document  
13 was sent to you?

14 A. I never received any call from Mr. Feldman to  
15 discuss this document.

16 Q. Did you receive any call from anyone in  
17 connection with this case to discuss this document?

18 A. No.

19 Q. Let me go ahead and take that back from you for  
20 just a minute. I want to give it to the court reporter  
21 and have a copy made. Were you ever instructed to  
22 return that document to anyone?

23 A. No.

24 Q. Were you ever told that it was inadvertently  
25 disclosed to you?

1           A. I wasn't told it, but I'm not surprised to hear  
2 that.

3           Q. But no one ever called you and said this  
4 document was inadvertently disclosed; is that correct?

5           A. That's correct.

6           Q. None of the counsel in this case; is that  
7 correct?

8           A. Yes.

9           Q. And you didn't file any motion to quash the  
10 subpoena duces tecum with regard to this document, did  
11 you?

12          A. No. I produced it to counsel.

13          Q. When did you produce it to counsel?

14          A. I produced documents in response to your  
15 subpoena in two sets. And I produced it either in the  
16 first or second set.

17               MR. SHELBY: We should clarify. The document  
18 that's been marked as Exhibit-5 is not the document in  
19 its current form as you produced it; is that right,  
20 Mr. Solan?

21               THE WITNESS: That's correct. I didn't  
22 redact it.

23          Q. However, this document, as redacted, appears to  
24 be a redacted form of the document that you produced;  
25 is that correct?

1           A. Yes. That's how I understood your earlier  
2 question.

3           Q. Thank you. One more question about this  
4 document that we're discussing. This is the attachment  
5 dated October 13 that is marked as Exhibit-5. You've  
6 received this after the first conference meeting with  
7 counsel and before the second conference meeting with  
8 counsel; is that correct?

9           A. Right.

10          Q. So you received this document, Exhibit-5, prior  
11 to completing your draft of your expert report; is that  
12 correct?

13          A. Yes.

14          Q. Do you have a copy of the unredacted form of  
15 this document?

16          A. I expect so.

17          Q. Did you bring a copy with you?

18          A. No.

19          Q. Do you have a copy in your office?

20          A. If I have one, that's where it would be.

21          Q. I would like a copy of that document.

22          A. Well, all I can tell you is that I did produce  
23 it to counsel.

24          Q. Well, I'm asking you if you'd produce a copy  
25 directly to me.

1           MR. SHELBY:     I think that's improper.  He's  
2     been retained as an expert.  He's provided the document  
3     to counsel.  We've produced it to you in its current  
4     form.  If there are issues concerning propriety of the  
5     redactions or the claim of privilege, then those are  
6     matters for us to litigate in the case, but Mr. Solan  
7     has complied with his obligations in response to your  
8     subpoena.

9           Q.  Dr. Solan, counsel's articulating his  
10    objection.  Does counsel represent you in this case?

11    A.  Yes.  Not this case.  With respect to the  
12    subpoena.

13    Q.  Counsel represents you with respect to the  
14    subpoena?

15    A.  I assume so, because I produced my documents to  
16    him.

17    Q.  So you think that counsel's acting on your  
18    behalf in this case?

19    MR. SHELBY:     Objection.

20    MS. RICHARDSON:     I'm just trying to clarify.  
21    I'm not trying to take you down --

22    MR. SHELBY:     Well, I'm not sure what you're  
23    trying to do.  I object to this line of questioning as  
24    vague and ambiguous, and also requires some legal  
25    conclusions.  If you want to explore the relationship,

1 you're welcome to do that.

2 Q. I'm just going to ask a few questions. I'm  
3 just trying to find out if you're represented by  
4 counsel here today, sir?

5 A. Well, I assume so, because I produced my  
6 documents to you through them. Any objections to this  
7 document would be an objection of the parties, and I'd  
8 be very uncomfortable with pending objections that may  
9 or may not be sustainable circumventing whatever the  
10 legal ruling might be by giving documents to a party  
11 that somebody might determine shouldn't have them. So  
12 I guess that's --

13 MR. SHELBY: I think I can make it easier for  
14 you. If you'd like, I'll instruct you not to produce  
15 additional documents, except to counsel who's retained  
16 you in this case.

17 Q. Counsel's instructed you not to produce. Are  
18 you refusing to produce?

19 MR. SHELBY: He already has produced.

20 Q. Are you refusing to produce it directly to me,  
21 an unredacted form of this document?

22 A. You know, I'll consider it, but it seems to me  
23 I'm very uncomfortable with a party saying that another  
24 party's not entitled -- not to allow whoever makes  
25 these decisions to make the decision without giving the

1 documents.

2 Q. I just need a yes or no answer for the record.

3 A. Yes. I don't think I should produce them  
4 directly to you.

5 Q. I'm going to need a yes or no. A definite  
6 answer on that. I'm going to ask if you would  
7 produce -- counsel instructed you not to and I'm going  
8 to ask you if you'll produce this in compliance with  
9 the subpoena duces tecum?

10 MR. SHELBY: Asked and answered.

11 MS. RICHARDSON: No, it hasn't. I don't  
12 think so. Not a direct no.

13 Q. I would just like a direct no or yes for the  
14 record, please. Counsel has instructed you not to  
15 provide it. I just wish to summarize. I wish to make  
16 it clear. I want to make sure this objection stands  
17 for the record. You have a subpoena duces tecum that  
18 is addressed to you, Dr. Solan, and I'm asking you if  
19 in compliance with that subpoena duces tecum, you will  
20 produce this document?

21 MR. SHELBY: Objection. He did produce the  
22 document in response to the subpoena. He satisfied his  
23 obligation.

24 Q. Will you produce an unredacted form of this  
25 document?



1           A. But I did produce an unredacted form of the  
2 document to counsel. Counsel redacted it and produced  
3 it to you in that form. That's what happened.

4           MR. SHELBY: Counsel, this is improper.

5           MS. RICHARDSON: I just want a yes or no for  
6 the record.

7           MR. SHELBY: You're entitled to your  
8 objections.

9           MS. RICHARDSON: Counsel, I just want a yes  
10 or no for the record so we can formalize it.

11          MR. SHELBY: He's answered the question.

12          MS. RICHARDSON: He's either going to produce  
13 it directly to me or he's going to provide it to you,  
14 but production only happens when it's provided to us.

15          MR. PRICE: I think the way his answer  
16 ultimately said is until the issue is decided by the  
17 ALJ, he's not going to produce the document.

18          MS. RICHARDSON: I think we ought to let  
19 Dr. Solan state that himself. Thank you.

20          A. Right now that's my position.

21          Q. I just want a yes or no, sir.

22          MR. SHELBY: That's his answer.

23          A. That's my answer.

24          Q. What is your answer?

25          MR. SHELBY: Asked and answered. Three times

1 at least.

2 Q. I just want a clear no and not an "I don't  
3 think so" for the record.

4 MR. SHELBY: Well, asked and answered.  
5 That's my objection. If you want to further --

6 Q. You still have to answer the question. Will  
7 you produce this document, an unredacted form of this  
8 document to me, in compliance with the subpoena duces  
9 tecum?

10 A. This is where I have the problem. I believe  
11 that I've complied with it by producing documents to  
12 counsel and having counsel produce the documents to you  
13 in whatever form. I don't know. The way you're  
14 stating that question --

15 Q. Well, no. Let's back up for a second.

16 A. Insinuates that I'm not complying with  
17 subpoenas and I don't know that to be true.

18 Q. Do you recognize this document?

19 MR. SHELBY: Were you finished with your  
20 answer?

21 Q. I'm sorry.

22 A. I'm not going to agree with that  
23 characterization. If you're asking me what I've done,  
24 that's what I've done.

25 Q. So wait. That's fair. I don't mean to

1 interrupt you. I'm sorry. Please finish.

2 A. No. You go ahead.

3 Q. So you believe that providing it to counsel,  
4 you've satisfied your obligations with the subpoena  
5 duces tecum; is that correct?

6 A. Yes.

7 Q. Thank you, sir. And you did provide an  
8 unredacted form of this to counsel, correct?

9 A. Absolutely.

10 Q. Thank you. And you do recognize what's marked  
11 as Exhibit-2?

12 A. Yes.

13 Q. And what is that, please?

14 A. It's a subpoena duces tecum.

15 Q. Do you recognize the specifications in the  
16 subpoena duces tecum?

17 A. Yes.

18 Q. And were the documents that you provided to  
19 counsel for Basic Research and the other Respondents in  
20 compliance with these specifications?

21 MR. SHELBY: Object to the form of the  
22 question.

23 Q. Did you provide documents?

24 A. I certainly did, yes.

25 Q. With regard to specification number one, did

1 you provide your complete file to counsel?

2 A. Yes.

3 Q. With regard to specification number two, did  
4 you provide all communications with Respondents  
5 referring or relating to this matter, regardless of  
6 whether you were the author, addressee or copy  
7 recipient?

8 A. I certainly believe I did, yes.

9 Q. With regard to specification number three, did  
10 you provide all communications with any person or  
11 entity, other than Respondents referring or relating to  
12 this matter?

13 A. Yes. I believe I produced all the documents  
14 that I have in connection with this matter.

15 Q. So with regards to specification number five,  
16 did you provide all documents and communications  
17 reviewed by you in connection with this matter?

18 A. Yes.

19 Q. With regard to each of the other numbered  
20 instructions, did you read through and comply with all  
21 of the other instructions in the subpoena duces tecum?

22 A. I believe I did.

23 Q. I have with me today a series of documents that  
24 you produced or that I received from counsel for the  
25 Respondents, and I would just like to walk through them

1 Q. No.

2 A. In some cases there's more than one copy of the  
3 same e-mail, but this seems to be it.

4 Q. Did you receive any e-mails directly from  
5 Mr. Popper?

6 A. I don't believe so, but if I did, it would have  
7 been "here's the phone number of my hotel" or something  
8 of that nature. But I don't think I did. I don't  
9 recall specifically.

10 Q. How did you determine what e-mails to produce?

11 A. I produced all e-mails. I produced all  
12 documents that I have, whether it was e-mails or hard  
13 copies or whatever.

14 Q. How did you go back through your e-mail files  
15 to decide which might be responsive?

16 A. Well, I don't really keep e-mail files. I get  
17 many, many e-mails a day and I get rid of as much as I  
18 can as quickly as I can. Some documents I copy into  
19 other files in my computer and retain them. And once I  
20 got your subpoena, I did keep those as e-mails, so  
21 that's what I did.

22 Q. So the e-mails that you have in front of you,  
23 were these e-mails that you had saved into another  
24 document?

25 A. Some of them, yes. And some of them were still

1 in the e-mail file as I received them in my in-box.

2 Q. So did you review then the documents in your  
3 in-box to decide what to produce?

4 A. Yes.

5 Q. Did you also review items in your sent file of  
6 Outlook Express?

7 A. I don't think so.

8 Q. Are there any other e-mails that you provided  
9 to counsel for the Respondents that you do not see here  
10 today?

11 A. Not that I can see.

12 Q. Other than the non-redacted form of Exhibit-5;  
13 is that correct?

14 A. Right.

15 Q. Do you have a draft of your retention agreement  
16 in this case?

17 A. I produced whatever I have.

18 Q. So there was just that one letter; is that  
19 correct?

20 A. That's all there is.

21 Q. There were no other agreements or writings  
22 between you and Respondents regarding the scope of your  
23 role in this matter?

24 A. That's right.

25 Q. Were you then paid the \$10,000 as a retainer?

1           A. I did some Lexis searches and I'm seeing here  
2 that those were produced. It appears that the answer  
3 is no.

4           Q. When you had the conferences with counsel for  
5 Respondents and Mr. Popper, did you discuss matters  
6 that helped you in formulating your opinions?

7           A. No. These opinions are really pretty basic.  
8 So the question was of this range of opinions that I  
9 might have, which ones might be relevant to the  
10 litigation from their perspective.

11          Q. Were the conferences otherwise helpful, though,  
12 in terms of your understanding of the facts and the  
13 procedural posture of the case?

14          A. I don't recall specifically. I'm trying to  
15 think if I learned anything from those conferences.  
16 There's nothing that I learned from those conferences  
17 that -- it's hard for me to tell. The initial  
18 conference that I had with Mr. Burbidge and  
19 Mr. Feldman, they spelled out the issues with respect  
20 to the Federal Trade Commission's allegations. I read  
21 them in the complaint. I had looked at some of the  
22 ads, not terribly carefully, but I saw what the case  
23 was about. And I was able quite early on -- I hadn't  
24 documented anything yet, but I was able quite early on  
25 to talk about the way these kind of adjectives work.

1 It's something that I just know about. So now the  
2 question is did I learn anything from subsequent  
3 meetings that provided me with useful knowledge, and I  
4 really don't know that I did.

5 Q. Is it fair to say, though, that the allegations  
6 of the complaint and the scope of your role in this  
7 matter were discussed at these meetings?

8 A. Yes.

9 Q. At both the first meeting and the second  
10 meeting with counsel for Respondents?

11 A. Yes.

12 Q. In reaching your conclusions in this matter,  
13 you also looked at the expert report of Dr. Nunberg; is  
14 that correct?

15 A. In writing my report, I made reference to his  
16 report.

17 Q. And you had reviewed his report?

18 A. Yes.

19 Q. Did you review Mr. Popper's report?

20 A. I don't know whether he wrote a report.

21 Q. So you didn't review any writings by  
22 Mr. Popper?

23 A. No.

24 Q. Thanks. Regarding the looseleaf notebook that  
25 you were provided, did you review any of the clinical